Liability Distribution: a History of Two Evolving Systems—American Tort Systems and Insurance Systems and Their Interactions

Book Review: Kenneth S. Abraham, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11. Cambridge, Mass., 2008. 274 pp. $45.00

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It is not very often lawyers are presented with a truly wonderful book. This is one of them: well written, important topics, easily understandable, highly informative in many ways, and a valuable reminder some of the time. All is accomplished without an arrogant or condescending passage in the entire text. Much of this review is a rough summary of the central theme of THE LIABILITY CENTURY[2]—that the availability of insurance has influenced, and continues to influence, development of tort law, and eventually may replace at least parts of the tort litigation system. The points to this review are two. First, as I've already stated, this is a marvelous book, both in content and in prose—not to mention argument, thoroughness, and (often hidden) ingenuity. All industrious lawyers should read and enjoy it. Second, a grasp of or a feel for the book will provide lawyers with a source to site in briefs and elsewhere. This review is intended to provide those lawyers with a guide.

On the dust jacket two leading legal scholars praise and recommend the book just as I am. Here is what Tom Baker from the University of Connecticut School of Law says: "Nothing like it has ever been written, ever. I rank it as among the most significant books in the tort and insurance field." James A. Henderson, Jr., from the Cornell Law School, joins in this view: "In demonstrating the complex interaction between tort and insurance, THE LIABILITY CENTURY makes an important contribution to our understanding of two reciprocally related and very important institutions in our legal landscape." They are each correct.

Professor Abraham of the University of Virginia Law School is a named "Distinguished Professor of Law." He has received achievement awards from his University for teaching, research, and public service, and he has received an award from the ABA for tort and insurance research work. As one might expect, these are his two major teaching areas. He has produced a tort treatise, a book on environmental liability insurance law, an insurance case book, and significant work for the American Law Institute, and more than 50 articles or book chapters. Both John DiMugno, Editor of this journal, and I have independently used his insurance casebook several times each. I am particularly fond of his first book DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY, which the Yale University Press published in 1986. It is really a book about jurisprudence, at least in part, and that is my first love. (It is also a significant, early-ish study of the theory of insurance faith and its problems, which is an additional love of mine.)

I. Summary & Comments

The central image of THE LIABILITY CENTURY, beginning on line 1 or page 1, is that of the "binary star." The central idea built into this phrase is that of two stars, "each in orbit around the other. Their center of gravity lies at a point in between them, and they revolve around the center of gravity." Of course, the idea of the book is that tort liability and systems of insurance are like two suns which are seen as a

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2. Quotes from the book will be cited by footnote. The title will be abbreviated as "TLC." This abbreviation should not be confused with "Tender Loving Care." The "TLC" code here will be hyphenated and followed by a number; it is the page number of the quote.

binary star, in this case each dependent upon the other for their role in the American legal system—or, for that matter, in any legal system resembling it. "For more than a century[,] these two systems have influenced each other's course of development. Neither would be anything like what it is today if the other had not existed and developed along with it. Today[,] the two systems constantly interact, and almost no effort to understand or reform one of them can take place without understanding the role played by the others." These propositions are true, even though insurance—"risk transfer and risk distribution, or spreading"—figure prominently in both the tort liability system and in non-tort systems of compensation. After all, insurance in the United States currently pays out about $1.5 trillion a year.[3]

A. Insurance and Tort Law: What Kind of Relationship?

The impact of insurance on the evolution of tort law has been cursorily recognized for some time. It has not been sorted out. Professor Abraham deploys the analogy of a skunk at a lawn party: "present in everyone's mind but none the less ignored."[4] Interestingly, since early in the Twentieth Century distinguished legal scholars have suggested that insurance should play a role in tort law, since defendants could usually insure more easily against liability than potential victims. This seems to have started with William O. Douglas, before he became a Supreme Court Justice, and it was continued by Fleming James, Jr., the leading tort scholar of the first half of the century. The idea exploded seriously into more everyday legal discourse with Justice Roger Traynor's concurring opinion in *Escola v. Coca Cola Bottling Company of Fresno*, 150 P.2d 436 (Cal. 1944), which was taught in law schools for many years as the dawn of the age of products liability.[5]

Insurance taken as a whole cannot be treated as just one, big, totally unified system. There are many systems within the giant INSURANCE—writ large, as it were—and some of the subsystems other than liability insurance have influenced the evolution of tort law in the Twentieth Century. Health insurance is an example of this. It has driven the size of tort awards by increasing the amount of money spend of trauma caused injuries, and that type of insurance immediately (or, relatively quickly) agreeing to pay health costs makes it possible for those injured—the plaintiffs in personal injury tort case—to resist "low-ball" settlement offers from liability insurers.[6]

Of course, the evolution of contingency fees for plaintiff lawyers in tort cases also has impacted this. More significantly, a number of features of the tort law and litigation itself have played a role in inviting interaction with and influence from insurance. Tort law has a number of goals. Not all of them are specific; they are not socially agreed upon; and even the relatively agreed upon goals are not well achieved by the tort system. For example, it probably does not make people and business more reasonable and safer; premiums may not be well calibrated to the risks created. Further, the tort system of liability is both "unsystematic and inefficient" at "ensuring compensation to victims."[7] In addition, tort law has been an only "partially successful" in delivering "corrective, justice, restorative justice, and civil redress[.]"[8] Indeed, it has proved to be "not very good at what it does or at what is expected to do." At the same time, there is little likelihood of there being sufficient changes in the offing.

B. Volume of History: The 1800s

Professor Abraham does not intend this to be a normative book suggesting reform.[9] The book is intended to be an investigative and objective historical volume about developments during the last century or so, various socio-political reactions to those developments (including both public and scholarly), and some projections of where things might go from here and into the future. Of course,

3. TLC-4
4. TLC-4.
5. TLC-7 and 144-45.
6. TLC-5.
7. TLC-9.
8. TLC-10.
9. TLC-8.

one of Abraham's continuing themes is the development of insurance as a way to deal with injuries of a variety of sorts may replace at least parts of the tort litigation system. Indeed, he almost begins with a key historical event where just this happened.

His actual beginning, however, after the first introductory chapter is a historical set up. He recounts how both and insurance and tort law looked toward the end of the Nineteenth Century. The primary focus of much of tort litigation and liability insurance has been negligence. The law and the social order were very suspicious of liability for negligence in litigation and in insurance.

With respect to the tort law, the social and economic orders before and during the American Civil War were such that there wasn't much need for actionable negligence tort law. Most people lived in rural areas and did not crash into each other much or accidentally inflict injury upon each other as often as they did once industry flourished and urban areas became large and more commonplace. Liability insurance was therefore quite uncommon; it was not needed. In the earlier part of the Nineteenth Century, "[t]ypical tort suits for accidental injury involved milldams, horses and the carriages they pulled, farm and residential fires, and in the classic case, a dogfight." [10]

It was also uncommon because many feared that liability insurance would "unduly encourage irresponsible behavior." Liability insurance was viewed as creating a "moral hazard"—a "tendency of a policyholder to exercise less care to avoid suffering a loss than he would exercise if he were not insured."[11] Of course over time, insurers developed ways of dealing with the danger of moral hazard: they rule out liability for intentional conduct; insurance is available only to those who have an "insurable interest"; complete strangers cannot buy life insurance on someone they do not know; and so forth.

In addition, insurance as a whole was regarded as a form of gambling, and the public was nervous not only about this fact in general, but how it would apply to liability insurance. In first party insurance, there was no recovery for injuries and damages which resulted (at least in some contexts such as maritime insurance) if the insured was itself negligent or sloppy. At the time, this was known as the "defense of barratry": it "precluded the recovery of insurance for losses caused by the misfeasance of the policyholder."[12] According to Abraham, citing old cases and treatises, damages from "perils of the sea" were not recoverable under contracts of insurance if the owner was negligent in creating the situation which led to the loss.[13] The barratry defense made liability insurance virtually impossible, and such insurance grew only after that defense was "put to rest."

The arrival of railroads stimulated the development of tort liability, more on some theory like strict liability than on the theory of negligence. They used the devices of waivers of liability and indemnity agreements to avoid liability in connection with passengers and cartage. In the famous case of *Phoenix Insurance Company of Brooklyn v. Erie & Western Transportation Company,* 117 U.S. 324 (1886), the Supreme Court of the United States ruled that a carrier on water might obtain insurance against the loss of goods caused in part "'by the usual perils, though occasioned by his own negligence[, and so it might] lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the

10. TLC-22.

11. TLC-16.

12. TLC-21 & 22.

13. In retrospect, other, briefer sources regard insurance barratry as more closely related to deliberate conduct, e.g., fraud, smuggling, sailing despite an embargo, etc. See David M. Walker, THE OXFORD COMPANION TO LAW 115 (Oxford U. Pr., 1980). Here is part of what is to be found in a classic source. "BARRATRY (from the Italian *barratrare,* to cheat). – In navigation barratry is, in its most extensive sense, any fraudulent or unlawful act committed by the master or mariners of a ship, contrary to their duty to their owners, and to the prejudice of the latter. It may be committed by running away with a ship, willfully carrying her out of the course prescribed the owners, delaying or defeating the voyage, deserting convoy without leave, sinking or deserting the ship, embezzling the cargo, smuggling, or any other offence whereby the ship or cargo may be subjected to arrest, detention, loss or forfeiture. Many foreign jurists hold that it comprehends every fault which the master and crew can c omit, whether it arise from fraud, negligence, unski[l]lfulness, or mere imprudence. In England it has been ruled that no act of the master or crew shall be deemed Barratry unless it proceed from a criminal or fraudulent motive. It is the practice in most countries to include Barratry iin the risks insured against." The text then discusses two Eighteenth Century English cases. 1 Cornelius Walford, THE INSURANCE CYCLOPAEDIA 255 (London: Charles and Edwin Layton, 1871). Obviously, someone has something wrong here.

latter.'"[14] Obviously *Phoenix* did not entail the disappearance of the barratry defense and the broad application of moral hazard which it represented, but it did begin that process, and state courts carried this process out in the next 15 years or so. The Supreme Court was careful to say that the obtaining of insurance "'does not diminish [a carrier's] responsibility to the owners of the good, but rather increased his means of meeting that responsibility.'"[15] In other words, the danger of increasing moral hazard by insurance would be tolerated by public policy if, as Abraham puts it, "the result was to help ensure that injured parties were compensated."

The background of the *Phoenix* decision was an increase in industrialization and its rate of coming, the growth of railroads and streetcar lines, the growth and dispersal of the population, the growth of cities, and the increase of injuries in the work place. These social changes continued and intensified. They led to significant changes in tort law and then insurance markets.

One of the first changes pertained to the tort liability of employers. They had traditionally been able to avoid vicarious liability to their workers through various common law rules, e.g., the fellow-servant rule, but exceptions to that rule began to develop in the latter part of the Nineteenth Century, e.g., the employer's duty to provide safe workplaces, the "vice-principal" doctrine, the "different department" exception,[16] and various statutory exceptions pushed and obtained by organized labor. These new tort recovery exposures produced a new kind of liability insurance, namely, that specially focused on the liability of employers. It started in England and rapidly spread to the United States, and here is spread rapidly to a variety of different new companies.

During this same time, tort claims were increasing sharply in urban areas. "The new technology of urban transportation, operating in the congested streets of the cities, obviously produced a good deal of injury."[17] The coming and spread of liability insurance influenced the structure of tort litigation. The insurers acquired ab initio the right to defend and a right to settle. In all such cases, the liability insurers were the "real parties in interest and were very much in control of the law suits they were involved in."[18] They were at the centers of various disputes. "Any other arrangement would have been difficult, if not impossible to, administer."[19] Imagine routine liability insurance where the insurer did not have a duty to defend and a right to settle.

Abraham's point is that after liability insurance came to be conceived as a loss spreading system, and after liability insurance became a publically available system, the tort- litigation legal order became something pretty much like a "liability insurance system," or—better yet—what we might now call a "'managed legal care'" system, or something close too it, though not identical to it.[20] Liability insurance has become very nearly "constitutive of the system's character," and in a very real sense, over the Twentieth Century, "tort would become insurance."[21] To a small and quite specific extent, this has happened explicitly.

C. First "Great" Tort Reform

This last development is to be found in the "original tort reform: workers compensation."[22] It was "the original tort reform and still is the most fundamental [such move] ever undertaken. Even after employers were—in theory—made to some extent liable for injuries to employees, the scope of their liability was quite limited, and their special liability insurance was itself very limited. Although Abraham does not say so, employee tort cases against employees outside the comp system are still difficult to win in front of many juries, and they are

14. TLC-25.
15. TLC-26.
16. TLC-27.
17. TLC-35.
18. TLC-36.
19. TLC-37.
20. TLC-37.
21. TLC-38.
22. TLC-39.

energetically and therefore expensively resisted over long periods of time. In any case, from the turn of the last century, tort cases against employers were not a predictable route to reasonable recovery for the truly injured; they did not help much in accident prevention, or even reduction; the administrative costs were high; and employee purchases helpful species of first-party insurance was too expensive. The workers compensation system was a response to each of these flaws, and it has worked to some extent.

Abraham discusses the data supporting this observation, at least to some extent, and includes a short helpful discussion of the structure of the comp system of insurance. He also makes a significant historical observation. According to him, workers comp was not a victory for either labor or industry. It was certainly not a victory for those who wished to redistribute wealth. Instead, it was "a product of coalition of labor and at least a substantial portion of the business community. Business men saw that if workers' compensation laws were not enacted, tort liability might expand and create a less desirable form of liability exposure."[23]

Of course, the workers comp system caused three substantial changes in the even then slowly evolving tort system. Awards to injured workers who "won" went down in size, but more workers were awarded compensation; a new form of employer liability was initiated; and comp insurance paid only medical fees and a percentage of lost wages but nothing for pain and suffering. "Workers' compensation was thus a tradeoff of certain employee rights for others, and of certain employer obligations for others."[24]

The administrative costs seem to have been far less than the tort system were, or would have been. On the other hand, the system has depressed wages a bit, however, especially in nonunionized businesses. Furthermore, the comp system contained an adverse selection problem: since virtually all employers were in the system, some of them were not oriented to safety and safety rules. Those tended to have accidents at the same rate, or even more accidents, as the coal mining industry did. And, of course, the same is true for sloppy workers and workers who don't mind secretly self-caused, on-the-job physical injuries in order to avoid working, at least for a while. There was and is a moral hazard generated by some injured workers; not all of them want to go back to work, and this creates unnecessary cost and therefore premium, if not discovered and stopped. (There is law about these last three topics, and there are institutions for dealing with some of the employer generated problems, but Abraham does not discuss them.)

Comp did not eliminate all work-based, bodily injury related tort litigation or liability. First, not all employers subscribed to it. Second, some employees in some states could refuse to join the system. Third, and most significant, (a) employers and comp carriers can sue outside third parties that contribute to an injury they have to pay, and (b) injured employees could sue non-employers for work-related injuries, e.g., if a manufacturer of a machine or machine tool had been negligent or had produced a defective instruments. Under some circumstances that non-employer could sue the employer—its buyer—pursuant, for example, to an indemnity agreement included in the purchase contract. Here is the significance of this discussion: "only 10 percent of all tort suits arise out of workplace injuries, [but] over 60 percent of all tort recoveries in excess of $100,000 involve these injuries."[25] Thus, "[i]n the end. . . , worker's compensation—the first tort reform—has been unable to escape tort entirely."[26]

An amazing number of tort reforms after the "original" one have involved the expansion of tort liability and the expansion of liability insurance for that new liability. Abraham considers motor-vehicle-based torts and related liability in this light at some length. It started with an adaptation of liability insurance for horse drawn vehicles and evolved from there, as the author notes. Currently, the amount of money spent on auto liability insurance-$110 billion—"dwarfs" what is spent on any other type of liability insurance. Obviously, auto insurance is a big business, and it is "the field where the modern tort process came into its own."[27] Of course, given this fact, it is

23. TLC-53.
24. TLC-57.
25. TLC-67.
26. TLC-68.

not surprising that legal fees constitute a substantial percentage of all that is spent.

D. Accelerating Auto Insurance

Auto insurance was created almost as soon as auto accidents result in lawsuits, and—as auto usage grew—the casualty right was very high. As a percentage of miles driven, it is much lower than in, say, 1930. Liability payments by insurers were quite low at first. The tort law stood in the way, since it was governed by the then existing negligence regime; contributory negligence totally barred recovery, the statutory system in many states followed the earlier common law requiring passengers to prove gross negligence in order to recover (a system perhaps designed to prevent collusively fraudulent claims), and so forth.

This system changed dramatically over the first half to 60% of the Twentieth Century. Part of the change was virtually dictated by the lack of individually purchased health coverage. First, there were "financial responsibility" laws, and then there was compulsory liability coverage, the latter of which was opposed by insurers all over the country. One attempt to deal with this situation was the "Columbia Plan"[28] of 1932 devised at Columbia University which would have transformed the standard of auto accident liability from negligence to strict liability. It was never adopted, but it never disappeared. Instead, state after state reformed the law of negligence: coverage was extended to those disobeying traffic laws and to injuries caused by parked cars; indemnity clauses were eliminated in favor of pay-on-behalf-of causes; "bodily injury" was redefined to include illness as well as cuts, breakages, and bruises; "omnibus clauses" were adopted; "med pay" clauses were widely adopted; and UM/UIM coverages were created. Courts became "an especially active force in promoting victim compensation through the expansive interpretation of liability insurance policy provisions."[29] Eventually even insurers gave in and adopted these various provisions. Thereafter, the auto insurance business exploded. "Premium volume in the late 1940s for all forms of auto coverage had been about $600 million. Ten years later, that figure had increased more than sevenfold, to $4.4 billion." Of course, the increase in the size of auto negligence controversies—both as to numbers and size—substantially increased the size of the plaintiffs bar and the entirety of the litigation bar. It also led to "[d]elay, inequity, and undercompensation"[30] in the system, the three of which are all discussed by Abraham in some detail and considerable wisdom.

He also discusses the tempting shift to a no-fault compensation system and provides multi-dimensional account of why it was not successful. After all, it resembles a welfare system, and it eliminates careless people from having to take responsibility. Abraham ends his discourse on auto liability by pointing out that "it is a prime example of how the routinization and bureaucratization in a field of liability tends to move it from the foreground to the background of public concern, despite the very substantial amount of money that is sometimes involved." [31] His point is that most people have grown accustomed to budgeting and paying significant sums for auto liability insurance and calculating appropriate deductibles, because large-to-huge liabilities would ruin their economic lives.

F. Cars to Docs: The Physicians' Dilemma & Their Self-Injury

Enormous sums are spent on auto insurance and auto liability, but it has "low political visibility. In contrast, medical malpractice liability occupies a place in contemporary policy debates far out of proportion to its seemingly minor economic importance. We spend a tiny percentage of the health-care dollar on medical malpractice insurance." And yet there have been what Abraham calls "three 'crises'" involving this topic since 1970, and they "have affected the availability and cost of medical malpractice insurance in the short run and led to legislative tort reform in the longer run." Abraham discusses each of these at

27. TLC-69.
28. TLC-74ff.
29. TLC-79.
30. TLC-87.
31. TLC-102.

some length. Alas, he says, there is very little to light up the mysteries surrounding these problems. "We have no definitive or even terribly persuasive empirical evidence of the effect of malpractice liability on physician behavior whether positive or negative."

Why? asks Abraham. His answer is simple. The legal procedural rules governing med mal cases are pro-profession. At the same time, the number of med mal suits has increased substantially. "Today, on average one out of every twenty physicians experiences a claim each year."[32] The medical profession has not and is not getting the legal structure—the legal protection—it wants. "It is a popular and socially prestigious group; it has political influence and even power." "Medical malpractice is a powerful example of how the underlying structure of a field can be a more important determinant of its character than the legal doctrines that purport to govern it."[33]

Some of this result from the evolution of the amount of medicine practiced and its increasing sophistication. These increases have been enormous, and they have lead to changes in applicable legal rules and jurisprudential attitudes. (For example, the system started with a "strict locality expert witness" rule[34] but that was replaced with a much broader—based on science and practice rule—and sometimes in obvious cases (e.g., sponges left inside the body of a surgical patient) no expert at all is required.) Other causes, Abraham argues, are the result of the medical profession's fierce and prolonged dedication to health insurance being wedded to a fee-for-services system, as opposed to some transformation thereof. Significantly, med mal liability insurance would have been far less noticeable and significant if it has been passed through to the 300 million medical patients than by requiring each physician to pick up his own tab. Abraham argues this last point elaborately and on the basis of much of the post World War II economic history affecting the medical profession. Yet another set of causes are to be found in the evolution of health insurance and in the cyclical nature of med mal insurance pricing.

Here is Abraham's summary of part of what has happened: "at the same time that the health care system was expanding from roughly 1965 to 1990, the forces that affected malpractice liability were left free to operate essentially without the limitations that might have operated in a different health insurance context. As a consequence, liability expanded dramatically. When managed care was eventually introduced, the malpractice liability genie had long before been let out of the bottle. A robust system of liability for malpractice had by then been operating for several decades, and it was far more difficult to shrink the scope of liability than it would have been to prevent the expansion of liability in the first place. Physicians thus got what was for them the worst of both worlds: the restrictions on their autonomy that came with managed care, and the continued exposure to liability for malpractice that had been part of the price they had paid for preserving their autonomy."[35]

Abraham closes his discussion of this part of the history of liability insurance by discussing the introduction of the "claims made"[36] policy in the 1970s, the refusal of a number of carriers to market physicians' malpractice policies of any kind, the role of tort reform in the latter part of the Twentieth Century and thereafter, plus the relationship between med mal insurance to the institutions which figure centrally in the health care delivery system, e.g., hospitals, rehab centers, hospices, and managed care companies. Tort reform, he says, will probably have only a "modest impact"[37] on these focal points. "As health care is increasingly delivered through these institutions and within the systems of treatment, a system-wide approach to optimizing patient safety is emerging anyway. The individual physician is not sensibly the exclusive focus of liability in this kind of setting any more than the pilot of a commercial airliner should be the focus of liability when airplanes crash."[38]

32. TLC-105.
33. TLC-105.
34. TLC-107.
35. TLC-120.
36. TLC-126.
37. TLC-137.

This creates a rub. One the one hand, institutions should be a focal point of med mal. It makes more sense economically and on the basis of other realities. On the other, physicians will fight to retain autonomy and control over medicine, if the past is any indicator. The autonomy and control the doctors want guarantee that they will be the main target of med mal litigation. If they step out of the way in the tort litigation, they have to give up some of the control. The decision-maker should have the ultimate liability. "[U]ltimately physicians are not going to be able to have it both ways."[39]

F. Products, Pollution & the Wagging Tail

One of the most sophisticated discussions to be found in THE LIABILITY CENTURY is that of "the long tail." Originally, liability policies for commercial entities like manufacturers did not cover products. Over time this changed some. First, as manufactured products increased in number, got better and better, and had longer and longer lives, the tort liabilities of manufacturers went up and up. Eventually, the introduction of strict liability accelerated the expansion of liability. Second, liability insurers expanded coverage to cover products and completed operations. As a result, the exposures of liability insurers increased: they stretched further and further into the future. This is called "the long tail."[40]

Later in the century, roughly the same thing happened as the result of the rise of environmental consciousness. Liability insurer began to include liability insurance for injuries exposures to harmful conditions. Such accidents might cause sicknesses and/or diseases which were not controlled easily by statutes of limitation that restricted the length of time during which a tort case could be brought when the case involved an obvious bodily injury, e.g., bleeding or bruising. This extension of coverage led to significant changes in the language of the policies. At first, coverage was restricted to injuries caused by accidents; it was changed to "bodily injury, sickness, or disease" caused by an accident; then it was changed to "bodily injury, sickness or disease" caused by an "occurrence," where the term "occurrence" was defined as an "accident or an exposure to" *harmful conditions,* an idea which was then itself defined. All these changes took many years, but they led to an even longer tail, and around that same time environmental ethics, law, and politics burst upon the American scene.

It became difficult to set differential premiums and the number of large lawsuits shot up and nearly out of site. Of course, these events triggered the "Age of Pollution Exclusions," (to coin a new phrase here) and that too—along with environmental clean-up statutes and litigation, plus asbestos, cigarettes, drugs, and other forms of mass tort litigation-produced an enormous about of expensive litigation. The insurers had predicted little of this as they changed the language and titles of the commercial liability policies. Naturally premiums went way up and not simply as the result if inflation.

G. Insurance Market Ruination

This history led to a significant problem in approximately the mid-1980s. Policyholders increased their deductible and/or self-insured retentions substantially. In addition, policyholder switched liability insurers much more often that they formerly had. Loyalty on both sides declined: claim denials rose; coverage suits went up; and bad faith claims became much more widespread.[41] "Insurance. . .became less reliable, and policyholders valued it less. Whether to litigate a coverage claim was frequently determined by a cold[,] risk-reward calculation[,] rather than as a part of an ongoing business relationship. In the meantime, it became more and more difficult for insurer to provide reliability."[42] This last problem arose from price competition. "A kind of reverse adverse selection problem arose, in which the price of coverage was kept lower than it would otherwise have been, because purchasers could not

38. TLC-137
39. TLC-138.
40. TLC-139 & 152ff.
41. Abraham does not make the last of these three points, but I have spent a fair fraction of my time as a lawyer working in the relevant areas, and this addition to his ideas is correct.
42. TLC-166.

differentiate between high- and low-reliability insurers. Then, as a consequence, all insurers were forces to deny more claims than they would have otherwise, because they had charged low premiums for that coverage."[43]

Abraham spends several interesting and informative pages describing how coverage litigation and underlying tort litigation develop in tension with each other when they are undertaken and evolve at the same time. One of the author's most interesting arguments grows out of this. Plaintiffs in tort cases often have considerable motivation to pursue punitive damages against commercial defendants. Of course, those defendants strenuously resist exactly these parts of cases against them; they resist them even more than they resist other parts of the plaintiffs' cases. Liability insurers have a strong motivation to resist claims of liability against their insureds, but if the plaintiffs succeed in proving at least some torts which would justify awards of punitive damages, the whole award of damages will be excluded from coverage under the "expected or intended" exclusion. Hence, as a matter of rational, economic self-interest liability insurers have some motivation to embrace those portions of plaintiffs' cases against their insureds. Yet they have a legal and moral obligation not to do that. This temptation also has internal dangers of its own. Punitive damages can be awarded on the basis of gross negligence, as well as explicit deliberateness. There is usually coverage for mere recklessness, even though its elements often suggest that the "expected or intended" exclusion applies. Thus helping a plaintiff by trying to prove the "expected or intended" exclusion in a coverage action, and only half-way succeeding, could easily trigger a much larger insurer exposure than doing nothing in that regard.[44] Abraham loves "catch-22"[45] problems facing participants in the insurance market place.

H. What Came First?

Near the end of his book, the author spends a chapter discussing what is sometimes called the "Chicken versus Egg Question." Which came first, the transformation trigger, consisting of legal change, which began the liability century, or liability insurance? Abraham suggests and argues a three component answer to this question. Legal changes in the lodestar of tort law—the law of negligence and its use--and practice came first, and insurance followed. Abraham takes this to be virtually entailed by a chronology of the late Nineteenth Century; the railroads, for example, had liability before they had insurance. However, after that, the existence of liability insurance helped tort liability to expand and develop. Its existence, availability, general "knownness," and force in developing the plaintiffs' bar all contributed. The money it provided made a simpler, more streamlined, and more logical system of negligence possible.

The arrival of liability insurance also may have helped create—or, at least, help the flourishing of—several other features of tort law, namely, premises liability, the standards of child liability, and the dissolving of immunity. Another feature of tort law reinforces the centrality of liability insurance. Most liability insurance does not cover the negligent infliction of emotional distress when it not caused by bodily injury to the victim. It cannot be a coincidence that this has not developed as a meaningful tort either, at least in most places.

There is a third phase in this historical development, however, where insurance did come first, according to Abraham, and this is the area of personal liability. Generally speaking, individuals were not sued much in tort before World War II, except in the area of auto accidents. The reason is quite simple: most people did not have the money it took and takes to pay legal fees and judgments. That would take liability insurance. Liability insurers responded by creating and marketing personal liability policies. They did not become a highly used commodity, however. Why would they? So insurers went in a new direction.

Before World War II, homeowner's insurance policies were "named peril" policies, and they were restricted—often by state law—to being property policies. The insurance industry persuaded state

43. TLC-167.
44. TLC-169.
45. TLC-167.

legislatures—starting with New York state—to permit multi-line homeowners insurance policies, and so the industry began including liability policies in the homeowner's property policies. After World War II, or obvious and well-known reasons, the number of home purchases increased drastically. There were suddenly a lot more mortgages, and the mortgagors were insureds under those property policies. They were delighted with the inclusion of liability insurance in the property policies, since that would increase the probability—if not ensure-that their mortgagees remained solvent and hence capable of paying the mortgages. This pattern spread throughout the country; the "named peril" coverage agreement was replaced by the "all risk" coverage language; and the contemporary homeowner's policy was born. Abraham argues that the liability of individual persons was not a significant part of general negligence tort law, until after this change was made in homeowners' insurance policies.

Thus, Abraham takes the position that "the availability of insurance does influence the modification or abolition of . . . rules of [tort law and practice] when the other conditions necessary for change are satisfied."[46] Some significant and influential legal scholars have asserted, if not exactly argued, otherwise. William L. Prosser, "the great twentieth-century torts scholar"[47] was among the latter group. Abraham asserts that he has proved them wrong. Maybe so. His view is extremely plausible.

I. Will Tort Law Be Replaced?

One of the themes in THE LIABILITY CENTURY is the idea that compensation systems other than tort litigation and the law of negligence, plus its cousins, struggle with existing and evolving tort law and practice in being the principal way in which compensation for at least physical injury is administered on American society. According to Abraham, the existence of attractive alternatives is a continuing temptation and/or trend in out society. Indeed, the book virtually began with this idea when it discussed the worker's compensation system and called it a major tort reform. It ends with the same idea, when it focuses on the compensation system used in dealing with the fatalities and injuries caused by 9/11. Thus one of Abraham's foci is the tension between tort law and liability insurance. Apparently Abraham believes that systems of compensation other than tort law will eventually replace tort law and practice in American society as the principal method of dealing with at least death and bodily injury. After all, the tort system has little to do with need, and a compensation system which centralizes need may make sense in today's world. In addition, civil litigation does not genuinely contribute to a civil and hence truly civilized society. So, there must be better ways of handling these problems. Finally, tort law and practice is not an effective or cost-effective way to spread risk, and liability insurance is not an effective way to spread accident preventions. Therefore they should be replaced, or—at least—substantially modified or limited. We shall see.

In order for this to happen, says the author, there are several important problems to solve. The first on is how the collateral source rule will survive into the future. A second one is how subrogation will continue to evolve. And a third one is whether it makes sense for life insurance to acquire a right of subrogation is new systems of compensation are instituted. Abraham explores these problems at interesting length.

II. Remarks

It is difficult to find anything to criticize in this elegant study. Even the footnotes are a very helpful bibliography of American legal history and relevant scholarship. How many of us knew that Thomas Baker, now of Penn Law School and no longer at Connecticut, published scholarly paper in GENEVA PAPERS.[48] How many books of legal history and historical speculation have a last chapter which can be read first for compelling and motivating orientation?

The only major thing I come away wondering about (though I expressed a couple of minor doubts as "Comments" in the main section) is the argument that the creation of the personal liability policy included in the homeowner's policy paved the way

46. TLC-194.

47. TLC-172

48. These ides emerged from a discussion I had with Portia J. Bott, my excellent and occasional colleague.

for the institution of lively personal injury tort practice. The law itself already existed; it did not take the creation and spread of insurance to do that. Thus, if anything, the spread of the liability section of the homeowner's policy was necessary, if at all, only for the spread of these kinds of suits. Abraham does not prove this part of his case, it seems to me. To do so, he would have to prove that no such thing would have happened had that liability section not have blossomed. But how on earth could this be proved?