PETER A. BELL

JEFFREY O'CONNELL

Accidental Justice

The Dilemmas of Tort Law

Yale University Press New Haven and London

CONTEMPORARY LAW SERIES

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To Dylan and Eamon Duke and Virginia Mae O'Connell, the future;
and to William Henry and Natalie Barry Bell, the foundation

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PREFACE

We have tried not to slant this book toward our own individual (and sometimes differing) opinions. As least we have not proselytized nearly as strongly as each of us has done in our individual writings. Rather, we have jointly sought to present and explain, reasonably fully, a spectrum of our own and other viewpoints under one cover. Thus, although we have not presented matters that we judged to be clearly wrong, we have included presentations of viewpoints with which one or both of us may disagree. We have further presumed on the whole that the proponents of divergent opinions are sincere in those views. This reflects not only our judgment but our belief that the merits of ideas are normally better understood free from attacks on the integrity of those presenting them. We have nonetheless tried to alert the reader to the interests of both tort law's adherents and its critics in their debates. In that connection, obviously it is not always easy to discern the extent to which various positions are the product of self-interest as opposed to conviction.

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INTRODUCTION

The best-selling author Stephen King would find himself quite at home in the world of tort law. It is replete with horror stories.

The stories are not all blood and guts—poisoned towns, incinerated motorists, mangled babies. In fact, much of the horror of tort law that Americans have heard about recently has come from legal machinery run amok. The stories are familiar: a drunk falls in front of a subway train and emerges with a $9 million judgment against the transit authority; a heart attack victim takes Sears and Roebuck to court for producing an overly difficult pull-start on its power mower; a criminal intruder recovers thousands of dollars after falling through a school skylight; a woman wins a huge judgment against McDonald's after being scalded by coffee spilled from a container while she tried to add cream and sugar.

More recently, books, articles, and full-page advertisements have trumpeted an even louder note of woe. Tort law, it is argued, imposes a hidden tax on the goods and services we all consume, a tax that adds significantly to the price of some products. Moreover, thanks to tort law, some valuable products are never developed, useful producers go out of—or never go into—business, and America's competitive edge further erodes.

Although there is considerable debate about tort law's responsibility for the foregoing catastrophes, there is none at all about the basic and continual horror story, told repeatedly in tort cases. Tort law, after all, is the law that determines the circumstances in which persons or businesses will be judged responsible to pay money to compensate other persons for their injuries. Its story is often one of

bodies maimed, of spirits scarred or broken, and of lives extinguished. These have ever been life's tragedies from which we have always tried to protect ourselves.

Tort law purports to turn its corrective eye toward these events when there is at least an allegedly external cause. Birth defects devastate whole lives and families. But tort law is for the most part initially passive. It stays out of the nursery until someone singles out the maker of a drug, like thalidomide, as having improperly provided a drug to expectant mothers that ultimately caused those defects. Millions of people, a Harvard study suggests, leave hospitals needlessly injured, dying, or dead as a result of their stay. Tort law isn't normally activated until someone points to specific improper medical care, rather than just to some disease or trauma, as the cause of that condition.

Today's horror stories echo those involving tort since at least the beginning of the Industrial Revolution. According to one theory of legal history, in medieval times, when accidental injuries inflicted by strangers were much less common, tort law lined up on the side of the victim. If someone directly injured a person by his actions, the injured person was entitled to bring a tort lawsuit and recover money damages. Proof of wrongdoing was unnecessary: "If a man assaults me, and I lift up my staff to defend myself, and in lifting it up hit another, an action for claim lies by that person and yet I did a lawful thing. And the reason . . . is because he that was damaged ought to be recompensed."[1]

Paradoxically, when accidental injuries proliferated during the Industrial Revolution, tort law's protection beat a retreat. Victims of railroads and the other awkwardly developing industries of the times found that tort law now insisted they could not recover compensation for injuries unless they first proved that the injurer had acted unreasonably. Why the change? According to traditional legal theory, to protect the nineteenth century's burgeoning entrepreneurial activity.

A tension had arisen that continues to play out in tort law today: between the desire, on the one hand, to compensate injured people

and to deter injury-causing conduct and the fear, on the other, of discouraging useful activities.

That tension has made itself felt in successive waves of tort litigation for more than 150 years. The first wave involved the workers of the United States' infant industries, brushed aside almost as rudely in the tort system as they were in the socioeconomic system. The labor reform movements around the turn of the century were reflected in increasing (but erratic) tort success by injured workers, and, ultimately, by the creation of workers' compensation systems. Workers' compensation removed worker injuries from tort law and allowed for their reparation (at significantly reduced dollar levels) without any need for the worker to prove his employer at fault.

Other classes of injuries encountered similar early resistance in tort law. Like workplace accidents, a second great wave—automobile accidents—tended to expose tort litigation as slow, expensive, erratic, and often inequitable in its process of compensating the injured. The result has been pressure to turn to no-fault schemes, which—like workers' compensation—would bypass tort litigation. Automobile accident law already has no-fault elements in about a third of the states.

When automobile accidents led to claims against the manufacturer of the car, such products liability tort suits, along with those for medical malpractice, became the dramatic tort wave of the modern era. Unlike typical car crash injuries, which give rise to lawsuits between ordinary citizens, these injuries threatened the livelihoods of influential institutions and persons—product manufacturers and health care providers—whose activities often led to injury.

Not surprisingly, efforts are afoot at federal and state levels to curb especially medical malpractice and products liability tort litigation. With respect to these kinds of accidents, the ever-increasing financial stakes have raised the decibel levels in the arguments between adherents and critics of the present tort system.

That cacophony has approached the level of a victim's scream with the newest wave of tort lawsuits, those involving injuries—including diseases like cancer—purportedly stemming from toxins

in the environment. A logical outgrowth of the environmental movement of the past twenty years, mass toxic tort lawsuits have paraded an even grimmer set of horrors onto the torts stage. Such suits confront us with stealthy but deadly maladies on a massive scale—and threaten the destruction of entire industries, sometimes victimized, it is argued, by greedy lawyers grossly exaggerating clients' condition. They also show woefully slow and inequitable, awesomely expensive and unpleasant tort machinery chewing away on both victim and those accused of causing the victim's condition.

This book is the story of these horrors, of tort law's response to them, and of tort law's paradoxical role in both avoiding—and creating—other horrors in its often clumsy effort to correct the first horror thrust onto the lives of victims of accidents and ailments.[2]

ACCIDENTAL JUSTICE

CHAPTER ONE

How Tort Law Works

Horrors visit us all. They come any day. Howard Young and his family were visited on a Tuesday.

It was an unremarkable Tuesday for most people, even for most other suburban lawyers rising early to dress and breakfast with minds on the 8:12 or the 8:23 train into the city. Not so for Howard Young. Tension crackled throughout his modest suburban home with the fitfulness and compressed fury of an electronic bug zapper. Upstairs, Howard's wife, Nicole, changed two-year-old Laura, who showed little of her customary playfulness. Elissa, eight, dressed attentively in her brightly bordered bedroom, with barely a nod at the Yamaha keyboard that usually lured her from the morning schedule.

Howard was the source of the storm clouds darkening the family's moods. He had been a smashing success at every academic endeavor set before him, but at thirty-one Howard was feeling the approach of failure. It wasn't there yet. He didn't really see it. Nonetheless, the apprehension was familiar—and palpable. Although failure had never actually touched Howard, its threat had haunted much of his uncluttered life—from Little League baseball and school recitals through the seemingly endless tests of college and law school right up to the state bar exam and his first six months as an associate at Plimpton, Beane and Ballantine, nearly five years ago.

Failure loomed again this Tuesday: Howard feared that he might lose his big case and maybe even his job. An irascible, unpredictable judge awaited him at court. Howard had convinced his law firm to take on the discrimination case, and he had invested thousands of working hours and tens of thousands of the firm's dollars in it, and

now the judge seemed ready to throw it out. Howard well understood how his firm would view the dismissal of such a costly suit, particularly in this time of declining revenues. And he was all too aware that Plimpton, Beane had begun selective downsizing, beginning with "less productive" associates.

Do a bad job in court, Howard told himself, and your carefully built pyramid of success could sink into the sand.

But first he had to fix breakfast for Laura and Elissa. Elissa's lunch had to be packed, coffee brewed, the dog fed. The morning ritual and his children's arrival in the kitchen brought Howard emotionally back to them, and before the morning's parting, the Youngs exchanged warm if hurried embraces all around.

After those farewells, Howard Young's Tuesday wound ever tighter until it unraveled completely. On the train into the city, he wrote, crossed out, and wrote more notes on a smudged legal pad. The scribbles were more hasty and turned more scribbly as he neared the station's imposing halls. The march to his office, last-minute arrangements with his secretary, and cab ride to court with his clients and senior partner were a background blur as Howard's mind continued to race through his case's legal labyrinth, looking for the exit.

Things went as badly as he had feared. The judge arrived straight from hell. He was abusive, disdainful—and he dismissed the case. Howard was trampled. In the numb haze that surrounded him after the judge's curt ruling, Howard saw himself tending to his clients, coolly discussing the judge's misconduct and the grounds for appeal with the senior partner, and, back in his office, meticulously filing all the notes, cases, and other relevant documents on a forever afternoon. On the two occasions when he had to go out of his office, he perceived in the averted eyes of other lawyers his own growing invisibility. He couldn't make himself leave the office early. He grasped at routine to keep him afloat.

When leaving finally seemed permissible, no destination offered. His mind, firing off random, disconnected thoughts, insisted that he could not go home. He stopped at a bar. He drank, slowly, solemnly,

alone. Gradually, his mind relaxed its sputtering and resumed more comfortable patterns of thought. He would not go home that night because he could not look as painfully into the depths of his own inadequacy as the presence of his dependents would require. He called Nicole and explained. She was concerned. He reassured her; he would stay overnight uptown with his law school roommate.

Howard returned to his small table. He ate occasionally the free hors d'oeuvres and gazed at the changing clientele. When Howard left the bar he actually felt better.

But it quickly became apparent that he was not better at negotiating the hard realities of the world. That world insisted, despite his slow imbibing and his perfunctory eating, that he was drunk. It set out to prove its point with a series of rolling sidewalks, sharply angled curbs, and indecipherable signs. Howard finally located the subway station, but he stumbled and twisted his ankle as he struggled down stairs to the uptown platform.

Feeling unsteady and a little nauseated, Howard leaned heavily against a girder. He tried to quiet his racing heart and heavy breathing, so as not to attract attention from the half-dozen people nearby on the platform. He waited. He waited so long that he began to worry that the subway had short-circuited. Twice he thought he heard the train coming, but nothing materialized. Howard worried more.

When he finally heard train sounds in the tunnel, Howard tottered to the platform edge and tried to see down the track. He saw only darkness. Cautiously, he put a foot closer to the edge. In so doing, he pushed on his twisted ankle. He felt sudden pain, lost his balance, and fell. Howard landed hard, on his back, in the middle of the track. He looked up, hurt and surprised. The people on the platform seemed far away, and so uninterested that Howard almost forgot he was in any danger. People looked at him, then looked away.

Howard's forgetfulness lasted only a few moments. In that time, the faint tunnel noises he had heard grew into a real train, racing into the station. Transfixed by his impending doom, Howard did no more than cover his face when the sudden shriek of brakes signaled

the train driver's panic. The train knocked Howard against the side wall, then struck him again and dragged him thirty-five feet before coming to a stop. Horror had arrived.

Howard Young did not die.[1] At times, he wished he had. His spinal cord severed, Howard never regained the use of his legs. Burned about the head and upper body by contact with the electrified third rail, he remained horribly scarred even after a series of painful skin grafts to rebuild his face. Comatose for three days as a result of brain injuries, Howard awoke to a life of significantly diminished mental capacities. He could no longer concentrate for extended periods. His prized ability to pick up complex concepts quickly and easily had been replaced with a sluggish, groping tenacity, but he could manage only limited understanding of anything complex.

Remarkably, there was no damage to Howard's emotional faculties. That was a mixed blessing. He could feel the love of his family and friends and the encouragement of the doctors, nurses, and rehabilitation counselors who dominated his life for the next four months. But he could also feel the sadness and desperation of Nicole and his young daughters as they struggled to adjust to a world without his physical and emotional support. For a long time, little Laura was afraid of him, disfigured as he was. Elissa found herself in a new role, which she described to a friend in a time of frustration as being a "maid." Nicole, in effect now a single parent with three children, entered the exhausting world of constant obligation. Howard had little to give back to anyone emotionally, struggling as he was to cope with his feeling of complete inadequacy, his pain, and the role of the disabled that had been thrust on him.

Financially, the Youngs' situation was not as desperate in the first year after the accident as it might have been. Things were certainly tight, though. In spite of Howard's unusually good health insurance, provided through his law firm, the Youngs still had to pay nearly $40,000 from their savings for their share of the medical, rehabilitation, and maintenance expenses. That nearly exhausted their financial reserves, but their standard of living remained about the same

because the law firm voluntarily paid Howard's full $150,000 salary for a year after the injury.

Nicole, however, was acutely aware that once that year's grace ended, the bottom would fall out. Howard, like most people, had no disability insurance to replace the loss of income for longer than six months.[2] It was clear that he could never return to the legal profession and that it would be a long time before he could hold any sort of job outside the home. Social Security disability insurance payments would replace only about $20,000 of his income. Nicole might be able to find work as an editor or technical writer, but the $20,000–25,000 from such a job would be reduced by $7,000–12,000 for child and home health care. Their net incomes could not possibly pay for the medical procedures and rehabilitation recommended by Howard's doctor for the next five years. Poverty loomed.

Financial help with the consequences of accidents sometimes comes from the law of accidents: tort law. Even in accidents that at first blush seem the victim's fault—like Howard Young's—further investigation may reveal circumstances that permit the victim to gain at least partial compensation for his injuries.[3]

For the victim of an accident, embarking on a tort lawsuit is no simple matter, however. If someone is having a baby, Dy-Dee Diaper Service learns of it through obstetricians or hospitals, and the company solicits business by mailing forms and information about diapers well before the baby's birth. No such system exists for accident victims. In fact, any lawyer trying to employ such a system would violate her state's rules of professional conduct.

This doesn't mean that lawyers who commonly represent injured persons fade into invisibility. Advertising—as well as attitudes toward it—has changed radically in the past twenty years. Lawyers once regarded it as undignified and improper to advertise their services. A lawyer, after all, was a professional; professionals' services differed from consumer products like children's cereals, triple-track windshield wipers, and personal-care beautifiers. The public should be informed of such services in a dignified manner, at most a listing in the Yellow Pages.

Lawyers' attitudes, like the times, have changed. These changes have been particularly pronounced among lawyers who regularly represent the injured in tort lawsuits—the plaintiffs' torts bar. Perhaps these lawyers, more than most, need advertising to reach potential clients. The clientele of such lawyers are the Nicole and Howard Youngs of the world, although usually less well educated and certainly less legally sophisticated than the Youngs.

Such clients are not like the businesses that provide the work for most lawyers. Unaccustomed to using lawyers, these clients don't have regular access to a network that can tell them what lawyers do and which lawyers are good. Often they won't have any idea that a lawyer could be helpful to them in their situation. So the plaintiffs' lawyer has reached out to make injury victims aware of her useful services and also of her advantages over other lawyers.

Most persons with valid tort claims, however, still do not seek out a lawyer. Recent studies indicate that fewer than one in five victims of another's negligence claim for compensation. A higher ratio of those injured in road and workplace accidents may claim, but even there, fewer than half do so.[4]

That Howard and Nicole Young did make a claim was a product of circumstance and luck. Howard was, after all, a lawyer. That meant that many of his closest friends were lawyers. Among them was Jack Wilkes, the law school roommate he was on his way to visit when he was crushed by the train. Jack happened to be one of those friends whom horror does not drive away. Jack also happened to be curious. In the course of his visits to Howard at the hospital and at his suburban home, Jack became quite interested in finding out exactly what had happened at the subway station. He had Howard's somewhat hazy recollections of the events, but Jack wanted to know more, to figure out why the train did not stop, why no one had helped his fallen friend.

What Jack found out, simply by knowing what and whom to ask, led Howard and Nicole to a tort lawyer. Jack knew that the Transit Authority police would have written a report about the accident that nearly killed Howard Young. Jack knew to call the Transit

Authority's office of legal counsel. From them, he learned that anyone injured in a subway accident could receive a copy of the accident report simply by requesting it in writing. Jack drafted such a letter and had Howard sign it; within four weeks, a copy of the report came back.

The report confirmed the basic events much as Howard remembered them. Witnesses on the platform recalled that Howard had been unsteady in his movements, obviously drunk, and leaning against a girder until the time he moved forward to look for the train. Witnesses reported that Howard had lain on the track from one to three minutes between the time he fell and the time he was struck. The report named five people who had been standing near enough to Howard to have possibly helped him after he fell.

Most interesting, the report indicated, through the statements of witnesses and based on observations, including the screech of brakes, that the train may have been going faster than permitted by Transit Authority guidelines. The report also contained a statement from the train's motorman that he had been trying to make up time lost due to a malfunctioning door; he had not seen Howard on the tracks when he first entered the station because he had turned away to close the cab door, which was ajar.

Nicole did not know what to make of the report, and Howard could not pay attention to it long enough to draw significant inferences. Jack, however, read the report as a clear signal that Howard's injury was not simply the result of his drunken foolishness. It was also the product of the unreasonable actions and inactions—the negligence—of other people. Jack suggested to Howard and Nicole that they might find the financial help they desperately needed in a tort lawsuit against those who could have prevented Howard's injuries if they had only acted with reasonable care.

Finding a lawyer was not the pin-the-tail-on-the-donkey process for Howard and Nicole that it is for most injury victims who finally decide to consult one. They did not have to rely on the Yellow Pages, the subway or TV ads, or some second cousin's one-shot experience with a lawyer (perhaps on something as unrelated as a real estate

closing). Although Howard was too embarrassed to let anyone in his old firm know that he might bring a lawsuit for injuries that were so obviously his own fault, Jack had no qualms about asking litigator friends for recommendations. Wary of the reputation of plaintiffs' lawyers as sharks, Jack especially requested his friends to recommend a lawyer who would treat Howard and Nicole as full human beings, as well as be able to extract as much money as possible out of those who shared responsibility for Howard's injuries.

The plaintiffs' lawyer whom the suffering Youngs finally visited in May, nearly eight months after the accident, was Pamela Jane Cowcroft. P.J., as she was known, was a thirty-six-year-old partner in a ten-lawyer suburban law firm that specialized in representing injured persons making workers' compensation and tort claims.

P.J. had been introduced to the excitement of trying cases in her second year of law school. In mock trial competitions there, and in nine years of law practice thereafter, P.J. had developed and tried nearly fifty cases. She found that law came alive in the context of people's injury claims. Merely mediocre at the doctrinal regurgitation and theoretical dabbling that law school exams required, P.J. excelled at fitting her clients' injury stories into the pigeonholes that tort law demanded. She superbly communicated with juries about the wrongdoings of others and their effects on her clients.

It didn't cost the Youngs a penny up front to talk with P.J. about their possible claim. In fact, P.J. made it clear to them from the outset that they would not have to pay anything out of their increasingly empty pockets for her legal help. She had already read the accident report sent her by Jack Wilkes. She listened attentively to the Youngs as they told her what had happened on the night of the accident and what had happened to their lives as a result. P.J. told the Youngs that she and her associate would need to do a little more checking on the matter and that she would let them know in a week whether she would take their case.

During that week, P. J. Cowcroft and her law firm went through a decision-making process unique to personal injury lawyers. Most

lawyers, when approached by a client seeking representation, need only decide whether the potential client can pay their bills. Although these lawyers may believe that they should indicate the likely outcome to the client, they often are financially indifferent to that outcome. But they do tell the client what he can expect to pay for representation. The plaintiffs' personal injury lawyer, by contrast, must quickly make careful, reliable predictions about the likely outcome of her client's case. She has to make that forecast skillfully, because if the client loses, the lawyer will not be paid. And even if the client wins, the amount recovered may not be enough to justify her time and effort.

Plaintiffs' tort lawyers represent injured persons on a contingency fee basis; the lawyer's receipt of her fee depends entirely on the client's receipt of money for his injuries. Accordingly, P.J. and the other lawyers in her firm had to quickly and carefully examine the Youngs' situation, through the eyes of the judge and jury who might eventually decide the merits of their case, and through the eyes of the potential defendants or their insurers who would decide whether and in what amount to offer a settlement.

That P.J.'s firm gives this sort of hard look at a client's situation before agreeing to represent him is one of the major implications of the contingency fee system by which the injured receive representation in tort cases. The contingency fee method has plaintiffs' lawyers act as gatekeepers for the tort system. An injured person whose claim has insufficient merit will not—or should not—get his foot in the tort law door because he will be unable to find a reputable lawyer to represent him. The lawyer is said to put her money where her mouth is.

The correlative of the contingency fee method is that adequate legal representation can be available regardless of income. A person injured under circumstances that probably will entitle him to sufficient compensation will be able to get a lawyer to represent him if he wants one. This is so even though lawyers representing a client on a contingency fee basis are supposed to charge that client for the costs of bringing such a suit. These costs do not include attorneys'

fees but do include such expensive items as photocopying, the fees of expert witnesses, the high price of obtaining information in formal legal proceedings before a trial, and attorneys' travel. But most injured people who lose a tort lawsuit will not have enough money to cover these expenses, which can range from less than a thousand dollars in simple matters to more than a million dollars in complicated litigation. So most of the time, lawyers simply do not collect for such expenses if the case is lost.

Like all free lunches, the contingency fee system does have costs. Prime among them is the size of the lawyer's fee when the injury victim is finally compensated. Typically, the lawyer takes 25–40 percent of that payment in fees, a percentage agreed to at the outset by lawyer and client. P. J. Cowcroft would take back to her firm $33,000 or more out of every $100,000 a defendant paid the Youngs. She would admit that settling or winning tort cases for persons seriously injured, like Howard Young, results in lucrative fees for her and her firm. She would argue, however, that such is the price injury victims must pay for the security of ready access to legal help provided by the contingency fee: a system that pays lawyers nothing when their client loses a case must pay them a handsome amount when the client wins. Otherwise, capable lawyers would have insufficient incentive to practice personal injury law.

These same economic considerations also mean that the contingency fee closes the door to the courts for many people even if they have valid tort claims. Many plaintiffs' tort lawyers will not represent a claimant in a products liability or medical malpractice case—the two most common kinds of litigated tort cases—unless the client has injury claims worth more than $100,000. The costs, in lawyers' time and litigation expenses, are simply too great for it to be financially worthwhile. This means that many persons with significant but not crushing injuries will not be able to get a lawyer, even if the law would eventually grant them compensation.

Moreover, it means that entities that often find themselves as defendants in tort lawsuits—such as major businesses and insurance companies—can influence the access of injured persons to the tort system. To the extent that such defendants can make a tort lawsuit time-consuming and expensive, they can reduce the number of persons who will be able to sue them. The more time and money a plaintiffs' lawyer must lay out to win a tort suit, the greater the injury a person must suffer before a plaintiffs' lawyer can afford to represent him.

Many people, however, like Howard Young and his family, have been so tragically injured that if they can be successful in a tort claim, they undoubtedly will receive enough money to make it worthwhile for a capable plaintiffs' law firm to put its resources into the case. In the Youngs' case, the decision comes down to the two basic questions that faced P. J. Cowcroft's firm: what are the chances that the Youngs will be successful in their legal claim, and will the person or persons against whom they succeed be able to pay the amount awarded by the court?

To answer these questions, P.J. first had to determine which persons or entities might be liable for the Youngs' injuries. She identified them as (1) the witnesses who stood on the subway platform after Howard fell, (2) the driver of the train, and (3) the Transit Authority. P.J. discarded other possible defendants as not worth suing. (The bar that had served Howard Young had gone bankrupt and hadn't carried insurance.)

She then had to determine what the Youngs' "causes of action" might be. That meant identifying the rules of tort law that each defendant might have violated, and under which a court would hold him or it liable to pay compensation. Likewise, it meant identifying the injuries to each of the four Youngs that a court would find deserving of compensation.

P.J. readily identified the broken tort rules as being in the category of negligence. Simply put, negligence law essentially requires someone who acts unreasonably to compensate persons who are thereby injured. In the Youngs' case, P.J. prepared to write a short formal document, called a complaint, to be given to (or "served on") each of the potentially liable persons and entities and then presented to the court if a lawsuit were formally started.

The complaint might say the witnesses acted unreasonably by not reaching down to offer Howard a hand or other assistance that would have moved him off the tracks out of danger's way. It would probably say that the train driver acted unreasonably by driving too fast, by not watching the tracks carefully enough, and by not applying the brakes soon enough. It probably would not accuse the Transit Authority itself of doing anything unreasonable, but would assert, rather, that the Authority should compensate the Youngs because of its special employment relationship with the negligent driver.

P.J. would recognize that the Youngs' chances of success against the five or more witnesses were slim indeed, since in most situations tort law does not require bystanders to assist someone in danger, even if it would be reasonable to do so. Nevertheless, she was prepared to push hard to convince judges that tort law, in situations like Howard Young's, had already decided that such witnesses could be liable to an injured person if they do not take reasonable steps to help him out of his danger. She was even prepared to try to convince judges that such a decision would be the most appropriate rule for tort law, even if it had not been previously clearly set forth as the rule. In other words, she might use Howard's case "to set precedent."

In such manner, tort plaintiffs and their lawyers constantly pressure courts to examine anew the legal rules that determine whether an injured person will receive compensation. Where a person has serious injuries, plaintiffs' lawyers have the incentive to be very creative in the view of law they present. That constant, creative pressure has made tort law extremely dynamic—some complain overly dynamic—during the past half century.

P.J. would also recognize, however, that the legal claims on which the Youngs had the best chance of success were the claims of negligence—unreasonable behavior—on the part of the subway train driver, who had been speeding and not looking where he was going. Even with a seriously injured plaintiff and a probably successful legal claim for liability P.J. and her firm would not be ready to represent the Youngs. Their fee was valuable to them only if the claim would succeed against a person or entity that could actually pay the compensation due.

This "deep pocket" is the object of the plaintiffs' tort lawyer's continual search and attention. Tort law responds to claims of injury and responsibility by delineating the circumstances in which certain injuring parties are judged legally responsible for a plaintiff's injuries and are ordered to compensate that injured person. It does not help a plaintiff to win a substantial tort judgment against a defendant who cannot pay.

Frequently, this means that it does no good to sue the most obvious wrongdoer. A subway train driver cannot possibly pay his share of Howard Young's injuries. Neither could most people. The owner who doesn't control his easily angered dog can't. The football coach whose player is paralyzed because the coach didn't teach him the correct impact protection can't. The painter whose bucket falls on someone can't, either.

As a result, the plaintiffs' tort lawyer must often see beyond the obvious defendant to secure compensation for her client and income for herself. It is second nature for her to look for responsible parties with deep pockets. When there has been a rape on campus, the victim's lawyer rarely will focus her attention on the rapist. He probably hasn't been caught. Even if caught, he probably has no money. Instead the lawyer's attention will turn almost automatically to the university, a deep pocket, and she will examine whether it took reasonable steps to prevent rapes. If not, the university may pay for the victim's injuries. Of course, if the rapist *were* found and did have sufficient assets, he, not the university, would ultimately be responsible for payment.

The search for the deep pocket most commonly proceeds down one of two avenues. The lawyer needs to find either a legally responsible defendant who has liability insurance or a defendant, such as a corporation, with substantial financial resources of its own. Pursuit down each of these avenues has led to some unusual twists and turns in the development of tort law.

Most Americans know a little about liability insurance. Most commonly, it is bought as part of a package of car insurance or homeowner's insurance. The insurance company agrees to pay compensation, up to a specified limit, for injuries related to use of the policy owner's car or home. Millions of ordinary Americans have it. So do most businesses and other institutions.

In the case of Howard and Nicole Young, however, would most of the individual wrongdoers have liability insurance that would pay for Howard's injuries? The inactive witnesses might have homeowner's insurance, but would that extend to injuries they negligently cause because of their subway behavior? The train driver might have similar insurance coverage, but it clearly won't cover injuries he causes in his work. P. J. Cowcroft can always hope that one of those subway bystanders turns out to be a junk bonds mogul. She won't, however, invest her time and resources in the Youngs' tort lawsuit if all she has are such insubstantial hopes.

So where's the party with the deep pockets? Over there, behind the driver: the Transit Authority. Naming the Transit Authority as a defendant would be so obvious to P. J. Cowcroft that she wouldn't even stop to consider why an entity that may not have done anything wrong—after all, it explicitly prohibited the kind of speeding and inattention that made the driver a wrongdoer—should be legally responsible for the Youngs' injuries.

If asked, however, P.J. would refer to the legal doctrine of "vicarious liability." This means that a person or entity is sometimes legally responsible for the consequences of other people's wrongdoing. That responsibility is not imposed because this party has done anything wrong itself, as the university in the rape situation mentioned previously may have. It is imposed because there is a special relationship between the wrongdoer and the party being held liable vicariously.

Vicarious liability most commonly provides a deep-pocket defendant when the wrongdoer is an employee of that defendant. The law requires the employee's injury-causing actions to have been within the scope of his employment. So the platform bystanders' employers would not be vicariously liable. The subway driver was clearly working for the Transit Authority at the time of the accident. If a court should decide that he were liable to the Youngs, it undoubtedly would also hold the Transit Authority liable, vicariously.

Given the high percentage of employed persons in our society, this legal doctrine of vicarious liability provides the deep pocket otherwise missing in many serious accidents. Increasing existence of deep pockets markedly increases in turn the number of tort suits that can be brought by injured persons. The vicarious liability doctrine is so old and well-settled in tort law that it is almost never questioned. Basically, it stems from the notion that an employer who benefits from his employees' activities ought as well to bear the burden of those activities when they go awry. Without the rule, thousands of injuries caused by others' wrongdoing would go uncompensated, because they could never make it to court.

Settled on her possible defendants and on the legal bases for a decision in the Youngs' favor, P. J. Cowcroft and her firm still have one final *t* to cross before deciding to represent the Youngs. They need to precisely assess the dimensions of the Youngs' injuries. Their prime interest in making that assessment is to determine just what injuries the law will recognize as deserving of monetary compensation. They want to know just what money damages the Youngs will get from tort law.

Tort damages stem from the underlying premise that the victim of another's tortious conduct should receive money damages in an amount that will put him in the same situation he would have been in had the accident never happened. The plaintiff, in other words, should be fully compensated for his injuries.[5]

This foundational premise cannot be taken literally. No one, certainly not lawyers and judges, can put Howard Young back into the world as he was before he was run over by the subway train. What this underlying premise of tort damages really means is that a jury (or a judge sitting alone in a case where neither side requests a jury) will be asked to examine the plaintiff's life as it is now and is expected to be in the future. They will compare it to the plaintiff's