Doing Away With Personal Injury Law

New Compensation Mechanisms for Victims, Consumers, and Business

STEPHEN D. SUGARMAN

Foreword by JEFFREY O'CONNELL

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To Karen, who by now probably has
many reasons of her own to hope
for the end of personal injury law.

Foreword

When I was a young legal academic—now 30 years ago—like most of my ilk, then and now, I fretted endlessly over what field I should concentrate my teaching and research on. And rightly so; such a decision is crucial to an academic career.

Then the retirement of an older colleague opened up two subjects—labor law and torts. My predecessor had concentrated on labor law, teaching torts as an appealing sidelight, allowing one to teach first year students (such fun then or now) in a relative backwater that, unlike labor law, didn't change much and therefore didn't require much keeping up. And that is the priority I thought I'd adopt. But two things became quickly apparent. Labor law was a monster, full of brilliant scholars who seem to have said—or be saying—it all. Preeminent was Archie Cox (my labor law teacher) but including the likes of Willard Wirtz and Ben Aaron. And not only that, cases and rulings cascaded from the NLRB and the courts at a rate to defy assimilation. Who needed it! Torts on the other hand was the opposite: If labor law was a tropical rain forest, torts was a wasteland. Some are able people, but, to speak frankly at the risk of doing so unkindly, many of them seemed most of the time to be poking around or exegeting on a lot of marginal, dry-as-dust doctrinal matters (the intricacies of the last clear chance in Missouri—that sort of thing). Largely ignored was the fact that tort law was, as an *insurance* mechanism, simply a disaster: cumbersome, arbitrary, dilatory, wasteful, and needlessly expensive. But at that point in tort law, insurance was unmentionable, not only in front of jurors, but by appellate judges, and in large measure by academics themselves.

One person above all stood out as an exception to that often dreary pattern: Fleming James of Yale. Almost uniquely, James (along with a few

others such as Robert Keeton of Harvard) saw tort law through the lens of liability insurance—and further saw it as part of a pattern (however awkward the fit) of social as well as private insurance. It is easy today to criticize James for urging the expansion of liability insurance to achieve social insurance goals, but few seem to recall that it was James' goal to move tort law toward a workers' compensation-like system. Tort liability insurance, dominated by wasteful and expensive focusing on determinations of fault and value of pain and suffering (as well as payment for the latter), would give way to payment of economic loss, irrespective of fault, thereby in turn doing away with the variables that make tort law so unworkable.

In direct furtherance of James' goal, I was thereupon blessed with the chance to work with Robert Keeton in formulating proposals for no-fault auto insurance. And beyond that I undertook the even more difficult task of applying James' and Keeton's insights to other areas of tort law—principally medical malpractice and products liability. The guiding principle in all this work was to make much better use of liability insurance dollars, taking care not to propose abandonment of tort law completely. Rather my aim was—and is—to use the constraint imposed by the dollars currently being spent on tort liability insurance but to use far more of those dollars to pay for actual monetary losses and thus to spend far less in transaction costs (mostly lawyers' fees) and nonmonetary losses (mostly pain and suffering). (On this point, see O'Connell, *An Alternative to Abandoning Tort Liability*, 60 Minn. L. Rev. 501, 537–40 [1976].)

One disappointment is this work has been how few torts scholars pursue similar efforts. This is not to say there weren't creative efforts along such lines (for example, by Marc Franklin, Roger Henderson, Richard Pierce, to mention a few). But too often scholars addressed only part of this issue, focusing, for example, on the need to cut down on tort recoveries without addressing the resultant shortfalls in compensation for injuries, or insisting that compensation is an entirely separate issue, unrelated to the merits of proposed changes in tort law. Also, scholars interested in fundamental changes too often ignored the details (call it the plumbing) of reform, preferring to skim the treetops. Finally, too many scholars who did address the compensation issue addressed it episodically, ignoring, in the latter case, the dictum that legal reform is not for the short-winded.

So with few exceptions, tort scholars failed to follow James' example of persistently and thoroughly thinking about tort law in insurance terms. To compound the tragedy, as the older generation of tort scholars such as James, William Prosser, Page Keeton, John Wade and Wex Malone gave way, the next generation in large measure found its own desert—also far removed from real problems, often continuing to refuse to face the confusing complexities of insurance. I refer of course to the subject of law and economics. How paradoxical that the first subject (after antitrust) to draw attention from the discipline of law and economics was torts—perhaps the

area of law the *least* suited for economists' rigid assumptions of perfect information and perfectly rational behavior. Tort law, dealing as it mostly does with fortuitous, unexpected, relatively unpredictable, rare, accidental events, resists much more than, say, the calculated world of commercial and real estate deals, the rigid assumptions of economics. As a result, tort law now faced a new wasteland—abstract, self-contained, artificial, also often ignoring insurance. The result in turn has been another generation of wasted opportunity—tort scholarship dominated by concerns quite unrelated to reality.

It is Steve Sugarman as a rare exception to all of this that is so impressive. He *does* address the interaction of tort law, insurance and compensation schemes; he *does* delve into the details of his proposals with a subtle appreciation of the literature, as well as testing his own proposals, and he *is* persistent. He has thought long and hard about this field and he stays at it, year after year, article after article (and now, one hopes, book after book).

Of course, with such an ambitious undertaking as his book represents, one can quarrel with some of his thoughts and ideas. Is he sufficiently appreciative of the costs of the private and social insurance substitutes for tort law he proposes? Does it, for example, make (actuarial) sense to include compensation for illness, so little of which is caused by tortfeasors, in his replacement for tort law, with a resultant disparity of costs between his new scheme and that which it replaces? Does it make sense to abandon a long-standing, sophisticated, and, on the whole, well-working scheme such as workers' compensation, rather than build upon it? One can discuss all this at great lengths, and we will all do so greatly aided by Sugarman's command of the literature and his provocative proposals, so deserving of further and close attention.

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Acknowledgments

I began teaching Torts at Berkeley in 1972, when I first came into academia, inspired by the refreshing ideas of Guido Calabresi. All the way through, I have received considerable instruction and encouragement from my colleague John Fleming. Although what I propose here is probably too radical for either of them, I trust they both will recognize some of their many insights along the way.

This book has been evolving over several years, and I am grateful to the editors of the *California Law Review*, the *Ohio State Law Journal*, the *San Diego Law Review*, and the Academy of Political Science who have earlier published articles of mine upon which I have drawn here.

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Introduction

I favor doing away with personal injury law and replacing it with both new compensation arrangements for accident victims and new mechanisms for controlling unreasonably dangerous conduct. This book is an argument for that proposition.

By personal injury law I mean the legal arrangements and surrounding institutions through which people who have suffered bodily injury make claims and file lawsuits against their injurers. These claims are for financial compensation for lost earnings, medical and other expenses, pain and suffering, and, on occasion, punitive damages. Personal injury claims comprise a very large part of the civil justice system. They are the core of, although by no means all of, tort law.

In the past, when the perceived social problem was that individuals were deliberately injuring others, making the injurer pay personally for the harm done seemed only just. It probably was the minimum punishment that a wrongdoer deserved. Furthermore, it may have been necessary to provide a prompt legal remedy in order to calm down the victim, preventing him from retaliating with force. Today, however, we are a long way from that state of affairs.

Currently, most injuries that find their way into the tort system are not cases of intentional wrongdoing; rather, they are the result of accidents. The most common sources of those injuries are automobiles and other forms of transportation, consumer products, medical and related services, workplace accidents, and accidents that occur on other people's property, such as those caused by slips and falls, fires, or other dangerous conditions. Thus, injurers usually are not people the victim is having a feud with; rather, they typically are a motorist that the victim was sharing the road with, the

victim's own physician or local bus company, or the maker of an item the victim was using. When someone now makes a tort claim, rather than obtaining swift justice, he or she often will wind up waiting years before the lawsuit is resolved. Moreover, a victim today rarely can expect to recover directly from an individual injurer. Instead, he or she will recover from an insurance company or a large impersonal enterprise, such as a corporation or a governmental entity.

Personal injury law, then, is a form of collective intervention into social and economic affairs. We judge other forms of government action, such as the public transportation system, the Social Security system, the national park system, or any important system of government regulation such as those run by the Food and Drug Administration and the Federal Aviation Administration, by comparing their costs with their benefits. So, too, should we judge personal injury law. Evaluated in this way, I have concluded that this part of tort law generates more perverse behavior than desired safety, that it is an intolerably expensive and unfair system of compensating victims, and that in practice it fails to serve any commonsense notion of justice. In short, I do not think we, as a society, are getting our money's worth.

In the 1960s and early 1970s legal scholars debated exciting proposals to replace parts of tort law with compensation systems tailored to various classes of accidents. The most pressing concern was a no-fault scheme to supplant auto accident law. Initial legislative successes on that front encouraged compensation-minded reformers to grow increasingly bold in their proposals. However, they have not been able to retain center stage.

In the political arena, the auto no-fault movement, which succeeded in less than half the state legislatures, has seemed for the past ten years to be at an impasse. Attention has turned instead to a vigorous, defense-inspired campaign to strip back personal injury law to its traditional core, curtailing the recent judicial expansion of victims' rights, but not providing any alternative forms of compensation.

In academia, tort theory has captured the limelight. Although scholars have written about tort theory from various perspectives, the main thrust of their writing has been to defend tort law's commitment to decentralized private law solutions to accident problems, if not to support the details of the existing tort system. It is time, I believe, to focus academic and political attention once more on doing away with tort actions for personal injury.

Part I of this book examines the justifications advanced in support of existing personal injury law and shows that these goals are either unachieved or inefficiently pursued. I offer a critique of several different kinds of tort apologists, starting in chapter 1 with devotees of law and economics who emphasize the safety goal.

There I argue that it is not tort law, but mainly other existing social forces, that cause people and enterprises to act reasonably. I detail various

real world aspects of the personal injury law system that undermine its ability to contribute to safety in the way that its defenders suggest. Then I discuss the substantial negative social effects that personal injury law has on human conduct, such as companies not developing and introducing products that the public wants, vaccines becoming unavailable in adequate quantities, recreational facilities closing down, and competent physicians ceasing to treat some patients. As I explain, tort law further causes the wasteful and unnecessary testing that doctors engage in for the purpose of avoiding lawsuits and that it leads to cover-ups of past wrongdoing, the manufacture of evidence of causation and fault, and the fraudulent staging of injuries. The current system also diverts significant time and attention of high-level executives and professionals away from their main tasks and causes severe demoralization and cynicism among professionals and within enterprises where those responsible for safety feel unfairly maligned.

Chapter 2 addresses enterprise liability advocates who emphasize the compensation goal. In the past thirty years, many academics, as well as judges and lawyers, have embraced personal injury law as a mechanism for compensating accident victims. As I show, however, most disabled people, even most accident victims, are not at all compensated by personal injury law. At the same time, many victims receive excessive compensation, especially those who receive large awards for pain and suffering, those who receive tort compensation for losses that are already covered by other employee benefit and social insurance systems, and those who obtain inappropriate windfall amounts of punitive damages.

The direct and more easily measurable costs of personal injury law, both private and public, are substantial. They are eventually borne by all of us in the form of higher prices for consumer goods and services, higher auto insurance rates, and higher taxes. A recent study conservatively estimated the direct cost of the American tort system in 1984 at $68 billion. For 1988 it is fair to put the direct cost at well over $100 billion. As I explain, the lion's share of this sum does not go to compensating victims, however; instead it is wasted in litigation and administrative expenses. The unwanted indirect costs of personal injury law, if not easily quantified, are also large. They include, most importantly, the already noted socially undesirable consequences that tort law has on people's behavior.

Chapter 3 examines justice and related goals. Is not doing justice to the litigants what the common law is about—resolving disputes between two or more parties by deciding what is fair as to them? That may be the theory, but, in practice, the amount that claimants recover is unlikely to reflect what an objective observer would say they truly deserve. Instead, what count considerably are the talents of the lawyer one happens to have; the tenacity of the defendant (or insurance adjuster) one happens to be up against; whether the defendant happens to be a motorist, a company, or a governmental entity; how attractive (but not too attractive) and how well

spoken (but perhaps not too well spoken) the claimant happens to be; what race the claimant is; what state and community the victim lives in; how well one is able to hold out for a larger settlement; the whim of the jury if the case gets that far; and whether one is lucky enough to have available the right sort of witnesses or other evidence of the injury and defendant wrongdoing. As a result, victims frequently come away from the lawsuits far more frustrated than satisfied. Our current personal injury law system is not a system of justice; it is a lottery. Unlike the official lotteries that many states now run, however, the tort lottery is one for which we all are forced to pay.

Part II criticizes the proposals for change that most other reformers have advanced. I start in chapter 4 with tort law reform of the sort pushed by the Reagan administration and defense interests and considered by state legislatures and Congress during the past couple of years. I then turn, in chapter 5, to broader reform proposals for either replacing parts of tort law with tailored compensation systems or substituting for the entirety of personal injury law a general accident or disability compensation scheme. While I find a number of the proposals considered in Part II to be improvements on the status quo, they are not ideal.

Part III offers reforms I do favor. For the long run, I propose that we (1) eliminate tort remedies for accidental injuries, (2) build on existing social insurance and employee benefit plans to ensure generous compensation to all accident victims that is in line with compensation now provided by progressive employers to cover employee income loss and medical expense, and (3) build on existing regulatory schemes both to promote accident avoidance and to provide outlets for complaints about unreasonably dangerous conduct (chapters 6 and 7). For the shorter run, I propose some first steps that might be politically more promising now and that would move us in the right direction for the long term. They include both legislative reform (chapter 8) and reform by private contract (chapter 9).

Contents

I

THE FAILURE OF TORT LAW