

Michigan Law Review

Volume 88 | Issue 6

1990

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Recommended Citation

Alfred F. Conard, *Coup De Grace for Personal Injury Torts?*, 88 MICH. L. REV. 1557 (1990).

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COUP DE GRACE FOR PERSONAL INJURY TORTS?

*Alfred F. Conard**

DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS AND BUSINESS. By *Stephen D. Sugarman*, with a foreword by *Jeffrey O'Connell*. New York: Quorum Books. 1989. Pp. xviii, 224. \$49.95.

For more than a century, personal injury tort law has been suffering amputations by workers' compensation and automobile no-fault regimes, eclipses by Social Security and employee benefits, and enchainment by limitations on the size of awards. Now Stephen Sugarman proposes to put the poor beast out of its misery, and to substitute a comprehensive system of compensation and deterrence that would operate largely without regard to fault and even without regard to the cause of need.¹

It is a brave plan and a mature one. Sugarman leaves no stone unthrown against tort suits for personal injury and no victim forgotten in his scheme for compensation. He recognizes the unreadiness of public opinion for his final solution, and proposes a more plausible "first step" to move society gradually toward its ideal destination.

I. THE PATHOLOGY OF TORT SUITS

Viewing the tort system in terms of the merits that its defenders claim for it, Sugarman finds it sick. It provides no compensation at all for accident victims who cannot tie their injuries to a tortfeasor who is either financially responsible or adequately insured.² When it does

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1. The plans outlined in the work reviewed were earlier set forth in Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987), and were the subject of comment in the following articles in the same issue: Gray, *On Sugarman on Tort-Chopping*, 24 SAN DIEGO L. REV. 851 (1987); Little, *Up with Torts*, 24 SAN DIEGO L. REV. 861 (1987); Berkowitz, *How Serious is Sugarman's "Serious Tort Law Reform"?*, 24 SAN DIEGO L. REV. 877 (1987); Snyder, *Serious Tort Reform Isn't: A Critique of Professor Sugarman's "Serious Tort Law Reform"*, 24 SAN DIEGO L. REV. 893 (1987); Cortese & Riemer, *Defining the Agenda for Serious Tort Reform*, 24 SAN DIEGO L. REV. 903 (1987); O'Connell & Tenser, *North America's Most Ambitious No-Fault Law: Quebec's Auto Insurance Act*, 24 SAN DIEGO L. REV. 929 (1987); Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929 (1987).

2. P. 37. Sugarman cites a British survey which found that only 12% of accident victims

compensate, it is likely to award huge amounts for pain and suffering³ which would be better spent on the basic needs of the uncompensated.

The tort system fails also, in Sugarman's eyes, to punish or deter injurers. Most tortfeasors are covered by liability insurance, so that they pay no more when they cause injuries than when they do not. The threat of increased premiums or of cancellation is remote.⁴

In Sugarman's analysis, the tort system also incurs prohibitive costs. It consumes vast human work hours in the litigation and insurance industries, whose costs surpass the benefits delivered to injury victims.⁵ On occasion, it poisons the system of justice by providing rewards for fabricated or exaggerated claims.⁶

Sugarman's dissatisfaction is not confined to the tort system's failure to achieve its avowed objectives. He is a professor not only of torts, but also of social and welfare legislation. From the welfare perspective, he is appalled by the lack of compensation for victims of accidents, diseases, and disabilities who cannot ascribe their misery to the fault of anyone else, but who are just as deserving as are the victims of reckless drivers (p. 37).

Sugarman is equally concerned with the plight of those who are in need because they are unemployed. His major premise is encapsulated in his broad assertion: "In general, all Americans should be ensured reasonable levels of income for periods of nonwork and should have generous protection against the risk they will incur medical and other expenses" (pp. 134-35).

Viewing fault as irrelevant to the appropriateness of compensation, Sugarman proposes that society should stop wasting its resources on proving its presence or absence as a condition of compensating need (pp. 127-29). He has examined carefully the numerous varieties of no-fault plans,⁷ and finds that they provide no relief for the victims of misfortune who cannot cite a "cause" of their need. Even the victims who can prove a cause undergo the delay and expense required to prove that a particular company or individual or product did the damage.

obtained tort recovery, and an American author's estimate that one in 25 malpractice victims recovers. For additional detail, he refers the reader to R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 34-69 (1965).

3. P. 39. Sugarman cites *GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: A FRAMEWORK FOR ACTION 27* (1987) and various law review authors.

4. Pp. 12-16. Sugarman makes these assertions without citing specific data. He recognizes that the assertions do not apply to large enterprises that self-insure, but he does not explain why tort law is ineffective in producing safety practices in these enterprises.

5. P. 40. Sugarman cites J. KAKALIK & N. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* (1986), and various commentators.

6. Pp. 20-21. Sugarman cites no authority for this statement.

7. Pp. 101-23. See especially p. 110, where Sugarman refers to proposals of Marc Franklin, Richard Pierce, Roger Henderson, Eli Bernzweig, and Geoffrey Palmer (author of the New Zealand plan).

II. THE PRESCRIPTIONS

Sugarman prescribes two regimes of treatment for the sickness of personal injury tort law. One of them is his ultimate plan, which he calls a "Comprehensive Compensation Strategy" (pp. 127-65) and which I will abbreviate as "CCS." Recognizing that CCS is some decades ahead of public opinion, he proposes another package for immediate adoption, which he calls a "Substantial First Step" (pp. 167-200) and which I will call "SFS."

1. *The Comprehensive Compensation Strategy (CCS)*

CCS would "do away with personal injury law" by sweeping it into a pair of comprehensive systems that would consolidate a basket of other programs such as workers' compensation, unemployment compensation, and Old Age, Survivors' and Disability Insurance (OASDI, popularly known as "social security"). But it would be broader than all of them put together. Under CCS, people who would otherwise lack needed income or health care would receive it without regard to the cause of their need. Occasions for compensation would include not merely accidents, illnesses, and lay-offs, but any other cause of need, including youth, old age, or incompetence (pp. 134-43). In contrast to no-fault, it might be called "no-cause" insurance.

Compensation would be paid from two sources. Temporary needs of wage earners and their families would be paid by their employers. Long-term needs would be met by an expanded social security system (pp. 143-48), which I will call "XSSS" to distinguish it from existing programs like OASDI, Unemployment Insurance, and Aid to Families with Dependent Children (AFDC).

Although CCS would compensate need regardless of its cause, the levels of compensation would vary in relation to the levels of income that the victims had earned before their need arose. As under workers' compensation, wage substitution would be set at some proportion of the prior wage, with some sort of cap.⁸ This arrangement would lead to considerable variations in the level of support. Nonearners would be supported at a lower level, which would be uniform with a few exceptions.⁹

For deterring risky activities, Sugarman would turn from tort law to governmental regulatory agencies like the Consumer Product Safety Commission, the Occupational Safety and Health Administration, the Environmental Protection Agency, and the National Highway Traffic

8. Pp. 136-41. Sugarman would cap wage replacement at twice the national average wage. P. 138.

9. A surprising possible exception would embrace victims of total disability who, at the onset of their disability, were students in higher education. Since their expectations of future income would be higher than the average, their disability benefits might be set above the minimum. P. 139.

Safety Administration, which would be given increased powers to investigate, regulate, and penalize violators (pp. 156-59). He suggests rather tentatively that tort suits for punitive damages on account of intentional wrongs might be preserved, although he places no reliance on them to promote safety practices (pp. 160-62).

Obviously, CCS goes far beyond any of the no-fault proposals that led the attack on tort law in the 1970s. It even goes beyond the New Zealand Compensation Act of 1972,¹⁰ which eliminated tort suits for personal injury. The New Zealand law awarded compensation to employed persons and victims of automobile accidents, but gave no benefits to unemployed persons who were injured by means other than automobiles. Furthermore, its benefits were not mingled with those of the social security system; accident compensation and social security were separate systems.¹¹

The closest ancestor of CCS is probably a set of recommendations advanced in 1984 by a group of social scientists at Oxford University, who proposed a unified program of compensation for illness and injury.¹² But CCS is more comprehensive than the Oxford plan in that it would compensate unemployment from causes other than illness and injury, and includes provisions for injury prevention that are not mentioned in the Oxford group's proposals.

2. *The Substantial First Step (SFS)*

Sugarman's "Substantial First Step," contains both take-aways and give-aways (pp. 167-200). The most substantial take-away would be the reversal of the traditional "collateral source rule," which requires that damages be awarded without regard to most of the benefits that the injury victim may receive under workers' compensation, sick leave, Social Security, or other sources.¹³ Under SFS, most collateral source compensation would be deducted from damages recoverable in tort suits.¹⁴

10. Accident Compensation Law 1972, N.Z. Stat. No. 43 (1972).

11. Palmer, *Compensation for Personal Injury: A Requiem for the Common Law in New Zealand*, 21 AM. J. COMP. L. 1, 17 (1973).

12. D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD & Y. BRITTON, *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* (1984). The work was sponsored by the Centre for Socio-Legal Studies, Wolfson College, Oxford University.

13. A 1986 article on collateral sources in automobile injuries listed 14 states that had reversed the collateral source rule in *medical malpractice cases*, and an Alabama statute providing for deduction, in products liability cases, of reimbursed *medical expenses*. Note, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 HASTINGS L.J. 667, 678-79 nn.86, 88 (1986).

In 1986, Florida and Michigan adopted laws reversing the collateral source rule in all personal injury cases. FLA. ST. ANN. § 768.76; Mich. Pub. L. 178, MICH. COMP. LAWS ANN. § 600.6303 (West 1987).

14. Pp. 174-76. Sugarman does not describe the procedures by which the collateral benefits would be deducted, but seems to assume that they would be estimated and deducted in the same way that losses are estimated and awarded. He says that "the torts process, whether in settle-

Take-aways under SFS would also include limits on awards for psychic loss and punitive damages. Nothing would be paid for the pain and suffering sustained during the first six months of a victim's disability, and a monetary cap of \$150,000 would be imposed on recoveries for long-term pain (pp. 176-80). Punitive damages would be awarded only by the judge, rather than by a jury (pp. 181-83).

A few crumbs of satisfaction would be offered to tort claimants and their lawyers. First, contributory negligence would no longer bar or diminish recovery (p. 186). Second, attorneys' fees would be routinely awarded to successful claimants (pp. 183-86). These consolations would apply only to the remnants of recoverable damage that would remain after deduction of collateral sources and curtailment of psychic and punitive awards.

The principal give-away that SFS would offer to injury victims is an expansion of the benefits that most employers already grant to employees and their families pursuant to law or contract (pp. 169-74). In cases of temporary disability, employees would be paid a fraction (typically two thirds) of their basic wage after a brief waiting period (typically one week). They would receive these benefits for disabilities of all kinds, including those having no relation to their jobs. Employers would also provide sick leave at full pay, without a waiting period, in some proportion to the number of days worked.

These provisions would be compulsory for all employers. Sugarman thinks they would add little to the costs of benefits now provided by major employers voluntarily or pursuant to state laws and union contracts (p. 189).

When the disability continues beyond a short term (typically six months), the employers' payments would be replaced by payments under the existing system of Old Age, Survivors' and Disability Insurance (p. 171).

Employers would also be encouraged, although not compelled, to provide health insurance to employees and their families. An incentive to provide these benefits, which are already widespread, would be supplied by relieving employers who provide them from medical benefit liabilities under workers' compensation (p. 173).

III. A HISTORICAL PERSPECTIVE

Sugarman's proposals seem revolutionary when compared with existing tort law, but they are not so radical when viewed against legisla-

ments or through formal adjudication, will have to estimate the future value of basic social insurance and employee benefits But, because estimating the victims' gross future losses is itself very problematic, only reasonable estimates are required." P. 175.

In contrast, the Michigan statute specifies that collateral sources should be determined and deducted by the judge without jury participation. MICH. COMP. LAWS ANN. § 600.6303 (West 1987).

tion, scholarship, and reform proposals affecting personal injury law over the past century.

1. *Work Injuries*

One hundred years ago, a major preoccupation of tort lawyers comprised claims of injured workers against their employers.¹⁵ "Assumption of risk" and the "fellow-servant rule" were the bread and butter of defense advocates. These aspects of the common law of tort were gradually excised by employers' liability laws, which appeared as early as 1855¹⁶ and reached the major industrial states by the first decade of the twentieth century.¹⁷

The employers' liability laws were only the precursors of deeper invasions. In most industries, tort actions by employees against employers were categorically displaced in the first quarter of the twentieth century by workers' compensation acts. These laws replaced the concept of fault with the concept of cause; employees were compensated for injuries caused by the employment regardless of fault. The principal elements of compensation were a prescribed fraction of the employee's prior wage, and virtually unlimited costs of medical treatment for covered injuries.¹⁸

The modified tort system that had survived for work injuries in the railroad industry¹⁹ was similarly studied by the Railroad Retirement Board in the 1930s and 1940s, and found inferior to a workers' compensation regime.²⁰ Congress did not, however, act on this finding.

2. *Automobile Injuries*

By the late 1920s, automobile accidents had superseded work accidents as the flagship of tort law. Some thoughtful academics and jurists became concerned by the tort system's capricious under- and over-compensation of injuries. In 1932, a consortium of distinguished lawyers, judges, and professors produced a study of automobile accident compensation that concluded by proposing a system of compensation for automobile injuries modeled on workers' compensation.²¹ But no legislature adopted the committee's proposal.

15. In T. SHEARMAN & A. REDFIELD, *LAW OF NEGLIGENCE* (4th ed. 1888), 115 of the 561 pages of text were devoted to "Liability of Masters to Servants." The introduction to the fifth edition in 1898 contained a spirited editorial denunciation of the fellow-servant rule. T. SHEARMAN & A. REDFIELD, *LAW OF NEGLIGENCE* vi-vii (5th ed. 1898).

16. For details, see W. DODD, *THE ADMINISTRATION OF WORKMEN'S COMPENSATION* 13 (1936).

17. *Id.*

18. *Id.* at 27-52.

19. Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1982).

20. U.S. RAILROAD RETIREMENT BOARD, *WORK INJURIES IN THE RAILROAD INDUSTRY, 1938-1940* (1947).

21. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCI-

In the 1950s and 1960s, a series of studies at Temple University,²² the University of Pennsylvania,²³ and the University of Michigan²⁴ again highlighted defects of the fault-based tort regime in relation to automobile accidents. These studies were followed and confirmed by a nationwide study sponsored by the federal Department of Transportation.²⁵ At the same time, scholars at Columbia University and the University of Chicago were studying sources of court congestion, to which accident suits were a major contributor.²⁶

Of the many reform proposals emanating from these studies, the most influential was the "Basic Protection" plan of Robert Keeton and Jeffrey O'Connell,²⁷ which became the template for the conclusions of the Secretary of Transportation and for a flock of bills in state legislatures. It led to the adoption during the 1970s of "no-fault" automobile injury laws in sixteen states.²⁸

DENTS (1932) [hereinafter ACCIDENT COMPENSATION REPORT]. The compensation plan appears at pages 211-16.

The study was authorized and the report issued by a committee "formed by voluntary association." *Id.* at 2. Its 14-members included academics (Charles E. Clark and Walter F. Dodd of Yale, J.P. Chamberlain of Columbia, and William Draper Lewis of Pennsylvania and the American Law Institute), public officials (Arthur A. Ballantine, Assistant Secretary of the U.S. Treasury, Ogden L. Mills, Undersecretary of the U.S. Treasury, and William A. Schnader, Attorney General of Pennsylvania), incumbent or former judges (Victor J. Dowling of the New York Appellate Division, Robert S. Marx of the Cincinnati Superior Court, Bernard L. Shientag of the New York Supreme Court, and Horace Stern of the Philadelphia Common Pleas), and practicing lawyers (Miles F. Dawson and Henry W. Taft of New York, and Henry S. Drinker, Jr. of Philadelphia). *See id.* at 15 n. 2.

The study was conducted primarily in Philadelphia under the direction of a Philadelphia lawyer, Shippen Lewis, but under the sponsorship of the Columbia University Council for Research in the Social Sciences. *See id.* at 8-9.

22. Adams, *A Survey of Economic-Financial Consequences of Personal Injuries Resulting From Automobile Accidents in the City of Philadelphia, 1953*, 7-3 *ECON. & BUS. BULL.* 5 (Temple U., Mar. 1955); *A Comparative Analysis of Costs of Insuring Against Losses Due to Automobile Accidents*, 12-3 *ECON. & BUS. BULL.* 7 (Temple U., Mar. 1960), at 1.

23. Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 *U. PA. L. REV.* 913 (1962).

24. A. CONARD, J. MORGAN, R. PRATT, JR., C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964).

25. J. VOLPE, *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* (1971). This was the summation of the Department of Transportation's "Automobile Insurance and Compensation Study," reported in a series of paperbound pamphlets.

26. Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies*, in H. JONES, *THE COURTS, THE PUBLIC AND THE LAW* 29 (1965); Rosenberg & Channing, *Auditors in Massachusetts as Antidotes for Delayed Civil Courts*, 110 *U. PA. L. REV.* 27 (1961); H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* (1959).

27. R. KEETON & J. O'CONNELL, *supra* note 2.

28. For tabulations, see 4 J. HAMMITT, R. HOUCHEMS, S. POLIN & J. ROLPH, *AUTOMOBILE ACCIDENT COMPENSATION: STATE RULES* viii, 13 (1985) [hereinafter J. HAMMITT]; 1 *ALL-INDUSTRY RESEARCH ADVISORY COMMITTEE, AUTOMOBILE INJURIES AND THEIR COMPENSATION IN THE UNITED STATES* 78 (1979) [hereinafter *ALL-INDUSTRY COMMITTEE STUDY*]. The All-Industry Research Advisory Committee describes itself as "formed by the property-casualty industry." It lists three insurance company associations and three representatives of "independents" as its members. *Id.* at iii.

In addition to the 16 states that the All-Industry Committee Study lists as "no-fault," it lists

The no-fault automobile insurance laws had two basic elements. First, they required that every automobile insurance policy should compensate victims of accidents involving the insured automobile regardless of fault; this meant that injured drivers and passengers could recover compensation for their injuries from the insurer of the car in which they were riding. Second, these laws curtailed the right of victims to sue anyone else for causing their injuries.

For major injuries (variously defined), victims could sue tortfeasors essentially as under common law. The amount of payments under the surviving zone of tort law proved to exceed substantially the amount paid under no-fault. Even in Michigan, commonly called the "purest" of the no-fault states, compensation for automobile injuries under the tort system substantially exceeded compensation under no-fault law.²⁹ The no-fault movement stalled in the 1980s, and there have been no further conversions.³⁰

3. Social Welfare Programs

While personal injury tort law continued to nourish lawyers and underwriters and congest judicial dockets, more direct means of relieving the distress of needy individuals, including injury victims, grew up alongside it. The destitution of injury victims, which had been highlighted by the Columbia study of 1932,³¹ had been greatly alleviated by the creation and subsequent expansions of the Social Security system to provide compensation for disability and death, and by sick leave and health insurance supplied by employers voluntarily or under labor contracts. By 1984, compensation for automobile accident victims under tort law was less than ten percent of the compensation paid to the victims of loss under the panoply of social and private loss-shifting systems.³²

eight "add-on" states, which provide some no-fault benefits to injury victims without modifying their rights under tort law. ALL-INDUSTRY COMMITTEE STUDY, *supra*, at 78.

29. *Id.* at 83 (reporting that in 1977 41.1% of total insurance payments were made under the no-fault regime and 53.4% under the tort regime).

30. J. O'CONNELL & C.B. KELLY, THE BLAME GAME 116 (1987).

31. ACCIDENT COMPENSATION REPORT, *supra* note 21, at 65.

32. See O'Connell & Guinivan, *An Irrational Combination: The Relative Expansion of Liability Insurance and Contraction of Loss Insurance*, 49 OHIO ST. L.J. 757, 759 (1988); O'Connell & Barker, *Compensation for Injury and Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J. 913, 924, 926 (1986). These articles report the tort proportion of total compensation at 7.9% in 1960, 8.8% in 1982, and 9.8% in 1984.

The authors make a point of the apparent increase of the tort proportion, but the significance of this aspect of the data is unclear. The measure of the "tort" sector used in these articles includes payments under no-fault plans, presumably to provide comparability with earlier years in which no-fault plans did not exist. If the no-fault payments were subtracted, however, and allowance were made for errors in the statistics, the apparent shift in proportions might be insignificant.

4. Curtailing Payouts

In the late 1970s and the 1980s, attacks on personal injury tort law took a new tack, inspired not by a concern for compensation, but by a concern with the spiraling costs of liability insurance.³³ Every state adopted at least one statute limiting in some way awards of compensation for personal injuries.³⁴ The movement led the American Bar Association in 1979 to appoint a Special Committee on the Tort Liability System, which reported, predictably, that no substantial changes were needed.³⁵

In 1986, U.S. Attorney General Edwin Meese appointed a group to study the "insurance crisis."³⁶ The group found no structural fault in the tort system, but reported that the magnitude of awards had become unreasonable. Its principal recommendations were to eliminate joint-and-several liability, cap noneconomic damages at \$100,000, turn large lump-sum damages into periodic payments, limit contingent fees, and stimulate alternative dispute resolution.³⁷

5. The Augury

These historical notes provoke both positive and negative reflections on Sugarman's proposals. On the supportive side, they remind us that tort law has been repeatedly charged with tragic deficiencies, and has been partially displaced by workers' compensation and no-fault regimes. More significantly, the primary role of relieving the distress of injury victims has been taken over by sick leave, Social Security, health insurance, and other programs that are unrelated to fault. If CCS were adopted, it would not deprive most injury victims of their meat and potatoes, but only of their fortune cookie.

On the negative side, history reminds us that personal injury tort

33. See Olson, *The Liability Revolution*, in *NEW DIRECTIONS IN LIABILITY LAW* 1-3, 42-53 (W. Olson ed. 1988); Olson, *Overdeterrence and the Problem of Comparative Risk*, in *id.* at 42.

34. For a tabulation of enactments in 1986 alone, see S. CARROLL, *ASSESSING EFFECTS OF TORT REFORMS* 47-72 (1987). For a survey of limitations on medical malpractice awards, see Smith, *Battling a Receding Frontier: Constitutional Attacks on Medical Malpractice Laws*, in *PERSONAL INJURY DESKBOOK*, 1986, at 226, 233-60 (B. Denkensohn & G. Ohlsson eds. 1986).

35. THE SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* (1984) (American Bar Assn. publication) [hereinafter ABA COMMITTEE]. The committee observed that, "[i]f there is a central complaint, it is that the tort liability system 'costs too much,'" and explained that "[w]e take note of this criticism because of the frequency of its repetition." *Id.* at 2-31 (citation omitted). The conclusions of the committee rejected virtually all suggested modifications of the system. *Id.* at 13-1 through 13-21.

36. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) [hereinafter WORKING GROUP REPORT]; TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS (1987) [hereinafter WORKING GROUP UPDATE]. These are paperback, typewriter-offset publications issued by the Government Printing Office that are not identified as the output of any standing agency.

37. WORKING GROUP REPORT, *supra* note 36, at 64-75.

law is a dietary staple that has survived every prior attempt to reduce it.³⁸ Although workers' compensation laws generally purport to suppress tort actions for worker injuries, claimants' attorneys have found means of maintaining tort suits against the remote employers of the victims' immediate employers and against the suppliers of equipment to employers.³⁹ Reformers' dreams of abolishing tort litigation seem about as likely to materialize as the abolition of armed conflict among nations.

IV. ARE SUGARMAN'S PROPOSALS A SOLUTION?

My reflections on Sugarman's proposals fall into two categories. The first I will call "optimality": If his proposals could be popularly accepted and legislatively adopted, would they advance human welfare? The second I will call "acceptability": Could a majority of judges, lawyers, and jurors learn to view the system as beneficial and fair? I will apply these questions separately to the Comprehensive Compensation Strategy and to the Substantial First Step.

1. *The Comprehensive Compensation Strategy (CCS)*

a. Is it optimal? The central feature of CCS is its severance of the link between the source of compensation and the cause of the need being compensated. The fundamental question is whether this severance will help more than it will hurt the men, women, and children whom it will affect.

In the tort system, compensation for an injury comes from or through persons who are associated in some way with the cause of the injury. The link persists even in automobile no-fault systems, where compensation depends on proving that automobile operation was a cause of the injury, although the operation need not have been faulty.

The link between cause and compensation has potential values on both sides of the compensation process. On the victim's side, it creates an incentive to identify the causes of injuries in order to obtain compensation. On the compensator's side, it provides motives to avoid accidents. When accidents have happened, the link provides incentives to resist claims for compensation that are unjustified or exaggerated, although this benefit is partially, or perhaps wholly, offset by the incentive to resist meritorious claims, too.

The incentive for accident avoidance is admittedly weak, touching individual tortfeasors lightly because they are usually covered by insurance or immune to money judgments. But it does motivate insurance companies to raise premiums for accident-prone drivers, and leads employers to promote safety practices by their employees.

38. See O'Connell & Barker, *supra* note 32, at 928-29; O'Connell & Guinivan, *supra* note 32.

39. See 2 A. LARSON, WORKMEN'S COMPENSATION §§ 71, 72 (1989).

Severing the link seems likely to have two kinds of costs, which may be massive, but which are hard to detect and control.

i. Loss of safety incentives. Uncoupling compensation for injury from causes of injury seems likely to diminish safety incentives for the potential perpetrators of injury, and perhaps even for the potential victims.⁴⁰

On the perpetrators' side, the fear of suffering a huge liability beyond the coverage of insurance would vanish. True, individual perpetrators could lose their licenses, or even their jobs, and employers could suffer from increased Social Security taxes, or perhaps fines of the type levied on negligent nuclear energy generating companies. But the chances of incurring these penalties would depend on the zeal of governmental agencies, which would probably lack the prosecutorial incentives of plaintiffs' lawyers and which would be subject to community pressures to go easy on the providers of employment and tax dollars. The notorious failure of the U.S. Department of Energy to police nuclear pollution illustrates the danger of relying on government agencies to promote safety without the goad of private action.⁴¹

Under tort law, accident victims and their lawyers have a powerful incentive to put their fingers on perpetrators of injury because their compensation depends on identifying a culprit. When victims lose this incentive, safety-promoting agencies like the Occupational Safety and Health Administration and the National Highway Traffic Safety Administration may never find out whom to punish.

The possibility of a decline in reporting the causes of injury is suggested by this reviewer's observations on property damage reporting under Michigan's no-fault law. The no-fault law, as originally enacted, abolished liability for damage done by automobiles to other automobiles, on the theory that car owners could insure themselves against damages to their own cars more efficiently than they could insure themselves against causing damage to others.⁴² Under this regime, owners of damaged cars who formerly would have insisted on a

40. See Trebilcock, *Incentive Issues in the Design of "No-Fault" Compensation Systems*, 39 U. TORONTO L.J. 19 (1989); Trebilcock, *supra* note 1, at 992-93; R. GASKINS, ENVIRONMENTAL ACCIDENTS: PERSONAL INJURY AND PUBLIC RESPONSIBILITY 320 (1989).

41. See Finamore, *Regulating Hazardous and Mixed Wastes at Department of Energy Nuclear Weapons Facilities: Reversing Decades of Environmental Neglect*, 9 HARV. ENVTL. L. REV. 83 (1985); Schneider, *Nuclear Tests' Legacy of Anger: Workers See a Betrayal on Peril*, N.Y. Times, Dec. 14, 1989, at 1, col. 1; cf. S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 283-84 (1987); Krier & Gillette, *The Un-Easy Case for Technological Optimism*, 84 MICH. L. REV. 405, 421-26 (1985).

42. MICH. COMP. LAWS § 500.3135(2) (1983), as originally enacted by 1972 Mich. Pub. Acts 294.

In 1979, the law was amended to permit tort suits for amounts up to \$400 on account of unintentional damage done to cars not covered by the car owner's collision insurance. MICH. COMP. LAWS § 500.3135(2)(d), (3), (4), (5), and (6) (1983), added by Act approved Nov. 13, 1979, Pub. Act No. 145, 1979 Mich. Pub. Acts 849, 884-85, and Act approved Nov. 13, 1979, Pub. Act No. 147, 1979 Mich. Pub. Acts 896, 896-97.

police report in order to sustain a claim against another driver stopped reporting fender benders to the police. Where there was no personal injury, the police, even when present, sometimes let the parties decide whether they wanted a report made.⁴³

Uncoupling compensation from causation might also reduce the incentives for potential victims to avoid injury, or to minimize the consequences of injuries that occur. Although human nature provides universal incentives to shy away from evident danger, it does not prevent thousands of cyclists from riding without helmets, or millions of motorists from omitting to fasten their safety belts. A system that is explicitly indifferent to contributory fault might intensify the widespread indifference to protecting oneself from tragedy.

The persuasiveness of Sugarman's proposal rests finally on the reader's degree of confidence in the capacity of a government bureau to detect the causes of injuries and to assess penalties without the pressures supplied by private claimants. In order to embrace his plan, one must believe that the costs of governmental safety administration plus the costs of an increase in accidents through the loss of deterrence would not exceed the costs of the tort system.

ii. Risk of abuse. Although the title of Sugarman's book signals only his proposal to excise tort law from personal injuries, his Comprehensive Compensation System involves an expansion of the Social Security system that is equally revolutionary. Under the existing system, beneficiaries have to show a need based on a specific cause, such as suffering a disabling injury, being laid off from work, or having dependent children that keep the claimant at home. Under CCS there would be subsistence support for anyone who is not working.

Sugarman probably assumes that there would be some means of determining that beneficiaries have a good reason, such as injury or lay-off, for not working, but he does not explain it. If there were no system, people could choose to live on the dole if they preferred not to work or preferred to work in the underground economy, where their incomes would not be visible to administrators of the system. The costs of supporting undeserving claimants would fall eventually on the general public through taxes.

How effective the civil servants of this expanded social welfare network would be in dealing with unjustified claims can only be guessed, subject to the biases of the guesser. Case workers in a welfare system seem likely to be more sensitive to demands of the needy claimants in their waiting rooms than to burdens imposed on distant taxpayers.

43. Under the law as it stood from 1972 to 1979, owners of damaged cars sometimes wanted a report charging the other car's driver with a violation because their own collision policies compensated them more generously for accidents caused by the negligence of others than for unexplained accidents. Whether the 1979 amendment changed the attitudes of car owners or police to accident reports is unclear.

b. *Can it win acceptance?* In order to accomplish Sugarman's aims, CCS must be perceived by a wide sector of public and professional opinion as fair and just. The proposals would have to be favorably perceived at the legislative stage in order to be adopted. They would need to enjoy enough acceptance *after* adoption to dissuade judges and jurors from evading or distorting their provisions or (in the case of judges) declaring them unconstitutional.⁴⁴

i. *The abandonment of tortfeasor liability.* Few ideas are dearer to lawmen and laymen than that wrongdoers should be ordered to pay for the wrongs they commit. The fact that tort law does not actually make tortfeasors pay, but rather shifts the costs through insurance to innocent bystanders, seems to have no effect on public attachment to the tort charade. The pretense of penalizing tortfeasors is perpetuated even by sophisticated academics, who talk as though tort law made tortfeasors pay for injuries. A Yale law dean and a Yale economics professor recently offered "four tests for liability in torts," all of which were phrased in terms of whether "the loss lies on the injured victim" or "the loss lies on the injurer."⁴⁵

Sugarman's abolition of the charade of tortfeasor liability (or the palliation of the charade in his proposed Substantial First Step) will not be acceptable until lawyers and voters learn to think of tort law not as allocating losses between injureds and injurers, but as allocating loss between injureds and a broad population of innocent consumers and taxpayers.

ii. *Indifference to the victims's deserts.* Sugarman's proposals clash with intuitive justice also by excluding the contributory fault of victims from any effect on the benefits that they receive. Defenses based on contributory fault of the victim are to be completely abolished in SFS as well as in CCS. Nothing is said about victims' aggravation of their injuries by neglect, which is presumably irrelevant, too.

The abolition of the contributory negligence defense is not surprising; it was banished long ago in workers' compensation systems. But most of these systems recognize a defense of "self-inflicted injury," and some recognize other fault-based defenses, such as "wilful misconduct."⁴⁶

It is easy to accept Sugarman's view that some level of subsistence and medical care should be provided regardless of the victim's own fault. To let the needy starve, even when they have precipitated their

44. See Note, *Legislative Limits on Medical Malpractice Claims: The Chances of Survival*, 37 MERCER L. REV. 1583 (1986); Note, *The Constitutionality of Florida's Cap on Noneconomic Damages in the Tort Reform and Insurance Act of 1986*, 39 U. FLA. L. REV. 157 (1987).

45. Calabresi & Klevorick, *Four Tests for Liability in Torts*, 14 J. LEG. STUD. 585, 587-91 (1985); see also S. SHAVELL, *supra* note 41, at 1, 5.

46. See 1 A. LARSON, *supra* note 39, at 6-1 through 6-67.

own needs, would be inhumane. It might also drive them into the underground economy, where they could live on crime.

But humanitarians who favor the compensation of even the negligent may still see some need for penalizing contributory fault. They may be reluctant to see claimants recovering compensation for pain and suffering (which would be allowed under SFS) to which claimants have contributed by their own fault, or to see faulty claimants collecting punitive damages (which Sugarman would allow even under CCS) from defendants who are no more faulty than themselves.

iii. The squeeze-out of private insurance. Sugarman's plan would have the effect of moving a good deal of benefit administration from the private insurance industry to an expanded public system of social welfare. This shift would be most marked in relation to work injuries, which are currently compensated by insurers for long periods of disability. In this respect, Sugarman's proposals differ from Keeton's and O'Connell's Basic Protection,⁴⁷ under which insurance companies would simply shift their activities from paying on a fault basis to paying on a no-fault basis.

This shift of activity would antagonize not only the private insurance industry, but also a wider public who would see it as the nose of the socialist camel in the business tent. It might be opposed even by observers who are neutral between private and public enterprise, but who would think it wasteful to create new government facilities and staffs to perform functions that private insurance agencies are already performing.

The acceptability of Sugarman's proposals therefore depends on the swing of public favor between public or private administration of benefit programs.

iv. The squeeze on lawyers. The lawyers who would oppose CCS would include not only the specialists in personal injury law, but also most general practitioners, to whom the chance of sometime picking up a big personal injury case is their best hope for opulence. Although these lawyers lost a few battles over no-fault, they have subsequently organized and blocked any further expansion of that concept.

There are, to be sure, lawyers who would see advantages to society or to corporate clients in cutting out damage suits, at least if the plan were modified to preserve the business of insurance companies. But these lawyers are far outnumbered by the general practitioners and the tort specialists. The recent report of an American Bar Association committee,⁴⁸ which supported the preservation of personal injury tort law without even the limits suggested by the Attorney General's

47. R. KEETON & J. O'CONNELL, *supra* note 2.

48. ABA COMMITTEE, *supra* note 35.

Working Group,⁴⁹ is a good indication of the position of the organized bar.

In the 1970s, no-fault advocates prevailed over the bar in some states by winning the support of a consumer movement that was more militant than it is today, of a sector of the insurance industry, and of both labor and management in the automobile industry. But the subsequent mobilization of the bar, which stalled no-fault in the 1980s, seems likely to block Sugarman's proposals in the 1990s.

2. *The Substantial First Step (SFS)*

Since Sugarman's Substantial First Step proposes a less complete revolution than his Comprehensive Compensation Strategy, it appears to have some advantage over CCS in acceptability.

Unlike CCS, SFS would preserve substantial private incentives for safety practices. The tort actions that survive would keep individuals and enterprises aware of the liability threat. These actions would also provide a demonstration of society's condemnation of risk-enhancing behavior.

By preserving a role for insurance companies and lawyers, SFS would weaken the appeal of these groups to public opinion. Although voters are not prepared to dispense with attorneys and private underwriters, they are quite ready to believe that lawyers and insurance companies are getting "too much." The authorization of attorneys' fees would palliate the indignation of the organized bar and dull voters' receptivity to lawyers' complaints.

The "collateral sources" that would dispense a good deal of the compensation under SFS are less afflicted with structural weakness than Sugarman's expanded social welfare system would be. The administrators of disability insurance, for example, have a professional interest in controlling the costs of their program which might not exist among administrators of a universal welfare system like the one Sugarman proposes.

There is a fair chance that SFS might overcome the inertia that stalled adoption of no-fault automobile proposals in the past decade by offering reductions in liability to a wider circle of defendants. These reductions might be partially offset by the proposed increases in health insurance, sick leave, and disability benefits, but the public (other than successful damage claimants) would probably gain because most of the collateral source compensation is already being paid. The savings would come from reducing duplication.

V. HOW DO WE GET THERE?

If Sugarman's plans could be made to work as designed, they

49. WORKING GROUP REPORT, *supra* note 36.

would create a society that would not only be kinder and gentler to the unfortunate, but would also free the income of the fortunate from the drain of costly litigation. Although the attainability of these goals is problematic, they seem worth the risks of social experimentation.

Any such experimentation would, however, face formidable opposition. Sugarman does not tell us how this opposition is to be overcome. He tenders none of the rousers like O'Connell's *Blame Game*⁵⁰ and *Lawsuit Lottery*⁵¹ to inspire activists. He does not even present tables or charts to make his points more visual.

Readers who are intrigued by Sugarman's goals will probably be asking themselves how society could be moved closer to the end-zone. I offer here some of the thoughts that have crossed my mind as I pondered this problem.

1. *Denouncing Double-Dipping*

One of tort law's most vulnerable vices is the principle that is known to lawyers as the "collateral source rule," but is little known by any name to anyone else. It is the rule that lets injury victims collect damages for lost wages and medical expenses even when those expenses have already been compensated, or will be compensated, by other sources such as workers' compensation, group health insurance, and OASDI.

A powerful coalition could be organized to attack the rule. But first, the rule would have to be given a name more easily grasped by the public, like "double-dipping." Motorists, whose voting power was demonstrated in the recent California referendum on insurance premium reductions,⁵² could be promised a substantial reduction in premiums if damages were reduced by collateral sources. Merchants and manufacturers would gain by a lowering of judgments for product liability.

Defendants' gain would not be confined to the arithmetical advantage of subtracting collateral benefits from the jury's estimate of gross loss. In many cases, defendants would gain also by reducing the jury's estimate of gross loss, because jurors would no longer visualize injured claimants as destitute paupers; they would see them rather as suitors who are no worse off than the jurors themselves, but are grasping for an extra slice of the welfare pie.

50. J. O'CONNELL & C.B. KELLY, *supra* note 30.

51. J. O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* (1979).

52. See Cal. Ins. Code § 1861.01 (West Supp. 1989) (containing the language of Proposition 103, approved Nov. 8, 1988); see also *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989); Stevenson, *California Court Delays Cuts by Voters in Insurance Rates*, N.Y. Times, Nov. 11, 1988, at 1, col. A1.

2. *Revealing Who Pays and How Much*

Trials, appeals, political debates, and even academic discussions⁵³ of injury compensation are conducted in front of a looking glass that reflects only the needs of the claimant and conceals the people behind the mirror who will pay the bill. No evidence and no argument is admitted about whose pockets will be tapped for the millions of dollars that the jury may assess against the nominal defendant,⁵⁴ nor about the disparity between what is paid by the contributors and what is received by beneficiaries.

In economic fact, most damage awards are shifted through various mechanisms, and eventually borne by the innocent public, much like taxes.⁵⁵ Damages assessed against individual motorists are shifted via insurance to large classes of automobile owners, differentiated by factors such as their neighborhoods of residence and drivers' ages. Damages assessed against manufacturers and merchants are shifted to consumers via higher prices, or to the taxpaying public by way of deductions from the taxable incomes of manufacturers and merchants. Moreover, the amount that the public pays is approximately twice what the injury victims receive because of the costs of investigation, litigation, and insurance administration.⁵⁶

From a welfare perspective, the merits of paying a million dollars to an accident victim, whether viewed in terms of intuitive justice or economic optimality, depends on who ultimately pays, and how much.⁵⁷ If juries are to make just decisions about shifting wealth, they

53. See, e.g., S. SHAVELL, *supra* note 41, at 1, 5; Calabresi & Klevorick, *supra* note 45.

54. For the general rule on the inadmissibility of evidence of either defendants' or plaintiffs' insurance, see 2 J. WEINSTEIN, *WEINSTEIN'S EVIDENCE* ¶ 411[01] (1989); cf. *Arnold v. Eastern Airlines*, 712 F.2d 899 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (reversing a judgment because of counsel's oral argument on defendant corporation's wealth) (content of the argument described in *Arnold v. Eastern Airlines*, 681 F.2d 186, 196 (4th Cir. 1982)).

For the impropriety of arguing that awards are reflected in insurance premiums, see *Finney v. G.C. Murphy*, 400 Pa. 46, 49-50, 161 A.2d 385, 387 (citing defense counsel's argument on this subject as an alternate ground for reversal). Cf. *Hoover v. Gregory*, 253 N.C. 452, 117 S.E.2d 395 (1960) (holding that no harm was done by judge's instructing jury to disregard effect of verdict on insurance premiums).

55. See P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 3-5 (1988).

56. For a compilation and analysis of data from various surveys, see J. KAKALIK & N. PACE, *supra* note 5, at x-xiv, 66-76.

57. On the intuitive level, there seems to be no welfare gain in requiring individuals with incomes of \$20,000 to compensate losses suffered by individuals with incomes of \$40,000, unless the losses of the latter reduce them to the level of the former. Even among individuals with equal incomes, there is no obvious gain in requiring the uninjured members to contribute a total of \$2000 to compensate an injured member for a \$1000 loss, which would enrich the injured member less than it would impoverish the contributors, in the aggregate.

On the plane of economic optimality, the case for compensation through a system that costs twice as much as it delivers is even more problematic. The total wealth of the injureds and the injurers is reduced when the latter pay \$2000 in order to give the former \$1000. The system

should know *from* whom, as well as *to* whom, they are shifting it, and the approximate ratio of benefits to burdens.

A possible tactic for promoting recognition of who really pays for personal injury compensation would be to admit in injury trials evidence and argument about who ultimately pays the bill and about the ratio between costs and benefits. Although insurers have traditionally opposed disclosing the fact of a defendant's insurance, they might find it advantageous if they could also disclose who pays in the end, and how much. Admitting this kind of evidence would prolong and complicate trials, but it is as relevant to a just solution as evidence on a claimant's anatomy, physiology, and prospective future earnings.

A proposal to admit these considerations in lawsuits would require a long campaign of public education, but the campaign itself would serve to educate voters and jurors on the realities of who pays what for injury compensation.

3. *Punishing the Perpetrators*

If the charade of assessing big damage awards against tortfeasors is abolished by the adoption of Sugarman's proposals, the importance of imposing real penalties for real fault should be intensified. Rather than putting a cap on punitive damages, as Sugarman proposes, punitive damages should be made truly punitive by assessing them against individuals, rather than corporations, and by forbidding anyone to insure or indemnify defendants against punitive liability. In order to restrain juries from assessing millions of dollars to express the depth of their indignation, they should be told that the damages are uninsurable and that defendants will have to pay punitive damages from their own pockets. This device would preserve the law's function in condemning wrongdoing while reducing the temptation for jurors to play Robin Hood by awarding "punitive" damages that will not cost a penny to the individuals who erred.

Claimants who have contributed to their own misfortunes could also be penalized without impoverishing them by diminishing their claims for punitive damages or for compensation for pain and suffering. Preserving the role of contributory fault in awards of these kinds would honor the law's functions of relating awards to deserts, and of demonstrating society's disapproval of risky practices of victims as well as of tortfeasors.

appears to be optimal only in cases where the loss of the injured, if uncompensated, will be multiplied by continued disability, unless one regards benefits to lawyers as a social objective.

Cf. Priest, *Understanding the Liability Crisis*, in *NEW DIRECTIONS IN LIABILITY LAW* 196, 210-11 (W. Olson ed. 1988) ("In effect, the system forces those with low incomes to subsidize the insurance costs of those with high incomes."). See also observations of S. SHAVELL, *supra* note 41, at 266, on "socially undesirable claims."

4. *Conserving the Services of the Insurance Industry*

Sugarman's plan could be modestly revised to keep insurance companies in the business of handling a volume of benefits similar to what they now handle under workers' compensation and health insurance. The primary merit of this step is its economy. It would avoid the expense of creating a new pool of personnel, office buildings, and computers to replace an existing pool of people and facilities.

On the political level, this amendment would disarm the skeptics who doubt that governmental agencies can operate as efficiently as private ones, and might mollify the powerful insurance industry.

5. *Promoting Class Suits for Safety*

Although Sugarman's plans are oriented toward welfare, they will fail to attract the support of safety advocates if they rely exclusively on the diligence of government bureaus to suppress dangerous activities. When individual claims have lost their sting, the law should authorize class suits for injunctive relief on behalf of potential injury victims, like miners, hospital patients, or automobile travelers (against trucks), in which attorneys fees' would be assessed against enterprises that disregard safety measures.

This device would provide a second line of defense against risks that government officials may ignore, like the poisoning of the environment around military defense facilities.⁵⁸

6. *Justifying the Lawyer Squeeze-out*

One of the toughest tasks in selling the Sugarman agenda will be persuading the public to dispense with the lawsuits that they have learned to regard as the prime instrument for compensating the innocent and punishing the guilty. The argument that lawsuits have a high expense ratio is unconvincing to voters because they do not perceive that they are the ones who pay the bill.

In order to make an effective appeal for a compensation system that bypasses lawyers, voters would have to be persuaded that they would save a lot on liability insurance that would not be offset by additions to their social welfare taxes. They would need to be shown that a big share of compensation can be dispensed more quickly and more cheaply in no-fault systems than through tort law.

In order to make an effective appeal on the basis of cost reduction, a viable CCS should not expand the classes of social welfare beneficiaries very far beyond those that now qualify under the cause-con-

58. See Finamore, *supra* note 41, at 87 (listing areas of potential government mismanagement); Schneider, *supra* note 41 (detailing radiation exposure to workers at weapons testing ground). For an analysis of the risk-reducing incentives of private suits, see Gillette & Krier, *Risk, Courts, and Agencies*, 139 U. PA. L. REV. (forthcoming 1990).

nected programs such as those for the aged, the disabled, the laid-off, and parents of dependent children. The humanitarian goal of helping the neglected needy will not win as many votes as savings on insurance premiums. The broadening of the social security net may be a desirable objective, but hitching it to the attack on tort law is likely to defeat both objectives.

CONCLUSION

During the 1990s, scholars and legislators will confront a passel of proposals to "reform" personal injury law. The flood of tort law modifications, which reached every state in the 1980s, gives proof of a tide of dissatisfaction that has not reached its apogee.

Most of the reform proposals will tinker with specific problems, like collateral sources in medical malpractice cases, or the magnitude of awards for pain and suffering, or the levels of insurance premiums. If adopted, these proposals will complicate the crazy-quilt of tort law without relieving the problems of delay, expense, undercompensation, and overcompensation.

In contrast with these patchwork repairs, Sugarman has offered a bold, well-articulated plan for extricating society by stages from the injustices and the waste of personal injury compensation under tort law. His work challenges scholars and legislators to replace atomistic revisions with a comprehensive and consistent plan for compensating needs of many kinds, while preserving incentives to avoid the creation of needs. Reformers and anti-reformers of the 1990s should be prepared to justify their projects as steps toward some goal as comprehensive and as fair as Sugarman's.