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# Beginning the Endgame: The Search for an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms

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BEGINNING THE ENDGAME:  
THE SEARCH FOR AN INJURY COMPENSATION SYSTEM  
ALTERNATIVE TO TORT LIABILITY FOR TOBACCO-RE-  
LATED HARMS

*by Paul A. LeBel\**

The reference to an endgame in the title of this contribution to the Symposium is meant to sound both an optimistic and a pessimistic note. The good news, one might argue, is that the key policy makers of our society have begun to think seriously about the many ramifications of a more widespread and detailed appreciation of the relationship between the use of tobacco products and the resultant adverse effects on health. The bad news is that as we are poised to engage in the endgame, much of our thought seems to be confined within the molds that offer little promise for arriving at the most socially responsible outcome to that game.

Legal developments in the safety and liability portions of the tobacco arena are currently progressing on six fronts.<sup>1</sup> In litigation to impose liability on members of the industry, there are claims to recover damages for harm to smokers as individual litigants and as members of classes of smokers,<sup>2</sup> claims to recover damages for harm attributable to exposure to environmental (or second-hand) tobacco smoke,<sup>3</sup> and claims by public authorities to recover the costs of publicly funded health care for tobacco-related health problems.<sup>4</sup> On the regulatory front, there are efforts at the federal, state, and local levels to control access

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1. Paul A. LeBel, *"Of Deaths Put On By Cunning and Forced Cause": Reality Bites The Tobacco Industry*, 38 WM. & MARY L. REV. 605, 615-33 (1997) (hereinafter cited as *Tobacco Deaths*). Criminal investigations are also proceeding at state and federal levels, but those are beyond the scope of this article, except to the extent that they might serve as a source of additional information about the industry and of additional pressure to reach closure on some of the outstanding safety and liability issues.

2. *Id.* at 618-23.

3. *Id.* at 625-26.

4. *Id.* at 626-29.

to tobacco products,<sup>5</sup> to expand the information that is available about those products,<sup>6</sup> and (to a considerably lesser extent) to affect the content of tobacco products.<sup>7</sup>

With the exception of the innovative use of Medicaid subrogation claims by the state attorneys general in nearly half of the states, the litigation strategies that are being used involve efforts to shape standard tort doctrines and procedural devices to fit the demands of the tobacco context.<sup>8</sup> Assuming that the substantive elements and the procedures can be made to accommodate liability for harm — in this case, harm caused by a product that is more accurately characterized as lethal rather than as defective — it is not at all clear that the public interest is best served by transferring great amounts of wealth from the tobacco industry to smokers and their heirs.<sup>9</sup> The daunting prospect of adjudicating tobacco tort claims by the hundreds of thousands calls into question whether we are capable of learning anything from the experience of mass injury litigation in such settings as asbestos, Bendectin, and silicone gel breast implants claims.

On the regulatory front, even the more robust regulatory strategies for tobacco are distinctive for their refusal to follow through on the full implications of the lethal and addictive nature of the products. If nicotine is an addictive drug,<sup>10</sup> and if it is delivered to consumers in a carcinogenic and cardiopulmonary risky manner,<sup>11</sup> then the cautionary approach by the regulatory agencies is more a testament to the political realities than it is evidence of a principled consistency in regulatory concern.<sup>12</sup> We

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5. *Id.* at 631-33.

6. *Id.* at 629-31.

7. *Id.* at 633.

8. Professor Eades' commentary in this Symposium offers a powerful critique of the use of tort remedies in this setting. Ronald W. Eades, *A Comment on Professor Paul A. LeBel's Ideas for a Tobacco Injuries Compensation System*, 24 N. KY. L. REV. 495 (1997).

9. The most cogent and compelling articulation of this skepticism has been put forward by Stanford Professor Robert Rabin. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 876-78 (1992).

10. The Food and Drug Administration has concluded that it is addictive. 61 FED. REG. 44,661 (1996).

11. The versions of the federally mandated warnings in effect since 1984 are unambiguous on this point. 15 U.S.C. § 1333 (1994).

12. Professor O'Reilly's contribution to this symposium makes a compelling argument for the proposition that the agency is not required to go farther and faster than it has. James T. O'Reilly, *Tobacco and the Regulatory Earthquake: Why FDA*

have entered into the endgame, one might conclude, but we seem to be resigned to playing by using the questionable moves of the conventional model of tort liability and a deferential approach to an industry that still possesses considerable political influence.

The principal papers and commentaries presented in this Symposium offer many insightful views of quite distinguished people whose thoughts on tobacco litigation and regulation will advance the public debate and the legal understanding on this significant topic. My own views are deeply sympathetic on a number of levels to those who are advocating an enhanced liability exposure for the tobacco industry and to those who are supporting both the federal regulatory regime about to go into place and some even more robust efforts by states and municipalities on disclosure and on use.<sup>13</sup> Nevertheless, and I hope not just to be contrarian, I propose to come at the current posture of the legal relationship between the nation's health and the tobacco industry from a different perspective. Instead of beginning with the litigation and regulatory models and working out the conceptual and the practical difficulties of applying them to the tobacco-related harm problem, I will start with the notion that thinking at the systemic level about injury compensation can lead us toward an approach that, if not superior to current paradigms, will at least help to inform the debate about the next round of legal responses to the problem.

This is admittedly not the first effort at devising a compensation program for tobacco-related harms. For at least two decades, legal scholars have reacted to concerns about the appropriateness of tort remedies in the cigarette context by offering suggestions for creating an alternative method of resolving those claims and of lowering the incidence of harm associated with the products.<sup>14</sup> This occasion for looking anew at the possibility of con-

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*Will Prevail After The Smoke Clears*, 24 N. KY. L. REV. 509 (1997).

13. More specifically, I think that Professor Wertheimer is quite convincing when she argues that tobacco products are susceptible to the application of traditional and modern concepts of products liability. Ellen Wertheimer, *Pandora's Humidor: Tobacco Producer Liability in Tort*, 24 N. KY. L. REV. 397 (1997). My concern is what follows from that liability. In a real sense, then, my concern is not that we cannot make a case for liability, it is that we *can*.

14. Richard C. Ausness, *Compensation for Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 36 WAYNE L. REV. 1085 (1990); Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269 (1977).

structing a compensation system for tobacco-related harms is the result of the convergence of three developments: first, a growing body of federal and state experience with compensation programs in other settings; second, a sense of frustration that the lessons of such mass tort litigation experiences as the asbestos cases are having such little impact on the planning for the resolution of the tobacco injury problem; and third, a belief that the disclosure of the internal workings of the tobacco industry will prompt a call for serious action sooner rather than later. For those reasons, the time is ripe for investing in a proactive approach to sketching the contours of an injury compensation for tobacco-related harms.

The ways in which a society deals with its citizens who have suffered injuries because of exposure to external sources of risk can be a telling indicator of the notions of justice that prevail in that society.<sup>15</sup> Injuries can be viewed as occasions for applying notions of corrective justice, returning the victims as close as we can to the status quo ante, or they can be seen as opportunities for engaging in a more sweeping exercise in distributive justice, using the intervention in the post-accident setting as an occasion for redressing other inequalities.<sup>16</sup> Accidental harm can evoke communitarian principles, under which the burden of dealing with the consequences of the harm is spread over a wide base,<sup>17</sup> or it can be seen as a matter for the injury victim to deal with under a more atomistic view of the person as an isolated unit, with strongly individualistic notions of personal responsibility and of culpability providing the critical concepts underlying a scheme for allocating losses.<sup>18</sup>

When one examines the multiple techniques of providing compensation for injury in this society at the end of this millennium, one gets a perhaps unintended but probably quite accurate sense of the philosophical pluralism, if not muddle, that underlies a significant segment of American law and public policy. Compensation for harm is accomplished through a wide variety of tech-

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15. See generally DAVID G. OWEN, ed., *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (1995).

16. Tony Honoré, *The Morality of Tort Law — Questions and Answers*, in OWEN, *id.* at 78-90.

17. Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (1990).

18. OLIVER WENDELL HOLMES, *THE COMMON LAW* 77-163 (1881).

niques and mechanisms, some created by legislative intervention and others produced through the accretion of a centuries-long common law decision making process. Against that background, it is more appropriate to think of looking at multiple systems from which guidance might be sought in addressing a particular injury problem, than it is to think that one can identify a single organizing principle.<sup>19</sup>

The driving force behind this article is a belief that the current situation with regard to tobacco-related harms offers an occasion for devising an injury compensation system that should be better able to accommodate the specific demands created by that situation than we would obtain by manipulating tort doctrines or by exercising regulatory authority that would likely be met with considerable political resistance that could produce a backlash that impacts other vitally important regulatory initiatives and liability doctrines. Such a system will be shown to deviate from our conventional understanding of tort law remedies in substantial ways.<sup>20</sup> Indeed, labeling an approach as a search for an optimum injury compensation system implies in the present day terminology that one is looking for an alternative or a supplement to a traditional tort litigation model of providing compensation.

In its broadest usage, the term "injury compensation systems" should encompass the full range of programs and mechanisms that can provide compensation to injured people. The oldest of the injury compensation systems in our legal heritage was what we would now describe as a first-party process, in which the injured person was generally required to draw on his or her own resources, including in many instances a network of extended family and charitable resources, to alleviate the consequences of a harm.

By the middle of the Nineteenth Century, a general body of

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19. See Izhak England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEG. STUD. 27, 68 (1980) (characterizing the attempts in "modern American scholarship in response to the crisis in tort law . . . to fashion an improved general theory of liability" as "doomed to failure").

20. A previous exercise along these lines in the drunk driving accident setting is PAUL A. LEBEL, JOHN BARLEYCORN MUST PAY: COMPENSATING THE VICTIMS OF DRINKING DRIVERS (1992). The problem posed by second-hand smoke was alluded to in that work as potentially susceptible to a compensation system solution. *Id.* at 331-34.

tort law rules and principles had taken shape and assumed a growing significance as a system for the allocation of at least some losses from the victim to those whose conduct was responsible (usually their negligent conduct) for contributing to the harm. The compensation that was obtainable under these traditional tort rules tended to reflect a number of doctrinal features: (a) the ability to characterize as negligent (or even more highly culpable) the conduct of the person from whom compensation was sought; (b) the identification of a quite specific and particularistic causal relationship between that fault and the harm for which compensation was sought; (c) an ability to characterize the injured person as being close to innocent in the production of the harm; (d) a skeptical attitude toward harm that was not tangible; (e) a process of determining legal responsibility that required individual adjudication of the issues in controversy; and (f) placement on the party seeking to relieve the burdens of production of legally sufficient evidence and persuasion by a preponderance of the evidence.

The Twentieth Century has seen an expansion, and more recently some contraction as well, in the scope of tort law as an injury compensation system. Strict liability has emerged as a viable theory of responsibility in some significant injury contexts. While strict liability in its modern incarnation was initially thought to be appropriate in the case of the most dangerous activities,<sup>21</sup> liability that was not ostensibly based on fault enjoyed a three decade expansion in the realm of products liability claims.<sup>22</sup> Recent developments in that field, however, reflect a considerable retreat from the full implications of applying truly strict liability in all but the simplest of product injury cases.<sup>23</sup> More attenuated connections to an individual's harm have supported legal responsibility in a few exceptional situations.<sup>24</sup>

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21. See, e.g., RESTATEMENT (SECOND) OF TORTS § 519 (1977) (translating the "unsuccessful containment" idea of *Rylands v. Fletcher* into a contemporary principle of liability for harm caused by abnormally dangerous activities).

22. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

23. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Official Draft 1997).

24. The innovative approaches taken in a few of the DES cases stretch the individual causation element well beyond its traditional shape. See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980) (initial adoption of market share theory of liability); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984), cert. denied, 469 U.S. 826 (1984) (risk contribution theory of liability); *Hymowitz v.*

Comparative responsibility has flourished as a replacement for the traditional notion of tort liability as an all-or-nothing proposition.<sup>25</sup> The legal system has shown a greater willingness to consider harms other than readily apparent physical injury as deserving of compensation.<sup>26</sup> In some instances, resolution of tort claims on a basis other than case-by-case adjudication has been approved,<sup>27</sup> although again recent developments suggest a growing reluctance to consider such adjudicatory methods as appropriate in the settings where they might have the most significant impact.<sup>28</sup> Finally, the burdens of production and persuasion have been eased for plaintiffs in some situations or imposed on defendants after a relatively minimal showing by plaintiffs.<sup>29</sup>

Although the extensive modification of traditional tort law has been a significant part of the compensation picture of the last fifty years, the most noteworthy injury compensation development in this century has been the introduction of a number of legislative compensation schemes that treat some types of injuries to individuals as problems that require more of a social

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Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), *cert. denied*, 493 U.S. 944 (1989) (furthest reach of market share theory, refusing to allow manufacturers of DES to exculpate themselves by disproving possibility of having caused the particular plaintiff's harm).

25. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (Council Draft No. 1 1996).

26. *See, e.g.*, *Watkins v. Fibreboard Corp.*, 994 F.2d 253 (5th Cir. 1993) (recognition of claim for damages for fear of developing cancer from exposure to asbestos); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980) (negligent infliction of emotional distress claim recognized for misdiagnosis of spouse with sexually transmitted disease).

27. *See, e.g.*, *In Re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (fairness opinion approving class settlement of claims that would have been unable to establish basis of liability as individual claims).

28. *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (rejecting class certification for determination of some common liability issues in nationwide tobacco litigation); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), *cert. granted*, 117 S. Ct. 379 (1996) (rejecting class certification for settlement purposes in asbestos litigation).

29. *See, e.g.*, *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978) (permitting plaintiff in design defect litigation to make minimal showing of causal relationship between design feature and harm, and then imposing burden of justification of that design feature on defendant); *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984) (imposing on pharmaceutical company the burden of proving that knowledge of the risk of a prescription drug was not within the scientific state of the art at the time of distribution).



solution than is likely to be obtained in the tort system.<sup>30</sup> The most significant of these alternative and supplemental compensation programs — the workers' compensation systems at the state and federal levels — traces its roots to Nineteenth Century Europe, and has been well established in the United States since the second decade of this century. In recent years, compensation programs have proliferated as legislatures have sought to divert categories of harms from being adjudicated by the tort litigation process.<sup>31</sup> In a development that may be somewhat more surprising, courts in the mass injury setting have now entered into the process of compensation program creation, utilizing a variety of procedural vehicles such as class action settlements,<sup>32</sup> and jurisdictional devices such as bankruptcy reorganization plan approval,<sup>33</sup> to accomplish that goal.

As we approach the Twenty-first Century, the phenomenon of an injury compensation program that acts as an alternative or a supplement to traditional tort liability has assumed a newly vigorous role. The most useful conceptual underpinnings of an effort to construct an innovative compensation program are likely to be found in the three-quarters of a century experience in providing compensation for workplace harm under the workers' compensation systems adopted in each of the states. That experience offers a significant insight both into the nature of the issues that are raised by compensating for injuries outside of the traditional tort arena and into the feasible contours of the resolutions of those issues. A good deal of the narrowly-focused injury compensation program legislation in recent years draws from the workers' compensation experience, in both positive (benefiting

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30. These systems are qualitatively different from no-fault insurance legislation, which have the effect of treating harms as purely private insurance matters rather than as requiring a social solution.

31. See, e.g., 42 U.S.C. §§ 300aa-10-300aa-34 (1994) (National Childhood Vaccine Injury Compensation Act); FLA. STAT. §§ 766.301-766.316 (1988) (Birth Related Neurological Injury Compensation); VA. CODE ANN. §§ 38.2-5000-38.2-5021 (Michie 1994) (Virginia Birth-Related Neurological Injury Compensation Act).

32. See, e.g., *In Re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (M.D. Ala. 1994). A revised settlement had to be fashioned after the bankruptcy petition by Dow Corning changed the amount and the sources of the funding available.

33. See, e.g., *In Re A. H. Robins Co.*, 880 F.2d 694 (4th Cir.) *cert. denied*, 493 U.S. 959 (1989) (upholding central elements of district court approval of reorganization plan establishing compensation program for victims of Dalkon Shield).

from the lessons in workers' compensation) and negative (failing to break through the confines of that experience) ways. The most recent of the significant conceptual advances in the law of injury compensation today occurs in the judicial arena, and one can take advantage of those developments as well by drawing on the experiences of the end-stage of the most innovative mass tort litigation to expand the range of options that one can put on the table when confronted with a new (or newly addressed) injury compensation problem.

A good deal of the innovation in the law of injury compensation in the last quarter-century has appeared to operate from the premise that specific inadequacies of traditional tort law can be remedied by a more or less radical departure from the tort litigation model. Too many of these systems, however, particularly those that have been created through the judicial process, seem to be engaged in re-inventing the wheel. In a sense, the injury compensation system creative process appears mainly to have looked vertically to the tort model, and seems to have had as its primary focus an attempt to avoid the more unsatisfactory features of that model.

The search for an optimum compensation system would benefit from the introduction of a different perspective on the developments in this area of law and policy. Such a search would look horizontally across the range of legislative and judicial compensation systems to identify the lessons that can be learned from the experience of other systems and that can then be extended to this new context if it is thought to be suitable for some deviation from a tort litigation vehicle for injury compensation.

#### I. THE GOALS AND THE ESSENTIAL ELEMENTS OF AN INJURY COMPENSATION SYSTEM

The developing law of injury compensation systems is one of the most explicitly instrumental bodies of rules and processes in American jurisprudence. Legislatures and courts are generally inclined to turn to a search for an injury compensation system only when some significant problem is perceived with the ability of traditional tort litigation to accomplish its function of providing appropriate levels of compensation to those who legitimately deserve to be compensated. An important part of understanding this body of law, then, consists of an appreciation of when and why case-by-case litigation of individual tort claims is thought to

be inadequate. The starting point for the crafting of most of the programs currently in place thus seems to be an examination of what was occurring in the tort arena's disposition of claims arising from these injuries and an exploration of what were thought to be the drawbacks to that disposition. For that reason, the initial decision to move in the direction of an injury compensation system and the shape of the system that is constructed each might be characterized as responsive or reactive to a disappointment with the operation of the tort system.

Equally important in the development of an injury compensation system as the sense of when a resort to tort law falls short, however, is an explicit identification of what an injury compensation system can hope to accomplish. It is only when the goals are known and the possible tensions among them are appreciated that it is possible to make informed policy choices about how to structure a particular compensation program. Although there can be differences of opinion about the terminology to describe and the priority to assign to them,<sup>34</sup> the goals of an injury compensation system can usefully be understood as occupying four distinct categories: the compensation for loss, the enhancement of safety, the achievement of administrative efficiency, and the imposition of an appropriate internalization of injury costs.

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34. A recent study of the Federal Employers' Liability Act offered the following statement of the goals of an injury compensation system:

Overall goals of injury compensation involve equity, efficiency, and incentives. Ideally, an injury compensation system should be equitable to the injured worker, should provide benefits in an efficient manner, and should be structured so that each party has incentives to reduce both injuries and the costs of those injuries that occur. . . .

A system's efficiency and incentive structure can be assessed objectively, but the fairness of any particular system depends on more subjective perspectives or social philosophies of individuals or groups. The criteria that may be considered in judging the fairness of a particular injury compensation system, however, can be defined and investigated. They include the extent of coverage, including who and what is compensated; the level of the compensation for losses; the speed with which the losses are compensated; the certainty with which they are compensated; and who bears the costs of compensation.

Transportation Research Board, *COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT* 4 (1994).

*A. The First Goal — Compensation for Loss*

To compensate for an injury is to take steps to offset the adverse consequences attributable to the injury. Unlike the case in such legal regimes as property and contracts, the nature of the harm addressed by tort law generally does not lend itself to remedies that restore the aggrieved person to the original state before the other person interfered with her or his rights. For the most part, our legal system accomplishes a compensatory function in the tort arena by requiring a party to make a monetary payment to the injured person or to someone who has incurred an expense or suffered a loss because of the injury to the victim.

Similar limitations in the ability to restore the injury victim to a pre-injury status exist when one resorts to a compensation system outside of the tort arena. Perhaps the greatest advantage of an injury compensation system is the ability to focus attention and direct funds that anticipate and alleviate the impact of prospective harms, as opposed to the predominantly retrospective focus of the tort liability system. Compensation programs can be constructed in particular contexts recognizing that some of the population will certainly be adversely affected in the future, and that some of those who are injured will certainly continue to incur losses after the initial injury. An injury compensation system enables a society and its legal system to get ahead of the curve instead of continually playing catch-up in addressing an injury problem.

Compensation can be structured to cover a variety of losses, and it can extend to a range of people who are related to the victim in different ways. Major distinctions can be drawn among the types of compensation to highlight the options in choosing which of multiple compensatory goals are realistically achievable in a particular context.

The basic theoretical distinction in compensation is between direct and indirect costs of injury.<sup>35</sup> Within the category of direct costs we find such items of loss as physical harm suffered in an incident, loss of income due to the inability to work, physical pain and suffering, and mental or emotional harm. Indirect costs

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35. Judge Calabresi characterizes this distinction as one between "primary" and "secondary" accident costs. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26-28 (1970).

of injury include such matters as the loss of economic support to those who depend on the flow of income supplied by the injured party, loss of emotional support that would have been provided by the victim, and loss of companionship or consortium as a result of the injury. A rough counterpart of this distinction within traditional tort doctrine would be a distinction between claims by the victim of the tortious conduct and derivative claims that flow from a relationship to that victim.

The characteristic feature of injury compensation systems created by legislatures is their tendency to restrict compensation to pecuniary losses. The largest system, workers' compensation, typically limits benefits to medical and rehabilitation expenses incurred as a result of a workplace injury or occupational disease, a partial replacement of wage loss during periods of disability due to that injury or disease, and death benefits to those who are actually dependent on the deceased worker. The state programs to replace the part of the medical malpractice system that would otherwise apply in birth-related neurological injury incidents similarly exclude non-pecuniary loss from the compensation that is provided.<sup>36</sup> One of the compelling justifications for restricting compensation in this way has to be the recognition that when limited funds are available, the highest priority use of the funds is to alleviate the consequences of the injury that are most likely to produce disadvantageous social effects, as the victim's personal resources would have to be diverted from their other beneficial uses and devoted to dealing with the harm.

The federal childhood vaccine injury compensation program is distinctive among injury compensation systems in its allowance of recovery for pain and suffering, with that recovery capped at \$250,000.<sup>37</sup> That compensation program has an opt-out provision, giving the vaccine injury victim an election to pursue a tort remedy following exhaustion of the statutory process,<sup>38</sup> and is thus distinguishable from the exclusivity model that is common to most other compensation systems. Allowing recovery for pain and suffering, even if modest in amount by comparison to tort re-

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36. See, e.g., VA. CODE ANN. § 38.2-5009 (Michie 1994) (authorizing compensation for actual medically necessary and reasonable care expenses, lost earnings, and the expenses of obtaining compensation).

37. 42 U.S.C. § 300aa-15(a)(4) (1994).

38. 42 U.S.C. § 300aa-21(a) (1994).

covery standards, could play an important role in reducing the disincentive to accept the award decision that has been made within the compensation program. This would in turn lower the social costs of operating a compensation program and a tort litigation system for resolving the same claims.

Because the relevant comparison when creating most injury compensation systems is to the tort liability system, there are limits on how much of a variation can exist between tort compensation and the benefits available under the new system. Too large a difference can raise concerns about depriving potential tort litigants of a remedy without providing some corresponding gain. If the difference narrows too much, however, one might question what is achieved by the creation of the new system.

For the broad-scale social contract arrangement of the workers' compensation systems, the trade-off metaphor offers a realistic and comforting image. Both categories of parties to the contract — employers and employees — receive and give up something of value under the system, with the public interest being served as well by the diversion of workplace harms into a compensation system that provides swifter and surer compensation at a lower expense than would be true within the tort system.

For the more narrowly tailored compensation programs of recent vintage, the smallest levels of benefits that are available tend to be found in the programs in which the likelihood of receiving any compensation in the tort system is lowest. Agent Orange victims who would have been unable to establish causation on an individual basis thus were able to get quite modest payments under a compensation program that awarded relief to the class of people who were exposed to the herbicide.<sup>39</sup> Similarly, the divergence between the size of tort awards and the benefits available in the compensation program established for Dalkon Shield victims as part of the A. H. Robins bankruptcy reorganization plan were greatest for the class of claimants who proved none of the elements that would have been necessary had they pursued a tort remedy.<sup>40</sup> In contrast, those claimants who

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39. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 220-21 (1986).

40. Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617, 630-34 (1992).

were thought to have the most viable tort claims were treated (in theory, at least) as if they would be given their full measure of tort damages from the compensation program.<sup>41</sup>

### *B. The Second Goal — Safety Enhancement*

The first-order justification for a compensation program is its delivery of funds to people whose injuries have left them or their dependents at some disadvantage. As such, a program that operated only with a corrective or distributive aim could still be justified by pointing to its ability to reach that first-order goal. The case for a compensation program is likely to be strengthened, however, if it can be shown to have a positive effect in enhancing safety by reducing the frequency or the severity of injuries.

Probably the most effective way of achieving a safety goal is action that is directed at the injury-producing conduct. Regulation of workplace practices<sup>42</sup> and consumer product bans<sup>43</sup> are examples of this sort of safety-related action, as are the setting of highway speed limits<sup>44</sup> and the installation of occupant protection systems in automobiles.<sup>45</sup> This kind of "specific deterrence"<sup>46</sup> of risks of harm requires a level of understanding of the magnitude of the injury problem and the contributions of the various factors that play a role in its size and severity that is often difficult if not impossible to appreciate until the problem has blossomed into a social and legal crisis. In a real sense, then, the legal decision maker who anticipates a risk but is unsure of how best to address it through direct regulation is encountering an open-textured situation characterized by the handicaps identified by Herbert Hart as associated with the legal authority who would prefer to govern through pre-announced rules: "relative ignorance of fact . . . [and] relative indeterminacy of aim."<sup>47</sup> The

41. *Id.* at 636-46.

42. 29 U.S.C. § 651 (1994) (Occupational Safety and Health Act).

43. 15 U.S.C. § 2057 (1994) (Consumer Product Safety Commission ban of consumer products).

44. *See, e.g.*, VA. CODE ANN. § 46.2-870 (Michie 1994) (setting of speed limit).

45. 49 C.F.R. § 571.208 (1994) (Federal Motor Vehicle Safety Standard for occupant protection systems).

46. The term is Calabresi's, and is used to distinguish the direct effect of regulation from the indirect effect of exposure to liability, referred to as "general deterrence." CALABRESI, *supra* note 35, at 95.

47. H.L.A. HART, *THE CONCEPT OF LAW* 125 (1961).

striking feature of the world in which people suffer injury is that events require decisions to be made after the fact about which there was prior ignorance and when the indeterminate aim to avoid harm could not realistically have been accomplished.

In contrast to the use of direct regulatory action to avoid harm, injury compensation programs produce their safety effects indirectly, if at all. Compensation obligations force an entity that might otherwise be legally and financially indifferent to the consequences of its action to take into account the accident costs for which it will be held responsible. Employers who are liable for workers' compensation benefits for injuries that entail no realistic exposure to tort liability are thus unable to be legally indifferent to those harms, and they may respond to that workers' compensation obligation by taking steps to lower the risk of harm. Compensation obligations may also induce a previously insufficiently interested third party to become involved in making decisions for safety. To use the workplace setting again, the contractual obligation to indemnify the employer for its workers' compensation liability can induce the workers' compensation insurance carrier to take two steps that would be expected to increase safety. First, it can tailor insurance premiums to the risk that the employer is actually posing to its work force, and second, it can conduct an inspection program to recommend or demand changes in work practices to lower the risk of employees suffering harm for which it is ultimately going to be responsible. Indirect lowering of accident costs can occur, therefore, whenever the party who controls the risk modifies its behavior in order to lower its exposure to the payment obligation.

One of the insights of the economic analysis of liability for product-related harms has been the safety effect that can occur even when the party in control of the risk lacks an economic incentive to lower the risk. If the expected liability costs were lower than the investment necessary to avoid the liability, the party would be acting rationally, all else aside, in paying its damages as they occur rather than changing its behavior to avoid liability. In such a situation, however, the imposition of legal responsibility for the harm suffered by the victims can cause the price of the goods or services posing the risk to rise above what it would be in the absence of a compensation responsibility. If the price increase depresses demand, then one would expect fewer harms *attributable to that risk* to occur.



The emphasis in that last statement is necessary to highlight the limit on what is being claimed for the effect of an increased price. It is not necessarily true that the net effect of lower demand for a risky product is a decrease in overall harm.<sup>48</sup> The empirical question that needs to be answered is how will the needs of the consumers who are priced away from the product now be met. If the answer is that those consumers will now engage in riskier behavior, the final judgement about whether there has been a net social safety gain will require a calculation of the accident losses that are prevented by the consumers' reaction to the higher priced product and the accident losses that are caused by the consumers' reaction to the higher priced product.

The fact that harms associated with alternative means of satisfying consumer desire might increase does not necessarily undercut the argument for attempting to obtain the safety gain attributable to the price increase that is associated with an imposition of legal responsibility for the harm. The net effect may still be positive in the sense that the harms attributable to whatever the consumers select as an alternative are more susceptible to direct regulation, or are easier to accommodate within existing legal and insurance regimes, or for some other reason pose less of a social problem than the harms associated with the product in question.

Two points about the relationship between an obligation to compensate for harm and a predicted enhancement of safety need to be kept in mind. First, the actual effects of an imposition of legal responsibility for harm are likely to be complex and to vary from setting to setting. Second, the fact that empirical questions need to be answered should not detract from raising the hypothesis that the implementation of a new injury compensation system proposal can achieve a safety goal as well as provide

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48. Professor Ausness refers to this as an example of the economic phenomenon of the "second best." Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423 (1997). The most obvious instance of this kind of effect is when consumers are priced out of the market for a safer but more expensive product and choose as a substitute a product that is less expensive but more dangerous. That does not seem to be a plausible scenario for tobacco products. A different way in which the effect might occur, however, is that consumers change the manner of use of the more expensive product so that the risk is magnified. For a discussion of how smoker behavior might change in a way that enhances the riskiness, see LeBel, *Tobacco Deaths*, at 639-40.

compensation to those who are injured.

*C. The Third Goal — Administrative Efficiency*

Compensating for injury can require activity by a variety of public and private institutions, each of which involves an expenditure of some resources — money, time, energy — to make the two most critical determinations: whether a claimant is entitled to compensation, and if so, what benefits should be paid. A goal of administrative efficiency serves as a constraint on the achievement of compensatory and safety goals: society as a whole is not well served when the cost of administering a compensation system rises to a level that exceeds the compensation and safety gains associated with the system. Efficiency may not be the most important criterion with which to assess a compensation program, but accomplishments on other dimensions would have to be extraordinarily important to justify a system that cost considerably more to administer than it provided in compensation and safety.<sup>49</sup>

The strongest lesson one can learn from the administrative experience of injury compensation systems is the cost of precision. In the tort system, there is considerable momentum toward increasingly refined allocations of responsibility. Under comparative negligence affirmative defenses, for example, fault must be apportioned between plaintiffs and defendants. The fault shares of parties, and in some cases non-parties as well, must be determined to apply a comparative fault contribution rule in a joint and several liability setting. If joint and several liability is replaced, in whole or in part, with a proportional liability scheme, the share of responsibility of each person who contributed to the occurrence of the harm becomes even more critical to the determination of the extent to which a plaintiff will be compensated.

The precision sought in these comparative responsibility doctrines comes at a price. The decision making demand on the fact finder becomes more complicated, and one might expect the presentation of evidence and arguments to be affected accordingly.

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49. This is, of course, one of the more compelling arguments in the arsenal of the critics of contemporary tort law, at least in such routine settings as the litigation of responsibility for losses suffered in automobile accidents. See generally JEFFREY O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* (1971).

The risk of confusion and genuine error should rise as juries are presented with more complex decision making tasks. The ability of parties and their attorneys to predict outcomes would be another factor that is affected by the introduction of new variables in the outcome. Although it is not clear that this would necessarily impede settlement,<sup>50</sup> it is likely to increase the uncertainty in which settlement valuations of claims take place.

Simplifying the determinations that a compensation system must make can reduce the cost of administering the system considerably. In the Agent Orange program, for example, virtually all of the particularistic causation determinations were eliminated by the decision to treat the simple fact of exposure to the herbicide in Vietnam as the initial threshold element.<sup>51</sup> Sophisticated medical and vocational determinations of the nature of harm and the degree of disability can similarly be eliminated with rough categorical decisions about harm and benefit amounts. Issues that would appear to matter a great deal in the normal human reaction to an incident, such as who was at fault, might be pushed to the background or out of the picture altogether in a compensation system, as is true of the workers' compensation system.

Along with the simplified determinations that can be built into the threshold entitlement elements, a compensation system's efficiency can be increased by adopting decision making processes that deviate from the intensive scrutiny associated with the litigation model. Decisions can be made within an administrative process that resembles claims processing of the insurance industry more than it does the fact finding of civil litigation. To retain the administrative efficiency gains obtained at that first level of decision making, an injury compensation system can structure the further review of those decisions to minimize the chance that some later stage will reintroduce the trial-type process that was avoided in the first instance.

While it is clear that the price of precision in making determinations can be lowered, the decision making efficiency itself co-

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50. One can imagine, for example, that the complexity of the litigation decisions increases the anticipated cost of litigating a claim, so that the expected return is lowered, making settlement more attractive.

51. Harvey Berman, *The Agent Orange Veteran Payment Program*, 53 LAW & CONTEMP. PROBS. 49, 53 (1990).

mes at a cost that may be significant. An important part of the motivation for the comparative responsibility movement in tort law is a sense of fairness that is offended by asking only *whether or not* questions without going on to ask *how much* questions as well. The creators of an injury compensation system might anticipate the charge of unfairly refusing to make fine discriminations among types of conduct and degrees of harm by making it clear what is the central aim of the system, and then structuring the delivery of benefits so that there is a strong correlation between the process that is used and the aim that is sought.

One other feature of administrative efficiency needs to be considered. The discussion so far has focused on the costs of making decisions within the compensation system. The manner in which the compensation system is coordinated with other systems and programs can have a significant effect on what the society as a whole invests in the solution of the injury problem. A desire to eliminate what appears to be wasteful expenditure of judicial resources can help to justify the abolition of the collateral source rule in tort law, for example. Instead of quantifying and determining responsibility for categories of harms that have been covered by other sources, a legal system might conclude that the best use of the civil justice system is to compensate for harm for which there is no other coverage.

Injury compensation systems can address this issue in a number of ways, with two models at opposite ends of the spectrum. The injury compensation system can be set up so that the entitlement to benefits is triggered only if other sources of compensation prove to be inadequate in a particular case. Under this model, the administrative costs of the compensation system would only be incurred when absolutely essential to accomplish the aims of the program. On the other hand, the injury compensation system can be established so that it is the compensation source of first resort, allowing society to avoid expenditures of resources in the other arenas in which the effects of the harm would have to be addressed. Compensation systems can thus be structured so that they are supplemental or exclusive sources of compensation.

What needs to be understood is that there are two sources of justice concerns in creating an injury compensation system. An appearance of diverting legitimate claims from a tort liability regime where those claims would receive more generous treat-

ment than they are given in the compensation system may seem unfair to the claimant. An appearance of extracting funds from entities who would bear no realistic exposure to tort liability may seem unfair to the parties who contribute to the financing of the compensation system. The most realistic prospects for an injury compensation system arise when there is a convergence of interests of the affected parties and the society as a whole, so that a responsible compromise can be brokered to accommodate the competing interests to the greatest extent feasible.

*D. The Fourth Goal — Appropriate Cost Internalization*

Internalization of injury costs may initially strike an observer more as a process by which other goals are achieved rather than as an independent goal itself. It is certainly true that safety effects, for example, can be traced to a decision that a particular industry must take injury costs into account when it makes decisions about how much to invest in safety. A legal system that imposes a compensation obligation on that industry uses the cost internalization process to induce producers and consumers to act in ways that promote greater safety.

Although the instrumental nature of cost internalization is clear, there is nonetheless some additional analytical clarity that can be achieved by focusing briefly on cost internalization as an end in itself. The starting point for a cost internalization analysis is Guido Calabresi's question, "What is a cost of what?"<sup>52</sup> That question is a matter of causation, asking when we can identify one factor as a cause of another. In the realms of theology and metaphysics, such an inquiry would look ultimately to first causes<sup>53</sup> and draw on quite subtle distinctions.<sup>54</sup> In the law of injury compensation, fortunately, the causal answer that underlies an appropriate measure of cost internalization is obtainable from a more concrete identification of burdens and benefits.

Achieving appropriate cost internalization as a goal for an injury compensation system is actually the converse of Judge

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52. See CALABRESI, *supra* note 35, at 133.

53. THOMAS AQUINAS, 1 SUMMA THEOLOGICA 33 (1948 ed.) (Q. 2, art. 3: proof of existence of God by reference to first efficient cause).

54. ARISTOTLE, METAPHYSICS, IN 2 COMPLETE WORKS 1552, 1555-57 (J. BARNES ed. 1984) (distinctions among four senses of causation).

Calabresi's prescription to avoid externalities.<sup>55</sup> The goal is to create a rough correspondence between those who enjoy the benefits of an activity and those who bear the burdens. When the activity is the manufacture or the distribution of a product that has the capacity to injure, the appropriate focus is on whether the losses associated with those injuries are included within the costs of the industry distributing the product. If they are so internalized, then the price of the product will reflect the injury costs as part of the social cost of the product, and production and demand levels will be set accordingly. If they are not internalized, then production and demand levels for the product will be inflated. Furthermore, in the absence of cost internalization, the injury costs that are externalized onto the victims will have to be borne by some segment of the population other than the producers and, through them, the full class of consumers of the product. It is the absence of cost internalization, not its appropriate utilization, that leads to injury costs being spread across society as a whole.

Within the contemporary law of products liability, even when the liability that is being imposed is putatively strict, the defectiveness analysis specifically and deliberately narrows the benefits and burdens comparison. The focus is on the risk that the product poses to the user or others and the benefits that the product offers to the consumers and others exposed to the risk. The overall economic benefit of the product is supposed to be excluded from the analysis, as is the economic burden associated with decreasing the availability or the affordability of the product.<sup>56</sup> It matters to that analysis, for example, whether people who would benefit from an unavoidably risky prescription drug are deprived of that benefit; it is not supposed to matter whether the pharmaceutical industry must downsize its workforce as a response to the exposure to products liability.

Approaching an injury problem through the vehicle of an injury compensation system provides room for thinking comprehensively and systemically about the overall social good that can be accomplished through the program. Determinations that are in

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55. CALABRESI, *supra* note 35, at 144-50.

56. *See, e.g.,* Cipollone v. Liggett Group, Inc., 664 F. Supp. 283 (D.N.J. 1986) (improper to include social benefits from production of cigarettes as factor in risk/utility analysis).

the broader public interest may be easier to make in the course of global solutions to problems than they are in the more piecemeal fashion of the adjudicatory process. Those who inquire about the effect of liability on the farm economies of tobacco growing states or the industrial economies of cigarette manufacturing states are met with indifference in the liability theories of tort law. Such concerns are legitimately incorporated into a consideration of the optimal social solution to a widespread social problem.

*E. The Essential Elements of an Injury Compensation System*

As the preceding discussion of the goals of an injury compensation system suggests, the emerging law of injury compensation systems draws on a variety of statutory and regulatory enactments and common law precedent, dealing with a wide range of substantive, procedural and remedial issues. Although one might be tempted to abandon an attempt to systematize and synthesize such a hodge-podge of programs, that temptation can be resisted if one keeps focused on a core of five major issues that the study or the creation of any injury compensation system will be required to address.<sup>57</sup>

*i. The defining issue for an injury compensation system is what is the basis of entitlement to compensation.*

The entitlement to compensation sets the parameters for the system. More than any other element of a compensation program, the basis of entitlement captures the essential aim of the program and defines how much flexibility there is likely to be in the construction of the other elements of the program.

The basic question at the heart of an injury compensation program is the identification of the injury compensation problem. The creation of a system requires careful thought about the nature of the problem, and of how it is possible to address it in this

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57. As is true of statements of the goals of an injury compensation system, different commentators might choose among various terms for the essential issues that need to be addressed. In a recently published proposal for a compensation program in the contaminated blood products setting, Professor Andrew Klein has identified the major components of the program as jurisdiction, funding, compensation, and access to the tort system. Andrew R. Klein, *A Legislative Alternative to "No Cause" Liability in Blood Products Litigation*, 12 YALE J. ON REG. 107 (1995).

manner. Is the problem that too many harms are occurring? Is the problem that too many injured parties are being left to their own devices to deal with the consequences of the harm? Is the problem that the litigation system reaches too many results thought to be socially undesirable? Is the problem that the litigation system reaches generally appropriate results but at an unacceptable cost? Is the problem the lack of a prospective focus, so that the injury compensation system could be seen as trying to get ahead of the curve of a massive number of claims instead of playing catch-up in the way that the tort litigation system generally does? The shape of the program will be responsive to the answers to these different questions.

Compensation programs can be set up so that they resemble the zero-based proof attitude of the litigation system, in which the decision maker begins with a clean slate and nothing happens until the claimant satisfies an evidentiary burden that is fact specific to the claim. Much of the attractiveness of the compensation system approach lies in the ability to make appropriate decisions without a high investment in fact finding, and in order to realize that attraction, the entitlement to compensation would have to be set in a more categorical way. Presumptions of entitlement built into the system from the start are a quite useful way of streamlining the process,<sup>58</sup> as are predetermined levels of benefits for particular showings of harm.<sup>59</sup>

*ii. Once the threshold for obtaining compensation has been determined, the next issue that needs to be addressed is what is the compensation that the system will provide to those who cross that threshold.*

Given the genesis of many injury compensation systems in particular dissatisfactions with the tort system in place at the time the system is created, it is not surprising that the questions

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58. See, e.g., 42 U.S.C. § 300aa-14 (1994) (Vaccine Injury Table containing conditions and time of onset to qualify as a vaccine-related injury for purposes of compensation under the National Childhood Vaccine Injury Compensation Act).

59. The intermediate group of claimants in the Dalkon Shield compensation program, those with proof of the use of the device and medical evidence of their conditions but who faced problems with alternative causes of their conditions, were compensated according to a schedule resembling a workers' compensation schedule for loss of body parts. RONALD J. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 313 (1991).



at this stage of system creation tend to turn on how closely the compensation will correspond to the damages that would be available if the claimant were successful in a tort action.

The basic choices to be made on this element of the system involve different sets of variables. One of the variables is the level of compensation: should the system attempt to provide total compensation or should there instead be an acknowledgment that the compensation is only partial. Another variable is the position that the compensation system occupies in the universe of potential sources of compensation: is the system the payor of first resort or is it instead a compensation source that comes into operation only for otherwise uncompensated harm. Related to that variable is the choice of whether to extinguish other claims that may arise out of the incident or exposure giving rise to the harm or to allow tort actions to proceed against those who occupy a third party status to the relationship between the injury victim and the enterprise that is held responsible through the compensation program.

The interaction between those sets of variables can help to shape the program. The availability of, and the likelihood of success on, third party claims can relieve some of the financial pressure on the compensation system, for example, which can in turn affect the level of benefits that can be afforded for those who do not have access to a third party recovery. Similarly, a decision to make the program a supplemental source of compensation can affect the demands that are placed on the funds that are available, opening up further possibilities for deciding what harm is compensable in what amounts.

If the claimant is given options of accepting the award made within the compensation system or pursuing a tort remedy, then the compensation that is available within the system has to be generous enough to provide an incentive to accept the system's award. That generosity is, of course, less needed as the prospect of success in the tort litigation declines.

*iii. Given the basis and the nature of compensation, the creators of an injury compensation system must decide what is the source of the funds for compensation.*

The workers' compensation system employs a variety of techniques for assuring adequate funding for claims for compensa-

tion. Some states create funding bodies from which compensation is paid, but the predominant mode of financing workers' compensation benefits is insurance obtained on the commercial market or, in the case of the more financially sound entities, self-insurance. When the decisions about compensation make the system resemble a social welfare benefit more than a liability determination, it is probably best to see the source of funds as a tax on the enterprise that has produced the harm.

The appropriate taxing unit is a decision that has to be made in the construction of a compensation program. Childhood vaccines, for example, are taxed on each dose produced by the pharmaceutical industry, but the tax rate varies among the vaccines according to the risk of injury associated with each vaccine.<sup>60</sup> If the risk is generally uniform across the enterprise that is being held responsible for financing the program, then the cost of administration of the system can be kept lower due to the absence of a need to make differential risk determinations affecting the financial obligations of individual contributors to the funding of the program. At the outset of a program where the risk variation is a matter of uncertainty, cost effectiveness in administration may call for an initial uniform assessment, with an on-going and periodic review process to determine whether the rate should be changed to reflect actual claims experience.

*iv. An injury compensation system must address the question of what procedures are to be used for making the two critical determinations: whether compensation should be awarded, and if so, how much compensation an individual claimant should receive.*

One of the major advantages of an injury compensation system is the opportunity to lower the costs of making the critical determinations of whether and how much compensation should be awarded. Although some states direct contested workers' compensation cases to the trial court of general jurisdiction, it is more common to find the first level of decisions made by administrative agencies, with subsequent judicial review in a trial court or, more commonly, directly to an appellate court. Compen-

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60. 26 U.S.C. § 4131 (1994) (tax on vaccines, the revenues of which are appropriated into the Vaccine Injury Compensation Trust Fund under 26 U.S.C. § 9510).

sation programs may set up special administrative bodies to make the decisions, as was the case with the Dalkon Shield Claimants' Trust.<sup>61</sup> The creation of a new compensation program may involve subcontracting the decision making to an outside body, as in the Agent Orange experience,<sup>62</sup> which might seem a particularly attractive option when the decisions are essentially insurance payment matters rather than complicated or contestable factual determinations. Decisions can also be made within a currently existing judicial structure, as with the special masters of the Court of Federal Claims<sup>63</sup> or within the bankruptcy process in the federal district courts.

*v. Finally, an injury compensation system must contain a clear process for determining how the compensation provided within the system is to be coordinated with the tort system and with collateral sources of compensation for the harm covered by the system.*

The options on this component of an injury compensation system include three basic models. Drawing on the experience with workers' compensation systems, the benefits available under the new system can be considered the *exclusive* remedy that is available to the injured person. The federal vaccine injury program employs a model of *election following exhaustion*; the injured person is required to proceed into the compensation program, but at its termination, the claimant is entitled to reject the result obtained within the system and pursue a tort remedy, albeit under a tort regime that is altered by substantive and procedural requirements set out in the legislation. The new compensation system might also be seen as a *supplement* to the existing tort liability system, stepping in to provide compensation for those who are not compensated or who are undercompensated under the prevailing doctrines of tort law.<sup>64</sup>

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61. Vairo, *supra* note 40, at 630-31.

62. Berman, *supra* note 51.

63. 42 U.S.C. § 300aa-12 (1994) (conferring jurisdiction on Court of Federal Claims to determine entitlement and amount of compensation under the National Childhood Vaccine Injury Compensation Program).

64. Professor Eades' commentary suggests that the compensation program funded by a tax on tobacco products, along with regulatory efforts, "should be merely an adjunct to the traditional tort system." Eades, *supra* note 8, at 495. In an earlier effort to construct a system for compensating victims of drunk drivers, the author

## II. SOME PRELIMINARY THOUGHTS ON THE CONTOURS OF AN INJURY COMPENSATION SYSTEM FOR TOBACCO- RELATED HARMS

Taking the general observations of the preceding section about the genesis of injury compensation systems and applying them to the situation we find when we examine the current legal posture of the tobacco industry in this country raises more questions than it provides answers. Approaching the issue in a systematic way and at a systemic level should, however, offer some instruction about what are — and perhaps even more importantly, what are not — useful avenues to pursue.

When one considers the goals of an injury compensation system, some are easier to achieve in a tobacco setting than others. At first glance, compensation would appear to be considerably more difficult to accomplish than would the achievement of the goals of reducing the risk of harm and of forcing the industry to internalize the costs of tobacco-related harms into the industry's operating expense. Containing within manageable levels the administrative expenses of any program established to provide those benefits is also problematic in any system that would attempt to provide a counterpart to tort damages for individual victims of tobacco-related harms.

Compensation of tobacco product users for their individual harm is difficult to reconcile with tobacco-related harms on both a conceptual and a practical level. One of the more distinctive features of tobacco-related harms is that the bulk of those harms occur to the people who voluntarily begin to use the products which, at least for some time now, have been accompanied by warnings of the risks that these harms will occur. In this sense, then, much of the harm that tobacco causes cannot be characterized as occurring to people who fit the traditional understanding of "innocent victims." This aspect of the problem raises two possibilities, in the sense that there are two different routes we might follow.

The first possible response is that a compensation system needs to be devised in such a way as to exclude from access to

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chose this option. LEBEL, *supra* note 20, at 290-92. On reflection, it is not clear that the same choice would be made by the author even in that setting today, given legitimate concerns about duplication of decision making tasks and the resultant higher costs of administration, compared to an exclusivity model.

the compensation provided by the system the "willing participants" in the risky behavior that leads to the harm. Such a response is deeply embedded in traditional tort ways of thinking about injury compensation. The defense of assumption of risk raised a total bar to recovery for more than a century of our experience with fault-based jurisprudence. In the pockets of strict liability for abnormally dangerous activities, assumption of the risk that made the activity abnormally dangerous has remained a defense. As a strict tort liability theory emerged for products cases, the product user's unreasonable decision to use the product knowing of the defective condition was retained as an affirmative defense.<sup>65</sup>

A reluctance to expend limited resources on those who knowingly encounter a risk for no good reason is responsive to a fundamental notion of personal responsibility. Indeed, in an earlier work on compensating the victims of intoxicated drivers, the author specifically excluded from a new compensation system proposal any possibility of recovery by the drinking drivers or those whose claims were derived from the drinking drivers.<sup>66</sup> That kind of restriction in the tobacco setting would not necessarily leave the system with nothing to do. Passive smoking victims who are injured by environmental tobacco smoke would constitute a presumably large class of persons who fit the profile of classic innocent victims.

It would thus be *possible* to design a system that excluded claims for compensation by the users of tobacco products. The question then becomes whether we *should* do that, or whether instead there is something about the tobacco injury context that undermines this initial reluctance to include product users within the class of those who are entitled to compensation of some sort. The possibility of finding that contextual peculiarity is heightened if we consider the second response to the issue of whether smokers should be treated as willing participants rather than as innocent victims.

The second and different response to the characterization question is that the moral responsibility for the adverse effects on the nation's health is so widely disproportionate when one considers the tobacco industry and the users of its products that

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65. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

66. LEBEL, *supra* note 20, at 297-99.

any qualms that we might have about rewarding people for their bad behavior should be set aside. It is one thing for society to view with special disfavor a driver who chooses to become intoxicated and then exposes himself and others to the enhanced risk of death on the highway. It is quite another thing for society to view with the same level of disapproval people who succumb to the sophisticated marketing efforts that result in the addiction of the youngest segment of the consuming population to the products whose full risks are unlikely to be conveyed by the manufacturers or appreciated by the consumers at the critical and vulnerable age when lifestyle choices are being made. The bipolar world of willing participants and innocent victims fails to capture the reality of a consuming population who became addicted at a time when in every way except for the government-mandated warnings the industry downplayed and denied the health risk.

Support for a response that is more tolerant of the choices initially made by those who are injured can be found both in contemporary tort law and in the experience of other compensation systems that have been developed as alternatives to tort litigation. One of the most widely adopted modifications in tort doctrine in recent years has been the shift in the treatment of plaintiffs' conduct defenses from total bars to recovery to bases for comparative reductions in the amount of recovery. A frequently adopted corollary to the comparative negligence doctrine has been the limitation of the assumption of risk defense to those situations in which the decision to encounter the known risk was unreasonable, viewed in objective terms. Within workers' compensation, the injury compensation system with which we have the longest experience, it has long been the case that only the most egregious fault on the part of the injured employee would act as a barrier to a full entitlement to the benefits of the compensation system.

The experience of opening access to compensation for those whose fault has contributed to their harm would be a stronger precedent to follow if other goals would be accomplished by doing so, and if the most problematic forms of compensation were adequately addressed. When one looks at those other goals in the tobacco setting, the grounds of support for expanding the range of compensation to include some of the harms suffered by tobacco product users become apparent.

Achieving an appropriate measure of cost internalization in

the tobacco setting is a goal that is going to be met in the near future only if there are litigation breakthroughs of one sort or another, or if a specially tailored program is adopted to shift some of the costs of those harms to the industry. With very few exceptions, the harms attributable to the use of tobacco products have been successfully externalized by the industry that manufactures and distributes those products. A curious feature of the contemporary tobacco litigation scene is that significant costs *are* being internalized by the industry, but those sums in the tens (or hundreds<sup>67</sup>) of millions of dollars are the costs of *defending* against any legal responsibility for the harm that the products have caused. Acknowledging that responsibility and then participating in an appropriately designed compensation system would divert that socially wasteful expenditure into channels that would actually accomplish some public good.

A compensation program that was limited to environmental tobacco smoke victims would be the easiest to justify on cost internalization grounds. For those harms of smoking, the burdens of dealing with the consequences of the product's use are visited on a segment of the population that enjoy none of the benefits of that use. Shifting the costs of their harms to the industry would be in accord with the classical restorative justice notions embodied in contemporary economic ideas of matching benefits and burdens through cost internalization mechanisms of private and public law.

An injury compensation system that reached more broadly so that the harms of product users who in some sense share the responsibility for their health-impaired condition could be compensated also has analogical support on cost internalization grounds. In the workers' compensation setting, for instance, careless workers and their resultant injuries are seen as an inevitable incident of the employment enterprise, and the costs of those injuries are thought to be appropriately incorporated into the operating costs of the employing enterprise and then into the prices paid for the goods and services of that enterprise.

A quite similar line of thinking would be applicable to a tobacco injury compensation system that included product users among its beneficiaries. Smoking-related harms are the most

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67. In a discussion following the presentation of the papers at this Symposium, the figure of \$600 million dollars in defense costs annually was mentioned.

predictable, indeed certain, of the consequences of distributing cigarettes, and a legal system that allowed the industry to continue to externalize the costs of those harms would allow the industry to understate its costs of operation significantly.

Because those costs have to be allocated somewhere, treating them as matters for the tobacco industry to internalize would relieve the financial burden on some other sources of public and private compensation. Including smokers as persons whose harms were included within the scope of a tobacco injury compensation system would make explicit what is implicit in the compensation provided to injured consumers through products liability litigation. Part of the price of the product reflects access to a system for shifting accident costs away from the victim and for spreading those costs over a different base than the one that would bear the costs if they were not shifted. Automobiles, for example, are marginally more expensive because a potential recovery of damages for harm caused by defective automobiles is part of the package obtained by the purchaser. Likewise tobacco products could be priced at a level that reflects the opportunity for those harmed by the products to recover some of the costs of those harms.

Cost internalization in this sense is appropriately seen as a form of insurance, albeit one that operates more as a tax than a voluntary decision to purchase coverage in the commercial insurance market.<sup>68</sup> Two questions follow from that understanding, however. First, is the cost being internalized by the appropriate enterprise? Second, is the system by which compensation is provided the most appropriate method for delivering the compensation? Each of those questions is answered in large part by considering in the tobacco setting the remaining goals of an injury compensation system. The risk reduction objective points strongly toward the tobacco industry as an appropriate institution on which to impose some of the costs of the harm caused by tobacco products, while the administrative efficiency goal is best served by a compensation system that is financed through a

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68. See David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 486 n.251 (1993) ("To the extent that the [loss] spreading mechanism [of products liability] extracts premiums from persons involuntarily, its funding mechanism should be considered a form of taxation.").



pecially earmarked tax on tobacco products that is used to address a limited segment of the financial consequences of tobacco-related harms.

The safety enhancement goal for a compensation system in the tobacco setting is more readily achievable than virtually any other objective. An increase in the cost of the tobacco product is likely to produce a corresponding decrease in demand, particularly among the younger users who are at the critical age when they are most likely to become addicted long-term users. Whatever method is used to force the industry to internalize the costs of the harm that their products cause will almost certainly have as a beneficial effect a reduction in the volume of those harms.

This exercise in thinking through the options for an injury compensation system grew out of a set of reflections on the rapidly changing legal posture of the tobacco industry in the summer of 1996.<sup>69</sup> The most promising of the developments surveyed in that article was a surtax on tobacco products enacted through voter referendum in three states.<sup>70</sup> The revenues from that supplemental excise tax were earmarked for special programs that would lower the cost of tobacco harms, both by supporting efforts to lower the smoking rate and by subsidizing measures to treat people with smoking-related health problems.

That kind of tax increase supporting particular programs is an eminently defensible piece of social policy. It accomplishes some shifting of injury costs to the industry that has, for the most part, successfully externalized those costs, and it does so in a way that may increase the price to reflect its social cost more than is currently the case. The lesson that emerges from the economic analysis of injury compensation is that the tax increase itself is likely to produce a beneficial effect if demand for the products declines. The search for an appropriate compensation program begins from that point, but it remains the most powerful justification for addressing the tobacco injury problem through a vehicle outside of the traditional tort litigation system.

Administrative efficiency, if not viewed as a fully independent goal, at least serves as an important side constraint on the methods that are used to achieve other ends. In the tobacco setting,

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69. LeBel, *supra* note 1.

70. The state referenda were passed in California in 1988, in Massachusetts in 1992, and in Arizona in 1994. *See id.* at 635-47.

the foundation for collecting the funds for an effective compensation program is already in place, in the form of the excise tax structure that is imposed on tobacco products by the federal and state governments. Distribution of funds to those harmed by the products is more problematic, largely because the phenomenal marketing success enjoyed by the industry has made the occurrence of those harms quite widespread.

Administrative efficiency notions play a role in making the centrally shaping decision of whether an injury compensation system in the tobacco setting should exclude claims by those who use the products. The effects of consumption of tobacco products are not signature diseases in the sense that asbestosis is uniquely attributable to exposure to asbestos fibers.<sup>71</sup> What that means is that a smoker who presents a particular health problem may have multiple factors in his or her personal history and the environment that arguably contribute to that problem.

The multiplicity of causal factors could lead to a decision to exclude smokers from access to the compensation program for tobacco-related harms in the absence of a showing of predominance of smoking as a causal explanation of the claimant's condition. Such a decision would, however, understate the complicity of the tobacco industry in the health risk that its product users face. More promising as a source of guidance in this setting is the experience in the workers' compensation setting of attributing responsibility and thus opening access to the program as long as there is a minimal showing that the relevant factor (in this case it would be the use of the tobacco products rather than the occupational exposure to harmful substances) was a significant contributing factor to the claimant's current condition.<sup>72</sup>

Drawing on those functional considerations, and appreciating the tensions between and among various goals in the tobacco-related harm setting, a tentative shape for a tobacco injury com-

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71. At least not yet. One of the evidentiary issues in *Brown & Williamson Tobacco Corp. v. Carter*, 680 So. 2d 546 (Fla. Dist. Ct. App. 1996) was whether the kind of cancer that the plaintiff suffered was consistent with exposure to the tobacco smoke byproducts. Medical science may become capable of specifically linking tobacco use and particular cancers in the future.

72. See, e.g., *Rutledge v. Tultex Corp.*, 301 S.E.2d 359 (N.C. 1983) (occupational disease established if claimant shows that workplace exposure to cotton dust significantly contributed to the development of the disease; exposure does not have to be sole cause of disease).

pensation program begins to emerge. The remainder of this section of the article will sketch the major elements of this initial approach to constructing an injury compensation system in this complex and politically charged environment.

The most realistic and manageable method of establishing a basis of entitlement to benefits from a tobacco injury compensation program would be for the creator of the program to construct a schedule of harms comparable to the Vaccine Injury Table in the National Childhood Vaccine Injury Compensation Act.<sup>73</sup> In that legislation, Congress established a list of conditions related to each of the vaccines covered by the Act, with a time within which each condition would normally be expected to occur if it were in fact vaccine related. The occurrence of the first onset or a substantial aggravation of one of the Table conditions within the period specified in the Table creates a presumption that the victim is entitled to compensation under the Act.<sup>74</sup> In the absence of the presumption from the Vaccine Injury Table, the claimant bears the burden of proving that he or she has suffered a vaccine-related injury.<sup>75</sup>

No one would suggest that the task of creating such a tobacco harm schedule is anything but breathtakingly complex, but it is perhaps the most critical preliminary step in fashioning a system that is manageable and affordable. The experience in administering the Black Lung Act suggests that time and energy invested in setting the right threshold at the outset would be more than repaid in the avoidance of subsequent difficulties in determining access to compensation in a way that does not convert the system into a general health insurance program.<sup>76</sup>

Once a working definition of tobacco harm is accomplished through the construction of a tobacco harm schedule, the question becomes what is to be done with what has been identified as tobacco-related harm. Monetary payments made to individuals seem to be the least justifiable use of the funds that would become available in a tobacco injury compensation program. The maximum attainment of the multiple goals of the system would

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73. 42 U.S.C. § 300aa-14 (1994).

74. 42 U.S.C. § 300aa-11(c)(1)(C)(i) (1994).

75. 42 U.S.C. § 300aa-11(c)(1)(C)(ii) (1994).

76. See PETER S. BARTH, *THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE* (1987).

be best achieved if the benefits were instead used to supplement the privately and publicly financed health care resources available to the population at large. Drawing on but expanding the theory underlying the claims by the state attorneys general, that the use of tobacco products has produced a health care cost that is being subsidized by various segments of the population, the compensation from this program could be provided in the categories which follow.

*A. For victims who suffer harms on the tobacco harm schedule and who are covered by health insurance, benefits would be provided to reimburse the victim for the difference between the actual cost of the health care for those harms and the insurance coverage that is available to the individual.*

This benefit of the compensation program would generally fall into two categories. For individuals whose insurance coverage has not been exhausted, the compensation would be in the amounts of the deductibles or co-payments required for the health care. These benefits would be available both for privately insured individuals and for those who are covered by Medicare. For those individuals whose health care has exhausted the major medical provisions of their insurance, the compensation would be in the amount of the health care expenditures, in the same way that uninsured individuals would be compensated below.

*B. For uninsured victims of harms on the tobacco harm schedule, benefits would take the form of payments to the health care providers who perform care for those harms.*

For this category of benefits, the program would act as a substitute for the Medicaid agency within the state where the care is provided. Instead of treating the health care as a public expense, the injury compensation system would treat it as an expense attributable to the tobacco industry to be funded through the compensation program. Payments would be made to the providers, not to the victims, and the payments would be made for the services as they are provided, eliminating any need to determine a lump-sum amount for future medical expenses.

*C. For tobacco-related deaths, as determined according to the tobacco harm schedule, a death benefit of a modest amount would be payable to the estate of the decedent.*

The purpose of this form of payment is largely symbolic, but experience in the law of injury compensation systems has suggested that symbolic payments can produce a beneficial effect.<sup>77</sup> The most important social fact about tobacco products is that when used in their intended ways, they produce disabling and fatal conditions. The sort of "terminal benefit" contemplated in this provision of the tobacco injury compensation program acknowledges the role that tobacco products play in the pathology of the American public.

As an incidental positive effect, the death benefit undercuts the curious argument that tobacco deaths actually produce a public good in the form of deaths that lower the long-term health care costs of people who would live longer were it not for their tobacco-related harm. Tobacco deaths themselves would become part of the cost of the product that the industry would be required to internalize, not some sort of perverse public benefit that the industry is providing to the nation.

Missing from this list of items that would be compensated by the tobacco injury compensation program is any payment to the tobacco victim for two items of loss: those that are pecuniary in nature but covered by some other funding source, and those that are non-pecuniary in nature. For smokers, such an exclusion could be justified on the ground previously raised, namely, that there are limited funds with which to try to accomplish a set of objectives and the lowest priority claim on those funds is the compensation of those who participated in the production of their harm.

For non-smokers, a different justification would have to be sought. Their participation in the harm is involuntary in all but the most formalistic way. It would be exceedingly harsh, for example, to hold that flight attendants chose to be exposed to

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77. In his fairness opinion in the Agent Orange litigation, Judge Weinstein used quotes from Frazer's *The Golden Bough* and from Abraham Lincoln's Second Inaugural Address in support of the proposition that public acknowledgement could be as significant as private compensation in the process of reaching closure of mass injury claims. In *Re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 857, 862 (E.D.N.Y. 1984).

concentrated environmental tobacco smoke as part of their employment, and that they could always have elected other work if they really objected to the exposure.

If there is to be any accommodation by the compensation program of claims for benefits that compensate for personal injury as such, it would be in the context of claims by non-smokers who have been harmed by exposure to the smoke from other people's use of cigarettes. Within an injury compensation system, those claims would present difficult scientific issues about causation, at least in the short run. That suggests that, again perhaps only in the short run, the appropriate view of the injury compensation system for this class of claimants is as a limited supplement to the other sources of compensation, rather than as a substitute for the wider range and larger size of the awards that might be obtainable in a tort recovery.

Financing the compensation system for tobacco-related harms is easily accomplished through a tax on tobacco products, with the revenue earmarked for this purpose. As described in a recent publication, such a tax would have two positive effects in the tobacco setting.<sup>78</sup> First, it would generate funds to support the compensatory aim of the proposal, with an expectation that the drain on other sources of funding for those same purposes could be lightened. Second, it would increase the price of the tobacco products so that the market signals received by consumers would at least somewhat more closely correspond to the actual social cost of those products, with whatever beneficial health effect such a rise in price might produce in the form of a lower demand for the products.

### III. CONCLUSION

The description of these remarks as "preliminary thoughts" is accurate for two reasons. First, there is a good deal to be done, especially in the empirical and epidemiological fields, before the next step of actually crafting a compensation program would be feasible. But second, and more importantly, this is an attempt to lower the rhetorical and economic stakes in the debate about what to do when we know as much as we now know about the risk of injury and death from the use of tobacco products. It

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78. LeBel, *supra* note 1, at 638-41.

ought not be a vain hope that once we have moved beyond the name calling and the finger pointing, we can enter into a conversation about how to play an endgame that has at its core the interest of the public as a whole rather than just the self-interest of the various parties who are most directly affected by the outcome. Serious consideration of an injury compensation system as an alternative to the tort litigation model could be a step in that direction.