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Symposium - Future Prospects for Compensation Systems - Introduction

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SYMPOSIUM

FUTURE PROSPECTS FOR COMPENSATION SYSTEMS INTRODUCTION

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This Symposium is an outgrowth of a program presented in San Francisco in January 1993 at the annual meeting of the Association of American Law Schools by the AALS's Section on Torts and Compensation Systems. It had occurred to me, as chairman of the Section for the year, that the previous programs within recent memory were all about torts, and not compensation systems. This led to a program on Future Prospects for Compensation Systems, which I had the honor to moderate, at which most of the participants in this issue presented earlier versions of their present articles: Professors O'Connell on motoring accidents;[1] Rabin on injuries from toxic materials;[2] Schwartz on industrial accidents;[3] and Weiler on accidents in medical treatment.[4] Professor Arlen, who is an economist as well as a lawyer, provided a general discussion.[5] In addition, present in the audience were Professors Miller and Phillips, whose experience with some of the emerging issues led to the inclusion of

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1. Jeffrey O'Connell et al., *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. 1016 (1993).

2. Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993).

3. Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983 (1993).

4. Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908 (1993).

5. Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093 (1993).

additional articles in this issue—Professor Miller's on new developments in the New Zealand compensation experiment[6] and Professor Phillips's on the Federal Employers' Liability Act (FELA) as an alternative to workers' compensation.[7]

There is no fixed definition of "compensation" systems. The term alludes generally to concepts for the replacement of tort liability in certain contexts with a statutory substitute. The pioneering model was workers' compensation. Proposals along these lines usually share two characteristics: their criteria for compensability do not purport to require that culpability be found on the part of the injurer, although culpability may have limited secondary significance in the context of certain definitional issues; and the measure of damages permitted is less than that traditionally provided in tort, for example, by restrictions on the availability of damages for noneconomic losses, or perhaps, for losses for which payments are available from collateral sources. The "compensation" notion is broad enough to cover both "liability" (or "third-person") and "nonliability" (or "first-person") systems, that is, both systems in which compensatory payments are made by or on behalf of injurers—for example, workers' compensation—and those where the payments are made by others, such as a state agency, or by the injured person's own insurer, as in the case of "no-fault" motoring insurance.

The papers in this collection are interesting, I think, apart from the merits of the specific proposals they advance, for a few general observations that may be drawn from them.

First, the idea of compensation systems as a preferred device for managing the costs of at least certain types of accidents seems to be alive and well among contemporary torts scholars. This appears to be so despite a spate of recent revisionist legal history, which has tended to promote the greater importance of negligence, as contrasted with enterprise liability, as a determining force in the development of twentieth-century accident law. Professors Rabin[8] and Schwartz,[9] indeed, are among the more prominent authors of such works. Yet what we now see are proposals for a greater, not a lesser,

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6. Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme*, 52 MD. L. REV. 1070 (1993).

7. Jerry J. Phillips, *FELA Revisited*, 52 MD. L. REV. 1063 (1993).

8. *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

9. *See* Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

use of compensation schemes. Even the papers that are most critical of shortcomings in existing compensation schemes—Professor Schwartz's and, in a sense, that of Professor O'Connell and his colleagues—do not suggest for a moment that it would be better for such schemes to be abandoned in favor of conventional negligence.

Professor Schwartz, for instance, makes it clear that the waste, fraud, and abuse that have manifested themselves in the California workers' compensation program are not the result of it being a workers' compensation program, but are instead attributable to other factors. One such other factor is a specific feature of the California scheme that need not and evidently should not be included in such programs: that the cost of medical evaluation is compensable even in the absence of a compensable injury or condition.[10] Another such factor is the compensability in the California program of injuries and conditions that are difficult to verify, which could be fraudulently claimed as easily in tort, to the extent that they are compensable in tort, as under compensation schemes.[11]

Professor O'Connell's paper, similarly, should be understood as addressing two separable issues. One is the question whether existing "no-fault" insurance schemes have proven successful in comparison with the negligence regimes they were designed to replace. On this the results, as I read the paper, are in line with earlier studies. Schemes with weak "thresholds"—that is, barriers to tort liability—accomplish little. Those with relatively strong thresholds, as in New York, work well in terms of providing better personal injury benefits—for society on the whole—than the tort system, for smaller premiums. This is apparently the conclusion that the authors draw from, for example, the comparison of New York and California rates for the personal injury components of motoring policies,[12] and to the best of my judgment the inference is plausible. No nostalgia whatever is expressed for the pure tort system. But, faithful to the charge to discuss the future of compensation schemes, the authors have examined another problem, which the casual reader may deduce only indirectly. The age of legislative interest in automobile "no-fault" schemes is over. The trend to enact such measures has petered out. Evidently, as a matter of practical politics, benefits in the magnitude achievable by the New York or Michigan model are not sufficient to revive the necessary political interest in states that have not already passed such laws. Dramatically increased savings

10. *See* Schwartz, *supra* note 3, at 990-91.
11. *Id.* at 994.
12. O'Connell et al., *supra* note 1, at 1021-22.

might do so, and might, the authors seek to demonstrate, be achievable through the total abolition of tort recovery, even for seriously disabling injuries. Whether the trade-offs here make such proposals desirable is fairly debatable. That this debate about a radical extension of the compensation regime does not suggest, however, reversal of direction away from compensation systems, is entirely clear.

The most enthusiastic defense, in these papers, of a tort-like system in preference to a compensation system is that of Professor Phillips, for the FELA. Even here, it may be noted, Professor Phillips does not propose a shift from an existing workers' compensation system back to normal tort law. He merely opposes the abandonment of the FELA. That act, it should be recalled, itself contains a number of changes from conventional negligence law that in their own way represent a reform package, from the point of view of injured workers, parallel to that provided by workers' compensation.[13]

Another observation is suggested by these papers: that the reasons for interest in compensation schemes have shifted over the years. Originally, in the development of workers' compensation, the principal challenge was to overcome obstacles to the establishment of the substantive grounds for liability in a negligence action—the need to prove fault, to avoid the fellow-servant rule, to overcome the defense of contributory negligence, and the like.[14]

The current proposals may reflect similar concerns, but they seem to indicate a different ordering of motivating factors. One of the newer preoccupations, for instance, is a desire to simplify claimants' burdens on the issue of causation. This is discussed extensively in Professor Rabin's paper and, to some extent, in Professor Weiler's as well. Another contemporary emphasis is on cost containment as a primary goal. In workers' compensation itself, of course, a limitation of the amount of liability—to specified economic losses—became a familiar feature. This does not seem, however, to have been viewed as a key reason for promoting that change from tort law,[15] but rather as an incidental trade-off, thought to be useful as a quid-pro-quo for constitutional purposes.[16] By contrast the

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13. *See* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 11.2 n. 22 at 77 (2d ed. 1986).

14. *See, e.g.*, 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 4.30 (1992).

15. *Id. See also* excerpts from the Wainwright Commission report, *quoted in* Ives v. South Buffalo Ry., 94 N.E. 431, 436-37 (N.Y. 1911).

16. *Cf.* New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917).

suggestion, discussed in Professor Phillips's paper and adverted to in Professor Schwartz's, that the industrial accidents of railroad and maritime workers be shifted from the FELA to workers' compensation, appears to be motivated primarily by the desire to save money. This suggestion comes from the employers, not the railroad or maritime unions. Its motivation is not to broaden benefits. Professor Weiler's suggestions on medical injuries, of course, are directed to the correction of a broader range of social evils than merely the costs of the health care system—for example, the undercompensation of many victims of malpractice. But a critical feature of his entire formulation—and of the Clinton administration's overall health care reform package, in the context of which his proposal has its principal opportunity for consideration in the foreseeable future—is cost containment. As noted above, Professor O'Connell's proposals, while also motivated by broader social concerns, are also decisively shaped by the need to demonstrate cost containment as the political key to any legislative action on further no-fault motoring schemes.

These papers invite attention to other considerations of a general nature: the uses and abuses of economic theory in the analysis of legal issues; the value and limitations of empirical studies; and the importance of the social context in which legal issues manifest themselves.

Economic theory has, of course, become a staple of legal literature for more than a generation.[17] Its implications for legal analysis require very careful handling. Some lawyers—like Professor Arlen who has a Ph.D. in economics—have the necessary training, as well as sound legal judgment. For those less seriously trained, however, even very sophisticated non-specialists, it can be hazardous to dabble casually with economic theory. The pitfalls are illustrated by an episode in the development of a paper that I admire on the whole very much, Professor Weiler's article on medical injuries. That paper was strengthened, in my view, in the course of its completion, in response to some of Professor Arlen's comments on the draft as originally presented in San Francisco.

By way of background, Professor Weiler's proposals encompass, as the reader will see, two major themes, which he thinks should be linked and which I consider deserving of very careful con-

17. The participation of lawyers in the law-and-economics movement may be traced to the appearance of Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

sideration independently, regardless of whether they are linked. One has to do with the possibility of compensating for the costs of medical injuries by reference to descriptive criteria that resemble those used in insurance to describe compensable events. This would contrast with the reliance on fault as the basis for liability that is embedded in malpractice law. Such suggestions have been made by others during the past twenty-five years or so.[18] Many disagree. For what it is worth, I find Professor Weiler's case persuasive that we should at least pursue this possibility, examine it further, and generally attempt to verify whether it is feasible. The most difficult obstacle in the past—apart from the opposition of many doctors and lawyers—has been in the difficulty of defining compensable events in insurance language, so as to be sufficiently inclusive—that is, to cover whatever medical injuries malpractice law would cover if it functioned properly—without undertaking to pay for the failure of good medical practice to cure. Professor Weiler reports encouraging progress in the development of a technique for specifying "designated compensable events."[19] Whether this progress is sufficient to establish the likelihood of success is hard to tell. If it should prove to be workable, it opens up possibilities not only along the lines of Professor Weiler's integrated proposal, but also for no-fault compensation on first-person or physician-liability models other than Professor Weiler's.

The other aspect of his proposal has been called "organizational medical liability" or "enterprise liability." This plan would shift the locus of liability from individual physicians to institutions with which, or through which, they practice, such as hospitals, health maintenance organizations, and whatever "managed care" entities may emerge from the Clinton administration's initiative for reforming American health care systems. The principal reasons for examining these enterprise liability possibilities rest on a series of assumptions about deterrence as a desirable and achievable objective of the system for managing medical accident costs. Professor Weiler develops explanations to the effect that conventional malpractice liability does less than it might to encourage care because physicians' liability is insured and premiums are not experience-

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18. *See, e.g.*, Clark v. Gibbons, 426 P.2d 525, 535, 539-40 (Cal. 1967) (Tobriner, J., concurring); Clark C. Havighurst & Laurence R. Tancredi, *"Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance*, 51 MILBANK MEMORIAL FUND Q. 125 (1973); Clark C. Havighurst, *"Medical Adversity Insurance"—Has Its Time Come?*, 1975 DUKE L.J. 1233; *cf.* Robert E. Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590 (1973).

19. *See* Weiler, *supra* note 4, at 933-35.

rated. Professor Weiler attributes this problem to aspects of insurance theory that are said to make the incidence of claims in the work life of an individual physician an unsuitable basis for differential charges. By contrast, he suggests, institutions responsible for more events than are covered by one individual's practice may develop the kind of loss experience that would be susceptible to differential rating. This could provide financial incentives for risk management in a way that would encourage care and help reduce avoidable injuries.

There are further institutional reasons for interest in the "enterprise liability" aspect of the Weiler proposal, but they too are related to the deterrence objectives. One, which he does mention, has to do with special problems in the organization and chaotic operation of hospitals. There are, for instance, many actors in hospitals who can be negligent. One consequence is that in a conventional malpractice case much is expended—and wasted from the point of view of the claimant—in finger-pointing among the defendants.[20] This waste could be reduced if liability were centralized. Another hospital problem poses a common threat: the responsibility for what ought to be done for patients often falls in the cracks between uncoordinated jurisdictions. A stronger overall institutional responsibility for the costs of resulting injuries might encourage more attention to reforms in systems management.

Professor Weiler has also made a more general point to the effect that a change from individual malpractice liability would afford a more realistic alignment of liability with the emerging conditions of practice, as more and more doctors are drawn into group arrangements. There is a potential aspect to this that may merit development in another paper. Increasingly, certain physicians are being constrained in their techniques of practice by the preferences of bureaucratic elements in the health care system. Insurers, for instance, resist payment for the use of high-technology diagnostic devices that neurologists consider important for proper practice. Insurers are also developing programs in which patients are discouraged from consulting doctors other than those who are "preferred" by the insurers. The insurers are suspected of excluding from their preferred lists—and potentially from the ability to practice—those doctors whose methods the insurers consider undesirably expensive, for example, those who prescribe the more modern high-technology diagnostic procedures. Similar behavior may be

20. *Id.* at 916.

expected in the future from the managers of competitive managed care enterprises, unless they are made responsible for the costs of their mistakes in such decisions. The individual doctor who omits to provide what she considers to be the best treatment in these circumstances is probably not subject to conventional malpractice liability, if the better treatment is not available because of the unavailability of funding for it (unless perhaps there were virtually unanimous professional agreement that the procedure should at least be prescribed whether or not it can be paid for). But there is something to be said for the proposition that he who decides not to fund what physicians consider proper treatment should bear the risk of paying for the costs of bad outcomes that could have been averted by the professionally preferred treatment. It would follow that, as such decisions increasingly fall to institutions under whose auspices physicians practice, such liability should be borne by those institutions, without regard to fault.

In any event, Professor Weiler's enterprise liability proposal is predicated upon deterrence objectives. At the same time, he proposes a number of cost-containment measures. This is a normal feature of compensation systems. Professor Weiler would, for instance, eliminate the collateral-source rule, confine damages essentially to economic loss, with "moderate" redress for loss of enjoyment of life for the gravely disabled, and would limit compensation for lost wages to two-thirds of the loss, up to a maximum based on the average wage in the jurisdiction (such as twice the average wage), and subject to a two-month deductible.[21]

Professor Arlen's discussion emphasizes the incoherence of loss limitations such as the offset of collateral-source payments in the context of a deterrence scheme, on the basis that the incentive for safety imposed on an actor who can control risks should match the cost of the harm caused by such risks (more or less). Professor Weiler replies—and thereby strengthens his paper, in my view—not by changing his proposal, but by changing his explanation for it. His new explanation is that "this programmatic feature [the collateral-source offset] is the only basis upon which medical no-fault could possibly be entertained in the political arena."[22] This strengthens his proposal, I think, because he now at least gives a sensible reason for the offset, which he did not do originally. Which brings us back to the pitfalls of purported economic analysis.

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21. *Id.* at 923-24.
22. *Id.* at 949.

The reason originally given for the offset was "that loss insurance is a considerably more accessible and efficient conduit for injury redress than is a no-fault liability regime that requires judgment about the *cause* of—if not the *fault* for—the injuries for which benefits are sought."[23] A similar argument is made for eliminating subrogation rights of health insurers. "The justification . . . is that making liability insurance secondary to loss insurance produces savings in overall insurance costs. Whereas no-fault workers' compensation, for example, spends roughly twenty cents of each claims dollar on administration, public and private health insurance spends between five and ten cents of each claims dollar for this purpose."[24] The fallacy in each case is to confuse the advantages of keeping one kind of claim entirely out of one insurance system—and entirely in another—with the advantages or disadvantages of inter-system adjustments of claims that are inevitably in both systems. If any review whatsoever is to be made of hospital records to identify adverse events, if any determination is to be made about the compensability of any part of a malpractice claim, for example, wage loss, the principal administrative expenses of the liability system are already implicated, whether there is subrogation or not. If, further, any claim goes to the health insurer for costs associated with the condition in the treatment of which a medical injury claim may arise, the administrative expenses of the health care system are already implicated whether or not malpractice (or similar) liability is established. There is no choice. There is no major savings to be made, no important efficiency to be achieved by preferring one system to another thereafter. The only cost thereafter relevant to the decision for or against subrogation (and hence against or for an offset for collateral-source payments) is the cost of making adjustments between the insurers. This subrogation expense is the cost that should be balanced against the impact on deterrence that flows from a decision to insulate the injurer—or not to do so—from the costs compensated by collateral sources. It is not the supposed over-all efficiencies of one kind of insurance or another that matters, even if the decision were to be made solely on the basis of economics, rather than practical politics.

I particularly admire Professor Weiler's empirical work, which provides important explanations for the bulk of his recommendations. Here again a cautionary note may be sounded, albeit a very

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23. *Id.* at 924 (emphasis in original).
24. *Id.* at 926.

minor one. Not all conclusions that purport to be derived from empirical studies are equally solidly grounded. Most of Professor Weiler's conclusions from his data are persuasive, to me, but at least one may go a shade beyond the evidence cited in its support. Professor Weiler twice states, in effect, that "most . . . malpractice claims are filed for the wrong cases."[25] He cites two sources in support. The first, in one of his books, is an analysis of data from the monumental Harvard study of New York hospital records for which he was responsible.[26] The data indeed cast doubt on a sizable number of the claims analyzed. For a general conclusion, however, that most malpractice claims are ill-founded, the support provided by these data is subject to some qualification. For instance, the total number of claims analyzed was forty-seven, a sample of doubtful significance. Of this number, it is true that only eight passed the screening criteria established in the study for a determination of probable injury from negligence. The data are, indeed, consistent with Professor Weiler's further conclusion that there may not even have been an injury in most of the cases studied. Yet it could also be said of eleven of the other cases that at least one reviewing physician thought there was injury stemming from negligence, and of another five cases (making a total of twenty-four of the forty-seven) that the screening procedure was not an applicable test because the complaint was of negligence outside the hospital that would not be expected to be recorded in the hospital chart. Accordingly, in a majority of the cases, the data are not inconsistent with the proposition that malpractice could reasonably be suspected. The other source relied upon was a study by a committee of anesthesiologists of 1004 lawsuits against their colleagues.[27] This, of course, is a much more impressive sample. Again there is ample, deplorable evidence that many physicians are subjected to the trauma of litigation over claims that most other comparably trained physicians consider ill-founded. But, as support for the proposition that *most* malpractice claims are unfounded, this too requires a little qualification. "For the 869 cases in which the appropriateness of care could be judged," the report states, "care was scored as appropriate in 46% of cases and inappropriate or below standard in 54% of cases."[28] As a comment on the Weiler paper, this is, of course, no more than

25. *Id.* at 913; *see also id.* at 918.

26. *See* PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE 71-72 (1993).

27. *See* Frederick W. Cheney et al., *Standard of Care and Anesthesia Liability*, 261 JAMA 1599 (1989).

28. *Id.* at 1601.

a trivial quibble. It is presented here merely as an example of the care with which conclusions attributed to empirical studies generally need to be treated, even in the context of scholarship of the highest quality.

Of somewhat greater significance to the studies at hand is my final point, on the importance of attention to social context in the evaluation of proposals for law reform. Again I pick the Weiler paper for an example, not because I consider it especially vulnerable to criticism, but rather because I consider it especially interesting, and especially likely to remain of enduring interest. Professor Weiler has, as we have seen, chosen to link his no-fault compensation proposal with his medical organization liability proposal, and has done so explicitly for deterrence objectives. The context, however, in which his proposals appear to have their greatest chance for consideration is as part of the Clinton administration's health care reform package. While they have previously been advanced in another theater, as part of a Reporters' Study sponsored by the American Law Institute, the ALI has conspicuously omitted to endorse any conclusions of that study. The work appears in print as a report *to* the Institute, not *of* the Institute. The proposal acquired new life—apart from its exposure in Professor Weiler's books and at the AALS program—when it was discussed as potentially the "key medical-liability reform" proposal of the President's Health Care Task Force.[29] While the Task Force's interest in the proposal has since been de-emphasized, in response to sharp opposition from medical organizations,[30] recommendations appear to remain under consideration at the time of this writing for the facilitation of pilot studies,[31] which may be all that Professor Weiler himself would rec-

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29. *See, e.g.*, Weiler, *supra* note 4, at 941 n. 98. Compare the views of Ira Magaziner, the White House Senior Adviser for Policy Development: "Although it was never the centerpiece of our proposal, we were going to move toward enterprise liability because we viewed it as one way to promote better quality. . . . [W]e got a lot of feedback from doctors who were nervous. . . . We respected that feedback and in response, we are going to encourage piloting to see if enterprise liability does work." *White House Reform Goal: Promote Autonomy*, AM. MED. NEWS, July 5, 1993, at 3, 40.

30. *See supra* note 29.

31. *See supra* note 29; *see also* Brian McCormick, *Lawyers, Consumers Vow Tort Reform Fight*, AM. MED. NEWS, July 26, 1993, at 3. *Cf.* Dana Priest, *White House Considers AMA's Prescription for Malpractice Relief*, WASH. POST, June 12, 1993, at A8 ("White House officials said yesterday that enterprise liability had been scrapped because reaction to the idea 'was not affirmative.' "); David Rodgers, *Initial Clinton Medical Malpractice Reform Plan Pulled After Resistance by Entrenched Interests*, WALL ST. J., June 15, 1993, at A20 ("[D]ays before Mrs. Clinton went before the AMA Sunday, the White House signaled that 'enterprise liability' was no longer a viable option beyond some potential demonstration prospects.").

ommend as a first step.

But consider the context. If the Clinton health care reform package were to be adopted, presumably the objective would be that it should provide for universal and adequate health care. Under the Weiler proposals for offset of collateral benefits, the institutions whose liability would be substituted for that of individual physicians would be immunized from liability for the entire health care component of the costs of injuries that are negligently inflicted, because all those health care costs would have been picked up by the comprehensive health care program. Non-economic loss would on the whole be noncompensable. What deterrent would be left? The cost of two-thirds of lost wages, less a two-month deductible, up to a maximum of twice the average wage in the state? Would even this level of compensation extend for more than ten months, in the case of the most severely disabled? After a year of total disability, I have been reminded by a colleague,[32] Social Security disability payments become available.[33] Would they then also be deducted from the wage-loss compensation? If the psychological assumptions of economics are really an adequate explanation of human behavior, one might be driven to question the rationality of the medical profession in opposing such enterprise liability proposals.[34] Conversely, of course, if practical politics is the explanation for the proposal for offset of collateral benefits, the question may be put whether legislators are likely to consider liability so attenuated to constitute a credible deterrence package.

There is, of course, another element in deterrence beside the average amount of compensation per claimant. This amount must be multiplied by the number of successful claimants to calculate the total tab for the liable party. The most striking finding of the Harvard study of New York hospital records is the large number of malpractice victims who never file claims.[35] It is on this finding that Professor Weiler appears to rely as a major justification for the changes he advocates. The political problem, moreover, to which he attributes the need for the offset of collateral-source benefits, is

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32. I am indebted to Professor David S. Bogen on this point.

33. *See* 42 U.S.C. § 416(i)(1) (1988); 20 C.F.R. §§ 404.315, 404.1505 (1993).

34. Physicians may, of course, be worried about more than malpractice liability premiums. They are already concerned by the increasing encroachments on their professional autonomy that have been imposed upon them by non-medical bureaucracies. The prospect of the role to be played by the risk-management personnel of hospitals, in furtherance of the deterrence objectives of the enterprise liability proposal, may well be distasteful for reasons that transcend economics.

35. *See, e.g.*, Weiler, *supra* note 4, at 912-913, 918.

based on an estimate of the total costs of liability if all eligible claimants were paid.[36] That so many claimants who would be eligible under the present system do not file claims now appears to be the result, at least in large measure, of their ignorance that they have been negligently injured in the course of treatment.[37] A surmise that more of these patients will be compensated under the Weiler enterprise liability proposal depends on the assumption that more potential claims will be identified under that proposal than are identified now.

Here, amplification of the proposal would be welcome. It would be interesting to understand better how it would come about that more patients would learn about potential claims, or that hospitals would take an initiative in making compensation in the absence of claims by patients. Some such increase is understandable if provision is made for automatic compensation for certain designated unexpected outcomes, regardless of fault.[38] Nevertheless, it is not evident how the major shortcoming today, the ignorance of the patient about the contribution of avoidable treatment errors to his condition, would be much changed under the enterprise liability proposal. Professor Weiler suggests that Swedish experience indicates a greater willingness of doctors to explain potential claims to patients where liability is divorced from fault.[39] But the Swedish scheme, as I understand it, is essentially a first-party program, not a liability plan.[40] My willingness to help you understand a claim you may have against your insurer does not, I think, signify an equal willingness to help you understand a claim against my employer, particularly if the claim is for serious avoidable harm caused by my negligence. Accordingly, a better explanation of whether, and if so, why the number of patients likely to be paid would approximate the number of patients who should be eligible for payment would be helpful for an evaluation of both the deterrence effect of the Weiler enterprise liability proposal, and of the justification for the calculations that are deemed to necessitate the immunization of responsi-

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36. *Id.* at 949.

37. *Id.* at 913. There can, of course, be other reasons, such as the loyalty of grateful patients who are convinced of the good faith and concern of their physicians.

38. *Id.* at 933-34.

39. *Id.* at 927.

40. *See* WERNER PHENNIGSTORF WITH DONALD G. GIFFORD, A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES 58, 168, 185 (1991); Edgar Borgenhammer, *Patients' Rights and Informed Consent: Swedish Experience*, 12 J. CONSUMER POL'Y 277, 280 (1989).

ble institutions from health care costs that are compensated by collateral sources.

The context of the health care reform program within which the enterprise liability proposal is to be considered provides a further paradox. Not only does the health care program diminish the effectiveness of the enterprise liability scheme for purposes of deterrence. It also diminishes the need for a change in the locus of liability for compensatory purposes. To the extent that the health care component of the harm caused by malpractice is to be covered anyway by the health care program, the need to make the liability program function better in order to pay for these costs more comprehensively is eliminated.[41] Professor Weiler may therefore encounter the same problem that has stalled Professor O'Connell's reform efforts. Big changes that are tough politically are not enacted in pursuit of modest goals. As the practical benefits of the enterprise liability proposal for both compensatory purposes and deterrence are diminished in proportion to the effectiveness of the health care reform package in the context of which it is presented, the remaining advantages of the proposal appear increasingly one-sided in favor of the medical community, whose present liability system costs could be substantially reduced in most jurisdictions.[42] But, as we have seen,[43] these beneficiaries are, for whatever reason, among the principal opponents of the proposal.

This does not, of course, begin to do justice to Professor Weiler's proposals. They do not require my endorsement. His own discussion provides all the support they need. Our medical malpractice system is certainly improvable, and Professor Weiler has provided the most important contemporary discussion of which I know about why it should be changed and how it may be possible to do so. My only suggestion is that the mix in which he has assembled his proposals may have been more suitable to the overall social context that existed before the Clinton health care proposals than it would be in the context that could develop if a wide-ranging health care reform program were to be adopted. This is not to say that Professor Weiler's proposals would each then lose its force, but only that the arrangement of the components he has analyzed, for no-

41. For a similar perspective in a somewhat different context, compare Kenneth S. Abraham, *Adopting Comparative Negligence: Some Thoughts for the Late Reformer*, 41 MD. L. REV. 300, 307-11 (1982).

42. There could be limitations to these reductions in jurisdictions that already exclude collateral-source payments, and impose caps on non-economic damages.

43. *See supra* notes 29-31.

fault, for cost containment, and for organizational liability, could in that context benefit from reshuffling and reformulation.

Other papers in this collection are equally rich, each in its own way. On behalf of the Torts and Compensation Section of the AALS, I would like to express my appreciation to all the contributors to this Symposium, and to Kamil Ismail, Esq. and his colleagues on the editorial board of the Maryland Law Review, for an unusually valuable contribution to the scholarship of accident law. The participants have, I believe, embellished the record of the AALS as a learned society, as well as enriching the understanding and stimulating the imagination of their auditors and readers. We are all indebted to all of them.