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Tort Law and Liability Insurance*

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The interaction between tort law and liability insurance is a complex problem that is difficult to deal with. This article provides a broad overview by distinguishing two approaches or models of the tort/insurance interface. One is the Deterrence Model in which tort law takes the leading role, whereas insurance is an auxiliary, and at times problematic, device. The alternative approach is the Compensation Model in which tort and insurance switch roles in order to provide optimal compensation to those in need. From there on, it is only a small step to no-fault schemes currently considered in some European countries as a substitute for traditional medical malpractice law.
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Introduction

The relationship between tort law and liability insurance is not a problem easily to be found in a table of contents or subject matter index of every decent treatise of either tort law or insurance law. Rather, it is a topic that thrives in the sphere of oral communication, for example, in conversations of lawyers in the hallways of court buildings, in discussions between teachers and students in the classroom, and in arguments over tort law at conferences. Lawyers from all branches of the profession – attorneys, judges, academics, insurance executives – entertain certain views about the relationship between tort law and liability insurance but very few of them get to write down what they think. This is not a problem in itself but for the fact that the lack of written statements stands in the way of progress on the matter. The private theories flying around the room remain untested against hard evidence or even against a standard of plausibility. To the extent that the views are contradictory, these contradictions are not discussed and thus remain unresolved.

Upon closer analysis, different ''schools of thought'' emerge which approach the subject matter from various angles and rarely engage in dialogue and discussion. Clearly, there are jurisdictions where one school is more popular than the other, but

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there is no close connection between the different approaches and national legal systems.

The deterrence model

General

Under the traditional approach to the subject, which is dominant in the German-speaking countries of Europe, the insurance issue is thought to be a problem for the lawmakers, not for the courts.[1] The tort system itself should be operated independently of the insurance aspect. Decisions on liability issues are to be taken regardless of the fact of the defendant being covered by an insurance policy. In short, the liability issue is to be kept separate from and independent of the insurance issue.

Interestingly, the modern economic approach to law works to reinforce the traditional model. Economic analysis of law has contributed to a revival of this view as its focus is the deterrence function of tort law, rather than its properties as a compensation mechanism.[2] This should hardly come as a surprise since the economic approach rests on the assumption that legal rules influence the behaviour of actors, and that the rules of tort law in particular provide potential tortfeasors and victims with incentives to take efficient precautions against harm. Therefore, it too places tort law first and supports the principle of separateness of tort law and liability insurance. The fact that the tortfeasor is covered by insurance in itself is no justification for imposing liability. Thus, law and economics may serve as a background theory of traditional perspectives on the interface of tort law and liability insurance.

Insurance and incentives to take care

In the tradition of the civil law, delict is the sister of crime, and tort law, like criminal law, serves a deterrence function, in addition to compensating victims. From the law and economics perspective, liability insurance is more of a problem than a solution. The shifting of the costs of harm from tortfeasors to insurance companies and from there on to the public at large obviously destroys the incentives tort law generates.[3] The potential tortfeasor relaxes in his efforts to take due care in order to avoid harm and succumbs to the sweet sirens of moral hazard. In this sense, insurance is anathema to a concept of tort law geared towards the production of incentives for efficient behaviour.

Benefits of insurance

The economic analysis of tort law does not discard insurance altogether, of course. Insurance is a valuable tool to increase the welfare of risk-averse actors by transferring

[1] Fenyves and Rubin (2005); Wagner (2005, no. 4).
[2] Faure (2005, no. 3); Ulen (2005, nos. 49 et seq.).
[3] Faure (2005, nos. 12 et seq., 84 et seq.).

the risk of crushing liability to an insurance company. There, it is pooled with other similar but non-cumulative risks such that the uncertainties cancel each other out. In this sense, the risk disappears in the hands of the insurance company by becoming an actuarial certainty. For the risk-averse actor insurance transforms the threat of an uncertain, large loss into the certainty of a constant stream of relatively small premium payments. These benefits of insurance have to be compared with its costs in terms of a lower level of care as a consequence of moral hazard.

Containing moral hazard

Fortunately for the law of torts, insurance companies doing business in the area of liability insurance have an incentive to contain moral hazard on the part of their clients. The relaxation of precautionary measures by the insured leads to more numerous and more severe accidents, which in turn cause the payments of the insurance company to rise. Within a competitive market, insurance companies will work hard to control their compensation payments in order to keep the premiums low and to attract more business. There are several instruments available to an insurance company to counteract the effects of moral hazard. Two different sets of instruments are to be distinguished.[4]

One course of action available to insurance companies is to monitor the behaviour of the insured in order to adapt the premium immediately once the insured relaxes his safety measures. If seamless monitoring were possible, the insurance company would always charge a premium which fully reflected the accident risks run by its client. The insured, in turn, would take efficient precautions against harm because any deviation from the efficient standard would trigger a rise in the insurance premium greater than the cost savings obtained by economizing on the side of safety measures. A second-best solution is to adapt the insurance premium after the fact, that is, after the accident, by means of a bonus/malus-scheme.

Of course, seamless monitoring of the insured by the insurance company is not possible and even to the extent that monitoring is possible, it is not even desirable because monitoring is not costless either. Therefore, insurance companies have developed a second device to control moral hazard, and that is to limit the insurance cover and to leave parts of the risk of liability lying where it was before conclusion of the contract for insurance, that is, within the lap of the insured. Pertinent examples are caps on the insurance cover, deductibles and various sorts of exclusions such as the exclusion of damage caused intentionally.[5]

In spite of these options, insurance remains a double-edged sword for the economic analysis of tort law. Along with the impossibility of restoring the incentives generated by the threat of being held personally liable to their full bloom with the help of caps, exclusions and like measures, a major problem is that insurance markets do not work perfectly either, as many insurers are reluctant to employ sophisticated techniques of

[4] *Ibid.*, nos. 86 et seq.
[5] *Ibid.*, no. 87.

risk-rating in favour of lumping together in one pool large numbers of risks of very different degrees.[6]

Exceptions

It is only in special areas that the principle of separateness is set aside and it is openly admitted that the availability of an insurance cover does have an impact on the determination of liability in the first place. These areas are:

(1) Liability in equity.
(2) Damages for pain and suffering.
(3) Privileges and immunities.
(4) Implied agreements to exclude or limit delictual liability.

In these situations, courts in most of the "traditionalist" jurisdictions tend to take liability insurance into account.[7] May these exceptions be explained on the basis of a law and economics approach? The answer is in the affirmative. In the case of liability in equity it makes perfect sense to fix liability with the superior risk bearer where the tortfeasor lacked the capacity to act rationally and to adjust his own actions accordingly. Where deterrence is unattainable, the next goal to pursue is an efficient allocation of risk.

The setting aside of legal privileges and the reluctance to imply contractual exclusions of liability where the tortfeasor is covered by insurance are phenomena which are more difficult to explain and justify. The rationale of the rule prevalent in many legal systems surveyed seems to be that the purpose both of legal privileges and of implied contractual agreements is to protect potential tortfeasors against ruinous liabilities, and not to benefit an insurance company which collected a premium in return for accepting the risk. This argument neglects the fact that the premium the insured would have to pay would be lower if privileges were enforced in the face of insurance, or rather, to the benefit of insurance companies. On the other hand, it may be doubted whether this reduction would be significant enough to justify enforcement of a legal privilege.

The compensation model

Placing insurance in the front seat

The Compensation Model uses tort law in tandem with liability insurance as a mechanism to provide victims of accidents with adequate compensation of their losses and to distribute the costs incurred among society at large. In such a world, the tort/insurance device is something like a market-type substitute for public compensation schemes, which dominate the practice of personal injury compensation all across Europe. From this point of view, the relationship between tort and insurance is turned

[6] *Ibid.*, nos. 13 et seq.
[7] Wagner (2005, nos. 5, 34, 57, 59 et seq., 62 et seq.) with further references.

upside down, as liability insurance takes priority over liability in tort. Whereas the traditional principle of separateness places tort first, in the sense that liability in tort must be established on its own turf and regardless of insurance coverage, the alternative approach is to look for insurance first and then to fix liability with those actors who have contracted for insurance coverage. In such a world, lawmakers are free to resort to the tort/insurance tandem in order to funnel compensation to the needy by, firstly, making insurance mandatory for a specific class of actors and, secondly, attaching strict liability to activities carried out by policyholders. Here, liability is little more than a conduit for connecting victims with an insurance pool.

Such a reversal of the roles of tort law and liability insurance is a pervasive feature of Scandinavian compensation systems.[8] The promotion of insurance to the front seat is based on a fundamentally different view of the functions of tort law. The two masterminds of Scandinavian tort law in the second half of the 20th century, Strahl and Hellner, "did not believe in the idea of prevention".[9] According to them, the main objective of tort law is – or should be – the protection of victims. Achieving the ultimate goal of optimal protection of victims requires to move the law of torts towards the principle of strict liability, and to supplement strict liability with liability insurance. Under this approach, the insurance company is the ultimate risk bearer who will then distribute the costs incurred by compensating the victim among the pool of policyholders. To the extent that insurance is mandatory or is bought by most enterprises and citizens on a voluntary basis, the risk is spread among the general public. The liability of the policyholder is nothing more than an intermediate albeit necessary step, in order to trigger the obligation of the insurance company and then to shift the costs on to society at large.[10]

Generous compensation of personal injury

The change of perspective has important consequences for the design of liability rules. As far as negligence liability is concerned, the standard of care should vary in accordance with the insurance status of the tortfeasor. If he carries liability insurance, the standard should be strict; if he does not, the standard should be lenient.[11] The view of tort law as a key for allowing victims access to insurance funds explains the generosity of Scandinavian tort law in the area of contributory negligence.[12] In cases of personal injury, compensation will not be reduced if the victim behaved carelessly himself and thereby contributed to the causes of the accident. It is only if the victim acted intentionally or with gross negligence that his contribution will be taken into account.

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[8] Dufwa (2005, nos. 2 et seq.).
[9] *Ibid.*, no. 5.
[10] See also Lewis (2005, no. 27).
[11] Dufwa (2005, nos. 42 et seq.).
[12] *Ibid.*, nos. 56 et seq.

No compensation for damage to property

In Scandinavia, the dominance of liability insurance in the way just described is limited to the field of personal injuries. Property damage is governed by another principle which is at once antagonistic and similar to the one followed in the area of personal injury compensation.[13] In the area of personal injuries, it is the policy of Swedish law to ultimately shift the costs of compensation to liability insurers. With regard to damage to property, the policy is that these losses should best be dealt with through first-party insurance taken out by the victim.

This objective explains the reluctance of Swedish law to grant compensation for property damage under ordinary tort law rules. In this context, the standard of care against which the behaviour of the tortfeasor is compared is lenient, whereas the standard imposed upon the victim is strict. Again, the concepts of negligence and of contributory negligence are employed in order to achieve the objective that the costs of property damage are ultimately borne by private insurance companies. In some cases, Swedish courts have even come close to embracing the principle that the failure to take out first-party insurance in itself constitutes contributory negligence.[14]

The (limited) functions of tort law

Taken together, both branches of the Compensation Model rest on one and the same principle, that is, that the costs of damage should be shifted to an insurance carrier. It is only in the kinds of insurance coverage that the compensation systems for personal injury and for property damage differ. In the former case, the appropriate mechanism is thought to be liability insurance; in the latter case, first-party insurance is preferred. This divergence explains why tort law has an important role to play in the area of personal injury compensation, but not as far as property damage is concerned. In the former case it is needed to provide a link between the victim and his need for compensation and the insurance carrier administering the funds collected from the pool of premium payers. Within the area of property damage even this auxiliary function is moot. All that is needed here is a rule throwing out claims for compensation brought by individuals as uninsured victims of property damage. Here, the sole function of tort law may be to provide a legal basis for some sort of settlement between the first-party insurer and the liability insurer.

Discussion

Historical developments

A first point to note is that there have been massive fluctuations in the esteem the two models have been held in, both within the community of scholars and within the political arena. During the late 1960s and the 1970s, the prevalent mood inside and

[13] *Ibid.*, nos. 60 et seq.
[14] *Ibid.*, no. 74.

outside academia tended to favour the Compensation Model. It is no accident that these decades saw the crest of the welfare state in Western Europe. It was a time of peace after the destructions and horrors of the Second World War, of dramatic increases in overall production and welfare, and a time that generated the proverbial baby-boom which had caused the population to boost. It seemed that the democratic promise of freedom, security and prosperity for everyone in society was about to be honoured or its fulfilment at least within reach. The ultimate guarantor of these promises was the State with its various programmes of social security churning out benefits to the needy. All across Europe, massive bureaucracies were established in order to run public health care and pension systems, either in the form of a public service or in the form of social insurance.

Within such an environment, private insurance looked much like a substitute for social insurance and tort law as a somewhat clumsy sibling of the social security system. This view of the cathedral lay at the heart of the no-fault movement to be dealt with subsequently.[15] Within the present context, it bears emphasizing that there is no deep gap between no-fault schemes and the Compensation Model which uses tort law as a conduit towards insurance funds. With a grain of exaggeration it may even be maintained that the Compensation Model, as it has been implemented in Scandinavia, amounts to a no-fault scheme in the guise of private law institutions such as tort and liability insurance. The belief underlying such a quasi-no-fault system may be summarized in two propositions: One is a deep scepticism towards the deterrent function of tort law. The other is the belief in the benefits of insurance in the sense that the best state of the world would be one where every risk was insured – be it liability insurance or first-party insurance.

In spite of the existence of political disagreement it should be noted that, today, the welfare state in the European style has approached its limits and has even moved beyond those limits. Everywhere, governments grapple with the financial burden imposed on them through inflated welfare systems in need of ever more funding. It is highly unlikely that we will see further expansions of the welfare state within the near future. The Compensation Model which regards liability in tort as a mere conduit to shift accident costs from victims to insurance companies has been linked intellectually to the rise of the welfare state – and it may also be tied to its decline. The fact that the law and economics movement appeared on the academic scene just at the time when welfarist theories peaked is remarkable and perhaps no accident. Law and economics set the intellectual scene for a rollback of the welfare state in general and for a rehabilitation of the traditional functions of tort law in particular. In addition, liability insurance lost its privileged role and turned into a problematic institution, in fear of destroying the benefits that tort law created in the first place.

Mere observations of the ebb and flow of political moods, public opinion and academic theories do not provide a substantive argument in favour of or against certain institutional arrangements. The re-discovery of the deterrent effect of tort law by law and economics does nothing to prove that this effect actually exists. For obvious reasons it is impossible to embark on this fundamental issue here and to

[15] See below the section entitled "No-Fault Schemes: Doing Away with Tort Law?".

provide an answer to one of the eternal questions of tort law. In spite of trying the impossible a few specific comments will be made.

Incentives to take care and incentives to insure

Looked at from the outside, it appears that the Compensation Model prevailing in Scandinavia is rather selective in accepting or denying the influence of tort law on the behaviour of potential tortfeasors and potential victims. On the one hand, little faith is put into the deterrent function of tort law, that is, the suggestion that the design of liability rules and their administration by the courts has an influence on the behaviour of potential tortfeasors, inducing them to take care.[16] On the other hand, potential tortfeasors and victims are expected to contract for an insurance cover, be it third or first-party insurance. However, if one does not believe that liability rules exert an influence on the behaviour of citizens, why then would one expect those citizens to buy insurance? Of course, one could reply that a risk-averse individual cares a lot about accident losses but only as long as these losses are not insured. Once the insurance cover is in place, the attitude towards liability changes and becomes one of indifference. This reasoning has a lot of truth to it but it brings the discussion back to the issue of moral hazard.[17] If the above description paints an accurate picture of the behaviour of potential tortfeasors, then liability insurance is a problematic institution indeed. Furthermore, it is in desperate need of risk-management mechanisms in order to restore some portion of the deterrent effect of tort law.

The same contradiction may be observed in the area of damage to property, where the contributory negligence defence may be based on a failure to buy first-party insurance. The denial of liability for property damage would be the threat used to induce the procurement of first-party insurance. Again, the desired effect will only materialize if the victim is sensitive to economic incentives. In sum, the proposition that the incentive effects of tort law are strong enough to induce potential tortfeasors and potential victims to take out insurance but not strong enough to induce them to take (more) care is implausible.

Intentional torts and gross negligence

In a world where every loss is covered either by first-party insurance or by the tandem of tort law and liability insurance, nobody would be held accountable for the consequences of his or her actions. It is very hard to believe that such an institutional setting would not adversely affect the behaviour of potential tortfeasors and victims. Thus even those legal systems that embraced the Compensation Model cared to exclude intentional or grossly negligent wrongdoing from the insurance regime. Under Swedish law, even claims for compensation of personal injuries are to be reduced if the victim caused the accident intentionally or acted with gross negligence.[18] In cases of

[16] Dufwa (2005, no. 5), explaining the dominant view in Scandinavia.
[17] See supra,"The Deterrence Model", the part entitled "Containing Moral Hazard".
[18] Dufwa (2005, no. 56).

serious misbehaviour, the incentive effects of tort law are obviously regarded as indispensable. However, if the threat of being held liable to pay damages is strong enough to deter intentional wrongs and gross negligence, why should it not deter simple negligence likewise, that is, provide incentives to take care?

This criticism might be rebuked by pointing to the various mechanisms available to insurance carriers to contain moral hazard. But again, if the incentive effects of these measures – bonus/malus-schemes, deductibles, experience rating – are conceded, how can the incentive effects of negligence liability be denied? After all, what these measures do is nothing else than restore, in part at least, the incentive effects of liability in tort, that is, the same effects that insurance destroyed in the first place.

Balancing the two models

Up to this point, much criticism has been directed at the Compensation Model. The recurrent theme of this criticism is that a legal system which is aiming at comprehensive insurance coverage for all kinds of losses underestimates the incentive effects of tort law and undermines the individual's sense of responsibility for the consequences of his or her actions. This argument certainly has merit but it may carry less weight than theoretical reasoning suggests.

Without having looked into any empirical studies, it might be suggested that Sweden and other countries following the Compensation Model are not wrought with an exceptionally high number of accidents. Obviously, the incentive effects of comprehensive insurance are not so severe that potential tortfeasors and victims relax completely and abandon the duty to take care altogether. As a matter of fact, some interest in precautions is likely to remain alive. How may this outcome be explained? One explanation has already been mentioned, that is, the fact that insurance companies operating in a competitive market will work to restore as much as possible the incentives generated by liability regimes with the help of measures like bonus/malus-schemes, deductibles and the like.[19] Another point to note is that in many areas of modern tort law, injury of another person carries with it injury to the tortfeasor himself. Automobile accidents are the best and most important example. In modern traffic, it is almost impossible to endanger somebody else without putting one's own bodily integrity and personal property on the line as well. Since every individual has an inborn instinct to avoid collisions and bodily harm in general, care will be taken in order to prevent accidents, not in an attempt to fend off liability costs but out of concern for one's own well-being.[20] How strong these self-regarding incentives to take care play out in a given case depends on the particular type of accident under consideration. In the area of motor traffic, the self-regarding incentives will be particularly strong with respect to collisions involving other motor cars as these accidents typically entail symmetric risks of injury to both parties. Things change with accidents involving pedestrians or bicycle riders. Here, one would not like to count solely on the interest to avoid harm to oneself but provide the driver with incentives to

[19] See footnote 17.
[20] Dewees *et al.* (1996, p. 16).

also avoid harm to the interests of others who are particularly vulnerable. Products liability and medical malpractice are again entirely different from road traffic accidents. In these areas, misbehaviour on the part of the manufacturer or doctor does not create any risk of injury to himself but the risk is solely directed towards others. Thus, the interest in avoiding harm to oneself does nothing to induce potential injurers to take care.

In sum, it would be highly surprising if there were no downside at all to a legal system that aims at shielding the individual from having to confront the consequences of his own actions. In a world, where both the personal injury and the damage to property branches of tort law are subordinated to comprehensive schemes of first- and third-party insurance, nobody will be held accountable for the damages caused. If that is the state of affairs, why should anyone care to avoid losses in the first place? Why should a hunter be careful with his shots even where he has positive knowledge of the fact that fellow hunters are moving in the line of fire? Why should students playing football close to residential homes be careful about not smashing a window?

No-fault schemes: doing away with tort law?

Introduction

If the Compensation Model uses the combination of tort law and liability insurance as a substitute of social insurance schemes, no-fault programmes go one step further in that they actually replace this combination with a system of first-party insurance. Whether the first-party insurance system is itself a public entity like the carriers of social insurance or rather a framework for a market of private insurance companies is of secondary importance only. Regardless of whether one or the other solution is adopted, the essential feature of no-fault schemes is the abolition of liability in tort and of its insurance in favour of direct insurance of victims against losses. The shift towards no-fault accident insurance schemes is not one for the courts to make but requires comprehensive actions by legislators.[21] However, the basic normative issues of no-fault liability are more or less the same as the ones raised in a study of the relationship between tort law and liability insurance. The same notions of victim protection and loss-spreading that underlie the Compensation Model also lie at the heart of the various no-fault schemes that were proposed over the last 50 years.

A short history of no-fault

Beginning in the 1950s the idea of abolishing the tort system altogether in favour of private or social first-party insurance gained support, particularly with regard to motor accidents. With the exception of New Zealand no country has implemented a comprehensive scheme of first-party insurance for personal injury,[22] but many North-American jurisdictions have adopted more modest versions of it which at least provide

[21] On the introduction of no-fault in the area of medical accidents see the volume of Dute *et al*. (2004).
[22] Harris (1974, p. 361); Mahoney (1992, p. 159).

basic protection of the traffic victim on a no-fault basis. No-fault schemes rest on the same assumptions as the Compensation Model discussed above. The combination of tort law and liability insurance is discredited for its inability to funnel compensation to every victim who needs it.

In the area of medical liability for example, liability is contingent on malpractice, and only those victims who succeed in proving malpractice are allowed to collect. Patient insurance schemes try to go further in dispensing with the fault requirement and instead merely demand proof of iatrogenic injury.[23] On the other hand, the concern with deterrence is played down. In reality, it is said, people do not think about liability issues before they act. If doctors, for instance, are deterred from careless behaviour, it is out of concern for their reputation, both among their peers and among potential clients, and not because of the threat of being held liable for the damage caused. These assumptions underlie the Swedish scheme of first-party patient insurance that has replaced tort law in the medical malpractice area.[24]

Over recent years, however, the once powerful no-fault movement has lost much support. In the United States no fault saw its crest in 1976 and has declined since, with several states repealing their already modest ("add-on") no-fault schemes.[25] New Zealand, which is still the most prominent example of a broad substitution of a no-fault insurance system for the combination of tort liability and third-party insurance, has run into considerable difficulties with regard to the financing of the scheme.[26] Likewise, in many European countries public opinion has turned away from collectivistic solutions in the tradition of the welfare state. Together with the proliferation of scepticism *vis-à-vis* the ever greater expansion of social insurance the attractiveness of no-fault schemes has suffered, even if they were organized within a market framework. Within academia, prominent supporters of a wholesale shift towards first-party insurance like Patrick Atiyah have defected from the flag.[27]

Switzerland quite recently considered the option of either reforming the law of tort or of switching to a system of insurance with respect to personal injury compensation, and opted in favour of tort law.[28] The major argument was that an insurance solution, in pure form, would sacrifice the deterrent effect generated by liability rules, and that any attempts to restore incentives to take care through a system of administrative fines or risk-rated premiums would compromise whatever savings in terms of administrative costs the switch to an insurance system promises.[29] Currently, only the introduction of a no-fault scheme in the area of medical malpractice is on the agenda. In Austria and in Switzerland, this discussion has already left academia and reached the political sphere.[30]

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[23] For an overview see Dewees *et al.* (1996, p. 139 et seq.).; Wendel (2004, nos. 28 et seq.) (supra fn. 21).
[24] Oldertz (1986, p. 635).
[25] Ulen (2005, no. 29).
[26] Mahoney (1992, pp. 168 et seq.).
[27] Atiyah (1997, p. 183).
[28] Brulhart *et al.* (2005, nos. 3 et seq.).
[29] *Ibid.*, no. 3.
[30] Fenyves and Rubin (2005, nos. 4 et seq.); Brulhart *et al.* (2005, nos. 100 et seq.).

Problems of no-fault

Deterrence

This is not the place to discuss in detail the advantages and disadvantages of no-fault schemes.[31] The heart of the critique launched against first-party schemes is of course the same as in the case of a refocussing of tort law on compensation and insurance discussed above, that is, substandard deterrence. If every victim of personal injury is compensated out of public funds with the person responsible going scot-free why should anybody take costly measures of precaution aimed at avoiding the harm? The counter-argument of the proponents of no-fault schemes is a general denial of the deterrence effect of tort law, combined with the contention that deterrence should not be left to the haphazard workings of the tort system but instead be taken care of by criminal or administrative law.[32] It will readily be accepted that the deterrence effect of tort law is not a perfect one, and that the economic models suggesting otherwise lose some of their explanatory force once they are transferred to the real world. However, it would be wrong to maintain that the threat of liability has no deterrent effect at all as such a contention would entail the assumption that people behave irrationally.

One would also like to ask why the proponents of no-fault believe in the incentive effects of administrative sanctions while at the same time they reject the notion that the sanctions imposed by tort law might influence the behaviour of actors in a beneficial way. If someone is responsive to an administrative fine of, e.g. €200, he is likely to respond to a tort judgment in an amount of €2,000 as well. In fact, a recent American/Canadian study has shown that no-fault plans only work satisfactorily in terms of deterrence if the premiums paid are carefully risk-rated.[33] This condition is at once crucial and rarely borne out in reality as in most practical examples, premiums are not risk-rated but flat. The explanation for this disappointing state of affairs may not only be the influence of interest groups but also the high costs of calculating premiums adequately reflecting each risk insured. If this is done with the necessary diligence and precision, much of the cost that the introduction of the no-fault regime was meant to save will come back.

Administrative costs

One would also like to question the assumption that a no-fault scheme would economize on administrative costs. Assuming that such a system were introduced to replace medical malpractice, the task would remain to separate the cases of iatrogenic disease (i.e., situations where the adverse condition of the patient was caused by the intervention of doctors and hospitals that committed a sort of ''mistake''), from other situations where the condition of the patient is deteriorating for ''natural'' reasons.[34]

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[31] A recent and comprehensive study favourable of no-fault schemes is the book Dewees *et al.* (1996) (supra fn. 23); a comprehensive survey of no-fault schemes and proposals in the area of medical malpractice is presented in Dute *et al.* (2004) (supra fn. 25); for my own – sceptical – views of the matter see Wagner (2003, pp. 328 et seq.); cf. also Burrows (1998, p. 120).

[32] Sugarman (1989, pp. 1 et seq.); Cane (1999, pp. 361 et seq.).

[33] Dewees *et al.* (1996, pp. 22 et seq., p. 26, p. 427) (supra fn. 23).

[34] Supra fn. 27.

In the same vein, the most problematic issue in medical malpractice litigation usually is causation and not negligence, that is, even where negligence may easily be established causation often remains opaque.[35] Thus, an investigation of each particular case is inevitable anyway, and it is hard to see how this effort could be significantly less extensive and costly as the investigation of a case within a medical malpractice suit.

Compensation

Finally, it is a misunderstanding to think that the primary goal of tort law is to compensate victims in the sense of extending help to those people in need of support, regardless of where this need comes from and who bears responsibility for it. This misunderstanding seems to have been born at the moment where scholars started to compare the financial needs of a victim of a traffic accident which had been caused through the fault of another with the condition of another victim, having sustained the same injuries but without being able to blame another driver for them. The former victim receives full compensation, the latter walks away with nothing. An unjust result? This question could be asked and answered in the affirmative only because the inquiry was limited to these two classes of victims. If one looks instead at the whole class of people sustaining personal injury for whatever reason or cause there is, matters change dramatically. Throughout the western world, most traumatic injuries are contracted within the confines of the home or garden. The whole array of personal suffering also includes non-traumatic diseases, only part of which have or may have human-made causes. How many people suffer from congenital diseases during their whole lifetime, how many suffer from poor health, without any human factor playing a significant role? Nobody has ever tried to discredit tort law for its failure to provide these "victims" with compensation. However, in what sense is a person suffering from a congenital disease different from the victim of a traffic accident that was caused by an act of God? If there is no difference in terms of need, then it becomes immediately clear that tort law was never meant as an instrument to provide help to the needy. Victim compensation in the broad and comprehensive sense of coming to the help of those people who need assistance simply lies beyond the reach of tort law, however designed.

It was Jane Stapleton who asked the indeed central question of why victims of accidents should fare any better than victims of disease, in that only the former group is allowed to collect damages from an insurance carrier, whereas the ill are relegated to whatever social security benefits are available.[36] From an European perspective, one might add the observation that on this continent comprehensive protection against personal injury as well as against disease is supplied already, if only under the guise of the social security system, that is, through the social health insurance schemes. Of course, these systems do not operate on the basis of full compensation of all losses, pecuniary or non-pecuniary, but this is precisely the level of compensation that the proposed no-fault schemes would be providing as well.[37] As a consequence, those

[35] Simanowitz (1995, p. 137).
[36] Stapleton (1986, pp. 142 et seq., pp. 150 et seq.).
[37] Cane (1999, p. 420) (supra fn. 32).

victims who now receive full compensation of pecuniary and non-pecuniary losses via the tort system would fare worse under no-fault, and those victims now receiving nothing out of the tort system would fare hardly better as they would only be moved from one branch of the social security system – health care – to another one: the no-fault insurance vehicle for traffic accident victims or victims of iatrogenic injuries.[38] Under present conditions it is highly unlikely that the benefits obtainable from a no-fault insurance vehicle would be substantially higher than the comparatively modest benefits available under the various social insurance programmes. All over Europe, social insurance schemes undergo a period of retrenchment. The partial rollback of the welfare state is no accident of history but caused by serious practical problems. If the experience of the European nations proves anything it is the fact that generous welfare schemes are impossible to maintain for long as these systems are exploited by everyone having a stake in it, from the public authorities running such systems, the doctors and hospitals retrieving their incomes from it to the patients and victims seeking access to the funds.

Conclusion and perspectives

Although Thomas Ulen once remarked that "no-fault never seems to remain dead but repeatedly rises, ghoul-like, from the grave to walk the earth anew",[39] the combination of tort law and liability insurance lies in a much safer harbour today than 30 years ago. Its replacement by a comprehensive scheme of first-party insurance within the foreseeable future in any European jurisdiction is highly unlikely.

However, the collectivization of liability to the benefit of both victims and tortfeasors might continue to play a role in cases of major catastrophes, if only on an *ad-hoc* basis. 'The September 11 Victim Compensation Fund' established after the terrorist attacks on the World Trade Center provides a good example although its major characteristics make it appear more like an outlyer than a new standard.[40] The fund combines the low thresholds for liability typical of no-fault plans with the full compensation principle typical of tort remedies. Such a combination may readily be explained by the extraordinary shock, outrage and compassion that followed September 11 but, in this regard, history will not repeat itself. In the future, we will still see *ad-hoc* funds being set up in order to provide compensation to those suffering from the consequences of major natural or human-made catastrophes but the level of compensation will never again match the full-compensation-principle of the September 11 Victim Compensation Fund.

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[38] Cf. Wendel (2004, no. 89) (supra fn. 21): "Since it is unlikely that a mandatory insurance system like the Swedish one could ever provide any considerable amount of compensation as is the case in some countries where cases concerning medical liability are settled in courts according to tort law, it must be combined with an extensive social security system." However, why are patients suffering from iatrogenic injury treated any differently from other patients who suffer from injuries caused by their fall from a tree or household ladder?

[39] Ulen (2005, no. 29 note 25).

[40] Enacted as Title f of the 'Air Transportation Safety and System Stabilization Act'; cf. Rabin (2002, 2003).

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