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Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action

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**LIABILITY INSURANCE AS TORT REGULATION: SIX WAYS
THAT LIABILITY INSURANCE SHAPES TORT LAW IN
ACTION***

*Tom Baker***

TABLE OF CONTENTS

INTRODUCTION.....	1
I. A BRIEF NOTE ON METHOD	3
II. THE IMPACT OF LIABILITY INSURANCE ON TORT LAW	3
A. IN PRACTICE, LIABILITY INSURANCE IS AN ELEMENT OF TORT LIABILITY	4
B. LIABILITY INSURANCE POLICY LIMITS ARE DE FACTO CAPS ON TORT DAMAGES	6
C. TORT CLAIMS ARE SHAPED TO MATCH THE AVAILABLE LIABILITY INSURANCE	7
D. LIABILITY INSURERS ARE THE ULTIMATE “REPEAT PLAYERS”	9
E. LIABILITY INSURANCE TRANSFORMS TORT RULES INTO SIMPLE “RULES OF THUMB”	11
F. NEGOTIATIONS OVER INSURANCE BOUNDARIES DRIVE TORT LAW IN ACTION	13
CONCLUSION.....	15

INTRODUCTION

In June 2004 the European Centre for Tort and Insurance Law held a conference to consider the impact of liability insurance on the law of torts from a comparative perspective. A highlight of that conference was the

* An earlier version of this essay was published in TORT LAW AND LIABILITY INSURANCE (Gerhard Wagner ed., 2005).

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opportunity to engage in extended conversation with Continental torts scholars. In these conversations, I was struck by the depth of feeling that accompanied the insistence that liability insurance had not had an impact on tort law and, moreover, that it would be illegitimate for liability insurance to have such an impact. I had arrived at the conference with a laundry list of what we knew and did not know about the impact of insurance on tort law, ready to discuss research agendas for extending that knowledge, and here I was confronted with a challenge to the basic premise.

My answer was less immediately persuasive to the Continental challengers than I had expected. They dismissed my explanation of the role of liability insurance in the narrowing of traditional tort immunities (e.g., intra-family, governmental, charitable) as a marginal development. Moreover, they could explain that development within their framework of law as an autonomous field. In their view, the narrowing of traditional immunities simply reflected the successful expansion of tort law into the realms of the family, the state, and the church. Insurance had little or nothing to do with it.

In addition, they dismissed as irrelevant my description of the role that insurance plays in organizing the behavior of legal actors and therefore in shaping tort “law in action.” That was sociology, not law.

Crossing back over the Atlantic, I pondered my response. The challengers’ point about the narrowing of tort immunities was a good one. Of course I was ready to explain how liability insurance allowed lawmakers to believe that inserting tort law into the domain of the family, the state and the church would be less disruptive than might otherwise be supposed (try telling that to the Catholic Church today) and, moreover, that liability insurance encouraged some defendants to attempt to abandon their immunity in order to force their liability insurers to compensate their victims. But I recognized that the story of cause and effect here was not a clear one, and that even a carefully argued and documented story about immunities was unlikely to persuade my Continental colleagues.

And so I resolved to rest my case on sociology, in the hope that I could persuade them to adopt a view of law that is encompassing enough to include the behavior of lawyers and litigants. Adopting that view, they could not help but see the impact that insurance has had on tort law more broadly understood.

I. A BRIEF NOTE ON METHOD

Because I am describing the behavior of litigants and lawyers, traditional legal sources such as statutes, cases, and treatises are of little assistance. Instead, drawing on a long tradition of sociological jurisprudence in the United States, I have gone into the field. The sources for the quotations that I will use to illustrate my points are the Florida and Connecticut lawyers I interviewed for the studies reported in the *Wisconsin Law Review* and the *Law and Society Review*.¹ I will also be drawing on my experience as a participant observer in a legal career that has kept me in near constant contact with lawyers, litigants, and a variety of insurance institutions.

This approach can be dismissed as anecdotal,² but it offers a view inside the workings of the legal system that no ordinary law book can provide. While qualitative research of this sort does not provide conclusive evidence regarding the prevalence or extent of the practices observed, it can be used to frame more systematic quantitative analysis that may provide that evidence. In the meantime, the persuasive power of qualitative research depends, like traditional doctrinal and policy argument, on the reader's response to the coherence and plausibility of the analysis.

II. THE IMPACT OF LIABILITY INSURANCE ON TORT LAW

Leaving aside the difficulty in interpreting doctrinal developments, such as the abrogation of traditional immunities, liability insurance has at least the following six impacts on tort law in action. First, for claims against all but the wealthiest individuals and organizations, liability insurance is a de facto element of tort liability. Second, liability insurance limits are a de facto cap on tort damages. Third, tort claims are shaped to match the available liability insurance, with the result that liability insurance policy exclusions become de facto limits on tort liability. Fourth, liability insurance makes lawsuits against ordinary individuals and small organizations into "repeat player" lawsuits on the defense side, making tort law in action less focused on the fault of individual defendants and more

1. Tom Baker, *Transforming Punishment Into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211 (1998); Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001). As part of the research protocol, participants were promised confidentiality. For quotations not previously published, I will identify the speaker simply as a plaintiffs' or defense lawyer.

2. E.g., Daniel Kessler and Daniel Rubinfeld, *Empirical Study of the Civil Justice System* (Nat'l Bureau of Econ. Research, Working Paper No. W10825, Oct. 2004).

focused on managing aggregate costs. Fifth, liability insurance personnel transform complex tort rules into simple “rules of thumb,” also with the result that tort law in action is less concerned with the fault of individual defendants than tort law on the books. Sixth, negotiations over the boundaries of liability insurance coverage (which appears nowhere in tort law on the books) drive tort law in action. The sections that follow briefly describe each.

A. IN PRACTICE, LIABILITY INSURANCE IS AN ELEMENT OF TORT LIABILITY

The legal elements of tort liability are well known. The defendant must have a legal duty to avoid harm to the plaintiff. The defendant must have breached the standard of care that applies in the particular situation, and that breach must have caused damage to the plaintiff. For a lawyer considering whether to take a particular case on a contingency basis, however, or for a litigant considering whether to finance a claim upon some other basis, these legal elements are only a starting point. Liability by itself is not enough. The defendant must have the ability to pay.

In typically colorful language, the tort lawyers I interviewed emphasized this basic point:

I was taught on my first day of practice there are three things: liability, damages, collectibility. I need collectibility first. I need damages second. I'm a good lawyer, I'll prove liability.³

Insurance has a fundamental effect on what this lawyer called collectibility—the defendant’s ability to pay and the facility with which the defendant can be made to pay.

Given the extent of consumer debt, the availability of bankruptcy to discharge civil liabilities, and the existence of limited but important exceptions to the assets that must be liquidated in a bankruptcy proceeding, the practical reality of tort litigation in the United States is that liability insurance is the only asset that plaintiffs can count on collecting.⁴ As one lawyer put it:

3. Baker, *Transforming*, *supra* note 1, at 222.

4. See Steven G. Gilles, *The Judgment Proof Society*, WM. & MARY L. REV. (forthcoming 2005).

The ideal case, from a plaintiffs' perspective, would be a rear ender [auto accident], with terrible injuries, and a big insurance policy. On the other hand, if you have a fall down on a private property with no homeowners [insurance], that sounds like the worst case.⁵

My field research confirmed the obvious point that insurance is the asset that matters for all but the wealthiest of individual defendants and small organizations.⁶

There is some evidence that this is also the case in many commercial disputes. Professor Lynn Lopucki has advanced and defended the controversial but plausible thesis that corporate groups increasingly locate risk in entities with no assets and placing assets in entities with no risk,⁷ with the result that the liability insurance of the risky entity is all that is available for victims if and when the risk matures into harm. He may well have overstated the case for ordinary tort litigation, but for mass tort claims he is not far from the mark. The increasing use of corporate bankruptcy as a mass tort litigation risk management tool makes liability insurance the asset that matters for mass tort victims as well.⁸

If liability insurance is a de facto element of tort liability, then people without liability insurance will not be subject to tort liability. In practice, people are required, either by law or contract in the U.S., to purchase liability insurance in a wide variety of settings (a fact that shows that lawmakers and strong contracting parties understand that liability insurance is a practical predicate for tort liability).⁹ But people are not required to purchase liability insurance in all settings. For example, people who rent their home in the United States are rarely required to purchase liability insurance and rarely do so voluntarily.¹⁰ The only liability insurance most renters purchase is automobile liability insurance.¹¹ As a result, most renters are, as a practical matter, immune from civil suit in the U.S., except in the case of an automobile accident.

5. Plaintiffs' lawyer from Connecticut interviews. See Baker, *Blood Money*, *supra* note 1.

6. *Id.* See also Gilles, *supra* note 4.

7. See Lynn Lopucki, *The Death of Liability*, 106 YALE L. J. 1 (1996).

8. See Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liabilities*, 148 U. PA. L. REV. 2045 (2000).

9. See Gilles, *supra* note 4.

10. *Id.*

11. *Id.*

This practical immunity does not show up in tort law on the books. But if broader renter's insurance were required, and if the requirement were enforced, a new domain of opportunity would open for tort lawyers, and the resulting flow of cases would surely have *some* effect on the development of tort doctrine. That effect might be as imperceptible on a day-to-day basis as the effect of lawyers' feet walking up the steps to the courthouse. But over time, pits and grooves will show. Even if they do not, however, the shape of tort law as a field of action will have changed.

B. LIABILITY INSURANCE POLICY LIMITS ARE DE FACTO CAPS ON TORT DAMAGES

In contrast to what I understand to be the case for some insurance policies in some European jurisdictions, all liability insurance policies in the United States are sold with limits on the amount of money that the liability insurer is obligated to pay for a particular claim or event, even if the damages owed by the insured are much larger. For example, as my European colleagues were shocked to learn, the limit on the mandatory automobile liability insurance policy in my state of Connecticut is \$20,000 per person, \$40,000 per accident, meaning that the maximum amount that the liability insurer must pay any one person is \$20,000 and the maximum amount that the insurer must pay all victims from any one accident is \$40,000. Of course, many people voluntarily purchase automobile liability insurance policies with limits that are much higher, but many people do not. In addition to these per-claim or per-event limits, many liability insurance policies also contain a specified dollar limit on the total amount of money that the insurer is obligated to pay for all claims or events covered by the policy. In my experience, such "aggregate" limits are nearly universal in commercial general liability policies in the U.S. (but not in automobile liability policies).

For defendants who would not be sued in the absence of liability insurance, the fact that the insurance policy limit functions as a de facto "cap" on the defendants' tort liability is obvious. What may not be quite so obvious is that the policy limit more often than not functions as a cap even for defendants who have other assets. There is good evidence that payments in excess of the policy limits are extraordinarily rare in cases involving individual defendants,¹² and nearly as rare in cases involving

12. Baker, *Blood Money*, *supra* note 1. See generally Bernard S. Black, Brian R. Cheffins & Michael Klausner, *Outside Director Liability* (Stanford Law and Econ. Olin, Working Paper No. 250) available at www.ssrn.com (reporting that directors and officers of corporations do not as a practical matter face any individual liability in securities fraud

commercial defendants.¹³ I have concluded that this situation results from a combination of factors: the existence of a cause of action for breach of the insurer's "duty to settle," the anchoring effect of the policy limit during settlement negotiations, the liability insurer's power to control settlements within the policy limits but not beyond the policy limits, and the related development of settlement norms within the tort litigation bar.¹⁴

For present purposes, however, the reasons that liability insurance policy limits function as a cap on tort damages do not matter. What matters is the consequence. Even tort litigation against wealthy individuals and large organizations has become, in all but the unusual case, an exercise in recovering money from liability insurance companies and only from insurance companies.¹⁵

C. TORT CLAIMS ARE SHAPED TO MATCH THE AVAILABLE LIABILITY INSURANCE

This next effect of liability insurance on tort law in action is a corollary to the first two. If only people with insurance are sued, and if the suits are targeted at recovering insurance money, then claims that fit into one of the exclusions in the applicable liability insurance policy (and thus would not be covered by the policy) are not worth bringing. Of course there are exceptions. Some defendants have enough assets that insurance does not matter. And some plaintiffs have the interest and the means to bring a lawsuit even when the defendant is not able to pay the damages. But the existence of these exceptions does not change the effect that the general rule has on the shape of tort law in action. Exclusions in liability insurance policies create, in effect, remote islands of tort liability that lawyers and law professors know about, but almost no one goes to visit.

actions because claims are virtually always settled within the limits of their D&O insurance policies).

13. See TEXAS DEPARTMENT OF INSURANCE, 2002 TEXAS LIABILITY INSURANCE CLOSED CLAIM ANNUAL REPORT 2, available at <http://www.tdi.state.tx.us/reports/pdf/taccar2002.pdf> (reporting that there was a payment in excess of policy limits in only 31 out of 9723 liability insurance paid claims in 2002 and that the total amount paid above the limits in those cases was \$9 million, as compared to \$1.8 billion in total liability payments in Texas in 2002; by comparison settlements by commercial insured within their deductible totaled \$41 million in Texas in 2002).

14. See generally Baker, *Blood Money*, *supra* note 1.

15. The widespread recent publicity surrounding the fact that members of the WorldCom board of directors were paying some of their own money to settle the WorldCom securities fraud litigation provides some evidence in support of my claim.

One important example is the exclusion for intentional harm, which is nearly universal in liability insurance policies in the U.S. covering bodily injury.¹⁶ This exclusion explains the dearth of intentional bodily injury tort actions brought in the U.S. The plaintiffs' lawyers I interviewed explained this situation as follows:

If you allege that he intentionally whacked her over the head, say with a baseball bat, okay, then the homeowner's policy doesn't come into effect. If you say that he negligently and carelessly struck her or did something that he shouldn't have done, then the homeowner's policy comes into effect. So, you've got to be very careful about what you allege—what your facts are.

I'm not dealing with intentional torts and when I have what I think is an intentional tort, I couch my complaint in negligence and hopefully I'll get the same efforts from personal counsel for the defendant, the individual defendant or corporate defendant, to say we didn't mean it.¹⁷

The defense lawyers corroborated this practice and explained that their duty to their clients means that they support the plaintiffs' effort to shape the claim to meet the coverage:

So what does the plaintiff's lawyer do? He doesn't even bother to sue for assault and battery, if he has any sense. He just proceeds on a negligence theory and does not bring the assault and battery theory, because there's no coverage in assault and battery and he runs the risk of the jury filling in the assault and battery line instead of the negligence line, and how does he explain that to his client? He got a hundred dollar judgment. Try and collect it. There's no coverage.

What about the scenario where the suit is just pled in negligence and it's not pled as an intentional tort? Now the insurance company hires you and you're there defending the negligence action. What are you going to do, say it wasn't negligence but he did do it intentionally?¹⁸

16. See, e.g., The ISO Homeowners and Commercial General Liability Forms, reprinted in TOM BAKER, INSURANCE LAW & POLICY: CASES, MATERIALS, PROBLEMS 338, 411 (2003).

17. Baker, *Transforming*, *supra* note 1, at 223-24.

18. *Id.* at 225.

Both legal rules and professional norms require defense lawyers to place the interests of the insured defendant ahead of the interests of the insurance company paying the defense costs.¹⁹ As a result, defense lawyers in the U.S. to some extent cooperate with the plaintiffs' lawyer in shaping the claim to fit the available coverage.

D. LIABILITY INSURERS ARE THE ULTIMATE "REPEAT PLAYERS"

Tort doctrine treats tort liability as the responsibility of a particular defendant to a particular plaintiff for a particular wrong. Liability insurance shifts the liability of the particular defendant to an entity for which that liability is simply one among an enormous portfolio of contingent financial obligations. Legal norms obligate the insurance company, and to a greater extent the lawyer employed by the insurance company, to handle the liability claim so that the interests of the particular defendant are paramount,²⁰ and in my experience insurance companies largely attempt to honor that norm.

But insurance companies also recognize and act upon the fact that they hold a portfolio of claims. This means that the results in one case can affect the results in another. As a result, liability insurers have an interest in the development of tort law rules and settlement norms that goes far beyond the interests of any ordinary defendant. In the terms of Mark Galanter's classic study, liability insurers are the ultimate "repeat player."²¹

As reflected by the statement that follows, this portfolio approach to litigation management frustrates plaintiffs' lawyers, but there is little that they can do about it:

Unless your client's a quadriplegic, they don't want to pay. And I think that's unethical, because I think what they do is they—they're supposed to be dealing with each case separately under the canons and I think what they're doing is they say—they won't verbalize this exactly—"Yes, this case is worth the policy. However, if we settle this case, then the next case will be brought, and we want to have a chilling effect on people suing our clients and reduce the overall amount we pay. And the way to do that is by using this case

19. See generally, Tom Baker, *Liability Insurance Conflicts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101 (1998).

20. *Id.*

21. Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

as an example.” They definitely do that. That's unethical. That's like me saying, “I know that Mary Jones, my plaintiff here, I know that her case is worth thirty-five thousand, but I'll settle for twenty because my other client's case for the same company, I think I can get an extra ten thousand for that, so it'll wash. Plus they're a better client, because they have three cases.” I don't see the difference.²²

The repeat player phenomenon makes tort law in action less focused on the fault of individual defendants and more focused on managing aggregate costs.

Many liability insurance company executives would assert that their repeat player advantage is more than outweighed by the bias of judges and juries. Judges and juries know that defendants have insurance, and as a result they are more likely to award the plaintiff damages, or so the argument goes.²³ Interestingly, empirical research on jury behavior suggests that juries are at least as concerned with the health and other first party insurance held by the plaintiffs, and with making sure that the plaintiffs do not get a double recovery,²⁴ but the direction of the bias is less important than the widespread belief that it exists. Since cases are settled in the “shadow of the law” based on the parties’ predictions about what will happen in court,²⁵ a widespread belief that juries act in certain ways has the same effect whether juries in fact act in that way or not.

Liability insurance helps transform tort litigation into a multi-player iterative game that develops and transmits beliefs and norms that become part of the rules of that game. In my view, those beliefs and norms constitute the *real* tort law for far more people than does the tort law on the books.

22. Plaintiffs’ lawyer from Connecticut interviews. See Baker, *Blood Money*, *supra* note 1.

23. See, e.g., Kent Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629 (1994).

24. See Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

25. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

E. LIABILITY INSURANCE TRANSFORMS TORT RULES INTO
SIMPLE “RULES OF THUMB”

Ross’s classic study of automobile accident claims handling provides the most extended account of the way that insurance adjusters transform complex tort rules into simpler and more easily administered rules of thumb.²⁶ In an important sense, this effect of liability insurance on tort law in action is simply an instance of the “repeat player” effect just described. But the practical implications of insurance adjustment are worth special mention. Otherwise, one might be misled into thinking that the repeat player status of the liability insurance company primarily affects only the development of tort law on the books.

One of Ross’s best examples is the rear end collision—an automobile accident in which one car hits another car from behind.²⁷ According to the formal tort law rule, liability depends on a careful and case-specific analysis of the accident and a consideration of whether the drivers exercised the degree of care that a reasonable person would ordinarily exercise in that situation. Ross’s adjusters applied a simpler, easier to administer rule that probably had the same result as the formal rule in most situations.²⁸ Their rule was that the driver of the car in back was liable in all cases.²⁹

Such rules are not universally applied. The greater the stakes, the more likely that the rules of thumb will give way to the particularized assessments that formal tort doctrine requires.³⁰ But, in the aggregate they combine to make tort law in action less focused on the individual fault of individual defendants than tort law on the books.

Ross generalized from this example as follows:

Adjustment of insurance claims compromises the legal mandate for individualized treatment with the need of a bureaucratic system for efficient processing of cases. This compromise can be observed at many points in the processes of investigation and evaluation. Investigation is vastly simplified, for instance, by presumptions as to liability based

26. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS* (1970).

27. *Id.* at 98-101.

28. *Id.*

29. *Id.*

30. *Id.* at 135 (“An injury situation that can qualify a claim as a ‘big case’ may receive something of the individualized treatment envisaged by the appellate courts.”).

on the physical facts of the accident. Accidents are thus seldom individualized to an insurance adjuster or a claims attorney. Rather, they are rear-enders, red-light cases, stop sign cases, and the like, and the placement of an accident into one of these categories ordinarily satisfies the requirements for investigation of liability. . . .

These observations are not meant as criticism of the good faith of the insurance industry or other parties associated in the handling of claims. Rather they are meant to put claims handling into proper context; to show that here as elsewhere—for example in handling pleas to criminal charges, or in making decisions as to whether a mental condition merits institutional commitment—a large scale society proceeds by routinizing and simplifying inherently complex and difficult procedures. This is how the work of the world is done. This is the law, as it is experienced by its clients rather than by its philosophers. Perhaps in the light of some kinds of legal philosophy it is bad law. In my opinion, such legal philosophy has lost contact with the reality of modern society.³¹

Ross's larger point about the nature of tort law is worth noting.³² Ross's point has taken hold in the American legal academy, and to a lesser extent in other jurisdictions influenced by the law and society approach that Ross's classic study exemplified.

I would never argue that tort doctrine and the consistent behavior of insurance adjusters are "law" in exactly the same sense, nor would I argue that tort doctrine is irrelevant.³³ But I would argue that any law professor who thinks that the routine behavior of "street level bureaucrats"³⁴ like insurance adjusters is not law needs to spend some time representing real people in the ordinary, low value accident cases that constitute the bulk of the tort law universe.

31. *Id.* at 135.

32. *Cf.* PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 103 (1990) ("[T]he rule . . . is the obstacle *par excellence* to the construction of an adequate theory of practice").

33. *Cf. id.* at 108 ("[T]he official description of reality is part of a full definition of reality . . ."). For an extended example of research incorporating doctrinal and law-in-action analysis, see Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories and Insurance Contract Damages*, 72 *TEX. L. REV.* 1395 (1994).

34. See generally MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980).

F. NEGOTIATIONS OVER INSURANCE BOUNDARIES DRIVE TORT LAW IN ACTION.

The final way that liability insurance shapes tort law is a bit harder to describe, perhaps because this point may well be the only truly new idea in this essay. The main idea here is to generalize an implied corollary of impacts one, two and three, above. As you may recall, those three are: liability insurance is a de facto element of tort law, liability insurance limits are de facto caps on tort damages, and tort claims are shaped to match the available liability insurance coverage. Each of these, of course, overstates the case. There are exceptions.

Each of these impacts call attention to a different kind of liability insurance boundary: *who* has liability insurance, for *how much*, and with regard to *what kinds* of liabilities? Each of these kinds of boundaries exerts a shaping force on tort law.

As a philosophical and doctrinal matter, tort liability certainly exists outside the boundaries of liability insurance coverage, but we are not going to go through the effort of establishing liability “out there” very often because there is no return in it. This suggests that liability insurance coverage establishes to some extent the boundaries of tort law itself, or at the very least the boundaries of tort law in action.

Alternatively, we might say that uninsured individuals are “outlaws” with regard to tort law and that liability insurance industry practices have the effect of making people outlaws with regard to tort liabilities. The kinds of practices that turn people into tort law outlaws include exclusions in liability insurance policies, marketing practices that leave populations uninsured (e.g., redlining³⁵), and the practice in the U.S. of bundling liability insurance with some kinds of property insurance but not others.³⁶

As this suggests, negotiation over who gets insurance, for how much, and against which kinds of liabilities drives tort law in action. These negotiations occur in legislatures debating what kinds of liability insurance to require and when; in administrative agencies debating how much effort to devote to enforcement of the insurance mandate; within large organizations debating whether to include an insurance clause in a standard form contract, how to word the clause, and whether to allow waivers; among contracting parties negotiating whether to include insurance

35. INSURANCE REDLINING (G. Squires, ed., 1997).

36. See Tom Baker & Karen McElrath, *Whose Safety Net? Home Insurance and Inequality*, 21 LAW & SOC. INQUIRY 229, 235 (1996) (reporting that the basic “dwelling protection” policy, unlike a “homeowners” policy does not contain liability insurance coverage).

requirements in their deals; and in the many places in which liability insurers establish and apply rules regarding who gets insurance, for how much, and against which kinds of liabilities. These kinds of negotiations establish the boundaries of liability insurance coverage. They separate the domesticated, insurance purchasing tort law citizen from the tort law outlaw, and they mark the frontier between the lawed and un-lawed activities of that tort law citizen.

A second kind of negotiation over boundaries takes place within the context of tort claims. These are negotiations over whether this particular defendant has insurance, whether the insurance is sufficient to cover the amounts claimed as damages, and whether the particular liabilities at issue are covered by the defendant's insurance policy. Because of the profoundly practical effect of these negotiations—among other things, they determine whether and how much the plaintiffs' lawyer will get paid—it is not surprising that they have spawned a host of secondary legal rules and professional norms.³⁷ These secondary rules and norms define the boundaries of liability insurance coverage, so that a reasonably complete understanding of tort law in action requires not only an appreciation of the formal liability rules and the shape and extent of liability insurance coverage, but also the rules and norms that govern the resolution of questions regarding people and liabilities that lie in close proximity to the liability insurance boundaries.

On the whole, my experience is that these secondary rules and norms operate to extend the liability insurance boundaries, but I would not make strong claims in that regard. My field research suggests that these norms and rules allow plaintiffs to transform uninsurable punitive damages into additional insurable compensatory damages, transform uninsurable intentional torts into insurable negligence actions, obtain a larger share of the recovery than the formal subrogation or lien rules allow, and increase the present value of the available insurance coverage by increasing the potential liability of an insurance company that refuses to offer a quick settlement.³⁸ On the other hand, my field research also suggests that in some circumstances plaintiffs care very deeply that the defendant pay with his or her own money—"blood money" some lawyers call it—because money from the insurance company will not adequately right the moral wrong that the defendant committed.³⁹

37. See, e.g., Baker, *Blood money*, *supra* note 1.

38. See sources cited *supra* note 1.

39. See sources cited *supra* note 1.

For present purposes we need not be very precise about these secondary rules and norms because my point is simply that they exist and that they are worthy and indeed even necessary objects of study for those who seek to chart the place of tort law in society.

CONCLUSION

This essay has described six ways that liability insurance shapes tort law in action. For most practical purposes, liability insurance has become an element of tort liability for all but the wealthiest potential defendants. The contractual limits on the amount of liability insurance place a practical limit on the amount of tort damages that plaintiffs can receive. Liability is shaped to match the available insurance coverage. Liability insurance makes tort litigation into a repeat player game in which the insurance companies handle individual cases according to their long-term interest in the development of tort law rules and settlement norms. Liability insurance personnel transform tort rules into more easily administered “rules of thumb.” Finally, negotiations over insurance boundaries drive the development of tort law in action.

I will conclude with a metaphor that may help to illustrate the power that liability insurance has to shape the development of tort law. Imagine a network of streams and rivers carrying water through the countryside to the sea. Water represents claims for relief. Tort law is the network of streams, rivers and lakes through which the water flows into the sea. Water that makes it into the sea represents the successful requests for tort law relief (whether by settlement, which is much more likely, or adjudication). Within this metaphor insurance is an invisible force that affects how much it rains and where, erects dams in some places, and sends huge torrents of water down others. Within this metaphor insurance is a force that turns some small tort rivulets into streams, and some tort streams into wide, straight rivers of tort liability.

Studying a snapshot of the landscape, we would clearly see how the tort law streams and rivers channel the flow of requests for relief, but we would miss the channeling force of liability insurance. Anyone who goes out and lives in the countryside would soon notice the strange pattern of rainfall, the odd placement of dams. Observing the landscape over time she might even start to wonder what, exactly, is channeling what. Does the network of tort law streams and rivers channel the requests for relief or do those requests channel the streams and rivers? And what explains why it rains so heavily on that hillside, while this other one is dry?

This metaphor is far from perfect, but it illustrates a powerful insight into the role that liability insurance plays in shaping tort law. The insight is not mine, though I may have extended it a bit. In the spirit of Nathan Isaacs, Roscoe Pound, Fleming James, and H. Laurence Ross I offer this insight across the Atlantic in the hopes of further conversations about insurance, law and society.