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Essays

WHAT IS A TORT CLAIM? AN INTERPRETATION OF CONTEMPORARY TORT REFORM

KENNETH S. ABRAHAM*

INTRODUCTION

One of the most common questions raised on the first day of torts class is, "What is a tort?" On their first day of law school, students falter until, eventually, it emerges that a tort is a civil wrong not arising out of contract. This almost completely circular definition is not enlightening, and that is part of the lesson. Unless you already know what constitutes a civil wrong, the definition is useless. And once you know what constitutes a civil wrong, the definition is unnecessary. In this Essay I shall explore the changing character of the civil wrongs that are governed by "accident law"—negligence and strict liability for personal injury—by looking at the implications of recently proposed and enacted tort reforms for our conception of the nature of a tort claim in this field.

In the last ten years, both proposed and actually adopted accident law reforms have proliferated. The scope and magnitude of these reforms are unparalleled in the history of tort law. They have come from the left, the center, and the right; they have involved medical, products, environmental, and other forms of liability; and they run the conceptual gamut from tinkering with tort law doctrine, to imposing liability for creating the risk of harm, to wholesale substitution of no-fault compensation schemes for tort liability. Both academic analysis and partisan debate over the wisdom and practicality of these reforms has been and continues to be intense. In short, tort law is in considerable turmoil and there is no end in sight.

It would be a mistake to try to find a single central message in all of this analysis, debate, and reform, for the subject is not monolithic. Some proposals and analyses have been based on the asser-

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tion of principle, some on pragmatic judgments about the most workable mix of tort law, regulation, and insurance, and some have been transparently self-serving. Nonetheless, it has been common to divide contemporary tort reform into two categories: reforms that would increase the scope of tort liability and reforms that would decrease it. This is obviously a useful classification, for it captures what is important to those who are immediately affected: whether a reform produces more or less liability, more or less compensation. This concern with whether plaintiffs or defendants gain an immediate benefit from a reform, however, obscures something else that is beginning to happen, and that I think will continue to happen in contemporary tort law.

At the core of our traditional conception of a tort claim are two notions: the right to individualized determination of the defendant's liability, and the right to custom-tailored compensation for the actual loss suffered by the claimant. The particular circumstances of the claim play an essential role in such a conception. But the combined effect of a number of the reforms that have surfaced in recent years is the erosion of this conception. In one way or another these measures de-emphasize the particulars of the individual claim.

In eroding the traditional conception, the reforms seem to me to be significant in two related ways. First, they promote a version of equity among claimants that both accords a priority to the compensation of out-of-pocket loss and reduces the risk of disadvantaging members of particular groups.¹ Second, the reforms import into tort law some of the more appealing (though to some people, unappealing) features of non-tort compensation systems—workers' compensation, auto no-fault, and private and social insurance. Because non-tort compensation systems tend to standardize claims and recoveries at the expense of individualization, it is no surprise that the two effects of recent reform are related. Indeed, the evolving conception of a tort claim reflects the effort to have what some reformers may think is the best of two worlds—the imposition of liability on particular wrongdoers that is at the core of tort liability, and the

1. In some respects this de-emphasizing of the particulars of individual claims reflects a focus on distributive instead of corrective justice—that is, on the overall distribution of goods in society, rather than on the obligations of particular defendants to particular plaintiffs. For discussion of this distinction, see generally Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pts. 1 & 2), 1 *LAW & PHIL.* 371 (1982), 2 *LAW & PHIL.* 5 (1983). But as I shall try to show in the remainder of this Essay, more is at issue in contemporary tort reform than whether to pursue corrective or distributive justice through the imposition of tort liability.

standardization of recovery that is at the core of health and disability insurance and other non-tort compensation systems.

At the outset a word about the character of my inquiry is in order. I do not contend that the authors of contemporary tort reforms have consciously attempted to change our conception of what it means to have a tort claim. On the contrary, most of those involved in tort reform, whether in litigation, in the legislatures, or in the pages of law reviews, are concerned mainly with expanding or contracting liability, not explaining or even understanding the jurisprudential significance of the reforms they propose. And because I want not only to describe the recent past but also to predict the future course and significance of reform, my analysis covers both reforms that already have been enacted and those that are being given serious consideration—though I do not include proposals for reform that are at this stage mere pie-in-the-sky. For all these reasons, I shall offer what I describe as an interpretation—a reading of the major features of contemporary tort reform, designed more to uncover their ultimate meaning and significance than to assess their immediate impact.

I. THE TRADITIONAL CONCEPTION

The traditional conception of a tort claim is rooted in the notion that every claim is unique. This conception is reflected both in the rules of law that govern the making of tort claims and in the manner in which they are implemented. There is individualization throughout: in the application of liability standards,² in the rules governing causation,³ and in the assessment of the claimant's damages.⁴

A. Liability Standards

From the time of its emergence as the dominant standard of liability for accidental harm, negligence has been defined as the failure to exercise the care that would be reasonable under the circumstances.⁵ Although, as Holmes suggested over a century ago,⁶ our notions of negligence might well have crystallized into a set of cate-

2. See *infra* Subpart I.A.

3. See *infra* Subpart I.B.

4. See *infra* Subpart I.C.

5. See, e.g., *Vaughan v. Menlove*, 3 Bing (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837); see also 3 FOWLER HARPER ET AL., *THE LAW OF TORTS* § 16.2, at 389 (2d ed. 1986).

6. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 98-99 (Mark D. Howe ed., Belknap Press 1963) (1881).

gorical rules delineating the kinds of behavior that do or do not satisfy the negligence standard, this kind of crystallization never occurred. On the contrary, even the nineteenth century per se no-duty rules have slowly eroded in favor of submission of negligence claims to juries for decision.⁷ The result is that at least in principle every negligence case is unique, for the law makes no effort to treat it as a member of a general category governed by a legal rule.⁸ The only precedent that most negligence cases set (and the major rule that most follow) is that because reasonable people could disagree about whether the behavior involved was negligent, the case should be submitted to the jury.

In the fields of accident law dominated by strict liability rather than negligence the situation is similar. The defectiveness of a particular product's design and the adequacy of the warning it carried may be litigated time and again, even though the same design and warning are involved in each separate case. In environmental liability, the law on the books is that the courts, not juries, are to decide such questions as whether a particular activity is "abnormally dangerous" and therefore warrants the imposition of strict liability for the injury it causes.⁹ The test for what constitutes an abnormally dangerous activity, however, requires consideration of six different and largely incommensurable factors.¹⁰ As a consequence, the imposition of this form of strict liability is highly context dependent, and per se rules govern its application to only a few especially dangerous activities such as blasting. In most other situations the

7. See generally James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976).

8. Admittedly, in certain other respects even traditional negligence law does not attend to the unique facts of the case at hand. For example, the external standard used to determine whether the defendant was negligent abstracts from the defendant's own circumstances and disabilities in evaluating the quality of his or her conduct. See GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* 24 (1985) (discussing the "reasonable person" standard); David Rosenberg, *Damage Scheduling in Mass Exposure Cases*, 1 COURTS, HEALTH SCI. & L. 335, 339 (1991) ("[T]here is no mistaking the averaging design of the external, reasonable person standard of the negligence rule.").

9. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. 1 (1965).

10. As delineated in the Second *Restatement of Torts*, these are:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from [the activity] will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on;
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520.

unique circumstances of each case must be considered in determining whether to impose strict liability for the consequences of the activity.

What is true of liability standards themselves is also true of most available defenses. It is now the law in most of the country that the doctrine of comparative negligence does not bar a plaintiff's recovery, but instead reduces the size of that recovery in proportion to the amount of negligence attributable to the plaintiff.¹¹ Whether comparative negligence or contributory negligence is in force, however, each doctrine focuses on the particular character of the plaintiff's conduct under the circumstances of the case. The same is true of certain other defenses to both negligence and strict liability, including product misuse and assumption of risk.¹²

B. Causation

The notion that each tort claim is unique also is reflected in the traditional rules governing proof of causation. The plaintiff must prove by a preponderance of the evidence that, but for the defendant's conduct, the plaintiff would not have suffered the loss in question.¹³ I admit that this but-for test in a sense divorces the causation issue from the unique facts of the case at hand because the jury must decide what would have happened had the defendant not been negligent (or not engaged in a strict liability activity). Because by hypothesis the defendant was negligent (or engaged in a strict liability activity), this decision requires a counterfactual inquiry involving one important "fact" that differs from the case at hand.

Nonetheless, the focus of the causation inquiry on the unique facts of the individual case does emerge, and nowhere more than in the rules regarding what cannot count as evidence of causation. "Naked" statistical evidence regarding the probability that the defendant's action caused the plaintiff harm is inadmissible,¹⁴ with

11. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 1.1, 1.4-1.6 (2d ed. 1986).

12. See, e.g., *Micallef v. Miehle Co.*, 348 N.E.2d 571, 578 (N.Y. 1976) (overturning the "patent-danger" rule, which barred recovery for injuries resulting from a patent, rather than a latent, danger).

13. See 4 HARPER et al., *supra* note 5, § 20.2, at 91.

14. See, e.g., *Guenther v. Armstrong Rubber Co.*, 406 F.2d 1315, 1318 (3d Cir. 1969) (evidence that defendant manufactured 75% to 80% of tires in stock not sufficient for plaintiff to get to jury); *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754, 755 (Mass. 1945) (evidence that defendant operated a bus route at approximate time and place of plaintiff's collision with bus not admissible on question of defendant's ownership of particular bus). See generally David Kaye, *The Limits of the Preponderance of the Evidence Standard*:

only a few exceptions.¹⁵ The result is that the jury is not permitted to base its decision on evidence about causation in other situations.¹⁶ When there simply are no particular facts (or there are insufficient facts) on which to base a causal determination, the plaintiff has failed to make out a *prima facie* case and the defendant wins automatically.

Moreover, the essence of the traditional causation requirement is that the action of the defendant must have wronged the plaintiff by causing him or her actual physical harm. That is, the defendant's actions must not only risk harm to the plaintiff, but that harm, or a harm very much like it, must actually occur.¹⁷ The idea that tort liability is imposed only when the defendant's actions have caused physical harm to the plaintiff is so obvious that it is almost transparent, but it is a critically important feature of the traditional conception of accident law. Without an actual-harm requirement, the plaintiff is a mere member of the public toward whom the defendant behaved improperly, and the imposition of liability on the defendant—however measured—begins to resemble criminal punishment for wrongdoing to the public at large rather than the rectification of a wrong to a particular individual. The actual-harm requirement thus makes the unique causal connection between the defendant's action and plaintiff's harm the focus of inquiry.

C. Damages

Without question, the rules governing recovery of damages in tort cases most clearly reflect the traditional conception of the uniqueness of every tort claim. The successful plaintiff is entitled to

Justifiably Naked Statistical Evidence and Multiple Causation, 1982 AM. BAR FOUND. RES. J. 487.

15. See, e.g., *Herskovits v. Group Health Coop.*, 664 P.2d 474, 476-77 (Wash. 1983) (jury permitted to determine whether physician's failure to diagnose illness in timely fashion was proximate cause of death, upon evidence that decedent's chance of survival was reduced from 39% to 25%).

16. The members of the jury are of course permitted to generalize from their own experience in and understanding of the physical world in order to answer the counterfactual causal inquiry. Indeed, it is hard to imagine how the causal inquiry could be resolved without reference to such experience and understanding, unless it were by reference to statistical generalizations.

17. On at least some views of the matter it also is not sufficient that the defendant harmed the plaintiff; harm to the plaintiff must also have been foreseeably risked. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928). In addition, in at least some situations the type of harm risked, and not some other type, must have occurred in order to hold the defendant liable. See *Petition of Kinsman*, 338 F.2d 708, 726 (2d Cir. 1964) (defendant liable only if injury to plaintiff caused by failure to raise a drawbridge before bridge was struck by drifting vessel was foreseeable).

recover individualized and unlimited damages for past and future out-of-pocket expenses such as lost wages and medical costs, and for past and future pain and suffering. Evidence of awards made to others who have suffered similar injuries not only is not binding—it is not even admissible; the jury does not hear of other awards and cannot consider them in assessing damages. The principle of individualization is so strong, in fact, that a “thin-skull” rule prevails, under which a plaintiff who is especially susceptible to injury may recover in full.¹⁸

Even the major exception to this principle of individualized full recovery confirms it. Under the doctrine of comparative negligence, the negligence of the plaintiff does not bar recovery, but merely reduces the plaintiff’s recovery in proportion to the amount of negligence attributable to him or her.¹⁹ The baseline against which this reduction occurs, however, is full and individualized recovery; comparative negligence thus maintains tort law’s allegiance to this principle of individualized recovery even while creating an exception to it.

In summary, the individualized character of the determinations that make up the traditional conception is evident when the rules governing standards of conduct, causation, and damages described above are considered together. And they have been surprisingly resistant to change. I think that the traditional conception has been so appealing because resolution of personal injury claims in court, before juries, has remained important. Part of this appeal is rooted in the ideal of corrective justice, under which a wrongdoer is required to rectify the harm done to his or her victim.

But in my view more is at stake than this simple, sometimes primitive, and in the modern context, often impossible ideal.²⁰ Also at stake is the idea that, without the aid of the government and the

18. *See, e.g.*, *Steinhauser v. Hertz*, 421 F.2d 1169, 1173-74 (2d Cir. 1970) (holding that plaintiff is entitled to recover in full if jury finds that accident was “precipitating factor” causing schizophrenia in child, who previously exhibited latent schizophrenic tendencies).

19. *See* SCHWARTZ, *supra* note 11, § 2.1, at 30-32. The same approach is used in jurisdictions where comparative negligence also applies in strict liability actions. *See, e.g.*, *Daly v. General Motors Corp.*, 575 P.2d 1162, 1168-69 (Cal. 1978) (proportionately reducing plaintiff’s recovery where plaintiff failed to use safety belts and door locks, and was driving while intoxicated).

20. The ideal of corrective justice is often impossible to achieve in a number of respects. For example, the “wrongdoer” may be an individual employee of a legal construct—a corporation—but the corporation is likely to be the defendant; the basis for the imposition of liability may not be that the defendant is a “wrongdoer,” but that the defendant should be held liable notwithstanding the absence of wrongdoing; and the

whole apparatus of the criminal law, ordinary aggrieved citizens can put authority on trial. That idea has become part of the democratic ideal in this country, and tort law is a major vehicle through which that confrontation occurs,²¹ or at least seems to occur. We have been willing to tolerate much that is unattractive and unfair about tort law in order to permit ordinary people to sue large institutions for malpractice, defectively designed products, and hazardous exposure to pollutants. There have always been alternatives, but they lie outside the tort system—stronger regulation for deterrence, and no-fault systems like workers' and auto compensation schemes. But, for two reasons, until recently there did not seem to be any feasible way to extend the compensation systems beyond employment and auto injuries: it appeared necessary to cut back on tort liability in order to extend these approaches into other fields, and that was politically difficult. Further, because of the difficulty of defining the events that would trigger a right to compensation, there did not seem to be any technically feasible way to construct workable no-fault systems of compensation in other fields.²²

What is now beginning to happen is that tort law is groping toward an arrangement that circumvents these difficulties by maintaining the right to sue in tort, while at the same time importing some of the more attractive features of non-tort compensation systems into tort law. The importing has begun to occur and will continue, I think, both because the alternatives are attractive in their own right, and because they would remedy some of the weaknesses of tort law that we once were willing to tolerate, but which have become increasingly objectionable. Of course it is open to question what the future will bring, for my analysis is almost as much a prediction of what is going to happen as it is a description of what has already happened. But a great deal has already happened, and in any case the role of the legal scholar sometimes is to help us see

defendant's insurance company, not the defendant, may provide the funds that "correct" the "wrong."

21. See generally Geoffrey C. Hazard, Jr., *Authority in the Dock*, 69 B.U. L. REV. 469 (1989).

22. See generally Kenneth S. Abraham, *The Insurance Implications of Alternative Compensation Systems*, 25 HOUS. L. REV. 817 (1988) (arguing that the difficulty of defining compensable events in product and process injuries, including environmental exposure injuries, makes expansion of health and disability coverage in private first-party and social insurance policies a more viable alternative than no-fault insurance schemes); James A. Henderson, Jr., *The Boundary Problems of Enterprise Liability*, 41 MD. L. REV. 659 (1982) (discussing problems in defining compensable events under an enterprise liability system for technologically advanced activities).

where we are going. That is what I will try to do in the following discussion.

II. THE IMPACT OF RECENT DEVELOPMENTS ON THE TRADITIONAL CONCEPTION

The decade of the 1980s was a period of enormous ferment in tort law scholarship and tort law reform. Significant new proposals for reordering tort law emerged,²³ the liability insurance "crisis" of the middle of the decade catalyzed support for some of these proposals, and tort reform statutes of one sort or another were enacted in over forty states.²⁴ In addition, judicial action in a series of mass tort cases experimented with new approaches on a number of different fronts.²⁵

Although this scholarship and the legislative and judicial action that it helped to spawn are diverse, one discernible theme is the tendency of many of the reforms to depart from the traditional conception of the uniqueness of every tort claim. Each of a series of reforms would erode (or has begun to erode) this traditional conception, by rendering the particular circumstances of the plaintiff or defendant less significant to the outcome of the claim than they would have been in the past. Interestingly, this common characteristic links together a number of otherwise quite different reforms. Some of these expand the scope of liability, by imposing liability measured by the degree of risk imposed on the plaintiff.²⁶ Others contract liability, by reversing the traditional "collateral source"

23. For a compendium, synthesis, and analysis of much of this scholarship and law reform, see generally the two-volume AMERICAN LAW INSTITUTE REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY]. See also TORT LAW AND THE PUBLIC INTEREST (Peter H. Schuck ed., 1991) (discussing tort reform controversy).

24. For a catalogue of the reforms that were adopted by statute, see Joseph Sanders & Craig Joyce, "Off to the Races": The 1980s Tort Crisis and the Law Reform Process, 27 Hous. L. Rev. 207, 220-22 (1990).

25. See, e.g., *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (overruling district court's "imaginative approach" that had required full trial on liability for 11 class representatives using evidence from 30 illustrative plaintiffs, enabling jury then to determine damages suffered by remaining 2990 class members); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 475 (5th Cir. 1986) (affirming district court's ratification of plaintiff class in mass-tort asbestos action, using bifurcated trials to determine punitive and actual damages separately). See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1986) (examining judicial approaches to Agent Orange litigation and suggesting alternatives); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659 (1989) (examining judicial approaches to asbestos-related and Dalkon Shield litigation, and suggesting alternatives).

26. See *infra* Subpart II.A.

rule or by placing caps on damages recoverable for pain and suffering.²⁷ Some facilitate the institution of tort claims by breaking down barriers to class actions,²⁸ while others make it more difficult or impossible to bring tort actions by authorizing waivers or disclaimers of tort liability.²⁹

A. *Liability for the Tortious Creation of Risk*

Perhaps the most radical of all the measures that would erode the traditional conception of a tort claim involves liability for the tortious creation of risk. A cluster of recent proposals and judicial decisions has begun a process of eliminating the actual harm requirement of tort law. Each reform makes the unique facts of the plaintiff's claim less important to his or her rights of recovery than they would be traditionally. In each instance, this departure is accomplished by measuring liability according to the degree of risk imposed on the plaintiff rather than by the amount of actual harm the plaintiff suffered.

The extreme form of liability for risk creation is liability imposed even before anyone suffers actual physical harm. A number of commentators and a few cases have advanced this idea.³⁰ They would compensate those subjected merely to the risk of harm—for example, because they were exposed to a carcinogenic substance—and would measure liability by multiplying the probability that the risk will materialize in harm by the expected magnitude of loss should it occur. If a plaintiff had a twenty-five percent chance of contracting cancer because of a tortious exposure to a carcinogen, she would receive twenty-five percent of the value of a claim for actually contracting the disease. A modified approach would measure liability in roughly the same manner, but would create a “fund” into which the defendant's payment would be made. Those who subsequently suffered injury would then be entitled to recover from the fund, based on the probability that their harm was caused by a party contributing to the fund.³¹

27. See *infra* Subpart II.B.

28. See *infra* Subpart II.C.

29. See *infra* Subpart II.D.

30. See, e.g., *Sterling v. Velsicol Chemical Corp.*, 647 F. Supp. 303, 321-22 (W.D. Tenn. 1987) (approving “enhanced risk” or “enhanced susceptibility” to disease as compensable injury); Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 783 (1985) (arguing that the basic objectives of tort law are better served if liability is based on risk of injury rather than on actual occurrence of harm).

31. See, e.g., *Rosenberg*, *supra* note 8, at 341-42 (suggesting that firms potentially

A less extreme approach would impose liability for risk only after harm had already been suffered. This approach may be starting to become commonplace. Perhaps the most well-known example is market-share liability, adopted most prominently in a number of DES cases,³² and sometimes employed in asbestos claims as well.³³ In such cases, each of many companies has marketed a generically identical or nearly identical substance; a large number of individuals are able to prove exposure to the substance and the occurrence of harm resulting from that exposure, but are unable to identify the particular defendant or defendants responsible for his or her exposure. Traditional rules governing proof of causation would leave such a plaintiff without a viable claim, because proof of any individual marketer's responsibility for the plaintiff's exposure would be impossible. Even proof that a particular company had marketed more than fifty percent of the substance in question would not satisfy the burden of proof under the traditional rule that naked statistical evidence is inadmissible.³⁴

Market-share liability responds to this problem of the indeterminate defendant by permitting the plaintiff to recover from each

liable for claims involving toxic exposure set aside a fund, or purchase commercial insurance to cover such claims); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990) (arguing in favor of increased risk of harm as a compensable event). In a sense, this modified approach departs even more radically from the traditional conception of a tort claim than does the pure approach. Under the pure approach the imposition of liability on the defendant and the receipt of compensation by the plaintiff are simultaneous. There is a direct, face-to-face connection between the plaintiff and the defendant in the course of the claim, and the judgment rendered obligates the defendant to pay the plaintiff. But under the modified approach the defendant does not pay the plaintiff directly; it pays into a fund that later pays the plaintiff.

This separation of the imposition of liability from the payment of compensation may seem to be merely formal. From the plaintiff's standpoint the defendant pays the plaintiff, and the plaintiff cannot recover unless he or she has been harmed by the defendant. On the other hand, from the defendant's standpoint, its liability is not to an individual or even to a group of individuals. Rather, the defendant is liable to a kind of intermediary—the fund created by its payment of the judgment against it. The identities of the individuals whose harm the defendant's actions have risked are immaterial to the defendant. By the time this risk materializes in harm, the defendant's legal relationship with and obligation to these individuals has terminated. In effect, the defendant has paid a tax calibrated to the riskiness of its activities and that tax has been used to finance a system that will later be used to compensate those who subsequently become victims of these activities.

32. Diethylstilbestrol (DES) was marketed as a prescription drug for the prevention of miscarriage, and was later alleged to cause cancer in daughters of some women who took DES during pregnancy. See, e.g., *Sindell v. Abbott Lab.*, 607 P.2d 924, 925 (Cal. 1980) (holding defendants liable in proportion to their share of the DES market).

33. See, e.g., *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981).

34. See *supra* note 14 and accompanying text.

marketer of the offending substance in proportion to the market share of that defendant. There need be no showing that the plaintiff was in fact exposed to any individual defendant's product.³⁵ The theory behind the doctrine rests on the probability that each defendant's product injured someone, and that such injury is highly likely to have occurred in proportion to each defendant's market share. By foregoing the requirement that a plaintiff prove causation in the traditional manner, those deserving of compensation receive it, and potential defendants are threatened with liability in proportion to the degree of harm that their actions caused. In the long run, in theory, each defendant will end up paying the same sum that it would have paid had perfect evidence of causation been available. In order to achieve this result, however, each defendant is held liable in proportion to the risk that its actions created rather than for the actual harm it caused a particular plaintiff.

The practical difficulties of implementing a market-share liability scheme are great, but these difficulties are beside the point. For my purposes here, the important point is that market-share liability marks a distinct departure from the traditional conception of a tort claim. It simply does not matter whether a particular defendant in a market-share case actually injured the plaintiff or not, for a defendant's action and the plaintiff's harm need not match. Any defendant's wrong now consists of having risked harming the plaintiff, rather than of having actually caused the plaintiff harm. Each plaintiff is a surrogate for all the parties whom a defendant actually injured, even though the defendant may not have injured that plaintiff. One traditionally essential set of particulars about the plaintiff's claim has therefore become completely irrelevant.

What market-share liability does in a narrow range of cases, other recent proposals and a few cases would accomplish much more broadly. These measures would extend the theory behind market-share liability to cases in which there is a form of direct evidence of the degree of risk imposed on the plaintiff by the defendant. Where market-share liability uses market share as a proxy for risk, these approaches would use epidemiological or other statistical

35. In some jurisdictions a defendant may avoid liability by showing that the plaintiff could not have been exposed to that defendant's product. For example, the defendant may show that during the years in question it made no sales in the state where the plaintiff resided. *See, e.g., McCormack v. Abbott Lab.*, 617 F. Supp. 1521, 1526 (D. Mass. 1985). In other jurisdictions, however, even this showing will not suffice to exonerate the defendant. *See, e.g., Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1074-75 (N.Y. 1989).

measures of the degree of risk imposed on the plaintiff by the defendant.³⁶ It is important to recognize that these approaches would not merely set aside the traditional prohibition against the use of naked statistical evidence to prove causation. Rather, they would impose liability even when statistical evidence showed that it was less probable than not that the defendant's actions caused the plaintiff's harm. In such cases, the plaintiff would recover only the percentage of his or her losses equal to the percentage probability that the defendant's actions had caused the losses.

Proportional liability for creating risk thus resembles market-share liability in the way it departs from the traditional conception of a tort claim.³⁷ Because there is no requirement of a match between the defendant's actions and the plaintiff's harm, even a defendant that probably has not harmed the plaintiff may be required under this approach to compensate the plaintiff for a portion of his losses. The basis of the plaintiff's claim has been transformed into a demand for compensation that depends much less than a traditional claim on the particulars of the parties' circumstances.

One point of significance about these different moves toward imposing liability for creating risk is that they are a response to the difficulty of creating non-tort compensation systems in the fields where proving causation is so difficult for plaintiffs. A primary feature of any liability or compensation system is the compensable event, or trigger of the right to compensation. That event may be defined by reference to fault, cause, or loss.³⁸ The principal technical problem that has prevented the development of no-fault medical, products, and environmental-injury compensation schemes analogous to those governing auto and work-related injuries is the difficulty of constructing a satisfactory set of compensable events.

36. See, e.g., *Herskovitz v. Group Health Coop.*, 664 P.2d 474, 479 (Wash. 1983) (measuring damages in a wrongful death case by the percent reduction in chance of survival); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

37. Like market-share liability, this approach is fraught with practical problems, not the least of which is the potential unreliability of the statistical evidence on which it would rely. See Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 867 (1987) (noting that "the data necessary to support the probabilistic measures of causation that could serve as surrogates for causal responsibility will rarely be available").

38. In tort, the dominant compensable event is the occurrence of an injury resulting from the fault of the defendant. By contrast, in workers' compensation and automobile no-fault insurance the event is an injury caused by employment or while driving. In health and disability insurance (private or social), the event is a loss falling into the appropriate category, regardless of fault or cause.

Because it is considered highly desirable to internalize within the health-care, products, and chemical industries the cost of injuries in each field, cause-based compensation systems are preferred. Otherwise, it would be technically more sensible (though in all probability financially impossible) simply to adopt loss-based systems providing universal health and disability insurance, instead of trying to charge each activity with the cost of providing no-fault compensation for the injuries associated with the activity.

Proposals for imposing tort liability for the creation of risk respond to this problem³⁹ by circumventing it. When tort liability is imposed for the creation of risk, then many of the knotty problems that would be associated with the definition and proof of a compensable event under a non-tort, no-fault compensation system are avoided. Certainly, it would be equally possible to avoid these technical problems within a no-fault compensation system by paying claimants for exposure to risk rather than for actual harm. Circumventing the problem within the tort system, however, avoids a political obstacle to the construction of such a non-tort system. To set up such a system outside tort law might require abolishing or restricting tort liability. Setting it up within tort law does not abolish or restrict tort liability;⁴⁰ on the contrary, it expands the scope of tort liability and thereby avoids both the technical and the political obstacles to the construction of a full-blown compensation scheme.

The result looks something like a compensation system operating in court. A true system of liability for risk creation would dispense compensation on a much more uniform basis than would traditional tort liability, because it would base awards on potential loss rather than actual loss, and inevitably there would be less indi-

39. There actually are two problems: (1) it is sometimes difficult to know whether a particular injury was caused by the activity in question (medical care or exposure to a product or environmental hazard, for example); and (2) even assuming that the injury was caused by the activity in question, not all such injuries must be included within the compensation system to assure optimal internalization of the cost of injuries associated with the activity. Examples in this category might include a minor side effect of beneficial medical treatment or an accidental cut caused by a sharp knife. Imposing tort liability for risk creation responds more to the first than to the second problem.

40. At the very least, tort liability appears to be expanded under this approach. To be entirely consistent, of course, damages should be calculated in proportion to risk regardless of the percentage probability that the defendant's action caused the plaintiff harm. For example, if a defendant is liable for 30% of a claimant's loss when there is a 30% chance that the defendant caused the loss, then the defendant should be held liable for only 70% of the loss when the chance that the defendant caused the loss is 70%. If under a new regime the defendant were held liable only for 70% of the loss in the latter situation, then liability would have been contracted in this respect, because under traditional rules the defendant would pay 100% of the loss in such a situation.

vidualized damage computation when the plaintiffs had not yet suffered injury. That this all appears a bit jerry-rigged and therefore only vaguely resembles the non-tort compensation systems with which we are familiar may be part of the point: that is sometimes what happens when you take a fish out of water.

B. Damages

If liability for creating risk appears only vaguely to be moving the tort system toward the standardization that is so characteristic of non-tort systems, recent reforms in the law of damages move tort law in that direction with a vengeance. I shall discuss three such reforms here: statutory caps on the sums recoverable as damages, proposals for scheduling damage recoveries, and abolition of the collateral source rule.

1. *Caps on Damages for Pain and Suffering.*—Perhaps the most visible reform enacted in the wake of the liability insurance crisis of the mid-1980s was the statutory cap on pain and suffering damages.⁴¹ Typically set at a figure of \$250,000 or higher, these caps are designed at least in part to preclude the occasional enormous judgment resulting from a “runaway” jury. Statutory caps also respond in a crude way to the argument that because it would make little economic sense for potential victims to insure themselves against pain and suffering, tort law should not impose liability for this form of loss.

There are plausible (though in my view unconvincing) arguments for completely abolishing the right to recover pain and suffering damages.⁴² Yet, if the right of some victims to recover in full for their pain and suffering is abolished, then the principle that underlies retention of the right of full recovery of such damages by other victims demands explanation. It might be argued, for example, that statutory caps simply recognize that it would be unreasonable for a jury to assess the present value of any individual’s pain and suffering

41. Between 1985 and 1988, 23 jurisdictions placed caps on damage recoveries. See Sanders & Joyce, *supra* note 24, at 220-22.

42. See, e.g., STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 228-35 (1987) (arguing that socially ideal compensation cannot be achieved under a liability system that compensates for nonpecuniary losses); Samuel A. Rea, Jr., *Non-Pecuniary Loss and Breach of Contract*, 11 J. LEGAL STUD. 35 (1982) (exploring “inefficiency” of full compensation for nonpecuniary losses resulting from breach); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 362-67, 408-11 (1988) (contending that tort liability should apply only to pecuniary losses while nonpecuniary harm should be covered by a legislatively-mandated system of fines).

at a level in excess of the cap in question, because no amount of pain and suffering could rationally be valued in excess of the cap. On this view, a cap assures that what is already irrelevant is not given weight nonetheless. But given the fact that juries commonly awarded sums in excess of what later became the statutory cap in particular jurisdictions, this argument is weak. An occasional jury might be regarded as utterly irrational; but common awards above a specified level suggest (even if they do not prove) that it is not irrational so to assess the value of certain kinds of pain and suffering. The operative principle behind caps is more likely to be that, although some claimants incur pain and suffering that could legitimately support awards in excess of the cap, some such excess awards are the result of inaccurate or punitive assessments. In order to avoid the latter, the caps are formulated to preclude the former as well.

Another plausible but ultimately unconvincing explanation for caps is that the real function of pain and suffering damages is to provide the claimant with a method of financing activities that become more desirable to him or her as a result of his injury—the projected cost of which normally is not recoverable as an out-of-pocket loss. The permanently injured athlete may wish to purchase a wide-screen television and season tickets to the local team's games, for example. Because it would be very rare that the present value of such expenses would exceed the statutory cap, the cap serves to prevent overcompensation for this category of expense. The weakness of this explanation, however, is that there is no necessary connection between the degree of a claimant's pain and suffering and the magnitude of the expense the claimant is likely to incur in order to engage in substitute activities. In addition, this theory cannot begin to explain awards made for lost enjoyment of life's activities to comatose claimants or others who could not possibly use their awards to finance the purchase of substitute enjoyments.

Whatever the motive for the enactment of statutory caps on pain and suffering damages, and regardless of whether there is a coherent principle underlying them, the effect of the caps is clear. Statutory caps compromise the traditional principle of full compensation for both economic and noneconomic loss suffered by a successful tort claimant. A cap renders irrelevant to the plaintiff's claim any pain and suffering that would be assessed a value in excess of the cap. The unique circumstances of those seriously injured victims whose pain and suffering would fall into this category therefore are ignored. In jurisdictions that have enacted caps, for all intents

and purposes a tort claim is no longer an action for full recovery of damages suffered by very seriously injured or exceptionally sensitive claimants. These claimants, not tortfeasors, bear the risk that they will suffer unusually severe pain and suffering.

2. *Damage Scheduling.*—A number of proposals for limiting the individualization of damage awards in other ways have recently emerged.⁴³ These proposals would subject awards for pain and suffering to “schedules” defining the lower and upper limits of awardable damages for particular kinds or categories of loss. The most straightforward of these proposals would categorize typical injuries according to their severity,⁴⁴ and would prescribe the range of awardable pain and suffering damages for each category. The amount awardable for a temporary minor injury such as an improperly set fracture would be lower than that awardable for a permanent major injury such as blindness or the loss of a limb.⁴⁵ A broader version of this approach would apply it not only to awards for pain and suffering, but to damages for economic loss as well. The plaintiff simply would receive a lump sum chosen from within a pre-specified range applicable to the category in which his or her injury fit.

Glen Robinson and I recently have proposed an analogous but more far-reaching scheme for “aggregative valuation” of claims in mass tort actions.⁴⁶ Under our proposal, the early claimants would try or settle their claims pursuant to traditional rules governing recoverable damages. These results would then be aggregated and used as the basis for constructing damage “profiles” for each category of loss. Later claimants’ recoveries would be subject to the upper and lower limits specified in the profiles. Because these profiles would be constructed from data regarding actual awards and settle-

43. See, e.g., Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, LAW & CONTEMP. PROBS., Autumn 1990, at 137. See generally Rosenberg, *supra* note 8 (proposing damage scheduling through averaging and prioritizing compensation in lieu of individual awards); James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171 (1991) (proposing development of a reporting system that would have precedential value for future awards); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 Nw. U. L. REV. 908 (1989) (proposing three alternative frameworks to perfect valuation of noneconomic damages under the current system of liability).

44. Depending on the complexity of the schedule, it might take into account the severity of the injury, its degree of permanence, and the life expectancy of the party injured.

45. See, e.g., Bovbjerg et al., *supra* note 43, at 921-22 (tables summarizing a sample of jury awards).

46. See generally Abraham & Robinson, *supra* note 43.

ments in the same action, they necessarily would take into account the discounting of these awards and settlements by juries or the parties themselves because of such nondamage-related issues as negligence and causation. Unlike more conventional damage scheduling, our approach therefore would take into account not only the severity of injury suffered, but also the strength or weakness of other elements of the claim.

There is one sense in which the effect of all damage scheduling could resemble the effect of statutory caps. If the highest category on the schedule had an upper limit, then the most severely injured or especially sensitive claimants would bear the same risk of suffering above-ceiling losses as they would when a statutory cap was in force. The highest category in a damage schedule need not have a closed end, however, although many of the proposals for scheduling seem to assume a closed end. In any event, the interesting features of damage scheduling lie in their effect throughout the schedule, not merely at the high end.

First, scheduling renders irrelevant the special severity of the losses suffered by claimants falling into any of the schedule's categories. The claimant with an extraordinarily painful broken arm finds himself undercompensated for his pain and suffering if under traditional rules he would have recovered more than the schedule allows him.⁴⁷ Indeed, if the schedule applies to both pain and suffering and economic loss, some claimants could find that they are not even fully compensated for their medical expenses and lost wages, because their losses in these categories alone exceed the upper limit allowed for a broken arm. Second, unlike the statutory cap, damage scheduling inserts a floor under which awards for a particular category of injury may not fall. Not only is the special severity of an injury or the claimant's special sensitivity irrelevant; the unusual mildness of the injury or the claimant's insensitivity to the injury also does not count. The claimants who heal far more quickly than the average person or who work in spite of their pain can pocket their awards with impunity, though presumably the awards made to such claimants will be at the low end of the scale.

In short, damage scheduling standardizes awards by treating

47. Of course, it is possible to imagine damage schedules that create only rebuttable presumptions and therefore permit the claimant to show that, because of the unusual severity of the injury, the upper limit applicable to that kind of injury should be relaxed. *See id.* at 147-48. Such an approach will tend to have fewer of the effects I point to in the text, but because of the typical operation of even rebuttable presumptions, these effects still are likely to appear to some degree.

claims that otherwise would not be alike as though they were alike. The claims that would be outliers in any given category are brought back within a normal distribution of awards. Like the outlier claims that are subject to caps, some of these would have been the result of jury error, but some simply would have warranted special treatment under the traditional conception of a tort claim. Plaintiffs whose claims might lie outside the high end of any particular schedule bear the risk that they will be less than "fully" compensated because their special characteristics are not taken into account. In contrast, defendants bear the risk that outliers on the low side will be more than "fully" compensated for the same reason. In both instances, however, the unique circumstances in which the plaintiff finds himself or herself—circumstances that play such a central role in the assessment of damages under the traditional conception of a tort claim—are of only limited significance in fixing the amount of the award the plaintiff receives.

3. *Collateral Sources*.—The traditional "collateral source rule" governs the tort law treatment of collateral sources of compensation for the plaintiff's losses, such as health or disability insurance. The rule provides that evidence of past or probable future payment of such benefits to the plaintiff is inadmissible in the trial of a tort action.⁴⁸ The result of this rule of evidence is of course also substantive: the plaintiff is entitled to recover in full from the defendant for losses that already have been or will in the future be paid by collateral sources such as first-party or social insurance.

The standard critique of the rule has been that it is inappropriate to impose liability on a defendant for sums that the plaintiff has not in fact lost, because she is insured. The standard responses have been that these losses are a real social cost even if the plaintiff has not lost them, and that optimal deterrence therefore requires that the defendant be threatened with liability for all the costs of its activities; that the plaintiff should not be denied the benefit of his or her foresight in purchasing insurance; that because plaintiffs often do not receive compensation for some losses, duplicate recovery for other losses helps to make them whole; and that in any event double compensation of the plaintiff can be avoided by permitting the plaintiff's insurer to contract for a right of reimbursement for its payments out of any subsequent tort recovery that the plaintiff secures.⁴⁹ For years the traditional rule held out against its critics,

48. See 4 HARPER et al., *supra* note 5, § 25.22, at 648-51.

49. See 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 23, at 162-64.

but then it began to crumble. In the 1970s several jurisdictions abolished it by statute in medical malpractice cases;⁵⁰ in the 1980s a larger number abolished it (again by statute) in all tort claims.⁵¹ In these jurisdictions, past and prospective insurance benefits paid or payable to the plaintiff are offset against the plaintiff's recovery.⁵²

The recent reversals of the collateral source rule present a more complicated picture than either statutory caps or damage scheduling. These reversals might be interpreted to have trained more rather than less attention on the particular circumstances of the plaintiff in a tort claim. In my view, however, these changes represent a move in the opposite direction. For the most part, recent modifications of the collateral source rule run with rather than against the grain of the other changes I have been canvassing.

The opposite argument, that reversal of the traditional rule represents a move toward rather than away from individualization, is as follows. The collateral source rule ignores differences among plaintiffs, because in computing the plaintiff's losses it precludes consideration of any collateral compensation received by the plaintiff for those losses. By requiring that such collateral payments to the plaintiff be taken into account in computing damage awards, statutory reversals of the rule (according to this view) increase the focus of the tort action on the plaintiff's particular circumstances—in this instance, the plaintiff's access to insurance against some of the very losses that he or she has sued to recover.

For two reasons, however, I think that this interpretation does not fit the facts as well as a very different interpretation. First, the notion that the collateral source rule ignores the plaintiff's access to

50. See Kenneth S. Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489, 504-06 (1977) (discussing potential modifications of the collateral source rule); Prentiss E. Feagles et al., Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, 1447-50 (citing California, Idaho, Iowa, New York, Pennsylvania, and Tennessee statutes).

51. In total, 25 jurisdictions have now enacted some form of legislation governing the collateral source rule. See Sanders & Joyce, *supra* note 24, at 220-22 (table listing those states enacting such legislation between 1985 and 1988).

52. Strictly speaking, in some of these jurisdictions the rule has not been completely abolished because the statutes abolishing the rule apply only to specified sources or exclude specified sources from their application. In addition, decisions in a number of federal cases have ruled the statutes inapplicable to certain federal social insurance programs, on the ground that the abolition would interfere with the federal statutory rights of reimbursement accorded some of these sources of social insurance. See, e.g., *Rubin v. Sullivan*, 720 F. Supp. 840, 846 (D. Haw. 1989) (disallowing matching funds under Medicaid); *Abrams v. Heckler*, 582 F. Supp. 1155, 1165 (S.D.N.Y. 1984) (upholding regulation precluding Medicare payments for services covered by auto insurance policies).

collateral sources is overly simple. In fact, the rule is responsive to these sources even as it prohibits reference to them at trial. Health and disability insurers usually provide in their policies that they shall be subrogated to the rights of their insureds against third parties who have caused these insureds to suffer losses covered by the policy. Statutes creating social insurance often do the same. In each instance, insurers' rights of subrogation may be exercised directly against these third parties—such as tortfeasors—or the subrogation rights may be translated into the right to be reimbursed for the amount of these insurance benefits out of any tort recovery secured by the policyholder. In practice, these rights of subrogation and reimbursement are not exercised systematically, but they are exercised.⁵³

Consequently, the assertion that the collateral source rule ignores the differential availability of insurance benefits to plaintiffs is far from accurate. The rule actually attends to these differences by permitting the creation of a fund out of which insurers can be reimbursed for the benefits they have paid.⁵⁴ In the absence of the rule, private and social insurers' rights of subrogation and reimbursement are far less meaningful. Requiring that a plaintiff's past and future access to insurance benefits be ignored in court was traditional tort law's method of distinguishing those who did and did not have such benefits. Abolishing the rule means the opposite: a plaintiff's status as an insurance beneficiary is no longer protected, and those who do and do not have insurance receive the same net compensation.

The second reason I interpret recent abolitions of the collateral source rule to be departures from the traditional conception is a bit more subjective. The collateral source rule has a moralistic quality about it, in that it seeks to assure that those who have been provident enough to purchase insurance are not denied the benefit of that providence. Yet, although the citizens of this country are far from being fully insured against the economic consequences of illness and injury, first-party and social insurance are no longer the uncommon or nonexistent phenomena they were at the time the rule came into existence and received this kind of moralistic sup-

53. For explanations of the reasons for this unsystematic exercise of insurers' rights of subrogation and reimbursement, see 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 23, at 164.

54. See John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1498-1512 (1966) (outlining several methods by which insurers obtain reimbursement).

port. For example, most Americans have health insurance;⁵⁵ virtually all the employed have workers' compensation covering them against wage losses resulting from work-related accidents or disease;⁵⁶ Social Security Disability Insurance (SSDI) provides nearly the entire working population with subsistence-level insurance against wage loss resulting from permanent disability;⁵⁷ and a much smaller but still significant percentage of the working population is covered against wage loss by private disability insurance.⁵⁸

The statutory abolitions of the collateral source rule that have been adopted in many states are at least partly a reflection of this growth in the forms and scope of loss insurance coverage protecting the American public. These statutes recognize that loss insurance is so widespread that it is the rare plaintiff whose losses are not covered in some respect by one or more sources of private or social insurance. Admittedly, abolition of the collateral source rule places the precise character of the plaintiff's collateral sources of coverage at issue in each individual tort claim; but from a broader perspective, such abolition emphasizes what most tort claimants have in common—collateral sources of insurance coverage—rather than isolating the particular circumstances that distinguish one plaintiff from another. In this respect the abolition of the collateral source rule is a move away from rather than toward the traditional conception of a tort claim.

To sum up, the three reforms of damages law that I have canvassed in this Subpart—statutory caps, scheduling, and reversal of the collateral source rule—are graphic illustrations of both of the effects of eroding the traditional conception of a tort claim that I have been underscoring. These reforms help to counteract the potentially arbitrary or discriminatory application of tort law to particular claimants, and they import into tort law devices that non-tort systems have used successfully in providing compensation. For example, under the traditional rules governing pain and suffering,

55. Most estimates are that between 30 and 37 million people in the United States (out of a population of 250 million) are uninsured. See, e.g., CONGRESSIONAL RESEARCH SERVICE, *HEALTH INSURANCE AND THE UNINSURED: BACKGROUND DATA AND ANALYSIS* 93 (1988); M. Eugene Moyer, *A Revised Look at the Number of Uninsured Americans*, 8 *HEALTH AFF.* 102 (1989).

56. Hawaii was the last state to adopt a workers' compensation law, in 1963. See ARTHUR O. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 5.30 (1952 & Supp. 1989).

57. See Social Security Act, 42 U.S.C. § 1396 (1988).

58. See HEALTH INSURANCE ASSOCIATION OF AMERICA, *1988 UPDATE: SOURCE BOOK OF HEALTH INSURANCE DATA* 7 (1988) (table).

enormous sums may be paid for pain and suffering to a few claimants. At the same time, other individuals' economic losses may go undercompensated. As it becomes recognized that for practical purposes a finite amount of money is available to compensate the victims of accidental illness and injury, this kind of distribution is transformed into a target for reform. Similarly, the collateral source rule permits double compensation for expenses that have been paid by a claimant's own insurance, even while other claimants have not been fully compensated for their medical expenses or lost wages. Both statutory caps on pain and suffering and the abolition of the collateral source rule can be viewed as attempts to reduce this kind of inequity among claimants, by preserving the large but ultimately finite sum that is available to compensate tort claimants for those who are most in need—victims with uncompensated out-of-pocket losses.

Proposals for scheduling damage awards would move the system toward another form of equity as well. The great strength of the traditional conception of a tort claim is its capacity to take into account the individual circumstances of the plaintiff and the particular chain of events leading to injury. The enormous discretion accorded the jury under this conception, however, also creates the potential that circumstances that ought to be legally irrelevant to the outcome of the claim may be taken into account. As groups, African-Americans and whites, men and women, the wealthy and the poor may fare differently as claimants under the traditional conception. Similarly, individual defendants and corporations, professional and nonprofessional defendants, local defendants and foreign defendants may fare differently.⁵⁹

The various forms of damage scheduling that recently have been proposed would tend to mitigate different outcomes because of prejudice or favoritism based on the foregoing factors. Everyone with the same injury would receive an award within a prespecified range. Admittedly, the data from which schedules are constructed might include outcomes based on such prejudice or favoritism. But by averaging or aggregating the outcomes from a representative sample of claims, the effect of these biases would be submerged; all subsequent claimants would receive awards that averaged the posi-

59. For example, one study showed that juries are likely to award substantially more in product liability, malpractice, or work injury cases than in an automobile case involving injury of the same severity. See AUDREY CHIN & MARK A. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* 52-56 (1985).

tive and negative differences resulting from the biases.⁶⁰ Thus, damage scheduling would attempt to avoid the silent inequities that can be camouflaged by what Holmes called the "featureless generality" of jury verdicts under the traditional conception.⁶¹

In addition to the effect of these reforms in the law of damages on equity among claimants, each reform represents an effort to import into tort law one or more features that are characteristic of non-tort compensation schemes. Three parallels here are striking. First, nearly all non-tort compensation systems employ rules governing coordination of benefits that are designed to avoid duplicate or overlapping coverage.⁶² Private insurance policies accomplish coordination through policy provisions; social insurance accomplishes it through statutory directives or regulations. Along the entire range of compensation systems, the only major exception to this practice is the collateral source rule of traditional tort law. Abolition of the rule is therefore a major landmark in the development of tort law. Abolition not only makes tort resemble other systems; in this respect it makes tort law one of them.

Second, damage scheduling of tort awards has counterparts in any number of non-tort compensation systems that use categorical rules of various sorts to ignore idiosyncracies and differences among individuals, in the interest of achieving equity among claimants and increasing administrative efficiency. Examples include the social security "grid" used to classify disabilities for purposes of SSDI,⁶³ the lump sums that workers' compensation pays for designated permanent disabilities;⁶⁴ and the "diagnostic review group" (DRG) limitations on Medicare reimbursements for particular kinds of illnesses and medical procedures that have been spreading through health insurance generally.⁶⁵ These devices are coming to be seen as attractive methods of capturing for tort law some of the efficiencies and equities generated by non-tort systems, and they are finding

60. See Abraham & Robinson, *supra* note 43, at 150-51; Rosenberg, *supra* note 8, at 340-41.

61. HOLMES, *supra* note 6, at 89.

62. See KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 133-72 (1986) (discussing the purposes and implications of and devices for coordinated coverage).

63. For discussion of the promulgation of the grid, and the controversy and litigation that followed, see JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1983).

64. See LARSON, *supra* note 56, at § 58.00.

65. See Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1984) (codified as amended in scattered sections of 42 U.S.C.). For discussion of these limitations, see J. Timothy Phillips & Don E. Wineberg, *Medicare Prospective Payment: A Quiet Revolution*, 87 W. VA. L. REV. 27 (1984).

their way into the tort reform movement in the form of caps on damages and proposals for damage scheduling.

Finally, aside from tort law, no compensation system explicitly pays claimants for their pain and suffering, and even those that pay compensation which might be viewed as a surrogate for pain and suffering only pay in limited amounts.⁶⁶ By foregoing such payment, these systems make compensation of out-of-pocket loss a priority, and at the same time avoid the statistical uncertainty that they would face if compensation of a non-objective category of loss were available without limit. Statutory caps on pain and suffering resonate with both these concerns.

C. *Class Actions and Bankruptcy*

In this Essay, I cannot undertake a thorough review of the developments in class actions and bankruptcy that have occurred during the last decade, nor can I do justice to the many innovative proposals for reform that have emerged during the same period. It is sufficient to note here that many of the important developments in class actions and bankruptcy in recent years have occurred in tort litigation, and that virtually every important actual and proposed change in the way these fields handle tort claims has had or would have the effect of rendering the particular circumstances of each plaintiff's claim less significant than they would have been under the traditional conception.⁶⁷

The tort system simply cannot resolve hundreds of thousands of claims through the ordinary process of individual litigation.⁶⁸ By their very nature, class actions tend to focus on the general rather than on the particular. For example, determinations regarding negligence (or strict liability) and at least some features of causation often are made generally and become binding on all members of the class. In addition, in a number of mass tort actions, including asbes-

66. The lump sum workers' compensation payments for specified permanent disabilities bear a close resemblance to pain and suffering damages, though they are not so denominated. Pain and suffering is also recoverable under automobile uninsured or underinsured motorist insurance, but the right to benefits is contingent on the existence of a valid cause of action in tort against the uninsured or underinsured motorist.

67. For fairly recent sets of recommendations, see AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT, TENTATIVE DRAFT No. 1 (Apr. 14, 1989) and TENTATIVE DRAFT No. 2 (Apr. 6, 1990); AMERICAN BAR ASSOCIATION COMMISSION ON MASS TORTS, REVISED FINAL REPORT AND RECOMMENDATIONS (1989) [hereinafter COMMISSION ON MASS TORTS].

68. For example, the Agent Orange, Dalkon Shield, and asbestos litigation have involved about 125,000, 210,000, and 340,000 claimants, respectively. See COMMISSION ON MASS TORTS, *supra* note 67, at 15e.

tos and Dalkon Shield litigation, the courts and such ancillaries as special masters and consultants have constructed schemes that would encourage or require claimants to be categorized and then compensated on the basis of that categorization.⁶⁹ In these cases the courts have used their class action and bankruptcy authority to fashion methods of standardizing claims and distributing payment, all under the rubric of imposing "tort liability."⁷⁰ Thus, in a very real sense the principal point of filing for Chapter Eleven bankruptcy reorganization in response to mass tort litigation is to trigger judicial authority to treat collectively claimants who otherwise would have the right to more individual treatment. Finally, much of the academic writing about class actions and damages in mass tort cases has been directed at devising satisfactory methods of departing from the traditional conception of a tort claim, through damage scheduling, aggregative valuation, and the like.⁷¹

In short, the function of class actions and bankruptcy reorganization in connection with tort claims is precisely to facilitate the demise of the traditional conception of a tort claim in mass tort actions. In these settings the law has begun to recognize that, for a variety of reasons, the individualization that is at the heart of the traditional conception is an unaffordable luxury. The rules governing the resolution of tort claims through class actions and bankruptcy—and the innovations that are now being proposed and seriously considered—make it increasingly feasible to depart from the traditional conception by paying comparatively less attention to the particulars of individual claims than would be paid outside these settings.

D. *Waivers and Disclaimers of Tort Liability*

The last set of reforms that I shall analyze does not involve change in the rules governing tort liability or damages, but elective

69. See Kenneth R. Feinberg, *The Dalkon Shield Claimants' Trust Claims Resolution Facility*, LAW & CONTEMP. PROBS., Autumn 1990, at 79; McGovern, *supra* note 25, at 659.

70. In other cases some trial judges have attempted to employ collective devices for resolving individual issues without great success. See, e.g., *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (granting mandamus against trial court's plan to determine liability and damages for an entire class of 3000 claimants based on a trial of selected claims representing different asbestos-related disease categories). For in-depth discussion of other innovative efforts that have met with mixed success, see Linda S. Mullinex, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991).

71. Without question, David Rosenberg has been in the forefront of this effort. See, e.g., Rosenberg, *supra* note 8, at 335.

substitution of alternative regimes for those rules. At the beginning of the modern era of tort law, tort liability displaced contract law as the source of liability for personal injury in settings, including the delivery of health care and the sale of products,⁷² where injurers and victims could have contracted before injury about their rights and obligations. That displacement did not merely make tort liability the dominant system for redressing wrongful personal injury; because tort law could not be set aside by contract, tort liability became the exclusive source of law governing liability for personal injury.⁷³ The traditional conception of a tort claim therefore also became the exclusive reference point for adjudicating personal injury claims. Tort liability could not be waived; it could not be disclaimed; and it could not be contracted away.

The citadel that these no-waiver, no-disclaimer, no-contract rules built is now in the early stages of being dismantled. In the fields of automobile liability, medical malpractice, and products liability, limited adoptions of elective no-fault regimes and far-reaching proposals for authorization of liability and compensation contracts are reordering personal injury law. The common characteristic of these measures, and in a sense their most important feature, is the suspension of the traditional conception's monopoly in the field of civil liability. Personal injury law and tort law are no longer synonymous.

These nontraditional measures can be classified most comfortably along two axes. First, they permit displacement of tort law either at the election of one party or upon the agreement of both parties. Thus, an alternative regime may be selected in a number of ways: only by the claimant,⁷⁴ only by the injurer,⁷⁵ or only upon mutual agreement.⁷⁶ Second, the alternative regime may be se-

72. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (holding that purchaser of a vehicle may sue manufacturer for negligence, notwithstanding absence of privity of contract between them).

73. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 97 (N.J. 1960) (holding that automobile manufacturer could not use disclaimer of implied warranty to relieve it of liability when plaintiff was injured because of manufacturing defect).

74. This approach is employed by the National Vaccine Act, which provides no-fault compensation to individuals suffering side effects from the administration of child vaccines. See National Vaccine Act, 42 U.S.C. §§ 300aa-1 to -34 (1988).

75. This approach is employed by the Virginia and Florida birth-injury funds. See VA. CODE ANN. §§ 38.2-5000 to -5021 (Michie 1990 & Supp. 1991); FLA. STAT. ANN. §§ 766.301-.316 (West Supp. 1989).

76. For proposals in this regard, see 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 23, at 487-536; Jeffrey O'Connell, *A "Neo-No-Fault" Contract In Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CAL. L. REV. 898 (1985).

lected before a cause of action in tort arises,⁷⁷ after a cause of action arises,⁷⁸ or at either point. The result is a combination of different possibilities, together with variations within each depending on whether full or only partial displacement of tort law rules governing liability and damages is permitted.⁷⁹ For example, the Virginia and Florida birth-injury compensation programs⁸⁰ afford obstetricians and hospitals an annual right to opt out of tort liability for birth-related neurological defects, but in exercising this right these health-care providers must opt into a no-fault compensation system financed by flat surcharges against them. On the other hand, the federal child vaccine-injury program⁸¹ is financed by pharmaceutical companies, and affords claimants who are already injured a right to opt into a no-fault compensation scheme that is comparatively less generous than the tort system has been to successful claimants in this field.

There are two main features of this entire cluster of possibilities. The first is that they are just that—possibilities. The parties' relationship need not be completely constrained by tort law in general or by the traditional conception in particular. By contract or (depending on the variation in question) at the unilateral election of one of the parties, the full individualization required by the traditional conception may be set aside. Second, in virtually all of these reforms and proposals, what tort law is set aside for is a set of rights and liabilities that is far more standardized and far less individualized than tort rights. Typically the claimant under these schemes is assured full compensation for medical expenses, partial compensation for lost wages, and sometimes a lump sum equivalent to pain

77. See, e.g., Richard Epstein, *Medical Malpractice, Imperfect Information, and the Contractual Foundation for Medical Services*, LAW & CONTEMP. PROBS., Spring 1986, at 201 (discussing contracts for health services, especially in light of the rise of health maintenance organizations (HMOs)); Glen O. Robinson, *Rethinking the Allocation of Medical Malpractice Risks between Patients and Providers*, LAW & CONTEMP. PROBS., Spring 1986, at 173.

78. See, e.g., Jeffrey O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims By Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U. L. REV. 589, 601 (1982) (proposing a statute that would give a defendant in a personal injury action the option of foreclosing such claims by offering, within 60 days, to pay the claimant's net economic loss, or "special" damages, in excess of losses covered by the claimant's collateral sources).

79. For example, complete *ex ante* waiver of tort liability might be permitted, or such waivers might be permitted only if the potential injurer promised to provide a substitute compensation package, such as no-fault payment of full economic loss resulting from an injury for which there would otherwise be tort liability. See *id.*; Kenneth S. Abraham, *Medical Liability Reform: A Conceptual Framework*, 260 JAMA 68, 71-72 (1988).

80. See *supra* note 75.

81. See *supra* note 74.

and suffering damages that is subject to a specified monetary ceiling.⁸² There is no need to prove negligence, and in some instances statutory presumptions of causation eliminate the need to prove that the claimant suffered actual harm at the hands of the party who would be a defendant if he were making a tort claim.⁸³

The contract alternatives thus sidestep some of the political difficulties entailed in the construction and implementation of mandatory non-tort compensation schemes, and encourage the more or less voluntary adoption of such schemes. For example, where the right to opt out of tort liability is unilateral, the political objections of those who are given that right are likely to fade away, since they can elect to remain in the tort system. To meet the objections of those against whom this right is exercised, some *quid pro quo* is necessary. This is likely to mean that the compensation scheme that substitutes for tort liability must be comparatively generous, either financially or through liberalization of compensability criteria.

So far the legislatures have chosen to construct these elective systems themselves, leaving one or both of the parties merely to elect or not to elect participation in a legislatively specified alternative to tort law. The next logical step in the development of contract alternatives may well be legislative or even judicial authorization for potential claimants and defendants to construct alternative systems themselves. Potential parties may then opt out of tort liability and into those systems by mutual agreement. But, for two reasons, this next step may be some years away. First, neither legislatures nor courts are likely to be comfortable with full freedom to contract out of tort liability before assessing experience with the more limited regimes that have been adopted. Second, some system must be devised for bringing into the picture the insurers whose interests would be affected by individual choices. For example, when patients or physicians opt out of the tort system, the exposure of both the physician's malpractice liability insurer and the patient's first-party and social insurers may be affected; these impacts need to be considered, and a method of accounting for them through rate changes, rebates, surcharges, and the like must be devised. Otherwise some of the principal beneficiaries and victims of a decision to opt out of tort and into an alternative regime will be left on the sidelines.

82. See, e.g., VA. CODE ANN. § 38.2-5009 (Michie 1990 & Supp. 1991).

83. See, e.g., *id.* § 38.2-5008.

If these problems were solved, it is quite possible that permitting the parties to opt out of tort liability by mutual agreement would generate a whole series of other schemes, custom designed by the parties for particular kinds of transactions or relationships: for lawnmower-related injuries, drug side effects, and the like. Legislatures cannot reasonably be expected to formulate such compensation programs individually, but they can be expected to authorize such contracts in general and establish specific constraints on their terms.⁸⁴ Even if the law cannot construct such schemes, it can allow the parties whose interests would be served by doing so to construct them. The right to opt out of tort liability would create the opportunity to do just that. The courts could police these contracts, having received the legislative message that, subject to the legislatively prescribed constraints, waivers and disclaimers of tort liability are presumptively valid rather than presumptively unconscionable. The private sector could then proceed to try to solve the technical obstacles to constructing alternative compensation systems.

III. IMPLICATIONS FOR THE FUTURE

Because I have claimed not merely to be describing what has already become tort law, but also to be using proposals for reform to predict what else will happen to tort law, I want to suggest in this Part why I think that the future will bring more of the same kinds of tort reform that I have been emphasizing. I argued above that contemporary reform has the effect of promoting greater equity among claimants. Of course, what counts as equitable or inequitable depends on what factors are considered legally important or irrelevant. Identical treatment of all claimants or all defendants is not equitable if there are relevant differences among members of these categories. The developments that I have canvassed seem to me likely to influence several forms of inequity that have long been recognized in the tort system, but nonetheless have been tolerated. As these inequities become less tolerable, reforms that respond to them are likely to be regarded with favor.

One inequity involves differences in the quality of the lawyers

84. These constraints would have to deal with at least two issues: how to establish the equivalent of "informed consent" or "knowing waiver" by claimants (and those who might become claimants), and the substantive requirements and limits of the approach substituted for tort liability. We have considerable experience with the former. As to the latter, a requirement that the alternative have a monetary value equivalent to the tort right waived, in light of the probability and severity of potential injury and any price differential offered in return for the waiver, might provide a suitable baseline.

representing claimants. Some are adept at proving causation in the face of scientific uncertainty, some are not. Some are capable of winning million-dollar verdicts and some are not. By imposing liability without requiring proof of causation and by standardizing award levels, a number of the reforms would tend to mitigate the effect of such differences. Another form of inequity I mentioned earlier is the possibility of jury prejudice—racism, sexism, xenophobia, and a variety of other biases. As we become more and more aware of diversity in our population and more sensitive to that diversity, sweeping the possibility of these kinds of jury prejudices under the rug becomes less and less comfortable, and reforms that respond to or tend to neutralize the prejudices by standardizing award levels become more attractive.

A third form of inequity might be called “legal luck.” If you are unlucky enough to fall in your bathtub, you receive limited compensation from health and disability insurance, but if you suffer the same injury at the hands of a third party like your doctor or the manufacturer of your car, under the traditional conception the sky is the limit—you are free to seek the pot of gold at the end of the rainbow. Few people ever find that pot of gold, and in certain respects, some recent reforms may simply bring the law on the books into line with the way tort law is actually practiced in most cases through compromise and settlement. But some of the reforms attempt to contain and manage the differences resulting from legal luck by shrinking the differences in compensation available from tort and the other systems, though without eliminating the differences. The result is a tort system that still has deterrence capacity and still awards more in damages than alternative systems, but that generates less difference in compensation levels and therefore makes people less uncomfortable about the effect of legal luck.⁸⁵

85. In a somewhat similar manner the imposition of liability for creating risk might be interpreted as a method of dealing with “legal luck” from the defendant’s rather than the plaintiff’s perspective. Under the traditional conception, either there is full liability or there is none. The party who has acted negligently, but has the luck not to have caused injury, escapes entirely, while the defendant who is negligent in the same way, but unlucky enough to have injured someone, may have to shoulder enormous liability for the injuries its actions caused. Morally speaking, the defendant whose risky actions do not cause injury stands in the same position as the defendant whose actions do. See Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 453 (1990). Liability for creating risk would diminish this distinction without a moral difference among defendants. Admittedly, however, two different factors tend to mitigate the effect of these forms of legal luck for defendants: liability insurance and the repeat-player phenomenon. By insuring, the potential defendant can transfer to an insurance pool the risk of having the bad luck of injuring someone; and even the nonin-

Because this and the other two forms of inequity are likely to remain troubling to many observers of the tort system, pressure for continued reform of this sort is likely to continue.

In addition to reducing inequity among claimants, I have argued that the reforms I have canvassed draw heavily on the devices employed by non-tort compensation systems. In my view the explanation is twofold. First, many of the reformers find the non-tort systems appealing, and are willing to settle for half-a-loaf rather than none.⁸⁶ They get half a compensation system—one operated by a court rather than an insurance company or government agency, or one in which tort liability is not abolished but is made optional. There is every reason to expect that this kind of pressure will continue. For example, my colleague Jeffrey O'Connell has created several new forms of elective no-fault in recent years and some are now being adopted.⁸⁷ This development is likely to encourage no-fault reformers.

The second reason for the appeal of non-tort systems is that the scope of tort liability has been expanding for at least the last century. Politically, the time for a *quid pro quo* seems to have come. More and more people have the right to recover in tort. When the scope of tort liability was limited and defenses were many, full individualization and unlimited damages seemed sensible. As liability has expanded and the defenses to it have withered away, for at least some reformers a trade-off was overdue. The features of non-tort systems that award lower levels of compensation in return for providing compensation to more victims appear to be an appealing trade for this expansion in the scope of liability. For many the full

sured actor mitigates the effect of such bad legal luck through what amounts to self-insurance if that actor has a sufficiently broad base of claims experience to be a repeat player. The argument for imposing liability for creating risk in order to mitigate the impact of legal luck is therefore much weaker from defendants' than from plaintiffs' perspective.

86. The logic of this development (if not also the history) proceeds as follows: First, the weaknesses of the traditional conception of tort law are recognized. Next, serious consideration is given to the adoption of non-tort liability and compensation systems that would supplement or displace the traditional conception, but the political and technical obstacles to the construction of such systems are recognized. Attention therefore turns again to reform within the tort system. Tort reforms are then formulated that in one way or another attempt to capture the benefits of the infeasible compensation-system alternatives to tort liability, while avoiding the disadvantages of these alternatives. This progression is not a figment of my interpretive imagination; it is explicit, for example, in the recent study group report on tort reform to the American Law Institute. See *1 ENTERPRISE LIABILITY FOR PERSONAL INJURY*, *supra* note 23, at 6-7.

87. See, e.g., Jeffrey O'Connell, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault*, 51 OHIO ST. L.J. 947, 947-51 (1990).

trade has not yet been completed, however, and for this reason too I would expect more reform that makes tort liability look increasingly like non-tort law.

It should go without saying that whether all these changes are desirable is a separate matter. One might think that dealing with the risk of jury prejudice by standardizing awards and ignoring diversity is a bad idea. One might favor the development of more non-tort compensation systems, but think that trying to transform tort law into a non-tort system is not sensible. Or one might favor the latter idea, but object to certain of the reforms that are employed to achieve the transformation of tort law. I happen to think, for example, that placing absolute dollar caps on pain and suffering damages burdens precisely the wrong people—those who have suffered serious injuries early in their lives—because they are the people who are most likely to receive a large recovery. Scheduling damages for all claimants makes much more sense to me.

But all that is a matter for another day. The first task is to understand the underlying significance and common direction of contemporary tort reform. Having gained a grasp of that significance, we can then undertake the normative task of assessing the wisdom of the reforms. Then at least we would not be debating the simplistic question of whether a particular reform does or should benefit plaintiffs or defendants. We could instead address more complicated and difficult questions involving how to handle diversity, which forms of equity among claimants are preferable, and tort law's proper relationship with the non-tort systems that are its institutional relatives. That is the kind of tort reform debate toward which we ought to be heading.

CONCLUSION

Let me conclude by emphasizing that my analysis has been offered in the spirit of interpretation, and indeed interpretation of an unfinished and evolving text. The multiple authors of the text probably would not recognize it in my interpretation. The whole text of tort reform, however, may not only be greater than the sum of its parts, but different from that sum as well. Whether my own interpretation will turn out to be correct, of course, depends on how the text continues to be written. But whatever the significance and shape of contemporary tort reform movement ultimately turn out to be, the road to that completed text should be very exciting indeed.