

# Serious Tort Law Reform

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## I. THE PROBLEM

Tort law is a form of collective intervention into social and economic affairs that carries with it substantial costs, both public and private. These costs include higher prices for goods and services, higher taxes, and the socially undesirable consequences that tort law has on people's behavior — such as the failure of companies to develop and introduce products the public wants, the wasteful and unnecessary testing that doctors engage in for the purpose of avoiding lawsuits, and the excessive defensive litigation strategies that lawyers and insurance companies use to defeat even those claims that are well justified under the current rules.

We judge other forms of government action, like the public transportation system, the Social Security system, the national parks system, or any important system of government regulation such as the Food and Drug Administration and the Federal Aviation Administration, by comparing their costs with their benefits. So, too, should we judge tort law. Evaluated in this way, I have concluded that tort law generates more perverse behavior than desired safety, that it is an intolerably expensive and unfair system of compensating victims, and that in practice it fails to serve any common-sense notion of justice.<sup>1</sup> In short, I do not think we, as a society, are getting our money's worth.

In the past, when the perceived social problem was that individuals deliberately were injuring others, making the injurer pay personally for the harm done seemed only just. It probably was the minimum punishment that a wrongdoer deserved. Further, it may have

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1. See Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985).

been necessary to provide a prompt legal remedy in order to calm down the victim, preventing him from retaliating with force. Today, however, we are a long way from that state of affairs.

Currently, most injuries that find their way into the tort system are not cases of intentional wrongdoing; rather, they are the result of accidents. The injurers usually are not people the victim is having a feud with; rather, they typically are a motorist that the victim was sharing the road with, the victim's own physician or local bus company or airline, or the maker of a product the victim was using. When someone now makes a tort claim, rather than obtaining swift justice, he often will wind up waiting years before his suit is resolved. Moreover, he frequently will come away from the experience far more frustrated than satisfied. A victim today rarely can expect to recover directly from the individual who injured him. Instead, he will recover from an insurance company or a large impersonal enterprise, such as a corporation or a government entity.

Compounding things is that the amount that claimants recover, if anything at all, is unlikely to reflect what an objective observer would say they truly deserve. Instead, what count considerably are: the talents of the lawyer one happens to have; the tenacity of the defendant (or insurance adjuster) one happens to be up against; whether the defendant happens to be a motorist, a company, or a governmental entity; how attractive (but not too attractive) and how well spoken (but perhaps not too well spoken) the claimant happens to be; what race the claimant is; what state and community the victim lives in; how well one is able to hold out for a larger settlement; the whim of the jury if the case gets that far; and whether one is lucky enough to have available the right sort of witnesses or other evidence of the injury and the defendant's wrongdoing.<sup>2</sup> In short, our current tort system is not a system of justice; it is a lottery.<sup>3</sup>

Unlike the official lotteries that many states now run, the tort lottery is one for which we all are forced to pay. This payment is extracted through higher auto insurance rates, with vaccines becoming unavailable in adequate quantities, with skating rinks closing down, and with competent physicians ceasing to treat some patients and refusing to provide others with professionally preferred treatment.

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2. For some empirical data on these widely accepted propositions, see, e.g., M. PETERSON, *CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS* at v, xi, 45 (Rand Corp. Inst. for Civ. Just. 1987); A. CHIN & M. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* at vi-ix (Rand Corp. Inst. for Civ. Just. 1985). See generally J. O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* (1979); J. O'CONNELL, *ENDING INSULT TO INJURY* (1975).

3. For early use of this expression, see T. ISON, *THE FORENSIC LOTTERY* (1967) (describing the British tort system); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

Additionally, wholly innocent assembly-line workers, engineers, secretaries, and marketing managers are threatened with job loss as companies suffer severe financial setbacks or even are thrown into bankruptcy for possible wrongdoing that occurred, if at all, many years ago and by people either who no longer work for the firm or who personally will go unpunished.<sup>4</sup> In short, for most ordinary citizens and taxpayers, today's tort system is a very bad gamble indeed.

What about tort law's role in compensating victims? After all, opinions of many courts today often suggest that compensation of

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4. For further information on these widely reported negative impacts of tort law, see, e.g., REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) (federal inter-agency study sponsored by the Attorney General) [hereinafter DOJ REPORT]; TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS (1987) [hereinafter CRISIS UPDATE]; COMM'N ON CALIFORNIA STATE GOV'T ORGANIZATION AND ECONOMY, A REPORT ON THE LIABILITY INSURANCE CRISIS IN THE STATE OF CALIFORNIA (1986); MEDICAL MALPRACTICE POLICY GUIDEBOOK (H. Manne ed. 1985) (study sponsored by the Florida Medical Ass'n); G. EADS & P. REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION (Rand Corp. Inst. for Civ. Just. 1983). For specific concerns about negative impacts of tort law on the drug and medical device industries, see Galen, *Birth-Control Options Limited by Litigation*, NAT'L L.J., Oct. 20, 1986, at 1; Rodarmor, *Doctor, Lawyer, Bionics, Chief*, CAL. LAW., Dec., 1984, at 44. For impacts on physicians' services, see Stewart, *Doctors Who Won't Deliver*, San Francisco Chron., Feb. 8, 1987, *This World*, at 7.

See also Rutigliano, *Insurance Crisis for Doctors?*, TRIAL, May 1986, at 29, 31. The Rutigliano article is a strong defense of the existing tort system by a lawyer who nonetheless recognizes that socially undesirable defensive medicine, especially in the form of unnecessary and expensive tests, is a product of tort law. The author calls on the medical profession to correct the problem by ending this "irrational response." But, because it seems to me that this sort of defensive medicine is a rational response from the self-interested perspective of individual doctors, I am quite pessimistic about the prospects for eliminating this waste until doctors are convinced that they should not fear unwarranted claims of malpractice. Note, further, that because the subjective beliefs of doctors are the key, plaintiff lawyers' arguments (generally correct) about the difficulty of actually winning a medical malpractice case, are somewhat beside the point.

Other perverse impacts of tort law include (1) the anxieties created by recurrent crises of liability insurance unavailability and perceived unaffordability, (2) the anger and demoralization experienced by doctors and engineers who feel under siege by the tort system and who believe that they are being held responsible for things that are not the result of their wrongdoing, and (3) the delayed justice experienced by other litigants because of the court-clogging effect of personal injury litigation.

For some recent empirical evidence, based upon surveys of doctors and lawyers, supporting the views that doctors overwhelmingly consider the malpractice system unfair and that the fear of malpractice suits causes professionals to turn away clients as well as to engage in costly, defensive procedures beyond those required by the standards of the profession, see Peters, Nord, & Woodson, *An Empirical Analysis of the Medical and Legal Professions' Experiences and Perceptions of Medical and Legal Malpractice*, 19 MICH. J. L. REFORM 601, 616, 627 (1986).

victims is the main function of tort law.<sup>5</sup> Even defense lawyers typically will concede, when confronted by badly injured victims, that, of course, something should be done for them. Indeed, let me assume that most Americans agree that when people become disabled and face unexpected income losses and medical expenses that leave them in financial straits, there is a collective duty to help them. How does tort law score on this social goal? Miserably!

First, tort law is a depressingly expensive way to compensate people. Less than half the money that is paid into insurance companies as liability insurance premiums finds its way into the pockets of victims.<sup>6</sup> The rest is ground up in lawyers' fees and the associated costs that litigation generates. The money also is consumed in the marketing, general overhead and claims administration costs of the insurers, as well as their profits in years when they make profits. And this does not account for the public costs to the judicial system that the tort system imposes, both financial and through delay in the handling of other cases.<sup>7</sup>

Furthermore, once tort law finally does deliver money to victims, a considerable sum goes to duplicate compensation that they otherwise have or will receive from other sources, such as health insurance, sick leave, Social Security, and the like. Much more of the damages that victims receive are paid, not for out-of-pocket losses, but for pain and suffering — and importantly so, not only in those million dollar cases one now increasingly reads about in the newspapers, but also in small, yet relentless, amounts that pour out in the settlement of routine cases where the insurance companies find it cheaper to pay than to litigate. As a result, estimates show that less than fifteen cents on the dollar of tort liability insurance premiums eventually goes to pay for income losses and medical expenses and other out-of-pocket losses.<sup>8</sup>

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5. The California Supreme Court has been especially candid about viewing tort law fundamentally as a vehicle for compensating injured victims. *See, e.g.,* *Jess v. Herman*, 26 Cal. 3d 131, 604 P.2d 108, 161 Cal. Rptr. 87 (1979); *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

6. *See* E. BERNZWEIG, *BY ACCIDENT NOT DESIGN* 85-89 (1980); P. MUNCH, *COSTS AND BENEFITS OF THE TORTS SYSTEM IF VIEWED AS A COMPENSATION SYSTEM* (Rand Corp. Inst. for Civ. Just. 1977); O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 504-11 (1976). For a recent review of the literature on the costs of the tort system in the medical malpractice area, *see* Zuckerman, Koller & Bovbjerg, *Information on Malpractice: A Review of Empirical Research on Major Policy Issues*, 49 LAW & CONTEMP. PROBS. 85, 100 (1986). *See generally* J. KAKALIK & N. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* (Rand Corp. Inst. for Civ. Just. 1986).

7. *See* J. KAKALIK & R. ROSS, *COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING VARIOUS TYPES OF CIVIL CASES* (Rand Corp. Inst. for Civ. Just. 1983).

8. *See, e.g.,* O'Connell, *supra* note 6. This result is consistent with the recent

In addition to being terribly expensive as a scheme of compensation, tort law is an incomplete system. It will remain so despite the increased willingness of courts to impose strict liability. Initially, many wrongdoers are uninsured or are not caught. Secondly, some victims either cannot gather adequate evidence to prove that they have been injured by wrongdoing, or simply do not even realize that they have been injured.<sup>9</sup> Thirdly, many people are intimidated by the idea of bringing a lawsuit to redress their rights, or do not even realize that they have legal rights to redress.<sup>10</sup> Finally, and most importantly, no matter how much the defense bar complains about far-fetched theories of liability (some of it justified), many accident victims have no plausible defendant to sue. For example, if, while cleaning my roof gutters, I fall off a ladder onto my patio and break my arm, who am I to sue? The ladder maker? The gutter maker?

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Rand findings on litigation costs. *See also* J. KAKALIK & N. PACE, *supra* note 6. Kakalik and Pace found that the costs of tort litigation in 1985 were \$14-19 billion, including both sides' legal fees and expenses, court expenditures, and the value of lost productive time that was devoted to litigation. For these costs the system delivered \$13 to \$15 billion to victims. On this basis, Kakalik and Pace conclude that 46% of the cost of the system goes into net compensation. Note, however, that they count as compensation to victims both those payments which duplicate collateral sources that victims already have and also payments for pain and suffering. Moreover, they do not include in their cost figures either the marketing expenses or profits of insurance companies. General insurance company overhead also apparently is excluded. But these costs are, of course, all built into liability insurance premiums and hence clearly are costs of the tort system, if not of the tort litigation system, which was the subject of Kakalik and Pace's study. Indeed, as James Kakalik confirmed to me in a telephone interview, they also exclude from their analysis both the costs of processing and the payouts of claims that do not involve lawsuits.

Robert W. Sturgis of Tillinghast, Nelson & Warren, Inc. recently offered the view (without citing any data) that, rather than the 15% figure given in the text, 25% of tort costs compensate victims' economic loss. *See* R. Sturgis, *The Cost of the U.S. Tort System: An Address to the American Insurance Association* 17 (Nov. 1985). In a telephone interview on May 11, 1987, Sturgis said that he "cannot support the 25% number rigorously" but that, based upon other studies he has seen, he is confident that it is a reasonable estimate of the "maximum" share of tort costs that go to cover economic loss. He further indicated that the 25% figure includes payments for economic losses that already are covered by other sources of compensation available to victims — payments that presumably either duplicate recovery or are reimbursed to the collateral sources. Since my 15% figure speaks to net out-of-pocket losses, if one were to reduce Sturgis' 25% for double coverage of collateral sources, his estimate would be in the same ballpark as that given in the text.

9. For example, many people who are victims of medical malpractice do not realize it, probably treating the result as an unavoidable adverse outcome. For some data about nonclaimant victims of medical malpractice, see Zuckerman, Koller & Bovbjerg, *supra* note 6, at 94-97.

10. These points are well demonstrated by an important recent British survey of accident victims. *See* D. HARRIS, *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* 45-78 (1984).

The patio maker? In short, many accidental injuries are essentially self-inflicted. One-car mishaps, in-home accidents, and recreational accidents are good examples of this.<sup>11</sup> Yet, these victims, like other victims, need compensation.

On the other hand, nearly everyone would agree that what is recovered by some personal injury victims is excessive. Tort recovery clearly is excessive when it duplicates other recovery. In addition, whatever one's feelings about pain and suffering recovery as a general matter, some awards, when viewed as part of an overall system, simply are unacceptably large.<sup>12</sup> These victims and their lawyers merely have won the spin of the tort lottery wheel.

Do we need torts for compensation purposes? When I consider my own situation, I know that if I were hurt in an accident, my medical bills would be paid. If I missed a week or a month or more of work, my wages would be continued. If I were disabled and no longer able to work as a law professor, I would have a generous disability pension. Hence, I do not need the tort system to compensate me for my economic losses arising from accidents. What's more, my protection does not depend upon my being able to prove that anyone was at

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11. A recent study in Great Britain of people who were disabled for at least two weeks from an accident found that only 12% recovered tort damages, including one in three road accident victims, one in five work accident victims and only one in fifty victims of other types of accidents. See D. HARRIS, *supra* note 10, at 317. Studies by the Consumer Product Safety Commission show that, of products covered by the Commission's jurisdiction, accident victims are injured most frequently and severely from things such as falling down stairs, playing sports, falling off or bumping into beds, sofas, tables and doors, and using products like knives, nails, cigarette lighters, lawn mowers, caustic cleaners, stoves, power tools, fuels, and fireworks. See 8 CONSUMER PRODUCT SAFETY COMM'N, NEISS DATA HIGHLIGHTS (Jan.-Dec. 1984). Although some of these victims will have tort actions, surely most will not.

12. I do not mean to suggest that people actually would prefer the money they receive to having avoided the pain and suffering they have and must endure. It is, rather, that I find it perverse to single out a few people to receive millions of dollars for their pain and suffering when others with equal pain and suffering are provided with little or no money for their "intangible" losses, such as those who cannot identify their injurer or have a judgment-proof injurer, those who are injured on the job, those who are victims of disease or congenital disabilities, and so on.

As for evidence about large pain and suffering awards, estimates for Florida, for example, show that, in those medical malpractice cases involving awards of more than \$100,000 in pain and suffering, the share of the total award allocable to pain and suffering is 80%. Indeed, an estimated 39% of the total indemnity paid to all malpractice claimants for all their losses is paid out for pain and suffering to the estimated 2.7% of medical malpractice claims that resulted in awards of more than \$100,000 in pain and suffering. MEDICAL MALPRACTICE POLICY GUIDEBOOK, *supra* note 4, at 132-39.

A recent study of jury verdicts in San Francisco, California and Cook County, Illinois found that during 1980-85, fewer than four percent of tort plaintiffs who won more than \$1,000,000 were awarded about two-thirds of all of the money awarded to tort plaintiffs. M. PETERSON, A SUMMARY OF RESEARCH RESULTS: TRENDS AND PATTERNS IN CIVIL JURY VERDICTS 3 (Rand Corp. Inst. for Civ. Just. 1986). For further data on the large role that pain and suffering damages play in the personal injury award picture, see Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1553-54 (1987).

fault or sold me a defective product. It does not matter whether I was careless in injuring myself, and it does not even matter whether or not an accident put me out of commission — sickness and other disabling causes are equally covered. That is how it should be. What I want, and what I assume most people want, is basic protection against income losses and for medical expenses that are incurred for whatever reason. The current tort system clearly does not provide this protection. I realize that I have what some might term a “progressive employer” — the University of California and ultimately the State of California. And, of course, not everyone has the kind of protection that I have. But this is the very problem that tort reformers should address.<sup>13</sup>

## II. WRONGHEADED REFORMS

### *A. Victims' Rights Cutbacks*

The word “crisis” now is used regularly to describe the tort law/liability insurance system. Some blame the insurance industry for the unavailability of liability insurance for certain types of risks, as

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13. Some seek to defend tort law on deterrence grounds. This is an especially common perspective of economists in whose tort law models the promotion of safety is the key element. These models, however, typically fail to consider either those other existing pressures that operate to promote safety (like regulation, market forces, self-preservation, and personal morality) or those real world features of the tort system that undermine the theoretical role it is seen to play in deterring unreasonably unsafe conduct (such as ignorance, incompetence of both individuals and organizations, the relatively small penalty tort law actually imposes because of the existence of liability insurance, and the high stakes many have in behaving dangerously and their corresponding willingness to discount the chances they will ever have to pay for injuries they cause). For a lengthy discussion of these points and an overall critique of the claim that tort law serves to promote safe conduct, see Sugarman, *supra* note 1, at 556-90.

The plaintiffs' bar claim that its efforts promote safety is not surprising. That virtually all the evidence provided in support of this claim comes from examples in which tort has failed as a deterrent and the lawyers have come in and sued the wrongdoer is revealing. See, e.g., Lambert, *Suing for Safety*, TRIAL, Nov. 1983, at 48.

That advocates on behalf of consumer interests should support tort on deterrence grounds is more interesting, if disheartening, in view of the lack of evidence in support of this position. See, e.g., *Testimony of Ralph Nader on the Insurance Industry Assault on Victim's Rights, Before the House Econ. Subcomm. on Stabilization of the House Comm. on Banking, Fin. and Urban Affairs, 99th Cong., 2nd Sess. (Aug. 6, 1986)* [hereinafter *Nader Testimony*]. An accompanying report by Nader's Public Citizen, *The Assault on Personal Injury Lawsuits: A Study of Reality Versus Myths* (August 1986) also broadly claims that tort deters while at the same time providing evidence that the liability insurance industry, in fact, now makes precious little effort to promote safety.

Some have argued that tort law serves the functions of giving victims satisfaction or vengeance, punishing defendants, disclosing corporate wrongdoing, and setting or signaling social norms. For my critique of these claims, see Sugarman, *supra* note 1, at 609-13.

well as the rapid upturn of costs in many liability insurance lines. Yet those who lay the primary blame on the law are making more political headway. At the present time, many defense interests and leaders in the Reagan Administration<sup>14</sup> are urging legislative action that simply would limit the existing common-law rights of victims — and in some states they are winning the political battle. This reflexive curtailment of tort recovery well characterizes the flurry of reforms enacted in the face of the “crisis” during the past year or so.<sup>16</sup>

Two things are fundamentally wrong with this approach. First, it does nothing to address the needs of otherwise uncompensated victims. Clearly, the judicial liberalization of tort law that has occurred in the past twenty-five years has been motivated, in substantial respects, by this concern.<sup>16</sup> Even if it turns out, as I think, that tort law is quite poorly designed to achieve the compensation objective, the remedy simply is not to try to turn back the common law clock to the 1950’s. Tort law instead should be replaced with a better compensation mechanism. The judges, perhaps understandably, have seized on the one mechanism that was available to them. Legislatures have far more leeway to design and enact an effective program.

The second thing wrong with the current tort law cutback effort is that it is unlikely to achieve a great deal of significant change. The proposals now being pushed by the Reagan Administration and defense interests do nothing for victims. This permits the plaintiffs’ bar and consumer groups to characterize these reforms as unfair bailouts of business and insurance interests, who allegedly have manufactured a crisis atmosphere when no real crisis exists — or needs to exist.<sup>17</sup> Combining the political power of the plaintiffs’ bar and these

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14. See DOJ REPORT, *supra* note 4 and CRISIS UPDATE, *supra* note 4. See also *Testimony of Richard Willard, Assistant Attorney General, United States Dep’t of Just. Before the House Subcomm. on Econ. Stabilization of the House Comm. on Banking, Fin. and Urban Affairs*, 99th Cong., 2nd Sess. (Aug. 6, 1986). Mr. Willard was the head of the Working Group and the main Administration spokesman on tort reform. For a report of recent remarks by Mr. Willard, attributing the liability insurance crisis to improper expansions of tort liability by liberal judges, see Carlsen, *Liability Crisis Is Blamed On Liberal Judges*, San Francisco Chron., Aug. 27, 1987, at 17, col. 1.

15. Ralph Nader, for example, has charged that Maryland, Washington, Colorado, Utah and Connecticut “have severely eroded the rights of injured persons.” See *Nader Testimony*, *supra* note 13. See generally Nader, *The Corporate Drive to Restrict Their Victims’ Rights*, 22 GONZ. L. REV. 15 (1986-87). Later in this article I will describe various specific changes that have been made.

16. See Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). Priest identifies Professor Fleming James as the key intellectual figure behind bringing into common law discourse beginning in the 1960s the loss spreading notion of “enterprise liability.” As Priest summarizes it, “James believed in absolute liability; his academic program was designed to achieve it.” *Id.* at 527.

17. For some charges and counter-charges see, e.g., *Availability and Cost of Liability Insurance, Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 2nd Sess. (Feb. 19 & Mar. 4, 1986); *Availability and Af-*



arguments about the one-sidedness of the proposed changes means that perhaps only a few states will make substantial reforms. Elsewhere, pressures for significant reform may well be diffused by measures such as the establishment of study commissions<sup>18</sup> or essentially meaningless damage limitation rules.<sup>19</sup> In many of the key states, legislatures probably will provide nothing more than symbolic relief for the defense, if that.<sup>20</sup>

In short, the defense side and the Administration have identified a

*fordability Problems in Liability Insurance, Hearing before the Subcomm. on Business, Trade and Tourism of the Senate Comm. on Commerce, Science and Transportation, 99th Cong., 1st Sess. (1985). For the argument that insurance regulation, rather than tort reform, is needed to protect consumer interests, see Hunter and Borzilleri, The Liability Insurance Crisis, TRIAL, Apr. 1986, at 42.*

18. See, e.g., Okla. Prod. Liab. Rep. (CCH) No. 607, at 4; R. I. [H.B. 8322] Prod. Liab. Rep. (CCH) No. 605, at 5; Iowa Prod. Liab. Rep. (CCH) No. 602, at 6; Del. [H.R. 253] Prod. Liab. Rep. (CCH) No. 604, at 6; and Me. [H.B. 1624] Prod. Liab. Rep. (CCH) No. 604, at 6.

19. For example, neither New Hampshire's cap of \$875,000 on pain and suffering awards (see N.H. Prod. Liab. Rep. (CCH) ¶¶ 93,025-93,055) nor Minnesota's cap of \$400,000 on noneconomic damages that does not apply to pain and suffering awards (see Minn. Prod. Liab. Rep. (CCH) ¶¶ 92,440-92,442) is said to have any real bite. See Greene, *The Tort Reform Quagmire*, FORBES, Aug. 11, 1986, at 76.

20. That is how I would characterize recently enacted general tort law reforms that I am aware of in New York and Illinois. See N.Y. Prod. Liab. Rep. (CCH) ¶¶ 93,301-93,320 and Ill. Prod. Liab. Rep. (CCH) ¶¶ 91,430-91,434. By contrast, both those states recently have enacted stronger defense-oriented measures aimed specifically at the medical malpractice area. See Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform*, 52 BROOKLYN L. REV. 135 (1986); Note, *The Illinois Medical Malpractice Reform Act of 1985: Illinois Operates Unconstitutionally on Medical Malpractice Victims*, 19 J. MARSHALL L. REV. 677 (1986).

In mid-1986, California voters adopted Proposition 51 which limits the application of the joint and several liability rule for noneconomic losses. I view this rather ill-conceived change as only a symbolic defense victory, demonstrating primarily that California voters are convinced that the tort system somehow is out of control. See generally, Kirsch, *Prop. 51 Shakes (barely) the House of Torts*, CAL. LAW., June 1986, at 69. Whether the pro-Proposition 51 supporters could pass a more serious curtailment of victim rights, however, is a different matter. Although it appeared at one time as though they would be trying to place another initiative on the June 1988 ballot (see Gunnison, *Lawyers, Local Governments Agree on Insurance Proposal*, San Francisco Chron., Aug. 12, 1987, at 9, col. 1), as of this writing, apparently they have abandoned that idea as part of a temporary truce with the trial lawyers, which largely maintains the status quo. See Wiegard & Gunnison, *Legislature Ok's Big Changes in Liability Laws* [sic], San Francisco Chron., Sept. 12, 1987, at 1, col. 5. Despite winning newspaper headlines like that just noted, my examination of the package of tort reform bills recently signed by California's Governor George Deukmejian revealed no big defense victories. As some cynics have suggested the main beneficiaries of this torts truce probably are California politicians and campaign managers since the money that would have gone into a battle over a torts initiative now will be available for candidate races. For a recounting of the political efforts of the American Trial Lawyers' Association to block tort reform at the national level, see Habush, *ATLA and the 99th Congress*, ATLA ADVO., Nov. 1986, at 1.

number of important changes that ought to be included as part of a package of reforms that also deals with the need for victim compensation. Indeed, the proposals I make here incorporate many of the things the defense side says it wants. The problem is that the vision of these would-be reformers, as to what is both necessary and just, is far too truncated.

### B. *No-Fault Compensation Plans*

Many academics have long favored dramatic changes in the tort law/liability insurance system. They have proposed a great variety of schemes, broadly modeled after the automobile no-fault idea, for replacing important pieces of the tort system with no-fault compensation plans covering things as varied as medical accidents, plane crashes, schoolyard mishaps, the side effects of pharmaceutical drugs and the like.<sup>21</sup>

Other academics are attracted to even bolder comprehensive accident compensation schemes, like New Zealand's, which works well as a substitute for virtually the whole of personal injury law.<sup>22</sup> These types of proposals — both "tailored" and general compensation plans — have the strong advantage of being attuned to the needs of victims. Moreover, many of these proposals would be clear improvements if the choice were between them and the current system.

Ultimately, however, no-fault accident compensation plans are not the correct solution for two reasons. First, as a matter of principle these plans unfairly single out for favorable treatment certain classes of victims from among the disabled generally. Let me illustrate this unfairness with some examples. Are the heirs of someone killed when an airplane unavoidably crashed after being hit by lightning more deserving of compensation than are the heirs of someone killed directly by lightning? I do not think so. Is someone who is disabled because of the unexpected side effects of a drug designed to relieve the pain of arthritis more deserving of compensation than someone

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21. See, e.g., R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); Havighurst, *Medical Adversity Insurance — Has Its Time Come?*, 1975 DUKE L.J. 1233; Fleming, *Drug Injury Compensation Plans*, 30 AM. J. COMP. L. 297 (1982). Professor Jeffrey O'Connell, one of the leaders of the no-fault movement, currently is promoting various elective no-fault schemes. See, e.g., O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985); O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61 (1986); J. O'CONNELL & C. KELLY, *THE BLAME GAME: INJURIES, INSURANCE AND INJUSTICE* (1987).

22. See G. PALMER, *COMPENSATION FOR INCAPACITY* (1979) and T. ISON, *ACCIDENT COMPENSATION* (1980) (descriptions and appraisals of the New Zealand plan by the two academics most responsible for its adoption). For proposals by American law professors in the same general vein, see Franklin, *supra* note 3, and Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980).

who is directly disabled by arthritis? I do not think so. Is a child who accidentally breaks his leg while bicycling or who accidentally burns his arm on a stove more deserving of compensation than is a child born without an arm or a leg? I do not think so.

Second, in order to avoid duplication of benefits, no-fault plans must deal with the difficult and often costly problem of coordination with our vast, underlying social insurance and employee benefit system. This is illustrated by automobile no-fault plans. Although these plans are a decided improvement over the tort system, automobile accident victims with good employee benefits have at least two potential sources of compensation for their medical bills and lost income. If an automobile plan is set up to pay only for otherwise uncompensated losses, then it is not a very good buy for people with other sources of protection — unless the no-fault plan also includes a complicated pricing arrangement that permits motorists to opt for large deductibles so that their no-fault benefits can be meshed with their other benefits. On the other hand, if automobile no-fault is set up to be primarily responsible for accident losses, complicated reimbursement arrangements with employee health plans, sick leave plans, disability insurance plans, Social Security and so on must be established. And besides, when no-fault is primary, motorists with good basic benefits are being forced to buy first party auto no-fault protection for which they have little or no need.

In order to avoid both of these problems — coordination of benefits and unfair treatment of the disabled — we should avoid layering in yet another new scheme of benefits as the no-fault solutions would do. Rather, as I will argue next, reforms should be aimed at our existing, basic mechanisms for providing people with income and medical expense protection.

### III. TOWARD A SOLUTION

#### *A. Overview*

A better approach to tort reform is to improve our ordinary employee benefit and social insurance schemes, with the goal of providing to nearly everyone first party income protection and medical benefits that are comparable to what people like myself have already. As we thereby use institutions other than the courts to provide basic compensation for most disabled people, we largely can roll back the existing personal injury law system — to the social gain of nearly everyone.

In this Article I propose a plan for making a substantial first step

in the direction I favor. This proposal — actually a package of changes — clearly is feasible for states to enact now.<sup>23</sup> The package would accomplish a number of things simultaneously.

First, on behalf of victims, our existing employee benefit and social insurance system would be improved substantially in its support of people who are disabled for whatever reason for less than six months, and in its support during the first six months for those who are disabled longer.

Second, we would, in turn, be able to remove the majority of the small and moderate injury cases from the tort system altogether. In terms of numbers, these currently represent the overwhelming majority of all personal injury claims.<sup>24</sup> As a further benefit, most temporary disability cases would be taken out of the workers' compensation system — as will shortly become clear.

Finally, for those relatively few personal injury cases remaining in the tort system, the law of damages would be significantly revised with important benefits gained for both the plaintiff and defendant sides. These changes, taken together, would make tort payments in the most serious injury cases more reflective of the basic compensation function.

Although my proposed changes would hurt some people, including some segments of the personal injury bar, I firmly believe that both accident victims as a class and consumers in general would be well served by them. Moreover, I think that business interests and much of the insurance industry should support them as well. Hence, my package is meant to link together victim, consumer, and business interests against those who profit from the excesses of the current regime, thereby ending the traditional legislative fight that pits business and insurance against consumers' and plaintiffs' trial lawyers. Of course, it remains to be seen whether, in the end, this coalition can be both forged and politically successful.

Before presenting my proposal in detail, let me explain somewhat more precisely how both short term and long term disabilities would be treated were the proposal enacted.

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23. I first proposed a package similar to this to the California legislature in testimony before the Assembly Committee on Finance and Insurance, in Anaheim, California on December 19, 1985. Assembly Bill 3987 (on file with the author) later was introduced during the 1985-86 Regular Session of the California Legislature in order to show that a plan such as mine readily could be put in bill form.

In my Article, *Doing Away With Tort Law*, *supra* note 1, at 648-51, I made more comprehensive and far-reaching proposals. These proposals, however, are not so readily enacted, and certainly not by individual states. Because the package proposed here represents a substantial first step toward the eventual realization of a desirable long-run solution, it can be seen as a reflection of the "narrower strategy" I advocated earlier. Sugarman, *supra* note 1, at 662-63.

24. As I will explain later, I expect my plan in a state like California to remove 80% to 90% of the existing personal injury claims from the tort system.

## 1. Short Term Disabilities

### *Earnings Loss*

Neither tort law nor workers' compensation would provide benefits to replace the first six months of earning loss following the onset of a disability. Instead, income replacement needs arising from both accident and illness would be dealt with generously by a combination of (i) a mandatory employer-provided sick leave benefit designed to deal with the first week of disability, and (ii) a strong statewide temporary disability insurance plan (based upon schemes now existing in five states including California and New York) for the rest of the period.

### *Medical Expenses*

Because of incentives contained in my proposal, employment-based health care plans would take care of the medical expenses of more temporarily disabled people than they do at present. Nonearner families could continue to look to Medicare or Medicaid. Workers' compensation and the tort system, where they applied, still would be available as a backup to compensate for medical expenses. Unlike the typical arrangements today, however, they would only be available to compensate for otherwise unreimbursed medical expenses. As a result, few short term disabled victims would fall into this residual category.

### *Pain and Suffering*

For injuries causing less than six months of disability, only those suffering a serious disfigurement or impairment (later defined in some detail) would have access to the tort system for the payment of general damages. Through this threshold device, tort compensation for pain and suffering would be reserved for those with serious injuries.

As a result of these various changes, personal injury claims for disabilities lasting less than six months largely would disappear. And, as previously indicated, these smaller cases represent most of the claims now handled by the tort system.

## 2. Long Term Disabilities

Although not my preferred long run solution, under this "first step" proposal, long term personal injuries would remain covered by

both the tort and/or workers' compensation systems. On the tort side, however, the method of determining damages makes the system less like a lottery and more like a compensation plan that is sensibly coordinated with other benefits schemes.

To achieve this result, the proposal envisions that, on the one hand, tort law no longer would duplicate benefits provided by other sources (unlike the common law rule)<sup>25</sup> and awards for both pain and suffering and punitive damages would be constrained. Yet, on the other hand, two changes would be made that benefit victims: successful tort plaintiffs (i) would be entitled to compensation from defendants for their reasonable attorneys' fees, and (ii) would no longer suffer a reduction in the amount of their recovery because they were at fault.

I next present the details of the package, which I have put in the California context for ease of exposition.

## *B. The Proposal Detailed*

### 1. Social Insurance and Employee Benefit Provisions

#### *Temporary Disability Insurance*

A generous temporary disability insurance program (TDI) is at the center of my proposal for short term income replacement in cases of disabilities arising from both off- and on-the-job injuries and illnesses. After a one week waiting period, workers would recover through TDI nearly all of their lost net wages for up to six months, subject to a weekly ceiling of twice the state average weekly wage.

Less generous schemes of this sort already exist in California<sup>26</sup> and four other states,<sup>27</sup> which currently provide some wage replacement benefits for employees who must stop work temporarily due to non job-related disabilities. In such jurisdictions, a number of significant liberalizations of the existing provisions would be required by my proposal. In states without TDI plans, I advocate the adoption of a scheme like the expanded California plan proposed here.<sup>28</sup> The discussion that follows focuses on the main features of the proposed TDI plan and explains the changes that would be required in

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25. See generally Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966).

26. See generally CAL. UNEMP. INS. CODE §§ 2601-3272 (West 1986).

27. The other states are Hawaii, New Jersey, New York, and Rhode Island. For a recent general description of temporary disability plans, see *Social Security Programs in the United States*, 49 SOC. SEC. BULL., Jan. 1986, at 37-41 [hereinafter *Social Security Programs*].

28. Legislatures in states with substantial automobile no-fault plans, like Michigan and Florida, would have to make difficult decisions about how to mesh those plans with the temporary disability insurance (TDI) plan. The New York answer to this problem provides one solution. See N.Y. INS. LAW § 5102 (McKinney 1985).

California.

(i) The TDI plan should provide benefits, on an after-tax basis, equal to eighty-five percent of the employee's predisability earnings.<sup>29</sup>

*Comment:* Assuming that the proposed TDI benefits would be subject to neither social security nor federal income taxes,<sup>30</sup> my proposal plainly implies replacing less than eighty-five percent of an employee's prior gross income. For now, therefore, I will assume that a replacement rate set at two-thirds of pretax earnings would approximate the proposed eighty-five percent after-tax result.<sup>31</sup>

A two-thirds rule would bring TDI benefits into line with what current workers' compensation plans now typically pay the temporarily disabled,<sup>32</sup> under which programs income replacement benefits also are not taxable.<sup>33</sup> Applying this standard to the TDI plan in California would mean a twelve percentage point improvement, or, in other words, a twenty percent increase in benefits, over the approximately fifty-five percent wage replacement rate of the existing plan.<sup>34</sup>

29. An 85% after-tax wage replacement rate is a necessary, but suitably generous, proportion to make recipients reasonably whole — and to justify removing from the tort system the responsibility for short term income replacement. The 85% figure rests on the assumption that those on disability leave save work expenses, such as commuting costs, and the judgment that a small gap between prior net wages and replacement income is justified on grounds of incentives for rehabilitation and against malingering. Although economists and others are correct in principle to worry about possible undesirable incentive effects produced by high wage replacement programs, no great cause for alarm exists here. For example, I have seen no evidence that automobile no-fault plans (with at least as generous short term wage replacement benefits as are proposed here) have caused victims to mangle. Nor do employers with voluntary plans having generous wage replacement benefits appear to have serious concerns about shirking. They seem satisfied that non-privacy-invasive, routine, medical monitoring arrangements sufficiently can assure that those employees on temporary disability leave indeed are disabled.

30. See generally I.R.C. §§ 104-05 (1986) (under which benefits provided by existing TDI plans are excludable from income). See, e.g., Rev. Rul. 75-499, 1975-2 C.B. 43 and Rev. Rul. 75-479, 1975-2 C.B. 44. This is not the place to discuss the potential uncertainties concerning the federal tax treatment of TDI benefits under my proposal. The method chosen for the financing of the expanded TDI plan I propose could complicate things, however.

31. Of course, basing the replacement rate on gross earnings in a system where the benefits are not taxable means that higher earners are relatively advantaged in terms of maintaining their past disposable income. As many find this an undesirable consequence, they probably would favor the 85% of after-tax income solution over the two-thirds of pretax income rule.

32. See *Social Security Programs*, *supra* note 27, at 32-33.

33. See I.R.C. § 104.

34. See the table set out in CAL. UNEMP. INS. CODE § 2655 (West 1986). The TDI plans in Hawaii and Rhode Island already have more generous wage replacement rates than does California's, with Hawaii's two-thirds rule reflecting the proposal made here. See *Social Security Programs*, *supra* note 27, at 39. For the view that the average

(ii) The maximum earnings level to which the TDI replacement percentage applies should be set at twice the state average weekly wage.

*Comment:* The current California TDI plan's benefit formula applies only to earnings up to the equivalent of \$21,900 annually, thus creating a weekly benefit ceiling of \$224.<sup>35</sup> Inasmuch as this earnings maximum is only slightly above the state average wage,<sup>36</sup> a substantial share of the workforce necessarily earns wages in excess of the TDI ceiling. Therefore, under the current plan, many moderate earners and their families may face severe financial disruption during periods of disability.<sup>37</sup>

By establishing the covered earnings ceiling at twice the state average wage, California's TDI benefit formula would apply to annual earnings of up to more than \$40,000 in current terms. This increase would bring the full wages of approximately ninety-five percent of the California workforce within the plan.<sup>38</sup> In turn, the maximum weekly benefit would become approximately \$530.<sup>39</sup>

Those few people whose earnings are even higher than twice the state average and who, therefore, would not have such complete earnings protection provided by TDI, equitably can be asked to buy their own excess coverage for those first six months of disability. In

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disabled individual would require 65% to 75% of gross pay tax-free to reach his or her predisability level of spendable income, see Miller, *Group Disability Income Insurance*, in *THE HANDBOOK OF EMPLOYEE BENEFITS* 240 (J. Rosenbloom ed. 1984).

35. See CAL. UNEMP. INS. CODE § 2655.

36. In 1986 the average weekly wage of workers covered by California's TDI plan was \$398. Telephone interview with Ken Budman, Employment Data and Research Dep't, Employment Dev. Dep't, State of Cal. (Jan. 6, 1987).

37. The maximum covered wage, and, in turn, the maximum benefit, currently is even lower in the other TDI states. See Price, *Cash Benefits for Short-Term Sickness: Thirty-five Years of Data, 1948-83*, 49 SOC. SEC. BULL., May 1986, at 13.

38. Using \$398 as the average weekly wage (see *supra* note 36), this translates into \$20,696 in annual wages. Twice that is \$41,392, which is more than what 95% of earners made as of 1985 according to data provided by California's Employment Development Department. See STATE PLAN WAGES EARNED IN THE FOUR CALENDAR QUARTERS 841-44 (July 30, 1985) [hereinafter STATE PLAN WAGES] (on file with the author). The formula I propose is meant to imply a regular increase of the earnings ceiling as average earnings grow.

The inadequacy of both the earnings ceiling and the wage replacement rate of California's current TDI plan already has caused many "progressive" employers to provide (or at least to offer) supplementary schemes designed to increase TDI benefits, thereby filling in the otherwise unmet income needs of employees during periods of temporary disability. At the University of California, for example, staff employees may elect a short term disability supplement (STD) in addition to the University's basic plan, which roughly parallels California's regular TDI plan. STD increases the wage replacement rate from 55% to 70%, and increases the covered wage ceiling to \$5000 per month. See YOUR PRUDENTIAL DISABILITY INSURANCE PROGRAM, UNIVERSITY OF CALIFORNIA 1986 at 7 (on file with the author). The TDI expansions proposed here make supplements of this sort largely unnecessary by assuring that all workers are well protected against short term disability income loss.

39. The \$530 amount is derived by taking two-thirds of \$41,392 divided by 52, with \$41,392 assumed to be twice the state average annual wage. STATE PLAN WAGES, *supra* note 38, at 841-46.



many cases, such people already will have that sort of protection provided through their job as an employee benefit.<sup>40</sup>

Clearly, even with these proposed liberalizations, the TDI plan would not benefit nonearners who remain uncovered by the program. Yet, of course, nonearners who are disabled for six months or less generally cannot count on receiving anything from the tort system for wage loss either. Their needs for income will continue to be met, if at all, through private arrangements, charity and existing public income transfer programs.<sup>41</sup> After all, if a person is a nonearner and has become disabled, he probably had been relying on some other nonwork source of income before his disability that should continue afterward.<sup>42</sup>

(iii) The TDI plan should cover work-related, as well as non-work, disabilities.

*Comment:* With respect to short term disabilities, workers' compensation and TDI in California now complement one another in the sense that the former covers work-related disabilities while the latter covers non-work disabilities.<sup>43</sup> By expanding TDI to deal with both groups, this change moves towards eliminating temporary disability cases not only from the tort system, but also from the workers' compensation system, which, of course, no longer would cover short term income loss. This shift in the source of one's recovery from workers' compensation to TDI also would have the important benefit of eliminating the often difficult decision that must be made under the current arrangement of whether an injury was work-related.<sup>44</sup>

40. In my work situation, for example, disabled University of California professors can obtain a year or more of fully paid disability leave.

41. The need for improving such programs may be great but is not the subject of this Article. To push now for a reform that attends to the income needs of all the temporarily disabled and does not rely on work based schemes is altogether too utopian, in my view.

42. One exception exists to this general point about nonearners. Anyone who becomes temporarily disabled while receiving unemployment compensation benefits would be eligible for and would move over to the TDI system. In short, such people would have a recent earnings record sufficient to qualify for TDI. This provision tracks the existing California scheme under which a disabled person with sufficient earnings in his or her "disability base period" (see CAL. UNEMP. INS. CODE §§ 2610-2611 (West 1986)) generally will qualify for TDI so long as he or she is not eligible for unemployment compensation benefits. CAL. UNEMP. INS. CODE § 2628 (West 1986).

43. CAL. UNEMP. INS. CODE § 2629 (West 1986) (barring the receipt of TDI benefits by someone receiving workers' compensation benefits).

44. See generally A. LARSON, WORKMEN'S COMPENSATION LAW (1985 & Supp. 1986) (Chapter III on "arising out of the employment" and Chapters IV and V on "course of employment").

Moreover, if workers' compensation instead were to continue to provide parallel short

(iv) The ordinary waiting period before TDI benefits become available should be seven days and the benefits should last for up to at least six months.

*Comment:* The phrase “waiting period” refers to the threshold period of disability with respect to which benefits are not paid, not the time when the first benefit check is due. Existing TDI plans, including California’s, typically have a seven day waiting period,<sup>45</sup> and I propose simply to continue this practice. The purpose of the waiting period is to exclude from the plan the relatively minor disabilities that only briefly keep the employee out of work.<sup>46</sup> This saves the TDI administration a mass of paperwork and reduces the TDI caseload considerably. Nevertheless, my proposal would not leave victims completely on their own for that first week, as the upcoming discussion of sick leave makes clear.

Before turning to that, however, something should be said briefly about the other end — the duration of TDI benefits. Although any time period is somewhat arbitrary, traditionally six months has been seen as a reasonable dividing line between temporary and long term. Unemployment compensation benefits in most states, for example, typically last for six months.<sup>47</sup> Even more relevant, long term disability benefits under the Social Security system traditionally became

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term income replacement benefits for the job-injured, an increase in the earnings ceiling in workers’ compensation would be necessary so as to prevent non-work injuries from now being treated better than work injuries.

One cost of moving the temporarily disabled off workers’ compensation and onto TDI might be that those people who are new in the workforce and are injured just when they begin their jobs would be worse off inasmuch as workers’ compensation traditionally looks to their immediate prior earnings, whereas TDI, at least in California, looks to the employee’s quarter of highest earnings in his or her base period, which typically is the year ending four months before the onset of the disability. *See* CAL. UNEMP. INS. CODE §§ 2610, 2611, 2655. Of course, the earnings period upon which TDI benefits are based itself could be changed. Another consequence of moving short term work-related injuries onto my proposed TDI plan will be an increase in the maximum income replacement benefit for which those with work injuries would be eligible. This is because basing benefits on a wage ceiling of twice the state average wage (as I have proposed) permits the payment of more generous benefits than currently are available through workers’ compensation. *See* WORKERS’ COMPENSATION, A STAFF REPORT ON SUBJECTS SELECTED FOR STUDY BY THE JOINT STUDY COMM. ON WORKERS’ COMPENSATION, CAL. SENATE INDUS. RELATIONS COMM. AND ASSEMBLY WORKERS’ COMPENSATION SUBCOMM., Feb. 1986, at 43, Table 3-2 (on file with the author) [hereinafter WORKERS’ COMPENSATION STAFF REPORT].

45. *See* CAL. UNEMP. INS. CODE § 2627(b) (West 1986). *See generally* *Social Security Programs*, *supra* note 27, at 39. Workers’ compensation plans also have waiting periods that, while sometimes shorter, most commonly are seven days as well. *Social Security Programs*, *supra* note 27, at 30.

46. For this reason, people who commonly wind up being disabled for considerably longer periods (for example, three weeks) eventually receive benefits for that first week waiting period after all. *See, e.g.*, CAL. UNEMP. INS. CODE §§ 2627.3, 2627.5, 2627.7 (West 1986) (the latter two sections provide for the waiver of the waiting period for certain claimants who are confined to a hospital).

47. *Social Security Programs*, *supra* note 27, at 25.

available once a claimant had been disabled for six months — although this waiting period now has been reduced to five months.<sup>48</sup> Nevertheless, states with TDI plans vary in their practices and although six months is the minimum, some plans, including California's, currently pay benefits for up to a year.<sup>49</sup>

While permitting states to do more, my proposal assumes that TDI benefits would be provided for at least six months, longer than the great majority of disabilities last.<sup>50</sup> At the end of six months, a person's condition normally will have stabilized sufficiently so as to permit a reasonable assessment of the person's long term prospects and, hence, his or her eligibility for programs aimed at permanent disabilities.<sup>51</sup> Moreover, as will be explained below, because those disabled more than six months are deemed to have suffered "serious injuries" for tort law purposes, and thereby automatically become eligible to include claims for pain and suffering damages in their lawsuits,<sup>52</sup> a six month period of TDI benefits would dovetail nicely with this rule.

#### *Mandatory Sick Leave*

(v) All employers, or at least those with more than some nominally small number of employees, should be required to provide their employees with paid sick leave benefits according to a reasonable schedule.

*Comment:* Although people who miss less than a week of work owing to a disability could, for example, dip into their savings or, if available, use up a paid vacation day in order to cover a brief period of lost income, this is not an altogether satisfactory arrangement.<sup>53</sup> Not surprisingly, therefore, between two-thirds and three-quarters of jobs

48. *Id.* at 14.

49. Section 2653 of the Unemployment Insurance Code, which temporarily increased the maximum benefit duration from 39 to 52 weeks from January 1, 1984 through December 31, 1986, recently was extended by Senate Bill 1577. *See generally Social Security Programs, supra* note 27, at 39.

50. For example, in California's workers' compensation system more than 70% of claims are for medical expenses only, about 20% include temporary income loss, and less than 10% are for permanent partial disability, permanent total disability or death. *See WORKERS' COMPENSATION STAFF REPORT, supra* note 44, at 5, Figure 1-1. Thus, in that system more than 90% of all cases, and two-thirds of cases involving income loss, are relatively short term disability claims.

51. Thus, under my proposal, those injured on the job would qualify for workers' compensation if they remain disabled or impaired at the end of their eligibility for TDI benefits.

52. *See infra* note 81 and accompanying text.

53. As for the relative importance of these very short term disabilities, one study found that 23% of the disabilities suffered by male workers in a given year lasted seven days or less. *See Miller, supra* note 34, at 239.

now carry with them some sort of sick leave benefits meant to keep most workers in full pay status during the occasional short illness or short period out of work owing to a minor accident.<sup>54</sup>

Nevertheless, the current American practice makes sick leave a voluntary matter, something that employers may or may not offer — and many do not. My proposal would assure that nearly all employees have this benefit — at least those working for employers with more than some very small number of workers.<sup>55</sup>

As for the schedule of minimum sick leave required, I propose that employees earn at least one day of paid sick leave (or its equivalent)<sup>56</sup> for every month worked. These days could be accumulated, beyond year end for example, until they are needed. This scale of sick leave benefits (or better) currently is routinely provided by most large employers.<sup>57</sup> This scale also is the sort of benefit guaranteed to workers in many European countries,<sup>58</sup> and, generally speaking, by our state and federal governments to their employees.<sup>59</sup>

I realize that even with this level of sick leave benefit assured, workers sometimes will not have sufficiently accumulated sick leave to cover fully the waiting period before TDI benefits become available. For example, people who regularly have been out sick for a day or two at a time may not have enough sick leave days saved up if they have to be out for a week. Nonetheless, the alternative of starting TDI on the first day of disability and not having a sick leave plan, on balance, is worse. The administrative burden aside, placing

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54. See *Social Security Programs*, *supra* note 27, at 37 (estimating that in 1982 about two-thirds of private sector employees had such protection). One recent survey found that 78% of large and medium-sized firms in the United States provide sick leave benefits. CHAMBER OF COMMERCE OF THE U.S. SURVEY RESEARCH CENTER, *EMPLOYEE BENEFITS*, 1985, at 20-21 (1986).

55. I reluctantly would exclude such employers for the usual administrative burden reasons that are used to excuse small and often unsophisticated employers from otherwise applicable governmental requirements. Perhaps a suitable minimum number in this case would be four employees.

56. By "equivalent" here I mean to include as satisfying the sick leave requirement those modern employee benefit programs providing a generous number of paid leave days that are meant to serve for both sick leave and vacation leave purposes, which have become increasingly popular of late. Stanford University Hospital, Bechtel, and Hewlett-Packard are examples of employers with such programs. This information was ascertained through telephone interviews. See generally Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CALIF. L. REV. 465 (1987).

57. See DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS*, 1985, table 18 (Bull. 2262, July 1986) [hereinafter *EMPLOYEE BENEFITS*].

58. See DEP'T OF HEALTH AND SOC. SEC., *INCOME DURING INITIAL SICKNESS: A NEW STRATEGY* (H.M.S.O. Cmnd. 7864, 1980) (a British government "green paper" that describes in Annex B the practices of many European countries).

59. For example, sick leave basically is earned at the rate of one day a month at the University of California. See UNIVERSITY OF CALIFORNIA, *STAFF PERSONNEL MANUAL*, Policy 410 (on file with the author).

a finite limit on very short term sick leave encourages employees to avoid exaggerating minor illnesses and prevents abusers from taking off, for example, one paid TDI day every week.<sup>60</sup> Hence, I conclude that workers themselves may be relied upon to deal with the occasional very short term gaps in income that might arise from insufficient sick leave under my proposal.<sup>61</sup>

I should emphasize that the generous TDI and mandatory sick leave programs I have proposed here serve two important independent functions. On the one hand, they are desirable for their own sake — for making routinely available to all temporarily disabled workers the sort of sensible and generous short term income replacement benefits that employees like myself now have. That is, they represent the sort of progressive changes in policy that I would propose were I looking only at employee benefit and social insurance reform and ignoring tort law.

At the same time, however, and in the context of this Article, the proposals permit me to argue in good conscience that the short term income replacement function of tort law (as well as workers' compensation) would thereby become obsolete — a position that just is not tenable with any significantly less generous first party scheme.<sup>62</sup> This, in turn, permits me comfortably to urge tort law cutback, which conveniently creates a significant source of funds for the first party benefits I have proposed.<sup>63</sup>

#### *Incentives for Providing Health Benefits*

(vi) If an employer adopts an employee health care plan that meets certain minimum standards, that employer should be exempted from having to provide medical benefits under its workers' compensation plan to its workers who are temporarily disabled through a job injury.

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60. There are, of course, other solutions. For example, one could imagine a plan under which TDI benefits begin after, say, the first or second day, but where that first day or two is the responsibility of the employee, who would have to go without pay or dip into vacation leave for that period. I leave consideration of these options for another time.

61. The most common option would be to use up vacation pay. In addition, however, the employee could turn to personal savings, borrowing, deferring the payment of bills, help from family and so on.

62. Obviously there is room for debate over the details. Some might argue that a mandatory sick leave plan providing, for example, eight rather than twelve days a year is sufficient. Others might argue for a TDI wage replacement ceiling of only, say, 150% of state average wages, and so on. Chiseling away on the generosity of my proposals is not the only way that things might go, I should add. For example, some might push to reduce the TDI waiting period or to require that sick leave is earned at the rate of one and one half days a month as is now common in many jobs.

63. For a general discussion of funding, see *infra* text accompanying note 150.

*Comment:* A very high proportion of employees already are covered by health care plans connected to their jobs.<sup>64</sup> At the same time, employers now are required by the workers' compensation system to provide what is often duplicate coverage for medical benefits for those injured on the job.<sup>65</sup> The usual consequence is a cumbersome, expensive, and often ineffective subrogation system in which the health plan is supposed to be reimbursed by the workers' compensation plan for expenses incurred in treating job injured workers. My objectives both are to reverse this arrangement and, to the extent possible, to get the workers' compensation system out of the medical expense business for those suffering only short term disabilities.

It would be desirable if all employers had good health care plans. Such an arrangement, valuable for its own sake, would permit streamlining workers' compensation as a system. Yet, candidly, I find it too daunting at the present to propose requiring good health care plans of all employers. Hence, this proposal simply creates an incentive.<sup>66</sup> Clearly, the proposed workers' compensation exemption together with the expansion of the TDI plan to cover all short term income losses, would readily permit individual employers with qualifying health plans to restrict workers' compensation to permanent impairments and disabilities that last more than six months.

The key here, of course, is how and at what level those minimum health plan standards would be set. To work as an incentive the burden must not be too great. On the other hand, to serve the function of replacing tort and workers' compensation, the minimum quality scheme must be high. I do not propose at this point, however, to deal

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64. Department of Labor surveys suggest that 96% of all employees working in large and medium-sized firms are covered by some form of health insurance. See *EMPLOYEE BENEFITS*, *supra* note 57, at 25.

65. See A. LARSON, *supra* note 44, at §§ 61.00 (medical benefits) and 97.51 (coordination with private plans). In California at present more than 70% of all workers' compensation claims are for medical benefits only, and medical benefits account for more than 40% of total workers' compensation benefits. See *WORKERS COMPENSATION STAFF REPORT*, *supra* note 44 at figures 1-1 and 2-1.

66. For medical treatment needed by those with longer term job related disabilities, perhaps the rule for those with qualifying health plans would be that workers' compensation medical benefits would serve only where needed, to supplement available benefits through both the employment-based health plan benefits and Medicare. This would further sweeten the incentive to have a qualifying health plan. For a recent call to require all employers to provide health insurance for their employees, see *FINAL REPORT OF THE SEVENTY-SECOND AMERICAN ASSEMBLY, HEALTH CARE AND ITS COSTS 8* (Nov. 1986) (on file with the author).

To be sure, shifting costs from workers' compensation to health plans will not make those costs disappear, although significant administrative savings should result. But for individual employers who are not fully experience rated, the savings from reduced workers' compensation premiums may well be considerably in excess of the increase, if any, in their health plan costs attributable to such cost shifting because of the way that many group health plans and health maintenance organizations (HMOs) price their programs.

at length with the issue of standards. Rather, at least for now, I suggest that they be set so that the employer's health plan (in California) must be certified to be "substantially equivalent" to what is provided either by the State of California to its regular employees or by the University of California to its employees.<sup>67</sup> Among other things, this would require that the health plan cover the employee's family, and, pursuant to provisions of recent federal law, provide former employees with coverage under the employer's plan for a reasonable period of time or until the former employees obtain new coverage through new employment.<sup>68</sup>

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67. Although I do not address it here, the selection of the proper certifying body would require careful attention. For a description of the University of California health plan options, see SUMMARY OF HEALTH PLANS (1986) (on file with the author).

68. The recent federal requirements are contained in Title X, section 10001 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 223 (1986) (adding/amending I.R.C. § 162K (1978 & Supp. 1986)) [hereinafter COBRA]. The COBRA provisions are meant to deal, at least in part, with the general problem that, in the past, many employees and their families have been without health insurance when the family breadwinner is between jobs.

There are some benefits that workers' compensation plans and tort law now, at least in principle, may provide to the temporarily disabled that should not be ignored in the rush to keep the nonserious injury cases out of both the tort and workers' compensation systems. One is the cost of rehabilitation programs. A second is additional cost that may accompany disability, even short term disability, that is not necessarily seen as a medical expense. These expenses may have to be incurred for things such as attendant care, or a special and costly diet, or enabling the person to become mobile. These sorts of costs, of course, are by no means restricted among the disabled to tort victims and the job-injured. Frankly, I see no good solution to the efficient payment of reasonable expenses for such purposes other than to insist that they be included benefits in any qualifying health care plan. Surely their medical necessity usually would be a prerequisite to their reasonableness, thus making their linkage to health care providers sensible in a perhaps analogous way to the fact that modern health care plans typically pay for prescription drugs.

A different problem is the need to replace the in-home services previously performed by someone who becomes disabled. Since these services may well be, and stereotypically are, now done by housewives who are not in the paid labor force, one could not easily attach the payment for replacement services to the TDI plan. Hooking them on to the health care plan would be plausible, however, even if this is well outside what traditionally is thought to be the responsibility of health insurance. Yet the fact remains that when someone who used to clean, cook, care for children and the like temporarily is unable to do so on account of a disability, this is a consequence of the medical condition. Certainly in most instances, other household members, friends and more distant relatives can pick up the slack at least for a time. Additionally, many social services agencies are ready to step in where need is acute and agency resources are sufficient. These factors provide support for a fairly substantial waiting period before providing cash benefits that would be designed to permit the disabled person to pay for a replacement. Yet, six months may be too long to wait. Hence, I would propose giving serious consideration to requiring qualifying health plans to provide cash benefits up to a certain fixed amount per day (for example, \$50) commencing once adult beneficiaries under the plan are disabled for at least six weeks. Such benefits would last for at least six months of disability, after which this need perhaps more suitably is the responsibility of the long term disabil-

In fact, a large proportion of employers in California currently provide health plan benefits which either would qualify already under my proposal, or could be made to do so with little change or added expense.<sup>69</sup> Others, one hopes, would find the incentive to avoid many workers' compensation medical claims a good reason to adopt qualifying health plans.

As was true in my earlier discussion of income replacement reforms, these "minimum standards" for health care plans serve dual purposes. Initially, they specify sensibly generous medical benefits that are desirable for their own sake. Additionally, they help move the society towards the point at which tort law (as well as workers' compensation law) simply would not have to worry about paying for medical expenses for temporary disabilities. Certainly, health plans covering state employees in California now provide full or nearly full coverage of medical expenses for the lion's share of those who are disabled for less than six months.<sup>70</sup>

In the next section, I take up the question of how tort law should be altered, along with the introduction of the package of social insurance and employee benefit changes I have proposed. I argue that we would be able (i) fairly to eliminate most temporary disability claims from the tort system, and (ii) to alter the basis of tort recovery in the claims that remain.

## 2. Tort Law Changes: Restrictions on Recovery

As briefly outlined above, my proposal both would contract and expand the damages that plaintiffs could recover in tort. Each of the

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ity income schemes.

As a final note on health care plans, it should be pointed out that one problem with requiring family coverage is that when two family members are working in covered jobs this gives them unnecessary double coverage. Indeed, one reason for an employer not to provide a health plan today is that a significant portion of the enterprise's workforce already may be covered through their spouses' work. Moreover, the problem of double coverage already is an increasing irritant to many two-earner couples. Perhaps, therefore, in such cases, double covered workers would have to be given the right to elect some alternative employee benefit. I anticipate that many two-earner, double covered couples would be happy if one could elect a child-care fringe benefit, or more pension benefits, in lieu of the double health care, and not at all resentful that they did not get the value of the health care plan as an increase in salary. Moreover, a cash out arrangement could jeopardize the current tax free nature of the health care benefit to the rest of the workforce. Another solution, of course, would be to provide for family protection as part of the health care plan, but to make the employee bear the cost of adding family members. I will have more to say about this in the section on funding. *See infra* text accompanying note 150.

69. *See* EMPLOYEE BENEFITS, *supra* note 57, at 25-29.

70. For the provisions concerning deductibles, coinsurance requirements and maximum benefits of the University of California health plan options, see SUMMARY OF HEALTH PLANS, *supra* note 67. In general, it is fair to say that university employees can choose plans (the HMO options) with no maximum and which essentially require no payments by the patient.



elements of the package is meant to give the tort award characteristics that make it resemble a long term disability compensation system, sensibly integrated with other compensation systems that serve the disabled. In this section, I discuss the proposed changes that would limit tort recovery; the discussion of those that would expand recovery follows.<sup>71</sup>

### *No Suits For Temporary Income Loss*

(vii) Tort victims should not be able to sue for the first six months of lost income.

*Comment:* This change is made possible because of the proposed employee benefit and social insurance changes described above. Tort law is taken out of the short term income replacement business and is allowed to focus its attention on the income losses of the long term disabled. Although any short term income losses not replaced by the mandatory sick leave and TDI plans would be borne by victims, the only significant unprotected income losses would be those of high earners who had elected not to make private arrangements to guard against that risk. So long as the income replacement threshold of tort law is restricted to income losses of six months or less, I believe that no important social function would be lost by denying recovery to such upper middle class and upper class victims.<sup>72</sup>

### *"Collateral Source" Rule Reversal*

(viii) Tort law's "collateral source" rule should be reversed so that tort law no longer compensates losses covered by social insurance and employee benefit plans.

*Comment:* At present, generally speaking, American common law ignores, and hence treats as "collateral," compensation sources such as medical and disability insurance, Social Security, sick leave bene-

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71. These proposals, in important respects, are broadly modeled after some "trades" earlier proposed by Professor O'Connell. See O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L. REV. 591; O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333 [hereinafter O'Connell, *Pain and Suffering*].

72. Automobile no-fault plans have come to the opposite conclusion, however. That is, they permit victims to sue in tort for lost earnings in excess of the internal weekly or monthly wage replacement limit of the no-fault plan. See, e.g., N.Y. INS. LAW art. XVII § 673(1) (McKinney 1985). For further discussion of the possibly desirable role of tort law in compensating income losses of high earners, in a piece otherwise quite supportive of the types of reforms proposed here, see Pedrick, *Perspectives on Personal Injury Law*, 26 WASHBURN L.J. 399, 414-15 (1987).

fits, workers' compensation and the like.<sup>73</sup> The result is either the duplication of benefits or expensive subrogation arrangements through which the collateral source is reimbursed.

The current regime, in short, operates on the principle that tort payments are to be "primary" and other sources are to be "secondary" — with those secondary sources sometimes having reimbursement rights. If the main goal is to achieve a sensible scheme of compensation, however, the existing system is very wasteful. Plainly, double payment is undesirable. From the viewpoint of administrative efficiency, having tort law serve only in a backup, that is, "secondary," role, paying exclusively for losses that are otherwise uncompensated, is far more sensible.

A policy of reversing the existing collateral source rule also has the long run advantage that, as other sources expand, tort law is eroded from within and increasingly is relegated to a peripheral role in the overall compensation package. Thus, specifically with respect to the long term disabled, the stage will be set further to oust the tort system when programs such as Social Security Disability are liberalized.

The key consequence of the reversal of the collateral source rule for the temporarily disabled, of course, is that they would not be able to sue for medical expenses paid for by health insurance, whether private or public — protection that, one hopes, would begin to verge on universal under my proposal. Still, I should emphasize that those relatively few short-term injury victims who have out-of-pocket medical losses could continue to seek compensation for those losses in tort.<sup>74</sup>

California law already has changed the collateral source rule with respect to medical malpractice cases. Provisions adopted in 1975 allow introduction of the victim's collateral sources as evidence.<sup>75</sup> Other states recently have adopted somewhat similar provisions for all tort cases.<sup>76</sup> Unfortunately, this "admissible evidence" approach does not always clarify what the jury (or judge) is to do with the

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73. See generally Fleming, *supra* note 25.

74. One, of course, could treat the income losses of the temporarily disabled in this same way — that is, simply reversing the collateral source rule as to them. But as already explained (*see supra*, text accompanying note 72), I prefer a stronger ban on tort recovery for such unreimbursed losses, which essentially would be those of the financially affluent.

75. CAL. CIV. CODE § 3333.1(a) (West Supp. 1987). See generally Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (upholding this provision against constitutional attack). Other states have adopted similar provisions for medical malpractice cases. See, e.g., DEL. CODE ANN. tit. 18, § 6862 (1984); N.Y. CIV. PRAC. L. & R. § 4010 (McKinney 1984); S.D. CODIFIED LAWS ANN. § 21-3-12 (1984); WASH. REV. CODE ANN. § 7.70.080 (1984).

76. See, e.g., CONN. GEN. STAT. ANN. § 52-102 (West Supp. 1987); IND. CODE ANN. § 34-4-33-14 (West Supp. 1987).

information. Under my proposal, tort recovery explicitly is not to include items otherwise compensated by the basic employee benefit and social insurance programs.

Notice that, for tort purposes, I would continue to ignore those collateral sources that are not a part of large scale collective arrangements for economic protection against the risk of injury and death. Hence, whereas tort law would not pay for losses already covered by Social Security, workers' compensation, employment related health care plans, private pension plans and group disability insurance, tort law would continue to ignore sources such as private savings and other forms of family income and wealth. The idea, after all, is not to make tort law a "means tested" benefit that is available only to those who are impoverished by the accident in question.<sup>77</sup> It is, rather, to have our basic public and employment based income and expense protection structure come first.

I recognize that, in order to perform the offset calculus required by my proposal, the torts process, whether in settlements or through formal adjudication, will have to estimate the future value of basic social insurance and employee benefits to which the victim is entitled. This estimating will be difficult to do accurately. But, because estimating the victim's gross future losses is itself very problematic, only reasonable estimates are required. Directing fact finders to estimate reasonably seems far preferable to me than merely allowing the fact finder to do what it wants with the information about other sources. I am confident that the approach I favor is administratively feasible because it recently has been adopted in some jurisdictions.<sup>78</sup>

Some people respond to the general problem of future uncertainty by arguing that under tort law, damages meant to compensate for future losses should be payable as they accrue. After all, Social Security pays benefits periodically to the disabled with adjustments made if the beneficiary returns to work, and both public (Medicare and Medicaid) and private first party health insurance plans also pay as medical expenses are incurred. I am not enthusiastic about put-

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77. Because some kinds of life insurance really are savings plans in important respects, and private savings are not one of the collateral sources I would count against a victim, for the sake of simplicity, I would not reverse the collateral source rule at all as to life insurance, at least at the outset.

78. See, e.g., MINN. STAT. ANN. § 548.36 (West Supp. 1987). Examples of offset statutes in the medical malpractice area include: FLA. STAT. ANN. § 768.50 (West 1985); IOWA CODE ANN. § 147.136 (West 1985); OHIO REV. CODE ANN. § 2305.27 (Baldwin 1984); PA. CONS. STAT. ANN. § 1301.602 (Purdon 1985); R.I. GEN. LAWS § 9-19-34 (1984); TENN. CODE ANN. § 29-26-119 (1980).

ting tort law on a pay-as-needed basis, however, notwithstanding my wish to make tort damages resemble a long term disability compensation plan. My reason is that the tort defendant is liable only for future losses and expenses properly attributable to the tort. If open-ended periodic payments were ordered in all serious cases, considerable future disputes would arise over causation. That, of course, is a shortcoming that does not apply to compensation plans not linked to specific sources of disability.<sup>79</sup>

Certainly, tort victims may be well advised to arrange to receive their award over time so as to avoid the risk of squandering a lump sum and winding up poor, or at least unable to pay for future medical needs. But surely, even under traditional rules, the victim's lawyer has the duty to explain that even if periodic payments are not conveniently negotiated with the defendant, an annuity certainly can be purchased by the victim. Moreover, with the growth of structured settlements in large injury cases, it appears increasingly common that tort defendants also are pushing for periodic payouts under the traditional regime. These arrangements typically will fix once and for all the total amount of the defendant's liability. Yet, where the victim's need for future medical treatment is quite uncertain and the causal problems noted above do not seem likely to be too troublesome, the traditional settlement system certainly permits the defendant to agree to become, in effect, the insurer. He may promise to pay, for example, for all reasonably attributable future medical costs, or at least all such costs up to an agreed upon sum.<sup>80</sup> However,

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79. For discussions of periodic payments, see generally R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 351-58 (1965); Henderson, *Periodic Payments of Bodily Injury Awards*, 66 A.B.A. J. 734 (1980).

In 1975 California adopted a provision permitting (at the election of either plaintiff or defendant) the payment of periodic payments for future losses in excess of \$50,000 in medical injury cases. See CAL. CIV. PROC. CODE § 667.7 (West 1980). With one exception, however, this provision fixes the amount and duration of the payments at the time of the judgment. The exception is that if the plaintiff dies before the sums allocated for future medical expenses and future pain and suffering have been paid out, those remaining payments revert to the defendant. The justifications for the California rule are said to be to protect the victim and his or her family from the victim's possible improvident early expenditure of a lump sum award and, through the rule governing early death, to prevent the victim's heirs from obtaining a windfall. See generally *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984) (upholding this section against constitutional attack). Of course, this sort of provision does nothing about unexpected increases or decreases in the victim's losses or expenses that appear as the future unfolds — apart from the victim's unexpectedly early death. Put differently, it deals with but one of the prediction problems faced at the time of trial or settlement. Section seven of the Uniform Law Commissioners' Model Periodic Payment of Judgments Act, 14 U.L.A. 32 (West Supp. 1987) [hereinafter Model Act] also attempts to deal with the uncertainty of future inflation, but not with the basic uncertainty that the living victim's medical needs and/or income losses may be other than predicted. Model Act, at 39-41 (section 11 and comment).

80. See generally F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 25.2 nn. 6-8 (2d ed. 1986). For a discussion of privately agreed upon payouts overtime, sug-

whether or not that happens in individual cases, it seems to me, is best left to private ordering.

As for the impact of reversing the collateral source rule, some evidence from the medical malpractice field suggests that this can serve significantly both to curtail the number of tort claims and to cutback the level of awards.<sup>81</sup>

### *A Threshold for General Damages*

(ix) Damages for pain and suffering, so-called general damages, should be barred in most personal injury cases involving temporary disability. Specifically, a threshold requirement should be adopted of at least six months of disability or serious disfigurement or impairment.

*Comment:* This proposal is meant to eliminate pain and suffering recoveries in most cases — I estimate eighty to ninety percent — in which people are disabled for less than six months. It is modeled after general damages thresholds in some automobile no-fault plans. The basic argument here is that once the state has assured that most people in the small and moderate injury cases have income loss and medical expense benefits, then most victims in this group in turn should be asked to forego tort damages that do not involve out-of-pocket losses.

In short, I see the pain and suffering threshold as a fair trade for the new first party benefits I propose. Think about it as converting the pain and suffering recoveries of today's relatively less injured tort victims into expanded income and medical expense recoveries for the temporarily disabled in general. In evaluating this trade as among victims, one should remember that temporary injury tort cases are the ones that now generate nuisance claims for pain and suffering. Therefore, although some obviously innocent victims of others' negligence will obtain less from this trade, so too will rather less deserving tort claimants who (no doubt with the help, if not connivance, of their lawyers) now exploit the economically rational desire of insurance companies and large enterprises to close out the books on small personal injury cases.

Understandably, insurers prefer not to spend all the money that would be necessary to determine whether the victim really is suffering in the way he or she claims, or indeed even to demonstrate that

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gesting that the usual practice is to estimate and fix future medical expenses so that the victim runs the risk of unexpected extra costs, see Whitmore & Nelson, *Designing the Structured Settlement*, TRIAL, Mar. 1986, at 74.

81. See Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 72 & 77 (1986).

the victim is exaggerating his or her loss in a case where the defendant is confident that is true.<sup>82</sup> Moreover, even as to those quite innocent and nonexaggerating victims who would no longer be able to obtain general damages under my proposal, one must understand that what is at stake here is pain and suffering that largely is transitory. Put differently, these are victims whose pain and suffering under today's system typically is finished long before a settlement, let alone a trial, occurs. Indeed, I believe that most people, contemplating the possibility of a temporary disability, would not want more than the prompt payment of their out-of-pocket losses, especially if they realized the enormous administrative overhead that would be saved by my plan.

An exception to the six month threshold requirement for claiming general damages is made for those who suffer what I call serious disfigurements or impairments. In general, by this expression I mean serious consequences to the victim's body that will extend beyond the six month period even though the victim is otherwise essentially recovered and able to return to his or her pre-accident activities. Examples include a large facial scar, the loss of a limb, the loss of fertility, and so on. Although such victims may not be permanently disabled from carrying on their regular work or normal activities, they are permanently impaired in other important ways and hence represent the strongest cases for general damages awards. Continuing to allow tort claims for pain and suffering in such cases also responds to rhetorical examples typically given by plaintiffs' lawyers in defense of the current system.

Obviously, some elasticity exists in the meaning of "serious disfigurement or impairment." Its interpretation could be developed in the reform statute or left to common law interpretation. Experience with existing automobile no-fault statutes that impose somewhat similar thresholds on tort suits for pain and suffering is helpful in this area. In view of the Michigan and Florida experience especially, care in the initial drafting seems quite important, even though great detailing in the statute probably is both unwise and unnecessary.<sup>83</sup> On this basis, what might be better is to include more than the phrase "serious disfigurement or impairment" that I have been using so far. For example, perhaps a sensible statutory definition would require "serious and permanent disfigurement, loss of a limb or organ, or serious and permanent impairment of an important bodily function."<sup>84</sup> For

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82. See L. ROSS, SETTLED OUT OF COURT 237-40 (1980).

83. See Comment, *Michigan's No-fault Threshold — Still a Confusing and Inequitable "Crap Game"*, 1986 DET. C.L. REV. 121.

84. This phrasing is taken largely from language defining "dignitary loss" contained in section 102 (a)(6) of the proposed Federal Product Liability Reform Act, S. 2760. See S. REP. NO. 422, 99th Cong., 2d Sess. 21-22 (1986). The language in the text

my purposes at this point, however, perhaps it is enough to have set out the general idea as well as my expectation that the threshold test would be designed and interpreted so that general damages claims would be restricted to a very small minority of those victims who essentially are able to return to their former activities in less than six months. As for the reliability of my prediction that a threshold of the sort described will eliminate about eighty to ninety percent of tort claims where people are disabled for less than six months, recent research indicates that the threshold in Michigan's automobile no-fault statute has eliminated an estimated eighty-nine percent of all personal injury claims arising from motoring accidents.<sup>85</sup>

### *A Ceiling on Pain and Suffering Awards*

(x) Pain and suffering awards should be restricted at the upper end as well. Specifically, the legislature should impose a ceiling of \$150,000 for general damages, to be adjusted regularly for inflation.

*Comment:* In no real way can money make up for the horrible suffering that seriously, often permanently, injured victims endure. For this reason, and because pain and suffering, however unpleasant, does not involve an out-of-pocket loss of funds,<sup>86</sup> it sometimes is argued that dollar awards for pain and suffering are an altogether inappropriate remedy and should be eliminated entirely.<sup>87</sup> Indeed,

also is fairly close to Florida's existing provision in its automobile no-fault law. See FLA. STAT. ANN. § 627.737(2) (West 1984).

85. See Hammitt & Rolph, *Limiting Liability for Automobile Accidents: Are No-Fault Tort Thresholds Effective?*, 7 LAW & POL'Y 1, 7 (Oct. 1985).

86. Medical expenses occasioned by pain and suffering, including therapy, of course would be outside of the ceiling under discussion.

87. See generally Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219 (1953). For evidence (admittedly now more than 15 years old) that few successful tort claimants know or care about damages for pain and suffering, see O'Connell & Simon, *Payment for Pain and Suffering: Who Wants What, When & Why?*, 1972 U. ILL. L. REV. 1. For more recent and broadly comparable British attitudes, see Lloyd-Bostock, *Fault and Liability for Accidents: The Accident Victim's Perspective*, in COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY, *supra* note 10, at 139-63.

In his proposal to trade the payment of attorneys' fees for the payment for pain and suffering, Professor O'Connell's preferred solution is to eliminate pain and suffering awards entirely. As a back-up position, he supports continued payment of seemingly unlimited pain and suffering in serious injury cases. See O'Connell, *Pain and suffering*, *supra* note 71, at 360-62. My proposal of permitting such damages, but subjecting them to a ceiling, falls between Professor O'Connell's two positions.

Were pain and suffering damages to be allowed in serious injury cases, Professor O'Connell would subject them to a deductible in the proposed amount of \$10,000. O'Connell, *Pain and Suffering*, *supra* note 71, at 350. This follows the position of the Uniform Motor Vehicle Accident Reparations Act, 14 U.L.A. 64 (1980) [hereinafter UMVARA]. In my judgment, no persuasive reason exists to subject anyone who satisfies

some find it indecent that people would ask for money when a loved one is lost, or that people would even suggest that their own pain and suffering should be given a price tag. Still others, noting that no real market exists for first party pain and suffering insurance, have concluded that it is wrong to increase the price everyone pays for goods and services in order to transfer money for compensation of losses that people themselves apparently do not want to insure.<sup>88</sup>

Yet, general damages currently are a central part of our tort system, and should not be barred thoughtlessly in cases of serious harm. If nothing else, general damages might serve the function of soothing the outrage people can feel, especially in cases of major injury, at having their bodies negligently damaged by others. And while in other cultures remedies such as an abject apology from the company president whose employee or activity injured you might be more apt, no one can deny that dollars have symbolic value in individualistic, capitalistic America. Hence, as already noted, under my proposal those who suffer either what I have been calling a "serious disfigurement" or who are unable to return to their normal activities within six months of the accident remain able to sue in tort for pain and suffering damages. Damages for intangible losses also would be available in wrongful death cases if they currently are allowed under state law.<sup>89</sup>

Still, I find quite inappropriate the enormous sums now sometimes given as general damages. They are unpredictably awarded — often, it seems, because of lawyer talent, jury idiosyncrasy and the like — and, I believe, serve no useful social purpose that \$150,000 would not serve as well. Greater sums serve to enrich the victim and his or her lawyer at the expense of the rest of us, taking an unreasonably disproportionate share of the total payout of the tort system.<sup>90</sup> After all, \$150,000 is a considerable sum even today, readily providing more than \$1000 a month to the victim, even if casually invested. This tidy amount, as well as any larger sum, I believe, should serve to soothe the seriously harmed victim's feelings of loss and/or outrage. While the purpose of pain and suffering awards certainly

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the high verbal threshold I have proposed to the additional requirement of a deductible. The UMVARA comments argue that this deductible serves to discourage claimants with minor or trivial injuries from alleging that they nonetheless meet one of the verbal thresholds, thus creating additional undesirable costs and controversy. This strikes me as overly cautious.

88. Certainly there is no market today for first party pain and suffering-like benefits for temporary disabilities. Although not widely purchased, first party accident insurance, however, typically does pay sums for certain listed serious impairments (like the loss of an eye or a limb). But if a person suffered that sort of harm, under my plan, he or she still could sue in tort for general damages for that loss.

89. See generally F. HARPER, F. JAMES & O. GRAY, *supra* note 80, at §§ 25.13 - 25.18.

90. See *supra* note 12.



should not be to make the victim wealthy, that is exactly what very large awards do.

To be sure, one may protest that the victim needs money to pay for his or her lawyer. After all, even in medical injury cases in California, a \$250,000 ceiling on pain and suffering awards has been used, rather than the \$150,000 ceiling proposed here.<sup>91</sup> But, as I will explain shortly, my proposal takes care of the victim's lawyer's fee directly so that general damages no longer need serve as a hidden device for that purpose. Indeed, my \$150,000 ceiling might be thought of as roughly comparable to a \$250,000 cap where the victim's lawyer's fee must come out of that sum.<sup>92</sup>

California's approach to capping pain and suffering awards currently is reflected in a number of other states' laws that also have limited general damages awards in medical malpractice cases, for example, \$250,000 in Utah<sup>93</sup> and Kansas<sup>94</sup> versus \$1,000,000 in West Virginia.<sup>95</sup>

Recently, a number of states have imposed ceilings on noneconomic losses for all torts cases. Once again, however, the height of the ceiling varies considerably, for example, \$350,000 in Maryland,<sup>96</sup> \$450,000 in Florida,<sup>97</sup> and \$875,000 in New Hampshire.<sup>98</sup> While it is true that there is something inherently arbitrary about any ceiling, important differences exist. New Hampshire's statute, for example, because of its size, is likely to affect very few plaintiffs, whereas my \$150,000 limit would restrict the recovery of a considerable number. Indeed, some evidence from several years of

91. CAL. CIV. CODE § 3333.2 (West Supp. 1987). See generally *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (upholding the constitutionality of this provision).

92. A ceiling of \$250,000 for pain and suffering is contained in section 204(c)(1) of the proposed Federal Product Liability Reform Act, S. 2760. See S. REP. NO. 422, 99th Cong., 2d Sess. 21-22 (1986). In the recently enacted National Childhood Vaccine Injury Act of 1986, Title III, Pub. L. No. 99-660, 100 Stat. 3755 (1986) signed by President Reagan on November 14, 1986, no-fault benefits of up to \$250,000 for pain and suffering are to be available to qualifying victims of vaccine side-effects. See H.R. REP. NO. 208, 99th Cong., 2d Sess., H.R. § 2115(a)(4) (1986) [hereinafter REPORT]. Under section 2115(d) of that program, however, the reasonable attorneys' fees of the claimant also are to be paid. But, in view of the no-fault character of the plan, they are not anticipated to be large. See S. REP. NO. 422, 99th Cong., 2d Sess., 22.

93. UTAH CODE ANN. § 78-14-7.1 (1987).

94. KAN. STAT. ANN. § 60-3407 (Supp. 1987).

95. W. VA. CODE § 55-7B-8 (Supp. 1987).

96. MD. CODE ANN. § 11-108 (1986).

97. FLA. STAT. ANN. § 768.80 (West Supp. 1987). Florida's ceiling recently was declared unconstitutional. *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987).

98. N.H. REV. STAT. ANN. § 508.4-d (Supp. 1987).

experience with medical malpractice limits on pain and suffering suggests that, even when the constitutionality of those limits was in doubt, imposing a ceiling of the sort I propose does reduce considerably the total payout of the system.<sup>99</sup> Moreover, in arguing against the high New Hampshire limit, I note that if \$875,000 were invested at eight percent, it would produce indefinitely \$70,000 a year, while permitting the recipient to leave the full principal to his or her heirs.<sup>100</sup>

In contrast, the Reagan Administration initially proposed a ceiling of \$100,000 for the combination of both pain and suffering damages, my subject here, and punitive damages, which I take up later.<sup>101</sup> Since that proposal, unlike mine, does not include additional compensation for the lawyer's fee, this ceiling comes close to proposing, in effect, that victims should often net no compensation at all for pain and suffering. Although, as already noted, there is much to be said for such a view, my judgment is that, as part of a substantial first step package, it is too great a break from the current system. As a tactical matter as well, it would be wiser, I believe, to leave in the system the possibility of fairly substantial awards for serious injury or death cases resulting from clear negligence to victims whose hard damages are quite small. More recently, in view of the decisions by various state legislatures that have acted, the Tort Policy Working Group has endorsed a \$200,000 cap on pain and suffering and separate limits on punitive damages.<sup>102</sup> This solution now is much closer to my proposed limit of \$150,000 with attorneys' fees added on top.

The workers' compensation laws of most states provide for payments for what amounts to pain and suffering in serious injury cases, especially where a partially permanently disabled worker has suffered one of those specifically "scheduled" impairments like loss of an eye or a limb.<sup>103</sup> Although these benefits are quite small in some jurisdictions, limiting tort awards to less than what injured workers might receive for the same loss in the more generous workers' compensation plans probably would be inappropriate.<sup>104</sup>

Another point of comparison is New Zealand, where even though ordinary tort law for personal injuries has been replaced by a general

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99. See Danzon, *supra* note 81, at 76.

100. Other states have enacted more complex limits, such as Alaska, where a \$500,000 limit on noneconomic damages does not apply to physical impairment or disfigurement (Alaska Prod. Liab. Rep. (CCH) ¶¶ 90,205-90,230). In Minnesota, where a \$400,000 limit on "intangible losses" does not apply to pain and suffering (Minn. Prod. Liab. Rep. (CCH) ¶¶ 92,440-92,442). I predict that these latter provisions, which try to subdivide general damages, are not likely to have much impact on jury behavior or on settlements.

101. See DOJ REPORT, *supra* note 4, at 66-69.

102. See CRISIS UPDATE, *supra* note 4, at 78-81.

103. See generally A. LARSON, *supra* note 44, at §§ 57.00-58.00.

104. *Id.* at app. A, tables 9 & 11.

accident compensation plan, victims still are entitled, on a nonfault basis, to compensation for what we call pain and suffering. The maximum amount of such payments is restricted, however, to \$27,000 N.Z.<sup>105</sup> Translating this figure to America is not easy, given differences in traditions and living standards, but I think it fair to say that someone wanting to import the New Zealand limit would settle upon a limit of less than \$100,000.<sup>106</sup>

I have chosen to express my proposed limit on pain and suffering awards in the form of a fixed dollar ceiling amount primarily because that is a familiar and easily understood idea. In fact, if the general principal of limiting pain and suffering awards gains acceptance, a more complex formula ought to be considered. The main point here is that, because the \$150,000 limit would apply to the very young and the very old alike, its bite would be far greater for the former group. In other words, if people of quite differing ages both were injured enough to be thought entitled to the maximum, the annuity value of the award would be far greater to the one with the shorter life expectancy. This suggests the possibility of a limit on pain and suffering of, say, \$50,000 plus the annuity value of \$600 per month for the expected future duration of the victim's pain and suffering — on the assumption that the cost of a formula like this in the aggregate would be more or less equivalent to the \$150,000 cap.<sup>107</sup>

Still, it is worth noting that the age of the victim at the time of injury is not explicitly taken into account either in the system of payments for impairments under United States workers' compensation plans or in the rules for payments for intangible losses for personal injury victims under New Zealand's general accident compensation plan. Moreover, considerable uncertainty exists as to exactly how a complex limit of the sort just imagined would function in practice. Therefore, for now at least, I am content with the simpler \$150,000 proposal.

Indeed, and in further argument against too much fine tuning, one

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105. See New Zealand Accident Compensation Act Amendment (No. 2) 1973, §§ 119-120. See also T. ISON, ACCIDENT COMPENSATION 64-68 (1980) (reviewing the first few years of experience with these provisions).

106. See Franklin, *Personal Injury Accidents in New Zealand and the United States: Some Striking Similarities*, 27 STAN. L. REV. 653 (1975).

107. For another discussion of this point, see MEDICAL MALPRACTICE POLICY GUIDEBOOK, *supra* note 4, at 172-73. Washington's new ceiling on pain and suffering works similarly since it is a function of the victim's life expectancy. See Donaldson, Hensen & Jordan, *Jurisdictional Survey of Tort Provisions of Washington's 1986 Tort Reform Act*, 22 GONZ. L. REV. 47, 49 (1986-87).

must appreciate that in practice a \$150,000 limit would not be watertight. Juries still would have some leeway to boost the victim's overall award in most serious injury cases by raising the estimated amount of the victim's lost future income and medical expenses, and settlement arrangements will be made in light of this possibility.

In quite a different spirit, some states have enacted an overall limit (for example, \$1,000,000) on the amount of total damages that one can obtain through the tort system, at least in medical malpractice cases<sup>108</sup> or in suits against the government.<sup>109</sup> But since this sort of provision could limit a permanently disabled victim's ability to obtain compensation for otherwise uncovered medical expenses and income losses, it is not part of my proposal.

### *Judicial Determination of Punitive Damages Awards*

(xi) The legislature should attempt to restore some order to the field of punitive damages. Specifically, the judge, rather than the jury, should be given the duty to determine the amount of punitive damages, if any, that the plaintiff recovers.

*Comment:* Many observers have concluded that the awarding of punitive damages, at least by juries, is now out of control.<sup>110</sup> Three major complaints are voiced. The first stems from the perception that juries are permitted to award punitive damages in what traditionally have been considered ordinary negligence cases. Many object not only to this outcome, but also believe it has negative effects on the torts process generally. That is, the prospect of winning punitive damages in such a wide range of cases, or at least a higher settlement award for non-punitive damages, routinely spurs plaintiffs' lawyers to make escalating claims of defense wrongdoing, thereby further embittering the torts settlement process.<sup>111</sup>

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108. Provisions of this type have been upheld against constitutional attack in Indiana in *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980), in Louisiana in *Williams v. Lallie Kemp Charity Hosp.*, 428 So.2d 1000 (La. Ct. App. 1983), and in Florida in *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783 (Fla. 1985), but not in Illinois in *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), or in North Dakota in *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978), or in New Hampshire in *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980). See also VA. CODE ANN. § 8.01-581.15 (1984); KAN. STAT. ANN. § 60-3407 (Supp. 1986); and WIS. STAT. ANN. § 893.55 (West Supp. 1986).

109. A large number of states have had statutory ceilings on state and local government liability for tort claims for some time. See generally Comment, *Wisconsin Recovery Limit for Victims of Municipal Torts: A Conflict of Public Interests*, 1986 Wis. L. REV. 155, 170-71 n.73. California currently has no such ceiling.

110. See generally Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982); NAT'L ASS'N OF INDEP. INSURERS, *PUNITIVE DAMAGES AND THE CIVIL JUSTICE SYSTEM: THE CASE FOR REFORM AND A PLAN OF ACTION* (1985) [hereinafter *PUNITIVE DAMAGES*].

111. For a recent discussion that considers the impact of punitive damages on the

Second, juries now sometimes are awarding punitive damages of enormous magnitudes. The \$127 million verdict against Ford in a 1978 Pinto crash case involving a fire<sup>112</sup> is symptomatic of the growing tendency of juries to award more than \$1 million in punitive damages.<sup>113</sup> Moreover, because of the growth of "mass tort" cases and the current rule that one victim's recovery of punitive damages does not preclude the rights of others to recover, defendants now face an increased possibility of having to pay a large aggregate amount of punitive damages for a single act.<sup>114</sup>

This is not to say that punitive damages are being awarded in a large proportion of torts cases; they are not. Data suggests that only between one and three percent of plaintiffs win such damages.<sup>115</sup> Nor should one forget that punitive damages awarded by juries frequently are scaled back — first by trial judges, then by appellate courts, and yet again in the course of post-trial settlement negotiations.<sup>116</sup> Nonetheless, the fact remains that juries do award in excess of \$1 million in punitive damages in a nontrivial number of actual cases.

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settlement process, see CRISIS UPDATE, *supra* note 4, at 47-52.

112. *Grimshaw v. Ford Motor Co.*, No. 19-77-61 (Orange County Super. Ct., Cal.) (Feb. 7, 1978), *aff'd as amended*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

113. Even by 1982 publicity had been given to many multi-million dollar punitive damages verdicts. See Owen, *supra* note 110, at 3-5. For two recent examples of jury verdicts of \$10 million in punitive damages against tampon manufacturers in cases involving toxic shock syndrome, see *O'Gilvie v. Int'l Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985) and *West v. Johnson & Johnson Prods., Inc.*, 174 Cal. App. 3d 831, 220 Cal. Rptr. 437 (1985). The Playtex \$10 million jury verdict, originally reduced to \$1,350,000 by the trial court, recently was reinstated by the Tenth Circuit. See *O'Gilvie v. Playtex, Kan. Prod. Liab. Rep. (CCH) ¶ 11,428* (1987). For a report of a very recent jury award of \$100 million in punitive damages, see Taylor, *Texas Jury Awards Record \$107.75 M in Benzene Case*, NAT'L L.J., Dec. 29, 1986, at 1. See also Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 Ky. L.J. 1 (1985-86).

114. See F. HARPER, F. JAMES & O. GRAY, *supra* note 80, at § 25.5A nn.32-33. For a relatively early recognition of the problem, see *Roginsky v. Richardson-Merrell, Inc.*, 378 F. 2d 832 (2d Cir. 1967).

115. See M. PETERSON, S. SARMZ, & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (Rand Corp. Inst. for Civ. Just. 1987). That study found, however, that the trend in the frequency and amount of awards of punitive damages is upward.

116. *Id.* at 26-30. For evidence that large award cases in general eventually settle on average for less than half of the initial jury verdict, see I. BRODER, ANALYSIS OF MILLION DOLLAR VERDICTS (Assoc. of Trial Lawyers of Am. 1986). In the famous Pinto case, the trial judge reduced the jury award of \$125 million to \$3.5 million, which was affirmed on appeal. See Owen, *supra* note 110, at 2. So, too, the \$100 million award in the benzene case (see Taylor, *supra* note 113) since has been overturned and a new trial ordered. See *\$108M Mosanto Award Overturned*, NAT'L L.J., July 13, 1987, at 22.

Third, it is troublesome that enterprise defendants run the highest risk of having large punitive damage awards assessed against them. Even if the conduct of the individual employees who were involved has been very culpable — indeed, even if they were high level management people — it seems misguided to anthropomorphize the enterprise by imagining that punitive damages serve to punish it. Instead, the innocent shareholders and employees at large bear the brunt of the punishment — and this seems highly inappropriate.<sup>117</sup> As long as the individual wrongdoers in the enterprise do not feel the sting of the judgment or find themselves demoted or fired, punitive awards show no more promise as a deterrent of wrongful conduct than do ordinary tort awards.<sup>118</sup> If, alternatively, punitive damages are to be defended on the ground that they are a solace for the outraged victim, I should have thought that ordinary pain and suffering awards adequately served that function.

This leaves, perhaps, the bounty or private attorney general function claimed in support of punitive damages — in which the victim is rewarded for calling attention to and helping to condemn the bad conduct in question. This justification for punitive damages also helps explain why they would go to the plaintiff — and the plaintiff's lawyer — rather than to the state, as has sometimes been proposed.<sup>119</sup> This line of argument, which sees punitive damages as a reward for public service, leads nicely to the reform proposal I offer here. Currently, judges generally decide the amount of attorneys' fees (if any) to be awarded to plaintiffs' lawyers who perform important public service functions in bringing litigation in other areas.<sup>120</sup> Under my proposal, judges alone would make punitive damages awards in personal injury cases.

A different question is whether change should be made in the substantive standard which must be met in order to trigger punitive damages. The traditional requirement of malice or at least intentional wrongdoing first gave way to the weaker test that, as Dean Prosser put it, it was sufficient that defendant have acted with

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117. See F. HARPER, F. JAMES & O. GRAY, *supra* note 80, at § 25.5A nn. 12-13.

118. It is difficult for management first to deny wrongdoing and then, when found liable, to turn around and sack the employees said to be to blame. For a discussion of punitive damages in the context of modern conceptions of corporate decisionmaking, see generally Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L. J. 1 (1984).

119. See, e.g., PUNITIVE DAMAGES, *supra* note 110, at 18; Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 34 DEF. L.J. 429, 479 (1985); recently enacted statutes in Colorado, COLO. REV. STAT. § 13-21-102(4) (Supp. 1986) (directing that one third of a punitive damages award go to the water conservation board) and in Iowa, IOWA CODE ANN. § 668A.1 (West Supp. 1987) (providing that 75% of a punitive damages award may be required to be paid to the state's civil reparations trust fund).

120. See, e.g., 42 U.S.C. § 1988 (1982). See generally *Court-Awarded Attorneys' Fees*, 14 REV. L. & SOC. CHANGE 473 (1986).

“such” conscious disregard of or indifference to the safety of the victim as to be the equivalent of intentional wrongdoing.<sup>121</sup> In turn, the “such” now seems to have been abandoned so that any “conscious disregard” will suffice,<sup>122</sup> and that in turn may well mean that the victim need show no more than knowing negligence.<sup>123</sup> In response, some have sought to pump up the standard, for example, by requiring the jury to find a “flagrant” disregard of the victim’s safety.<sup>124</sup>

Recently, a number of states have enacted legislation limiting punitive damages in one way or another. New Hampshire, for example, has barred them entirely, joining other states where this has long been the rule.<sup>125</sup> It seems to me unnecessarily abrupt, however, suddenly to bar even judge-made awards in states which now allow punitive damages. On the other hand, just as I consider it unsatisfactory under the present system to be content with the trial judge’s ability to reduce a jury verdict, so too do I find insufficient the reform proposal that seeks initially to have the jury decide if punitive

121. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 10 (5th ed. 1984); *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

122. See, e.g., CAL. CIV. CODE § 3294(c)(1) (West 1986) (enacted in 1980 which liberally defines “malice” for punitive damages purposes). *But see infra* note 124.

123. See, e.g., *West v. Johnson & Johnson Prods. Inc.*, 174 Cal. App. 3d 831, 220 Cal. Rptr. 437 (1985). In *West*, although the trial court found that the jury’s \$500,000 compensatory and \$10 million punitive awards both were the result of passion and prejudice, the court nonetheless termed the defendant’s conduct “reprehensible” and allowed a substantial award (\$100,000 in compensatory damages and \$1 million in punitive damages). 174 Cal. App. 3d at 875, 220 Cal. Rptr. at 464. Yet, from the evidence reported by the court of appeal, the plaintiff’s theory seems to be that although her disease was unknown at the time of her injury, the defendant could and should have discovered it earlier. While this might have been possible had the defendant initially tested better or responded more aggressively to complaints (points that the plaintiff’s expert witnesses made much of), there is no indication that this defendant acted any differently from its competitors. And while that inaction may not excuse the defendant from a charge of negligence, why it amounted to “knowing” negligence is unclear. In any event it strikes me as a rather bold basis for awarding punitive damages.

124. This, for example, is the strategy of section 303(a) of the proposed Federal Product Liability Reform Act, S. 2760. See S. REP. NO. 422, 99th Cong., 2d Sess. 21-22 (1986). That section also would require the plaintiff to demonstrate the defendant’s “conscious, flagrant indifference” by “clear and convincing evidence.” California recently enacted stricter standards for punitive damages, (a) requiring proof by “clear and convincing evidence” and (b) redefining malice to require intentional or “despicable conduct” carried on with a “willful and conscious disregard of the rights or safety of others.” See Civil Liability Reform Act of 1987, ch. 1498 (adding/amending CAL. CIV. CODE § 3294 (West Supp. 1987)).

125. N.H. Prod. Liab. Rep. (CCH) ¶¶ 93,025 et seq. Apparently the other states generally prohibiting punitive damages are Louisiana, Massachusetts, Nebraska and Washington, although some limited exceptions exist in some of them. See Sales & Cole, *supra* note 119, at 435-36.

damages are appropriate and then has the judge determine their amount.<sup>126</sup>

My hunch is that real change, in terms of both when punitive damages are given and how much is awarded, is far more likely to occur by leaving the standard as it is but giving the job of applying it to the trial judges. Judges understand and, I think, can be counted on to respond to, the context in which the change in decisionmaking authority was made.<sup>127</sup> Moreover, were it understood that rewarding the public service of uncovering wrongdoing is the prime function to be served by punitive damages, this probably would lead judges in the so-called "mass tort" cases to deny or at least substantially limit the amount of punitive damages awarded to second and subsequent plaintiffs who sue with regard to past conduct that already has been identified and condemned in an earlier case.<sup>128</sup>

### 3. Tort Law Changes: Expanding Recovery

Along with limiting tort recovery in the ways described above, I would expand it in other ways.

#### *Attorneys' fees*

(xii) Successful plaintiffs should be awarded their reasonable attorneys' fees in addition to other tort recovery.

*Comment:* It would be desirable if the transaction costs of obtaining a tort award could be cut dramatically. This, unfortunately, is unlikely. Under the current regime it often is argued that the collateral source rule and/or pain and suffering damages serve as a practical matter to pay for the victim's lawyer. Since I have proposed changing those rules significantly and cutting back on recovery in both instances, I think it only fair in turn that the victim's lawyer be paid openly and in addition to the victim's other recovery. Although other American compensation systems do not pay for the claimant's advocate, only the tort system *requires* such expensive help. Therefore, as part of making tort recovery in the victim's hands look more like recovery under those other systems, I have concluded that the additional payment of the victim's lawyer is necessary.

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126. For the same reason, I do not think that specific reforms need now be made to respond to concerns often raised by would-be defendants that punitive damages are awarded pursuant to civil law rather than criminal law standards of proof. See PUNITIVE DAMAGES, *supra* note 110.

127. This proposal parallels one of the recommendations put forward by Sales & Cole, *supra* note 119, at 477, and by Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 664 (1980). For evidence that California trial judges surveyed by Professor Gary Schwartz probably also would favor my proposal, see Schwartz, *supra* note 110, at 146-47.

128. See Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1325 (1976).



My proposal may be viewed as undercutting any incentive a victim now has to settle his or her case without a lawyer, since at present the victim can keep the fee the lawyer otherwise would take. But, in fact, under the present system, victims generally are ill advised to pursue their claims themselves; that is, studies show that claimants usually are better off even after paying for their lawyers than they are trying to do it alone.<sup>129</sup> Moreover, since tort law would concentrate on the serious injury cases under my proposal, most likely a lawyer would have been involved anyway.

Using the direct award of attorneys' fees rather than using, for example, pain and suffering indirectly, not only is more candid, it is fairer. Suppose, for example, that Victim A has \$25,000 in special damages and \$35,000 in pain and suffering. Under today's system, if the lawyer's fee is one-third of the recovery, then, on the theory that pain and suffering pays, \$20,000 of that \$35,000 goes to the lawyer. If Victim B, however, has \$45,000 in special damages and \$15,000 in pain and suffering damages, the \$20,000 legal fee this time eats into his or her out-of-pocket economic loss (unless, of course, some of that \$45,000 happens to be covered by a collateral source). In other words, under the present system the lawyer's fee really comes out of the victim's entire recovery, of which the pain and suffering portion may or may not be adequate.

My proposal calls for the award of "reasonable" fees to successful plaintiffs. The meaning of "reasonable" could be left to common law development or perhaps the judges could be asked to adopt regulations. I would favor, however, a statutory solution. More precisely, for cases that go to trial, I propose a strong presumption against the award of fees greater than those sliding scale fee percentages currently used in California for medical injury cases. This scale allows the attorney to charge the client no more than forty percent of the first \$50,000 of the award, thirty-three percent of the next \$50,000, twenty-five percent of the next \$100,000, and ten percent of any amount in excess of \$200,000.<sup>130</sup>

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129. See, e.g., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY, *supra* note 10, at 81-82.

130. CAL. BUS. & PROF. CODE § 6146 (West 1987). See *Roa v. Lodi Medical Group, Inc.*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985) (upholding this provision against constitutional attack). Under my proposal, provisions should be made so that the "bend points" in the fee schedule would be regularly upwardly adjusted for inflation. California recently liberalized these fee rules in ways not reflected in the text. Basically, the permitted 25% fee now extends to recoveries from between \$100,000 and \$600,000 (not \$200,000), and the permitted fee on the excess is now 15% (not 10%). See Civil Liability Reform Act of 1987, ch. 1498 (adding/amending CAL. BUS. & PROF.

Thus, under my plan plaintiff lawyers continue to take personal injury cases on a contingent fee basis and the fees would continue to be a proportion of the recovery obtained. But, the fees would be added on to the plaintiff's recovery, rather than taken out of it as happens today, and the percentages allowed ordinarily would be restricted to the statutory schedule. The latter restriction, of course, would be of special importance in the very large cases, where the flat percentage fee now ordinarily demanded by lawyers (often thirty-three percent, sometimes forty or even fifty percent) is widely viewed as creating a windfall.

The sliding scale maximum fee arrangement currently seems to work in medical injury cases in California, still serving to provide victims with competent legal services.<sup>131</sup> A reduced percentage recovery for the plaintiff's lawyer as the stakes go up, at least in theory, might have some influence on the willingness of some lawyers to press on with a great deal of time and effort. But, underzealousness is hardly a trait that one would expect the plaintiffs' bar suddenly to adopt.

One must understand that the amount of the victim's lawyer's fee also would be diminished under my proposal because those maximum percentages generally would apply to a smaller total. This comes about because, as already explained, no recovery of the first six months of lost income would be allowed, the collateral source rule largely would be reversed, and limits would exist on both pain and suffering and punitive damages. Shortly, I will provide some examples illustrating how the fee mechanism would work.<sup>132</sup>

I expect that in most cases the court would award fees according to the maximum allowable percentages. But this would not occur automatically. In class action cases, or in mass torts situations with many similarly situated plaintiffs, or indeed in any individual case in which it was demonstrated that the lawyer had to put in little time per plaintiff, the court could approve only a lesser fee.<sup>133</sup> Generally speaking, a lower fee award likely would occur in cases in which liability is clear.

On the other hand, trial courts would be able to award fees in excess of the ordinary maximum in unusual cases involving special service to the public at large that would not be recompensed ade-

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CODE § 6146 (West Supp. 1987)).

131. To the assertion that California's existing fee schedule "will make it impossible for injured persons to retain an attorney to represent them" Justice Kaus, speaking for the majority in *Roa*, responded, "plaintiffs have made no showing to support their factual claim." 37 Cal. 3d at 928, 695 P.2d at 169, 211 Cal. Rptr. at 81.

132. See *infra* text accompanying note 148.

133. See generally Feinberg & Gomperts, *Attorneys' Fees in the Agent Orange Litigation: Modifying the Lodestar Analysis for Mass Torts Cases*, 14 REV. L. & SOC. CHANGE 613 (1986).

quately were the regular scale applied. Some lawsuits, for example, might require a truly extraordinary amount of investigation as compared with the recovery. Others might involve truly extraordinary future benefit (for example, paving the way for many additional claims for similarly situated victims) yet produce little damages in the case in question. As with reductions from the fee schedule, the legislation should make clear that these upscale deviations are to occur only in exceptional cases.

Should the plaintiff's lawyer and the client be able to agree to a fee that is larger than the proposal envisions that defendants would pay? That is, should the law allow the plaintiff to agree to put up some of his or her own award as a supplement in order to obtain, say, a better lawyer or harder work? Although this is a close question, on balance, the answer should be "no." No reason exists to think that the traditional contingent fee system functions in this way; that is, one does not read or hear about better lawyers regularly charging more. Nor, as just noted, does good reason exist to believe that the limitation imposed on lawyer-client freedom of contract in California medical injuries cases has deprived victims of the skilled and energetic representation that, under my plan, some might argue only could be obtained were the parties permitted to contract around the fee schedule. And even if the proposed fee limitation arrangement were to have some modest impact upon the amount of pain and suffering awarded — which might occur — in view of the essentially arbitrary nature of that award, I would not be disappointed.

This proposed approach to the victim's legal fees, of course, would affect settlement negotiations as well, since the defense would have to agree to add on a sum for the claimant's attorney. This is the routine practice in Great Britain today, for example, where the winning party is entitled to his legal costs, and it works smoothly.<sup>134</sup> In Great Britain, of course, the amount added on is supposed to be based on an hourly rate for efforts made. Thus, my proposal if anything, should be even easier to manage since there would be no debate over whether, say, the time that the victim's lawyer put in, and hence the total fee sought, was too great. In fact, settlement negotiations in America today already are carried on with both sides clearly aware of what part of the award is for the claimant's lawyer. My plan, in a sense, simply would have those negotiations occur in the

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134. See COMPENSATION AND SUPPORT FOR INJURY AND ILLNESS, *supra* note 10, at 128-32. I do not mean to defend the details of the British scheme, which turns out to be very expensive in the smaller cases.

shadow of a formal rule that provided for such fees.

It is fair to ask whether the maximum fee schedule should be lowered for those cases that are settled, at least if they are settled before the case reaches the courthouse steps, so to speak. Traditionally, personal injury lawyers take a different percentage of the award depending, loosely, upon whether the case is tried or not.<sup>135</sup> Perhaps, then, for cases settled reasonably early on in the litigation process, the defendant should only have to pay the claimant's lawyer, say, thirty-three percent of the first \$100,000, twenty percent of the next \$100,000, and ten percent of settlement amounts in excess of \$200,000. I note by comparison that fees are now limited to twenty-five percent under the Federal Tort Claims Act<sup>136</sup> and that the Reagan Administration's Working Group has proposed a sliding scale fee limit (to be paid for by victims and apparently applicable to both tried and settled cases) that roughly is similar to what I have just suggested.<sup>137</sup>

### *Contributory Negligence*

(xiii) Contributory negligence in no way should affect the plaintiff's recovery.

*Comment:* If one accepts that the goal in reforming tort damage rules is to make recovery under that system more like recovery under social insurance and employee benefit plans, then contributory negligence by the victim no longer should count. It does not count either in the Social Security system or the workers' compensation system.<sup>138</sup>

With this change, tort law will have moved in the course of a couple of decades from a time when contributory negligence was a

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135. For example, a lawyer may charge one third if the case is settled, 40% if it goes to trial (or full preparations for trial are necessary), and 50% if it goes to appeal.

136. 28 U.S.C. § 2678 (1982).

137. Twenty-five percent of the first \$100,000, 20% of the next \$100,000, 15% of the next \$100,000 and 10% of the remainder. *See* DOJ REPORT, *supra* note 4, at 72.

A different question is what to do about plaintiffs' costs other than legal fees. For the present, I would leave the rules about such costs as they are, with the liable defendant typically paying largely trivial sums and, therefore, the successful plaintiff paying out of his or her award what can amount to substantial sums. But making defendants pay for such costs is sure to generate some new disputes over their reasonableness. Moreover, when one remembers that workers' compensation claimants pay their own attorneys (typically 10%) and their own other costs, requiring tort claimants only to pay their other costs seems fair by comparison.

In his proposal to trade pain and suffering for attorneys' fees, Professor O'Connell was strangely silent on how the amount of the claimant's attorneys' fees would be calculated, but he did support having the defendant pay for the plaintiff's costs as well. *See* O'Connell, *Pain and Suffering*, *supra* note 71, at 351-52.

138. Note that intentional self-infliction of harm precludes recovery in workers' compensation and would continue to preclude tort recovery, as today, under my proposal. For the workers' compensation rules, see generally, A. LARSON, *supra* note 44, ch. VI, at §§ 30.00 et seq.

complete bar (at least formally),<sup>139</sup> through the current era of comparative fault,<sup>140</sup> to a situation in which the victim's fault would not count officially against him at all.<sup>141</sup> Of course, the victim still would have to show that the defendant is at fault or properly is covered by a doctrine of strict liability, but that would suffice. And the consequence would be a considerable benefit for a substantial proportion of tort plaintiffs.<sup>142</sup>

At first blush, the existing comparative negligence regime appears evenhanded. But the individual victim, out of whose pocket the money comes, and the defendant's insurer or employer, into whose pocket it goes, hardly are equally positioned in terms of need. Moreover, the victim, not the injurer, is the one who bears the full physical burden of the injury.<sup>143</sup>

This proposal is likely to be most controversial in cases where the victim is mostly at fault and the injurer, thus, only slightly at fault. In extreme cases, however, the courts can be counted on to use "proximate cause" (or even "no duty") rules to shift responsibility away from the injurer to the victim. Moreover, in an individual case that seems to entitle a wrongdoing plaintiff to an unjust windfall, the jury might well hold back on the victim's award.<sup>144</sup>

139. Many think that, judging the law in action, the old rule nonetheless functioned as a comparative negligence rule in many cases.

140. California adopted comparative negligence in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858, (1975). Most states now have adopted some form of a comparative negligence regime. See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (2d ed. 1986).

141. In some jurisdictions ordinary contributory negligence currently is no defense at all in strict product liability cases. See *RESTATEMENT (SECOND) OF TORTS* § 402A comment (1977). See generally V. SCHWARTZ, *supra* note 140, at § 12.2; M. FRANKLIN & R. RABIN, *TORT LAW AND ALTERNATIVES* 626-38 (3d ed. 1983). Many find such a rule rather odd, under the existing regime, because it means that a defendant who is liable on the basis of his fault is able to reduce his liability because of the fault of his victim, whereas a defendant who is liable even without being at fault is not. The justification for that result must be that victim compensation is seen in such jurisdictions as the central purpose of strict products liability. My proposal would extend this rationale to all personal injury cases.

142. For recent British data on the frequent role that the allegation of contributory fault plays in reducing tort damages, see *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY*, *supra* note 10, at 91-92. I assume that United States studies would reveal a broadly similar pattern.

143. Also relevant here is that my plan limits the victim's other damages, since under today's system, they serve to help the at-fault plaintiff nonetheless to cover at least all of his out-of-pocket costs when he suffers a decrease in his recovery because of his own negligence.

144. Just as juries well may have applied comparative fault rules at a time when contributory negligence was formally a complete bar, so too they might sometimes apply comparative fault rules in a no bar world. If politically necessary, I would relent and

This brings me to the end of my package of tort reforms. Notice that none of these changes really goes to substantive law — such as new standards for product liability or medical malpractice that some have proposed.<sup>145</sup> I firmly believe that the call of the Reagan Administration's Working Group to return to the "fault system" is the wrong message.<sup>146</sup> The long-run goal should not be to reinvest in the discredited idea that tort law can do somebody's idea of exquisite justice in individual cases,<sup>147</sup> but rather to replace tort law with something better.

#### 4. Some Illustrations of How the Proposed Changes Would Work

In this section I will briefly illustrate how, as a whole, my package of reforms would operate.

*Scenario 1.* Suppose that, owing to the negligent failure of the employees to keep the supermarket aisles clean, John Jones, a young accountant doing his weekly shopping, slips, falls and breaks some bones. As a result, Jones must spend a week in the hospital and five weeks at home, recuperating. Afterwards, however, Jones is fully healed and able to return to work. Under my plan, during the first week of disability, Jones would rely on his sick leave benefits, after which he would go on the TDI plan for the remainder of his time off work. Assuming his employer had provided a qualifying health plan, all, or nearly all, of Jones' medical expenses would be covered. He would be unable to sue in tort either for income loss (which probably would have been de minimus on a net basis anyway) or for pain and suffering. Although in principle Jones might be able to claim in tort for out-of-pocket medical expenses, they probably would be so trivial that he almost surely would not sue. One should clearly understand that Jones has been hurt worse than a large proportion of people who today make tort claims and who, like Jones, would be unable to claim under my proposal.

Suppose instead that Jones were hurt in that supermarket because a glass bottle of some carbonated beverage exploded in his face as he reached to pick it up and put it in his cart. Assume further that the cuts he incurred kept him off work for a week while they were healing, leaving him with a large permanent scar on his face. In this

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agree to apply comparative negligence principles whenever the victim is more at fault than the injurer, and have no decrease for the victim's fault only when the injurer is as much as or more at fault.

145. See, e.g., MODEL UNIFORM PRODUCT LIABILITY ACT § 104, 44 Fed. Reg. 62,714 (1979); Havighurst, *Altering the Applicable Standard of Care*, 49 LAW & CONTEMP. PROBS. 265 (1986) (contractual-based liability standards for medical malpractice).

146. See DOJ REPORT, *supra* note 4, at 61-62.

147. See generally G. CALABRESI, THE COST OF ACCIDENTS (1970).

example, although Jones again would have his income needs and medical expenses provided through work-related benefits and not the tort system, he would be able to claim general damages in tort for his serious disfigurement. On top of whatever he recovered in tort (subject to the \$150,000 maximum) Jones would have his lawyer's fee paid.

*Scenario 2.* Suppose that Sally Smith, a professional ballet dancer, is thrown to the ground and badly injured as the bus she is attempting to get off carelessly starts to pull away from the curb while she is still only half way out the door. Assume that as a result she no longer can use one of her legs and is unable to return to her old job. Instead, after a long recuperation, she is able only to take up less satisfying and lower paying work. Under my proposal, Smith could sue in tort for her net income losses starting six months after her accident, her uncovered medical expenses (if any), her pain and suffering (subject to the maximum) and her legal fees. In this situation of partial permanent disability, Smith probably would have no non-tort source to compensate for her long term loss in earning power. If, on the other hand, she had been permanently unable to return to work, her income loss recovery in tort, while larger to start with, would be reduced by whatever she might obtain from Social Security and her job-based pension plan, if any.

*Scenario 3.* Suppose that Betty Brown, a married housewife, is the victim of botched surgery that prevents her from having children. Assuming that her husband's employer has a qualified health plan, her medical expenses essentially would be covered. She would be able to sue in tort, however, for general damages, subject to the \$150,000 maximum, plus her legal fees.

The first three scenarios illustrate the basic operation of my proposal's compensation system. Next I will make some comparisons between the current and proposed systems through examples of serious injuries that use hypothetical dollar amounts.

*Scenario 4.* Consider Paula Peters, a seriously disfigured victim who has \$120,000 in special damages (gross income loss and medical expenses) and \$240,000 in general damages under the current system. Today, Peters would net from the tort system approximately \$240,000 after paying her lawyer's estimated \$120,000 fee (although perhaps some further portion of her recovery would have to be repaid to collateral sources she might have, depending upon contractual provisions). Assume further that in fact \$50,000 of her special damages either are covered by collateral sources or are income losses

for the first six months.

Under my proposal, Peters could recover in tort only \$70,000 in special damages, up to \$150,000 for pain and suffering, and her reasonable legal fees. Nonetheless, she would probably net from the tort system nearly the same dollar sum she obtains today,<sup>148</sup> and with her first party work-based benefits promptly paid, she probably would think of herself as better off under my plan. Her lawyer's fee, however, would not be \$120,000 out of \$360,000 as it typically would be under the current plan, but rather just over \$55,000, assuming the case were settled for \$220,000. The total tort judgment against the defendant, then, would be just over \$275,000 rather than \$360,000. Note further that had Peters been fifteen percent at fault, she would have suffered a cutback on her gross recovery of about \$50,000 under the current rules, but would suffer no cutback under my proposal. Even so, the defendant's total burden would be less under my proposal.

*Scenario 5.* Finally, consider the hypothetical Ralph Richards, a young school teacher injured in an auto crash, who has suffered a very severe injury and would recover today \$600,000 in special damages and \$1.5 million in general damages for a total of \$2.1 million. Under the current system, Richards probably would net \$1.4 million with \$700,000 going to his lawyer. Under my proposal, assuming that Richards' collateral sources and his six months of income loss were estimated to be \$100,000, then he would get \$500,000 from the tort system for his net special damages and \$150,000 for pain and suffering. In addition to this \$650,000, assuming the case were settled, Richards' lawyer would get approximately \$100,000. The defendant's total judgment would be cut by nearly two-thirds. Richards' lawyer's substantial \$100,000 fee nonetheless would be dramatically less than the \$700,000 he or she would obtain under the current system. As before, Richards would have all of his out-of-pocket income losses and medical expenses paid. But instead of having \$900,000 net after those expenses and his lawyer's fee,<sup>149</sup> Richards would have \$150,000. As I argued earlier, under my proposal Richards could obtain from his general damages award \$1000 a month indefinitely as a solace for his condition. Under the current system, his award invested at eight percent would yield \$6,000 a month. Richards effectively would be a millionaire, just as though he

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148. It is difficult to predict what sort of pattern of pain and suffering awards would develop under a regime that imposes a ceiling on such awards. Would anyone who would have recovered more than the ceiling under the current plan simply obtain the ceiling amount? Or would a general scaling back on the award of special damages occur so as to reserve the ceiling for the very most seriously hurt? Only experience with a serious cap will tell.

149. This is based upon the following calculation: \$2,100,000 gross less \$700,000 for the lawyer, less \$500,000 otherwise uncovered special damages equals \$900,000.



had won the lottery. Even though he is very seriously injured, I do not think this is what society should be doing with its money. This, of course, is a controversial matter, but the hypothetical at least well illustrates my point.

#### 5. Financing the Proposal: Who Pays and Who Benefits

How much money will today's would-be tort defendants save under my proposal? How expensive are the new first party benefits going to be? Who, in the end, is going to pay more and who less? Unfortunately, providing firm answers to these important questions is not easy, and at this point I am able only to provide some analysis about tendencies.

Clearly the cost of the tort law system would be cut back sharply as the mass of small personal injury cases disappear, the collateral source rule is reversed, and enormous awards for pain and suffering are curbed. Those savings would be offset somewhat by increases in tort costs owing to defendants' obligations to pay plaintiffs' attorneys fees and the elimination of the role of contributory negligence. On balance, therefore, the proposed package of tort reforms should yield a significant reduction in the cost of all forms of liability insurance that now cover bodily injury — everything from automobile insurance, to medical malpractice insurance, to product liability insurance, and so on. Certainly, individual physicians and individual motorists should notice the difference. In large enterprises, although there of course would be dollar savings as well, perhaps more important would be the greater calm and stability that my proposal would bring. High echelon executives would be less distracted with tort liability problems; the scale of liability for most firms would become more predictable; and, in turn, the problem of liability insurance unavailability with respect to bodily injury claims should disappear.

Public costs now associated with the processing of so many personal injury suits ought to decline as well. Yet, rather than an immediate savings in the costs of the judicial system, we probably first would see an improvement in the speed and care with which other legal problems were handled. I would count that as a significant benefit.

With respect to the proposed first party benefits, I deliberately have left unresolved so far the extent to which they are to be financed formally by payments from employers as opposed to employees. Traditionally, sick leave and workers' compensation formally are funded by employers. California's TDI program, on the other hand,

is funded formally by employee contributions, and the practice regarding employment-based group health insurance varies — sometimes fully paid for by employers, sometimes funded by shared employer and employee contributions.

In the long run, which side makes the formal payment probably does not matter much. That is, whether they pay or the boss pays, employees ultimately really bear the incidence of all these employee benefit and social insurance programs in the form of lower wages.<sup>150</sup> Put most simply, were employees, for example, to have to start paying workers' compensation insurance premiums out of their wages and salaries, their pay probably would increase to reflect this shift in the formal burden. To be sure, because of income tax advantages, some financing arrangements allow (or traditionally have allowed) employers and employees together to appear to shift costs onto the taxpayers at large. Yet even here, to the extent that a large overlap exists between the taxpaying population and the working population, these advantages ultimately probably are less than they appear to be.

Nevertheless, regardless of what the incidence theory says about the bearing of these costs in the long run, the formal assignment of the burden does matter. First, short-run/transitional impacts exist that may vary depending upon who pays. For example, wage differentials may take time to adjust, especially where collective bargaining contracts are in place or where employees are working for minimum wages. Second, psychological factors are at work. For example, it seemingly has been quite important for symbolic reasons that Social Security be funded by equal contributions from employers and employees. Moreover, whether the money comes out of the employee's paycheck or is paid out before determining the employee's gross earnings seems to matter psychologically even though either way has its costs: if the employee formally pays, then the gap between the worker's gross and take home pay is widened (this is bad); yet at the same time, the worker's gross pay ought to be higher (this is good).

These considerations have led me to the following funding proposals which seek to minimize the the impact of the reforms as judged by who formally pays. First, the expanded TDI program, which now ordinarily is funded in California by what in recent years has been an employee contribution of between .8% and 1.2% of the first \$21,900 of wages,<sup>151</sup> instead would be funded by equal employer and

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150. See generally Woodbury, *Substitution Between Wage and Nonwage Benefits*, 73 AM. ECON. REV. 166 (1983); Smith, *Compensating Wage Differentials and Public Policy: A Review*, 32 INDUST. & LAB. REL. REV. 339 (1979).

151. I say "ordinarily" because some employers merely provide the TDI benefit and do not deduct any contribution from the employee's paycheck. The relatively wide recent swings in California's TDI contribution rate have been a product of both a poorly

employee contributions on all wages and salaries.<sup>152</sup> Exactly what level those contributions would be requires more analysis that I so far have not been able to do, but, quite likely, they would be less than one percent each.<sup>153</sup> One good reason for asking employers to pay at least half of the TDI costs is that an important segment of workers' compensation costs, now formally paid for by employers, would be shifted over to the TDI plan, thus generating substantial offsetting employer savings.

The mandatory sick leave program would be funded by employers — as is, in a sense by definition, the practice today. As for qualifying health plans, I would permit employers to ask employees to pay up to one half of the costs and still have the plan qualify.<sup>154</sup> But, of course, there would be no requirement for any employee contributions. The flexibility created in the financing of this part of the package would allow individual firms and their workers to sort out what, overall, makes most sense for them.

Given these cost sharing arrangements, let me turn to consider their impact on various types of employers and employees. In enterprises in which employees already have good benefits, the net new costs will be minimal at most, and actual savings would not be uncommon. After all, in such employment, broadly comparable sick leave already is provided. Supplements to the existing TDI and workers' compensation programs already are provided that are reasonably or nearly comparable to what would be required under the reforms I propose. Also, health plans already are provided that at

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designed contribution formula and an unpredicted benefit growth. These problems now appear to have been solved and there is reason to believe that, absent the changes proposed here, the contribution rate would soon settle down at about one percent of taxable wages. See generally CAL. EMPLOYMENT DEV. DEP'T, ANNUAL REPORT AND ACTUARIAL EVALUATION OF THE DISABILITY INS. FUND (1985) (on file with the author).

152. Or, alternatively, on wages and salaries up to the TDI ceiling used for purposes of determining benefits.

153. As for cost implications of increasing the maximum wages to which the benefit formula applies to twice the state average wage, two things bear noting. In the first place, the extra cost of such benefits, as compared with maintaining the existing TDI ceiling, is not likely to be large. For example, a recent study that examined increasing the maximum workers' compensation benefit in California suggested that a less than three percent cost increase is implied by boosting the maximum from 100% to 200% of the state average weekly wage. See WORKER'S COMPENSATION STAFF REPORT, *supra* note 44, at 45 table 3-2. Second, the increased revenue brought about from subjecting higher wages to the TDI funding mechanism ought to more than pay for the higher benefit costs brought about by raising the benefit ceiling.

154. Employers also could ask employees to pay for coverage of family members, under which arrangements such coverage would be optional for any family members covered through another job.

least closely approach what I would require of qualified plans. Any additional costs of compliance with the new TDI and health plan rules that such employers would face ought to be able to be paid for by the administrative savings achieved from the merger of TDI and workers' compensation for income replacement, plus the savings accruing from the elimination of the workers' compensation/health plan overlap for medical expenses. In sum, "progressive" employers and their employees, taken as a group, would not be burdened by my plan. Indeed, because of the savings in liability insurance costs (or its equivalent) that these employers would enjoy, a net financial gain ought to result in the progressive employment sector. To be sure, different classes of progressive employers would fare differently, especially to the extent that benefits now funded through workers' compensation, which is somewhat experience-rated,<sup>155</sup> are shifted over to TDI, which, like Social Security, would be funded under my proposal by uniform contributions. But these gains and losses, on the whole, would be small.

Employees who now have poor benefits would fare quite differently. Many would get sick leave rights they currently do not have. Many would obtain substantial improvements in their temporary disability benefits. Perhaps many would obtain much better health plans. Of course, these improvements would have to be paid for. The TDI cost increase that would be charged to employees would be quite modest — although higher earners, of course, would face larger increases to go along with the increased ceiling on their protection. New employer costs for TDI generally ought to be offset by savings in workers' compensation and liability insurance. Health insurance improvements, of course, would be optional — where the incentive to have a qualified plan is taken up, employers could ask employees to contribute to the cost.

In the end, the mandatory sick leave portion of my proposal could well represent the most important financial burden on employers who offer no such benefits today.<sup>156</sup> In response to the financial concerns this requirement would raise, I have three comments. First, having some kind of sick leave benefit attached to one's work is a very good idea. In this respect, the United States rules and practices are rather backward as compared with European countries, which at least suggests that our society can afford it. Second, as noted earlier, small employers could be exempted from this requirement. Third, firms might be permitted to include certain restrictions in their sick leave

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155. See generally REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 93-98 (1972).

156. For example, a Chamber of Commerce study, *supra* note 54, table 4, found that paid sick leave on average cost those companies surveyed which provided such benefits 1.3% of payroll.

plans — at least if those restrictions would help make employers without sick leave plans today less fearful that this sort of benefit would generate abuse. For example, perhaps an employer would be allowed to provide that the sick leave benefit could not be used until the second day of any individual bout of disability, thus discouraging the use of Monday and Friday sick days when the employee really is just on holiday.<sup>157</sup>

In sum, viewed broadly, my proposal should not be viewed as asking more of employers than is fair for them to pay. Any increase in direct costs to employees should bring along benefits for which, I think, the great majority of informed employees would be happy to pay.

Finally, one must remember that the savings from my proposed restrictions on tort law would be enjoyed by others besides employers. Most importantly, at least where no substantial automobile no-fault plan is in place, motorists too could look forward to significant auto insurance premium reductions. If this was thought unnecessarily generous, however, and if money was wanted to subsidize generally the first party benefits I have proposed, the financing package perhaps could include an increase in the gasoline tax that would offset, for example, half of the average motorist's savings in automobile liability insurance. In this way, although motorists as a class would benefit somewhat less than otherwise, the net financial shift of the burden of the proposal, as compared with the current regime, could be reduced. Some will be skeptical about whether even dramatic reductions in the cost structure of liability insurers will be translated, through competition, into appropriately lower liability insurance costs. Although I do not share that skepticism, if it were necessary to achieve passage of my plan, I would support required roll backs in liability insurance premiums.

#### IV. CONCLUSION

The proposal advanced in this Article not only provides a good substitute for the current resort by the temporarily disabled to tort and/or workers' compensation claims, but it also provides many

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157. In addition, employees might not be permitted to claim sick leave during periods for which TDI benefits are available. This is in contrast with current practices, under which employees usually use up sick leave before going on TDI. That option ordinarily is much more desirable for workers now in view of the limited wage replacement provisions of TDI. But the difference would shrink dramatically under my proposal, thereby making it sensible to restrict sick leave use to periods out of work of one week or less.

workers with valuable expanded protection against losses caused by illness and by home and recreational accidents. In my judgment, a generous TDI program, mandatory sick leave, and employment-based good quality health insurance are benefits in need of adoption quite apart from the current problems with the tort system. Conveniently, however, the adoption of such benefit arrangements makes possible a substantial rollback of tort law. At the same time, the new benefits can be financed primarily from the savings that will be realized from the substantially reduced role of the personal injury law system.

One certainly could propose doing more to provide assured compensation to seriously injured victims who are hurt off the job. This could be done, for example, by expanding workers' compensation to cover off-the-job as well as on-the-job injuries, as some have proposed.<sup>158</sup> Indeed, were such an expanded workers' compensation scheme also to cover dependents of workers, it would be a reasonably comprehensive mechanism for long term disabilities. This transformation would be a large step — but whether it is the right step is not clear. Perhaps an expansion of Social Security's disability coverage to provide benefits in partial permanent disability as well as total disability cases would be a much better solution. But that, of course, requires the cooperation of the federal government. Hence, for the present, I will stop with my existing package, which is ambitious enough, and which readily can be enacted by individual states now, especially states such as California with TDI plans already in place.

I should not oversell, however, the consequences for the current torts "crisis" in states adopting the reforms here proposed. Serious injury cases would remain in the torts system. This means, for example, that doctors' complaints that they are being unjustly sued when babies are born with serious birth defects are not likely to go away. Nevertheless, doctors should have their malpractice insurance bills cut somewhat<sup>159</sup> and at least would have the satisfaction of knowing that, if large settlements are made in cases brought against them, most of the money would be aimed at the net out-of-pocket costs of the victim. Moreover, one should appreciate that other tort reforms now being discussed seriously are not likely to be any better in serving those doctors and others who see themselves as facing an insurance crisis. Furthermore, keeping the serious injury cases in the tort

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158. See, e.g., Henderson, *Should Workmen's Compensation Be Extended to Non-occupational Injuries?*, 48 TEX. L. REV. 117 (1969). For support for my position that the key to tort reform lies in rendering its compensatory function superfluous through the improvement in first party work-based benefits, see STATEMENT BY THE AFL-CIO EXECUTIVE COUNCIL, LIABILITY INSURANCE AND TORT LAW (May 21, 1986).

159. The amount will depend primarily upon what reforms a state already has enacted in the medical malpractice area.

system should blunt the criticism of those who still believe that tort serves important deterrence and punishment functions and worry that the "crisis" atmosphere will lead to changes that destroy these roles. Although I already have stated that I am highly skeptical about the claims that tort significantly deters or punishes,<sup>160</sup> for those who think otherwise, under my proposal the specter of a substantial tort award (including punitive damages awarded by the judge) would continue to hang over the heads of those who are responsible for a serious injury.

In sum, what most needs re-emphasizing is that my package promises not simply cutbacks in tort recovery as some would advocate, but a sensible *package* of tort cutbacks, tort expansions and, most importantly, complementary expansions in employee benefits and temporary disability insurance. Were this package enacted, the bulk of the personal injury tort claims would disappear from the judicial system. Most disabled victims, however, excepting of course, those who are lucky enough now to be big lottery winners, would consider themselves better off. Enterprises and units of government would face much less uncertain prospects of tort liability. Defendants would not have to be so worried about the possibility of lightning striking them in the form of outlandish awards for either general damages or punitive damages, and, in return for reduced and more certain tort obligations, employers could be asked fairly to provide the better employee benefits mandated by my plan. We the public, as workers, consumers, and would-be victims, would get much more for our money. It would not be a perfect answer by any means, but it would be a big step forward.

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160. *See supra* note 13.

