

The Transformation of Tort Reform

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In the 1950s, tort law was something of a backwater. Still, UC Berkeley's Dean William Prosser, the most important figure in torts in the early post-war era, was pushing on various fronts for its liberalization in favor of victims. Many of Prosser's goals were importantly realized in the 1960s and 1970s, as common law tort doctrine became increasingly receptive to plaintiffs.

Many other reformers in the 1960s, however, concluded that tort law was inefficient and ineffective in providing needed compensation for injured people. The administrative costs of running the tort system were horrendous, with up to half the liability insurance premium dollar going to defendant expenses and with plaintiffs' attorneys typically taking as their fees one-third of the settlement or recovery. Loads of accident victims could not recover in tort because a) they were not the victim of

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another's fault, b) could not prove that even if it were true, c) were themselves at fault, and/or d) their tortfeasor was judgment proof. A range of alternative compensation schemes was proposed, both for specific categories of injuries (most importantly automobile "no-fault" plans) and across-the-board for all accident victims (a reform actually adopted in New Zealand in the early 1970s).

By 1985, when I published *Doing Away with Tort Law*, 73 Cal. L. Rev. 555, many of us hoped that the replacement of American personal injury law with a combination of sweeping European-style social insurance schemes plus stronger safety regulation via administrative agencies was not far in the future. But, so far, it has not played out that way.

Even in the 1960s and early 1970s, the most important torts scholars of the last third of the 20th century (Guido Calabresi and Richard Posner, both now federal judges) began to write about the safety-promoting potential of tort law, and economic models of tort law as a "deterrent" began to be taught to new generations of law students. Some friends of tort law (including both Calabresi and former Berkeley law professor and later California Supreme Court Justice Roger Traynor) envisioned that "enterprise liability" for all sorts of accidents could serve the dual functions of discouraging carelessness and providing compensation to accident victims. Yet, enterprise liability has not seriously caught on, at least not as a doctrinal matter.

Instead, through the 1970s and 1980s we found ourselves with a robust tort law based on negligence (comparative fault replaced contributory negligence as a complete bar to recovery, new doctrinal areas were opened up to plaintiffs, and lawyers representing victims became much better at their craft). This state of affairs could fairly be seen as a victory for the odd pairing of the plaintiffs' bar on the one hand and, on the other, the academic thinking of Prosser, the pragmatist, and Posner, a fan of the negligence principle and a key founder of the "law and economics" movement (even if the latter is usually seen as a conservative approach to law).

But the battle over tort law was hardly done. Since the late 1970s, business interests have objected to how much tort law costs them as a result of the liberalization of tort doctrine and the growing effectiveness of the plaintiffs' bar in convincing juries to award huge sums in many celebrated cases. Yet, the defense side could hardly object to the imposition of tort liability on real wrong-doers, and those critics of tort law were unlikely to favor social insurance-like replacements. Instead, they have waged a campaign before state legislatures (with substantial success), Congress (with no real success so far), and in state Supreme Court elections (with some success) to roll back victims' legal rights. Most of the effort has been focused, not on tort doctrine, but on tort damages law and the procedures governing tort law. This effort has yielded reforms in some states like caps on pain and suffering, a reversal of the "collateral sources" rule so that tort law becomes secondary to other forms of compensation, restrictions on joint and several liability (so that deep

pocket defendants are less likely to have to bear the risk that more-at-fault defendants are insolvent), and so on. Common law judges, at least in some states, also seem to have been influenced by this well-coordinated political campaign, scaling back on some earlier pro-victim decisions. In the 21st century, some think we have reached a *détente* between the defense community and the well-healed and populist-talking "trial lawyers."

Yet, federal legislation now in the offing could still change things dramatically. Most importantly, of course, we may finally be joining the other rich nations of the world by having something of a comprehensive national health insurance program. In addition, legislation is now moving through Congress that would guarantee workers paid sick leave for very short term disabilities and paid temporary non-occupational disability income benefits that would last for up to a year. Suppose these measures are enacted, and suppose further the adoption of changes in the law of tort damages that would a) require liable defendants to pay their victims' reasonable legal fees and expenses, b) reverse the collateral source rule for these new federal health and income schemes, and c) impose a threshold requirement for pain and suffering (requiring, say, as is the law in New South Wales Australia, that the injured party be at least 15% disabled before any pain and suffering damages may be awarded).

Under such a scenario, most of the small injury tort claims that are made today would disappear, and tort law for bodily injury would be left to focus primarily on a much fewer number of serious injuries. In such a sharply changed world, those of us favoring focused no-fault schemes for serious harm (especially from auto accidents) and/or more comprehensive New Zealand-like reforms might, once more, gain a hearing (especially with Ralph Nader, the plaintiffs' bar's greatest ally, having somewhat tarnished his reputation as Mr. Consumer with his Quixotic runs at the Presidency).⁸⁸