

Tort Reform Through Damages Law Reform: An American Perspective

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Substantive tort liability depends on whether the defendant breached a duty of care and thereby caused an injury that is fairly part of the risk the defendant took. Yet, whether the defendant is liable or not is only part of the story. The way we determine the amount of money awarded to successful plaintiffs also critically impacts upon tort law's social function. Indeed, sweeping changes in the law of damages can dramatically transform tort law.¹ Perhaps this explains why Professor Harold Luntz has made damages a central focus of his scholarship.²

At common law, tort damages were meant to provide complete compensation for the tort victim's loss. When a wrongdoer caused harm, the goal of tort damages was to force the defendant to pay for everything necessary to make the specific plaintiff whole. Awards were meant to be highly individualised as to their amount, so as to reflect the unique circumstances of every individual case. Precise justice was understood to be as important in the award of monetary recovery as it was in the determination of liability itself.

Many people continue to embrace this view, and it clearly reflects the perspective of many judges and legislators in a large number of United States jurisdictions. American tort lawyers who represent plaintiffs in court typically make their reputations by convincing juries that an enormous sum is required to put a particular victim equivalently back in the position he or she would have been in but for the tortious conduct of the defendant.

Yet, in some American states, and in other nations around the world, different values have been brought to bear on the law of tort damages. These other perspectives can be importantly traced to experience in the design and implementation of social insurance schemes that compensate people suffering from disabilities (such as industrial injury compensation plans). Those social insurance schemes generally rest on the notion that it suffices to provide victims with rough justice when attempts at achieving precise justice cost too much. Costs here include both the financial costs of more individualised administration and the moral cost of inconsistent treatment of equals. Furthermore, whereas tort law conventionally has been understood to be exclusively about corrective justice,

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1 For earlier American writing in this vein, see for example, Jeffrey O'Connell, 'A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by also Abolishing the Collateral Source Rule' [1979] *University of Illinois LR* 591; Jeffrey O'Connell, 'A Proposal to Abolish Defendants Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees' [1981] *University of Illinois LR* 333; and Stephen Sugarman, *Doing Away With Personal Injury Law* (1989) at 174–191. Although the analysis presented here draws primarily on law in the United States, the concepts are relevant to all developed nations. This discussion applies only to personal injuries, however, so other actionable injuries are set-aside for now.

2 Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002).

social insurance schemes almost always contain a distributional justice perspective. Put simply, those plans worry more about the actual monetary needs of ordinary people than the needs of those who are financially well off or otherwise well provided for.

Once it is appreciated that some or all of the typical features of social insurance schemes might be substituted for common law principles, the possibilities of large-scale changes in the tort damages law become evident.

In this essay, I explore several core issues with respect to tort damages in personal injury cases. In the process I propose ways in which the common law and traditional US rules might be changed so as to make recovery in tort considerably more like recovery under social insurance schemes. Along the way, I point out that Australia in general, and New South Wales in particular, have already moved in the direction I suggest. Although a few American states have also begun a similar shift, the process is slower, in part because the underlying politics has been so easily characterised as no more than ‘taking away victims’ rights.’

My proposals are not meant merely as a package of pro-defendant changes, even if, on balance, they would considerably reduce the cost of tort liability. My central motivation is not simply to enable enterprises and individuals to purchase cheaper tort liability insurance, even if this consequence should also yield general social benefits in the form of lower priced goods and services. Rather, my goal is a reformed law of tort damages in personal injury cases that better meets what I see as genuine victim need.

1. Primary v Secondary

Conceptually, the most crucial initial issue that must be resolved in constructing the law of damages for personal injury is whether tort should be the primary or a secondary source of compensation for victims with valid tort claims. Put differently, should victims turn to tort initially, or only as a matter of last resort to fill in where compensation is otherwise not available?

More than a century ago, the answer to this question mattered little, because then most accident victims had no other source of compensation. But today that is all changed. Every developed nation has some institutional structure in place, altogether apart from tort law, to deal with its citizens’ medical and related expenses and their loss of income.

In many countries, all residents have access to free or low cost health care, and the social insurance scheme replaces a considerable share of lost earnings arising from disability, retirement, unemployment and death. In robust systems, disability benefits attend to both short and long term needs, as well as to both partial and total disabilities.

Despite its wealth, the United States has a less comprehensive scheme, and we rely on both private insurance and the labour market to a far greater extent than countries with a broader political consensus on the social welfare role of the state.³

³ See generally, American Law Institute, *Enterprise Responsibility for Personal Injury*, Vol 1, The Institutional Framework (1991).

For example, although most of our elderly and many of our poor have government-funded free or low cost health care, most Americans access health care through private health insurance provided in connection with the employment of one or more household members. As a consequence, perhaps 15 to 20 per cent of Americans are without health insurance.⁴ They must go without health care, pay out-of-pocket for care, or else seek care as charity patients. So, too, the US lags behind most wealthy nations with respect to income protection. Our national Social Security scheme provides moderate wage replacement benefits to survivors of deceased former workers and to workers and their families if the worker is totally and permanently disabled. Beyond that, those injured on the job have some wage replacement protection through workers' compensation schemes; those schemes are mandated by the fifty individual states, not the national government, and a substantial majority of employees are protected through insurance their employers purchase from private carriers. To provide income replacement in case of total disability beyond that made available through social insurance, many workers are provided, or permitted to purchase, group-based private disability insurance through their employment, and there is an individual market in long-term disability insurance policies that caters especially to high earners. Only a handful of states mandate income replacement for non-occupational short-term disabilities, and sick leave benefits are nowhere required by law. On the other hand, larger employers commonly provide such benefits to their regular employees.

Notwithstanding this 'crazy quilt,' even in the US, there is a good chance that anyone who happens to be an accident victim with a valid tort claim will today have at least some substantial alternative source of compensation.

Historically in the US, and at common law generally, these so-called 'collateral sources' have been formally ignored in tort litigation.⁵ Defendants are not permitted to lower the amount of damages they owe merely because advance provision has otherwise been made for victim need. Nor, traditionally, are American juries meant to learn about such other sources of compensation any particular victim might have had. This approach has been variously justified: the wrongdoer should not get off easy; safety incentives would be undermined; proper social cost accounting would be disrupted; victims and/or society pay for the collateral sources and that advance planning was not done to benefit wrongdoers.

Nonetheless, the rule has been much criticised, even by those who concede that 'precise justice' might be better served, for example, by a careless driver's auto insurer paying full tort damages to the victim, and that victim, in turn, reimbursing his own health and disability insurers. The central objection to this arrangement is practical, not theoretical. Put simply, the transaction costs of shifting losses from one insurer to another are so large that, it is claimed, society as a whole would be

4 See at <<http://www.census.gov/hhes/www/hlthins/hlthin03.html>>.

5 See generally Harold Luntz, 'The Collateral Source Rule Thirty Years On' in Peter Cane & Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 377, and John Fleming, 'The Collateral Source Rule and Loss Allocation in Tort Law' (1966) 54 *California LR* 1478.

better off forgoing the luxury of whatever exquisite justice is achieved by the common law solution. Moreover, if there is no reimbursement by the victim of the collateral sources, then, critics believe the victim winds up with a socially undesirable windfall of double recovery. Furthermore, in America, because legal fees are paid by victims and are generally calculated as a proportion of gross tort recovery, the common law rule is also seen by American critics as unjustly benefiting plaintiffs' lawyers at the expense of their clients. Finally, many American opponents of the common law collateral sources rule argue that by driving up the cost of tort liability it makes goods and services more expensive and for some crucial matters, like health care services, this can have the result of denying some members of the public adequate access to such things.

In response to these arguments, several American states have recently taken steps to overturn the conventional rule.⁶ Some simply reverse the rule for specified sources. Others, somewhat opaquely, provide that juries may be told about certain collateral sources, presumably with the implied understanding that juries will appropriately reduce awards accordingly, but without specific instruction to that effect.

Although plaintiffs' lawyers and many consumer groups in the US view these reforms as part of a broader effort to 'take away victims' rights', I nonetheless conclude that a substantial reversal of the collateral source rule should be the centerpiece of what I envision (and will more fully describe later in this essay) as a balanced reform of the law of damages that would dramatically alter tort law's social role. As the first piece of the overall package, this reform would reserve tort for when it is most needed, that is, to deal with compensation needs that are not already met by the society's core social insurance arrangements. Put differently, if society is already assuring some income support and health care for all accident victims, then 'making them whole' does not require duplication (and complex follow on arrangements) through tort law itself.

Political leaders in many countries appear to have resisted this change on the ground that the reversal of the collateral source rule shifts costs away from liability insurance (and the causes of accidents) and onto social insurance schemes whose funding is especially politically sensitive. But since it should be clear to even those with modest sophistication that citizens generally pay for both social insurance and liability insurance (the latter via the costs of goods and services), it seems to me to be politically irresponsible to waste money in transaction costs merely on the basis of the public's misperceptions as to how costs are borne (ie, allowing the public somehow to imagine that when the payment of tort claims comes from private insurance companies, then these costs really are not being borne by consumers).

Those especially concerned about social cost accounting (and the impact the assignment of accident costs may have on the level at which accident-causing activities are engaged in) might be placated if a reversal of the collateral source rule were joined with a tax (or some suitable substitute) on activities whose costs would otherwise be shifted onto basic safety net benefit schemes. As to auto

⁶ See generally Stephen Sugarman, 'United States Tort Reform Wars' (2002) 25 *UNSWLJ* 849.

injuries, for example, along with reversing the collateral source rule, petrol taxes could be increased and/or auto registration fees could be increased. While outside of tort law, the Quebec auto no-fault scheme has, in effect, adopted this approach.⁷ So far, however, US states that have somewhat reversed the collateral source rule have not taken this extra step of imposing new fees on activities that are relieved of costs because of the modification of damages law.⁸

Assuming there were to be a substantial reversal of the collateral source rule, this does not mean that it would be appropriate to reverse the rule for *all* collateral sources, however. Privately purchased life insurance is a good example. Indeed, American jurisdictions that have already altered the collateral source rule have made this distinction. They have not reversed the rule for private life insurance, but they have for US Social Security benefits, even though an important type of those benefits is the payment of pensions to deceased workers' survivors — in short, a life insurance policy whose benefits are paid out over time.

I agree with this distinction because the cultural understanding of these two collateral sources is very different. Private life insurance is viewed as providing a voluntarily-arranged supplemental source of income, aimed at improving the material well being of policy beneficiaries on top of whatever else they might receive at the time of the insured's death — including stocks, bonds, real estate, personal property, and tort claims that might come to the survivors. Consistent with this perspective, it is unheard of for the standard life insurance policy to insist upon reimbursement if the policy beneficiary is successful in a wrongful death action in tort. By contrast, basic Social Security income replacement benefits and basic health insurance (as well as workers' compensation insurance) are widely understood as core safety net protections and not supplements.

The wisdom of continuing to ignore private life insurance when other benefits are being calculated is, in my view, re-enforced by our experience with the way life insurance was treated in the US by the compensation scheme set up in response to the aeroplane hijack terrorism events of September 11, 2001.⁹ Contrary to past practice, in this case Congress provided that benefits payable to survivors of those killed on 9/11 would be reduced by life insurance payments obtained by those survivors. This was seemingly justified on the simple basis that, when survivors had life insurance proceeds, their need was correspondingly less. Moreover, the plan's

7 Auto accident victims do not directly receive compensation from the Quebec auto no-fault plan for their motoring-related health care, since that is already provided by the Canadian national health scheme. But, each year, the auto scheme pays a lump sum to the health scheme, reflecting the approximate cost of health care provided to all auto accident victims. This cost, in turn, is passed on to Quebec motorists in the fees they pay into the auto plan. See generally Stephen Sugarman, 'Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow' (1998) *Les Cahiers de Droit Numéro Spécial* 109.

8 In countries like Australia, the pressures for and against the reversal of the collateral source rule appear to have resulted in an inconsistent resolution of the issue, both over time and as to different types of accidents. For the very complicated state of Australian law on this issue, see Luntz, above n2 at 423–478. See generally, Luntz above n5.

9 See generally Robert Rabin, 'The Quest for Fairness in Compensating Victims of September 11' (2001) 49 *Cleveland State LR* 573.

designers probably thought this solution would be politically attractive with the public since its effect would be to lower what otherwise could be enormous payments to families of high earners killed in the terrorist attacks (since the 9/11 plan benefits were generally designed to reflect the lost earnings of those who died).

But in fact, as surely could have been anticipated, life insurance protection varied enormously among the victims. Hence, the 9/11 plan wound up ‘valuing the life’ of victims very differently — and most objectionably, devaluing the advance planning and thrift of the victim. As a result, it was commonly and powerfully argued that the family of a person who had paid US\$12 000 a year for life insurance would get far less from the 9/11 plan than the family whose now-deceased breadwinner instead had more frivolously spent the same money to lease an expensive sports car.

Assume, then, that tort damages law is altered so that recoveries in personal injury and death cases are reduced from what they would otherwise be by subtracting benefits provided by basic social safety net schemes, but not subtracting private life insurance proceeds or other sources that are culturally understood to belong to the recipient beyond any tort recovery that is awarded. (As for how tort law should deal with private disability insurance that provides income replacement to high earners, see section 3 below.) Even reversing the collateral source rule to this limited extent would reduce sharply the role tort law in the US and in many other nations now plays in accident compensation. In addition, it would provide a mechanism for further diminishing the role for tort, were the basic social safety net to expand (as well as the mechanism for a renewed larger role for tort if a changing political climate or a decreased public fiscal capacity results in a reduced basic social safety net).

2. *Compensation for Non-Economic Loss*

The second most important issue in the law of damages for personal injury is its role in the compensation for what we in the US call pain and suffering, or general damages, or non-economic loss.¹⁰ However labelled, this refers to losses based neither on lost income nor on out-of-pocket financial payments made (or owed) by victims. Rather, this is money to compensate for the physical pain and suffering that goes along with a physical trauma, the emotional harm that can come from an injury to one’s self or a loved one, the disappointment or embarrassment coming from one’s changed appearance or altered abilities to engage in pleasurable activities and favourite pastimes as a result of an injury, the harm to one’s dignity from being wrongly injured by another, and so on.¹¹

US tort law compensates these losses quite generously. The formal US rule is that the jury determines an appropriate pain and suffering award in the specific case. Hence, in principle, one’s recovery is supposed to turn on a highly individualised appraisal of the victim’s precise harm. In practice, the amount is

¹⁰ See Luntz, above n2 at 211–246, for the Australian position.

¹¹ This is altogether apart from either medical care that might be sought to deal with those sorts of losses, or lost income that might result from these losses.

also understood to turn on the talent of the victim's lawyer, the appeal of the victim to the jury, jury composition, the nature of the defendant's faulty conduct, and more. In reality, of course, the overwhelming share of tort claims is settled without a trial. In principle, settlement occurs in the shadow of a likely jury verdict in the individual case. In practice, lawyers for victims and lawyers and insurance adjusters for defendants negotiate in more rough and ready ways.

It is not true, as sometimes rumoured, that in the US pain and suffering awards (general damages) are simply figured as three times the special (or hard, or economic) damages. Nonetheless, participants in the process report that there is more than a kernel of truth to the idea that the parties start their negotiations with that multiple well in mind, adjusting their demands and offers based upon all sorts of particulars in the case.

In any event, other things being equal, one ordinarily can anticipate a larger pain and suffering settlement if one has larger medical bills (or more lost income). While there is undeniably some common sense appeal to the idea that the greater your medical needs, the larger your pain and suffering, in the US this sort of thinking can all too often have the undesirable effect of victims running up larger health care costs in order to have a multiplier effect on their tort awards for pain and suffering. This is especially objectionable when victims are encouraged by their own lawyers to obtain what amount to fraudulent health care services. Some unscrupulous lawyers have a special arrangement with, say, a physical therapist, chiropractor, or other health care provider, who is happy to earn the extra income for services which may well not be needed (and in extreme cases are not actually provided, even though paper records are created). Under the US percentage-of-recovery-based system for the payment of victim legal fees, this inflation of health care costs not only means more money for the client and the friendly health care provider, but also more money for the lawyer. To be sure, defence interests know about these shenanigans and have good reason to make efforts to uncover them and expose the participants to punishment, which for the unethical lawyers involved could mean disbarment from future practice. Nonetheless, it is widely believed that undetected fraud of this sort is substantial.

In contrast to tort law, pain and suffering type harms are largely ignored in the US by a wide range of other compensation mechanisms. For example, basic social insurance plans and typical private disability insurance policies do not compensate for pain and suffering.

To be sure, there is a small private market in the US for so-called 'accident insurance'. These policies provide a specified (and usually relatively small) payment for the loss of an eye or an arm or a leg (but they typically do not cover many other common and painful injuries caused by accidents, like an injured back or neck, or nerve pain down the leg). It is also true that American workers' compensation plans typically provide modest payments for certain serious harms like major disfigurements or dismemberments.

Moreover, it is noteworthy that in the US at least two important non-tort national victim compensation schemes have provided for non-economic loss. The Childhood Vaccine Injury program awards up to US\$250 000 for non-economic loss to seriously disabled young children who are accepted under the terms of the

plan as having suffered their harm as a side-effect of a childhood vaccine. So too, the 9/11 compensation plan provided lump sum benefits to survivors of those killed as a consequence of the terrorist acts that were completely unrelated to any income or other out-of-pocket loss of the survivors. The amount set by the special master who managed the 9/11 plan was also US\$250 000 per decedent, plus an additional US\$100 000 for each surviving spouse and child. But while these may seem like large sums when compared with other nations' tort awards for non-economic loss, in the US 'deep pocket' careless defendants may well find themselves owing more than a million dollars (and occasionally more than ten million dollars) for pain and suffering to victims they have gravely disabled.

Many American scholars and business leaders have called for reform in the way that tort law deals with pain and suffering awards¹² — although earlier calls simply to eliminate this category of tort damages are not common today. Rather, the typical effort by defence-minded reformers in recent times has been to impose a ceiling (or cap) on the amount of such awards.¹³ In California more than thirty years ago, for example, a cap of US\$250 000 (that same amount again) was imposed on pain and suffering recovery in medical malpractice cases. Later, other states adopted ceilings that were often applicable to pain and suffering awards in all personal injury cases. These caps tended to range rather widely from, say, US\$300 000 to US\$850 000. But the major direct effect of any cap is the same. It is to cut back on what the most seriously injured victims can be awarded.

In the US a monetary cap also tends, in its effect, to harm the young more than the old, other things being equal. That is, under the American system, permanent pain and suffering is conventionally determined by taking into account the future life expectancy of the victim — ie, the number of years of suffering that lie ahead. So, other things being equal, a 25 year old would be expected to obtain more money for the same huge injury than a 55 year old would. For this reason, some have envisioned that caps could be set in terms of annual limits (or, what is much the same, individuals would face shrinking caps the older they are). The legislature in the state of Washington tried a more flexible cap of this sort, taking victim age into account. However, the Washington Supreme Court found the law unconstitutional on other grounds and so the opportunity to assess the suitability of this age-related approach was lost.¹⁴

Indirectly, caps could also have an important additional effect. If the ceiling is understood to reflect what the legislature has determined should be paid to the most seriously harmed victim, then one might feel it appropriate to reconsider what are the proper sums payable to those who, prior to the cap, would have received an amount, say, nearly equal to the cap, but for a far less serious harm than one can suffer and yet now be restricted by the cap. Were that to occur, a cap could, in the end, have the effect of forcing a downward adjustment of pain and suffering awards not only on those above the cap, but also throughout the full range of harms.

12 For a classic article, see Louis Jaffe, 'Damages for Personal Injury: The Impact of Insurance' (1953) 18 *Law & Contemporary Problems* 219.

13 See generally Sugarman, above n6.

14 *Sofie v Fibreboard Corp* 771 P2d 711 (1989).

Yet, it does not appear that caps in the US are intended to or importantly have such effects. Juries, for example, are generally not told about caps; rather, they are instructed to award damages as always, with the judge then later simply knocking off anything that turns out to be above the cap.

But, one could surely imagine a regime in which a cap amount was set to reflect what is thought appropriate for the most severe injury, with instructions to those managing the system to adjust accordingly. Indeed, perhaps the easiest way to envision such a scheme is to think about adopting a schedule that lists a wide range of harms, with presumptive benchmark sums for pain and suffering set from zero up to the highest figure, depending on the nature of the injury (with the largest amount becoming the cap). This approach appears to have taken hold somewhat informally in Great Britain.¹⁵

In Australia, a restrictive statutory approach to non-economic loss has been enacted in several jurisdictions.¹⁶ Caps have been placed on recovery for general damages (typically ranging AU\$250 000-\$350 000).¹⁷ Losses are then scheduled up to the cap, so that only the gravest injuries yield the maximum recovery. The New South Wales law provides that the severity of the loss in the individual case is to be compared with the most extreme case, and appropriate awards as a percentage of the maximum are set out by statute. For example, a non-economic loss which is 20 per cent of the most extreme case is to receive but 3.5 per cent of the maximum award; a non-economic loss which is 30 per cent of the most extreme case is to receive 23 per cent of the maximum award; and a non-economic loss which is 60 per cent of the most extreme case is to receive a full 60 per cent of the maximum award.¹⁸ As for what per cent of severity is to be attached to specific sorts of injuries, courts are supposed to pay attention to what percentages have been assigned by other courts in similar cases.¹⁹

In my view, the most essential policy choice with respect to pain and suffering awards has not even yet been mentioned. It is deciding whether some harms should attract zero recovery. Put differently, the issue is whether there should be a threshold (or floor) on recovery for pain and suffering.

I favour that solution for a variety of reasons. First, these awards are today often paid out for small pains and emotional upsets that are long gone before the money is received. That is, there is no ongoing pain and suffering, and indeed that which the victim felt might well have been very temporary. Second, because of the

15 See The Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (7th ed, 2004). Canada has also moved in this direction. See generally, Stephen Waddams, 'The Price of Excessive Damage Awards' (this issue).

16 See generally, Prue Vines, 'Faith, Hope and Personal Injury: the Ipp Report and the Civil Liability Acts' (2004) 1 *Australian Civil Liability* 1. See also Luntz, above n2 at 585–596 for a discussion of statutory limits in a variety of accident contexts. For a discussion of a wide range of recent Australian changes in damages law as applied to the field of medical accidents, see Harold Luntz, 'Damages in Medical Litigation in New South Wales' (2005) 12 *JLM* 280.

17 See for example, *Civil Liability Act 2002* (NSW) s16 (\$350 000 to be indexed over time as per s17).

18 *Civil Liability Act 2002* (NSW) s16.

19 *Civil Liability Act 2002* (NSW) s17A.

nuisance value of these cases, victims are often able to exploit defendants' needs to get the claims off their books. Worse, because less is at stake, these are also cases in which devious victims are readily able to get away with running up unneeded care costs, to manufacture ailments, and the like.

Third, and this is perhaps most important, if combined with the reversal of the collateral source rule proposed above, a threshold on pain and suffering recovery provides the potential for simply eliminating entirely from the tort system an enormous share of current claims. After all, if you have your medical bills and lost income reasonably well replaced already, and if you are not injured enough to meet the threshold for recovering for pain and suffering, what is there to sue for? Indeed, as a practical matter, you might well be willing even to absorb modest shortfalls in recovery of economic losses if that is all you could recover in tort in any event. And while the latter means a modest burden for victims, the potential social gains of ridding the system of a giant share of current claims are very large. Obviously, there is the prospect of large savings in legal costs and payouts, as well as the reduced burden on the administration of the judicial system. Less evident, but perhaps equally important, there is the prospect of overturning the widespread American social norm that suing somebody else when you are hurt in an accident is what everyone does and what you are culturally expected to do.

Finally, combining a threshold on pain and suffering awards with a reversal of the collateral source rule means that the tort system would shift its focus towards the more seriously injured.

Based upon experience with auto no-fault plans in the US and Canada, there is good reason to believe that the imposition of a fairly high verbally phrased floor on recovery for pain and suffering for example, requiring serious disfigurement or dismemberment or at least three months of full disability — could achieve a very significant reduction in personal injury claims.

Such a threshold could be combined with a presumptive schedule of recovery for a range of increasingly serious injuries. With both a schedule and a threshold, presumably even those at the bottom of the schedule would be entitled to not insignificant sums. For example, under this approach, which I favour, pain and suffering awards might range from US\$15 000–25 000 at the base to perhaps US\$500 000 at the top. A US\$500 000 maximum in the US would still target American awards considerably beyond those of other nations, but it would more like putting the US schedule at the edge of the chart instead of way off the chart.

Australia is again out in front in moving in this direction, as a few jurisdictions have already enacted thresholds on the recovery for pain and suffering. In New South Wales, for example, a non-economic loss which is less than 15 per cent as severe as the most extreme case does not entitle the victim to recover any damages for pain and suffering.²⁰

20 *Civil Liability Act 2002 (NSW)* s16.

3. *Income Replacement: Progressive v Regressive*

As already noted, tort law is conventionally understood to be a system in the service of corrective justice, not distributive justice. Put differently, the traditional role of damages law is to restore the victim to the position he would have been in absent the tort — at least to the extent that money can achieve that. To be sure, the fact that you get money rather than having your body instantly repaired and restored casts some doubt on how seriously tort law can pretend to achieve corrective justice after all.

Nonetheless, when it comes to replacing lost income, the long-standing commitment of tort law is to replace *all* lost income.²¹ This means that higher earners will receive more from the system than will low earners, other things being equal. Of course, other things are not equal, and it is complicated to determine, for example, the relative likelihood of high and low earners becoming tort victims and whether the same sort of physical injury is likely to have a larger (or smaller) impact on the future earning potential of one, who, before the accident, was a higher (or lower) earner. But what is clear is that if two people of the same age are disabled for a month, or for five years, the amount to which they are entitled in tort will be greater for the one who was earning more at the time of the accident.²²

The upshot is that tort law in action is understandably viewed as regressive — and especially when its funding arrangements are taken into account. After all, motorists, generally speaking, do not pay different sums for liability insurance simply because they earn different salaries. So, too, enterprise defendants do not pass the cost of tort liability on to consumers on the basis of consumer income levels. In short, for the same injury, higher earner victims as a class draw more from the tort system than do lower earner victims, but without paying more into it.

This need not be the law of damages. Indeed, social insurance schemes — even if wage-related — tend to resolve this issue very differently. In the US, benefits are wage-related in both our national Social Security scheme and our state workers' compensation plans. But these plans impose a limit on the level of wages that are replaced (and Social Security also replaces a smaller share of income the higher the income of the claimant). The basic social understanding of these plans, as already noted, is that they are aimed at core household needs. And as a corollary, these plans assume that those with much higher earning can choose, and except for deliberately high risk takers, will responsibly choose to purchase what they conclude is an appropriate level of supplemental protection (or will take jobs with employers who provide supplemental income protection as part of the employment package).

Given that social understanding, tort damages law could also adopt such an attitude, and I favour that sort of reform. Indeed, the case for this approach grows stronger in my view once it has been decided to reverse the collateral source rule with respect to basic social safety net benefits.

21 For the Australian situation generally, see Luntz, above n2 at 301–354.

22 As with pain and suffering, completely destroying the future income potential of a younger person, other things being equal, yields a larger award than would be made to one near the end of his career.

As just noted, high earners are the very ones best positioned to obtain extra insurance to protect wages that are not covered by social insurance. For those who buy this extra disability insurance, to then provide tort recovery as well would amount to unneeded double recovery in my view. To be sure, reversing the collateral source rule might suffice to deal with this problem if the reversal were applied, not merely to basic income replacement plans (as proposed above), but also to this sort of additional income protection as well. Yet, that would be an incomplete solution, in my opinion, when we next consider the victim who has not obtained supplemental income protection. Simply reversing the collateral source rule in an even more expansive way will have no effect on that high earning plaintiff, who would still draw generously from tort, thereby rewarding what strikes me as cavalier risk taking. Put differently, the point here is not that private disability insurance and private life insurance should be treated differently for purposes of the collateral source rule. It is rather that, from the perspective of distributive justice, tort law itself should be understood to compensate only for moderate levels of income loss to the extent that they are not already replaced by basic social insurance schemes. The result of this way of thinking would be to have tort law deny everyone recovery for the loss of high levels of income, once more bringing tort damages law closer to the policies governing social insurance.

If this policy were pursued, a difficult issue is just where the cut-off line should be. Again, experience in the US with the 9/11 compensation plan may offer some preliminary guidance. There, the plan administrator provided tables showing what benefits would be paid to survivors of those who had earned up to US\$231 000 a year, which was said to be the cut off for approximately 98 per cent of American earners. Of course, the 9/11 plan was not understood to involve wrongdoers paying their tort victims. Moreover, there were complaints by families of high earners, especially when this seeming restriction on income replacement was combined with the set off of life insurance proceeds discussed earlier.²³ Yet, overall, there seemed little public opposition to a cap on benefits at the ninety-eighth percentile in income.²⁴ But this may well be inappropriately generous. Indeed, it seems to me that it might be quite sufficient for tort law to limit income replacement to, say, the seventy-fifth percentile, or perhaps at two or three times the average weekly wage. The latter in the US today would put the cap, not at US\$231 000, but perhaps somewhere in the US\$70 000–\$100 000 range.

While some might favour completely eliminating the role of tort in replacing lost income, the modest level of income replacement provided by most US social insurance schemes would make this abrupt change in the US too harsh in my view.

23 Indeed, some have speculated that of the perhaps eighty or so claimants whose family members died in the 9/11 attacks and who have sued in tort, rather than accept the 9/11 plan benefits, a large share is comprised of those whose decedents were high earners with large life insurance policies.

24 The plan administrator denied that there was a hard cap on income replacement at the 98 per cent level, and information is not yet forthcoming about precisely how survivors of those in the top two per cent of earners were actually treated with respect lost income beyond the tables. But it is generally understood that, even if families of higher earners might have received something more, the principle of full income replacement was not applied to such stratospheric earning levels.

Put differently, the goal here is to exclude the really high earners from having all of their income replaced by tort law, and not to exclude the middle class from full wage replacement.

Once more, Australia has taken the lead on this issue, as several jurisdictions have restricted recovery for income loss to a multiple of the average annual earnings of full time adult workers — typically three times that amount, as in New South Wales.²⁵

4. *Sharing*

The common law rule was that an at-fault victim, whose negligence contributed to his own injury in a causally relevant manner, could recover nothing from someone whose fault was also a cause of the injury. The law, in effect, conveyed the message that we do not open our courts to wrongdoers, especially those who could have avoided harm had they only been careful.

Nowadays all this has changed, and nearly everywhere a regime of comparative fault has taken over.²⁶ In what we in the US call the ‘pure’ form, even a victim who is 75 per cent at fault will recover 25 per cent of his loss from a defendant who is 25 per cent at fault. A majority of US states, however, have adopted the so-called ‘modified’ form, in which victims whose fault is greater than (or in some cases equal to) that of the injurer remain fully barred from recovering. These harsher rules continue to let off some wrongdoing defendants.

I propose a much more dramatic change in the effect of victim fault on damages recovery. In its strongest form, victim fault would be ignored, regardless of what share of the fault is attributable to the victim. An example of a more moderate reform would provide that, if the victim is no more at fault than the injurer, then the victim’s fault would be ignored, but when the victim’s fault is more than the defendant’s, the defendant would be liable for damages equal to his share of the fault. Notice that, as compared to the ‘pure form’ of comparative negligence, this moderate reform provides greater compensation to victims who are less than half at fault. Regardless of the precise rule adopted, the sentiment behind reform of this sort rests on several considerations.

First, victims are the ones who suffer the physical harm. Hence, they already incur a substantial negative consequence of their fault. Second, from the viewpoint of punishing injurers, horizontal equity among injurers counsels against reducing a defendant’s liability simply because that defendant’s victim coincidentally also was to blame for the accident. Think of two drivers who carelessly speed through an intersection. One hits an innocent pedestrian and the other hits a carelessly inattentive second motorist. Both speeding drivers are equally at fault, but

25 *Civil Liability Act 2002 (NSW)* s12. See generally, Harold Luntz, ‘Damages for Personal Injury: Rhetoric, Reality and Reform from an Australian Perspective’ (1985) 38 *Current Legal Problems* 29 and Harold Luntz, ‘Keeping Professors in the Comfort to Which They Have Grown Accustomed’ (1995) 3 *Torts Law Journal* 1.

26 For the Australian situation, see Luntz, above n2 at 133–148. See generally American Law Institute, *Restatement of Torts (Third): Apportionment of Liability* (2000).

reducing the damages paid by the second (as comparative fault now does), imposes a lesser penalty on the second driver, who was no less careless than the first. Third, counterpart solutions in compensation plan alternatives to tort point in the same direction. In US workers' compensation schemes, for example, ordinary fault by victims is ignored.²⁷ That the employer is 'strictly liable' in workers' compensation is not itself the reason why employee fault is generally ignored. After all, defective product makers in the US are also strictly liable in tort. But the latter currently have available to them the partial defence of comparative fault (say, against a careless user of the product), when the employer does not. The reason that the employer does not goes to a wider understanding about the social need to provide medical care and income replacement to industrial accident victims whether or not they were injured through their own carelessness. My proposal for tort damages reform would ordinarily take away this defence from the defective product seller too, and hence, as with reform in the law covering income replacement discussed above, this reform would also bring tort damages law more in line with social insurance generally.

A different matter is the sharing of losses among defendants. Assume that the fault of more than one defendant was a cause of the victim's harm, and that the award is initially apportioned among them on the basis of defendant fault. The practical issue, then, is who should bear the risk that one or more of those who carelessly caused the victim's loss is either unable to be brought before the court (the absence problem) or financially unable to pay for his share of the damage award (the insolvency problem). The solution that best reflects a desire to use tort damages in order to provide backup compensation to tort victims is one that thrusts the risks of insolvency and absence on defendants. In the context of the other provisions here proposed, this is the solution I generally favour. In the US we call this a rule of joint and several liability.

The rule at the opposite extreme adopts the principle of what we call several liability. There, a defendant is liable for damages only up to its share of the fault (unless otherwise independently liable for the fault of another defendant, say, in co-conspirator cases). Hence under this rule, the risks of insolvency and absence are borne by victims.

In-between rules are also possible. In California today, for example, defendants bear those risks as to economic losses, but victims bear them as to non-economic losses. Or, under the rule proposed by the *Uniform Comparative Fault Act* (1979), those risks are shared by both defendants and plaintiffs.²⁸ Hence, if the victim is not at all at fault, insolvency and absence are problems for the deep pocket defendant before the court. But if the plaintiff is also at fault, then he shares those risks with the available defendant(s) — based on the relative fault of both plaintiff

27 To be sure, certain especially blameworthy worker misconduct can preclude any recovery from workers' compensation, and so too, extreme wrongdoing by victims might also appropriately serve as a continued bar under the general rule proposed here. Indeed, in comparative fault jurisdictions today, in instances of especially wrongful behavior, victims may be fully denied tort recovery just as they were under the common law rule.

28 12 *Uniform Laws Annotated* 33 (1981 Supp).

and defendant(s). While this latter solution has considerable appeal in the current US state of the law, it seems to me to be out of place if the proposal described earlier is embraced — that victim fault generally is to be ignored.

All things considered, then, a sensible victim-oriented compromise solution on the question of sharing might resemble something like this. Ordinarily, victim fault is ignored. If, however, the victim's fault is more than that of a single defendant, then, as between them, the victim bears his share of the available pain and suffering award based on his relative fault (but the defendant still bears all of the economic loss). In the same vein, if there are multiple defendants and one or more is absent and/or insolvent, then, only if the plaintiff is more at fault than the defendants as a group, would he bear any of those risks, and the risk would be restricted to pain and suffering damages, which the more at fault plaintiff would bear in proportion to his fault.²⁹

5. *Legal Fees*

The typical rule outside the US is that the loser pays the winner's legal fees. In the US, however, the formal rule is that each side pays its own fees. But in practice, the American rule functions rather differently. On the defence side, although defendants officially have responsibility for their own fees, win or lose, those fees are almost always paid for by liability insurance (assuming defendants carry that insurance). Indeed, liability insurers not only pay for the legal defence, they normally control the defence (including selecting the lawyer and determining whether to settle, and if so for how much). After all, it is their money that is at risk. On the victim side, plaintiffs too have a kind of insurance. Even though claimants formally bear their own fees, win or lose, the contingent fee system that applies in virtually all personal injury cases means that there is no fee if there is no recovery. The plaintiff's lawyer, by taking on the case, in effect, provides the insurance that covers the fee (ie, not charging) if the case is lost.

The major shortcoming of the American system is that when victims win, they have to pay their own legal fees out of their awards, and typically those fees now range between 20 and 50 per cent of the recovery depending on the nature of the case, who the victim is (eg, minors are often charged less because courts may not approve higher fees in such cases) and at what stage of the litigation the case ends (eg, after an early offer of settlement versus after a protracted appeal of a trial court verdict). In a world of high pain and suffering awards and where the collateral source rule remains, victims may well be able to pay for their legal fees out of what

29 In the *Restatement of Torts (Third): Apportionment of Liability*, ss28–31, the American Law Institute has recognised a large number of alternative solutions to this issue, but not the one I propose here. A related issue is what to do with the risk of under-settlement. Suppose the plaintiff has reached an agreement with one defendant, but that turns out to be for less money than what the judge or jury later determines to be that defendant's fair share of the liability. In such a setting, where the settlement was truly based on an estimate of the defendant's liability, and not, for example, on what was in fact the defendant's limited solvency, I would not oppose leaving the risk of under-settlement with the plaintiff, as the *Uniform Comparative Fault Act* (1979) generally recommends.

is understood as an extra bundle of recovery. Yet, this outcome happens idiosyncratically, depending on differences among cases that have little to do with the fairness of leaving the victim under-compensated as to real economic losses.

Hence, along with a partial repeal the collateral source rule and a restriction on the right of recovery for pain and suffering, I favour changing the law of damages in the US in a way that (unlike most other nations) continues to impose defence side legal costs on defendants win or lose, but (like most other nations) requires defendants to pay victim legal costs if the victim wins (and presumably settlements would be made that provide for coverage of the victim's legal fees). Put differently, under my proposal legal fees would be treated like other recoverable expenses that are incurred as a result of the accident.

Under such an approach one must decide what constitute reasonable fees. Although they might be set as a percentage of the recovery, which is how victim lawyers in the US now typically charge, there are many other options. Some say that, while it is true that tort recovery usually increases when the victim is harmed more, the plaintiff lawyer typically does not do proportionately more work to obtain such a recovery. On that view, the rule might be that, as recovery goes up, the fee owed by the defendant to the claimant's lawyer would decline as a proportion of damages won. For example, the fee might be 50 per cent of the first US\$50 000 recovered, 25 per cent of the next US\$100 000 and 10 to 15 per cent of the rest. Alternatively, some argue that the fee proportion should be higher (ie, rather than lower) the more the victim wins. The theory here is that higher awards reflect greater effort or talent shown by the victim's lawyer.

There are other options as well. For example, victim legal fees could be based on an hourly rate tied to how much time the plaintiff's lawyer put into the case (which is how defence lawyers charge) or they could be set as a lump sum tied to the nature of the case (eg, so much for an auto crash, so much for a slip and fall injury and so on).

A quite different solution would be to base the fee that the defence owes the victim's lawyer on a comparison of the amount of any early offer of settlement by the defence to the amount ultimately won at trial or achieved in settlement. For example, the plaintiff's lawyer might be awarded a fee equal to, say, ten per cent of whatever the defendant offers within, say, 90 days of the harm. But to the extent that the ultimate payout is more than the initial offer, the defence would owe the plaintiff's lawyer an amount equal to, say, 40 or 50 per cent of the difference. Moreover, if the final payout was less than the early offer, this might result in a reduced, or even zero, legal fee. This sort of formula arguably not only nicely approximates the value added to the case by the lawyer, but also provides strong incentives for the defence to make reasonable early offers and for victim lawyers to recommend to their clients to take such offers, if made. This would be an attractive way to establish claimant legal fees in my view.³⁰

30 In Australia today, somewhat analogous rules now govern the award of legal fees to successful plaintiffs.

6. *Punitive Damages*

In US tort cases in most states, juries may award punitive damages for truly outrageous conduct. Defence interests in the US have been bitterly complaining about the award of punitive damages for several years, and they have been heard.

Even though such damages are actually awarded infrequently, and their amounts have long been reduced by trial judges, by appellate judges, and in post verdict settlement agreements, the rare enormous award is terrifying to many company executives. Moreover, these executives and their lawyers complain that even a small risk of a potentially huge punitive award forces them to offer unduly generous settlements. Further, some argue that many punitive damages awards have been imposed for conduct that falls far short of the level of misconduct formally required by the law.

As a result of these complaints, some American states have responded by eliminating this sort of recovery altogether, leaving extra punishment to the criminal and administrative law systems. Other US states have limited recovery in a variety of ways, such as trying to assure that punitive damages are not awarded merely for negligence. This approach has also been taken by some Australian jurisdictions.³¹ In some American states, punitive awards (or a portion of them) go, not to the victim, but to the state treasury, or some special fund set up by the state for this purpose. Furthermore, the US Supreme Court has recently weighed in, holding that certain punitive damages awards violate the US Constitution.³² The upshot is that those with substantial compensatory awards are now not normally supposed to receive punitive damages that are larger in amount than their compensatory awards, rarely more than four times the amount of their compensatory damages, and almost never more than 10 times as much. However, if the defendant fault is huge and the individual victim's harm rather minor, then higher multiples might be appropriate after all.

At an earlier time I recommended for the US that the determination of whether punitive damages should be awarded and, if so, the amount should be made by judges not juries. Although I still favour that solution, at this point in America perhaps it would be wisest to wait some years to see how the various recent reforms turn out in practice before making further changes. I mention punitive damages here primarily to acknowledge that their availability for victims of the worst sort of wrongdoing is not inconsistent with otherwise moving the law of tort damages towards the social insurance model. This is, after all, the solution reached in New Zealand, which has largely abolished tort law for accidental personal injuries and yet has maintained the right to sue for exemplary damages in egregious cases.³³

31 For example, *Civil Liability Act 2002* (NSW) s21. For the Australian situation generally, see Luntz, above n2 at 71–90.

32 *State Farm Mutual Automobile Insurance Co v Campbell* 123 SC 1513 (2003).

33 For further support of this position, see generally, Harold Luntz, 'A Personal Journey Through the Law of Torts' (this issue) at notes 95–100.

7. *Conclusion*

To review, suppose tort damages in personal injury cases cover:

- otherwise un-reimbursed medical and related expenses caused by the tort;
- lost income up to no more than, say, three times the state average wage, to the extent that income is not otherwise replaced by core social insurance plans;
- pain and suffering, with amounts payable tied to a schedule that requires well more than a minor injury before any award is allowed and that tops out at, say, US\$500 000 (or its cultural equivalent in other nations);
- victim losses, in most cases, regardless of whether the victim too was at fault;
- victim legal fees, based importantly upon how much recovery the plaintiff's lawyer obtains beyond what is promptly offered by the defendant; and
- punitive damages, for now, to the extent currently permitted.

As a result of these changes, damages law for personal injury in tort would much more reflect the values underlying the payment of benefits by non-tort compensation plans. A much greater share of the damages awarded in tort would go to fill genuine need, and more of the total payout would go to the more seriously injured. Were these changes put in place in the US, tort law for personal injuries would play a very different social role from the one it plays today. Put more informally, damages law in San Francisco would move somewhat closer to damages law in Sydney.³⁴

Finally, I should emphasise that, along with Harold Luntz, I continue to believe that it would be even more desirable if both of our countries would emulate the law in Auckland.³⁵ Yet, I recognise that in today's political and economic climate in both the US and Australia, the prospects of adopting a New Zealand-style accident compensation scheme seem even further away than they were 20 years ago. Nevertheless, political currents, like ocean waves, come and go, and it seems to me that a country would be much better positioned to shift to a sweeping no-fault approach to accident compensation if its basic tort damages law were broadly in tune with social insurance thinking generally. Hence, the reforms recommended here, in my view, are desirable, not only in their own right as applied to our existing, largely fault-based tort law, but also as a future stepping stone to something even better.

34 To comply with these criteria, the law in New South Wales would also have to be somewhat altered. Although tort damages law in Sydney already contains several of the elements I favour, it would especially need revising as to both the collateral source rule and the consequences of victim fault. Indeed, as for the latter, unlike many other areas of tort damages reform discussed here, New South Wales currently seems to be moving in the opposite direction by becoming harsher to at-fault victims. See for example, *Civil Liability Act 2002* (NSW) s55.

35 See, for example, Harold Luntz, 'Proposals for a National Compensation Scheme' (1981) 55 *Law Institute Journal* 745 and Harold Luntz, 'The Case for No-Fault Accident Compensation' (1985) 15 *Queensland Law Society Journal* 167.