BOOK REVIEW

THE CHICKEN AND THE EGG: KENNETH S. ABRAHAM'S "THE LIABILITY CENTURY"

Adam F. Scales

INTRODUCTION

IT may surprise casual students of insurance that relatively few insurance law scholars are equally at home writing about torts. Until recently, insurance law scholarship was essentially contract law scholarship, even as the major disputes of the past quarter-century have emerged from the transformation of tort liability that occurred in the 1960s. For their part, torts scholars have tended to treat insurance as an afterthought—a footnote to important debates about such things as corrective justice, deterrence, and efficiency. Furthermore, although these fields are naturally hospitable to law and economics scholars, relatively little effort has been expended to analyze the systematic interaction between these different bodies of law and bureaucracy. In contrast, Professor Abraham's important book, *The Liability Century*, ably threads this needle by providing a cogent analysis of these two highly important and interrelated fields.

Books about the tort system tend to be polemics relentlessly drained of nuance.[1] Either the tort system is awful—an unmitigated hindrance to the national economy and progress[2]—or the tort system is the only thing standing between the welfare of the American public and the abyss: its principal flaw is that there is not more of it.[3] *The Liability Century* is, by contrast, a largely anthropological

[1] An important recent exception is Tom Baker, The Medical Malpractice Myth (2005).

[2] See, e.g., Robert V. Wills, Lawyers Are Killing America: A Trial Lawyer's Appeal for Genuine Tort Reform 7 (1990) ("My central message is that lawyers control your life more than you realize and certainly more than you would want them to.").

[3] See, e.g., Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law (2001).

exercise. Peering over the ridge separating the old century from the new, Abraham examines what might be labeled "The Ages of American Liability Law." Through these ages, he elucidates the appealing metaphor with which he opens his study:

> Astronomers have discovered a solar formation they call a "binary star." This formation consists of two suns, each in orbit around the other. Their center of gravity lies at a point in between them, and they revolve around that center of gravity. Neither star could remain where it is, *or as it is*, without the other. They are two separate bodies, but each is dependent on the other for its place in the universe.[4]

In this Book Review, I provide an overview of Abraham's major themes, comment on their persuasiveness, and offer some direction to readers for other sources they might wish to consider. As the passage above suggests, Abraham's thesis is that tort law and liability insurance enjoy a symbiotic relationship. Although tort law emerged first, and necessitated the development of insurance, each system has deeply influenced the other's path. Like the binary star, neither would be anything like its present self without the influence of the other.

Binary systems, however, form in nature. Abraham examines several instances in which the interaction of the very human institutions of tort and insurance law frustrated the hopes of their planners. The book is divided into eight chapters. Chapter One introduces the reader to the evolution of personal injury law and liability insurance. Chapters Two though Five each tackle discrete areas of reform throughout the modern history of liability law. Chapters Six and Eight further flesh out the major themes of the book, while Chapter Seven considers the legal response to mass disasters, including 9/11. This Book Review is divided into sections that generally track these chapters.

I. THE DAWN OF A NEW ERA

Despite their modern complementary roles, systems of tort and insurance have only recently shared the stage. Liability insurance

[4] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, at 1 (2008) (emphasis added).

did not emerge until the 1880s, centuries after the writ of trespass set the terms for the evolution of tort law. The doctrinal impediment was the concern that insuring bad behavior was likely to produce more of it.

Abraham traces the expression of this concern through several stages: the rise and fall of the "barratry" defense precluding first-party coverage for losses negligently caused by the policyholder; the extension of this to indemnity agreements that effectively transferred property insurance entitlements from innocent shippers to negligent carriers (such a situation closely resembles that of a carrier being indemnified by a liability insurer for negligently caused loss); and ultimately, the direct rejection of an implied public policy exclusion for negligently caused harms.[5] This last stage was reached within a decade of liability policies' introduction.[6]

That introduction comprises the larger explanation for the centuries-long delay between the emergence of tort liability and the development of liability insurance to cover it. Until the late nineteenth century, there simply was very little liability that needed to be insured against. Before the Employers' Liability Acts (now known as workers' compensation), the economic and doctrinal limitations on employees' tort claims made proceeding to court extremely unappealing. Likewise, they made purchase of liability insurance unnecessary. But, as liability to the workman became meaningful and expansive, companies arose to spread the risk. More importantly, risk-spreading probably led to more liability, as once-unattractive defendants were replaced by the most attractive defendants of all: insurance companies.

This thesis is extremely compelling, though Abraham is careful to note the inferential limits of the piecemeal data available to us. Studies of this period suggest that claims rose significantly faster than population growth,[7] though this by itself does not decisively point towards an expansion of tort law or liability insurance specifically. One datum, however, does strongly suggest such a link. In 1880, a mere dozen suits alleged negligent operation of horse carriages on Boston streets, but by 1900, 1,400 claims alleged negli-

[5] Id. at 21–26.
[6] Id. at 29.
[7] Id. at 34.

gence on the part of Boston's new electric streetcar system. It is very unlikely that only twelve people were injured by horse carriages in 1880, but it is exceedingly probable that few individual tortfeasors would have had substantial assets.[8] By contrast, the operator of a streetcar is highly likely to be solvent. If one thinks of liability insurance as a proxy for judgment collectibility, this suggests liability insurance's capacity to draw claims into the tort system.

Chapter One closes with a preview of a later discussion on the claims-processing bureaucracy.[9] Relatively early in the rise of liability coverage, insurers asserted their right (by including within the terms of policies a correlative duty) to control the litigation and settlement of cases brought against the insured. The legal and economic implications of that joinder have been ably explained elsewhere.[10] For Abraham's purposes, the important point is that this was part of liability insurers' intricate entwinement with tort liability. To the extent tort-claiming grew out of access to liability insurance, and insurers dominated the processing of those claims, it is unsurprising that tort law should take on the coloration of an insurance system. Indeed, as Abraham shows, that is precisely what happened.

II. THE ORIGINAL TORT REFORM

The inadequacy of injured workers' remedies prior to the adoption of workers' compensation acts is well known. Tort law promised little, and delivered less, to victims of industrial accidents. After canvassing the dreary state of tort compensation, Abraham asks why first-party insurance for work-related disability did not step into the breach. Disability insurance was available, but primarily from fraternal societies, and in sums that paled in comparison with those offered by the cheap and highly popular industrial life insurance policies sold door to door. Particularly, since disability insur-

[8] Id. at 34–35.
[9] See id. at 37–38, 87–92.
[10] See, e.g., Douglas R. Richmond, Liability Insurers' Right to Defend Their Insureds, 35 Creighton L. Rev. 115, 115–18 (2001); Charles Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev. 1583, 1592–98 (1994); Kent D. Syverud, The Duty to Settle, 76 Va. L. Rev. 1113, 1163–72 (1990).

ance would have been much more useful to the typical worker, why wasn't it more widely available?

Abraham suggests that "[t]he most satisfactory explanation" involves moral hazard and adverse selection. Moral hazard is the tendency to take fewer precautions in the presence of insurance. Adverse selection is the tendency of riskier people to gravitate towards unsuspecting insurance pools, eventually raising premium rates and causing less risky people to exit.[11] A great deal of insurer behavior is designed to combat, or at least manage, these problems.

These problems are rarely insuperable, but would have made disability insurance relatively unattractive early in the twentieth century. These are problems of information, and while insurers used crude rate classes in both liability and (first-party) accident insurance, these did not supply much information about differences within an industry. Thus, low-risk employees would likely have subsidized high-risk employees (perhaps one should say that the subsidy would benefit high risk *employers*), leading to depressed demand. Abraham also suggests, plausibly, that private disability insurers would have compared unfavorably with fraternal societies' ability to monitor injured employees in order to guard against malingering—an ex post form of moral hazard.[12]

These observations indicate that the problem of inadequate compensation for the injured was as much an insurance system problem as it was an indictment of tort law. Likewise, the introduction of workers' compensation may usefully be understood as an insurance solution to a tort system problem, with the limitations such a solution suggests. From a modern standpoint, workers' compensation seems to create significant under-deterrence relative to tort liability. Compensation awards are partial—they replace only a portion of wages and offer nothing at all for non-economic damages. Thus it is easy to assume that workers' compensation does not result in optimal rates of accident prevention.

At the time of adoption, however, workers' compensation promised significantly more liability than employers had experienced under the parsimonious tort law of the times. One would therefore

[11] Abraham, supra note 4, at 45–48.
[12] Id. at 46–47.

have predicted significantly greater accident prevention, relative to the pre-compensation era.

One of the most useful aspects of Abraham's study of liability problems is the extent to which he underscores that while the problems themselves may be perennial, their perceived importance has not been. Most readers will be struck by his observation that workers' compensation did not, in fact, clearly reduce the number of accidents across all industries. Accident reduction seems to have occurred primarily among unionized firms, and Abraham suggests an explanation grounded in the concept of moral hazard: workers' compensation payments do not automatically flow from corporate coffers (where their sting would be greatest).[13] Nor need they be extracted solely from increased prices for industrial goods (the explicit goal behind the slogan, "[t]he cost of the product should bear the blood of the workingman").[14] Instead, workers' compensation premiums appear to have resulted in decreased wages for employees.

The upshot is that "the original tort reform" effectively mandated the purchase of first-party disability insurance, using formally responsible employers as a pass-through mechanism. Why might such an insurance system perform unevenly in the task of accident reduction? Because many accidents are attributable to employees themselves. (Indeed, one of the greatest benefits for injured workers was the abolition of contributory fault in workmen's compensation, which technically denied all recovery.) The rational response of insured persons is to take fewer precautions because the costs of prevention are fully internalized while the costs of unprevented accidents are not. Indeed, Abraham notes a study of the coal industry's experience after adoption; coal miners, it turns out, bore a greater share of compensation expenses (insurance premiums) than other workers, and employers carried less of the burden. The result: coal industry accidents increased by twenty percent following the implementation of workers' compensation.[15]

Equally fascinating is the claim that accident prevention was not a major goal of workers' compensation reformers. Abraham sug-

[13] Id. at 59–60.

[14] Herman Miles Somers & Anne Ramsay Somers, Workmen's Compensation: Prevention, Insurance, and Rehabilitation of Occupational Disability 28–29 (1954).

[15] Abraham, supra note 4, at 59–60.

gests that reformers would not have been encouraged by the deterrent effects of tort law.[16] Moreover, the early success of liability insurers in inducing safety was limited (which suggests some interesting historical problems for the emerging literature analyzing "Insurance as Governance"). In this Calabresian period of legal scholarship, it is difficult to imagine a liability system that does not regard prevention as a prime goal. Abraham's point is perhaps best understood to limit the expected reach of private law remedies, without impugning the prevention aspirations of public law initiatives (specific legislative prescription for safety appliances and the like that were sprinkled throughout this era). Still, it is humblingly counterintuitive for this casual student of workers' compensation history to learn how little reformers thought of tort law's reach even then! This is consistent with Abraham's argument that the true significance of the 1886 decision in *Phoenix Insurance Co. v. Western Transportation Co*. was the prioritization of compensation over deterrence.[17] *Phoenix* rejected an insurer's challenge to a shipping agreement that gave a negligent common carrier the benefit of the shipper's property insurance. In so doing, the case served as a bridge to liability insurance across the waters of public policy concerns about under-deterrence—concerns that had made insuring against negligently caused losses somewhat suspect.

III. THE AUTOMOBILE CENTURY

Abraham notes that it is somewhat strange that automobile accident liability rarely attracts the howls of protest associated with medical malpractice or product liability suits. After all, automobile liability premiums total $110 billion annually, approximately three times the liability footprint of these other domains combined.[18] The automobile firmly stamped itself on the economic and social history of twentieth-century America and nowhere was this truer than the system for allocating automobile-related losses.

Abraham documents the explosion in auto claiming, noting that by mid-century, increased rates of auto liability claiming could not be explained solely by reference to population increases and

[16] Id. at 49–50.
[17] 117 U.S. 312 (1886); Abraham, supra note 4, at 26.
[18] Abraham, supra note 4 at 69.

demographic trends. He points to the rise and professionalization of the trial bar (Melvin Belli makes a cameo appearance here), a phenomenon that would have been unthinkable absent a ready supply of insurance dollars.[19]

This symbiosis penetrated deeply. Auto liability claims are, to an unusual degree, governed by the limits of insurance policies. Theoretically, this would be true of any liability, but auto policies rarely have limits that approach adequate compensation for serious injuries.[20] Because few individual drivers can satisfy liabilities in excess of policy limits, liability insurers exert a great deal of control over the identification, valuation, and processing of auto claims. It is but a small exaggeration to say that there are no automobile tort claims—only auto-related insurance claims.

Unsurprisingly, insurers tend to delay processing of high-value claims. At the same time, they tend to overpay on modest claims, partly the result of a principal-agent misalignment in which the "claims bureaucracy" is paid to close claims quickly. Abraham suggests a risk-bearing argument to explain how plaintiffs' lawyers inadvertently contribute to slow claims processing: Because their incentive is to maximize the size of their claims portfolio, the pursuit of new claims retards their ability to present and resolve claims.[21] I am not sure he is right. Portfolio-oriented lawyers have an incentive to get payments, even small payments, as quickly as possible. Not only is sooner usually better than later, but this permits modest claims to be replaced with more substantial ones. On the other hand, once a plaintiffs' firm has acquired a claim by retaining an injured victim, presumably it remains attracted to not-yet acquired larger claims. Possibly, this desire for maximizing claim volume outweighs the attractiveness of the mundane task of actual collection. However, this interaction between liability insurance and plaintiff-side portfolio strategies merits further study.

[19] Id. at 82–85.

[20] Historically, insurers resisted compulsory insurance requirements for several reasons, including the fear that they would force insurers to cover high-risk drivers at a loss. Their fears proved well founded. Id. at 73–74.

[21] Id. at 88–89 ("The larger the portfolio, the less variance there is in aggregate outcomes and the more predictable and steady is the flow of cash from contingent fees.").

Following the enactment of workers compensation reform, claims processing transaction costs fell to 32% of total system expenditures. In other words, a tort system that had returned 55 cents in compensation to plaintiffs for every dollar spent by liable parties in processing a claim now provided 68 cents on the dollar when reconfigured as no-fault compensation. It comes as something of a shock to learn that the modern auto liability system returns less than 50 cents on the dollar in compensation. To put this number in perspective, it is nearly identical to the compensation yield of asbestos litigation, the poster-child for tort law's inefficiencies.[22] Together with the fact that non-negligently injured victims are simply not compensated at all—causing a third of all accident victims to be "invisible" to the liability system—the suggestion that there must be a better way is well taken.

That suggestion found its doomed flowering in the no-fault system first recommended in the 1920s, but put firmly on the table during the 1960s by Abraham's indefatigable colleague Jeffrey O'Connell and the late Judge Robert Keeton. No-fault systems have long played a siren's song to would-be tort reformers. Since the successful advent of workers' compensation, however, their hopes have been dashed.

Abraham begins with the familiar story of no-fault's demise—the resistance, both high-minded and low, towards curbing injury victims' tort rights, and the shameless legislative hobbling that guaranteed failure wherever no-fault was enacted. But, in Abraham's retelling, this is inevitably a story about the choices required in designing an insurance system. Abraham reminds us that the income-replacement feature of no-fault would have created a substantial subsidy running from low- to high-income drivers. Of course, the present system does the same (though this effect is ironically ameliorated because of low insurance limits), but the low-income subsidizers have presumably driven negligently.

Abraham makes a very interesting point about the influence of the tort system on no-fault's design. Describing tort law as "the

[22] See Stephen J. Carroll et al., RAND Inst. for Civ. Just., Asbestos Litigation xvii–xxxii (2005) (outlining a summary of the RAND Institute study on asbestos litigation). In 2005 the University of Connecticut School of Law hosted a symposium on the topic entitled "Asbestos: Anatomy of a Mass Tort." The papers presented there may be found in the *Connecticut Insurance Law Journal*, Volume 12, Number 2.

reference point," he notes that the low mandatory limits under no-fault basically reproduced the tort system's undesirable tendency to overcompensate minor injuries and undercompensate major ones. Thus no-fault could be viewed as an attempt to reproduce tort law, albeit more efficiently. In this sense, the no-fault solution was an insurance system with very modest aspirations—aspirations that would be comfortably exceeded by abolishing tort and relying on the market to supply desired levels of first-party coverage. "[T]he shape of the tort system tended both to inhibit the imagination of reformers and to constrain the political feasibility of the alternatives to tort."[23]

Time, as always, permits consideration of the long view. The reformers of the 1960s had the legal and political wind at their backs. Long-simmering doubts about the value of the negligence system had begun to fluctuate into a tort environment that at the margins began to resemble a kind of universal accident insurance. For such a world, no-fault was ideally suited. Nevertheless, as Abraham notes, at just that time, the tide was about to recede, and today fault-based liability is again ascendant. With its return, the "transformational" impetus behind no-fault has dissipated.[24]

But isn't "tort reform" perennially popular? Decades of legislative innovation would suggest so. Why, then, haven't reformers targeted automobile liability from the perspective that there is too much of it?[25] Such appeals have obviously been successful in the "hot button" areas of malpractice and products liability, despite the fact that they pale next to the auto liability insurance system. Abraham offers several explanations: the auto liability "problem" has been ameliorated by tort reform measures taken at the behest of other groups; auto liability costs moderated substantially during the 1990s because states did not increase their minimum insurance requirements;[26] the problem of auto liability does not generate obvious and stable constituencies favoring and opposing reform; and

[23] Abraham, supra note 4, at 96.
[24] Id. at 97–100.
[25] Id. at 101–03.
[26] Again, insurers have counterintuitive incentives not to press for higher limits. Although this would increase demand for their products, it would also make those products more valuable and more likely to be utilized. Thus, mandatory limits remain absurdly low, often $25,000 per person or less.

most people are prepared to accept auto insurance rates as a cost of living—irritating once a year, perhaps, but nearly as unavoidable as death and taxes.

Although other tort domains do not share all of the features that made no-fault a losing enterprise, they are equally tethered to the liability insurance system. That bond, as Abraham elaborates in succeeding chapters, explains why meaningful liability reform remains a "sobering prospect."[27]

IV. MEDICAL LIABILITY: MYTH OR DILEMMA?

Chapter Four marks a subtle turning point in the book, as Abraham considers more contemporary liability controversies. Relatedly, it seems that he feels on more familiar ground here and is somewhat less reticent to venture the occasional personal view. I suspect that some readers—and this book can usefully be read by any professor of liability law, and certainly ought to be by those who opine on the desirability of reforms—will find in this chapter the beginnings of disagreement with Professor Abraham.

Although malpractice liability is an utterly trivial component of national health expenditures—something one would not know by reading the claims of some reformers—it is a significant aspect of physicians' finances.[28] Because the policyholder base—individual physicians—must hope to spread the costs of liability among the fifteen percent of health care spending they capture, malpractice costs are bound to be outsized from their perspective. This is a point that Abraham makes rather elegantly through this chapter: the liability problem is as much, and perhaps more, a feature of healthcare system organization than the tort doctrines that purportedly govern that liability.

Abraham observes that physicians' longstanding insistence on autonomy has come at the expense of personal liability for medical error. Moreover, as new medical technologies have redefined pa-

[27] Id. at 103. Abraham's point is addressed to liability reforms, but proponents of healthcare reform should take note as well. Not only would reform here implicate every single problem faced in employment, auto, medical malpractice, and product liability reforms, but it would do so on a scale ten times larger. Sobering, indeed.

[28] Id. at 105–06 (estimating malpractice premiums at $16 billion annually, compared with $2 trillion for healthcare).

tient expectations upward,[29] the formal constraints on physician liability (the custom-based standard) were less effective in practice than might have been supposed.[30] It is not uncommon for liability system critics to suggest that liability awards are "random" lightning strikes not reliably associated with conduct associated ex ante with wrongdoing. I have never found this credible. But Abraham identifies a practice that suggests this criticism has at times been advanced in good faith: he notes the absence of experience-rating in medical liability insurance, at least through the insurance "crises" of the 1970s and 1980s. He suggests this was because insurers found past claims insufficiently reliable predictors of future liability.[31] Given the rapid changes in claim frequency and severity since the 1960s, this explanation is plausible and might refute my skepticism. On the other hand, liability insurers would certainly appreciate that medical malpractice reforms would find an unreceptive ear if championed primarily by doctors their own systems rated poorly.

Physicians are unusually susceptible to cyclical swings in liability rates because they cannot adjust prices quickly enough to recoup added premiums. Given the small size of physician "firms," it is unlikely that they could have dealt with these swings even if they retained the autonomy they enjoyed prior to the rise of managed care. But managed care ensures limited pricing power in the face of higher premiums.[32]

This background sets up Abraham's very clear catalog of the causes and consequences of the periodic insurance crises afflicting medicine. Long-term liability insurance costs are closely tied, unsurprisingly, to actual liabilities, but short-term dislocations that often prompt calls for reform are the result of stubborn structural features of the medical-insurance complex. The rapidly changing

[29] Id. at 115–16; cf. Uwe E. Reinhardt, Reforming the Health Care System: The Universal Dilemma, 19 Am. J.L. & Med. 21, 32–35 (1993) (observing the inflationary tendency of medical technology: "instead of necessity being the mother of invention, invention became the mother of necessity").

[30] See, e.g., James F. Blumstein, The Legal Liability Regime: How Well Is It Doing in Assuring Quality, Accounting for Costs, and Coping with an Evolving Reality In the Health Care Marketplace?, 11 Annals Health L. 125, 141–44 (2002); E. Haavi Morreim, Medicine Meets Resource Limits: Restructuring the Legal Standard of Care, 59 U. Pitt. L. Rev. 1, 15–16, 27 (1997); E. Haavi Morreim, Redefining Quality by Reassigning Responsibility, 20 Am. J.L. & Med. 79, 86–91 (1994).

[31] Abraham, supra note 4, at 117.

[32] Id. at 105–06.

liability environment of the 1970s was particularly disruptive for a system in which claims were presented years after the negligence that caused them, indeed, years after the liability premium had been set.[33] Tort reforms enacted in response appear to have briefly retarded liability, but they could not address the structure of the insurance business. Declining interest rates, tax reform, and associated reserving changes by insurers brought about a supply-side "crisis" in the 1980s.[34]

It will surprise no one that the response of insurers and physicians to a problem having a modest relationship to tort law was further tort law reform. Abraham notes the counterintuitive fact that tort reform devalues liability insurance, suggesting that the rational response of insurers would be to oppose it. Other scholars and insurers themselves have made similar observations.[35] Abraham, however, suggests that to do so might be politically untenable, given insurers' relationships with physicians (who obviously benefit from reduced liability). Moreover, because of the time-shifted relationship between premium income and liability payouts, tort reforms enacted today will reduce losses under already-sold policies. Insurance managers might accordingly be acting on the well-documented tendency to capture immediate gains and shift losses downstream.[36]

In any event, these reforms, too, would have limited impact.[37] But the crisis did spur more substantive reform proposals, principally medical no-fault. In a crisply written analysis, Abraham explains why medical no-fault is unworkable and unlikely to be implemented. Liability-worthy medical events are conceptually difficult to describe without reference to negligence—and we already have a system for medical negligence. Even if that could be done, separating the chaff of unavoidable adverse outcomes from

[33] Id. at 123.

[34] Id. at 130–31; see also Kyle D. Logue, Toward a Tax-Based Explanation of the Liability Insurance Crisis, 82 Va. L. Rev. 895, 954–56 (1996).

[35] See, e.g., Tom Baker, Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action, 12 Conn. Ins. L.J. 1 (2006).

[36] Abraham, supra note 4, at 129–30.

[37] Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damages Caps, 80 N.Y.U. L. Rev. 391, 428 (2005) (summarizing research reaching the "counterintuitive" conclusion that damage caps lead to increased damage awards).

the wheat of compensable events is a daunting practical burden.[38] Abstractly, an optimistic view of this task might be defensible solely in light of the workers' compensation and automobile no-fault experiences; one can very sensibly and intuitively attribute injuries to employment and automobile driving, an intuition that is fairly stable until the margins. I have always been surprised, however, that proponents of medical no-fault did not draw rather dispiriting lessons from the product liability reforms of the 1960s. The observed limits of these reforms convincingly demonstrate that the fault dimension of such claims is an unavoidable requirement of their legal cognizability and administrability; faultless product liability is an unstable concept at its core. So is faultless medical liability.

Ironically, the compensation problems in these areas could be solved, but probably only in the context of a universal insurance program of the sort that doctors have long resisted. Abraham suggests that relieving physicians of liability exposure makes some sense—he analogizes the physician to the pilot of a commercial airliner; modern medical errors often result from a series of systemic mistakes, rather than any singular instance of fault that may be pinpointed to the system's totemic head.[39] Such a system would be far better at managing the cyclical liability-insurance risks that are responsible for a good deal of physician's perceived tort-related distress. But such a system will demand continued displacement of physician autonomy in return. And if there is one lesson that steadily emerges from Abraham's study of liability problems, it is that no solution is free.

V. GIFTS THAT KEEP ON GIVING

It is difficult to find a more unabashedly instrumentalist set of doctrines than those that emerged in the 1960s and 1970s to address product and environmental injuries. Although changing notions of individual and corporate responsibility provided the moral impetus for expanded liability, the policy justifications tended to revolve around the notion of more efficient risk spreading. In this fascinating chapter, Abraham reveals this to be an illusion.

[38] Abraham, supra note 4, at 133–35.
[39] Id. at 137.

Abraham begins with a point he has made for different purposes elsewhere:[40] by the time courts started expanding liability for products-related injuries, individuals had much greater access to first-party insurance than they had during the workers' compensation reform era.[41] One reason that has been given for the sharp divergence between American and European product liability law (that is, why American law is outsized in comparison) is the absence of universal health insurance in the United States. Earlier in my career, I tended to discount this theory, perhaps ascribing too much sincerity to the pronouncements of reform-minded courts. I have, however, come to appreciate the often hydraulic character of liability and insurance systems; pressure in one location is invariably relieved elsewhere. Without alternatives, injury victims and their lawyers will search for—and, as the twentieth-century experience confirms, find—the remote, yet solvent defendant who is unprotected by immunities, whether formal or informal.

Regardless, Abraham is clearly correct that, by the 1960s, health and disability insurance were much more widely available, which logically ought to have relieved some of the pressure for expanded tort liability. Even if it did not, this much more substantial first-party insurance market might have given reformers such as California Supreme Court Justice Roger Traynor, whose economic insights still seem compelling sixty years after he began to articulate them, reason to hesitate before assuming that loss-spreading was more easily done via tort law.

Another point is the remarkable observation that the products liability insurance judicial reformers claimed justified expanded liability in fact largely did not exist at the time. Abraham focuses on Justice Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*, which was written just at the dawn of modern public liability insurance policies, an era in which there would have been relatively few claims.[42] In fact, products liability insurance did emerge to meet that growing tort liability—Abraham explores complementarities such as these in the next chapter. But, the mismatch between expanded liability and expanded coverage acted to frustrate the aspi-

[40] Id. at 86.
[41] Id. at 139–40.
[42] 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring).

rations of tort reformers. In other words, reformers failed to anticipate that liability insurance markets would react in ways tied to, but with a logic wholly different than, new liabilities that could be summoned with the stroke of a pen.

Abraham develops this critique in ways that are largely applicable to both products-related and environmental liabilities.[43] First there is the "long tail" problem. Even under a relatively stable liability regime, certain product hazards and nearly all environmental risks manifest themselves years and often even decades after premiums have been collected. Worse, the period of the 1960s through the 1980s was anything but stable: new classes of defendants were created to respond to innovative damage claims, stemming from conduct that would not previously have been regarded as tortious. Meanwhile, insurers faced a period of judicial skepticism in the construction of their liability policies. Perhaps with one eye towards emerging liabilities, courts creatively wrested coverage from policies that were either silent on their intent, or manifested an imperfectly-executed intent, to exclude coverage.[44] Throw in rapid changes in investment risk—and no one can sensibly expect insurers not to use investment gains and losses in rate-setting—and the picture that emerges is one of comprehensive dysfunction.

Note that Abraham is not saying that product liability was excessive (except, perhaps, rhetorically), nor is he particularly critical here of the interpretive changes that significantly expanded insurance coverage. His point is simpler, and, I think, impossible to refute: the market for liability insurance did not work well, and a central justification for liability-enhancing changes was that it would. As a result, insurers to some extent have been withdrawing from these markets. Abraham reports that by 2003, thirty-two percent of commercial liability losses were self-insured.[45] This is an astonishing figure, though how it might be accounted for in future debates about tort reform is unclear. What is clear is that as disputes over coverage have become increasingly heated (due largely to the phenomena just described), liability insurance purchasers

[43] Abraham, supra note 4, at 152–63.

[44] One of the best descriptions of this process may be found in one of Abraham's own articles, *A Theory of Insurance Policy Interpretation*, 95 Mich. L. Rev. 531, 567–69 (1996).

[45] Abraham, supra note 4, at 166.

cannot be certain they are getting the protection for which they are paying. In a liability system where insurers are likewise unsure they have been paid for the protection they are providing, it is unsurprising that insurance is not playing its hoped-for role, if it ever did.

VI. THE CHICKEN AND THE EGG

In Chapter Six, Abraham outlines the case for the complementarity between tort law and liability insurance.[46] Although complicated by dynamics beyond reformers' contemplation, the idea that liability changes would be a necessary, and often sufficient, condition for new liability coverage is straightforward. Abraham's thesis is that this process also works in reverse: the availability of insurance induces complementary changes in tort doctrine, so as to make use of that insurance.

Abraham describes the barriers to personal liability insurance that existed during the first half of the twentieth century. Insurers sold very specific forms of insurance to individuals and businesses that targeted particular risks. Over time, the standard commercial general liability policy evolved to comprehend general risks without regard (at least until the exclusions) to the cause of that risk. Thus, a set of insurances covering elevators or theater operations was condensed to coverage for "bodily injury." Abraham notes, though he does not emphasize, that this built insurance-side complementarity into the liability system; with respect to novel liabilities not yet excluded, "coverage was, in effect, automatic."[47]

On the personal lines side, emergence of a robust market awaited regulatory changes and a solution to the adverse selection problems, generated by insureds' ability to select just those particular risks against which they wished to insure. The "master stroke" was to combine general liability protection with residential property insurance, which was an increasingly mandatory aspect of home ownership. Thus, the modern homeowner's policy was born.

It is worth noting that although business liabilities are the typical subjects of tort horror stories and reform efforts, much of the Li-

[46] He is not articulating a normative case for complementarity, viz., that courts ought to construe insurance policies in line with perhaps-unanticipated tort law developments.

[47] Abraham, supra note 4, at 175.

ability Century involved assigning responsibility to individual defendants. Of course, they were not individual for long; as every insurance professor teaches, and as Abraham underscores, almost no one gets sued absent liability insurance. Abraham fleshes out his sophisticated version of the Willie Sutton theory by identifying four areas of expanded liability that reveal the influence of liability insurance on tort doctrine: premises liability, wherein tort law's erosion of no-liability rules in favor of maybe-liability standards is most vividly displayed; the changing standards of care applicable to children; the fall of judicially crafted immunities involving intrafamily suits and charities; and emotional distress, which has slowly gained acceptance as either a compensable item of damage or an independent wrong.[48]

Abraham's thesis is modest. He does not claim that, in general, a conscious judicial design linked the availability of insurance with new liability. Nor does he claim that these liability changes were not often the product of other moral and doctrinal currents, the paths of which were perhaps given unique shape by the existence of liability insurance. Rather, he suggests that insurance made such shifts palatable to courts that otherwise faced the prospect of creating meaningless or misdirected remedies, and was thus practically a necessary condition for the recognition of these remedies. Understood modestly, Abraham is mostly convincing. Certainly, the thesis is strengthened by those numerous points where courts expressly conditioned tort liability on the extent of insurance, as was true in the 1960s demise of intrafamily immunity (it went first for auto accidents) or the modern charitable immunity gloss that permits liability where the entity has liability insurance. One might add environmental liabilities that exist only if they are insured.

I suspect that the persuasiveness of his thesis will, for most readers, turn on their particular familiarity with the doctrinal changes he identifies. For example, it is impossible to analyze intrafamily immunity issues without considering the constitutional and legislative constraints on sex discrimination that gained speed during the latter half of the twentieth century; or without reference to the anti-"heart balm" statutes that took root during the 1940s (to preclude torts such as seduction and alienation of affection that would

[48] Id. at 178–93.

be unlikely to be covered by insurance in any event), to say nothing of the changing mores of which these were an expression. I agree, insurance money tends to make change go down easier, and Abraham has plenty to work with in the opportunistic liability rulings of the 1960s, although liability insurance seems to me a minor player overall here.

Likewise, his discussion of emotional harm and insurance is thoughtful, but seems incomplete. Abraham very candidly observes that his thesis describes little about the creation of emotional distress liability, because to a significant extent, liability insurance did not evolve to complement liability for emotional injury. He notes, however, that the physicalist dimension of insurance policies, which is oriented toward corporeal harm, has nonetheless provided a convenient check on the expansion of emotional harm liability.[49] Roughly speaking, emotional harm that results from a physical accident is far more likely to be recognized as compensable than is harm resulting from near accidents or purely psychic phenomena (the classic example is a telegram misinforming someone that a relative has died).

Unfortunately, the approaches taken to define the scope of recoverable emotional harm are so variable that I am less hopeful than Abraham that courts have ever appreciated the limits of liability insurance on this score. Regardless, the larger problem is the implicit classing of emotional injuries with those foreseeable harms (torts committed by children or charities, for example) that tort law did not appear to recognize consistently until liability insurance became widely available. In my view, the central feature of emotional distress doctrine has been courts' profound skepticism that we are talking about any *injury* at all. Abraham is surely correct that courts have frequently pointed to the presumed ease with which emotional harm can be falsified. I think, however, that the physical/nonphysical distinction is explained less by insurance and more by that venerable legal principle that "life is tough." This is an area where it is difficult to ignore doctrinally exogenous facts such as gendered tort claiming patterns (traditionally, emotional distress, whether direct or derivative of family members' injuries,

[49] Id. at 192–93.

constituted a larger share of women's claimed damages then men's), and the emerging organic conception of mental disease.

The individual liability setting is a useful case study because courts could not have expected individuals to satisfy liabilities absent insurance. Thus, Abraham must be correct that liability insurance made discussion of expanded tort duties "meaningful." The problem is that these developments unfolded alongside expanded liability for businesses; indeed, many premises liability cases involve corporate defendants who had benefited under the tripartite distinction attacked in cases such as *Rowland v. Christian*.[50] Emotional injuries frequently appear in cases involving defective products, medical malpractice, and other business settings for which liability insurance is not an essential dimension of loss spreading. That is, while some of Abraham's examples are unique to individual defendants (e.g., the child's standard of care), others can be generalized to the point that they must qualify any insurance-based explanation for their development.

Despite these reservations, Abraham succeeds in prodding one to reconsider just how much these developments do, in fact, owe their existence not to high-minded changes of judicial tune, but the morally ambiguous pot of insurance gold. Some of his examples involve transparently candid courts; but it is in the nature of gravity to act in ways that must be inferred, rather than observed directly. Such is the influence Abraham traces for liability insurance in the context of emerging tort doctrines.

I leave it to the reader to explore Abraham's fascinating penultimate chapter on the 9/11 Fund and the role of collateral sources. I did not appreciate at the time of enactment how the Fund would become a kind of universal metaphor about the tort system, whether viewed as an enviable model to be copied or as an unjustified departure from the constraints of the liability system.[51] Examining the Fund's treatment of collateral insurance benefits and other issues, Abraham observes ways in which designing a replacement for tort law obligates one to take into account considerations that seem paramount in tort law, but may have little role

[50] 443 P.2d 561, 565–68 (Cal. 1968) (rejecting a premises liability framework that distinguished between trespassers, licensees, and invitees).

[51] See generally, George W. Conk, Will the Post-911 World be a Post-Tort World?, 112. Penn. St. L. Rev. 175 (2007).

to play in a replacement scheme. For example, though Abraham does not say this, it is highly improbable that a system of universal health insurance would long tolerate the extensive system of tort liability that exists today. In several intriguing illustrations, Abraham invites the reader to imagine the tradeoffs and changes of emphasis implicit in moving from a regime of tort towards one more reliant on first-party insurance.[52] Given that the tort system accounts for only eight percent of benefits paid for injury, illness, and death, the day when those tradeoffs will come due may be closer than many people realize. A final chapter summarizes the book's findings and suggests that the twenty-first century should be a period in which the distinctive competencies and limitations of tort and insurance are recognized more systematically than was the case during the twentieth.

CONCLUSION

Professor Abraham has unveiled some complexities about the interaction between tort and insurance that are easy to forget or ignore. Time and again, what has been regarded as a tort law problem is revealed as an insurance problem in disguise. Or, tort solutions are undone by insurance system problems. Readers accustomed to the standard, discrete accounts of the twentieth century's greatest liability hits will have to pause to consider, as Abraham has, the remarkable continuity realized by retelling those stories as insurance tales. Most observers believe that the tort system will eventually evolve in ways quite unrecognizable as "tort" today. If so, the Liability Century may one day be viewed as a waypoint to a century devoted towards strengthening solidarity and ensuring security, in probable derogation of aspirations long prized by the tort system. Readers of Abraham's book will have no doubt what that century should be called.

[52] Abraham, supra note 4, at 217–19.