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Harmonizing Wrongs and Compensation

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INTRODUCTION

In his seminal work, TORT LAW IN AMERICA, Ted White describes tort law as vacillating between a focus that is admonitory, emphasizing conduct that is wrongful, and compensatory, providing the injured with resources to allay their injuries.[1] We are currently in an admonitory period, and, according to White, we have been since around 1980.[2] Moreover, we are not at the point that the pendulum starts to swing back to a more compensatory understanding of tort law. We are, however, at a moment of flux in tort theory.

During this recent period, the dominant understanding of admonition has been instrumental: Liability is imposed in order to efficiently deter accidents.[3] Tort law is used as a means to the end of promoting safety. That

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1. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 291 (2003).

2. *Id.* at 244–48.

3. This goal is associated with a law-and-economics approach to tort law, which has been described as "the dominant theory of torts. It is the theory to meet and beat." PHILOSOPHY AND THE LAW OF TORTS 5 (Gerald J. Postema ed., 2001). *But see* Michael D. Green, *Negligence=Economic Efficiency: Doubts* >, 75 TEX. L. REV. 1605, 1643 (1997) ("Negligence no

understanding of admonition is increasingly challenged by an alternative: Tort law provides vindication to those civilly wronged by others.[4] In other words, tort law is not simply about providing incentives to behave better—it is about the ability to rectify wrongs, placed in the hands of those who suffered them. Although the latter is a preferable admonitory understanding, this moment of flux is an excellent opportunity to seek a still-better alternative. Instead of continuing to vacillate between opposing theories, we should attempt to blend admonition and compensation. My approach incorporates Gregory Keating's focus on distributive justice,[5] as well as access-to-justice concerns.[6] The gist of the concept is a tort law that is generally wrongs-based, while incorporating a form of compensatory pressure-release valve or bypass.

The goal of this Article is to advocate for this synthesis as a general approach to tort theory. Incorporating compensation into tort law would match the motivations of many parties in the tort system and help improve its administration. I practiced tort law for seven years, usually representing plaintiffs. Some of my clients were interested in vindication, but the majority were motivated by compensation, by which I mean they needed money to pay their medical bills and replace lost wages. There is a problem, however, with sending both types of plaintiffs into the same tort system. Tort law, particularly negligence, is uncertain, and that uncertainty leads to delay and transaction costs as lawyers and experts dispute liability and damages.[7] For plaintiffs interested in vindication, perhaps the time needed to pay close attention to the facts and circumstances makes sense. After all, determining whether one has been wronged is a serious inquiry. Those features, however, are counterproductive to compensating the injured. A system of tort law that is able to vindicate rights in proper cases, but also efficiently compensate harms in others, would be ideal.

History both supports the need for a compensatory bypass in tort law and provides guidance as to the tradeoffs it would likely entail.[8] The urge for compensation has shaped tort law going back over a century, regardless of whether it was in an admonitory or compensatory phase. Compensation is a

doubt entails a balancing of competing concerns, but those concerns often are not identical to what a rigorous economic efficiency standard would require.").

4. A great deal of credit for this change belongs to John Goldberg and Ben Zipursky and their advocacy of civil recourse theory. *See, e.g.*, JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020).

5. Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 194–95 (2000).

6. I thank John Goldberg for this characterization.

7. *See infra* Section I.

8. *See infra* Section II.

particularly powerful motivation during accident surges. Tort history reveals a pattern of surges of accidents, and a common response to these surges: recovery becomes more swift and certain, but in smaller amounts.[9] Both parties receive benefits in the compromise. I discuss three examples: (1) workplace accidents, (2) automobile accidents, and (3) mass disasters. It is foreseeable that injuries will continue to pressure tort law, and it would be wise to incorporate a mechanism to handle that pressure. Moreover, a common response to the pressure of injuries is to compromise, exchanging ease of compensation for a decrease in its size. Oscar Gray, himself, made this observation in the context of compensation systems: they generally involve lesser or no fault requirements and reduced damages.[10] Facilitating such a tradeoff would correspond to the wishes of the parties in many cases and more efficiently provide both compensation and vindication.

I. PARTIES' MOTIVATIONS AND EFFICIENCY

Despite tort theory's current focus on admonition, many plaintiffs in the tort system are motivated by compensation. In fact, I believe the majority of tort plaintiffs are primarily motivated not by vindication but by compensation—they need money to pay their bills. I base this on my experience as a practitioner, primarily representing plaintiffs in personal injury cases. Some of my clients were motivated by vindication; this was more likely to be true in intensely personal cases like false imprisonment and defamation. Most of my clients, however, seemed to me primarily motivated by the pursuit of lost resources. Unlike the common view of plaintiffs as gold diggers, my clients generally sued reluctantly and only when it became clear it was necessary to obtain compensation.[11]

Although this is an anecdotal view,[12] it is supported by objective data. Vindication is best achieved with a public acknowledgment of the claimant's victory (i.e., a jury verdict in the claimant's favor). But if vindication alone motivated plaintiffs, one would imagine a world in which a large number of cases were tried to verdict. In reality, the opposite is true: the vast majority

9. *See infra* Section II.

10. Oscar S. Gray, *Future Prospects for Compensation Systems Introduction*, 52 MD. L. REV. 893, 894 (1993).

11. Stella Liebeck of the McDonald's coffee spill case is an example of this attitude. Liebeck was awarded $160,000 in compensatory damages and $2.7 million in punitive damages, which were reduced by the trial judge to $480,000. Before filing suit, or even consulting a lawyer, Liebeck requested that McDonald's pay her medical bills, approximately $11,000, to resolve the injury. Kevin G. Cain, *And Now, the Rest of the Story…About the McDonald's Coffee Lawsuit*, 45 HOUS. LAW. 25, 26, 29 (2007). I thank Greg Keating for this point.

12. I have attempted, unsuccessfully, to design a study that would provide more systematic data on why plaintiffs bring tort claims. It is important, and I hope to try again soon.

of tort cases settle.[13] Marc Galanter finds approximately 98% of civil cases are resolved before trial.[14] There is similar data concerning automobile accidents—a majority of all tort claims and three-quarters of all payouts[15]—which are resolved before trial over 97% of the time.[16] Many of these settlements require plaintiffs to acknowledge a statement by the defendant denying wrongdoing[17] and include confidentiality provisions.[18] Other factors, such as general peace and compensation, which can be especially pressing for some, must then motivate many claimants.

As noted, there is no large-scale study on why tort plaintiffs file claims, but a few studies have been conducted specific to medical malpractice. These studies have found several non-compensatory reasons plaintiffs file suit. Three reasons are particularly potent: "to get information about and understand their injury and the circumstances surrounding it, to determine accountability, and to prevent future injuries."[19] Yet one study of Florida medical malpractice plaintiffs asked the participants: "If you had had the opportunity of receiving guaranteed compensation for medical expenses and lost income caused by the medical injury, but no compensation for pain and suffering, inconvenience, or other non-economic losses, would you have taken that opportunity?"[20] This question gets directly at the primacy of compensation as a motivation for plaintiffs. Over thirty percent of the

13. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 465 (2004).

14. *Id.*

15. JAMES M. ANDERSON, PAUL HEATON & STEPHEN J. CARROLL, RAND INST. FOR CIV. JUST., THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE 1 (2010).

16. Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1495 (2009).

17. Admitting fault is an "extraordinary step." Associated Press, *Pa. Hospital Admits Fault in Infection That Killed Preemies, Settles Lawsuit*, PENNLIVE PATRIOT NEWS (July 15, 2020), https://www.pennlive.com/news/2020/07/pa-hospital-admits-fault-in-infection-that-killed-preemies-settles-lawsuit.html (statement of plaintiffs' attorney Matt Casey) (stating that an admission of fault was "something he said he's never before seen in a civil settlement in over two decades of medical malpractice work").

18. *See* George L. Blum, *Nondisclosure or Confidentiality Agreements in Cases Involving Products Liability*, 40 A.L.R 7th Art. 2, §2 (2019) ("[M]ost defendants in mass tort cases involving products liability, drugs, or toxic substances will not settle without a secrecy agreement."); Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 690 (2001) ("[C]onfidential settlements most likely account for a large proportion of all settlements."); Minna J. Kotkin, *Reconsidering Confidential Settlements in the #MeToo Era*, 54 U.S.F. L. REV. 517, 525 (2020) (explaining that in employment discrimination cases, estimates of the number of cases settled secretly range from 60% to 78%).

19. Jennifer K. Robbennolt, *What We Know and Don't Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1016 (2005).

20. Allen W. Imershein & Alan H. Brents, *The Impact of Large Medical Malpractice Awards on Malpractice Awardees*, 13 J. LEGAL MED. 33, 40 (1992).

subjects answered in the affirmative.[21] Even in an area of tort law that involves a personal relationship between the parties and in which many patients feel a sense of betrayal by their physician,[22] this study indicates more than three out of every ten plaintiffs would accept economic loss alone to resolve a claim.

Thus, there is a portion of claimants in the tort system for whom compensation is the primary motivating factor. Forcing these plaintiffs to use the same tort system inhabited by plaintiffs pursuing vindication is harmful to both types of plaintiffs. Tort law—negligence especially—is uncertain; it is based on what a reasonable person would do, and is compounded by the vagueness of how to value pain and suffering. Working within these uncertain standards is slow for lawyers and other experts, resulting in delay and transaction costs. If one is seeking vindication—righting a wrong—the painstaking attention to detail may be worth it. Not so for those merely seeking compensation. For those seeking payment for medical bills and the replacement of lost wages, the further loss of time and money are just wasteful. Moreover, their presence in the tort system exacerbates the problems of delay and transaction costs for those seeking vindication.

When plaintiffs are motivated by compensation, their needs are often urgent.[23] They have creditors waiting to receive money for medical bills, or for other bills that could not be paid due to their inability to work. Delay is so detrimental to plaintiffs that one leading scholar, writing decades ago, noted, "The speeding up of settlements . . . would do more to relieve the distress of injury victims than any other conceivable change in tort law administration."[24] If "justice delayed is justice denied," justice is denied often in tort law.

A study by the prestigious Harvard School of Public Health found that the average medical malpractice case takes five years from the time of the injury to resolution, and one in three cases lasts six years or longer.[25] This is a long time for a plaintiff to wait to recover lost funds, but defendants suffer, too. Defendants such as physicians and manufacturers are distracted from their primary work; prolonged litigation reduces the amount of time available

21. *Id.*

22. *Id.* at 41.

23. An earlier version of this argument is found in JEFFREY O'CONNELL & CHRISTOPHER J. ROBINETTE, A RECIPE FOR *BALANCED* TORT REFORM 29–49 (2008).

24. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 826 (2011) (quoting Alfred F. Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 315 (1964)).

25. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2031 (2006).

for more productive efforts.[26] The Harvard School of Public Health authors stated, "These are long periods for plaintiffs to await decisions about compensation and for defendants to endure the uncertainty, acrimony, and time away from patient care that litigation entails."[27] In addition to creating problems for the parties to the tort cases in question, delay clogs the dockets of the judicial system, forcing parties in other disputes to wait until earlier cases are resolved.

Delay is problematic beyond complex malpractice cases. A recent study examined all publicly recorded foodborne illness settlements and verdicts in the United States between 2000 and 2011.[28] From the time of the incident until the time of resolution, the average length of resolution was 3.35 years; one case took fourteen years to resolve.[29] Cases going to trial averaged 3.66 years before a final verdict; cases that settled were somewhat faster, at 2.93 years, although one settlement took ten years to complete.[30]

Although problematic by itself, delay is associated with the further difficulty of transaction costs. As cases grind on, lawyers and experts for both sides are busy working and billing. Lawyers representing plaintiffs typically charge a contingency fee of 33%, and sometimes up to 50%, of gross recovery.[31] Defendants or their insurers pay lawyers either an hourly rate or a flat fee, regardless of whether they win or lose. In addition to lawyers, parties in many types of tort cases must pay experts. In the early 1990s, a products liability litigation guide included multiple examples of a plaintiff's advanced expenses totaling several hundred thousand dollars.[32] In 2002, Gary Schwartz estimated that the average plaintiff's medical malpractice expenses (not including attorneys' fees) were approximately $50,000 per case.[33]

26. In 2006, I spoke to an orthopedic surgeon who told me that he had been sued twice in his career. Both cases lasted over ten years, and both cases resulted in him being dismissed from the suit.

27. Studdert et al., *supra* note 25, at 2031.

28. Alexia Brunet Marks, *Check Please: Using Legal Liability to Inform Food Safety Regulation*, 50 HOUS. L. REV. 723, 723–24 (2013).

29. *Id.* at 768.

30. *Id.*; *see also* Jeffrey O'Connell & Craig A. Stanton, *Justice Delayed Is . . . Delay Ignored: The Indifference of Judges and Law Professors to Legal Lassitude*, 49 DEPAUL L. REV. 489, 489–90, 494 (1999) (describing a study conducted in four leading Torts casebooks which revealed fifty-one cases that went to trial, with the average time from incident until appellate decision being 6.94 years; in almost half the cases, the judges ordered a remand or a new trial).

31. Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 657 (2003).

32. 3 JOHN F. VARGO, PRODUCTS LIABILITY PRACTICE GUIDE § 42.065a, at 42, 56.15–.16 (Matthew Bender ed., 1992).

33. Gary T. Schwartz, *Empiricism and Tort Law*, 2002 U. ILL. L. REV. 1067, 1071 (2002).

Transaction costs ultimately reduce the amount of money reaching the plaintiff as compensation. In 2018, a study conducted by the U.S. Chamber of Commerce's Institute for Legal Reform estimated that of every dollar spent in the tort system, only fifty-seven cents go towards compensating plaintiffs for their injuries.[34] The remaining money was consumed in "cost[s] of litigation, insurance expenses, and risk transfer costs."[35] Although the U.S. Chamber pursues a tort reform agenda, the percentages in its study estimate tort law to be *more* efficient than many other sources of data, going back decades. For example, the Harvard School of Public Health study referenced earlier found that 54% of the money expended in the medical malpractice cases in its sample was spent on transaction costs, leaving plaintiffs only 46%.[36] Other studies have found the percentage of money reaching plaintiffs as compensation in medical malpractice cases is even lower, at 40%.[37] Transaction costs in products liability cases are similar, with studies finding the percentage of money reaching plaintiffs in the low forty-percent range.[38]

Transaction costs have bedeviled tort law for decades. A major study in the 1980s concluded that tort law's administrative costs were 54% of net plaintiff benefits.[39] There was an efficiency difference within torts, however: "The plaintiffs' net compensation as a percentage of the total expenditures was 52 percent for auto torts and 43 percent for all other torts."[40] Joanna

34. PAUL HINTON, DAVID MCKNIGHT & LAWRENCE POWELL, U.S. CHAMBER INST. FOR LEGAL REFORM, COSTS AND COMPENSATION OF THE U.S. TORT SYSTEM 24 (2018), https://www.instituteforlegalreform.com/wp-content/uploads/2020/09/Tort_costs_paper_FINAL_WEB.pdf.

35. *Id.* at 26. Taking fault out of the process is not a panacea; parties still fight over causation and other things. It can, however, reduce transaction costs substantially. Workers' compensation's transaction costs are approximately 21%, less than half those of tort law. Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT L. 75, 82–83 (2013).

36. Studdert et al., *supra* note 25, at 2031.

37. Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 VAND. L. REV. 257, 286 n.159 (2013) (first citing PETER W. HUBER, THE LEGAL REVOLUTION AND ITS CONSEQUENCES 151 (1988) (concluding that plaintiffs receive forty cents of every dollar paid by defendants in medical malpractice cases); and then citing Patricia M. Danzon, *Liability for Medical Malpractice*, *in* 1B HANDBOOK OF HEALTH ECONOMICS 1339, 1369 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000) ("concluding that plaintiffs receive forty cents of every dollar paid by defendants in medical malpractice cases")"").

38. Shepherd, *supra* note 37, at 286 n.159 (first citing STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 104 (2005) ("concluding that plaintiffs receive forty-two cents of every dollar paid by defendants in asbestos cases"); and then citing HUBER, *supra* note 37, at 151 ("concluding that plaintiffs receive forty cents of every dollar paid by defendants in products liability cases")).

39. JAMES S. KAKALIK & NICHOLAS M. PACE, RAND INST. FOR CIVIL JUSTICE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 70 (1986).

40. *Id.*

Shepherd summarizes tort law's transaction costs problem: "Hence, for every dollar defendants pay to compensate victims, an additional dollar and change is spent on legal and administrative expenses. Moreover, as legal fees and litigation delays continue to increase, this inefficiency will only worsen."[41]

The problems of delay and transaction costs can be traced to tort law's overwhelming uncertainty. All law is potentially subject to factual uncertainty, but beyond that "it is not always clear how a tort rule applies to the (undisputed) facts."[42] Unfortunately, this is true in a double sense. Robert Rabin notes that accident law "is open-textured both in the liability determination of fault and the damages determination of noneconomic harm."[43] In other words, the standard for determining whether someone is liable is vague, and once that decision is made, determining how much they owe in damages is also vague.

In strict products liability, the liability issue is whether a product is defective. A product may have one of three types of defect: manufacturing, design, or warning.[44] Design and warning claims are by far the most common and consequential products liability cases.[45] Yet David Owen describes design and warning notions as covered in "shrouds of mist . . . so vague that they are often effectively meaningless."[46] He continues, "One indeed may ask whether 'law' itself exists in such terrain, or whether 'lawless' is the better word to describe the prevailing 'rule' of random guilt."[47]

In terms of design defects, jurisdictions are not uniform, but the majority appears to follow the risk-utility test.[48] Owen finds little comfort in the apparent consensus:

First, there is no single clearly accepted view as to how the design defect balancing test should be described or formulated. A related finding is that there is considerable variation in how the balancing test is formulated among the states, among decisions within the same state, and often even within the same judicial opinion. Another finding is that courts today quite typically cobble together a variety of separate and often conflicting formulations of balancing tests borrowed, without analysis, from earlier opinions. Further,

41. Shepherd, *supra* note 37, at 286–87.

42. Mark A. Geistfeld, *Legal Ambiguity, Liability Insurance, and Tort Reform*, 60 DEPAUL L. REV. 539, 540 (2011).

43. Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431, 432 (2011).

44. RESTATEMENT (THIRD) OF TORTS: PROD. LIABILITY § 2 (AM. LAW INST. 1998).

45. Geistfeld, *supra* note 42, at 544.

46. David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 37 (1982).

47. *Id.*

48. Geistfeld, *supra* note 42, at 547.

many courts acknowledge that a variety of factors should be balanced but neither discriminate between the various factors nor explain how they should be balanced or otherwise interrelate.[49]

The standard for warnings is no better. The Reporters for the Restatement (Third) of Torts: Products Liability, James Henderson and Aaron Twerski, state that the doctrine is "little more than an empty shell. . . . [as] such a tort is too lawless to be fair or useful."[50]

Determining liability in medical malpractice cases is equally difficult. There are a number of potentially liable defendants to sort through: physicians, nurses, hospitals, and manufacturers of equipment and pharmaceuticals. Complicating matters further, a study by the Institute of Medicine found that adverse results in health care are not typically caused by the fault of a single individual, but instead by complex, multicausal, systemic interactions.[51] Such a finding, however, is inconsistent with most medical malpractice litigation, in which plaintiffs' lawyers focus on the fault of individuals.[52]

Additionally, proving fault in malpractice cases, whether of an individual or a system, is often difficult because of the nature of the human body. The body is made up of intricate, interlocking parts that require years of devoted study to properly understand. Yet, we require lay people to distinguish adverse consequences due to fault from preexisting conditions that further develop during treatment. And we require them to do so within the time constraints of a trial often taking less than a week. Moreover, the education process provided to jurors often includes conflicting and confusing technical expert testimony regarding the defendant's or defendants' negligence.

Despite these difficulties, the results of medical malpractice litigation do not appear to be arbitrary; data suggest that there is a correlation between fault and liability.[53] For example, the Harvard School of Public Health study determined the assessment of liability in the tort system was correct nearly

49. *Id.* (quoting David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. MICH. J.L. REFORM 239, 242 (1997)).

50. *Id.* at 547–48 (quoting James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 326 (1990)).

51. COMM'N ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM (Linda T. Kohn et al. eds., 1999).

52. NEIL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 151–69 (2000).

53. Philip G. Peters, Jr., *What We Know About Malpractice Settlements*, 92 IOWA L. REV. 1783, 1785 (2007) (conducting a meta-study and concluding that settlement outcomes are driven by the strength of plaintiff's case).

three-quarters of the time.[54] That means, however, that despite taking an average of five years to resolve disputes, the tort system still gets it wrong over a quarter of the time. Plaintiffs should be particularly concerned about incorrect outcomes. According to a meta-study determining an error rate for and against each party, plaintiffs win approximately 10–20% of cases with weak evidence of negligence and 50% of cases with strong evidence thereof.[55] Thus, plaintiffs win between 10% and 20% of cases they probably should lose, but lose half of the cases they probably should win.

Uncertainty is not only a problem in determining liability in complex products and medical malpractice cases; it affects simple negligence cases as well. Kenneth Abraham demonstrates the uncertainty of the "reasonable-care-under-the-circumstances" standard by focusing on the job of the factfinder.[56] The finder of fact must: (1) determine the empirical facts, such as what actions the defendant took; (2) determine what kind of care and how much of it was necessary under the particular circumstances, and (3) decide whether the defendant met the standard annunciated in step two.[57] Abraham describes the second step as "an act of discretionary norm creation" specific to the facts and circumstances of this case.[58] Moreover, Abraham notes that the norm creation in most negligence cases is "unbounded," meaning the factfinder uses its "own general normative sense of the situation, informed by individual experience and by the evidence submitted by the parties."[59]

Abraham reveals the complexities of unbounded norm creation even in "the simplest of negligence cases,"[60] a slip-and-fall arguably caused by negligent snow removal on a sidewalk. What does reasonable care require? Abraham presents a list of potentially relevant factors: How much snow the defendant removed initially, whether the defendant inspected the premises later, the visibility of the ice, the number and steepness of the stairs, whether there was a railing, how long the area was in the sunlight during the day, and the snow removal customs in the neighborhood.[61] Thus, the finder of fact faces numerous decision points: "[E]ach of these items of evidence is a potential predicate for the application of a norm to the facts of the case—for example, that a homeowner should remove all but the tiniest bits of snow

54. Studdert et al., *supra* note 25, at 2028.

55. Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1464 (2007).

56. Kenneth S. Abraham, *The Trouble with Negligence*, 53 VAND. L. REV. 1187, 1190–91 (2001).

57. *Id.*

58. *Id.* at 1191.

59. *Id.* at 1190.

60. *Id.* at 1193.

61. *Id.*

from steps, [or] that subsequent inspection is (or is not) necessary."[62] Except in the unlikely event that any of the precautions are mandated by statute or ordinance, "the failure of the defendant to employ the precaution is simply an optional basis for the negligence decision by the finder of fact [who] . . . is simply directed to weigh all the evidence in deciding whether the defendant was or was not negligent."[63]

If, as seen, "[t]he standard of reasonable care is notoriously vague,"[64] the standard for measuring pain-and-suffering damages is even worse. Take the California jury instructions as an example. In California, for "Noneconomic Damage[s]," the factfinder is told: "No fixed standard exists for deciding the amount of these noneconomic damages."[65] The factfinder is also warned: "You must use your judgment to decide a reasonable amount based on the evidence and your common sense."[66]

Stating that pain and suffering is vague is merely to paraphrase the jury instruction: "No fixed standard exists for deciding the amount of these noneconomic damages."[67] Moreover the use of the words "judgment," "reasonable," and "common sense" in a single sentence is a warning of intense subjectivity.[68] Such vagueness creates a number of problems. One is "a lack of 'horizontal equity."[69] Juries award very different amounts of money for similar injuries, creating a large amount of variation within an injury category.[70] Even worse than the seeming randomness of such a distribution is the truth that these decisions are often influenced by factors

62. *Id.*

63. *Id.*

64. Geistfeld, *supra* note 42, at 547. Over the past several decades, the Supreme Court of the United States has limited the awards of punitive damages based on the Due Process Clause. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"); BMW of North America, Inc. v. Gore, 517 U.S. 559, 574–85 (1996) (setting three guideposts to determine if punitive damage awards satisfy due process: (1) the degree of reprehensibility of the conduct; (2) the ratio between compensatory and punitive damages; and (3) sanctions for similar misconduct); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991) (holding that the Due Process Clause applies to punitive damages awards). The Court's limits are based on certain constitutional concerns: arbitrary deprivation of one's property, fair notice of the precise conduct to be avoided, and poor decision-making by judges or juries. *State Farm*, 538 U.S. at 417–18. Geistfeld is so concerned about tort law's vagueness, he maintains that basic tort awards implicate these concerns to the same extent as punitive damages. Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1099–100 (2005).

65. JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS 3905A (2017).

66. *Id.*

67. *Id.*

68. *Id.*

69. Geistfeld, *supra* note 64, at 1107.

70. *Id.*

such as race, gender, and socioeconomic status.[71] Such factors carry more weight when the standard is vague.

For present purposes, the problem with the vagueness of pain and suffering damages is that it exacerbates the problem of vagueness in the standard for liability. Measuring pain and suffering causes tremendous administrative costs.[72] Litigation is increased because the double vagueness—is the defendant liable and how much should they pay if they are—allows the parties' evaluations of the claim to substantially diverge.[73] Divergences in expectations impede settlement, both reducing its likelihood and increasing the time and money needed to reach accord.[74]

Again, if a plaintiff is primarily motivated to right a wrong, the reasonable person standard can allow for a robust examination of the facts and circumstances. The delay and transaction costs involved are an unfortunate byproduct, but may, perhaps, be justified by the search for truth.[75] If, however, a plaintiff simply wants to replace lost income, the uncertainty, delay, and transaction costs are intolerable. They postpone and diminish what can be urgently needed funds. A compensatory alternative, as history demonstrates, could have advantages for both plaintiffs and defendants.

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71. *Id.* at 1107–08.

72. Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858, 871 (1999).

73. *See* 2 A.L.I. REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 202 (1991); *see also* Catherine M. Sharkey, *The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zipursky*, 60 DEPAUL L. REV. 695, 696 (2011) (emphasizing that the certainty of rules can operate in a "pro-liability direction").

74. P.S. ATIYAH, ACCIDENTS, COMPENSATION, AND THE LAW 216 (3d ed. 1980); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 196–97 (2004); O'Connell & Eaton, *supra* note 72, at 871.

For an extreme example, involving punitive damages, of tort law's transaction costs and delay, consider the Exxon Valdez case over an oil spill off the coast of Alaska. Even though negligence was not an issue, and the captain was admittedly drunk, the case lasted decades. Exxon Shipping Co. v. Baker, 554 U.S. 471, 477 (2008). The accident occurred on the evening of March 24, 1989, and the Supreme Court rendered an opinion on the case on June 25, 2008, vacating a Ninth Circuit opinion and remanding. *Id.* at 476, 515. The Ninth Circuit made an award and remanded the case to the district court for entry of final judgment on June 15, 2009. Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077, 1082 (9th Cir. 2009). In 1994, the jury handed down the punitive damages verdict and lead plaintiffs' counsel hugged his three-year-old son. Richard Lempert, *Low Probability/High Consequence Events: Dilemmas of Damage Compensation*, 58 DEPAUL L. REV. 357, 368–69 (2009). An Exxon lawyer stated: "He'll be in college before you get any of that money." *Id.* at 369 (quoting Robert E. Jenkins & Jill W. Kastner, Comment, *Running Aground in a Sea of Complex Litigation: A Case Comment on the Exxon Valdez Litigation*, 18 UCLA J. ENV'T L. & POL'Y 151, 192 (2000)). Transaction costs were astronomical. *Id.* at 368. More than 1,000 depositions were taken over 2,500 deposition days. *Id.* More than sixty law firms were involved. *Id.* Ten years into the saga, it was estimated that Exxon had already spent $300 million on its defense. *Id.* Plaintiffs' attorneys were to receive 22.4% of all funds eventually paid. *Id.*

75. I suspect even vindication-oriented plaintiffs have problems with delay and transaction costs.

II. HISTORY

Tort history can teach us several things about the desirability of a compensatory tort bypass.[76] First, going back over a century, compensation has been a primary motivating factor for a substantial portion of plaintiffs. This is true in both admonitory and more compensatory phases. In other words, the compensatory focus of a portion of current plaintiffs is not an anomaly and is unlikely to go away. Instead, it should be accommodated. Second, compensatory urges are most obvious during surges of accidents. Accident surges heighten suffering, which needs to be alleviated, and also make compensatory solutions more possible due to the sheer number of accidents. Third, the compensatory solutions that have arisen from accident surges demonstrate a pattern that can be useful in designing a compensatory bypass.

The compensatory pressure of injuries repeatedly shapes the law. Ever since the mid-nineteenth century—when negligence became a separate tort and the Industrial Revolution produced new ways to maim the human body—tort law has experienced waves of injuries. These waves, often spurred by technology,[77] have occurred throughout the history of negligence law. They amount to a mass of suffering human beings seeking compensation from a system focused on limiting liability. The restrictions were particularly rigid during negligence's first several decades. There is no reason to think these waves of injuries will cease; thus, we should design tort law to absorb the pressures we know are coming.

The law follows a pattern in response to the surges. The law generally responds in a compensatory manner, such as by relaxing requirements to recover, either formally or informally, in exchange for a reduction in the amount of recovery. In this compromise, both parties receive a benefit. Claimants gain more swift and certain access to (sometimes desperately) needed funds, while defendants (and their insurers) get smaller, more predictable payouts. A compensatory mechanism making it easier for the parties to reach such a consistently favored result would improve tort law's ability to achieve both compensation and vindication. In this Section, I will discuss three examples of the pattern: workers' compensation, automobile accidents, and mass disasters.

76. Portions of this section are adapted from Christopher J. Robinette, *Why Civil Recourse Theory Is Incomplete*, 78 TENN. L. REV. 431 (2011).

77. *See generally* Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 11 J. TORT L. 71 (2018).

A. Workers' Compensation

Until the mid-nineteenth century, there was no overarching tort of negligence.[78] Negligence "emerged from the action of trespass on the case to take fairly clear shape in a few prescient judicial decisions and bits of commentary during the 1860s."[79] As negligence was emerging as a cause of action, its potential application exploded. After the Civil War, industrialization and the growth of railroads dramatically increased the risk of injury, particularly to people in the workplace.[80] John Witt describes the results: "Industrializing economies in the mid to late nineteenth century experienced an explosion of accident rates alongside the rapid development of new industries and more powerful machinery."[81] Industrialization's injury rates surpassed even those of the war.[82] Not only were there more injuries, those injuries were more severe. As Donald Gifford states: "Locomotives, automobiles, and industrial machinery were more likely to result in crippling or even fatal injuries than were horses that threw a rider or the carelessness of coworkers using hand-tools."[83]

The 1850 census was the first to calculate national deaths from accidents.[84] Between 1850 and 1880, "the [percentage] of deaths attributable to accident[s] among men aged ten to fifty increased by over 70 percent, [rising] from 7 percent to 12 percent."[85] The worst category of accidental injuries, by far, was workplace injuries, which "represent[ed] close to one-third of all accidental deaths and . . . between one-half and two-thirds of all accidental injuries."[86] In 1890, railroad worker death rates were 314 per 100,000 workers per year.[87] Also in 1890, coal mining deaths "rang[ed] from 215 deaths per 100,000 workers per year in bituminous coal mines to 300 deaths per 100,000 workers per year in anthracite coal mines."[88] Trainmen, who "operat[ed] the coupling devices between [rail]cars, and brakemen, who operated the train's handbrakes, died in work-related accidents at rates of 900

78. KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 20 (2008).

79. Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1260 (2001).

80. ABRAHAM, *supra* note 78, at 26–27.

81. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 22 (2004).

82. *Id.* at 24 (quoting BUREAU OF STAT. OF LABOR & INDUS. OF N.J., THIRTEENTH ANNUAL REPORT 367 (1890)).

83. Gifford, *supra* note 77, at 124.

84. WITT, *supra* note 81, at 26 (citing J. D. B. DE BOW, U.S. CENSUS, MORTALITY STATISTICS OF THE SEVENTH CENSUS OF THE UNITED STATES, 1850, at 17–20 ('1886)).

85. WITT, *supra* note 81, at 26.

86. *Id.* at 27.

87. *Id.*

88. *Id.*

and 1,141 deaths per 100,000 workers per year, respectively."[89] In comparison to contemporary accident rates, those around the turn of the twentieth century were horrifying: A 1912 study of accidental deaths "estimated 82,500 deaths per year; [since then], the population of the United States has tripled, but the number of accidental deaths has increased by less than a quarter."[90] Witt summarizes: "Industrialization . . . had devised . . . new and unfamiliar mechanisms for inflicting harm on the human body."[91]

An increase in litigation accompanied the increase in the number and severity of accidental injuries. Between 1870 and 1890, "the number of accident suits being litigated in New York City's state courts grew almost eightfold; by 1910 the number had grown again" more than five times.[92] From 1870 until 1910, the percentage of tort cases in New York City's trial courts' contested caseload increased from 4.2 to 40.9%.[93]

Tort law provided little relief for this mass of workplace injuries. A leading Torts casebook states that tort provided "relatively few instances of compensation" for workplace incidents during this time.[94] In his treatise, William Prosser presents various estimates placing the percentage of uncompensated workplace accidents between 70% and 87%.[95] The limitations were both doctrinal and practical. Doctrinally, many courts—at least in workplace accident cases—found that if the employer's conduct was consistent with custom in the trade or business, the employer was not negligent as a matter of law.[96] But the "most significant aspect of the doctrinal development"[97] was the "unholy trinity"[98] of defenses at the

89. *Id.*

90. *Id.* at 26–27.

91. *Id.* at 28.

92. *Id.* at 59.

93. *Id.* (citing RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1910, at 20 tbl. 4 (1992)). Gifford chronicles several factors that laid the groundwork for an increase in litigation at the end of the nineteenth and beginning of the twentieth centuries. Gifford, *supra* note 83, at 80–83. They include: (1) the demise of the complicated writ pleading system, (2) the abolition of the witness disqualification rule (*see generally* Kenneth S. Abraham & G. Edward White, *The Transformation of the Civil Trial and the Emergence of American Tort Law*, 59 ARIZ. L. REV. 431, 468 (2017)), (3) the advent of the contingent fee, and (4) the advent of liability insurance. Gifford, *supra* note 83, at 80–83.

94. VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 1268 (13th ed. 2015).

95. G. Edward White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265, 1271 n.13 (1987) (citing WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 530 n.32 (4th ed. 1971)).

96. Gifford, *supra* note 77, at 95.

97. SCHWARTZ ET AL., *supra* note 94, at 1267.

98. *Id.*

employer's disposal: the fellow servant rule, assumption of risk, and contributory negligence.

The fellow servant rule, in most cases, prevented an employee from recovering from the employer if the injury was caused by the tortious conduct of another employee.[99] Assumption of risk allowed an employer to escape liability even if it had been negligent if the employee accepted or continued in the employment after notice of such negligence.[100] Finally, contributory negligence allowed an employer to escape liability despite its own negligence if the employee had been even slightly negligent himself.[101] On a practical level, employees or their families were forced to find the courage to sue the hand that fed them. Even if they managed to find that courage, "[l]ong, drawn-out litigation placed severe financial burdens upon workers."[102] In the end, "the realities of wealth and ineffectual representational institutions for workers"[103] made the recovery of compensation rare.

Attorney Crystal Eastman provided an illustration of tort's compensatory limitations. In her influential book *Work-Accidents and the Law*,[104] Eastman reviewed 526 workplace deaths in Allegheny County, Pennsylvania during parts of 1906 and 1907.[105] Nearly all fatal workplace accidents, 523 of 526, killed men; almost half were married men, and 63% were the sole supporter of their family.[106] In over half of those cases, "the widow and children were left by the employer to bear the entire income loss."[107] In only 30% of the cases did the family receive over $500, which was approximately a year's income for the lowest paid of the deceased workers.[108]

In advocating for a change to the common law tort system, Eastman "organize[d] work-accident debates around the image of the wounded family."[109] Highlighting her finding that 63% of the deceased men in her study were the sole supporter of their family, she stated, "[t]he people who

99. Gifford, *supra* note 83, at 95.

100. *Id.* at 96.

101. *Id.* at 96–97.

102. SCHWARTZ ET AL., *supra* note 94, at 1267.

103. *Id.* at 1268.

104. CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW (Paul Underwood Kellogg ed., 1910).

105. *Id.* at 119.

106. *Id.* at 119–20.

107. *Id.* at 121.

108. *Id.* at 122. The 30% figure is likely on the high side; Ms. Eastman made several liberal assumptions to reach it. *See id.* at 121–22 (stating that this figure was reached by "assuming that all the unknown amounts were large and that all suits pending would be decided for the plaintiff").

109. WITT, *supra* note 81, at 130.

perished were of those upon whom the world leans."[110] She described the lives of the widows and orphans left behind by workplace accidents, complete with poignant photographs.[111] One widow and her children, for example, were forced to leave their home and move into the back rooms of a parent's house.[112] Other commissions studying workplace accidents "also made dependent wives and children central objects of concern."[113] For example, the New York State Employers' Liability Commission stated the families of injured or killed workmen "must depend upon the work of women and children, or upon the assistance of relatives and friends, must reduce their standard of living to the detriment of health, and must often become destitute and dependent upon charity."[114]

Once Eastman's book was published in 1910, support for workers' compensation spread like a "prairie fire."[115] In the years after New York adopted the first workers' compensation program in the United States,[116] it became the law in jurisdiction after jurisdiction.[117] Workers' compensation, as its name indicates, is based on compensatory principles. Whereas tort law was believed to be based on fault,[118] greatly reducing the role of fault in workplace injuries was one of the primary attractions of workers' compensation.[119] The law, which was adopted as a substitute for tort, eliminated the requirement of proving fault on the part of the employer.[120] Instead the employee need only demonstrate the injury was work-related, "arising out of or in the course of employment,"[121] making it much easier to recover. That the purpose was compensatory—providing resources to allay

110. EASTMAN, *supra* note 104, at 119.

111. *Id.* at 137.

112. *Id.*

113. WITT, *supra* note 81, at 131.

114. N.Y. STATE EMP'S. LIAB. COMM'N, REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK BY THE COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS 27 (1910) [hereinafter WCR].

115. WITT, *supra* note 81, at 127.

116. *Id.*

117. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J. L. & ECON. 305, 320 tbl.2 (1998).

118. *See, e.g.*, WCR, *supra* note 114, at 10 ("The New York system of liability is, speaking generally, founded on fault . . . . That is the fundamental principle of our law, inherited from the common law of England, which no statute in this State has ever changed.").

119. Christopher Howard, *Workers' Compensation, Federalism, and the Heavy Hand of History*, 16 STUD. AM. POL. DEV. 28, 32 (2002). Workers' compensation does not abandon the concept of responsibility. *See* Gregory C. Keating, *Is Tort Law "Private"?*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 362 (Paul B. Miller & John Oberdiek, eds., 2020) (describing workers' compensation as a form of "collective responsibility").

120. Fishback & Kantor, *supra* note 117, at 309.

121. *Id.* at 305–06.

injuries—is underscored by the focus on easing the suffering of injured workers and their families.[122]

Workers' compensation allowed those injured on the job to recover more swift and certain compensation, but it was not one-sided. In what became known as the "Grand Bargain,"[123] employers and their insurers gained smaller, more predictable payouts. Witt describes the bargain as "a kind of rough-justice in any one case, splitting the difference as between employers and employees."[124] Cases "would no longer get bogged down in litigating thorny questions of fault"[125]; instead, "injured employees would be compensated for virtually all injuries arising out of and in the course of their work."[126] On the other hand, "[d]amages would not be at the discretion of a jury or designed to make the injured employee whole, as in the law of torts, but would instead be scheduled at one-half or two-thirds the injured employees [sic] lost wages, plus medical costs."[127] In short, as befits a bargain, grand or otherwise, "employees, employers, and insurance carriers all saw the adoption of workers' compensation as to their mutual benefit."[128]

B. Automobile Accidents

Shortly after the states began adopting workers' compensation statutes, efforts to reform automobile accidents based on compensatory principles were expected.[129] The history of reform efforts for automobile accidents resembled that of workplace accidents. Just as before, there was a surge in automobile accidents along with congestion in the courts. Also as before, the automobile accident reform attempts were based on compensatory principles. The reform efforts, however, were also different in significant ways. The formal reform of automobile accidents took much longer and was less sweeping than workers' compensation. More importantly, however,

122. *See id.* at 306 (discussing "the financial protection that workers' compensation provided injured workers and their families").

123. *See, e.g.*, Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081, 1082 (2017).

124. *Id.* at 1082 n.3 (quoting John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1186–87 (2005)).

125. *Id.* (quoting John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1186–87 (2005)).

126. *Id.* (quoting John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1186–87 (2005)).

127. *Id.* (quoting John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1186–87 (2005)).

128. *Id.* at 1083.

129. *See* Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 367–68 (1914).

substantial alteration of the manner in which automobile accident claims were processed came informally.

A dramatic increase in automobile accidents occurred between the mid-1910s and the early 1930s. Between 1915 and 1932, deaths due to automobile accidents "multiplied over seven times."[130] Moreover, in 1932, the "automobile fatality rate ha[d] increased more than 500% since 1913, while the death rate for other kinds of accidents show[ed] a decline of over 30% for the same period."[131] Writing in 1925 in the *Columbia Law Review*, a scholar stated:

> Formerly, when horse drawn vehicles, slow in movement and few in number, were the principal means of transportation, there was comparatively little danger in the use of the streets. But the increasing use and speed of automobiles have made our streets more dangerous than our factories and are causing a greater loss of life and a greater number of casualties or losses than in the World War.[132]

In short, as automobiles became increasingly common, they created "a hellish carnage."[133]

Once more, the increase in accidents led to congestion in the courts. Automobile accidents constituted thirty percent of all new cases on the Supreme Court of New York County's calendar between October 1928 and April 1930.[134] Additionally, a study of the Courts of Common Pleas of Philadelphia County found that automobile accident cases were half of all cases tried to a jury.[135]

Formal tort reform of automobile accidents was slow and piecemeal. A significant early effort was the 1932 "Columbia Plan," produced by the Committee to Study Compensation for Automobile Accidents ("the Committee"), a group of academics, lawyers, and social scientists under the auspices of Columbia University.[136] The Committee proposed compulsory

130. COLUMBIA UNIV. COUNCIL FOR RSCH. IN THE SOC. SCI., REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 17 (1932) [hereinafter COLUMBIA PLAN].

131. *Id.*

132. Gifford, *supra* note77, at 110 (quoting Robert S. Marx, *Compulsory Compensation Insurance*, 25 COLUM. L. REV. 164, 167 (1925)).

133. Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941*, 4 CONN. INS. L.J. 521, 540 (1998) ("The rapid growth of motoring coupled with unimproved roads and a population with no historical experience driving such machines, combined to generate a hellish carnage that is difficult to appreciate in our era of air bags, engineered highways, and automobile conscious people.").

134. COLUMBIA PLAN, *supra* note 130, at 20.

135. *Id.*

136. *See id.* at 2–3.

automobile liability insurance paying benefits without reference to fault.[137] The Columbia Plan was explicitly based on compensation. The Committee drafted an outline that provided: "[T]he main purpose of [the] compensation plan is to spread through insurance the inevitable losses due to automobile accidents."[138] Similar to Eastman's focus on the wounded family in *Work-Accidents and the Law*, the Columbia Plan covered the plight of accident victims' families and included numerous individual "case studies" that humanized the effect of automobile accidents.[139] The Columbia Plan did not garner enough political support to be enacted in any jurisdiction; automobile accident reforms were placed on the backburner as the Great Depression and World War II consumed national attention.[140]

Scholars continued to focus on automobile accident reform, and a breakthrough occurred in 1965 when Robert Keeton and Jeffrey O'Connell published *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*.[141] Keeton and O'Connell noted the continued surge in automobile accidents: "In 1963 the death toll reached a new high of 43,600, which was in turn eclipsed by a figure of about 47,000 to 48,000 in 1964."[142] Furthermore, these accidents continued to cause court congestion that was described by Keeton and O'Connell as "crushing."[143] The authors proposed that states adopt no-fault automobile laws in which mandatory first-party insurance would cover economic loss caused by personal injuries.[144] In essence, up until a certain monetary threshold—perhaps $10,000—a driver's own insurer would pay the driver for economic loss from personal injuries suffered in automobile accidents, without reference to fault.[145] Tort liability was reserved for larger cases—those above the threshold—but the recovery would be reduced by the amount already provided through first-party

137. ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 138 (1965).

138. Young B. Smith, *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785, 799 (1932). Deterrence was disclaimed: "The problem of compensation for injuries caused by such accidents rather than the problem of accident prevention has been the Committee's field of study." COLUMBIA PLAN, *supra* note 130, at 1 (footnote omitted). The Committee also questioned the principle of fault: "The Committee believes that the principle of liability for fault only is a principle of social expediency, and that it is not founded on any immutable basis of right." *Id.* at 212.

139. COLUMBIA PLAN, *supra* note 130, at 4, 223–35.

140. Joseph A. Page, *Roscoe Pound, Melvin Belli, and the Personal-Injury Bar: The Tale of an Odd Coupling*, 26 T.M. COOLEY L. REV. 637, 668 (2009).

141. KEETON & O'CONNELL, *supra* note 137.

142. *Id.* at 11 (footnote omitted).

143. *Id.* at 13.

144. *Id.* at 7, 9.

145. *See id.* at 7.

insurance.[146] The idea was to efficiently resolve smaller cases, leaving the resources of the court system available to process more significant cases.

No-fault insurance was based on compensatory principles.[147] Keeton & O'Connell concluded that neither fault nor deterrence was an entirely sufficient reason to shift losses.[148] Instead, they argued that "the burden of a minimum level of protection against measurable economic loss" should be "treated as a cost of motoring."[149] Specifically, they contended that "[t]he cost of providing this minimum level of compensation for traffic victims would be distributed generally among the persons who benefit from motoring, without regard to fault in particular accidents."[150] In the 1970s, sixteen states adopted some version of no-fault automobile law.[151]

Thus, automobile accident tort reform, as a formal matter, was delayed and unsystematic. Informally, however, there was a substantial reform of the way in which automobile accident claims were processed. The informal reform—routinization of the claims process—was also a product of the surge in automobile accidents, was compensatory in nature, and can be traced primarily to liability insurance.[152]

The surge of automobile accidents and the need to compensate victims led to reform of insurance laws. In January 1927, new automobile insurance mandates went into effect in Massachusetts and Connecticut. Massachusetts adopted a compulsory automobile insurance law, meaning it is illegal to operate a vehicle without an insurance policy in effect.[153] On the other hand, Connecticut adopted a financial responsibility law.[154] Unlike a compulsory law, a financial responsibility law generally did not require purchasing insurance until after an accident.[155] Once an accident occurred, the driver was required to prove the ability to pay future damages,[156] typically demonstrated by purchasing insurance. The potential inability to pay

146. *Id.*

147. *Id.* at 249–50.

148. *Id.* at 249.

149. *Id.* at 268.

150. *Id.*

151. Paul J. Barringer et al., *Administrative Compensation of Medical Injuries: A Hardy Perennial Blooms Again*, 33 J. HEALTH POL., POL'Y & L. 725, 732 (2008) (noting that, of the sixteen states, twelve retain some version of no-fault law today).

152. For a more detailed account of the routinization of automobile accident claims, see Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543, 550–66 (2013).

153. 1925 Mass. Acts 426–31.

154. 1925 Conn. Pub. Acts 3956–58.

155. *Id.*

156. *See, e.g.*, 6 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 61.01 (Jeffrey E. Thomas & Christopher J. Robinette eds., 2020).

damages for the initial accident was a weakness of financial responsibility laws, and compulsory laws became the dominant approach to automobile insurance. Today, forty-eight states and the District of Columbia have enacted compulsory automobile insurance laws.[157] As noted by the Supreme Judicial Court of Massachusetts: "The purpose of the compulsory motor vehicle insurance law is not, like ordinary insurance, to protect the owner or operator alone from loss, but rather is to provide compensation to persons injured through the operation of the automobile insured by the owner."[158]

By the time of the Columbia Plan in 1932,[159] it was already obvious that liability insurance for automobile accidents dramatically liberalized recovery of compensation. The Committee reviewed 2,500 closed cases of temporary disability involving insured defendants and 900 cases involving uninsured defendants.[160] Claimants received payment in 86% of the insured cases, but only 27% of the uninsured cases.[161] In cases of permanent disability, claimants received payment in 96% of the 192 closed cases with insured defendants, but only 21% of the 90 cases with uninsured defendants.[162] The Committee opined, "[I]nsurance companies pay in so large a proportion of the cases in which liability insurance is carried, that the principle of liability without fault seems almost to be recognized."[163]

Regarding automobile accident claims, compensation was not simply conditioned on the fault of the tortfeasor and the lack of fault by the victim; instead "the theory of full compensation or none yields to the practice of partial compensation in almost every one of the multitude of settlements."[164] Keeton & O'Connell attributed this to settlement practices: Because of the large number of insureds, insurers take a collective view of risk, appraising claims "impersonally by standards appropriate to the management of a large pool of risks."[165] An individual claim will settle "whenever this can be done for a sum representing an appropriate discount from the probable amount of an award if the case should be tried and lost. This discount is tailored to the degree of likelihood that the insurer would win if the claim were litigated."[166]

157. *See, e.g.*, *id.* at § 61.02[1] (stating that New Hampshire has a financial responsibility law). Virginia recently revised its statutes to allow motorists to pay an uninsured motorist fee as an alternative to compulsory insurance. VA. CODE ANN. § 46.2-706 (2020).

158. Wheeler v. O'Connell, 9 N.E.2d 544, 546 (Mass. 1937).

159. *See* COLUMBIA PLAN, *supra* note 130.

160. *Id.* at 203.

161. *Id.* at 204.

162. *Id.*

163. *Id.* at 203.

164. KEETON & O'CONNELL, *supra* note 137, at 254.

165. *Id.*

166. *Id.*

Insurers will pay money to some cases it could have won at trial, but will make that up in other cases by settling for less than it would have lost at trial. "The insurer's major concern is the most economical allocation of available funds to all the claims in the risk pool."[167]

Laurence Ross shed light on the role of insurance adjusters in the claims process in his major empirical study of claims practices, chronicled in *Settled Out of Court: The Social Process of Insurance Claims Adjustments*.[168] Ross's study supported the assertions in the Columbia Plan and by Keeton & O'Connell that the fault standard was not strictly applied in automobile accident cases. Based on formal law, which included the absolute bar of contributory negligence in most jurisdictions at the time, "a literal application of these rules would result in very few recoveries."[169] But the files Ross reviewed told a different story: In the "large majority of cases . . . a claimant who has provable economic loss will recover something."[170] Additionally, complete denials of compensation were "very largely confined to trivial losses."[171]

Ross attributed these results to insurance and the role of adjusters. He concluded that adjusters were pressured to close cases promptly, and that the easiest way to do so was to pay claimants.[172] Ross also found that adjusters understood liability in mechanical, not moral, terms.[173] Using bright-line traffic laws instead of the complex "reasonable person" standard,[174] adjusters put cases into broad categories such as "rear-enders, red-light cases, stop sign cases, and the like."[175] In terms of damages, most cases are simply valued by some multiple of medical bills.[176] Ross believed that payment followed liability and damages, as interpreted by the insurer.[177] The limitations, however, were very loose, particularly regarding liability: "As liability

167. *Id.*

168. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS (1970). Ross recruited three large insurers to cooperate in his study. From the companies, he interviewed sixty-seven adjusters and their supervisors in six different locations. He supplemented the interviews with field observations of the adjusters, notes from negotiation session between adjusters and plaintiffs' lawyers, and interviews with plaintiffs' lawyers. Additionally, Ross tested his hypotheses with an analysis of 2,216 bodily injury claims closed by one of the insurers in a two-month period in 1962. *Id.* at 9–12.

169. *Id.* at 199.

170. *Id.* at 81.

171. *Id.* at 247.

172. *Id.* at 19.

173. *Id.* at 21.

174. *Id.* at 98.

175. *Id.* at 135.

176. *Id.* at 107–08.

177. *Id.* at 21.

becomes more questionable, the claim becomes 'worth' less in the adjuster's eyes. When there are strong doubts as to the insured's negligence, or . . . evidence of contributory negligence[,] . . . the adjuster will define the claims as one 'for compromise.'"[178] Even under these circumstances, "the adjuster is reluctant to pay less than medical bills."[179] Importantly, Ross also found that some payment is made in most cases with high damages, without regard to the facts on liability.[180] Although formal law becomes more important as the size of the claim increases, Ross found evidence of routinization even in larger cases. Ross concluded, "even a highly individualistic law, when required to handle masses of cases, becomes categorical."[181]

Routinization was aided by the rise of repeat players on the plaintiffs' side. Plaintiffs' lawyers in the early twentieth century did not generally approach automobile accidents in a coordinated, systematic manner.[182] Samuel Issacharoff and John Witt chronicled these changes, which began in 1946 when a group of workers' compensation claimants' lawyers formed the National Association of Claimants' Compensation Attorneys ("NACCA").[183] In a few years, NACCA began to focus on tort cases, including automobile accidents. Group members shared information on trial and settlement practices, helping them overcome the informational advantages insurers had long held.[184] In addition to the sharing of information, referral networks were created, leading to specialization for plaintiffs' lawyers.[185] As a result, generalists handled automobile accidents less often.[186]

Having specialists on both sides of cases brought advantages. The "presence of bargaining agents who knew the short-cuts, the heuristics, and the rules-of-thumb often made the settlement process considerably more efficient."[187] Sometimes adjusters and plaintiffs' lawyers would swap cases, meaning if one case was settled at 50%, then another would be as well.[188] They also often created "package-deals" in which a number of cases were

178. *Id.* at 51.

179. *Id.*

180. *Id.* at 202–03.

181. *Id.* at 23.

182. There were isolated exceptions in certain urban areas. *See* JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 267 (2007).

183. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1610 (2004).

184. WITT, *supra* note 182, at 243.

185. Issacharoff & Witt, *supra* note 183, at 1611.

186. *Id.* at 1611–12, 1614.

187. *Id.* at 1614. Not all of the efficiency advantages are ethically permissible.

188. *Id.* at 1611–12.

settled at a time.[189] The efficiency created by routinization meant that by the mid-1960s automobile accident claims were being settled much faster than other tort claims.[190] Because automobile accident claims provided efficient compensation to many more victims than formal doctrine would have allowed, Issacharoff & Witt compared automobile accident claims to workers' compensation claims. They stated: "The striking feature is the similarity of the mature tort injury system in auto claims to the administrative system of workmen's compensation."[191]

Routinization on the plaintiffs' side has taken one further step, as described by Nora Engstrom. In the course of the last several decades, settlement mills have developed as a new business model for plaintiffs' personal injury firms.[192] According to Engstrom, settlement mills are "high-volume personal injury law practices that aggressively advertise and mass produce the resolution of claims, typically with little client interaction and without initiating lawsuits, much less taking claims to trial."[193] Claims arising from automobile accidents are the hallmark claims of settlement mills.[194] For settlement mills, "[e]fficiency trumps process and quality."[195] Mills typically accept almost any case; Engstrom interviewed one mill employee who stated that the "*modus operandi* was to sign everything up."[196] Despite this lack of quality control, cases in which an insurer makes no offer are very rare.[197] Although ostensibly operating pursuant to formal law, settlement mills function more like no-fault insurance, providing "fairly certain and standardized sums at relatively low systemic cost."[198] In doing so, the informal routinization of automobile claims accomplished what formal tort reform could not.

As with workers' compensation, however, not all of the benefits flow to plaintiffs, defendants and insurers benefit, as well. Defendants' liability payments are more predictable, and transaction costs, such as time and attorneys' fees, are reduced. Insurers receive what they perhaps want the most—predictability—and smaller payments in a lot of cases. In many ways, the informal reform of automobile accident claims reached the same

189. *Id.* at 1614 (quoting Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U. L. REV. 895, 904–05, 904 n.48 (1953)).

190. *Id.*

191. *Id.* at 1615.

192. Engstrom, *supra* note 16, at 1486.

193. *Id.*

194. Engstrom, *supra* note 24, at 807.

195. Engstrom, *supra* note 16, at 1493.

196. *Id.* at 1499 (quoting Telephone Interview with D.R. (Apr. 3, 2008)).

197. *Id.* at 1517 n.207.

198. Engstrom, *supra* note 24, at 809.

outcomes as the formal reform of workplace accident claims. In both instances, surges of tort claims led to a compensatory reformulation of the law that provides some benefits to all the parties involved.

C. Mass Disasters

Over the last two decades, in response to certain tragedies, both legislatures and private corporations have set up funds to compensate victims of specific mass disasters.[199] These mass disasters, and the funds created in their wakes, follow the pattern. A surge of injuries highlights the limitations of resolving claims through tort law; a compensatory work-around is created that has benefits for claimants and potential defendants. The fact that fault and responsibility are essentially the same with respect to each victim makes case-by-case negligence liability particularly unattractive. As Robert Rabin notes, "What all of this adds up to is compensation as a focal point in a new guise."[200] I discuss three examples: (1) the September 11th Victim Compensation Fund, (2) the Deepwater Horizon Oil Spill Trust, and (3) the General Motors ("GM") Ignition Switch Fund.

1. September 11th Victim Compensation Fund

On September 11, 2001, the United States suffered the worst terrorist attack in its history when Al Qaeda hijackers flew airplanes into the World Trade Center in New York City, the Pentagon in Virginia, and—thanks to heroic passengers—a field in Pennsylvania.[201] Within days, Congress created the September 11th Victim Compensation Fund.[202] The Fund's dual purpose was to compensate the victims of the tragic attack and to protect airlines from crippling tort liability.[203] The gist of the Fund was that claimants would receive no-fault compensation from the federal government in exchange for relinquishing the right to sue in tort anyone other than the hijackers and their accomplices.[204]

199. Robert L. Rabin, *Jeffrey O'Connell and the Compensation Principle in Accident Law: Institutional and Intellectual Perspectives*, 6 J. TORT L. 3, 24 n.84 (2013) (defining mass disasters "loosely to include multiple injuries from randomly generated killing sprees, as well as acts not necessarily suited for formal class action treatment").

200. *Id.* at 26.

201. Sean K. Mangan, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1059 n.132 (2002).

202. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 401, 115 Stat. 230, 237 (2001) (codified as amended at 49 U.S.C. § 40101 (2012)).

203. Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 771, 783–84 (2003).

204. Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 573 (2001); *see also* Janet Cooper Alexander, *Procedural Design and Terror*

The rules and procedures of the Fund were to be promulgated and administered by a "Special Master," who was appointed by the Attorney General of the United States.[205] Kenneth Feinberg was appointed Special Master in November 2001.[206] Each claimant was required to fill out a form providing: (1) claimant's physical harm suffered or, if filing on behalf of a decedent, proof of death; (2) economic and noneconomic losses suffered; and (3) any collateral sources, such as life insurance, received or pending.[207] The Special Master was required to review the claim and make a determination within 120 days of the filing of the claim.[208] The claimant need only prove they were: (1) present at the scene of the crash sites at the time or in the immediate aftermath of the attacks and suffered physical injuries or death, (2) a member of the flight crew or passenger on one of the flights, or (3) a representative thereof.[209] Economic loss specific to lost wages was determined by "a 'presumed economic loss' schedule based on age, size of family, and recent past earnings."[210] Under the schedule, however, a claimant received no credit for annual gross income over $200,000.[211] Noneconomic loss for an eligible death was limited to "$250,000 plus an additional $100,000 for the spouse and each dependent of the deceased victim."[212] Punitive damages were not available.[213] Payment from the Fund was required within twenty days of the Special Master's determination,[214] and was not subject to judicial review.[215]

The Fund differed from tort liability in several ways. First, neither fault nor causation needed to be proved. Relatedly, delay and transaction costs were dramatically reduced. Under the Fund, a claimant would have compensation within 140 days of filing a claim.[216] Attorneys and experts were not required for the process, and many lawyers offered *pro bono*

Victim Compensation, 53 DEPAUL L. REV. 627, 632 (2003). I am describing the original 9/11 Victim Compensation Fund that operated until 2004. The Fund was reactivated in 2011 and reauthorized in 2015. A more comprehensive overview of the Fund can be found at *About the Victim Compensation Fund*, SEPT. 11TH VICTIM COMP. FUND, https://www.vcf.gov/about (last visited Feb. 3, 2021).

205. Air Transportation Safety and System Stabilization Act § 404(a), 115 Stat. at 237–38.

206. Rabin, *supra* note 204, at 582.

207. Air Transportation Safety and System Stabilization Act § 405(a), 115 Stat. at 238.

208. *Id.* § 405(b)(3), 115 Stat. at 239.

209. *Id.* § 405(c)(2)(A)–(C), 115 Stat. at 238.

210. Rabin, *supra* note 204, at 584.

211. 28 C.F.R. § 104.43 (2020).

212. *Id.* § 104.44.

213. Air Transportation Safety and System Stabilization Act § 405(b)(5), 115 Stat at 239.

214. *Id.* § 406(a), 115 Stat. at 240.

215. *Id.* § 405(b)(3), 115 Stat. at 239.

216. Alexander, *supra* note 204, at 716–17.

services, so transaction costs were limited.[217] On the other hand, damages were also limited: There were, effectively, caps on both economic and noneconomic loss, and punitive damages were unavailable.[218] Moreover, collateral sources were subtracted from awards provided by the Fund. In general, those who sued recovered more than twice the average recovery of the Fund.[219] In a highly unusual alteration, the federal government provided the money for the awards made by the Fund instead of the airlines.[220] Among other things, due to the taxing power of the federal government, this virtually eliminated the possibility of non-payment due to insufficient funds.

The benefits to each side are clear: Claimants received no-fault payment very quickly with minimal transaction costs. The airline defendants received protection from tort liability beyond the amount of their insurance, and an opportunity to avoid years of acrimonious litigation. The federal government symbolically stood behind the sympathetic victims of a horrendous terror attack and protected the very useful airlines serving its citizens from bankruptcy. Special Master Feinberg emphasized that "the pathway of tort was littered with obstacles."[221] His administration of the Fund was "aimed at encouraging victims to forego the uncertainties and delays associated with tort in favor of immediate recourse to no-fault compensation for cabined recovery of out-of-pocket and intangible loss."[222] Ultimately, 97% of eligible claimants waived tort liability in exchange for an award from the Fund.[223]

2. BP Oil Spill Fund/Gulf Coast Claims Facility

On April 20, 2010, the petroleum company BP created a catastrophic oil spill in the Gulf of Mexico.[224] Several months later, BP formed a compensation fund in response to pressure from President Barack Obama that claimants be fairly paid from a fund independent of BP.[225] Under the Oil Pollution Act of 1990 ("OPA"),[226] BP was designated the responsible party

217. *Id.* at 648, 716.

218. *Id.* at 649.

219. Benjamin Weiser, *Value of Suing Over 9/11 Deaths Is Still Unsettled*, N.Y. TIMES (Mar. 12, 2009), https://www.nytimes.com/2009/03/13/nyregion/13lawsuits.html. The amount recovered in suit, however, was then reduced by attorneys' fees and costs and was achieved years later. *Id.*

220. John King et al., *Bush Signs Airline Bailout Package*, CNN (Sept. 23, 2001, 8:49 AM), https://edition.cnn.com/2001/US/09/22/rec.airline.deal/.

221. Rabin, *supra* note 199, at 25 (citing KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 17–19 (2005)).

222. *Id.* (citing KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 161 (2005)).

223. *Id.* (citing KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 161 (2005)).

224. Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. COLL. L. REV. 255, 259 (2011).

225. *Id.* at 256, 261.

226. 33 U.S.C. §§ 2701–2762 (2011).

for the spill and was to be held strictly liable for losses, which included "removal costs, natural resource damages, personal property damages and attendant economic loss, loss of profits resulting from destruction of real or personal property or natural resources, and lost taxes and fees."[227] OPA caps the responsible party's liability at $75 million plus cleanup costs, unless negligence, willful misconduct, or violation of applicable regulations is proved.[228] Claims are made to the responsible party, and, if not denied or settled in ninety days, the victim may sue.[229]

The fund was to be stocked with $20 billion provided by BP and sought "releases from claimants of litigation against BP."[230] Gulf Coast Claims Facility ("GCCF") was the entity created to distribute the $20 billion BP fund.[231] GCCF sought to pay not only OPA claims, but "state-tort claims for physical injury and death" as well.[232] Kenneth Feinberg was named the GCCF Claims Administrator.[233] Eligibility was dependent upon a combination of loss location and business type.[234]

Claimants were divided into four groups.[235] Group 1 was composed of claimants that were "heavily dependent on Gulf resources and tourism and were located in zip codes that bordered the Gulf shore."[236] They could recover even if evidence linking the claimant's loss to the oil spill was not submitted.[237] Group 2 consisted of "individuals and businesses that were located in the Gulf Alliance counties, but were not in zip codes that bordered the Gulf shore, as well as businesses that, while located in zip codes that bordered the Gulf shore, were not heavily reliant on Gulf resources and tourism."[238]

To determine eligibility, claimants in Group 2 were first subjected to a "Financial Test," comparing their post-spill income in 2010 to other recent periods.[239] Even if the claimant failed the Financial Test by not establishing a sufficient post-spill decline, eligibility could be established by providing a

227. Stier, *supra* note 224, at 259–60 (footnotes omitted) (citing 33 U.S.C. § 2702).

228. 33 U.S.C. §§ 2704(a)(1), (c)(1).

229. *Id.* § 2713(c).

230. Stier, *supra* note 224, at 255–56, 261.

231. *Id.* at 262.

232. *Id.*

233. *Id.*

234. BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY: REPORT OF FINDINGS & OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE 39 (2012), https://www.justice.gov/iso/opa/resources/66520126611210351178.pdf.

235. *Id.*

236. *Id.*

237. *Id.* at 40.

238. *Id.*

239. *Id.*

"specific causation document" linking a claimant's losses to the spill, such as a canceled contract.[240] Claimants in Group 3 "either were not located on the Gulf shore or Gulf Alliance counties, or were businesses or the employees of businesses that were not heavily reliant on Gulf resources and tourism."[241] Eligibility for compensation required claimants in Group 3 to pass both the Financial Test and provide a specific causation document.[242] "Group 4 consisted of claimants in business types that were deemed ineligible for compensation at various times by the GCCF."[243]

In terms of time, distribution of the funds was divided into phases.[244] In Phase I, the first six months after the oil spill, payments were made based on lesser documentation than would be required later.[245] The goal was to make these emergency payments "as quickly as possible" to stabilize struggling claimants.[246] Claimants did not waive their right to sue by accepting emergency payments, but final settlements were reduced accordingly.[247] In Phase II, claimants were allowed to choose among a quick payment, an interim payment, and a final payment.[248] A quick payment, $5,000 to an individual or $25,000 to a business, was available to claimants that had taken an emergency payment or an interim payment from the GCCF, and was available without providing additional documentation.[249] It required claimants to release their right to seek further compensation in relation to the spill.[250] Interim payments compensated claimants for "all past documented damage" due to the spill and allowed claimants to make further claims against the fund once each quarter to seek additional compensation.[251] Claimants were required to provide documentation, but were not required to provide a release.[252] Final payments compensated claimants for "all documented past damage plus estimated future damage" caused by the spill; claimants were required to release their right to any further compensation in relation to the spill.[253]

240. *Id.* at 37, 40.

241. *Id.* at 41.

242. *Id.*

243. *Id.*

244. *Id.* at 28–56 (describing GCCF Phase I and Phase II).

245. *Id.* at 29.

246. *Id.* at 30.

247. Myriam Gilles, *Public-Private Approaches to Mass Tort Victim Compensation: Some Thoughts on the Gulf Coast Claims Facility*, 61 DEPAUL L. REV. 419, 434 (2012).

248. BDO CONSULTING, *supra* note 234, at 34–35.

249. Gilles, *supra* note 247, at 436 n.97.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

GCCF determinations regarding the payment of interim and final payments were to be made within ninety days of being presented.[254] Payment to the claimant had to be made within fourteen days of receipt of the signed release.[255] As with the 9/11 Fund, damages were restricted.[256] GCCF did not make any payments for alleged punitive damages.[257] GCCF also "deduct[ed] and offset prior payments by BP or other sources," such as insurance, "from the final settlement amounts."[258]

The BP fund differed from tort liability in several ways. Claimants were not required to prove fault due to the OPA's strict liability standard.[259] Partially because of strict liability, and partially because the goal of the fund was to counteract an economic threat by providing money quickly, delay and transaction costs were reduced.[260] Emergency payments were available within the first six months of the oil spill.[261] In Phase II, GCCF protocols required making decisions on interim and final payments within ninety days of receiving them, and actually paying the claims within fourteen days of receiving a signed release.[262] Transaction costs were reduced; only three percent of claimants hired a lawyer.[263] On the other hand, damages were limited. Collateral sources were deducted from settlement amounts and "capped" in the sense that all payments had to be made from the available funds. Punitive damages were not available.[264]

Again, the benefits to claimants and BP are clear. Claimants received swift compensation, in many cases, when it was urgently needed, with low transaction costs. Moreover, the placement of funds in the hands of GCCF

254. BDO CONSULTING, *supra* note 234, at Exhibit Q § V(A)(1) ("Gulf Coast Claims Facility Protocol for Interim and Final Claims").

255. *Id.* at Exhibit Q § V(F).

256. *See supra* notes 211–215 and accompanying text (describing the limitations to available damages for the 9/11 Fund).

257. Stier, *supra* note 224, at 263.

258. Gilles, *supra* note 247, at 438.

259. Stier, *supra* note 224, at 259.

260. *Id.* at 256 ("Created quickly in response to a still-unfolding crisis and crafted in part by an executive branch that should be committed to public justice, the quasi-public fund allows for relatively swift movement of compensation to claimants. The BP Gulf oil spill posed a systemic threat to the Gulf-area economy—slow-moving trial verdicts may not have prevented a downward economic spiral as coastal businesses closed.").

261. *See supra* notes 245–247 and accompanying text.

262. *See supra* notes 254–255 and accompanying text.

263. Stier, *supra* note 224, at 264 n.74. Feinberg and his office, however, became a significant transaction cost: At the height of the work, BP Feinberg's office—"three lawyers and about five staff members"—received $1.25 million per month. Roger Parloff, *From 9/11 to Orlando, Ken Feinberg's Alter Ego in Compensating Victims*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/business/ken-feinberg-compensation-fund.html.

264. *See supra* note 257 and accompanying text.

removed the fear of BP's insolvency due to a flood of claims. BP was able to protect itself from a large number of claims with relatively circumscribed awards. BP benefited when claimants elected the fund because there was a real possibility that damage awards from lawsuits would be extremely high because of the tragedy and possible jury mindsets.[265] In processing more than one million claims, GCCF paid out $6.2 billion to over 220,000 claimants in its year and a half of operation; 97% of payments were made to claimants in the Gulf states.[266]

3. GM Ignition Switch Fund

Compared to the other two funds, the GM Ignition Switch Fund was simple. It did not involve legislation or the government; it was a business directly compensating victims of wrongdoing in exchange for releases of claims.[267] In 2014, after delaying action for several years,[268] GM issued a recall on 2.6 million small cars due to a faulty ignition switch.[269] While a car was being driven, the ignition switch could slip out of the run position; the car would stall, and the power steering, power brakes, and air bags would be disabled.[270] The faulty ignition switch resulted in at least 169 deaths, and 124 wrongful death cases.[271]

By March 2014, GM retained Kenneth Feinberg as a consultant to explore options for compensating the victims.[272] He was given "sole discretion" in deciding both the eligibility and the amount a victim would receive.[273] GM agreed to honor Feinberg's decisions: "No appeals. No

265. Gilles, *supra* note 247, at 447.

266. BDO CONSULTING, *supra* note 234, at 59–60.

267. Gabe Nelson, *Feinberg Details Eligibility for GM Ignition-Switch Compensation*, AUTO. NEWS (June 30, 2014, 1:00 AM), https://www.autonews.com/article/20140630/OEM11/140639993/feinberg-details-eligibility-for-gm-ignition-switch-compensation.

268. Tanya Basu, *Timeline: A History of GM's Ignition Switch Defect*, NPR (Mar. 31, 2014, 4:33 PM), https://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect.

269. Tom Krisher, *GM Ignition Switch Fund Rejected 91% of Claims*, USA TODAY (Aug. 24, 2015, 4:00 PM), https://www.usatoday.com/story/money/cars/2015/08/24/gm-ignition-switch-fund/32282521/.

270. *Id.*

271. Associated Press, *GM Ignition Switch Fund Pays Out $594.5 Million*, L.A. TIMES (Dec. 10, 2015, 2:32 PM), https://www.latimes.com/business/la-fi-1211-ge-ignition-claims-20151210-story.html.

272. Jeff Plungis & Tim Higgins, *GM Hires Feinberg to Handle Recall; CEO Barra Testifies Before Congress*, INS. J. (Apr. 1, 2014), https://www.insurancejournal.com/news/national/2014/04/01/325021.htm.

273. Gabe Nelson, *Feinberg Details Eligibility for GM Ignition-Switch Compensation*, AUTO. NEWS (June 30, 2014, 1:00 AM), https://www.autonews.com/article/20140630/OEM11/140639993/feinberg-details-eligibility-for-gm-ignition-switch-compensation.

rejection. It must pay it."[274] Feinberg required that claimants provide evidence, even if circumstantial, that the faulty ignition switch caused their injuries.[275] He further determined that victims would not be excluded from the fund based on contributory negligence.[276] GM did not "cap" the fund; there was no limit on the aggregate amount of money that GM would pay under the fund.[277]

In awarding damages, Feinberg used a formula that relied on national averages for settlement values of economic and noneconomic losses.[278] In death cases, economic losses were based on the victim's age, salary, historical earnings and dependents; noneconomic payouts were $1 million for the deceased and "$300,000 each for the surviving spouse and any dependents."[279] National averages were used in cases of living victims as well.[280] For example, victims who spent between eight and fifteen days in a hospital would be paid $170,000.[281] Victims were allowed to choose a standard amount based on averages or request an individualized calculation based on "extraordinary circumstances."[282] Simple cases were paid in ninety days, while more complex cases were paid in 180 days.[283]

The fund was different than tort law in several important ways. First, proving fault was not required and contributory negligence was irrelevant; proof of causation was sufficient. Partially because of this, delay and transaction costs were reduced. Eligible claims were paid in 90 or 180 days. On the other hand, compensation was typically based on an average settlement figure, generally less than would be potentially available in tort. Punitive damages were not available.[284]

The fund provided benefits to both sides. Claimants recovered reasonable compensation swiftly with low transaction costs. GM resolved claims more efficiently than through the tort system and avoided blockbuster verdicts. GM further earned the good will of admitting error and compensating for it. Over the course of the fund, Feinberg paid out $594.5

274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. David Shepardson, *GM Fund Approves $594.5 Million in Ignition Claims*, REUTERS (Dec. 10, 2015), https://www.reuters.com/article/us-gm-recall-compensation/gm-fund-approves-594-5-million-in-ignition-claims-idUSKBN0TT0DE20151210.

million in order to settle 399 claims.[285] Claimants receiving settlement offers through the fund accepted them over 90% of the time.[286]

Funds are proliferating as a way to resolve a large number of tort claims. Linda Mullenix states: "The twenty-first century may very well mark both the advent and triumph of fund approaches to resolving mass tort litigation."[287] It is important to note, however, that these funds and the concept of funds generally have been criticized extensively. As indicated, Kenneth Feinberg administered all of the funds in this section. He has been accused of being too close to the sponsors of the funds,[288] as well as questioned about the amount and process of his compensation.[289] The funds have been accused of being insufficiently transparent,[290] and failing to meet the requirements of procedural justice.[291] Perhaps most significantly, given the importance of choice on the part of the claimants, funds have been criticized on the grounds of lack of informed consent.[292]

My limited purpose in this Article is not to endorse any particular fund, or even the general concept of funds. Instead, it is to demonstrate that a

285. Associated Press, *supra* note 271.

286. *Id.*

287. Linda S. Mullenix, *Mass Tort Funds and the Election of Remedies: The Need for Informed Consent*, 31 REV. LITIG. 833, 833 (2012). Funds are currently being used to compensate victims of child molestation at the hands of priests employed by the Catholic Church. *See, e.g.*, Associated Press, *Pennsylvania Dioceses Offer $84M to 564 Clergy Abuse Victims*, CBS PITTSBURGH (Dec. 26, 2019, 10:06 AM), https://pittsburgh.cbslocal.com/2019/12/26/pennsylvania-dioceses-offer-84m-to-564-clergy-abuse-victims/.

288. John Schwartz, *Man With $20 Billion to Disburse Finds No Shortage of Claims or Critics*, N.Y. TIMES (Apr. 18, 2011), https://www.nytimes.com/2011/04/19/us/19feinberg.html (reporting that "plaintiffs' lawyers say he is working for BP").

289. Stier, *supra* note 224, at 255. Feinberg did not take any compensation for administering the 9/11 Victim Compensation Fund. Mike Steenson & Joseph Michael Sayler, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524, 535 (2009). His law firm, however, received $850,000 a month from BP at one point. Stier, *supra* note 224, at 255. That figure rose to $1.25 million at the height of their work. Parloff, *supra* note 263.

290. Schwartz, *supra* note 288 (discussing complaints that the BP claims process was "opaque at best").

291. *E.g.*, Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 914–15 (2011).

292. Mullenix, *supra* note 287, at 837–38 ("[M]ore consideration ought to be given to whether mass tort claimants—often under pressure or physical or psychological distress—have received sufficient neutral, dispassionate information to make an informed judgment concerning whether they should elect to receive compensation from the fund and forgo litigation or other alternative dispute resolution options."). That claimants choose compensation from a fund knowingly and willingly is particularly important in light of a study finding that many claimants viewed the decision as one "between money and a host of nonmonetary values that [study] respondents thought they might obtain from litigation." Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 647 (2008).

substantial number of claimants are attracted to the compromise of more swift and certain compensation, even if it means less of it. As noted, 97% of potential plaintiffs chose to use the 9/11 Victim Compensation Fund[293] and over 90% of potential plaintiffs receiving an offer from the GM fund accepted it.[294] Those percentages are overwhelming, even if one accepts for the purposes of argument imperfections in the informed consent process.[295]

The details of the foregoing discussion can be distracting, but for our purposes, there are a few salient points. Tort history reveals that compensation has been important for a portion of claimants in the tort system for well over a century, even during more admonitory phases of tort law. Compensatory preferences have resulted in workers' compensation, no-fault auto laws and routinized auto claims, and various compensation funds. Plaintiffs motivated by compensation are the norm, not the exception. Attempting to accommodate their preferences is better than dismissing them. Moreover, surges in accidents tend to heighten the need for compensation and make it more possible due to the ability to routinize claims. Finally, there is a pattern to the compensatory solutions created to resolve accident surges: A compromise is enacted in which plaintiffs receive funds more certainly and swiftly, but in lesser amounts.

CONCLUSION

To summarize, there is a percentage of plaintiffs, likely substantial, for whom compensation—the replacement of lost funds—is the primary motivating factor in filing a tort claim. The open-textured nature of most tort cases, which may assist in an individualized justice procedure attempting to vindicate rights, is ill-suited to compensation. Such uncertainty is slow and costly. Tort history reveals that a portion of plaintiffs have been motivated by compensation for well over a century, and that becomes most apparent in surges of accidents. Tort law is often beset by such surges; they are a blessing and a curse. Waves of injuries involve pain and need, but they also focus attention on a problem and invite solutions. Moreover, the sheer number of injuries means that their resolution can be routinized. Although routinization has occurred in different ways, a pattern of compromise benefiting both parties has emerged. Compensation for injuries becomes swifter and more certain, but in lesser amounts.

293. Rabin, *supra* note 203, at 792 n.79.

294. Associated Press, *supra* note 271.

295. Regarding the 9/11 Victim Compensation Fund, Mullenix states the "claimants seemingly had relatively good information and assistance of counsel available to make an informed decision about their election of remedies." Mullenix, *supra* note 287, at 838.

A pressure-release valve, designed to remove compensation-oriented cases from wrongs-based tort law, would benefit the plaintiffs and defendants in those tort cases, as well as reserve the tort system for those interested in righting wrongs. Following the pattern of the Grand Bargain and the structure of the more modern settlement funds, such compensatory cases should be resolved much more swiftly and certainly than cases in the traditional tort system, but with reduced damages.

The solutions seen in the prior section—workers' compensation, routinized automobile accident claims procedures, and compensation funds—have many positive attributes, but also limitations. Workers' compensation is both under- and over-inclusive. It is only available for workplace accidents, leaving all other injuries to the challenges of the tort system. On the other hand, it almost completely replaces tort law for injuries in the workplace. If the parties want a wrongs-based, individualized justice ruling, it is not available to them. The routinization of the automobile accident claims process has similar problems: It is only available for those injured in automobile accidents. On the other hand, routinized claims procedures are not necessarily best for all automobile accident victims. In particular, clients accepting the services of settlement mills, which have ethical issues,[296] are often unaware of the type of representation they are selecting.[297] Especially in the case of serious injuries, the failure to understand the limited quality of settlement mills can be costly.[298] Finally, mass disaster compensation funds only compensate those injured in very specific circumstances. Moreover, to be legitimate, such funds must be transparent and include fair procedures, most importantly assuring informed consent on the part of those choosing the fund compensation.

Most of tort law is not properly designed to meet the compensatory goals of a large number of claimants. What is needed is a way to bypass tort law in cases better suited for compensation, while leaving wrongs-adjudication in place as the default.[299] Designing such a bypass is challenging, but worth the effort. If successful, it would incorporate compensation into wrongs-based tort law, smoothing the vacillation Ted White describes between admonitory and compensatory phases in tort.[300]

296. Engstrom, *supra* note 16, at 1547 ("[T]hose who have meritorious claims and have been seriously injured are least apt to benefit from [settlement mills], raising profound ethical and public policy issues deserving detailed scrutiny by academics, bar organizations, and the judiciary.").

297. Engstrom, *supra* note 24, at 837.

298. *Id.* at 838–41.

299. An alternative, beyond the scope of this paper, is also to move to collective or enterprise responsibility for activities, leaving wrongs for acts. Keating, *supra* note 119, at 367–69. *See generally* Gregory C. Keating, *Products Liability as Enterprise Liability*, 10 J. TORT L. 41 (2017).

300. *See* G. EDWARD WHITE, *supra* note 1, at 291.

Additionally, the search for a way to fairly compensate those claimants who are not seeking vindication may create common ground on tort reform. A simpler, cheaper procedure with decreased pain and suffering damages would be fairer than some current reforms, like caps on damages, yet potentially generate the savings desired by business interests.