

On Sugarman on Tort-Chopping

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A reply to Professor Sugarman.

That Professor Sugarman's proposals have stimulated spirited comment should not, of course, be taken as a reflection on them. We are, on the contrary, indebted to him for a refreshing and in some respects original contribution to the literature of accident law. I would, indeed, if given a chance to vote on his proposals as a package, probably endorse them. I believe I would do so for at least the minimum reasons Professor Sugarman himself suggests, that they appear to represent progressive changes in policy from the point of view of employee benefit and social insurance reform, apart from their implications for tort law. And even taking into consideration their effect on tort law, I suppose that society would in some important ways be better off with his package of changes than it is under the present mixture of liability and insurance arrangements for the management of accident costs. Compensation for the costs of relatively small injuries and short-term disabilities would for many be handled better, with less uncertainty of recovery. This would entail social advantages that are not only to be welcomed for themselves, but could also offset to at least some extent social costs that are incurred in the process.

In this respect, Professor Sugarman's package is similar to no-fault first party motoring insurance schemes. The trade-offs are roughly similar, and probably yield a positive balance for similar reasons, at least for some accidents. And, again similarly, the evil plausibly addressed is an old one. It is the "lottery" aspect of negligence law, that has been with us in days of plentiful and affordable,

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albeit inefficient, liability insurance as well as in days of purported crisis.

Here is the rub. I do not come away from Professor Sugarman's paper with any sense of the relevance of his proposals to the problems that appear acute in the current tort-plus-liability-insurance scene; with any confidence in his evaluation of his proposals in comparison with others that he rejects summarily; or with much of a basis for judging for myself whether his proposed package would not be even better without the tort changes that he suggests, or with different ones.

My difficulties stem partly from what seem to me to be inadequacies in Professor Sugarman's treatment of tort law, and partly from uncertainties, which Professor Sugarman has not dispelled for me, in my understanding of the reasons for the current atmosphere of crisis.

The superficiality of the vision of tort law with which Professor Sugarman presents us is exemplified by the remarkable statement that "opinions of many courts today often suggest that compensation of victims is the main function of tort law."¹ If Professor Sugarman's intention is to disparage tort law, this would be a good way to do it, were readers so ill-informed as to believe the statement. If, after all, the "main function" is compensation, why not simply discard tort liability altogether and have the government compensate accident victims directly and automatically? If, however, such a concept is actually the position of any serious commentator in the field, I have not encountered it.² Professor Sugarman attributes the notion to three opinions of the California Supreme Court.³ Even the California court, it appears, can be maligned. No fair reading of those three cases can yield the suggested "main function of tort law."⁴ Instead

1. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 797-98 (1987).

2. While the contention that such a position is held by others is not unusual, it is typically advanced by those who appear to regard any consideration of plaintiffs' needs as irrelevant and accordingly invalid. Cf. Little, *Up With Torts*, 24 SAN DIEGO L. REV. 861 (1987). Professor Little's outlook on torts is one on which I think I might have been able to comment usefully if I were writing fifty years ago. Despite its manifest erudition and thoughtfulness, however, I am afraid that I have been carried too far out of touch with those views by the intellectual history of the intervening years to be able to address them constructively now.

3. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *American Motorcycle Ass'n v. Superior Ct.*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Jess v. Herman*, 26 Cal. 3d 131, 604 P.2d 208, 161 Cal. Rptr. 87 (1979).

4. The *Rowland* court emphasized considerations of fairness and the availability of loss-distribution mechanisms in removing a barrier to the liability of negligent injurers who are occupiers of land. The *American Motorcycle* case decided two issues. One, having to do with equitable indemnity among joint tortfeasors, had nothing to do with the compensation of plaintiffs. The other, the refusal to abandon the doctrine of joint and several liability, merely retained a traditional rule, again based on considerations of fairness, that one who negligently causes an indivisible injury is liable for all of it, even if others also should be. *Jess*, which changes the traditional rules on setoff of claims in

those cases are consistent with another, quite different position, for which there is no end of respectable authority, one that involves complexities with which Professor Sugarman's present analysis does not begin to engage.

There are many social objectives, the advancement of which we consider good. To the extent that a tort system, or any other social institution, tends to advance them, or to work against them, that system can be considered better or worse. Among the social consequences that we consider desirable is the amelioration of suffering. Therefore, everything else being equal, we should favor the distribution of accident costs, in preference to their concentration. The same point is sometimes put in terms of the minimization of accident costs, on essentially the same reasoning: that the social costs of accidents are greater if economic loss is not distributed, to the extent that this leads to avoidable secondary dislocations.⁵ This applies both to accident victims and to injurers who engage in relatively normal, socially acceptable activities, and to whom the victims' costs may be shifted. The well-being of individuals and organizations is advanced by the facilitation of prudent and orderly mechanisms for absorbing and spreading accident costs among others, or over time, or in both ways. We also favor effective incentives for reducing the risk of accidents. And it is desirable that the community's sense of justice be satisfied, or at least not deeply offended, by the operation of our legal institutions. There are also other social objectives that transcend the allocation of accident costs, having to do with the maintenance of freedoms, e.g., of religion. It is to the interplay of all these considerations, rather than to anything as simple as a goal of "compensation" alone, that most modern scholars, as well as our more reflective judges,⁶ look for evaluating our institutions for the management of

response to the adoption of comparative negligence, is indeed helpful to plaintiffs, but its underlying philosophy has more to do with the purposes of insurance law than of tort law. The recognition of a public interest in the compensation of tort victims in the administration of automobile liability insurance, that would be frustrated by setoff, hardly amounts to an assertion that the compensation of victims is "the main function" of tort law. I do not suggest that the California court was indifferent to plaintiffs' interests, much less hostile to them, but only that it based its decisions on broader considerations than the crude primacy of "compensation" as a goal of tort law.

5. See generally G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

6. Including Justices Peters and Tobriner of the California court, the authors of the opinions cited and discussed *supra* notes 3 & 4.

Scholars often have observed that particular tort doctrines are ineffective to achieve objectives other than compensation, especially in particular contexts, e.g., negligence law in the context of motoring accidents. To recognize the corollary that such doctrines could be replaced in those contexts, without social loss, by better ways of providing compensa-

accident costs. Partly because these considerations are so familiar, as they must surely be to Professor Sugarman, we are sometimes tempted, in the interest of economy of expression, to skip over their full exposition. The danger in doing so is the loss of sensitivity to the different ways in which they apply to different classes of accidents. The principal difficulty in approaches such as Professor Sugarman's, which concentrate on the relationship between accident victims viewed as one general group, on the one hand, and, on the other, major social institutions such as courts or welfare programs or health insurers, is that they obscure the important ways in which alternative arrangements can have differential advantages in the context of particular types of accidents, or of injurer-victim relationships.

Consider, for instance, the differences between motoring accidents, accidents arising from defective products, and those resulting from medical malpractice. If there is now popular dissatisfaction with something called broadly "tort law" — referring, no doubt, to the accident law component of tort law — it is curious how different elements of dissatisfaction apply differently in the three areas.

That negligence law, the heart of tort law for motoring accidents, works very imperfectly there, is a familiar complaint. Equally familiar are the doubts that the prospect of tort liability adds significantly to the incentives for safety that should otherwise influence an insured driver whose neck is at stake in the event of a crash. Here indeed we have an area where the tort system leaves much to be desired in terms of efficacy of loss-spreading and of deterrence, and where its operation is questionable in terms of considerations of fairness. This has led, as we know, to the adoption in some states of no-fault first party insurance schemes to supplant tort law for this type of accident. But this is not a hot issue in 1987. We hear little if anything about pressure for the spread of automobile no-fault laws to new states. Here there is no crisis in the availability of liability insurance, no pressing need for law review symposia.

The perception of crisis centers mainly on the availability and costs of product liability and medical malpractice insurance. Here I could be persuaded by the data I have seen that insurers may have become demoralized by sharp increases in average jury awards. These increases appear to have been generated not by increases in median awards, which have remained remarkably stable in constant dollars, but by increases, at rates that may seem unpredictable, in a relatively small number of very large awards. And for this problem I very much doubt that Professor Sugarman's changes will offer much of a solution. I am aware of no evidence that the size of the impor-

tion, including non-tort mechanisms, is not at all the same as to hold that compensation is the "main function" of tort law, nor is the advocacy of such changes.

tant large verdicts in question is attributable particularly to awards for pain and suffering, or for medical costs compensable from collateral sources, or the costs of short-term disability, although all are probably included in those awards. It is at least equally likely that the increase in average awards is being driven mainly by the improved ability of plaintiffs' counsel to establish the economic losses of the long-term underinsured disabled, and by the improved ability of the medical profession to extend the lifespan of the seriously disabled. Savings for the tortfeasor certainly would be realized by Professor Sugarman's proposals, but it is questionable whether they would eliminate the phenomena that I suspect are the principal disruptors of the actuarial process.

If this surmise is right, there may be a further consequence. Its significance is not only that the kinds of proposals suggested by Professor Sugarman are not likely to solve the problem. Perhaps nothing we can do will do that, but perhaps time will. It may be too early to assume that the unpredictability of cost increases, if it still exists, will continue indefinitely. A new equilibrium may be reached, in which more realistic estimates of the costs of caring for the long-term disabled will restore predictability about insurers' exposure for the small number of most severe claims. I can make no assertions about this, except that a better understanding of these dynamics is desirable before we make far-reaching changes in our legal system in response to phenomena that may be temporary or, indeed, already in process of spontaneous adjustment.

At the same time it should be noted that the Sugarman proposals tend to shift accident costs from those who may have a measure of control over them, e.g., the producers of defective products, to the public in general, i.e., the participants in health insurance programs, or the accident victims themselves. From the fact that it is doubtful that deterrence is a beneficial consequence of fault-based liability for automobile accidents, it does not follow that we should be indifferent to the allocation of the costs of accidents from defective products. Different considerations apply. Business managers should be responsive to costs. While the sensitivity of premium rating is questionable, there is surely more incentive for safety if producers as a group must pay the full cost of their accidents than if they can have those costs socialized. And in the product liability field one of Professor Sugarman's principal objections to what he calls tort law, the negligence lottery, does not apply. In most jurisdictions strict tort liability is available for product injuries.

The malpractice scene suggests different insights. One, as indeed Professor Sugarman correctly notes, is a widespread sense of injustice among physicians — a sense that claims are pressed to judgment or settlement against doctors who are not regarded by other doctors as malpractitioners, for injuries that doctors do not believe were caused by malpractice. This may well be a symptom of a serious deficiency in tort law. If it is, it is not remedied by Professor Sugarman's proposals. The sense of injustice about the coercion to pay a claim perceived to be invalid is not lessened by the savings Professor Sugarman's proposal would provide. These are objections which, if believed (and they often should be, I think), turn on principle, not on the amount of money involved. More about these later.

Another insight is that, while all doctors are unpleasantly affected by premium increases, the sense of crisis is generated by the existence of huge and rapidly increasing rates for just a few groups of specialists, principally the obstetricians and gynecologists, and some who deal with accident victims, such as neurosurgeons and orthopedic surgeons. Perhaps anesthesiologists also should be included. If the costs of insurance could be stabilized for these groups, and if the acute sense of unfairness which they appear to experience could be relieved, the medical crisis would become tolerable. My uncertainty, again, about the probable effectiveness of Professor Sugarman's proposals in this area leaves me looking for other reforms. I agree with Professor Sugarman's rejection of some current proposals, such as those of the Reagan Administration. But I think he dismisses far too lightly the possibility that no-fault compensation plans can be usefully substituted for fault-based liability. The field of medical accidents is an area where such plans, if they can be properly formulated, offer great potential promise in creating the possibility of a far preferable relationship between patient and doctor, based on insurance coverage, limited in amount, against specific adverse outcomes, than that which is now developing under the constant threat of litigation between them. There are problems, particularly in the definition of the insured contingency. We cannot insure that patients will get well; we can try only to insure against injuries by their doctors, or perhaps against certain specific conditions that are closely associated with the technology of treatment.⁷ There also may be problems in causation theory, e.g., as to coverage for the reduction in small chances of recovery. But interesting attempts that have been made to develop analogous formulas appear to be a promising beginning, as in the National Childhood Vaccine Injury Act of 1986⁸ and the Vir-

7. For a discussion of some of the difficulties in devising no-fault plans for medical accidents, see Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590 (1973).

8. Title III, Pub. L. No. 99-660, 100 Stat. 3755 (1986).

ginia Birth-Related Neurological Injury Compensation Act.⁹ We should not be deterred from exploring such approaches by Professor Sugarman's trivial (I am sorry to say) objections to no-fault accident compensation plans.¹⁰ They may well be potentially more promising solutions than his for important aspects of the current claims.

To return to products liability, a similar inquiry may be illuminating. I wonder how much of a crisis producers really face if we exclude asbestos and Dalkon Shield claims, for which the pertinent dies are already cast. For the most part, those claims are not for me convincing examples of a tort system out of control. The indications there of heedlessness as to safety are just too great on the part of most, although perhaps not all, the defendants. Otherwise I am aware of serious problems in two areas. The first is the problem of entirely honest and careful producers of useful pharmaceutical products, such as vaccines. Some of those products apparently are driven off the market because the cost of providing for even a few adverse reactions is unsupportable by the limited revenues to be expected if the products are marketed at prices reasonable to the consumers. Here a fair solution may well be a no-fault compensation plan that accords greater protection to some claimants than they might have had in the tort system, while limiting the potential recovery for all. Such an approach already has been attempted.¹¹ There may also be need for stricter judicial control over trials, to prevent juries from arriving at scientifically absurd results. Limited reforms of this nature may be sufficient to maintain the insurability of products liability in general, along the lines of mainstream tort developments over the past few decades. I would prefer to see the benefits of those de-

9. VA. CODE ANN. §§ 38.2-5000 et seq. (Michie Supp. 1987).

10. Professor Sugarman asks whether the heirs of someone killed in an airplane crash caused by lightning are "more deserving of compensation" than the heirs of someone else hurt by lightning, or whether a child who hurts his leg while bicycling or who accidentally burns his arm on a stove is "more deserving" of compensation than a child born without an arm or leg. Sugarman, *supra* note 1, at 804-05. The apparent point is vulnerable on two grounds, as an objection to no-fault plans. First, it does not address the reasons for which Professor Sugarman might think that his sets of plaintiffs might "deserve" more than the other unfortunates, were fault involved in their injuries. Second, I know of no product liability in case of these accidents, unless their products were defective. In that case there are reasons for liability apart from what one class of victim "deserves" in comparison to the victims of nature. A little complexity, furthermore, in the coordination of benefits under a no-fault plan with those from collateral sources should not be a fatal objection to a reform that otherwise would be effective for managing the costs of accidents arising from medical treatment, or from defective products.

11. See National Childhood Vaccine Injury Act of 1986, Title III, Pub. L. No. 99-660, 100 Stat. 3755 (1986).

velopments retained rather than sacrificed, if it is practicable to do so, and I am by no means persuaded of its impracticability. Again I make no assertions, but I suggest that inquiry of this sort is more likely to be advisable than approaches, such as Professor Sugarman's, that divert attention from this type of analysis.

This does not begin, of course, to do justice to the wealth of Professor Sugarman's ideas. I agree with much of his thinking. In addition to his rejection of some current proposals for the cut-back of victims' remedies, and a return to greater reliance on the fault system, the suggestion that plaintiffs' fault should be disregarded seems worthy of consideration. I would join Professor Sugarman here, at least where it seems probable that defendants are more likely than plaintiffs to be able to distribute the losses, or that defendants are more likely than plaintiffs to be influenced by the tort system to prevent losses. This may cover most cases. As Professor Sugarman suggests, some willingness to compromise may be politically necessary. Another compromise that might be considered is to permit plaintiffs' fault to be considered in the award for pain and suffering, but not for economic loss, except perhaps for economic loss covered by collateral sources.

I also favor some efforts to control punitive damages. The ABA proposal for a requirement of proof by "clear and convincing evidence" may help.¹² On Professor Sugarman's proposal that punitive damage awards be made by judges only, however, it would be interesting to have his analysis of the predictable constitutional issues.

Finally, I do not share Professor Sugarman's enthusiasm for the shifting of accident costs from injurers to the plaintiffs' bar. Plaintiffs' bar may well have its share of sleaze. It has also performed, in my view, important service to the community in realizing the "ombudsman" function of tort law.¹³ I do not think it has been established that the rewards reaped have been more than a fair price for a vigorous and innovative plaintiffs' bar. It would not be a better society, I think, if a reduction in the rewards for such work led to a reduction of its attractiveness to bold, intelligent litigators. That may not happen from Professor Sugarman's proposals, of course, but I think that this is not an area where we should be looking for economies for the benefit of tortfeasors or their insurers.

In summary, I am more sympathetic to Professor Sugarman's views than some of his critics in this issue. I could support his package, but I think it would be better if it were a considerably different package. I do not think his proposals, if enacted, would significantly

12. A.B.A. REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM *ii*, 18 (1987) (RECOMMENDATION NO. 5b).

13. *Cf.* Linden, *Tort Law as Ombudsman*, 51 *Can. Bar Rev.* 155 (1973).

affect the atmosphere of crisis that gives rise to them. I would favor instead the further development of themes that have already emerged in Twentieth-century American accident law, rather than the radical repudiation of that tradition. In particular I urge continued attention to the likelihood that the imposition of full accident costs may beneficially influence the behavior of certain actors who control the relevant risks, but also consideration of the substitution of no-fault insurance relationships (with limitation of liability, and including third-party plans) for fault-based relationships where general public benefits appear on balance to be obtainable from such a substitution.

