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TORT LUCK AND LIABILITY INSURANCE

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ABSTRACT

Important features of both the incidence and magnitude of tort liability depend heavily, and therefore arbitrarily, on luck. One of a number of examples is the eggshell-plaintiff rule, which imposes liability for all the physical injury a defendant causes, even if the amount of that injury was unforeseeable. In each instance, tort liability hinges on chance in a way that bears only an attenuated relationship, or no relationship, to the degree of responsibility that can fairly be attributed to the party in question. Despite the arguable injustices that tort luck reflects, it remains in the background, largely uncontroversial. Tort luck would be surprising, intolerable, or both, if it were not enmeshed in a system that relies so heavily on liability insurance to cushion its impact. Liability insurance reconciles, ameliorates, or eliminates many of the anomalies and contradictions in tort doctrines that might have otherwise disappeared long ago. This Article analyzes the ways that liability insurance interacts with tort luck, identifying the pervasive presence of insurance in tort liability, from both qualitative and quantitative perspectives. It then examines the tort doctrines and practices that make liability hinge, arguably arbitrarily, on luck, and the ways in which insurance ameliorates this tort luck. Finally, the Article develops a counter-history of tort law, exploring the shape that

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tort law might have taken if liability insurance had not been available to play a role in ameliorating tort luck.

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INTRODUCTION

In what is often regarded as the seminal statement about negligence as the basis for imposing tort liability, Holmes said that the "state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members."[1] But it was no more justifiable to do this, he said, than to "compel me to insure [my neighbor] against lightning."[2] Holmes was writing four years before liability insurance was introduced in this country.[3] Understandably, he seems not to have envisioned the role that private liability insurance would come to play in the negligence system that he sought to justify, or the way that liability insurance would cushion against the "lightning" of what I call "tort luck."[4]

Modern tort law, as it developed in the century after Holmes wrote, is full of injustices that result from luck. An individual who drives only a few miles per hour over the speed limit, but as a result kills a pedestrian, can be held liable in tort for millions of dollars. The eggshell-plaintiff rule imposes liability for all the physical injury a plaintiff *suffers*, even if that amount of injury was wholly unforeseeable.[5] A corporation can be held liable for harm caused by decades-old conduct—conduct that occurred when its shareholders were entirely different parties, and when the conduct was not even tortious.[6] A defendant who totally defeats a tort suit against him is nevertheless responsible for his own, often substantial, counsel fees.[7]

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1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 96 (Forty-Second Printing ed., Little, Brown and Co. 1948) (1881).

2. *Id.*

3. *See* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, 26–32 (2008) [hereinafter THE LIABILITY CENTURY]; HOLMES, *supra* note 1.

4. The philosopher Bernard Williams used the term "moral luck" to describe, among other things, the variability of outcomes that may result from identical conduct. *See* BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, 30 (1982) (referring to "determination by the actual"). Sometimes one is lucky enough to avoid causing great harm and thereby escapes with minimal approbation. *Id.* at 28–30. But on other occasions the same conduct does cause great harm and brings with it both external and internal condemnation. *Id.* Tort luck is in a sense the legal analog to moral luck of this sort.

5. Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375, 377 (2013).

6. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1885 n.15 (1991) (discussing successor liability).

7. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993). Although I refer here generally to "tort law" and "tort luck," my analysis is principally directed at tort liability for bodily injury and property damage. As will become clear below, this form of liability constitutes the overwhelming majority of tort cases. The amounts paid for defamation, invasion of privacy, false imprisonment, and other such torts are so small that data regarding these sums is not even reported. *See infra* notes 12–17.

In each instance, tort liability, or its accompanying effect, hinges on chance in a way that bears only an attenuated relationship, or no relationship, to the degree of responsibility that can fairly be attributed to the party in question. Despite the arguable injustices that these examples of tort luck reflect, they remain in the background of tort law, largely uncontroversial. Tort scholars accept them, and law students learn of their existence, only in passing and as if they were unremarkable. In fact, of the features of tort luck that I have mentioned, only the eggshell-plaintiff rule is likely to receive any express reference at all in the typical first-year torts course.

This lack of attention to the injustices entailed in tort luck would be surprising, intolerable, or both, if tort luck were not enmeshed in a system that relies so heavily on liability insurance to cushion its impact. Without liability insurance to perform this function, the injustices produced by tort luck certainly would not have remained in the background, taken as a given, and not subject to serious questioning. In fact, the law of torts probably would not be what it is at all if liability insurance did not exist.

Liability insurance and tort law are inextricably interwoven, and in far more complicated ways than are reflected in the common lawyers' notion that tort liability simply chases insurance. Most importantly for my purposes here, a number of the doctrinal features of tort law that seem arbitrarily, capriciously, or unequally to make liability hinge excessively on luck are rendered far less so not merely by the availability of liability insurance in general, but also by the particular ways in which liability insurance functions. Liability insurance reconciles, ameliorates, or eliminates many of the anomalies and contradictions in tort doctrines that long ago would have been addressed, or would have disappeared, if it were not for liability insurance.

The few scholars who have addressed tort luck have done so from a philosophical or moral standpoint that either expressly or impliedly rejects as irrelevant any consideration of the way that liability insurance interacts with the liability consequences that luck produces.[8]

8. *See, e.g.*, Larry Alexander & Kimberly Kessler Ferzan, *Confused Culpability, Contrived Causation, and the Collapse of Tort Theory*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 406 (John Oberdiek ed., 2014); Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 LEGAL THEORY 181 (2006); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007); Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune, and Tort Law*, 16 QLR 315, 315 (1996); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David G. Owen ed., 1995).

For these scholars, the moral structure of tort law, and therefore any evaluation of it, must be understood on its own terms.[9] That tort liability can usefully be understood "on its own," however, does not mean that tort law must always be so understood. In any event, as I will argue below, for practical purposes liability insurance cannot be divorced from tort liability. Tort law cannot be usefully understood on its own.

Considering the justice or morality of tort law without considering its interaction with liability insurance may be an interesting heuristic or philosophical exercise, but it has little to do with what actually occurs, and little to do with whether tort liability as it actually exists is morally acceptable.[10] That tort law embodies a substantial luck-based component of liability in the face of the arguably arbitrary or disproportionate consequences that result is, in my view, a telling indication of the power that liability insurance has to ameliorate these consequences.

In what follows, I analyze the ways that liability insurance interacts with tort luck. Part I identifies and details the pervasive presence of liability insurance in tort liability, from both qualitative and quantitative perspectives. Part II examines the tort doctrines and practices that make liability hinge, arguably arbitrarily, on luck, and the ways in which liability insurance ameliorates this tort luck. Finally, Part III develops a counter-history of tort law, exploring the shape that tort law might have taken if liability insurance had not played a role in ameliorating tort luck.

I. THE PERVASIVE PRESENCE OF LIABILITY INSURANCE

There has been considerable writing about the role that insurance—especially liability insurance—plays in tort, though there has been virtually no writing about the interaction between tort luck and insurance.[11] Most tort scholars and teachers tend to ignore the role of

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9. *See, e.g.*, Avraham & Kohler-Hausmann, *supra* note 8, at 181 (arguing that corrective justice allows luck to dictate dissimilar outcomes in similar situations).

10. *See* Goldberg & Zipursky, *supra* note 8, at 1125 (discussing morality and the law in general).

11. The one exception is Tom Baker's brief essay on moral luck in auto insurance. Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 THEORETICAL INQUIRIES L. 165 (2007). For discussions of liability insurance and tort, see generally THE LIABILITY CENTURY, *supra* note 3; ROB MERKIN & JENNY STEELE, INSURANCE AND THE LAW OF OBLIGATIONS (2013); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 98 (2d ed. 1980); Tom Baker, *Liability*

liability insurance altogether, perhaps in part because their focus is on doctrine alone, or on deterrence and compensation from a theoretical standpoint. In addition, simply by virtue of the boundaries between the categories of legal scholarship and specialization, few tort scholars have insurance expertise. For such scholars, liability insurance is perhaps either an abstraction or a "mere" source of payment, the features of which stay very much in the background of their concerns. When liability insurance stays in the background, however, it is a considerable challenge to justify tort law's treatment of luck, or to explain the persistence of doctrines that otherwise seem patently unjust. With liability insurance in the foreground, by contrast, tort luck comes to seem, if not wholly unremarkable, at least not highly problematic.

An outline of the qualitative and quantitative features of the role insurance plays in tort will set the stage for my analysis of the way that insurance interacts with tort luck.

A. Quantitative Analysis: What Insurance Pays

It is difficult to obtain a reliable estimate of the total direct cost of tort liability. Because I am interested here mainly in orders of magnitude, I will not attempt to resolve the ongoing debate between tort reformers and their critics about the proper figure. Instead, in my view a sensible working number is $230 billion per year.[12] The largest component of that figure is auto liability. In 2016 (the latest year for which data is available), automobile liability insurance premiums, less expenses that did not involve defense costs, were $111 billion.[13] In

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Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action, 12 CONN. INS. L.J. 1 (2005) [hereinafter Baker, *Liability Insurance as Tort Regulation*].

12. The latest data are as follows. At the low end is the estimate by a pro-tort group of $194 billion in 2009. J. ROBERT HUNTER & JOANNE DOROSHOW, AM. FOR INS. REFORM, TOWERS PERRIN: "GRADE F" FOR FANTASTICALLY INFLATED "TORT COST" REPORT 12 (2010). At the high end is an estimate by a generally anti-tort entity that projected total tort costs for 2013 to be $273 billion. TOWERS WATSON, U.S. TORT COST TRENDS: 2011 UPDATE 11 (2011). Part of this difference, perhaps even most, has to do with how "tort" is defined and whether to include general insurance company overhead in the calculation. My $230 billion estimate includes third-party claims resolved without a lawsuit or lawyer involved (which I think are "tort" claims, despite Hunter and Doroshow's view to the contrary), but excludes general insurance company overhead (which Towers Watson includes).

13. A.M. BEST CO., BEST'S AGGREGATES & AVERAGES: PROPERTY/CASUALTY 383 (2017) (including $127.8 billion for "Private Passenger Auto Liability" and $25.1 billion for "Commercial Auto Liability," or a total of $152.9 billion, less roughly 28% of premiums, or $42 billion, for "Total Underwriting Expenses Incurred").

effect, this is the total of payments to victims plus the costs of defense of claims, by auto liability insurance. The corresponding figures for other fields are as follows: medical professional liability, $6.9 billion;[14] general liability, $45 billion;[15] and products liability, $2.6 billion.[16] This omits other miscellaneous and quantitatively insignificant forms of liability insurance, such as the liability insurance components of Homeowners' and Renters' insurance. Even by my conservative calculation, liability insurance pays roughly $165 billion, or 71%, of the $230 billion in annual tort liability costs.[17]

In addition, some portion of tort victims' medical expenses are paid by their own health insurers, with a very uncertain portion of those payments ultimately returned to the health insurers out of liability insurance payments made to victims. My conservative estimate is that 20% of total torts costs of $230 billion ($46 billion) are for victims' medical expenses, that 60% of this $46 billion is paid by victims' health insurance ($27 billion),[18] and that, by virtue of subrogation-reimbursement rights, 40% of this sum ($11 billion) is returned to the health insurers out of tort settlements and judgments and therefore ultimately is not paid by health insurance.[19] This makes a total additional sum of roughly $16 billion in tort costs paid by insurance, in this case health insurance. Add this to the $159 billion in tort costs paid by liability insurance, and the figure reaches $175 billion of total tort costs of $230 billion, or slightly more than 76%, paid by a combination of liability and health insurance. As I have emphasized, this is a

14. *Id.* at 381. This includes about $9.1 billion in direct premiums paid to commercial insurers, less 30% for underwriting expenses. Because Best's does not include physician-owned mutual malpractice liability insurers, this figure is understated. By my rough estimate, this probably constitutes another $2.5 billion, but I do not include it in my calculations in the text.

15. *Id.* at 382. This includes roughly $62 billion in direct premiums less 26.8% for underwriting expenses. This figure is based on what Best's labels "Other Liability" and includes both general liability and the products liability component of CGL insurance.

16. *Id.* This figure may seem comparatively small because it includes only freestanding products liability insurance. As discussed *supra* note 15, much such insurance is included in the "Other Liability" category; the figure includes $3.6 billion in direct premiums less underwriting expenses of 30%. *Id.*

17. As a cross check, it is worth noting that the Towers Watson study, TOWERS WATSON, *supra* note 12, at 14, estimates that $62 billion of the total tort costs of $264 billion in 2010, or 23%, were self-insured, with a corresponding 67% covered by liability insurance. Although these studies and my estimates are for all tort liability, in all probability liability for bodily injury and property damage represents more than 95% of the total.

18. THE LIABILITY CENTURY, *supra* note 3, at 204.

19. *Id.*

conservative estimate. The true figure is probably closer to 80% or more.[20]

Note the significance of these figures. Tort defendants pay only 30% of their tort liabilities directly out of their own pockets. This self-insured component of tort costs is probably incurred almost entirely by commercial defendants, since—as I will indicate below—few individuals can or do make tort payments out of their own pockets. Correspondingly, nearly 80% of tort victims' losses are paid by a combination of liability and health insurance. Thus, the tort system we have in actual practice is a system in which insurance—mostly liability insurance—bears most of the liability and pays most of the compensation.

B. Qualitative Analysis: What Insurance Does

It has long been understood that routine tort cases—especially those involving auto accidents—are resolved by settlements reached by plaintiffs' attorneys and liability insurance claims-adjustors or attorneys representing liability insurers.[21] Nuances in tort law doctrine play a minimal role, individual defendants are not involved, and settlement costs are paid by the liability insurer.[22] But not all individual defendants are insured. For example, we know that between 3.9% and 25.6% of all drivers are uninsured, despite mandatory insurance requirements.[23] Knowing what happens in routine cases where there is auto liability or homeowner's liability insurance does not reveal what occurs when a case is not routine. For example, the defendant may be uninsured, or may have insufficient liability insurance as measured by the severity of the plaintiff's injuries and potential tort recovery if a case goes to trial.

In an eye-opening study, Tom Baker has provided many of the answers. Through a series of interviews with plaintiffs' and defendants' attorneys, Baker shows that liability insurance is not an after-the-fact method of redistributing the costs of accidents, but a key ingredient of

20. *Id.*

21. *See, e.g.*, ROSS, *supra* note 11, at 98–99; Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1488 (2009); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 807 (2011); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1582–83 (2004).

22. *See* sources cited *supra* note 21.

23. INS. INFO. INST., THE INSURANCE FACT BOOK 80 (2016).

what compensation is paid to begin with.[24] Most importantly, plaintiffs' lawyers only rarely seek to recover more than the amount of the liability insurance that covers individuals who are defendants, even when the plaintiff's' losses exceed this sum.[25]

In effect, then, liability insurance operates as a ceiling on the amount of compensation that is available. Individuals do not pay tort claims[26] unless they have failed to purchase the amount of liability insurance that is appropriate to their economic status.[27] In addition, even when collateral sources such as workers' compensation and health insurance have the formal right to be reimbursed out of the plaintiff's settlement or judgment for prior payments, this right is incompletely enforced.[28]

It is therefore no surprise that liability insurance also heavily influences whether tort claims are made at all, and what these claims allege.[29] There is little point to bringing a claim against an uninsured individual defendant.[30] And since liability insurance policies exclude coverage of liability for intentionally-caused harm, claims that may have actually constituted battery or another intentional tort often are "under-pleaded," to allege negligence only, in order to ensure that the deep pocket of the defendant's liability insurer will be in the picture as the case proceeds.[31]

In contrast to individuals, in my experience, commercial and organizational defendants are likely to be covered by enough liability insurance—tens or hundreds of millions of dollars of coverage per year—to cover the amount of all but the most gargantuan tort liabilities. The amount of liability insurance available to such defendants therefore does not act as a practical limit on the amount of the plaintiff's potential tort recovery. But the larger the business or organization, the more likely its liability insurance will be subject to a

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24. Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y. REV. 275, 285–86 (2001) [hereinafter Baker, *Blood Money*].

25. *See id.* at 281.

26. *See id.* at 281–86.

27. *Id.* at 296.

28. *See id.* at 303–13.

29. Baker, *Liability Insurance as Tort Regulation*, *supra* note 11, at 5.

30. *Id.*

31. *See generally* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1722 (1997). *See also* Baker, *Liability Insurance as Tort Regulation*, *supra* note 11, at 7–9 (finding that policy exclusions for intentional torts encourage litigants to proceed with general negligence claims instead, and that implied exclusions for punitive damages encourage litigants to pursue higher compensatory damages).

"self-insured retention," or deductible, for comparatively small liabilities.[32] Exactly what share of these defendants' liabilities are self-insured, rather than covered by liability insurance, is uncertain; but I estimate that no more than one-quarter are self-insured.[33] Thus, roughly three-quarters of commercial and organizational defendants' potential liabilities are covered by liability insurance. Comparatively large liabilities are probably paid almost entirely by liability insurance, whereas smaller liabilities are likely to be paid by commercial defendants themselves, by virtue of their self-insured retentions.[34] But smaller liabilities are more frequent than large liabilities. Exactly what proportion of actual payments are made by commercial defendants, as opposed to their insurers, is therefore not entirely clear, but the 30% figure I derived in Section I.A is probably an accurate estimate.

To be sure, liability insurance is not perfectly protective of the parties it insures, any more than other contractual promises are. Liability insurance policies exclude coverage of certain liabilities, and liability insurers sometimes deny coverage of liabilities that actually were covered by the policy. To the best of my knowledge, there is no data on the percentage of valid claims that insurers deny. And I suspect that the more that is at stake, the more likely a liability insurer will deny coverage. I once called this the unwritten "big claim exclusion" in liability insurance policies.[35] But based on nearly forty years of study and involvement in liability insurance coverage litigation, in my experience, most typical tort liabilities are covered by liability insurance, and most liability insurers cover most typical liabilities without disputing them.

In short, for practical purposes, in bodily injury and property damage cases involving individual defendants, insurance is a constitutive feature of the regime of tort compensation in this country. For the most part, there is no compensation paid in such cases except by liability insurance.[36] In cases involving commercial and

32. *See* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 493 (6th ed. 2015).

33. I make this estimate based in part on the Towers Watson report, which indicates the total self-insured liabilities of individuals, businesses, and organizations to be $61 billion out of $264 billion, or 23%. TOWERS WATSON, *supra* note 12, at 14. For the reasons I indicated earlier in Section I.A, I think that both of these numbers are too large, but there is no reason to think that their proportions are inaccurate.

34. *See* ABRAHAM & SCHWARCZ, *supra* note 32, at 493.

35. *See* Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 104 (2001) [hereinafter *Commercial Liability Insurance*].

36. *See* ABRAHAM & SCHWARCZ, *supra* note 32, at 495.

organizational defendants, liability insurance is not literally constitutive of the compensation regime, but liability insurance is nonetheless the overwhelming source of payment in this category of cases as well.[37]

II. HOW LIABILITY INSURANCE AMELIORATES TORT LUCK

When tort liability is considered "on its own," tort luck seems problematic, disproportionate, or downright arbitrary. The philosophers of law that I referred to earlier may or may not have rescued tort liability from this seeming flaw.[38] But the very fact that these scholars seem to believe that the role played by luck in tort appears in need of rescue suggests that insights can be gleaned from consideration of the role played by liability insurance in ameliorating tort luck.

By definition, luck is an outcome based on chance.[39] Ronald Dworkin has distinguished "brute luck" from "option luck."[40] Brute luck involves outcomes based entirely on chance, whereas option luck involves outcomes based on chance that is at least partly a consequence of prior choice.[41] Thus, experiencing an auto accident following a decision to commute to work by car rather than public transportation might be considered option luck. There is a sense in which much tort luck is option luck because it is the consequence of choices made with at least some level of discretion. But for my purposes here, tort luck much more closely resembles brute luck, because it involves differences among people or organizations that have made similar prior choices, or no meaningful relevant choices at all. For example, it would be possible to say that those who incur tort luck in the realm of auto liability have chosen to be drivers, and that the tort luck they encounter is thus the product of that choice. But that choice is not optional in the same sense that someone chooses to work in a position with strong job security with limits on her maximum earnings, instead of choosing to become an investment banker with a higher earning potential but less job security. Choosing to drive does not involve that kind of meaningful choice. In any event, merely because permitting people to risk option luck is often desirable, on the ground that doing so enriches people's life choices,

37. *See* Baker, *Liability Insurance as Tort Regulation*, *supra* note 11, at 7.

38. *See* sources cited *supra* note 8.

39. *See Chance*, BLACK'S LAW DICTIONARY (3d pocket ed. 2006) ("The unforeseen, uncontrollable, or unintended consequences of an act.").

40. Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 293 (1981).

41. *Id.*

does not mean that all option luck—here, tort luck—is desirable. Especially when the consequences of such choices are obscure and only rarely materialize, as in tort, tolerating option luck may be far from optimal.[42]

Three features of the law of torts result in impositions of liability, or consequences even when liability is not imposed, that hinge heavily on arguably-undesirable tort luck. The first instance of tort luck is *outcome variability*. The incidence of liability and the amount of damage for which a defendant is responsible may vary enormously, depending on antecedent factors that are by any standard largely irrelevant to the moral basis for imposing liability.[43]

The second instance of tort luck is the *cost of defense*. Under the "American rule," even the defendant who completely defeats a lawsuit cannot recover the cost of defense from the plaintiff.[44] Even a winning defendant thereby loses, and sometimes loses a substantial sum. It is therefore a matter of luck whether one is made a defendant in an unsuccessful lawsuit, and is thereby forced to incur the cost of defeating the suit.

The third instance of tort luck involves *time and change*, in two respects. First, common law change, including change in tort liability, is effectively retroactive. Sometimes a change in the law that for the first time subjects a party in the defendant's position to tort liability might have been anticipated, but not always. A party may be subject to liability for past conduct that could not reasonably have been anticipated to subject that party to liability at the time the party engaged in the conduct.[45] Second, by virtue of exceptions to statutes of limitations, "long-tail" tort claims sometimes may be brought years or even decades after the conduct that ultimately caused harm occurred.[46]

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42. In contrast, the failure to purchase liability insurance could certainly be considered option luck, and therefore appropriately a basis for distinguishing among otherwise similarly situated parties. *See* Baker, *Liability Insurance as Tort Regulation*, *supra* note 11, at 177 (explaining underinsurance cases where a certain class of drivers are likely to pay out of pocket but typically less than the shortfall needed between injury costs and available liability coverage).

43. *See* discussion *infra* Section II.A. I am not referring here to such variables as attorney quality or jury prejudice, although those also influence outcomes.

44. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 4 (5th ed. 2017) [hereinafter FORMS AND FUNCTIONS].

45. *See, e.g.*, The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (holding operator of two tugboats liable for loss of cargo and barges in storm due to lack of reliable radio).

46. *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 925, 925–26 (Cal. 1980) (involving suits by adult daughters of women who ingested the allegedly defective drug DES during pregnancy).

When these suits are brought against corporations or organizations, the current owners of the corporate or organizational defendants may have had no connection to the business at the time the tortious conduct occurred or may have been in no position to assess the risk that such liability could possibly be imposed in the future. Yet it is these individuals who must now indirectly bear the liability for the consequences of that earlier conduct.

These three features of tort liability impose liability or financial responsibility that is substantially disproportionate to the degree of responsibility that could reasonably be attributed to the parties in question. This disproportionality, however, remains largely in the background of most analyses of tort liability. In my view, it would be astounding for these features of tort liability to have stayed in the background, largely transparent from the standpoint of policy change, in the absence of liability insurance. Rather, each would have come in for severe criticism and pressure for reform. But liability insurance either ameliorates or completely eliminates their arbitrariness and disproportionality, making it much more possible for tort law to remain in its present form, without being subject to the severe criticism and dissatisfaction that could otherwise be levelled at it. In what follows, I examine these forms of tort luck in more detail and explain how liability insurance helps to ameliorate them.

A. *Outcome Variability*

The law of torts accepts variations in the consequences of identical or similar conduct, and in the assessment of damages resulting from that conduct. These variations would be highly problematic and difficult to tolerate in the absence of insurance.[47] Outcome variability takes two forms: causation luck and severity of loss luck.

1. Causation Luck

A momentary act of careless inadvertence can result in substantial liability, even if the inadvertence is unavoidable and common. For example, it is clear that everyone commits acts of carelessness—such as not looking where one is going while walking on a crowded sidewalk, taking one's eyes off the road while driving, or speeding for a few

47. Goldberg and Zipursky refer to this as "causal" luck, and then divide this category into "fortuity as to realization" and "fortuity as to extent of loss." Goldberg & Zipursky, *supra* note 8, at 1132–40. Though our terms differ, our concepts are very similar.

seconds—from time to time. Indeed, more than forty years ago, a U.S. Department of Transportation study found that the average driver committed an act of negligent driving every two miles.[48] Yet the very idea of reasonable prudence seems to admit of no exceptions to its standard; perfect compliance is the requirement.[49] One cannot escape liability by being reasonably prudent 99% of the time, if a jury finds that the single slip committed was negligent.

Thus, the law of negligence at least permits, and perhaps requires,[50] holding ordinary people liable for failing to comply with an impossibly high standard of conduct: never being careless.[51] Whether one incurs liability under these circumstances is like being struck by lightning—one behaved as everyone else does, but liability strikes because one's conduct randomly happened to cause harm. That it is not clear whether perfect compliance is *required,* or is only a standard that the jury is *permitted* to apply, only underscores my point. If the unfairness of requiring compliance with such an impossibly high standard were not

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48. Drivers were covertly observed during one to two miles of city driving in this study. Of the group, 48% were judged entirely safe, 41% committed more safe driving acts than unsafe ones, 9% committed an equal number, and 1% drove unsafely more than safely. In total, then, 51% committed at least one unsafe act in less than two miles of driving. David Klein & Julian A. Waller, *Causation, Culpability and Deterrence in Highway Crashes*, *in* U.S. DEP'T OF TRANSP., AUTOMOBILE INSURANCE AND COMPENSATION STUDY 64 (1970).

49. Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 288–92 (2012).

50. *Id.*; Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887, 908 (1994).

51. Tort law does not distinguish among different forms of negligence, but it is pretty clear that negligence is a number of very different forms of conduct. Negligence may consist of the kind of inadvertence, or carelessness, that I have just discussed. But negligence may also consist of foolishness, in the sense of consciously taking a risk that good judgment would suggest not be taken; or negligence may consist of selfishness, in the sense of consciously taking a risk that weighs the actor's interests too heavily and potential victims' interests too lightly. FORMS AND FUNCTIONS, *supra* note 44, at 70–71. For an alternative conceptualization, see Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. PA. L. REV. 2131, 2156–57 (2015) (distinguishing negligent "performance" from negligent precaution-taking).

In contrast to carelessness, not everyone is foolish or selfish much of the time. A perfect compliance requirement as to these forms of negligence—if you are foolish or selfish and thereby cause harm, you are liable—seems less arbitrary than it does in connection with carelessness. Moreover, foolishness and selfishness are forms of more nearly conscious decision-making. For both reasons, foolishness and selfishness are likely to be more blameworthy than carelessness. Therefore, the fact that liability for these forms of negligence depends heavily on causation luck may be less objectionable. But it is still the case that the same act of foolishness or selfishness may cause harm or it may not, depending on highly fortuitous circumstances.

mitigated (in the ways I describe below) by liability insurance, tort law would long ago have been compelled to resolve the issue. The fact that tort law can muddle through, without having resolved the issue through rulings made as a matter of law, or in the formulation of jury instructions addressing the issue, is a telling indication that resolution through amelioration takes place by means of liability insurance.

It is true that some of the luck associated with this phenomenon (and the others discussed below) may also be ameliorated by juries' not imposing liability, or imposing liability for less damages than would be warranted, when luck has adversely affected the defendant, even when the law of torts would permit or require a jury to decide otherwise. But the very fact that some juries might do so while others might not is just another reflection of the degree of luck built into the system.

2. Severity of Loss Luck

The harm that a negligent act causes, and consequently the damages that a defendant must pay, are so variable that they often bear a wholly disproportionate relation to the wrong the defendant committed. This variability occurs in two ways. First, the amount of harm that may result from equally wrongful conduct—indeed from nearly identical conduct—may vary enormously depending on minute differences in circumstances. Driving five miles per hour over the speed limit may cause very serious injury or death, or it may cause little (or no) harm. Similarly, driving twenty-five miles per hour over the speed limit—much more blameworthy conduct—may cause no injury, or minor injury. There is, of course, some relation between the amount of harm that can be expected to result from driving five and twenty-five miles per hour over the speed limit, respectively. That is why the latter is more negligent than the former. But the amount of negligence attributable to the defendant is doctrinally irrelevant unless the plaintiff was also negligent, in which case (under the doctrine of comparative negligence) this will affect the amount of damages awarded. In the absence of the plaintiff's own ("contributory") negligence, however, there are no degrees of negligence. Tort doctrine provides that the plaintiff recovers all his or her damages, proximately caused by the defendant's negligence, regardless of how negligent the defendant was.

Second, even holding constant the precise conduct of the defendant, the vulnerability of the plaintiff can radically affect the amount of harm the defendant's negligent conduct causes.

This is in a sense merely one subset of the general category of severity luck, but it is worth identifying separately because the issue is governed by the discrete doctrine of the eggshell plaintiff. Under this doctrine, the defendant "takes his victim as he finds him," even if the extent of harm suffered by the plaintiff was not foreseeable. What makes the defendant's conduct wrong in this situation is that it risks a foreseeable extent of harm. But then the defendant is held liable for causing harm, whose extent was not foreseeable. On any straightforward assessment, imposing liability for the full amount of the plaintiff's harm in such a case seems out of proportion to the wrong that the defendant committed.[52]

I have elsewhere discussed the practical reasons that support imposing such liability.[53] The principal reason is that, in the absence of the eggshell plaintiff rule, in every negligence case the "normal" amount of harm to those in the plaintiff's position that was reasonably foreseeable would be a potential question of fact. Because the very idea of "normalcy" could always be placed at issue, what previously had been simple negligence cases could devolve into complex affairs, perhaps even involving expert testimony about the extent of harm to the plaintiff that was foreseeable. The eggshell plaintiff rule makes all of this unnecessary and inadmissible.[54]

3. How Liability Insurance Ameliorates Causation and Severity of Loss Luck

The principal way that liability insurance mitigates causation and severity of loss luck is through the risk-classification of liability insurance premiums. Liability insurance does not merely spread the risk of incurring these forms of luck. In addition, because premiums vary depending on the *ex-ante* risk posed by the party or parties insured, premiums are calibrated to the average risk posed by insured parties in various risk classes. The result is that insured parties are charged premiums that take into account the differential probability that they will be held liable for a fortuitous or disproportionate consequence of their wrongdoing, but (up to the amount of liability insurance covering them) do not have actual financial responsibility for any individual outcome.[55]

52. *See generally* Calandrillo & Buehler, *supra* note 5.
53. *See* discussion *supra* Section II.A.1.
54. *See* FORMS AND FUNCTIONS, *supra* note 44, at 164–66.
55. Despite this form of risk spreading, it is clear that liability insurance can and does create incentives for safety. *See* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 199 (2012).

For example, automobile liability insurance premiums depend on the age of the driver; the age and type of vehicle; use (mileage, among other things) of the vehicle; the territory where the vehicle is driven; sex of the driver; marital status of the driver; occupation of the driver; and the safety equipment on the vehicle. In addition, through "experience-rating," the driver's accident and citation record can significantly affect premiums.[56] Similarly refined risk-classification and experience-rating occur in CGL insurance, and there is classification based on medical specialty in medical malpractice insurance. In this way, those who pose the same risk of incurring causation and severity luck pay the same premiums.

It is true that, in the rare case in which an individual tortiously causes enormous harm, the amount of applicable liability insurance is unlikely to be adequate to completely cover the individual's liability. But as the Baker study discussed earlier indicated, in such cases it is also rare for the plaintiff to insist that the defendant pay out of his or her own pocket the amount of the loss that is not paid by liability insurance.[57] In any event, even if the plaintiff pressed for such "blood money," the defendant can only pay what he can pay, and that is usually little. Beyond that, bankruptcy, not payment out of the defendant's own pocket, is the likely outcome.[58]

On the other hand, commercial defendants sometimes purchase liability insurance subject to a substantial self-insured retention, or deductible, and therefore are vulnerable to causation and severity luck to the extent of their self-insurance. But these forms of outcome luck are likely to affect such defendants in inverse proportion to the amount of their self-insurance and therefore in inverse proportion to their apparent vulnerability to causation and severity luck. This is because, the greater the assets of a company, the greater the frequency at which it is likely to incur liability, and therefore the more likely the outcome variability it encounters will average out over time.[59]

For example, the average individual who is in an auto accident once every ten years would be severely affected on the rare occasion when his

56. BERNARD L. WEBB ET AL., 1 INSURANCE OPERATIONS 250–54 (2d ed. 1997). For discussion of the different forms of risk-classification, see KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 68–76 (1986).

57. Baker, *Blood Money*, *supra* note 24, at 285–86.

58. *Id.* at 289–90.

59. *See* ABRAHAM & SCHWARCZ, *supra* note 32, at 493; *Commercial Liability Insurance*, *supra* note 35, at 101–03.

negligent driving caused substantial harm, if he were not covered by liability insurance. But the self-insured business that incurs dozens or hundreds of tort claims each year will not be so affected, because variability within this set of claims will be statistically predictable. The liability insurance that such a business has purchased to sit above its self-insurance will protect such a business from the outcome and severity variability that results in an extremely rare, enormous liability.

In short, by aggregating through risk classification, charging policyholders premiums in proportion to the risk of liability they pose, and then paying policyholders' judgments and settlements, liability insurance homogenizes the causation and severity luck that afflicts the incidence of tort liability itself. The arbitrariness and disproportionate liability that would otherwise characterize the different treatment of similarly negligent parties is instead transformed into liability insurance premiums that more accurately reflect the differences among parties than actually imposed liabilities themselves do. In many, if not most instances, the amount of a premium paid liability insurance—protection against the impact of liability—is likely to better reflect our considered intuitions regarding responsibility for harm than will tort liability itself.

B. The Costs of Defense

In the United States, we conceive of civil suits in a very different way than much of the rest of world. Here, if a suit satisfies minimal criteria of plausibility, the plaintiff who brings an unsuccessful suit is not responsible for the defendant's counsel fees.[60] This is the so-called "American rule."[61] Outside of tort law, there is nonetheless a considerable barrier to bringing suit because the plaintiff must pay his own (often hourly-based) counsel fees, win or lose. But most tort suits are handled by plaintiff's counsel on a contingent-fee basis. If the plaintiff succeeds, the counsel fee is a percentage of the recovery. If the plaintiff loses, no counsel fee is due.[62] The consequence is that in tort cases plaintiff's lawyers are the gatekeepers, accepting only those cases that satisfy the lawyer's risk-reward standards. Having satisfied that

60. *See* Vargo, *supra* note 7, at 1575–78. For an analysis of the impact of alternative approaches to this issue, see Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 59 (1982).

61. *See* FORMS AND FUNCTIONS, *supra* note 44, at 4.

62. *See id.*

threshold, however, potential plaintiffs have little if anything to lose and everything to gain by bringing suit.

In contrast to plaintiffs, defendants in tort suits always have nothing to gain and at least something to lose. Even a defendant that wholly defeats a suit against him still has no right to recover his costs of defense from the plaintiff. The defendant who wins a tort suit therefore always appears to lose something, and sometimes a lot, anyway. This is, *prima facie*, an unjust and arbitrary result. Yet philosophers of tort and other tort theorists virtually always completely ignore the matter of defense costs, as if the parties in an unsuccessful tort suit were returned to the *status quo ante*. That is true for plaintiffs, but not for defendants.

The principal argument for the current rule is that requiring unsuccessful plaintiffs to pay defendants' counsel fees would unduly deter potential plaintiffs from bringing suit. That is probably correct.[63] But we could certainly permit plaintiffs' attorneys to pay defendants' counsel fees if and when the plaintiffs were liable for them. If that approach were taken, then the deterrent effect on the bringing of suits would still exist, but would be indirect. The risk-reward calculations of plaintiffs' attorneys would have to take into account not only the prospect of receiving no fee or a percentage of a compromise settlement, but also the attorneys' possible responsibility for defendants' counsel fees. The result would be that, in the aggregate, attorneys would accept fewer cases, or a different mix of cases, because marginal expected rewards would have been reduced, and fewer or different plaintiffs would be able to bring suit. But we do not do that.

In any event, in the absence of liability insurance, this or some similar alternative probably would have been adopted, because I doubt that the impact of the American rule on defendants would have been considered worth tolerating, standing alone. What has happened instead is that defendants in tort cases have found a way to cushion what would otherwise be the harsh effect of the current rule, which imposes the costs of defense even on defendants who are made the subject of groundless, false, or fraudulent suits.

From very early in the development of modern tort liability, liability insurance has been comprised of two principal components: indemnity and defense. Even the earliest conventional liability insurance policies,

63. *See* Erik S. Knutsen, *The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada*, 36 QUEEN'S L.J. 113, 115 (2010) (discussing the inhibition of litigation in Canada resulting from the rule that unsuccessful plaintiffs may be required to pay defendants' costs).

first sold in the United States in the early 1880s, covered defense costs.[64] The indemnity portion of a liability insurance policy pays covered judgments and settlements. The defense portion provides a defense, usually "outside policy limits," meaning that the liability insurance provides and pays for defense counsel, but that the costs of defense do not erode the amount of indemnity provided by the policy. All individual auto and homeowner's liability insurance, all individual medical malpractice insurance, and most CGL insurance, has always been provided on this basis, and insures against the costs of defense without limit by providing that the insurer has a "duty to defend" the insured.[65]

In the extreme case, a liability insurer may be required to spend many times the amount of the actual liability insurance provided by the policy (the indemnity) in order to defend a suit against its insured. A few types of modern business and professional liability insurance policies (most notably Directors & Officers liability insurance) cover defense "within limits," typically by permitting the insured party to hire its own defense counsel and claim coverage of these costs from the insurer, with expenditures on defense provided as part of the amount of indemnity covered by the policy.[66] But these are very much the exception, not the norm, and in any event these policies also provide insurance of the costs of defense, just not without limit.

An important aspect of the defense insurance that standard liability insurance policies provide is that it does not depend on the validity of the claim against the insured.[67] Rather, liability insurance provides a defense to any claim that would be covered if it were successful.[68] In the past, policy language expressly covered claims even if they were "groundless, false or fraudulent."[69] That language has been omitted from most contemporary liability insurance policies, but other policy language that has been substituted, covering claims or suits "seeking" damages covered by the policies, is nearly as explicit on the issue.[70] The broad scope of this duty to defend is not controversial. By one name or

64. THE LIABILITY CENTURY, *supra* note 3, at 35–36.

65. RESTATEMENT OF THE LAW: LIAB. INS. § 14(3) & cmt. g (AM. LAW INST., Tentative Draft No. 1, 2016).

66. ABRAHAM & SCHWARCZ, *supra* note 32, at 536.

67. *See* RESTATEMENT OF THE LAW: LIAB. INS. § 14(1)(a) (AM. LAW INST., Tentative Draft No. 1, 2016).

68. *See* Pryor, *supra* note 31, at 1730.

69. RESTATEMENT OF THE LAW: LIAB. INS. § 14 cmt. a (AM. LAW INST., Tentative Draft No. 1, 2016).

70. ABRAHAM & SCHWARCZ, *supra* note 32, at 536.

another, the judicially-created test for the duty to defend is that the claim against the insured be "potentially" covered by the policy.[71]

The result is that those covered by liability insurance are protected not only against liability imposed if a case goes to trial or is settled, and not only against the cost of defending suits in which some payment is made to the plaintiff, but also against the cost of defeating entirely frivolous suits alleging any form of liability that is covered by their policies.[72] Defendants in such suits are not left with the bill for the costs of defense. As a consequence, significant pressure to reverse the American rule that even successful defendants must pay their own defense costs has never developed.

It is worth noting, however, that the defense component of liability insurance does not provide protection against the cost of defending all frivolous suits.[73] Rather, as I noted above, a defense is provided only if the suit in question seeks to impose liability that would be covered if the suit in question were, hypothetically, successful. This determination is made by comparing the allegations of the complaint with the terms of the policy.[74] And insurance law provides that uncertainty is to be resolved in favor of the policyholder.[75] This is what the courts mean when they say that "the duty to defend is broader than the duty to indemnify."[76]

But even though this broad conception of the duty to defend protects ordinary individuals against the costs of defending *most* suits they can expect to see, it does not protect against *all* such suits. Suits that definitely would not be covered by a policy, even if they were successful, generate no duty to defend.[77] This means that if the allegations in a suit would not be covered by any liability insurance policy that the defendant did purchase or could have purchased, then there is no means of protecting against even an unsuccessful suit of that type.[78] There are few such general categories of suit, but they do exist.

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71. RESTATEMENT OF THE LAW: LIAB. INS. § 13 cmt. b (AM. LAW INST., Tentative Draft No. 1, 2016).

72. *See* ABRAHAM & SCHWARCZ, *supra* note 32, at 600–01.

73. Even when the insurer provides a defense, there is a split of authority regarding the insurer's right to obtain recoupment upon showing that the claim—or an identifiable portion regarding which defense costs can be separately apportioned—had no potential for coverage. Some courts permit recoupment under either or both circumstances, but others do not. *See id.*

74. *Id.* at 584–85.

75. *See Commercial Liability Insurance*, *supra* note 35, at 97.

76. ABRAHAM & SCHWARCZ, *supra* note 32, at 585.

77. *See* Pryor, *supra* note 31, at 1735.

78. *See id.*

But of course there are also some types of suits that might be covered under some circumstances, but could not possibly be covered under the particular circumstances alleged, because of exclusions in a liability insurance policy that would otherwise provide coverage.[79] Most notably, all insurance policies exclude coverage of liability for harm or loss that the insured has intentionally caused.[80] The cost of defending against a false allegation that the insured intentionally caused harm or loss, when there is no accompanying express or implied allegation of a covered liability (such as negligence), is therefore not covered.[81] Nor is the cost of defending the very unusual allegation of tortious wrongdoing that no policies cover—such as negligent infliction of pure economic loss outside the professional or fiduciary liability context—covered under insurance policies.[82] The problem here is that because there is no indemnity against such an allegation, there is also no insurance of the cost of defending against it.[83] This gap is an artifact of the linkage of defense cost insurance with indemnity.[84] There is virtually no freestanding insurance against the cost of defense.[85]

I think there are two explanations for this gap. First, coverage of the cost of defending against most tort suits by liability insurance is so extensive that the demand for freestanding insurance against the remaining, rare uninsured defense costs would be very limited. Second, in light of the breadth of the existing duty to defend, insurers selling freestanding defense cost insurance could be sufficiently threatened with adverse selection that supply would be limited as well. This is because those who were most likely to be made defendants in suits not covered by their current liability insurance would be more likely to seek freestanding defense cost insurance.

The incentive structure of the tort liability system, then, is partly a function of the widespread insurance of defendants' cost of defense.

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79. *See id.*

80. *Id.* at 1725.

81. *See id.* at 1735–36.

82. *See* Ann O'Brien, *Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss*, 31 ARIZ. L. REV. 959, 968–69 (1989).

83. *See id.* at 968.

84. *See Commercial Liability Insurance*, *supra* note 35, at 105–06.

85. Some freestanding "legal cost" insurance is available, but it provides little if any protection against the cost of defending against tort suits. *See, e.g.*, ARAG, https://www.araglegal.com/index.htm (last visited Apr. 15, 2018) (offering legal insurance for the cost of such services as purchasing a home); LEGALSHIELD, https://www.legalshield.com (last visited Apr. 15, 2018) (offering legal insurance for such services as defending against prosecutions for traffic violations).

Unsuccessful plaintiffs do not have to pay defendants' counsel fees because defendants do not have to pay them directly—defendants' liability insurance pays them. If such liability insurance were not virtually always present, however, then defendants would either have demanded significant cutbacks in the scope of tort liability, or the rules permitting plaintiffs' counsel to charge contingent fees would have been changed. If the former would have provoked a change in the *de jure* scope of tort liability, the latter would have provoked a *de facto* change, as the number of lawsuits that it was practical for plaintiffs to institute would have substantially decreased.

C. Time and Change Luck: Retroactive Overruling and Long-Tail Liability

In this Section, I discuss two aspects of tort luck that are affected by the passage of time. One involves the imposition of liability in the present for the consequences of conduct that would not necessarily have been considered tortious at the time that the conduct occurred. This occurs through the retroactive overruling of precedents. The other, sometimes related, aspect involves liability imposed long after the conduct that causes harm occurred. This is "long-tail" liability. In both instances, liability insurance softens, or entirely eliminates, the disproportionate impact of this form of unlucky change over time.

1. Retroactive Overruling

Judicial decisions that overrule precedent are almost always applicable to the parties in the case that changes the law, and typically to other parties whose relevant conduct has already occurred, even when these parties could not reasonably have anticipated such a result when they engaged in the conduct in question.[86] Consequently, when a

86. *See, e.g.*, Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 282 (1969) (observing that new rules of law typically apply retroactively, regardless of whether the basis of the change is "constitutional, statutory, or judicial"). In theory, a new precedent can restrict liability and thereby surprise potential plaintiffs. I doubt, however, that a surprising *restriction* of liability affects potential plaintiffs' behavior or planning. At least in bodily injury cases, individuals' interest in preserving their own bodily integrity is probably sufficient to maintain whatever incentive they have to take self-protective care, with or without anticipated protection afforded by tort liability. In any event, over the last 150 years, the evolution of tort has been almost exclusively in the direction of liability expansion. *See generally* FORMS AND FUNCTIONS, supra note 44. Only in the field of defamation, where constitutional restrictions on the scope of liability have developed, has liability contracted. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (restricting

tort-liability-expanding judicial decision is made, a party that did not understand its conduct to be tortious at the time of the now-relevant conduct may nonetheless find that it is later liable for the harmful consequences of that conduct.[87] Sometimes such a change in the law could have been anticipated as a possibility, but not always. In the latter cases, the imposition of liability is a surprise—a turn of bad luck. Those whose conduct has already occurred are unlucky enough to face liability without having had any reasonable means of avoiding it, while others have the means of avoiding liability because they have notice of the prospect that liability will be imposed before they decide whether to engage in conduct that may expose them to liability.

But liability insurance mitigates, or eliminates, this effect. The genius of liability insurance, from the beginning, has been that it provides insurance against liability generally, rather than targeting liability under a particular doctrine or doctrines.[88] Thus, CGL insurance covers businesses' liability for "damages[] because of bodily injury or property damage" that occurs during the policy period, without regard to the particular doctrine of tort law or rule under which a plaintiff sues the policyholder.[89] Similarly, auto liability insurance covers "damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident" during the policy period.[90] Other forms of liability insurance take an analogous, "general" liability insurance approach.[91]

Consequently, when new forms of liability develop, or old restrictions on the scope of liability are removed, any retroactivity that they entail is automatically handled by the applicable type of liability insurance. For example, when strict liability for injuries caused by product defects replaced negligence as the basis for liability across the country in the period between 1965 and 1975,[92] there was no need for any adjustment in the language of CGL insurance policies, and policyholders did not find themselves exposed to new uninsured liabilities. Rather, product manufacturers whose policies covered liability for bodily injury "that occurred during the policy period" were

public officials' right to recover damages for defamation); Gertz v. Welch, Inc., 418 U.S. 323, 351 (1974) (restricting private figures' right to recover damages for defamation regarding matters of public concern).

87. *See* FORMS AND FUNCTIONS, *supra* note 44, at 155–56.

88. *See id.* at 282.

89. *See* ABRAHAM & SCHWARCZ, *supra* note 32, at 435–36.

90. *See id.* at 639.

91. *See* THE LIABILITY CENTURY, *supra* note 3, at 148.

92. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1975).

covered against strict liability, if that was the theory under which liability was imposed on them, just as they had been covered against negligence liability before that.[93] The only adjustment necessary was that insurers had the option of raising premiums for subsequently-sold insurance.[94]

In effect, then, liability insurance not only insures against tort liability. By providing insurance of liability that is not geared to particular causes of action, liability insurance also protects policyholders against the risk of a change in tort law that expands liability retroactively.[95] Among other things, this is insurance against the risk that a retroactive change in the law will impose liability that is disproportionate to the blameworthiness that would have been attributed to liability-triggering conduct, at the time the conduct occurred.[96] This is insurance, that is, against a particular form of tort luck: being subjected to an otherwise unfair retroactive judgment of tortiousness.

2. Long-Tail Liability and the Disconnection Effect

Liability has a long "tail" when there is a considerable period between liability-triggering conduct and the imposition of liability for harm caused by that conduct.[97] Long-tail liability arises in the following way. Statutes of limitation enacted in every state provide that tort suits must be brought within a specified period of time after a tortiously-caused injury or loss occurs.[98] The nominal period of limitations is rarely more than six years.[99] This restriction gives potential plaintiffs an incentive to bring suits while evidence is fresh, and provides potential defendants with repose and enhanced security of expectations.[100]

Basic fairness to injured parties, however, requires at least some additional flexibility. Much tortiously-caused injury manifests itself at

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93. *See* THE LIABILITY CENTURY, *supra* note 3, at 154–55.
94. *See id.* at 153–54.
95. *See id.* at 150–51.
96. *See id.*
97. *See, e.g.*, Susan D. Glimcher, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U. PITT L. REV. 501, 502–03 (1982) (stating that liability from the use of pharmaceuticals may not be discovered until many years later when the drug user's offspring reaches adulthood).
98. *Id.* at 501.
99. *Id.*
100. *See id.*

the same time or virtually the same time as tortious conduct occurs.[101] Auto accidents and slips and falls are good examples. But that is not always the case. First, in some instances there is a gap between the time tortious conduct occurs and the time that such conduct causes injury. It is impossible for an injured party to bring suit before he or she is injured. Therefore, the period of limitations cannot begin to run until injury actually occurs. The result is that potential defendants cannot have the repose and security of expectations that would be provided to them if the period of limitations began at the time that possibly-harmful conduct occurred. Second, regardless of when tortiously-caused injury occurs, the plaintiff may be unaware of its occurrence until years afterward.[102] For example, certain kinds of insidious disease, such as asbestosis, can go undetected for a considerable amount of time.[103]

In both instances, the injured party cannot reasonably be expected to bring suit until an injury manifests itself. By legislation or judicial decision, most states have therefore engrafted "discovery" exceptions to their statutes of limitations that permit the imposition of "long-tail" liability.[104] The result is that suits alleging liability for bodily injury or property damage can sometimes be brought decades after the conduct for which the defendant is alleged to be liable took place.[105] The very reduction of unfairness to injured parties that discovery exceptions accomplish, however, produces a corresponding disadvantage to certain defendants, because the security and repose that would otherwise be provided by statutes of limitation is removed by such exceptions.[106]

a. *The Disconnection Effect*

Discovery exceptions not only reduce the security of expectations but also the repose that statutes of limitations provide potential defendants.[107] In addition, in the case of corporate defendants, the longer the time between the occurrence of the conduct that ultimately causes injury and the initiation of suit by the injured party, the greater

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101. *See id.*

102. *See, e.g.*, Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1187 (2d Cir. 1995) (asbestos case).

103. For a discussion of this phenomenon in the asbestos context, see *id.* at 1198.

104. *See, e.g.*, CAL. CIV. PROC. CODE § 340.5 (West 2017); KY. REV. STAT. § 413.140 (West 2017); N.Y. C.P.L.R. § 214 (West 2003); Childs v. Haussecker, 974 S.W.2d 31, 33 (Tex. 1998); Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983); Glimcher, *supra* note 97, at 501.

105. *See, e.g., Stonewall*, 73 F.3d at 1191.

106. Glimcher, *supra* note 97, at 512–14.

107. *Id.*

the chance that, for practical purposes, the identity of the real party or parties in interest on the defendant's side have changed. I will call this the "disconnection effect," to reflect the possible absence of a connection between the parties that should in fairness bear the costs of actions taken by a company while these parties were shareholders, and the parties that actually face the economic burden of liability when it is imposed many years later. This reflects a disconnect between moral responsibility and actual liability.

Consider the most extreme but not at all extraordinary example: a publicly-traded corporation that is held liable for injuries caused by conduct that occurred decades earlier. There may well have been a complete turnover, perhaps multiple complete turnovers, of those who were shareholders at the time the corporation's wrongful conduct occurred, and those who are shareholders at the time the suit alleging liability for harm caused by that conduct is brought. The logic of corporate liability is that the shareholders properly bear indirect responsibility (up to the value of their shares) for the tortious conduct of the company they own, because the shareholders have ultimate control of that conduct.[108]

Those who did not own shares at the time of corporate conduct, however, had no control over that conduct. There must therefore be a different justification for imposing liability on a corporation whose shareholders bear little or no relation to those who had the right to control conduct that is now the focus of liability. Three such justifications have some plausibility.

First, information about the risk that a corporation's past conduct has resulted in harm, or will result in harm, often emerges gradually rather than at a single moment.[109] At any given point, therefore, the value of the shares of a corporation will take into account the known risk that it will face liability in the future for harm caused by conduct that occurred in the past.[110] The value of shares will be discounted accordingly. At any given time, shareholders will in effect bear the risk of the corporation's future liability through a reduction in the value of their shares that takes into account the possibility that past corporate

108. Unlimited shareholder liability for corporate torts would be even more vulnerable to the concerns I have just noted. *See, e.g.*, Hansmann & Kraakman, *supra* note 6, at 1884–85. Long-tail liability does not appear to trouble the authors of this seminal piece, probably because they assume virtually throughout their analysis that liability insurance will be available to shareholders.

109. *Id.* at 1896.

110. *Id.* at 1896–97.

conduct will result in future liability.[111] Correspondingly, those purchasing shares at any such time will be doing so at a discount in the price of the shares that takes into account the risk that the corporation will be held liable in the future. If liability is later imposed, these shareholders will have been paid to bear liability indirectly, by virtue of the discount in the price of the shares they purchased.

Second, as between innocent current shareholders and innocent injured parties, the former are superior bearers of the risk of injury than the latter. Many shareholders are more likely already to have diversified their risk by owning shares in multiple corporations. In effect, comparatively innocent shareholders insure completely innocent potential victims.

Finally, there is no administratively practical alternative. A theoretically superior approach might be to permit corporate entities a reduction in liability in proportion to the degree of responsibility properly allocable to their current shareholders, in light of their knowledge at the time they purchased their shares of the risk of future liability, and in light of the amount of the discount in the price of the shares they purchased that is traceable to the risk of future liability. But such an approach would create fact-finding nightmares.

After the imposition of long-tail liability became more common in the early 1980s, a number of states enacted measures to mitigate this form of liability. For example, "statutes of repose" applicable to products liability set absolute limits on the period of years after the manufacture of a product during which suit alleging that the product was defective could be brought.[112] And exceptions to the rule that the period of limitations did not begin to run until an injured child reached its age of majority were also sometimes enacted.[113] But these reforms only modestly mitigated the impact of long-tail liability.

As a consequence, and whatever the overall arguments for long-tail liability, the potential for the disconnection effect to generate tort luck remained. But as in the case of the other instances of tort luck that I

111. *Id.* at 1898 n.50.

112. *See, e.g.*, General Aviation Revitalization Act of 1994 § 3(3), 49 U.S.C. § 40101 (2012) (adopting an eighteen-year limitation period for general aviation aircraft); Tanges v. Heidelberg N. Am., 710 N.E. 2d 250, 251 (N.Y. 1999) (applying Connecticut's ten-year statute of repose to injury caused by a printing press).

113. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 260, § 4 (2014) (prescribing both a three-year statute of limitations and a seven-year statute of repose for medical malpractice torts, regardless of the age at which the harm was incurred); 42 U.S.C. § 300aa–16(a)(2) (1994) (adopting a thirty-six-month statute of limitations beginning at onset of the symptom caused by the faulty vaccine, regardless of the age of the patient).

have canvassed, liability insurance has ameliorated a considerable portion—though not all—of this effect.

b. The Impact of Liability Insurance

There might well have been considerably more pressure to alter the scope of long-tail liability, were it not for the way that liability insurance operated during the most intense period of long-tail liability. The relationship between long-tail liability and liability insurance is complicated, but I believe that the history of that relationship largely supports my contention that liability insurance ameliorated the disconnection effect, during the period in question, just enough to forestall additional reforms of long-tail liability. Briefly summarized, that history is as follows.

During roughly the decade between 1975 and 1985, long-tail liability not only came into its own; this was also the period when long-tail liability was at its peak. The classic mass tort suits alleging long-tail liability were filed during this period. These included suits involving the Dalkon-Shield, Bendectine, asbestos, DES, and other products posing the risk of long-latency disease.[114] In addition, CERCLA, the federal statute imposing massive retroactive cleanup liability, largely on U.S. corporations, for land and water pollution caused by hazardous substances, was enacted in 1980.[115]

All these forms of liability involved extremely long-tail injury or damage. For example, DES suits involved women who alleged that they had been injured *in utero* by their exposure to a drug that their mothers had taken during pregnancy, which resulted in the daughter-plaintiffs suffering from adenocarcinoma when they became teenagers or adults.[116] Similarly, the plaintiffs in asbestos bodily-injury suits often had been exposed to this product decades before their lung diseases manifested themselves.[117] And CERCLA suits alleged liability for the cost of pollution cleanup involving property damage that may have begun to occur decades earlier.[118]

The liability insurance that many of the defendants facing these and similar liabilities had purchased over the years, however, had the

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114. *See* THE LIABILITY CENTURY, *supra* note 3, at 147.

115. For a discussion and analysis of these developments, see *id.* at 146–52.

116. *See* Sindell v. Abbott Labs., 607 P.2d 924, 924–26 (Cal. 1980).

117. *See* Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1186 (2d Cir. 1995).

118. *See, e.g.*, A.Y. McDonald Indus. v. Ins. Co. of N. Am., 475 N.W.2d 607, 610 (Iowa 1991).

potential to strongly mitigate the disconnection effect that otherwise would have been created by these liabilities. What was called Comprehensive General Liability ("CGL") insurance before 1986 (and "Commercial General Liability" after that) was the standard form of liability insurance purchased by commercial entities beginning in 1941.[119] A predecessor form of insurance, "public liability" insurance, had provided similar coverage before 1940.[120] Consequently, there was liability insurance covering commercial entities during all the times relevant to the long-tail liabilities in question.

This is because CGL insurance and its predecessors covered liability incurred on an "occurrence" basis.[121] Under these occurrence policies, there was coverage of liability imposed because of bodily injury or property damage that occurred "during the policy period."[122] As a result, the liability insurance policy or policies that were in effect at the time of the injury or damage that was the subject of a much later lawsuit were responsible for any liability imposed in that suit.[123] For example, a suit alleging liability for injury caused by DES in 1954, but not manifested until 1974, would be covered by the defendant or defendants' 1954 CGL policies, even if a suit alleging liability for that injury was brought in 1975. Similarly, a suit alleging liability for the cost of pollution cleanup at a site where pollution occurred between 1940 and 1960 would be covered by the defendant's 1940–1960 CGL insurance policies, even if the suit were not brought until 1982.

Consequently, to the extent that a defendant's liability insurance policies covered it against such liability, that insurance eliminated the disconnection effect, because of the time when the insurance was purchased and the identity of the shareholders who paid for it indirectly. Liability imposed on a defendant would be covered by liability insurance that was effectively paid for by shareholders at or near the time of the conduct causing the injury or damage that ultimately resulted in liability many years later.[124] Current shareholders of the defendant would not bear the burden of such liability, because the liability insurance providing coverage of a current long-tail liability would have been paid for by shareholders in the distant past, not by current or nearly-current shareholders.[125] In effect,

119. *See* THE LIABILITY CENTURY, *supra* note 3, at 155.
120. For a history of the development of CGL insurance, see *id.* at 32–35, 152–55.
121. *See id.* at 154.
122. *See id.*
123. *Id.*
124. *See id.* at 159–60.
125. *See id.* at 163–64.

long-tail insurance of long-tail liability potentially eliminated the disconnect that created the disconnection effect.

c. *Gaps in the Ameliorating Impact of Liability Insurance*

Even at the time, however, in practice, CGL occurrence-based liability insurance did not always completely eliminate the disconnection effect. Insurers had a series of complete and partial possible defenses to claims for coverage, and the amount of insurance that defendants had purchased in the distant past was not always sufficient to cover the enormous liabilities that they were currently incurring. But at least in principle, CGL insurance could eliminate disconnection.

Moreover, as the long-tail liability phenomenon peaked in the mid-1980s, CGL insurers shifted gears in a way that created a greater possibility of disconnection effects going forward. Liability insurers did this by partially shifting from occurrence to "claims-made" coverage.[126] In contrast to occurrence policies, claims-made policies cover liability for claims or suits brought during the policy period, even if the bodily injury or property damage for which the suit seeks damages occurred before the policy period.[127] As a result, past shareholders pay for occurrence coverage of long-tail liability, whereas current shareholders pay for claims-made coverage of long-tail liability.[128]

By 1986, medical malpractice insurance was predominantly claims-made.[129] But because the same physician paid for insurance covering his or her liability over time, the shift to claims-made beginning in the mid-1970s created no disconnect.[130] At this point, however, CGL insurers began offering only claims-made policies to some corporate policyholders.[131] This could not create any retroactive disconnection because occurrence policies that had been issued prior to 1986 would continue to cover liability imposed in the future, arising out of bodily injury or property damage that had occurred prior to 1986.[132]

However, going forward, the introduction of claims-made CGL policies could create a disconnection. Suits for bodily injury or property damage that occurred after 1986 would be covered by the claims-made

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126. *Id.* at 163.
127. *Id.* at 163–64.
128. *See id.*
129. *Id.* at 125–30.
130. *Id.* at 125–30.
131. *Id.*
132. *See id.* at 126–28.

policy in force during the year when a suit was brought.[133] Current or nearly-current shareholders of defendants in such suits would have paid for this coverage, even when the conduct causing the injury or damage, and possibly the injury or damage as well, had occurred years earlier, when prior shareholders were effectively the owners of the defendant.[134] For example, a claims-made policy issued in 2016 would cover liability imposed in a suit brought in 2016, alleging liability for harm resulting from conduct that had occurred in 1986.

The disconnection effect that occurrence-based CGL insurance policies had been neutralizing for many decades was therefore re-introduced by the shift from occurrence to claims-made coverage. And in certain instances, the impact of claims-made insurance was even more substantial than might be supposed. The reason is that many long-tail liabilities emerge over time rather than abruptly, thereby giving claims-made insurers the opportunity to completely exclude coverage of specified long-tail liabilities from the scope of their policies. A good example is the inclusion of asbestos exclusions in claims-made policies beginning in the 1980s.

For example, suppose that a disease was allegedly caused by exposure to a defendant/policyholder's product from 1986 to 1996, and that, once the disease begins to manifest itself, scientific inquiry shows that there is a twenty-five-year latency period between exposure and manifestation of disease. The disease first manifests itself in some individuals beginning in 2011, and suits alleging liability for it begin to be filed in 2012. The defendant can expect suits to be filed at least until 2021, and probably for some years thereafter as well. But potential claims-made insurers now know that such suits will be filed. Consequently, these insurers have the right to decline to sell coverage, or only to sell policies containing exclusions from coverage of liability for the disease in question, thus leaving current shareholders to bear the full burden of liability for harm resulting from conduct that occurred twenty-five or more years earlier. In such instances, claims-made insurance does not merely shift the cost of insurance from past to current shareholders; it effectively makes it impossible for current shareholders to insure against financial responsibility for harm caused by conduct of the company they own that occurred before they were shareholders. This is disconnection between responsibility and liability with a vengeance.

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133. *See id.* at 163.
134. *See id.*

Interestingly, however, that very prospect influenced the development of tort law in a way that mitigated this form of the disconnection effect. In the mid-1980s there was a "crisis," called a "liability insurance crisis" by some[135] and a tort liability crisis by others,[136] that reflected in part the turmoil resulting from the rise of long-tail liability. For some corporations and other organizations, the cost of liability insurance doubled or tripled in the space of a year, and for other entities liability insurance was unavailable at any price for a period. The causes of this crisis are complex, but there can be little doubt that it was at about this time that the expansion of tort liability, including long-tail liability, which had been taking place in the courts for the past twenty-five years, ceased occurring.[137] This is also the period when the first tort reform statutes of general application were enacted in many states.[138] For three decades since that period, tort liability doctrine has remained largely unchanged, and certainly has not expanded liability. The momentum of change, and the crisis atmosphere that accompanied it, are a distant memory.

In my view, at least some of the responsibility for this development was the interaction between long-tail liability and insurance. The crisis of the mid-1980s was a shot across the bow of courts and legislatures. These institutions saw for the first time that where tort law went, liability insurance was not always sure to follow. And with that recognition, the expansion of long-tail liability halted.

But it did not reverse direction. With increased stability and increased confidence that the future would look roughly like the past, liability insurers in the ensuing period have sometimes offered policyholders the choice between claims-made and occurrence-based CGL insurance. It seems likely that the price of shares in publicly-traded companies reflects to some extent a company's choice between occurrence and claims-made coverage, and the corresponding degree of

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135. *See, e.g.*, Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 399 (1987); Kyle D. Logue, *Toward a Tax-Based Explanation of the Liability Insurance Crisis*, 82 VA. L. REV. 895, 895 (1996).

136. *See, e.g.*, Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. ON REG. 455, 455 (1988).

137. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 248–54 (Expanded ed. 2003); Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 791–94 (1992); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 691 (1992).

138. For a catalogue of the reforms, see Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 217–23 (1990).

liability exposure and premium levels that a new shareholder can expect the company to face. Liability insurance thus no longer automatically eliminates the disconnection effect, but the market may be doing so in part by way of its impact on share prices.

III. THE DEVELOPMENT OF TORT LIABILITY WITHOUT LIABILITY INSURANCE: A COUNTER-HISTORY

A completely different way to assess the relationship between tort luck and liability insurance is to anticipate how tort liability would have developed if liability insurance had never existed. How might tort liability have dealt with the disproportionate effects of tort luck if liability insurance had not been available to ameliorate these effects? I think that modern tort law—the tort law that we know and accept as being somewhat inevitable—might well have developed very differently. In what follows, I will identify a number of different scenarios in which tort law might have developed in the absence of liability insurance. Without necessarily making strong historical claims, I will use this counter-history as an alternative means of exploring the adjustments that tort law might have made if liability insurance had not been available to ameliorate tort luck and thereby to influence the direction that tort law actually took.

A. *Less Liability, Calibrated Damages, and Loser Pays*

It is easy to anticipate that, in the absence of liability insurance, tort liability would have been more limited than it has proved to be, that damages rules would have been different, and that unsuccessful plaintiffs would have been required to pay defendants" counsel fees.

1. Less Liability

The development of tort liability since the late nineteenth century is essentially the story of the expansion of negligence liability. Abolition of many of the no-duty and limited-duty rules that restricted liability for negligence, relaxation of the rules regarding the burden of proving causation, and the rise of strict liability for injury and damage caused by product defects are all examples. Each took place in the face of confidence on the part of the courts that, where liability went, liability insurance would follow.[139] If liability insurance had not existed, however, the courts likely would have been much more restrained in their expansion of tort liability, and with it, exposure to liability related to tort luck; they might well have refrained from much of this expansion.

Moreover, because liability insurance ameliorated tort luck, the existence of liability insurance was a gold mine for both plaintiffs' attorneys and defendants' attorneys, and helped to motivate their involvement in the developing expansion of tort liability. For plaintiffs' attorneys, liability insurance was a source of recovery for their clients and for what amounted to the payment of contingent fees.[140] Certainly the plaintiffs' bar therefore had a strong incentive to promote the expansion of tort liability, and to oppose legislation and judicial decisions restricting tort liability; they could do so openly. For defense counsel, there was also money generated by liability insurance.[141] The liability insurer's duty to defend provided a ready and reliable source of counsel fees for these attorneys. Prudence and loyalty to their clients may have prevented the defense bar from openly opposing reform legislation, but legislative restriction of liability also was not in its interest. This probably had subtle political ramifications that inhibited the enactment of such restrictions.

If liability insurance had not existed, however, neither side of the bar would have had the same strong interest in the slow and steady expansion of tort liability. They would likely have favored this expansion less intensely, and opposed legislative restriction of liability less strongly. The result might well have been the enactment of statutory tort reform before it appeared in the mid-1980s, and reform that was more restrictive than actually occurred.[142]

We have some limited evidence on this score in the history of long-tail liability. As I indicated above, as such liability expanded, occurrence-based liability insurance came under stress. In the mid-1980s it became more difficult to obtain such insurance, both because claims-made coverage was made more available, and because an "absolute" pollution exclusion precluding coverage of liability for most

139. For the classic statement of this position, see Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

140. Sanders & Joyce, *supra* note 138, at 256 (suggesting a "belief that plaintiffs' lawyers escalate damage claims for their own pecuniary interests, and perhaps a belief that juries award unjustifiably large sums to ensure that the plaintiff retains some given amount after the lawyer takes his fee").

141. *Id.* at 216 n.35 (discussing the rise of the cost of defending against a claim).

142. *See id.* at 256.

traditional environmental pollution was included in both forms of CGL insurance.[143] The expansion of long-tail liability then halted, and measures that to some extent placed limits on the existing scope of long-tail liability were adopted. For example, statutes of repose placed limits on the length of time that physicians remain vulnerable to liability;[144] doctrines that facilitated long-tail liability such as market-share liability did not spread much beyond the states from which they originated or the products on which they were based;[145] and a state-of-the-art defense to products liability, relevant almost exclusively to long-tail liability, and that some courts had at first rejected,[146] firmly took root.[147] Here, then, we need not speculate about what would have happened had liability insurance not existed; as insurance against long-tail liability became less available, and the expansion of such liability ceased and was to a significant extent curtailed, both judicially and legislatively.

2. Calibrated Damages

As long as the plaintiff's negligence has not contributed to his or her injuries, tort law takes an all-or-nothing approach to damages. Either the defendant is liable in full for the plaintiff's damages, or the defendant is not liable at all. But this need not necessarily have been how the law of tort damages developed if the full impact of tort luck was always visited on defendants. In the absence of liability insurance, it seems very plausible that both causation and severity of loss luck in tort might have been addressed by adopting the converse of comparative negligence, which developed to ameliorate the harsh effect of the complete defense of contributory negligence: depending on their conduct, defendants might have been liable for less than the plaintiff's full losses, even when the plaintiff had not been negligent.

For example, in the absence of liability insurance, the amount of liability imposed on defendants might have varied based on a qualitative measure, depending on whether the defendant had committed slight negligence, negligence, or gross negligence. Slight negligence might have resulted in liability for one-quarter or one-third of the plaintiff's damages, negligence in liability for one-half or two-

143. KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 60 (1991).

144. *See* 42 U.S.C. §§ 300aa–14, 16 (1994); MASS. GEN. LAWS ch. 260, § 4 (2014).

145. Kenneth S. Abraham, *Stable Divisions of Authority*, 44 WAKE FOREST L. REV. 963, 965 (2009).

146. *See, e.g.*, Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 546 (N.J. 1982).

147. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. m (AM. LAW INST. 1998).

thirds, and gross negligence in liability for three-quarters or all of the plaintiff's damages. In this way, the minute or modest differences in the blameworthiness of the defendant's conduct that tort law now formally ignores might have been given operational content that is now taken care of by the averaging effect of liability insurance premiums.

Alternatively, the damages awarded might have varied based on a quantitative measure. Comparative negligence is based on a quantitative measure, but despite its name the measure is a fraction of the total negligence contributing to the plaintiff's loss. That analogy would have been unworkable where only the defendant was negligent. But it would have been possible to provide that the defendant would be liable for partial damages, quantified in proportion to the degree of blameworthiness attributable to him.

Finally, damages might have been awarded on a scalar basis. A damages scale provides specified recoveries for specified injuries. The scale can address pain and suffering damages only, or all damages. Thus, for example, pain and suffering damages for loss of an arm might be $10,000 for each year of the plaintiff's life expectancy. Or total damages might be $25,000 per year, regardless of the actual amount of the plaintiff's past and anticipated future medical expenses and lost wages.[148] A scalar approach cushions defendants against the variability of damages awarded by different juries for the same injury, but does not address conduct or damages variability more generally.[149]

3. Loser Pays

Ironically, coverage of defendants' defense costs by liability insurance may have helped, indirectly, to bring about the expansion of tort liability. It seems unlikely that successful defendants would have continued to bear their own legal costs if liability insurance had not been available to pay these defense costs. Either plaintiff's attorneys would have been authorized to pay these costs when their clients were

148. *See generally* Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1989).

149. It is worth emphasizing that although each of these approaches would have had some impact on causation and severity luck, none would have neutralized their arbitrary or disproportionate features as effectively as liability insurance has done. That is because it would still have been possible for an only slightly negligent defendant to have caused an enormous amount of harm and to have been held liable for a sizable sum, even if that sum was only a modest percentage of the plaintiff's total loss. Liability insurance protects a defendant against such an outcome.

unsuccessful, or plaintiffs themselves would have been required to bear them, as occurs now in many foreign systems.[150]

Under either approach, there would have been fewer suits brought, including a disproportionate reduction in the number of high risk suits seeking to bring about a change in the law favoring liability. These are the riskiest suits to bring, and therefore they would have been most affected by a loser-pays rule. The result could have been not only a reduction in the number of suits and recoveries as compared to what actually occurred, but a tendency for the law of torts to be less favorable to plaintiffs than it turned out to be, simply because disproportionately fewer suits seeking a change in the law would have been brought.

B. Bifurcation of Liability Standards

A very different development that might have occurred in the absence of liability insurance is bifurcation. Different liability standards might have been applied to individuals and small businesses, on the one hand, and large organizations—especially large commercial enterprises—on the other hand.

In the face of modern tort liability, liability insurance is essential for individuals and small businesses. Without liability insurance, merely being named the defendant in a tort suit would be a potential disaster to such parties, and could bring financial catastrophe in the event that the suit is successful. But for large commercial enterprises, liability insurance is in all but the most extreme cases a method of financial planning rather than a bulwark against disaster. The shareholders of such enterprises typically have diversified portfolios; uninsured liability would therefore simply be passed through to such shareholders *pro tanto*, in the form of a decline in the value of their shares. Liability insurance helps smooth out the corporation's balance sheet by averaging expected losses over time, as well as protecting against rare losses of unexpected magnitude.[151]

It is therefore the former group—individuals and small businesses—who would have been most affected if tort liability had developed in the absence of liability insurance. Tort liability rules are

150. The incentives and effects that arise in a loser-pays system can be complex. *See* Knutsen, *supra* note 63, at 115 (describing the obstacles that middle class people face in bringing lawsuits). For discussion of the issues, see generally Bruce L. Hay, *Fee Awards and Optimal Deterrence*, 71 CHI. KENT L. REV. 505 (1995); Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139 (1984); Shavell, *supra* note 60.

151. *See* THE LIABILITY CENTURY, *supra* note 3, at 232–35.

largely unitary—one size fits all defendants, whether individuals or entities, and whether the entities are small or multi-national. But there are exceptions: products liability rules do not apply to occasional sellers of new products or to any sellers of used products,[152] different rules apply to children engaging in non-adult activities than to adults,[153] and those with mental deficiencies are sometimes held to a lesser standard than those without such deficiencies.[154] If tort had developed in the absence of insurance, there might have been many more such bifurcated rules.

Most importantly, tort law might have applied different rules to large commercial enterprises than to individuals and smaller businesses, with the former facing different, and more exacting, liability rules than the latter. For example, different rules governing foreseeability might have traced causation further for large commercial defendants than for others; there might have been more or stronger defenses available to individuals and small businesses; the collateral source rule might have applied in suits against large commercial enterprises but not in suits against individuals and smaller businesses; a more nearly subjective standard might have been used to determine whether the latter were negligent; and compliance with custom by individuals and small businesses might have been a complete defense to a claim of negligence rather than merely an evidentiary consideration for the trier of fact.

The result of this sort of bifurcation would have been that defendants that had realistic prospects of passing their liability costs on to shareholders would have faced tort liability as it has actually developed, whereas those who would be forced to shoulder liability themselves would have faced less liability than they do now.

C. *Vertical Liability Integration*

The foregoing scenarios each involved, or were likely indirectly to produce, less tort liability than has actually developed. Under a different scenario, there might have been a radical shift in the focus of liability. If there had been no liability insurance, but the expanded tort liability that now exists had developed anyway, it seems likely that

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152. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. LAW INST. 1998).

153. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 10 (AM. LAW INST. 2005).

154. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 11 (AM. LAW INST. 2005).

another adjustment would have been made to accommodate the liability exposure that individuals and small businesses would have faced.

I call this "vertical liability integration." It would consist of sizable entities, operating further than individuals from the proximate cause of harm, nonetheless being held vicariously liable for, or contractually undertaking to indemnify, individuals held liable in tort. For example, if medical malpractice liability insurance had not developed, hospitals and other health-care organizations such as HMOs might have been held liable for, or contractually undertaken to indemnify physicians against, liability for medical services provided by physicians under the auspices of or in connection with an affiliation between a physician and a hospital or other health-care organization. As I have indicated in other work, this might or might not have resulted in more formal or informal vertical integration of health-care delivery more generally, as the organizations bearing the actual cost of malpractice liability sought to control the conduct of physicians in order to influence the incidence of their liability.[155]

A development more radical but still possible to imagine would have involved vertical integration of liability for auto accidents. Auto liability is the domain where ordinary individuals would have been most vulnerable without the protection provided by liability insurance. Without such protection, an auto liability regime even remotely resembling the regime that has actually developed would have posed the threat of financial ruin to many individuals and families. Two different forms of vertical liability integration can be imagined.

First, employers might have undertaken to bear liability for all of their employees' and family members' auto liabilities, whether or not work-related. At first glance, this may seem to be a big leap, but in fact it is not. This is, after all, effectively what employer-funded health insurance has done for a very substantial percentage of the medical expenses of employees and their families, beginning during the second half of the twentieth century: employers have made themselves responsible for the health care costs of employees and their families, even if the costs are not work-related in any way. Bearing all of employees' auto liabilities, whether or not work-related, could have worked in roughly the same way.[156]

155. *See generally* Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381 (1994).

156. This might have involved greater moral hazard than risk-classified liability insurance, but it is also possible that wage adjustments or payroll deductions resembling risk-proportional auto liability insurance premiums might have mitigated this hazard.

Second, auto manufacturers might have undertaken the burden of the auto-related liabilities of the purchasers of their vehicles and their families, either on an automatic basis or only for purchasers whose employers did not already cover the purchasers' auto liabilities. It is quite possible that we will be moving in that direction anyway. With the advent of self-driving motor vehicles, many auto accidents will be caused by manufacturer error rather than driver error. Liability for auto accidents may therefore evolve on its own toward manufacturer rather than driver liability.[157]

D. More Government Regulation

One of the key characteristics of our system is that much conduct that otherwise might be prohibited or directed by regulation is left permissible and unregulated, in part because those who engage in the conduct face the threat of tort liability for harm that the conduct may cause, and those who suffer such harm have some assurance of compensation. Thus, not only the threat of liability, but also the incentives to avoid causing harm that are created by liability insurance, are considered to be a sufficient deterrence substitute for regulatory prohibitions and directives.

As a consequence, our system contains a complicated mix of safety incentives generated by the market, regulation, tort, and liability insurance. In a rough and ready way, there is an equilibrium reflected by this mix. For its part, liability insurance creates a wide variety of incentives for policyholders to conduct their activities more safely than they would in the absence of insurance. In this way, liability insurance is a form of outsourced government regulation that reduces moral hazard.[158]

Without the safety incentives that liability insurance creates, the risk that tortious activity would cause injury, damage, or loss would probably have been substantially increased. The equilibrium among the current sources of safety incentives would not have existed. With the threat of greater harm caused by tortious conduct, I think that there would have been far more pressure for governmental safety regulation than there actually has been.

157. *See* Andrzej Rapaczynski, *Driverless Cars and the Much Delayed Tort Law Revolution* (Columbia Law Sch. Law & Econ. Working Paper No. 540, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764686.

158. *See generally* Ben-Shahar & Logue, *supra* note 54.

Probably some of this increased pressure would actually have produced more regulation than we currently have. The upside of our current freedom to engage in risky conduct, subject to the threat of tort liability covered by liability insurance, is of course the possibility that the conduct will be productive and that the risk of harm it entails will not materialize. With increased regulation, however, this upside would have been at least to some extent replaced by a decreased potential for productive activity, albeit with less chance of tortiously-caused harm occurring. That state of affairs would have entailed a very different trade-off between freedom of action and safety than has been generated through the availability of liability insurance. Without liability insurance, in a very real sense we would have had a system with less freedom of action than this form of insurance, linked with tort liability, has afforded us.

IV. CONCLUSION

The features of our system that involve tort luck may seem to be unavoidable and uncontroversial, but neither was inevitable. Modern tort liability and liability insurance have grown up together. As the scope and incidence of tort liability expanded, liability insurance virtually automatically ameliorated or eliminated the impact that luck would otherwise have had on the individuals and entities that bear liability today. More than merely a source of money to pay judgments, liability insurance is now a constitutive feature of tort liability, the means by which tort luck is tamed and rendered fair. If liability insurance did not pervasively perform this function, our system of tort liability might well have looked very different; it certainly would have been far less acceptable.