
Economics of Civil Justice Reform Proposals

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In this session, I am going to talk about what I would call substantive civil justice reform proposals, mostly in the tort area, and some of the justifications and the ways of thinking about these reform proposals. This is not, I am sure, an issue that comes before your courts, but implicates all of your courts and how they operate.

Let me first describe a simple economic model of how tort law operates. One way we might think about tort law is that our system of tort law places incentives on parties to take precautions to prevent injuries. Some of tort law has nothing to do in particular with incentives. For example, if a person simply happens to hurt somebody else, there may be an issue of corrective justice as between the parties. The most important area of tort law, however, is how to create incentives to reduce accidents in the future. To that end, what responsibilities should be placed on parties like manufacturers or doctors?

Let's imagine we have costs on the vertical axis. The horizontal axis is going to be a little complicated, but let me suggest something. If we want to encourage parties to make investments to prevent accidents, we have to think about how they are actually going to do that. We know, as with other goods and services, that the cost curve for almost any type of investment will increase over time as it becomes marginally more costly to prevent further accidents. We would imagine, as parties are encouraged to make investments to prevent accidents, that accident losses would decline. As there are greater investments to prevent accidents on this upwards sloping curve, the number of accidents, and the magnitude of accidents that occur, is going to decline. So the horizontal axis is both the level of preventive investments and the number of accidents, the magnitude of accidents, weighted by the costs of accidents.

If we are trying to think about this as a general social policy question, the optimum is at the point where the marginal cost of accidents equals the marginal cost of preventing accidents. We are never actually going to find a point like this, but it is useful in thinking about such a point for conceptual purposes. It is at this point that we have optimal accident prevention, in the sense that the costs of preventing further accidents, that is, the costs beyond this optimum, are greater than the costs of the accidents themselves.

I do not mean to define this solely in terms of economic losses. There are some people, some economists, who think that losses, like pain and suffering or emotional distress, ought to be devalued or nonexistent. I do not believe that. If there are ways of reducing the amount of pain and suffering, we want to do that. Who in the world is in favor of pain and

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suffering? Of course, pain and suffering is a complicated concept because we do not have any way to put a dollar value on it. Nevertheless, these accident losses ought to include pain and suffering, emotional distress, and other actual true losses that people suffer.

It is fairly uncontroversial to say that a social optimum is at a point at which the marginal cost of investments to prevent accidents equals the amount of reduction of accidents. If you are in some position less than this point, the accident costs are greater than the costs of preventing them. Judge Posner's principal, and more controversial, theory in academics is that the common law is efficient, meaning that common law rules reach exactly this point, exactly this optimum.¹ He claimed we were always at this optimum point. Posner spent about the first ten years of his academic career writing articles showing that in every area, we can interpret the common law rules to be efficient in an economic sense. Now, there was no reason they ought to be efficient in particular, except as a social policy, and there is no mechanism to achieve efficiency in these rules. Prior to 1972, when Posner first wrote *Economic Analysis of Law*, judges did not take efficiency very seriously. I think it is an important social value, but, with perhaps the exception of the antitrust area, efficiency had not, and has never, been a value that judges talked about too much.

Of course, Posner had a little problem explaining changes in the law, for example, shifting from negligence to strict liability. Does that imply that strict liability is the optimum, or that the optimum was negligence? His answer to that, given his belief that the common law was efficient, was that negligence and strict liability are exactly the same.² I am not kidding. His argument was, negligence and strict liability have exactly the same effects in terms of encouraging investments to prevent accidents. Personally, I believe that explanation is loony. Go back and look at some of those products liability cases in the fifties and sixties. They are unbelievable to the modern eye. It was really a different culture. But, the explanation made Posner's theory consistent.

UNIDENTIFIED SPEAKER: Can we subtitle this the Pinto analysis? Isn't that exactly what that is?

PROFESSOR PRIEST: Well, not exactly, but it is something like the Pinto analysis.³ You all know the famous Pinto memo that was generated by some Ford engineer.⁴ Ford was making a decision about whether it should put the gas tank in one position, or put it further forward in some other position, or put a shield on it. They made an estimate of the costs of accidents. They added the number of burn fatalities times the number of expected fatalities, to the number of nonfatal burns times the number of those expected to be burned. They compared these accident costs to investment costs, and concluded that to put the shield on the Pinto would make the costs of investment greater than the accident losses. Now, of course, that memo proved not to be very effective when it was introduced in litigation. The jury saw it and rendered a \$125 million punitive damages verdict.

Actually, the latest General Motors case with the four-point-something billion dollar



punitive damage award, remitted to the reasonable \$1.3 billion, is very much the same thing.⁵ That was a case in which there was a similar memo, called the Ivey memo, which made a similar type of calculation.⁶ So we could call this the Pinto analysis. But this is a form of cost-benefit analysis and it goes beyond the Pinto.

The National Highway Transportation Safety Administration makes its decisions about what rules it is going to adopt and what it is going to require in terms of auto safety with exactly the same analysis. We could call it the NHTSA analysis because they make the same type of cost-benefit analysis, based on expected accident losses versus the cost of a recall or a design change. In fact, every agency of the American government uses this type of analysis. It is somewhat peculiar, then, that we allow juries to be shocked by this, and that they can take away more than the gross profits of General Motors over a two-year period in one case.

Auto manufacturers have to do some kind of analysis of this nature to determine how they will design cars. If you want to prevent all accidents, you would make a tank instead of a car. That would not be effective in many other ways. Manufacturers have to look at decisions this way. If they are prevented from doing so by the extraordinary reactions of juries to these memos, we are probably going to be worse off because the decisions of juries will be less informed.

If you go back and look at the Pinto case, you will see that the problem in the Pinto case was not the analysis. The problem with the Pinto memo was that there were estimated accident costs and expected accident costs. The estimate for a fatal burn was \$200,000. Ford multiplied the dollar estimate of a fatal burn, \$200,000 by 180, the number of fatal burns expected to occur. Then Ford added to that the nonfatal burns, and some other costs, and came up with an estimate which was about one-third of the actual costs that they faced after litigation over these burns. Ford very much underestimated what this cost would be. Even in the *Grimshaw* case, the Pinto case in which the plaintiff won a large punitive damages verdict, the compensatory damages award for the fatal burn was \$2.5 million.⁷ If Ford had put \$2.5 million into that calculus, instead of \$200,000, it would have easily made the design change. It is not so much that the analysis of costs against benefits is somehow heinous in and of itself. Rather, the analysis has to be done correctly, and Ford should be liable for that mistake.

UNIDENTIFIED SPEAKER: Where did they come up with the \$200,000 figure? Did the engineers crunch the numbers, or did lawyers?

PROFESSOR PRIEST: There was some evidence that this was just some back-of-the-envelope calculation by some lower level character who was not really taken seriously in the design process at all. [Author's note: I have subsequently learned that the \$200,000 figure was taken from NHTSA, making the question of Ford's liability or its "mistake" in calculation, as I have described it, a much more difficult matter.]



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UNIDENTIFIED SPEAKER: Not a lawyer?

PROFESSOR PRIEST: Not a lawyer, no. It was just a round number. The \$2.5 million is higher than the figure NHTSA uses. NHTSA today uses a \$2 million figure in its determination of a value of a life in its determination of whether to have a recall or whether to impose some design requirement or safety standard. NHTSA uses the same analysis, it just uses different numbers than Ford did. Even with a \$2 million figure, though, Ford would have made the opposite decision, if that had been a decision-making memorandum, which Ford denied. Again, I do not have any access to Ford, and I do not know all of the record of that case, but I think it was a problem with the method of analysis rather than the analytical approach itself.

But let me go back to this question: Are we at an optimum or not? How do we know? Well, we do not really know, and there is not really any way of making that determination. However, we can analyze what happens if we are not at an optimum. If we are not at the optimum point in terms of creating incentives for prevention, then we are having more accidents than we ought to have. In that case, the standard ought to be enhanced because there would be additional reductions in net accident losses and an increase in welfare from moving to this optimum point. If, however, the actual losses suffered are less in magnitude than the costs of preventing those accidents, it is not clear, even under our modern law, that the manufacturers will act to prevent those accidents by making those investments. It is not clear whether we want them to as a matter of social policy, because it results in a loss of net welfare.

Sometimes this cost versus benefit, or investments versus accident losses, analysis is viewed as manufacturer versus consumer, or manufacturer versus driver. I am not sure that is the best way to think about it. The Pinto calculus, meaning Ford's accident costs without the guard, versus the costs of changing the design to include the guard over the gas tank, is not really consumer versus manufacturer. Ford made a decision about what it would provide to the consumer. If Ford pays to include the guard, it would pass those costs along to the consumer by raising the price. The eight dollars that imposing the guard would cost is not going to come out Ford shareholders' dividends. The question really is: Are the set of consumers, on the whole, better off with the guard or without the guard? Certainly, those consumers who might otherwise have been injured are better off. But it is not clear that the consumer population as a whole is better off by having these investments made when the costs of the investments are greater than accident losses. Again, the implication of making investments when the costs of investments are greater than accident losses is that there is no way to stop wanting more safety short of building cars like tanks. It is really a decision to make our cars perfectly safe. If we are indifferent to the costs that are passed on to consumers in terms of safety, relative to what the consumers as a whole gain from safety, we could get tanks instead of cars.

I do not think that happens in the world. What happens if, from a standpoint of economic analysis, the liability standard goes beyond the point at which costs equal



benefits to the consumer population as a whole? The losses beyond this optimum point are losses that are not economically worthwhile to prevent, which is to say the costs are greater than the benefits. Manufacturers, in that case, become insurers for these losses suffered by consumers. Recoveries by consumers in this context are better regarded as a form of manufacturer insurance, rather than as something that will lead to actual changes in the investment pattern of manufacturers in terms of what they are producing.

A lot of people, myself included, believe that in many areas of the law, we have a great deal of insurance provided through the legal system. This should not be surprising over some range. Justice Traynor, in *Escola v. Coca-Cola*⁸ and *Greenman v. Yuba*⁹ wanted strict liability for manufacturers of defective products. According to Traynor's analysis, our society should want the manufacturer either to prevent the accidents that can be prevented, or to provide a form of insurance and pass it along in the product price.

Most states do not make manufacturers or other defendants insurers explicitly. On the other hand, every time we move beyond the optimal point, that is in fact what we do. We include a form of insurance in the price of the product that is passed on to consumers, so that if an individual is injured, he or she recovers against the manufacturer. But, the injured party is recovering insurance, as opposed to recovering for the failure of the manufacturer to take some action to prevent the accident.

These modern civil justice reform proposals are related to insurance, and can be thought about as related to an insurance function that is produced by modern tort law. Tort recoveries are different than insurance recoveries: When a consumer recovers against an insurance policy, he or she recovers a different amount and recovers in a different way than when a consumer or a victim recovers under tort law. If the tort system is providing an insurance function, how should we think about, and evaluate that?

There are many differences between recovering under first-party insurance and recovering under tort law. Again, the idea of insurance is to provide a single recovery of economic losses. Insurance serves, in economic terms, to equalize the marginal utility of money over periods of time. Insurance serves to provide monetary resources available to individuals that are equalized in good periods, when they have not suffered a loss, as well as in periods when they have suffered a loss. When you pay a premium to your insurer, whether it is homeowners insurance, personal health insurance, or auto insurance, you reduce the amount of money you have today in order to recover the amount that you lose if you suffer a loss in the future. Insurance equalizes returns in the sense that the resources you have available to you today are less because you are paying these insurance premiums. But if you suffer a loss, the insurer pays the amount of the loss and restores you, more or less, to this equalized position.

Insurance applies chiefly to economic losses, and for a very good reason. If insurance is not related to economics, there is not really any point in insuring. For example, most of us do not buy life insurance for children. Most life insurance on children, I am sorry to say, is burial insurance. It is not really life insurance in the more classic sense because there is no reason to insure a child for a million dollars or \$500,000

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unless that child is a source of financial support. It is usually just the opposite. If there is some chance your child is going to die, you want to have the richest life you can with the child prior to his or her death. Your emotional situation has changed, but your financial position is not going to be changed adversely by the child's death. In fact, your financial situation may be changed positively, although no one would want that.

More generally, how do insurance recoveries differ from tort law recoveries? First, in first-party insurance, there is no pain and suffering, that is, there is no market for pain and suffering insurance. Again, there is an economic point to this. I do not doubt that there is an economic dimension to pain and suffering, but on the other hand, it is not clear that pain and suffering can be repaired through money. You do recover rehabilitation expenses under first-party insurance, and in some jurisdictions pain and suffering has a larger dimension and is used in place of more explicit recovery for rehabilitation expenses. I think a better course is to call it rehabilitation, evaluate it as rehabilitation, have experts determine what the appropriate rehabilitation is going to be, but treat it as an economic loss. A true pain and suffering loss, or a true emotional distress loss, is not compensable in any sense. Another difference between insurance and tort recoveries is that insurance is always accompanied by deductibles and co-insurance, so it is even less than a full economic recovery. The third principal difference is that there are various insurance mechanisms that assure that the victim only recovers once. There is a single recovery feature to it, either through subrogation or through the various "no stacking" provisions in insurance policies. Generally, if someone is covered by different insurance policies, the insurers themselves work out between themselves who is going to pay the recovery, but there is only a single recovery in insurance.

These differences between insurance and recoveries under the tort system lie behind the justification for much that has been proposed in terms of civil justice reform, or a reform of tort law. One of the stronger tort reform proposals that we have seen over the years is a cap on pain and suffering damages. Another proposed reform is a cap on punitive damages. Other reforms include abrogation of the collateral source rule and joint and several liability.

How can we think about these tort reform proposals? This depends in some sense on where we think the legal system is, that is, if we think that the legal standards are at the optimum point where cost equals benefit and all the legal incentives are created so as to compel manufacturers or others to make investments equal to the point where the benefits from the investment equal the costs of the investment. If so, these various forms of tort reform are reductions from the optimum which, as we might expect from any reduction of the optimum, would lead to some reduction in the incentives for accident prevention and, therefore, an increase in the accident rate.

On the other hand, if we think that the legal system has gone beyond the optimum point and that defendants in some contexts are providing consumers with a form of insurance along with the product, as Justice Traynor recommended, then these reform proposals serve to constrain tort recoveries to something that is more insurance-like.



Thus, the tort recovery becomes something that is more like what the consumer would buy if he or she were buying insurance in the marketplace. Again, there is no market for pain and suffering insurance. Punitive damages are quite unrelated to an insurance function. If we are at the position where there is a great deal of insurance being provided or where the liability standards are such that manufacturers are providing insurance, the justifications for punitive damages decline substantially.

UNIDENTIFIED SPEAKER: Just to make sure I am on the same page, the reason the manufacturer buys insurance beyond the optimum point is because the cost of insurance has a risk factor that makes it less expensive than making the change in the design?

PROFESSOR PRIEST: Right. The reason is that what I am calling the optimum is what tort law commands, so we do not know whether our modern standards of tort law command this optimum, which is what Posner said, or whether they have gone beyond this optimum, which Traynor recommended in his definition of strict liability. A number of jurisdictions have nominally said that they do not want to make manufacturers insurers, that is, not absolutely liable. There is still a question as to whether or not we are at this optimum.

The reason that I regard this as insurance is that if it is more costly to prevent the accident than to suffer the accident, you can insure for it. There are costs of insurance, but as a general matter, those costs are less than the costs of preventing the accident. This is true of insurance that we buy now. It is one of the great financial intermediation instruments in the modern world. It is much cheaper for any one of us to buy insurance for our car than to put aside reserves in case we run somebody down. It is much cheaper for us to buy homeowners insurance than it is to do everything possible we can to make sure there is never a fire in the house.

The aggregation of risks through insurance makes it possible to deal with losses of this nature at a much lower cost than if you had to actually prevent them, or if individuals had to put the money aside. The point here is that manufacturers, either through self-insurance or through actual liability insurance, if pushed beyond the optimum point, will simply insure for those losses rather than actually prevent them. There is, however, some variation of that when you are dealing with punitive damages.

There is a question as to what bad faith means in this context, and what the concept of bad faith adds to the analysis. We could probably justify punitive damages if the manufacturer could have taken some action to prevent the accident but did not. For example, the manufacturer knew it could prevent the accident by some investment, say, some shield on a gas tank, but did not. That is not quite the Pinto memo. In the Pinto memo, Ford came up with a calculus as to the costs versus benefits and decided the shield would add more to the price of the car than was worthwhile to consumers, so they did not add it. Again, I think their numbers were way off. Is that bad faith? I do not know. This is an interesting issue about the nature of our standards in the legal system. Does the

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Pinto memo reflect a conscious disregard of safety? Not really. Ford was trying to take into account exactly what the trade-off would be. I would think a better case for a conscious disregard of safety would be one in which the design engineer said, "We don't care."

The *Grimshaw* case had a lot of other elements than that memo. At the time the memo was drafted, William Clay Ford and Lee Iacocca had gone to the White House and told President Nixon, "Look, we are trying to keep the price of this Pinto as low as possible. We want to sell the Pinto for under \$2000, and this is consistent with your plans to reduce inflation through price controls. But we are running into problems from NHTSA. They want the thing safer and safer and safer, and they just pay no attention to costs."

Nixon wasn't too attentive to this, but he said, "I'll do what I can." So Nixon sent a letter over to NHTSA telling them to pay attention to costs. Nothing ever happened.

In *Grimshaw* there was not only this memo, but you also had the evil Nixon getting involved in trying to reduce safety in the car. It was awful. The trial was very dramatic. But it was a bad situation for Ford as a general matter. So, is this a conscious disregard for safety? I do not think a cost-benefit analysis, unless it is just grossly in error indeed perhaps intentionally in error as in cooking the books, constitutes a conscious disregard for safety. If, however, the engineer had said, "Look, I know that the value of a life ought to be \$2 million, but I'm not going to get the result I want if we use \$2 million in the calculus. I am going to use \$200,000 instead, because there was one case someplace in New Hampshire where somebody was incinerated and only recovered \$200,000." I would call that bad faith. I would call that conscious disregard for safety.

UNIDENTIFIED SPEAKER: Might the bad faith analysis be altered by looking at Ford's own cost-benefit analysis given that, as I recall from the Pinto litigation, part of what was established was that Ford fixed its own cost-benefit analysis by factoring in its decision to conceal this information from the consumer? Not only does Ford produce this defective car, but it also knows, and decides not to disclose to the public, that it is now manufacturing the only small car that produces rear end explosions that will cause fatalities.

PROFESSOR PRIEST: Well, I do not know. I have looked at the *Grimshaw* documents. The concealment part had to do with the efforts to manipulate Nixon into stopping NHTSA from looking at it more carefully. I suppose it is a somewhat complicated matter in the sense that we do not really have many expectations of manufacturers to talk about the safety features of all parts of the car. For example, I have purchased a number of cars, and I do not ever remember seeing anything about where the gas tank was located or what the risk utility calculation was with regard to the gas tank.

I suppose if there were some deliberate concealment, that is bad faith because I think you would only have deliberate concealment where you are in a situation like this where



there is some benefit. Why else would you conceal? If you are making the optimum investments, you have no reason to conceal. The reason you would have to conceal would be if your investments are far less than they should be. I believe fraud on NHTSA to be a serious occasion for punitive damages. I think fraud on the consumer is a little more complicated. The *Grimshaw* memo was not of that nature.

The *Grimshaw* memo was really this calculation of fatal burns, nonfatal burns, and other losses. They added this all up and came out with the number X . Then they had the costs of the different designs, times some number of million cars, and that came up with Y . X equaled one-half of Y in that calculus. There was not a concealment feature to the memo. There were a lot of issues, and I do not mean to be resolving this case, saying anything about Ford, or claiming that the Pinto was a good car. I wouldn't let my kids drive a Pinto unless they promised to keep going really fast, no stopping.

UNIDENTIFIED SPEAKER: If we now shift to the benefit side of their calculation, they are saying, "We expect that there will be X number of Pintos sold." In the background, it was their goal to compete with the Chevy Vega and with the imports, to somehow market a car that would retail under \$2000. Those were the days. In any event, as they project that, they say, "We expect, with our marketing budget and our advertising budget, our product to make X number of sales." Ford decides, of course, that it is not going to explain to the public that its is the only car in this market range that lacks a gas tank protector. If that became known to the public, their sales, of course, would plummet, so they also could be faulted economically for not calculating what fair disclosure would produce in sales.

PROFESSOR PRIEST: Yes, maybe so. Of course, they got killed for it. Once the publicity came out, it really wasn't the \$125 million verdict, which was later remitted to \$3.5 million, that stopped the Pinto. It was the market response. People quit buying them, so the Pinto was withdrawn from the market. That was the principal effect and the necessary effect. Maybe Ford should be faulted for that. I do not doubt that. Honestly, I am not sure how realistic it is to expect that market response. We have had a little competition for safety over the years, but it does not always work.

I do not know how many of you drive Volvos. There are a lot of Volvos driven around the Yale campus. People say they're really safe and so forth, but the Volvo has not taken over the market. The former president of Yale, Kingman Brewster, really believed in safety. He drove a car that was designed so that the engine would drop out of the car if there was a collision. So the engine drops out and, of course, the car slows down dramatically. It was supposed to have been really safe for the occupant. There was a slight design problem: Any fender bender would cause the engine to drop out and the car would have to be towed away. He was constantly driving around New Haven with his engine dropping out. There are limits to the demand for safety in automobiles.



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UNIDENTIFIED SPEAKER: In answer to that question about who the insurer is in this context, I thought part of the debate, the controversy, is that there are those who say the insurer is the consumer. Although the manufacturers buy the insurance, it is passed along to the consumer. In effect, in this scenario, the consumer is forced to buy third-party insurance as opposed to first-party, when the market demonstrates that if the consumer were knowledgeably buying it himself, he would only be buying first-party insurance.

PROFESSOR PRIEST: That is a very good point. While we can talk about making the manufacturer the insurer, we presume costs are going to be passed along, as all costs are in competitive markets. It really is the consumer who is paying for this insurance, and that is the heart of the point. The consumer pays a higher premium when this insurance is provided through tort law than when the insurance is provided through first-party insurance. These efforts at tort reform, such as reducing pain and suffering and constraints on punitive damages, are an effort to try to make tort recoveries resemble insurance recoveries. Again, you do not get punitive damages with insurance. Insuring for punitive damages makes no sense.

Abrogation of the collateral source rule and joint and several liability make the insurance more rational. Just as in first-party markets, there are mechanisms to ensure that only one payment is made to an individual. Under the collateral source rule, there can be more than one payment to a victim. That is the whole point. Abrogating the rule makes the tort recovery more like a rational insurance system. Similarly, abrogating joint and several liability has an insurance rationale to it. In a situation where there are multiple defendants and all of them are passing the costs along to consumers, it is not clear that the consumer wants to pay for multiple insurance recoveries. In a number of auto cases, the plaintiff sues the auto manufacturer and sometimes the State Highway Department. If someone runs into a telephone pole, the utility company might also be sued. If all of them have to buy insurance for the consumer, there is a duplication there that does not exist in the first-party insurance market.

Who loses or gains from this form of insurance, if insurance is being provided? First-party insurance markets operate by segregating high risk from low risk insurance pools and charging a premium equal to the median risk within the pool. Much of what we see in insurance markets represents the efforts of insurers to segregate high risks from low risks. For example, we see insurers that provide different premiums for smokers. Auto insurers charge different premiums based not only on driving history, but also on age and sex, where it is allowed, and it is in most states. If you buy life insurance, there is typically an application that asks a number of different health questions. But it also asks, for example, if you fly a plane or if you have a private plane. What is the reason for that? Why would the insurer discriminate against pilots? Pilots are more likely to make mistakes and trigger their life insurance policies. Pilots are not excluded from having insurance, but they are higher risk individuals because they are more likely to be involved in a fatal accident. Your premium becomes higher, you move into a different insurance



pool, if you have features that suggest you provide a higher risk to insurers. It is good to charge higher premiums to higher risk individuals because it allows insurance to be provided at a lower cost to those with lower risk.

Insurance provided in the tort system does not do that so well. If insurance is being provided, or sold along with the price of the product, there is some distinction that some products are more sold to more risky individuals than others. But it is very hard to distinguish high risk consumers from low risk. Within a particular product, you certainly cannot distinguish high risk from low risk consumers. One particular problem is that product insurance includes pain and suffering recoveries because it is delivered through tort law. Pain and suffering recoveries are very highly correlated with lost income. The reason is, the larger pain and suffering recoveries usually are awarded in cases in which a person is severely disabled and cannot work for some period of time. That is not to say that when there is not a lot of work loss there cannot be pain and suffering, but the damages are typically less. When pain and suffering is correlated with income, this means that individuals with relatively low incomes are lumped into the same pool as, and have to pay for the average pain and suffering of, individuals with relatively high incomes. In terms of pain and suffering, again, correlated with income, high income individuals become relatively high risk in the sense that they are imposing greater costs on the insurance pool than low income individuals. The insurance provided in tort law has a redistributive effect from low income to high income, to the extent that the product is purchased by both high income and low income individuals.

I have compared cases and accident rates over periods of time and there are some interesting data. There is no empirical evidence whatsoever showing that accident rates have declined with the adoption of strict products liability, which is a little puzzling. There is no question that there has been a tremendous increase in the number of safety precautions added to products. Accident rates are declining for almost every activity and product, and have been declining at a relatively stable rate since World War II. But, there is no observable difference in accident rates generally or for any single product from the adoption of the strict liability standard.

I looked at things like diving boards. Diving boards for home pools have been essentially eliminated for liability reasons. The companies that produce diving boards have been put out of business because they were sued so many times. Accident rates really have not changed much, but lawsuits, on the other hand, have increased dramatically. The same is true for general aviation. The lawsuits have increased very dramatically over time, but accident rates per mile flown have declined at roughly the same rate since World War II. Until the Airline Revitalization Act,¹⁰ which limited liability, the entire general aviation business was basically going out of existence in the United States. At one point, the sales of planes produced in the United States declined from about 15,000 to less than about 800.

The point I am trying to make is really this: When you see the market dropping off entirely because the manufacturer is providing insurance, it is not clear that the insurance



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is worth its costs to the consumer. Otherwise, there has to be a judgment as to whether we are at an optimum point, less than optimum, or whether we are providing insurance through the tort system. If we are providing insurance through the tort system, one might think about these various civil justice reform efforts as an attempt to make recoveries under the tort system more closely resemble insurance recoveries.

Notes

1. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed.1992).
2. See *id.*
3. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 348 (Cal. App. 1981).
4. See *id.* at n.2.
5. See *Anderson v. General Motors Corp.*, No. BC-116926 (Los Angeles County Court, July 9, 1999).
6. This is a reference to a document written by a General Motors engineer, Edward C. Ivey, in 1973, stating that although fixing a GM design defect would cost the company about \$8.59 per car, paying tort claims after accidents occurred would only cost the company about \$2.40 per car.
7. See *Grimshaw*, 174 Cal. Rptr. 348. At issue in this case was a design defect in the Ford Pinto. Instead of placing the Pinto's gas tank above the rear axle, Ford designers placed it behind the rear axle, in order to leave room for a bigger trunk on the subcompact model. This design feature, among several others, made the Pinto's gas tank vulnerable in crash situations.
8. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).
9. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).
10. General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 (1994).

