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Tort Cases in Judicial and Alternative Dispute Resolution Systems

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I. A Framework for Evaluating Tort Dispute Resolution Systems

A. Introduction

How should we assess the effectiveness of systems for resolving tort disputes? Are we to measure their "efficiency" in producing decisions? Their capability for producing "correct" decisions? Should we acknowledge as inevitable some percentage of deviation from ideal outcomes and measure effectiveness by a standard of optimal relationship between how much the system costs and how close it comes to achieving in practice the ideal of justice for which it aims? Is it fair, reasonable, and possible to use such a cost-benefit calculus for assessing effectiveness? To what extent do cases of some types involve values so fundamental that society must, to demonstrate its commitment to their worth, spend more to protect them in the individual case than any monetary "equivalent" that could reasonably be awarded as damages in that case?

These basic questions about criteria of judging effectiveness probably can never be fully and firmly answered, once and forever. They may serve, however, as direction finders - as the basic questions beyond grasp but toward which we reach while proceeding as far as we can. They may serve as a reminder of the context within which other questions about evaluating dispute resolution are explored.

B. Characteristics of Tort Disputes

1. Caseload Characteristics

Precise data on the distribution of tort cases by types are not available.[1] Even so, it seems clear that a majority of the tort cases filed are claims for damages based on negligence and more than three-quarters are claims for accidental injuries to person or property (including strict products liability as well as negligence claims).[2] Percentages of different

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1. See, e.g., the latest available annual reports of judicial caseload statistics in California and Massachusetts: Judicial Council of California, Part II, Annual Report of the Administrative Office of the California Courts (January 1, 1978); Fiske, The Massachusetts Courts, Twentieth Annual Report to the Justices of the Supreme Judicial Court as of June 30, 1976. Each of these reports contains extensive data on caseloads, but the categories are not designed to disclose the distribution of tort cases by types. A sharper focus on the distribution appears in the report of a special study of the caseload in a New York court, but the data are now a quarter century old. See Zeisel, Kalven, and Buchholz, Delay in the Court 25-31 (1959). See also the data of a special study in Massachusetts, reported in n. 1, p. 4 infra.

2. See the 1952-54 data in n. 1, page 3. Consider also the following table taken from the latest available annual report, Judicial Council of California, Part II, Annual Report of the Administrative Office of the California Courts 79 (Jan. 1, 1978):

types of cases vary among districts within a single state,[1]

TABLE XVII—CALIFORNIA SUPERIOR COURT
FILINGS BY TYPE OF PROCEEDING
Fiscal Year 1976–77

Type of proceeding	Filings 1976–77	Change in filings from 1975–76 Amount	1975–76 Percent	1966–67 Amount	1966–67 Percent
Total	713,917	47,459	7.1	267,417	59.9
Probate and guardianship	64,910	1,963	3.1	7,282	12.6
Family law	172,211	3,609	2.1	62,622	57.1
Pers. inj., death & prop. dam.:	85,604	5,294	6.6	38,469	81.6
Motor vehicles [a]	57,193	4,638	8.8	-	-
Others [a]	28,411	656	2.4	-	-
Eminent domain	2,249	−1,368	−37.8	−7,101	−75.9
Other civil:	198,417	36,988	22.9	109,177	122.3
Complaints [a]	82,232	−2,723	−3.2	-	-
Petitions [a]	116,185	39,711	51.9	-	-
Mental Health	5,451	−647	−10.6	−17,836	−76.6
Juvenile:	107,786	−286	−0.3	49,775	85.8
Delinquency: [a]	93,171	−809	−0.9	-	-
Original	58,142	1,199	2.1	-	-
Subsequent [b]	35,029	−2,008	−5.4	-	-
601 W. & I.	6,801	−6,005	−46.9	-	-
Original	4,887	−4,788	−49.5	-	-
Subsequent [b]	1,914	−1,217	−38.9	-	-
602 W. & I.	86,370	5,196	6.4	-	-
Original	53,255	5,987	12.7	-	-
Subsequent [b]	33,115	−791	−2.3	-	-
Dependency: [a]	14,615	523	3.7	-	-
Original	13,840	689	5.2	-	-
Subsequent [b]	775	−166	−17.6	-	-
Criminal	54,682	−134	−0.2	8,354	18.0
Appeals from lower court:	12,748	1,136	9.8	9,875	343.7
Civil: [b]	10,240	1,152	12.7	-	-
Criminal: [b]	2,508	−16	−0.6	-	-
Habeas corpus:	9,859	904	10.1	6,800	222.3
Criminal [b]	4,019	−359	−8.2	-	-
Other [b]	5,840	1,263	27.6	-	-

[a] Reported as a separate category starting in 1967–68.
[b] Reported as a separate category starting in 1975–76. Prior to 1975–76 in juvenile proceedings, only original petitions were counted as filings.

Although the report does not make clear whether "Other Civil: Complaints" and "Petitions" include substantial numbers of tort cases, a negative answer to the question seems likely. One clue appears in the following comment: "The sharpest rise in filings in 1976-77 was recorded in the other civil petitions category. This category was up about 40,000 cases (52 percent) from the 1975-76 level and accounted for over four-fifths of the net filing increase in 1976-77. This increase reflects the continuing impact of Public Law 93-647, effective July 1, 1975, which mandates an extensive child support enforcement program nationwide." Id. at 77.

With respect to personal injury cases, the report adds:

"The next largest increase was registered in the personal injury category where about 5,300 (7 percent) more cases were filed. Of this number 4,600 were personal injury cases involving motor vehicles. Filings for personal injury cases other than motor vehicle increased by 2 percent.

"The personal injury-motor vehicle cases filed in 1976-1977 represented an increase of 81 percent over the filings in that category in 1967-1968, while the personal injury-other than motor vehicle cases filed in 1976-1977 were double the number filed in 1967-1968. Personal injury cases generally require a substantial expenditure of judicial effort and comprise a large part of the court's civil workload. About 60 percent of the overall increase in personal injury filings occurred in Los Angeles County." Id. at 77.

1. See, e.g., Zeisel, Kalven and Buchholz, Delay in the

and among states.[1]

Court 25-31 (1959) reporting that personal injury cases were 49.1%, and other tort cases 14.3%, of the caseload of the Supreme Court, New York County, in 1952-54. They add:

"But it [this court] tries more contract cases than all the other four Supreme Courts [in New York City's five boroughs] together. Close to half of its suits are contract cases and torts other than personal injury negligence cases. Probably no other state court of unlimited jurisdiction in the United States has an equally high percentage of these suits." Id. at 25.

1. For example, in fiscal year 1976-77 the "personal injury, death, and property damage" case filings in the California Superior Court, totaling 85,604, consisted of 57,193 "motor vehicle" and 28,411 "others." In Massachusetts, on the other hand, motor vehicle cases are a smaller percentage of tort cases, and a smaller percentage of the total caseload of the Superior Court. See Widiss, Bovbjerg, Cavers, Little, Clark, Waterson, and Jones, No-Fault Automobile Insurance in Action: The Experiences in Massachusetts, Florida, Delaware and Michigan, p. 133 (1977):

"In Superior Courts, about two-thirds of all pre-no-fault civil cases were MVTs [Motor Vehicle Torts]. But MVTs have declined in every year since PIP [Personal Injury Protection, which is part of the "no-fault" law], and the figure projected for 1975 shows that MVTs probably now account for only about one quarter of all civil cases. Since PIP, MVTs have dropped 70 percent--from about 23,000 annually to fewer than 7,000 in 1975. The Superior Court post-no-fault trend did not, however, reverse a past pattern of steadily rising litigation--both total MVTs and total civil cases were more or less constant for many years before no-fault--nor were the declines so precipitous as at the District Court level ... ."

The District Court is a court of limited jurisdiction where the partial tort exemption for personal injury claims had relatively greater impact. Also, the data referred to in the quoted passage reflected the additional impact, in the District Court, of a tort exemption affecting property damage claims, which was subsequently repealed.

Because of their incompleteness and imprecision, reported data on caseloads of the past provide an insecure foundation for predicting the characteristics of future caseloads. Moreover, developments of the 1970s suggest, if they do not clearly establish, trends that may produce significantly different patterns. Certainly claims of professional negligence have been increasing more rapidly than tort claims generally. Also, one may view this development as one aspect of a broader tendency toward a disproportionately high increase of types of tort claims that are more complex and make greater demands upon the dispute resolution system.

Later sections of this paper consider relationships between characteristics of different types of tort cases and the demands and burdens they place upon dispute resolution.[1]

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1. See Part I, Section B, Subsections 6 and 7; Part I, Section D, Subsections 1, 3 and 4; Part III, Sections B, D, E, F, G and H.

2. The Burden on the Courts and Parties: Trial and Before-Trial Activity

The burden of the tort caseload on the courts and on the parties is affected not only by the number and complexity of cases but also by tendencies with respect to how the cases proceed through the system. The potential burden on the courts is reduced by settlements, which either avoid use of trial time or at least reduce it when the settlement occurs after the trial is under way. The burden on the parties is affected not only by trial time, however, but also by time and resources spent in discovery procedures, including depositions, and in investigation, negotiation, preparation for trial, and appearances for pre-trial hearings. The extent of the burden of all the before-trial activity varies widely among different localities. Before states began to adopt rules of civil procedure patterned after the federal rules, discovery was generally more limited in state than in federal practice. As the influence of the federal rules on state rules has grown stronger, however, broader discovery rules have become common. Though in many states general use of the broader opportunity for discovery did not occur immediately, in time a practice of broader use has developed. Precise data are not available, but probably it is the most common practice in most localities that depositions of the plaintiff and defendant are taken, and in cases involving severe injury or complex facts, depositions of other key witnesses may also be taken.

Some insight into the typical burden of tort cases on the courts is provided by data annually reported in California. The Judicial Council established categories of cases and fixed a weight for each category, with the purpose of reflecting the relative workload of the several superior courts. The weights are meant to represent the average amount of case-related time spent on a case in each of the categories. "Personal injury cases, both motor vehicle and other, accounted for 12 percent of the filings and 11 percent of the weighted caseload in the state [in fiscal 1976-77]."[1]

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1. Judicial Council of California, Part II Annual Report of the Administrative Office of the California Courts 83 (1978).

3. Substantive Interests at Stake in Tort Dispute Resolution

Any comprehensive evaluation of a dispute resolution system must take account of the principles of substantive entitlement it purports to apply, since different substantive principles may have different impacts on dispute resolution.

Most tort disputes concern claims for compensation for harm.[1] Though surely not the most basic of the substantive entitlements recognized by the legal system, asserted rights to compensation are often a source of extreme concern on the part of individual claimants or individual defendants, sometimes for economic reasons and sometimes on grounds of principle. Also, the cumulative effect of the legal system's treatment of claims for compensation may create concerns beyond those regarding the just disposition of the individual claim.[2]

Claims for compensation are in some instances presented in another form rather than as tort claims. They may be presented, for example, against a governmental entity, as welfare claims. Also, within the private law system, they may be presented as contractual claims, under an insurance policy or some other form of agreement for providing benefits. Each of these three major types

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1. See Part I, Section B, Subsection 1 supra.

2. For example, in the 1970s such concerns have been expressed with vigor in relation to medical malpractice and products liability claims.

of claims for compensation - tort, contract, and welfare - differs substantially from the other two and might intuitively be expected to present substantially different issues of dispute resolution. This paper will not explore those differences fully but will suggest comparisons occasionally.

Though most often involving claims for compensation, tort disputes may instead, or in addition, involve claims for other forms of relief. Such disputes center upon interests with respect to which recognition of the substantive entitlement to legal protection may be more significant than the particular remedy available, whether compensation or some other form of relief. Most often this occurs when the interests in issue are associated with the protection of individual autonomy.[1]

4. Substantive Principles of Compensation

In Anglo-American law clearly, and probably in legal systems generally, three key ideas stand out as basic explanations for rules and practices about awarding and denying compensation. For convenience, they may be referred to as the fault principle, the strict accountability

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1. Problems regarding proposed withdrawal of extraordinary life support measures are in point. Fears of malpractice claims against physicians and hospitals may make health care providers reluctant to withdraw life support measures without court authorization; thus, fears of later tort suits lead to demands on the dispute resolution resources in preventive proceedings for which the courts may not be ideally suited.

principle, and the welfare principle.

The fault principle applies to conduct that is antisocial in the sense that its costs (including harms) outweigh its benefits. In Anglo-American law this weighing of benefits against costs (including harms) is accomplished, in relation to intended harms, through theories of justification, such as defense of person, defense of property, and public necessity. In relation to unintended harms, the weighing occurs in determining whether the conduct was negligent. In both instances, the conduct is determined not to be blameworthy when benefits outweigh costs. When fault is essential to liability, disputes of fact about allegations of fault in particular cases are a major source of demand upon the dispute resolution system.

When fault is not found - when conduct is found to be more socially beneficial than harmful and is therefore to be encouraged in the overall interest of society - the conduct may nevertheless cause harms. Should these harms be compensated? If the answer is yes, we must also face a second question. By whom?

In some instances, in every legal system, the answer to these two questions is that compensation should be paid by a blameless actor whose conduct caused or, more precisely, was one of the causes of harms to others. In Anglo-American law, some of these instances of liability without fault have been the product of case-by-case judicial development. Examples are liability of keepers of wild animals, liability of landowners

under the doctrine of Rylands v. Fletcher, and strict products liability. Other instances of liability without fault have been the product of statutes. Examples include "pure foods" statutes that long preceded a general doctrine of strict products liability. Although these varied judicial and statutory developments are often viewed as independent of each other, one may see them instead as expressions of a single principle of strict accountability.

The key idea of the principle of strict accountability is that an actor whose conduct is blameless (in the sense that its usefulness outweighs the harms and risks it causes) should nevertheless be liable for harms and risks distinctive to the actor's conduct or enterprise. One of the supporting reasons for the principle is that the benefits derived from conduct produce an "enrichment" that is "unjust" unless the actor or enterprise pays for harms and risks fairly regarded as caused by the conduct or enterprise. A second supporting reason is that application of the principle of strict accountability for harms and risks distinctive to an actor's conduct or enterprise promotes fair social cost accounting and economic efficiency. Strict accountability assigns to the conduct or the enterprise the costs of the harms it causes; this allocation tends to cause these costs to be included in the price of any product of that conduct or enterprise. If the conduct or enterprise is socially useful (its benefits outweighing costs)

it will survive in the marketplace even at the higher price that includes the cost of compensating for harms done. If the added cost prices the products out of the market, this outcome demonstrates that the conduct or enterprise was not socially useful. Its costs outweighed its benefits, and society will be best served by discouraging it. Thus, strict accountability serves to provide deserved compensation, to deter antisocial conduct, and to assist the community in arriving at rational and well informed choices about what conduct is socially desirable and what conduct is not.

The third of the three key principles of compensation - the welfare principle - is beyond the scope of the body of law commonly referred to as the law of torts. It is stated here to complete the larger framework of legal principles underlying claims for compensation. As a means of insight into the relationship between this principle and the other two, consider again the two questions stated above as an introduction to the principle of strict accountability. When fault is not found - when conduct is more socially beneficial than harmful and is therefore to be encouraged in the overall interest of society - but the conduct nevertheless causes harms, should the harms be compensated? If so, by whom?

If the answer to these two questions is that compensation should be paid not by the actor whose socially beneficial conduct caused the harm but instead by society, through

one of its representative governmental entities, the key idea is within the scope of the welfare principle.

In contrast with the welfare principle. which bases compensation on need rather than the source of the need, the tort principles of fault and strict accountability depend on the application of some concept of causation. Inherently, the principles of fault and distinctive risk imply that some among all the antecedents of a harm for which compensation is claimed will be separated out and treated as legally relevant causes. Other antecedents are legally irrelevant; they are treated as not being among the legal causes of the harm for which compensation is claimed. This necessity of determining legal cause is, of course, relevant to the demands that tort disputes make upon the dispute resolution system. The issues involved are both legal (what legal rules of causation are to be applied) and factual.

5. Tendency of Tort Disputes Toward Bipolar Form; Substantive Involvement of Other Interests

Claims for compensation, and to a somewhat lesser extent even claims for other forms of protection of individual autonomy, are commonly presented for dispute resolution in bipolar form. Even when the tort claimant sues two or more defendants for compensation, the dispute may be viewed as one involving two or more separate claims, each involving one claimant and one defendant. If there are claims among defendants for contribution or indemnity, they too may be viewed as separate claims, each involving a contribution claimant and a contribution defendant, or an indemnity claimant and an indemnity defendant.

In fact, of course, other interests than those of the claimant and defendant are always at stake indirectly, if not directly. The very fact that the claim is presented within a legal system implies that it is to be treated systematically and not as if it were unique. The resolution of any dispute over the substantive rules of entitlement that govern the claim may have indirect impact on many other claims as well, because of its precedential effect. Moreover, the cumulative effect of allowing or disallowing claims of particular characteristics will have substantial effect not only upon other like claims but also in other significant ways - for example, in deterring or encouraging conduct and activity similar to that of the claimant and defendant, and in allocating costs of similar activities,

products, and services.[1]

6. Disputes of Pure Fact and Disputes of Evaluation

Typically, though not invariably, tort disputes involve disputes of pure fact. What happened, when and where, and who was involved?

Typically, also, tort disputes involve evaluative conclusions - for example about the quality of conduct and the nature of causal relations. These evaluative conclusions are commonly referred to as findings - even as "fact findings" - and this terminology may carry a connotation that they are in essence just like findings of fact. They are, however, inherently quite different.

Evaluative findings are illustrated by findings of negligence. The evaluative finder - the jury - in a typical negligence action must make a judgment about the quality of conduct rather than merely determining which of conflicting versions of what happened is correct. Some issues of evaluation are relatively simple and uncomplicated, even though requiring an exercise of judgment rather than merely a determination of the relative credibility of conflicting evidence. Other issues of evaluation,

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1. The medical malpractice and products liability "crises" of the 1970s are examples of instances in which organized groups have asserted that case-by-case resolution of individual disputes as if they were merely bipolar gave inadequate attention to other interests at stake.

however, may be quite complex and may call for an exercise of special skills or a specialized form of judgment. The negligence issue in a professional malpractice case is an illustration. Even if the responsibility for making the evaluative finding of negligent diagnosis is placed upon a layperson on a jury, specialized help may be required, for example, by rules that forbid a determination not supported by expert testimony.

7. Other Tendencies of Tort Disputes; Casual Rather Than Continuing Relations and Past Rather Than Future Events

Most tort claims arise out of casual rather than continuing relationships - two motorists are at the same place at the same time, or the product of an identified manufacturer fails when an identified individual is within the zone of danger from its use. It does happen, however, that tort claims also arise out of continuing relationships. Sometimes the continuing relationship is coincidental to the tort, as when an intrafamily tort claim arises out of a traffic accident. In other instances, the continuing relationship is more closely associated with the tort itself, as when the duty of care that is violated by a physician is a duty arising from a continuing physician-patient relationship.

Most tort claims - and especially claims for compensation rather than some other form of relief - concern disputes over past events rather than what may happen in the future. Disputes of fact are typically disputes about what did happen, or with what intent the parties acted in past circumstances. This characteristic tends to give an either-or quality - again a bipolar nature - to the factual disputes. The alternative outcomes to be held in view by the adjudicator thus tend to be fewer and less complex than when the dispute concerns future events other than the very redress of compensation that is the object of the claim.

C. Procedural Interests at Stake; Criteria for Evaluating Procedural Effectiveness

In addition to substantive rights, procedural interests of high value are at stake in a dispute resolution system, for tort or any other kinds of claims. The key procedural interests may be classified in categories concerned with (1) integrity, (2) impartiality, (3) accuracy (of factfinding), (4) consistency (of evaluative determinations), (5) timeliness, (6) accessibility, (7) affordability, and (8) acceptability. Viewed from the perspective of the evil to be avoided, the integrity of a dispute resolution system concerns its effectiveness in protecting against corruption and coercion; impartiality, its effectiveness in protecting against bias and prejudice; accuracy and consistency, its effectiveness in protecting against, respectively, mistakes in fact findings and in evaluative determinations; timeliness, its effectiveness in protecting against delay; accessibility, its effectiveness in protecting against denial of access; affordability, its effectiveness in protecting against undue expense of access; acceptability, its effectiveness in forestalling unease about its effectiveness and fairness and resistance to giving effect to its determinations.

These procedural interests are of such value in themselves that a system producing "correct outcomes" may nevertheless be a failure because it does not satisfy these concerns about process.

D. Other Criteria for Evaluating Tort Dispute Resolution

1. Lawmaking Effectiveness: Sensitivity to All Interests at Stake

In the overall assessment of the tort dispute resolution system, it will be necessary to consider not only how well the system deals with the bipolar claims formally at issue but also the extent to which the formally bipolar claims involve other interests and how well it deals with issues bearing upon those interests. This aspect of the evaluation is an appraisal of the lawmaking function within the dispute resolution system.[1] The scope of this lawmaking function may vary considerably among different dispute resolution systems. For example, it is relatively less substantial in worker compensation proceedings than in tort trials.

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1. See Part IV infra.

2. Consistency of Outcomes with Declared Principles

One measure of the effectiveness of a system for resolving tort disputes is its effectiveness in producing outcomes consistent with declared substantive entitlements that the legal system purports to be applying. From this perspective, one who considered the declared principles of decision very unsatisfactory might nevertheless give the dispute resolution system high marks for producing in a very high percentage of cases outcomes entirely consistent with those declared principles. This perspective accepts as a premise the existing tort doctrine, whatever it may be at the moment of evaluation of the dispute resolution system, and proceeds to inquire how well the existing method of resolving disputes under that doctrine achieves the objective of faithfully applying that doctrine case by case.

In applying declared principles to the evidence presented in particular cases, does the system produce factfindings consistent with what actually happened? When it undertakes to determine states of mind, such as some form of intent, is its percentage of accuracy high? When it undertakes to evaluate conduct as reckless, negligent, or prudent, are its evaluative findings accurate and reliable?

Even from this perspective taking the governing substantive rules as given, however, an evaluation of the effectiveness of dispute resolution cannot be limited to inquiry about how well the system treats

the cases it tries to conclusion. Plainly the system will not and could not adjudicate all potential disputes, or even all matters that reach that degree of contention that might appropriately be classified as a dispute.[1] Many disputes will be settled and many potential claims will be foregone. What impact does the dispute resolution system have on these dispositions outside the system? Does it foster outside dispositions consistent with the principles of substantive entitlement it purports to be applying? Or does it tend to cause outside dispositions that are inconsistent with those principles?

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1. See Part V , Section A infra.

3. Effect on Continuing Relationships

Whenever parties to a dispute have some continuing relationship, concerns about the impact of dispute resolution procedures on that relationship have a bearing on choices among different forms of dispute resolution. In general concerns of this kind have less bearing on tort dispute resolution than, for example, on resolution of family law disputes, for the reason that the parties to most tort disputes do not have a continuing relationship. In examining the fitness of a dispute resolution system for the whole array of tort claims, however, it will be necessary to take account of some types of tort claims that deviate from the more common pattern and do involve continuing relationships. Thus, a particular dispute resolution system may be more suitable for resolving intentional tort claims among strangers who become involved in an argument after a traffic accident than for resolving intentional tort claims arising out of family or neighborhood quarrels.

4. Relationships Between Substantive Law Standards and Burdens of Dispute Resolution

The nature of substantive law principles and the criteria of substantive entitlement may have a bearing on the nature and extent of the burdens of dispute resolution.

Disputes based on application of the fault principle tend to make heavier demands upon the dispute resolution system than disputes based on application of the principle of strict accountability. One reason is that substantial resources must be committed to resolving difficult pure fact disputes[1] about details of past events; an example in point is the necessity of attempting to recreate the disputed split-second sequence of events immediately preceding the crash of two cars. A second reason is that additional resources must be committed to resolving evaluative questions[2] to convert those findings about details of what happened into findings of negligence and contributory negligence and even to degrees of fault under comparative fault systems. Moreover, though causation issues must be resolved in applying either the principle of strict accountability or the fault principle,[3] they tend to be more complex

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1. See Part I, Section B, Subsection 6 supra.

2. Id.

3. See Part I, Section B, Subsection 4 supra.

and to involve more debatable evaluations when the fault principle is applied. These differences lend some weight to arguments for substantive law reforms that decrease reliance on fault and increase reliance on strict accountability;[1] such a substantive change tends to reduce the cost per claim of dispute resolution. Unless a proposed substantive law change of this kind would tend to increase claims enough to outweigh this factor, the result would be a reduction of the total demand on the dispute resolution system.

From another perspective, substantive law changes decreasing reliance on fault and increasing reliance on strict accountability may be instances of simplifying substantive law and reducing the number of "decision points" in dispute resolution.[2]

In general, 20th century developments in American tort law support the conclusion that a trend toward strict accountability has been under way, though it may have been slowed or arrested recently.[3]

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1. See Part III, Section B infra.
2. See Part III, Section A infra.
3. See Part III, Section B infra.

5. Adaptability: Assigning Disputes to Optimal Dispute Resolution Systems

To what extent has our total legal system tailored the dispute resolution system for a particular dispute to the nature of that dispute? To what extent might it be feasible and desirable to give more attention to such tailoring?

Another way of expressing essentially the same questions is to focus on the rules of the total legal system for assigning particular disputes to one or another among the available dispute resolution systems, then asking: How well have we designed our rules for assigning a dispute to one or another among the available dispute resolution systems? Could we improve these assignment rules to increase the probability that a particular dispute is assigned to a system well tailored to deal with it effectively? Might those rules give greater attention to reassignment as circumstances of the dispute change?

Like the more basic questions stated in the Introduction to this paper, these are questions that we probably cannot answer firmly and fully, even after careful exploration. It may be useful to have them stated, however, as a reminder of the context in which other questions are considered.

II. Benefits and Costs of Judicial Resolution

A. Jury Trial Evaluated by Procedural Criteria

In the American legal tradition at least, and perhaps more broadly as well, jury trial is the most elaborate and refined of all the available dispute resolution systems. It reflects a deep concern with the process itself. It aims for the greatest possible assurance of both the fact and the appearance of fairness of process, whatever the outcome. It is the "full-dress" system of dispute resolution.

1. Evaluation of Civil Jury Trials Generally

Part I, Section C, of this paper identifies eight key procedural interests at stake in any dispute resolution system: (1) integrity, (2) impartiality, (3) accuracy (of factfinding), (4) consistency (of evaluative determinations), (5) timeliness, (6) accessibility, (7) affordability, and (8) acceptability. How does jury trial rate on each of these counts?

Integrity. The integrity of a system depends on its effectiveness in protecting against corruption and coercion.

Though no system can be fully secure against corruption, key characteristics of a system make it more or less susceptible to deliberate misuse by those disputants who would corrupt it to win their controversies. Jury trial, as an institution, has built-in checks against corruption because of the distribution of responsibility

in a way that gives each participant in the decisionmaking a limited share of the power to affect the outcome. Responsibility for resolving disputes of fact is committed primarily to a group (usually six or twelve). Responsibility for instructing that group on legal rules, insulating them from hearing inadmissible evidence and argument, and monitoring their application of legal rules to admissible evidence in order to find facts fairly is committed in the first instance to a single person - the trial judge - but subject to review by the larger number of persons serving on a higher court. This dispersion of responsibility and power greatly increases the difficulties of corrupting the system in a particular case without corrupting more than one decisionmaker, and thus reduces the risks that corruption will occur in fact. On this count, jury trial would seem to deserve a higher rating than any of the alternatives that have been or might be seriously advanced.

The characteristics of jury trial that tend to make it relatively secure against corruption are relevant also to risks of coercion. The fact that the decision is a group decision and that the secrecy of the deliberations is protected by law help to reduce the exposure of jurors to effective coercion by threats or in other ways.

The public sense of assurance of integrity of the system will depend, also, upon the openness of the system to public scrutiny. One aspect of jury trial might be thought to rate low in this respect, since the secrecy

of jury deliberations is protected by law. However, it seems likely that the public will readily understand that other valued interests are served in this way, including protection of jurors against coercion. In general, the conduct of other aspects of jury trial as public proceedings causes the system to rate high with respect to openness to public scrutiny.

Impartiality. Impartiality of a system of dispute resolution depends on its effectiveness in protecting against bias and prejudice. On this count, too, it would seem that jury trial rates higher than any of the alternatives. It is surely true that in some instances a particular judge may be more impartial - better able to put aside personal predilections - than a group such as a jury. It may be true also that wisely selected judges as a group will be both inherently more disposed to impartiality and better schooled to guard against unintended bias or prejudice than is a jury of nonprofessional decisionmakers. It may be true, as well, that in relation to particular issues (for example, faithful application of the rule that contributory negligence is a complete bar to a negligence claim, in jurisdictions where that is still the law), a jury is more likely than a judge to depart from faithful application of the legal rule because of a bias that is contrary to that rule. Yet, a system-wide comparison of performances of individual decisionmakers with performances of decisionmaking groups can be expected in general to reveal less influence

of bias and prejudice for the very reason that the biases and prejudices of different individuals in the group conflict and tend to produce net group attitudes deviating less from the community consensus than individual attitudes do.

Effective insulation of decisionmaking against bias, prejudice, and predisposition depends not alone upon who is deciding, and upon the institutional structure for group rather than individual decision, but also upon institutional arrangements for separating the function of decisionmaking from the function of developing the evidence and arguments for the opposing parties.[1] This point was eloquently stated in a 1958 report of a Joint Conference on Professional Responsibility, under the auspices of the American Bar Association and the Association of American Law Schools.[2] More

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1. For more detailed development of this theme, see Keeton, Resolving Negligence Claims in Non-Judicial Forums, X Forum 771 (1975).

2. "In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute without the aid of partisan advocacy.

"Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently

recently, a group of three scholars designed an experiment in which they sought to test empirically the claim that an adversary form of presentation counteracts bias of decisionmakers.[1] Their findings lend some support

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intense to draw from his mind all that it is capable of giving--in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

"It is small wonder, then, that failure generally attends the attempt to dispense with the distinct roles traditionally implied in adjudication. What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

"An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances." Fuller and Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1160 (1958).

1. Thibaut, Walker, and Lind, Adversary Presentation and Bias in Legal Decisionmaking, 86 Harv. L. Rev. 386 (1972).

to the claim; in their words, the adversary mode "indeed seems to combat, in Fuller's words, a 'tendency to judge too swiftly in terms of the familiar that which is not yet fully known.'"[1]

From another perspective, this separation of decisionmaking and advocacy functions may be viewed as a way of assuring each disputant a reasonable opportunity to present evidence and argument, and with reasonable assurance of openminded consideration.

Jury trial in American courts probably presses farther than any other dispute resolution system toward separation of the function of developing the arguments and supporting evidence for opposing positions. Although this characteristic of jury trial has adverse consequences on cost, it contributes substantially to a stronger affirmative evaluation as to impartiality.

Accuracy and Consistency. Accuracy of factfinding and consistency of evaluative determinations depend on the effectiveness of a dispute resolution system in protecting against mistakes of understanding that result in erroneous findings and unpredictable evaluative conclusions. The jury system has both its supporters and its detractors on these counts. Probably most observers agree that the good common sense of a group

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1. Id. at 491.

of six or twelve jurors is in general a better insulation against mistaken conclusions about the credibility of witnesses and mistaken inferences from evidence than the combination of common sense, expertness in a relevant subject matter field, and experience in decisionmaking ordinarily produces in individuals. But the body of opinion to the contrary varies in relation to the complexity of the issues involved in a case, and especially in relation to involvement of evaluative as distinguished from pure fact findings.[1]

Thus, some observers have argued that complex antitrust cases ought not to be submitted to jury trial, and proposals have been advanced from time to time for alternative methods of resolving disputes over issues involving expert knowledge and opinions on matters as to which there are differences even among qualified experts.

In addition to depending on understanding, accuracy and consistency depend also on the integrity and impartiality of the dispute resolution system - the two characteristics discussed immediately above.

The capacity of the dispute resolution system to measure up to high standards of accuracy and consistency

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1. See Part I, Section B, Subsection 6, for discussion of the distinction between evaluative and pure fact findings, and its significance in dispute resolution systems.

is a very significant element of its performance in tort disputes since they tend to involve both disputes of pure fact about what happened in past events[1] and evaluations, including "findings" about the quality of conduct and the nature of causal relations.[2]

It is obvious that evaluative "findings" are matters of opinion, with respect to which often there are not clearly right and clearly wrong answers. Yet the bipolar nature of tort disputes requires yes or no answers. Consistency in resolving such questions is not a matter of objectively demonstrable conformance to a reality existing in the physical world. Rather, it is conformance with a sense - perhaps best described as a community sense - of what the evaluative determinations ought to be. It is difficult and sometimes impossible to demonstrate that a dispute resolution system has or has not achieved an appropriate outcome in a particular case. Indeed, like the umpire's call, the decision rendered by the dispute resolution system is itself the authoritative determination and we are left with no authoritative basis or standard for challenging it, outside the rights of appeal or correction within the system itself. Nevertheless, the performance of a dispute resolution system may over time instill in

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1. See Part I, Section B, Subsection 6 and 7 supra.

2. See Part I, Section B, Subsection 6 supra.

the community a sense of confidence or lack of confidence in the consistency of evaluative findings of the system.

In a subtler way, these two points - both the difficulty of demonstrating error and the fact that over time a dispute resolution system may instill a sense of confidence or lack of confidence in its performance - apply to findings of pure fact as well as evaluative determinations. In theory, of course, the system is supposed to find the truth about a physical event that is alleged to have happened and in fact either did or did not. For example, the defendant either did or did not drive into the intersection after the traffic light had changed to red, and the plaintiff did or did not start across the street within a marked crosswalk. But when the dispute comes to a tribunal for resolution, the decisionmakers (and any Monday-morning quarterbacks as well) ordinarily cannot be certain what happened. Accuracy - conformance of the fact findings with what actually happened - is in truth a matter of probability, short of certainty, though we speak of the determinations as findings of <u>fact</u>.

In this context of lack of certainty, the potential influence of bias and prejudice is significant; protections of the impartiality of the system bear heavily on the "accuracy" of its findings and the consistency of its evaluations. The high rating of jury trial in relation to impartiality leads also to a high rating for accuracy and consistency, at least in those instances in which complexity is not a serious problem.

Timeliness, accessibility, and affordability. Timeliness depends on the effectiveness of a dispute resolution system in protecting against delay; accessibility, its effectiveness in protecting against denial of access; affordability, its effectiveness in protecting against undue expense of access. The effectiveness of jury trial in these three respects depends more upon the priority that the community gives to the right to jury trial than upon inherent characteristics of jury trial itself. It is true that one inherent characteristic of jury trial is relevant here; it costs more than the alternatives, both in public funds and in direct and indirect costs to litigants. But if our society values jury trial enough to give it a sufficiently high priority in the allocation of public and private resources, jury trial can be timely, accessible, and affordable. How well have we done, in fact, in fulfilling theoretical guarantees of jury trial? How well have we done in making jury trial timely, accessible, and affordable?

It is the reality, not the theory, of timeliness, accessibility, and affordability that counts most. If in fact the right of access is conditioned by high cost or by prolonged delay, the interest in access is poorly served. Access must in reality be prompt and at reasonable cost for the interest in access to be served well. Since evaluation of a dispute resolution system depends in substantial measure on its capacity

for fulfilling theoretical entitlements to access promptly and at low cost, a system that is conceived to protect identified interests because they are fundamental, and without regard to high costs of affording such protection, may in fact effectively deny the very protection it professes because its guarantees outrun its capacity. The consequence is that access is conditioned in fact on prolonged delay and a resulting increase in cost.

Exactly this set of conditions has developed in many American courts with respect to the constitutional guarantee of jury trial in civil cases. Over a long period during which the constitutional provisions and doctrines regarding the right to jury trial have remained unchanged, access has in some courts become egregiously delayed because of disparity between caseloads and available court time. In this context, arguments on a theoretical plane about the high value our polity attaches to the right to jury trial, however the disputants fare in the contest, do not resolve the issue. Instead, the effective decision on the priority given to the right to jury trial comes in the legislative decisions about establishing needed courts and the appropriations to support their operation.

How effective is jury trial as a system for tort dispute resolution? One part of the answer is that it is in fact operating in a way that must candidly be judged as strikingly inferior to what it is supposed

to be in constitutional theory.

One possible remedy is, of course, the creation of more courts, in sufficient number and sufficiently financed and supported to match the constitutional theory in actuality.

A second possible avenue toward matching the constitutional theory in actuality is to improve the efficiency of the court system dramatically. Probably the only realistic hope - if there is one - of achieving such a dramatic improvement as would be required is to devise ways of encouraging voluntary agreements either to settle or to resort to an alternative dispute resolution procedure in lieu of jury trial. This avenue is considered at some greater length in Part V of this paper, on the subject of Promoting Settlements.

It bears emphasis here, however, that encouragement of settlement or agreement upon an alternative procedure for dispute resolution by merely placing jury trial out of practical reach for one or both parties, through delay, is not what is referred to here as encouraging <u>voluntary</u> agreements. When the disadvantages of delay place jury trial out of reach, it is effectively denied even though the theory of entitlement continues to be voiced. Moreover, substantive entitlements, as well as the basic procedural entitlement to jury trial, may be affected. Delay is likely to have a differential impact on the parties to a dispute that affects outcome substantively. Not only may delay cause a case to

be settled that otherwise would have been resolved through jury trial but also it may cause a case that would have been settled for one figure before an early opportunity for jury trial to be settled at a very different figure because one party is more severely disadvantaged by delay than is the other. A system of dispute resolution must be found wanting when it effectively makes practical changes in substantive entitlements in this way.[1]

Acceptability. Acceptability of a dispute resolution system is, in a sense, its public image. In the long run, however, a dispute resolution system is very likely to have a putlic image no better than it deserves on the basis of its performance, and probably about as good as it deserves. Acceptability depends in part on performance as measured by nonprocedural criteria of evaluation discussed in later parts of this paper.[2] It depends also on the system's performance in relation to all the other seven categories of procedural evaluation.

A system riddled with corruption, or with pervasive bias and prejudice among its decisionmakers, will be publicly perceived as arbitrary and unfair, and its

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1. See Part I, Section D, Subsection 2 supra.

2. See Parts III and IV infra.

decisions and orders will be widely resisted by parties and poorly supported by the public. Similarly, though perhaps in less powerful degree, a system that measures up well in integrity and impartiality will nevertheless rate poorly on acceptability if the public resources committed to its support are insufficient to enable the system to score high marks in timeliness, accessibility, and affordability.

With respect to a system's performance in relation to accuracy and consistency, it has been noted above that in the disputes that come to a tribunal for disposition - settlement procedures having failed - it is likely to be the case that certainty about what happened, and how these events should be evaluated, is an impossibility, and that in these circumstances the high rating of jury trial with respect to its protection of impartiality leads also, in relation at least to uncomplicated factual and evaluative questions, to a high rating for accuracy and consistency. This strength of jury trial probably has much to do with its priority status in civil cases, as well as criminal, in American jurisprudence.

There are, of course, added advantages distinctive to the criminal context concerned with protection of fundamental rights of individuals against oppression either by agencies of government or by majority preference relating to less fundamental interests. They have an important bearing on the distinctively greater acceptability of jury trial for criminal charges. Although interests

of this fundamental character are not involved in the great mass of tort cases, typically involving claims for compensation, they may sometimes be involved in tort disputes of a less typical character. For example, basic interests of personal autonomy are sometimes at stake in tort disputes over informed consent to medical procedures - blood transfusions in opposition to religious convictions, or organ transplants, especially if the donor is alleged to be incapable of effective consent.

It is not easy to persuade a losing disputant that the process was fair even though the decision was adverse. The more often one system achieves this difficult outcome in comparison with another system, the better it rates in this category of acceptability. In this respect, jury trial rates high in comparison with the alternatives.

2. Considerations Bearing Distinctively on Tort Disputes.

Tort disputes tend to be bipolar[1] and in this respect relatively uncomplicated. The interests of others that are at stake indirectly in a typical tort claim for compensation are interests primarily affecting the fashioning and application of legal rules and therefore tend not to add significantly to the complexity of

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1. Part I, Section B, Subsection 5, supra.

questions submitted to the jury. The great mass of tort cases, then, do not place a strain on the capacity of the jury trial system to rate well in the category of accuracy. Also, most tort cases concern casual rather than continuing relations, and past rather than future events.[1] Thus, they tend to depend heavily on disputes of fact, about what happened in the past, uncomplicated by concerns about the effect of dispute resolution on continuing future relations between the particular disputants before the tribunal. These are types of questions in the resolution of which the good common sense of the jury has value and the risk of overtaxing the capacity of the decisionmakers is low. Jury trial is well adapted to resolving disputes centered in those areas of substantive law within which our legal system maintains substantive entitlement to compensation that depends on such fact questions as these. Questions as to whether a similar evaluation may extend to less typical tort cases are addressed elsewhere in this paper.[2]

3. Summary of Evaluation by Procedural Criteria.

If sufficient public resources are made available to provide timely access to jury trial, and if private costs are held within the range of affordability for

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1. Part I, Section B, Subsection 7, supra.

2. See Part III, Section G, infra.

the parties involved, jury trial probably rates higher than any alternative in acceptability. It is the "full-dress" system - the system that provides the best protections against corruption, coercion, bias, and prejudice, and, along with nonjury judicial trial, a highly structured process for assuring fair hearing, including a reasonable opportunity to have one's evidence and arguments heard and genuinely considered. The condition stated at the beginning of this paragraph, however, is critically significant - "if sufficient public resources are made available to provide timely access." In many American courts that condition has not been fulfilled in the last two decades, and prospects for the dramatic increase in support required to make the theoretical guarantee of timely access to jury trial a reality in tort cases are not encouraging. Absent dramatically increased appropriations, it must be expected that a delayed and expensive jury trial system for resolving tort disputes will grow increasingly less acceptable and the case for turning to alternatives will grow stronger.

B. Nonjury Trial Evaluated by Procedural Criteria

Integrity and impartiality. Nonjury trial in our legal system typically occurs before a single judge. Group protection against risks of corruption, coercion, bias, and prejudice[1] is thus unavailable, but in other ways the legal system protects the integrity and impartiality of this form of dispute resolution. In the first place, the criteria and procedures for selection of judges, in general though not universally, include more safeguards than exist in relation to the selection of decisionmakers in alternative dispute resolution systems. Secondly, judges generally serve for terms - many for very long terms or for life - and as a group benefit from long experience as professional decisionmakers. Third, the structure of judicial administration, the code of judicial conduct, and the expectations generated both formally and informally provide stronger reinforcement of the safeguards of integrity and impartiality than exists generally in alternative dispute resolution systems. With all these protections of impartiality, however, it is nevertheless a common perception among trial lawyers that protection against bias and prejudice is significantly stronger in jury trial than in nonjury trial. This perception is manifested not only in direct expressions of opinion but also in common practices of

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1. Part II, Section A, supra.

"judge shopping" that arise whenever the docketing system provides an opportunity for an election by a lawyer; probably the single factor most often influencing the choice by a lawyer to steer a dispute to one judge rather than another of the same court is the known predilections of one or both of the judges toward certain types of issues. The incidence of "judge shopping" in the legal system is sufficient evidence to demonstrate the extreme difficulty of designing and maintaining effective safeguards of the impartiality of the system for assigning cases to judges. It also serves to remind us that another problem remains, even if the assignment system is impartial - that is, the perceived bias or prejudice that serves as the incentive for "judge shopping" to occur when the system makes it possible.

Accuracy and Consistency. As to accuracy in the resolution of disputes about what happened in the past, in typical bipolar tort litigation over claims for compensation, some observers would give the edge to jury trial and others to nonjury trial, at least when it occurs before an average or better judge. Concerns about the risks of bias and prejudice, referred to in the next preceding paragraph, help to account for the views of those who would give the edge to jury trial.

With respect to very complex evaluative issues that tax the capacity of the jury to understand the evidence and to understand its application under imprecise

standards of law, probably nonjury trial rates higher than jury trial on accuracy. Its rating in this respect, and in protection of the interests of integrity and impartiality as well, might be improved by the use of a multi-judge tribunal, though that change would produce substantial disadvantages of cost and, as a result, in timeliness, accessibility, and affordability.

Timeliness, accessibility, and affordability. In relation to affordability, nonjury trial plainly has an edge over jury trial. The major reason that nonjury trial is more affordable is lower cost incident to the fact that the nonjury trial is typically somewhat more expeditious. In the first place, it saves the time that would be expended in preparing and delivering the charge to the jury and all the special instructions that may be given as the trial proceeds. Secondly, trial lawyers tend to take longer in presenting evidence for a jury, not alone because of bypassing requests for special instructions about the evidence but also because of the expectation that the judge will comprehend the evidence more readily than jurors in general, and by an even larger margin in comparison with the slowest among the jurors (for whom the trial lawyer, ordinarily at least, wants the evidence to be plainly understandable).

Timeliness and accessibility, as well as affordability to the extent that costs tend to rise with long delays, are not inherently different for jury and nonjury trial. The administration of a system may make them so, however,

because of preferences given to one or the other form of trial within an overloaded system that cannot provide prompt trials for all cases. In practice, probably jury trials have tended to suffer the consequences of delay to a somewhat greater extent than nonjury trial.

Acceptability. As noted in an earlier section of this paper,[1] acceptability of a dispute resolution system depends heavily on how well the system rates on the other seven criteria of procedural evaluation (which are examined in that subsection in relation to jury trial). It is relevant to the comparison between jury and nonjury trial that the determinations of fact in jury trial are made by a group drawn together for the special purpose of deciding that case, and disbanded immediately afterward. It is not unlikely that a losing litigant will feel that the tribunal was unfair, but probably that feeling is less likely to be translated into a feeling of unacceptability of the dispute resolution system when the decision group promptly disappears from view than when a single decisionmaker remains prominently in view and may be thought to be continuing to decide other cases improperly. It may be doubted, however, that this difference has a very substantial impact on the relative acceptability of jury and nonjury trials.

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1. Part II, Section A, Subsection 1.

It may be suggested that the fact that one party or the other so often elects jury trial whenever the choice is available, in American jurisdictions at least, indicates that jury trial plainly rates higher in acceptability than nonjury trial. Another explanation is at least a possibility, however, and especially in relation to the most typical of tort disputes - claims for compensation. Although defendants would in some instances elect jury trial if plaintiffs did not, clearly plaintiffs as a group prefer jury trial because of a belief that juries will be more sympathetic to claims for compensation than judges would be. Thus, the pattern of election might be the expression of a preference for the perceived bias of juries, rather than an expression that jury trial is inherently more acceptable in any other respect.

C. Evaluation in the Legal Profession.

In comparison with alternative dispute resolution systems, trials in the judicial system (jury or nonjury) are quite clearly favored by the legal profession. This preference was manifested, for example, in the discussion groups of the "Pound Revisited" Conference in St. Paul, in 1976.[1] The growth of arbitration for

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1. [The proceedings of the Conference, currently being prepared in the Federal Judicial Center, are expected to contain reports of the discussion groups that confirm this point.]

commercial disputes manifests a different view outside the profession, but not in relation to the typical dispute over compensation that accounts for the great mass of tort cases.

In relation to worker compensation claims the prevailing dispute resolution system is neither jury nor nonjury trial but instead an administrative tribunal. It may well be, however, that the administrative tribunals of worker compensation systems are the closest thing to nonjury trial among all the alternatives to judicial dispute resolution.

D. Evaluation by Nonprocedural Criteria.

A previous section[1] of this paper identifies key nonprocedural criteria for evaluating dispute resolution. An evaluation of judicial dispute resolution of tort cases, in jury and nonjury trials, by these other criteria is presented in Parts III and IV, infra.

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1. Part I, Section D.

III. Relationships Between Substantive Law and Dispute Resolution Systems

A. Clashing Values of Simplicity and Refinement; The Role of Expectations

Our legal system places high value on sensitivity of substantive law to the relevance and appropriate weight of all the special nuances of the particular case in dispute. The key value of sensitive refinement of legal doctrine is obvious; it enables us to take account of more of the kinds of factors that affect intuitions about what is fair and just. The values of simplicity may be less obvious, but they are not less real. First, simpler legal doctrine imposes less of a load on the dispute resolution system; its application requires less of the time and energy of those who administer the system. Second, the less complex substantive rules are more likely to be correctly understood by the public, including both parties to a transaction. Third, expectations of the availability of relief from the legal system are likely to be more realistic and the likelihood of dispute will be reduced if legal doctrines are simple. Fourth, even if the parties develop contrasting expectations and find themselves locked in dispute, the likelihood of accommodation and settlement is higher than when their rights and liabilities are governed by complex substantive law, since a full exchange of views, with or without the assistance of counsel, is more likely to bring the parties' matured expectations of the outcome

of formal dispute resolution near enough to each other to make settlement an attractive alternative.

A trend toward complexity of substantive law - toward increasing the number of "decision points" - and the resulting strain on dispute resolution systems was observed more than a decade ago by John Frank.[1] His plea for simplification has gone unheeded. With only occasional exceptions, lawmakers in legislatures and courts have continued to produce, and academicians have generally continued to press for, legal rules with more and more refinement.

Perhaps the common law system, focusing to the extent it does on case by case dispositions, distinctively fosters an emphasis on refining the substantive law. Counsel have strong incentives to develop reasoned grounds for distinguishing adverse precedents. A court, moved by its sense of the equities, and even though genuinely resisting the temptation to manipulate doctrine, is encouraged to see differences of sufficient magnitude, between previously decided cases and the one at hand, to justify the conclusion that the issue before the court is one of first impression. A new exception or qualification of previous doctrine is recognized.

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1. Frank, American Law: The Case for Radical Reform (1969).

Case by case, doctrine grows more complex.

Case-by-case decisional lawmaking probably tends more than statutory lawmaking to give special weight to the value of sensitive refinement of the rules of substantive law to the eccentricities of the particular case. The court has a case in hand, fully presented for decision, and has the power and responsibility to make law to cover the case if previous lawmaking has left a gap. Naturally the court is more likely to fashion a rule that gives weight to all the special features of the case at hand since this case is the immediate problem and the occasion for acting. That immediate concern is likely to override interests in keeping the law simple - so it will be easier for the public to understand, less likely to cause conflicting expectations, and more likely to produce settlements rather than disputes that must be resolved in court. Thus, the chief reason that simple rules that cut corners to achieve certainty are more likely to appeal to a legislature than to a court is institutional. A legislature's focus tends to be more wholesale in orientation; a court's more retail; the legislature's, more concerned with the effect of the rule it is enacting on the interests of the whole community; the court's, more concerned with interests of the parties before it.

In light of these inherent tendencies of the lawmaking process in courts and in legislatures, probably we should look to legislatures as the more promising agency

for reforms of substantive law aimed at simplification. When one reflects, however, upon the complexities of a tax code or a commercial code, or even a no-fault automobile insurance act after it has weathered the accommodations of the legislative process, the prospects for any major shift toward simplification of substantive law are not very encouraging.

The weight that simplicity deserves depends partly on its effect on the load upon the dispute resolution system. It depends, secondly, on avoiding the disparity between declared entitlements and enforced entitlements that occurs when complexity contributes substantially to the overloading of the dispute resolution system.[1] Sensitively refined laws have less value than they purport to have if they not only are themselves not enforced because of the overloaded dispute resolution system but also are contributing to the overload that denies practical enforcement of other laws as well.

Questions for Exploration: Might we develop effective ways of encouraging a practice of explicit consideration of the impact of complexity on dispute resolution? Might we develop other possible ways of advancing the cause of simplicity?

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1. See Part III, Section H infra.

B. A Trend Toward Strict Accountability?

Questions for Exploration: Is there, as suggested earlier in this paper,[1] a general trend in tort law toward greater emphasis on the principle of strict accountability and less emphasis on the fault principle? If so, will this trend produce a somewhat less complex set of doctrines relating to compensation? It seems probable that both questions can be answered affirmatively. Even though difficult issues of causation may remain in some instances (as in the strict products liability field), disputes over the basis of liability probably will tend to be less complex than under fault doctrine.

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1. Part I, Section B, Subsection 4 supra.

C. Designated Compensable Events; Physician and Hospital Liability

The American Bar Association Commission on Medical Professional Liability has sponsored a study of the feasibility of designating compensable events in medical treatment. The Commission is not committed, however, to supporting the use of such a list as a means of changing to a principle of strict accountability in lieu of negligence in medical injury cases; rather, the exploratory inquiry into the feasibility of identifying commonly recurring and readily identifiable events associated with medical care might turn out to be useful as a means of reducing and simplifying decision points within a fault system. For example, a list of designated compensable events might be used as a basis for either rebuttable (or conclusive) presumptions of fault. One might imagine, also, an associated list of outcomes as to which there would be a presumption against a finding of fault.

Questions for Exploration: Can the burden of malpractice cases on the dispute resolution system be reduced through the development of a system of designated compensable events, either within the fault system or as part of an alternative compensation system that would be substantively as well as procedurally acceptable?

D. Simplifying the Measure of Damages for Permanent Injuries; Periodic Payments

The tort measure of damages for permanent injuries requires "fact" findings about, first, what will happen for a lifetime in the future and, second, what would have happened throughout a predicted life expectancy had the tortious injury not occurred. These questions about the future are not "bipolar" questions to which the answers are either right or wrong, and with respect to which at least we can be right more often than wrong. All our predictions for the future - both as to what will happen and as to what would have happened but for the injury - are estimates of probabilities; the one thing certain about them is that they will be wrong. The improbability of "fact" findings that are even reasonably close to what later develops in reality is partly due to the inherent complexity and difficulty of the question submitted for "fact" finding under the tort measure of damage for permanent injuries.

Simplification of the issues presented for dispute resolution in a claim for compensation for personal injuries is one among key reasons advanced for proposals for a system of periodic rather than lump-sum payments of compensation to seriously and permanently injured persons. The National Conference of Commissioners on Uniform State Laws is developing a proposed act on this subject, which is expected to come before the 1979 Annual Meeting (in August) for Second Reading.

The most recent draft of this Act provides for trials in which factfinders must still predict future disability; thus all the problems of predicting future physical conditions, including the needs for expert medical witnesses, remain. The proposed act would, however, require factfindings of predicted lost wages and medical expenses in current rather than predictably inflated or deflated dollars. Thus, it would sharply reduce dependence on economists as expert witnesses in the trial of serious personal injury and death actions. Also, the proposed act might be expected to have a tendency to encourage settlements because of potential tax advantages to the parties. In these ways enactment of the proposed act might be expected to reduce the burden of serious injury and death actions on the dispute resolution system, though this potential benefit is not a primary objective of the act.

E. Coordination of Benefits

Multiple claims for compensation based on a single injury make multiple demands on the dispute resolution system. This is true, for example, when the substantive law applies the collateral source rule, under which the claimant may recover twice or more because a tortfeasor is not entitled to a reduction of damages on account of benefits the claimant has been receiving (or has a right to receive) from a source collateral to the tortfeasor. It is true, also, when the claimant is denied double recovery but one who has compensated the claimant is subrogated to the claimant's right of recovery against a third person.

The potentially overlapping sources of compensation are numerous, including worker compensation, accident insurance, health insurance (private and public), liability insurance, medical payments insurance, property and casualty insurance, income tax deductibles and exemptions, and social security.

Provisions regarding coordination of benefits from varied sources have been included in no-fault insurance legislation, and the open discussion of the matter in this context has contributed to development of more interest in it in other contexts as well.

Since the costs of multiple dispute resolution must ultimately be paid by those who pay the insurance premiums, or otherwise finance the varied sources of compensation, the burden tends to work back eventually

to groups that overlap extensively. As a result, the potential benefits of social cost accounting from careful attribution of responsibility through multiple layers of loss transfer are seriously diluted. In this context, simplification of the law by adopting rigorous coordination-of-benefits rules that limit the number of demands made on the dispute resolution system because of a single injury become increasingly attractive.

An alternative short of adopting such rigorous substantive rules regarding coordination of benefits is to require that second and later loss-shifting claims be processed by an alternative dispute resolution system. Such a provision appears in some no-fault automobile insurance statutes. For example, a Massachusetts no-fault insurer, having paid no-fault benefits, has a subrogation-like right to reimbursement from the liability insurer of a motorist who negligently caused the injury, but this claim must be processed through arbitration rather than in court.

F. Enacted and Proposed Reforms of Product Liability and Medical Malpractice Law

In the period 1975-79, statutes modifying the law with respect to medical malpractice claims were enacted in a majority of the states and statutes regarding products liability were enacted in some states. Most of these changes were initiated for the purpose of reducing overall costs of the system. Others were concerned with availability as well as affordability of liability insurance coverage. The subjects addressed included caps on the measure of damages, shortened limitations periods, and tightening of the criteria of liability (that is, requiring more proof, or proof of a more serious degree of fault, to sustain a claim of medical malpractice, or of a "defective" and "unreasonably dangerous" quality of the product to sustain product liability).

A draft model product liability law, prepared under the auspices of the Secretary of Commerce and based on a study of the Interagency Task Force on Product Liability was published for comment in January, 1979.[1]

Although the primary objective of these statutes and proposals is cost control, one might view some

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1. Department of Commerce, Office of the Secretary, Draft Uniform Product Liability Law, 44 Fed.Reg., No. 9, pp. 2996-3019, Jan. 12, 1979.

of the changes as designed to achieve that objective through rules of law that would be simpler to administer as well as demanding more proof to support a claim. For example, shorter limitation periods tend to bar automatically the oldest claims, with respect to which problems of administration arising from unavailability or staleness of proof would be most serious.

The potential impact of the enacted changes in these areas is quite limited.[1] The combined effect of commonly proposed modifications within the present negligence-and-liability insurance system for medical malpractice claims probably cannot effect cost reductions of more than about one-fifth to one-fourth of what costs would be without change. Inflation and increases in the claims rate might be expected to produce increases of equal or greater dimension within a year or two, thus obscuring the real effect of such cost-reducing measures.

Question for Exploration: Is it realistic to expect that proposed reforms of products liability and medical malpractice law would have substantial effect on the dimensions of the burden of claims of these types on the dispute resolution system?

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1. See generally American Bar Association, 1977 Report of the Commission on Medical Professional Liability, at pp. 10, 55-58.

G. Proposals Regarding Toxic Substance Pollution

Publicity given to dramatic instances of toxic substance pollution - especially to cases of kepone poisoning in Virginia and polybrominated biphenyls (PBB) in Michigan - have brought to public attention a potential body of compensation claims whose demands on the dispute resolution system are likely to be both distinctive and substantial.

The first Michigan court case involving PBB's went to trial in 1977. The trial came to a conclusion 14 months later, with a judgment for the defendants, after the longest trial in the state's history.

Under existing law, rights to compensation arising from toxic substances pollution are governed primarily by state law. Proposals are pending, however, to create a federal cause of action - in some versions for enforcement of claims in the court system, in others for enforcement through administrative tribunals.[1]

Claims based on toxic substance pollution deviate from the most common pattern of tort claims for compensation in significant ways. First, they are not predominantly

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1. See, e.g., HR 9616, which includes a proposal for a special dispute resolution system within an administrative agency. See also Soble, A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution, A Model Act, 14 Harv.J.Legis. 683 (1977).

bipolar even in form, much less in substance, since they tend to arise in large numbers of associated claims. Second, they involve extraordinarily complex factual, economic, social, and legal disputes. Third, they tend to involve not only past events but as well continuing activities and risks. Fourth, they tend to have interstate and national implications to a far greater extent than most tort claims for compensation. The total of these and other differences probably makes a far stronger case for national intervention in both lawmaking and dispute resolution than can be made for tort claims generally. Further exploration of the significant characteristics of these claims and of their implication for dispute resolution seems warranted.

H. Matching Entitlements with Obligations.

The substantive entitlements recognized by tort law and the procedural entitlements recognized in tort dispute resolution systems become realities only if obligations to fulfill them are recognized and are practically enforceable. Often a formal declaration of entitlement, by judicial opinion or by statute, is separated both temporally and institutionally from a declaration imposing a specific obligation to fulfill the entitlement. When the later declaration of obligation occurs, frequently it turns out to be more measured and limited than the declaration of entitlement. In reality the entitlement is as limited as the matching obligation to enforce it.

A striking example of this phenomenon is the changing reality with respect to the guarantee of jury trial in tort cases.[1] Substantive law declarations have dramatically expanded entitlements to compensation during the twentieth century. This development, along with other social, economic and legal developments, has even more dramatically increased the burdens on our courts. Matching provisions for obligations (including appropriations of public funds to provide jury trials to adjudicate claims to the expanded entitlements to

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1. See Part II, Section A supra.

compensation) have fallen short of the need. Thus, the effectively enforceable entitlements are in many instances substantially different from the formally declared entitlements.[1]

In the context of a time of expanding rights to compensation, the disparity between declared entitlements and enforceable obligations of fulfillment has tended to limit somewhat the scope and amount of compensation. The potential effect of changes in dispute resolution systems for tort cases might vary from this pattern, however. For example, the availability of speedier dispute resolution would alter the bargaining positions of the parties, particularly in relation to cases in which the claimant's economic needs create a pressure on the claimant to reduce the amount demanded in order to effect an earlier settlement. A full evaluation of proposed changes in dispute resolution systems must take account of the effects the changes will have, in whatever ways, upon the substantive entitlements and obligations of the parties.

The developing fields of tort liability based on professional negligence and on toxic substance pollution may be viewed as two key illustrations presenting a

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1. See generally Keeton, Entitlement and Obligation, 46 U.Cinn.L.Rev. 1, 18-33 (1977).

more general issue regarding the effectiveness of jury trial for resolution of distinctively complex controversies. The highly favorable rating of jury trial as a system for resolution of tort disputes[1] is influenced by the bipolar orientation, the ordinarily uncomplicated nature of issues of pure fact, and the relatively less complicated nature of evaluative issues of negligence and causation when those issues are confronted in the most typical of tort actions involving personal injuries arising from common types of accidents. The higher rating of jury trial is less secure in relation to more complex evaluative issues, such as those of professional negligence, and the more complex factual and evaluative issues presented in toxic substance pollution litigation. If the right to jury trial is to be withdrawn from any part of the whole array of tort disputes, complex tort litigation would seem an appropriate place to start. Even so, any proposal that parties to such a dispute be required to submit to an alternative form of dispute resolution in lieu of jury trial is destined to encounter severe opposition.

The central issue is in essence a cost-benefit problem, though resistance to viewing it in that way may be expected. A dispassionate reading of the available evidence strongly supports the conclusion that current

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1. See Part II supra.

arrangements for dispute resolution are in serious peril because of the tension between the declared guarantee of jury trial and the limited resources committed to fulfilling the guarantee. In order to fulfill the guarantee of timely, accessible, and affordable jury trial, it will be necessary to increase manyfold the resources now appropriated for this purpose. Only in that way does it seem likely that the problems of severe delay may be met. In the absence of such a sharp increase in resources committed to the administration of justice, a choice must be made between, on the one hand, increasingly delayed jury trials generally and, on the other hand, withdrawal of the right to jury trial in selected types of cases. The author of the present paper would favor the increased appropriations that would be required to avoid this dilemma of choosing between two alternatives, each of which will be seen as delivering something less than equal justice. Absent such appropriations, withdrawing the right to jury trial in types of cases that are distinctively complex would seem less objectionable than allowing jury trials generally to become even more delayed than they now are.

IV. Relationships Between Lawmaking and Dispute Resolution

A. Resolving Disputes About Established Law

In the judicial dispute resolution system, responsibility for finding "facts" is consciously, though not always clearly, distinguished from responsibility for determining the law that governs the dispute. A litigant, on appropriate request, is ordinarily entitled to separate statement of findings of fact and conclusions of law in a nonjury trial as well as in the verdict and judgment of jury trial. This clarification of the basis of decision is a part of the full and fair hearing guaranteed to the parties in judicial dispute resolution. Also, the trial judge's conclusions of law - expressed as such by the trial judge in a nonjury trial and implicit in the charge to the jury and the judgment entered on the verdict in jury trial - are typically subject to appeal to at least one higher court, with associated expectations of a reasoned explanation of the affirmance or reversal in most instances.

Some alternative dispute resolution systems include similar provisions for separate determinations of applicable law. For example, worker compensation systems commonly provide for an administrative tribunal from whose determinations of applicable law an appeal may be taken into the court system, typically (though not universally) only as to applicable law. Many alternative dispute resolution systems, however, omit or limit guarantees of explicit, separate treatment of issues of law. Many arbitration

systems, for example, do not require separate statement of conclusions of law and provide for appeal or review only for mistakes of exceptional and fundamental character.

Issues discussed in the remaining sections of this Part tend to surface only in a judicial system or an alternative that, like the judicial system, offers some guarantee of separate statement of conclusions of law. Absent such a requirement, issues about lawmaking processes are rarely exposed for explicit treatment during the dispute resolution proceedings.

B. Lawmaking for New Questions; Filling Gaps

Currently prevailing views of legal process accept as inevitable that in a small but significant percentage of tort disputes issues may be raised by one of the parties, or at the instance of a court, for which no answer is provided in the applicable constitutional and statutory enactments or in judicial precedents. The view that all the necessary law exists in the authoritative sources and remains only to be discovered, not created, during the dispute resolution proceedings is widely recognized today as a fictional description of the inevitably creative role of courts. The fictional nature of the view that all the needed law "exists" and remains only to be found is recognized even by those who regard the fiction as a benign and useful one. They see it as designed at least to foster the appearance of keeping lawmaking out of the dispute resolution process and perhaps also to foster in reality a more limited creative role than they fear may develop if lawmaking by courts, to fill gaps, is openly acknowledged.

Within a judicial dispute resolution system, this lawmaking function is performed primarily by courts of last resort, since their determinations control lower courts. Cases in which such an issue may be decisive are among the most likely to be appealed and decided by courts of last resort.

A full evaluation of alternatives to judicial dispute resolution must take account of the weight

to be given to the presence or absence of any provisions for addressing and providing answers for any gaps in the applicable law as it appears in the authoritative sources. This is not to say that such provisions need be as elaborate and substantial in alternatives as they are in the judicial system, but it is to suggest that the absence or reduction of such provisions, and the resulting disadvantages of process as well as advantages of speed and cost saving, should be taken into account.

C. Openness to Reexamination of Substantive Law

The legal system as a whole must strike an accommodation between stability and change. Without stability, it would cease to be a system of law. Without change it would soon become rigid, outmoded, and arbitrary as measured against aims of justice. The judicial dispute resolution system incorporates within its own processes these partly clashing and partly complementary values of stability and change.

Probably most alternative dispute resolution systems provide less flexibility for internal change of the governing substantive rules and depend more on outside forces to change the governing directives under which the alternative system operates. For example, the governing legal rules for resolution of worker compensation disputes have relatively few gaps for lawmaking on new issues and are relatively closed to change internally. They have been modified frequently during the years since they came into existence - at least in regard to scope of coverage and amount of compensation - but the changes have been made in legislatures, externally to the dispute resolution system itself. As long as the external processes of change function effectively to meet the needs for change, this arrangement has the advantage of simplifying the disputes heard within the dispute resolution system. The disadvantage is, of course, that the total system will tend not to respond to needs for change until pressures build from an accumulation

of instances of dispute resolution outcomes commanded by the existing rules but considered to be unfair from the perspective of lawmaking. That disadvantage exists also in the judicial system, however, in relation to changing existing rules of law as distinguished from deciding "issues of first impression" (filling gaps). Indeed, the prospects for changes of existing law were generally weaker in courts than in legislatures before a recent change in the practices of judicial overruling of precedent (commencing about 1958 and extending to the present time). In the years since 1958, courts have been more willing to overrule precedents they regard as outmoded.[1] In this context, the judicial dispute resolution system will be preferred by a claimant whose claim may not be valid under existing substantive law but has elements of appeal from the perspective of public policy arguments about what the law should be.

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1. For documentation of this development, see the Appendix to Keeton, Venturing to Do Justice (Harvard University Press, 1969).

D. The Choice Between Rules and Standards

Substantive law criteria for determining rights to compensation may be expressed in one or the other of two ways that differ sharply in their most common manifestations, even though in variations on the two forms the differences may be less substantial. One of these ways of defining rights to compensation is to do so by rules; the other, by standards.

The method of definition by rule is illustrated by a statutory speed limit and a "rule" of tort decisional law that anyone exceeding that speed, absent special excuse, is negligent. The method of definition by standard is illustrated by the judicially created "standard" of ordinary care, in the application of which a jury considers all the evidence of the circumstances as well as the speed at which a person was driving and determines whether the conduct was in violation of the standard, in which event they find that the actor was negligent.

The application of standards tends to require more time and resources of the dispute resolution system than does the application of rules. Rules tend to be more precise, and to make outcomes more predictable. Standards tend to be more adjustable to all the varied nuances and circumstances of individual cases, but outcomes tend to be less predictable under standards, and less certain to be consistent among many applications,

and especially among applications by different persons.

Probably the overall development of tort law since 1950 has moved toward greater use of standards and less use of rules than was characteristic in the first half of the century. For example, the law of occupiers liability, though applying standards such as "negligence" and "wilful and wanton misconduct," depended heavily on detailed rules about duties associated with various kinds of relationships between the occupier and persons on the land. In the 1960s and 1970s, the courts of a growing number of jurisdictions have supplanted these varied duty rules with a single duty of ordinary care, the finder of "fact" being charged to take all the circumstances into account in determining whether the occupier's conduct measured up to that standard in relation to the claim at issue.[1]

A second example appears in judicial decisions and legislative enactments determining that statutes of limitation applying to medical malpractice claims are subject to an exception that the limitations period does not commence to run until the claimant has had reasonable opportunity to discover the grounds for the claim. Thus, if a sponge is left inside the patient at the conclusion of an operation, the limitation period

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1. For discussion of the legal process issues, see the majority and dissenting opinions in Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976).

does not commence to run until the patient "has reason to know" (a standard) the source of recurring pain. Other jurisdictions apply a rule that the limitations period commences to run when the operation is completed.

Though the trend of three decades or more has been toward greater use of standards - probably because of their greater flexibility and potential sensitivity to the nuances of the particular case - counterforces have been manifested in recent years. Proposals for legislation, and some enactments, in relation to periods of limitation for medical malpractice and products liability claims are in point. In general these proposals opt for a firm clear time line, such as may be imposed by rule, in preference to a standard that depends on "reason to know." These changes have been aimed in part simply at cost control, but in part also at achieving greater certainty of outcome by establishing a clear guideline that presents to a finder of fact a simpler issue and one as to which the outcome is likely to be more predictable.

No doubt there are needs for both rules and standards in the total tort system, and such trends as can be identified are not likely to have substantial impact on the character of the whole system within the near future.

V. Avoiding Formal Dispute Resolution: Promoting Settlement

A. System Dependence on Settlement

Empirical studies of personal injury claims within a system in which such claims give rise to causes of action in tort indicate that between 98 and 99 per cent of all claims made are settled.[1] The remaining claims that go through full trial are enough to contribute substantially to the excessive caseload existing in most American courts at the present time.

Given the extraordinary percentage of typical tort claims for compensation that are settled, even a tiny percentage change in disputes settled could have dramatic impact on the system. If, for example, some institutional or social change affected the tendencies to settle and reduced the percentage of settled automobile accident disputes from 99 per cent to 98 per cent, the impact on the system of cases of that type proceeding through full trial would be doubled. The whole judicial dispute resolution system to which such cases are assigned is perilously dependent on settlement. Conversely, the positive impact of a change that increased the percentages of settled disputes even marginally could be dramatic. This realization

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1. See, e.g., Franklin, Chanin & Mark, Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation, 61 Colum.L.Rev. 1, 10 (1961). One may speculate that, because of overcrowded dockets, cases tried to verdict in the late 1970's would be an even lower percentage of claims than when Franklin et al. made their study.

spawns interest in ideas about how the percentages of settled disputes might be increased.

B. Interest and Attorneys Fees as Influences on Settlement

Might the percentages of disputes settled be increased by enactment of laws imposing interest from the date of accrual of a tort claim, rather than from the date of judgment (when interest first begins to accrue on tort claims under the laws of many jurisdictions)? Empirical and analytic case studies indicate that such changes do not produce the desired effect of an increased percentage of settlements.[1] Comparison of the incentive structures affecting both parties to disputes, under systems as they would exist before and after the enactment of a law causing interest to run from the date of accrual of the tort claim, reveal good reason to expect that such a change would not increase the percentage of settled disputes. It is true that the disadvantage of the earlier point of commencement of interest would cause defendants to have an incentive to increase their offers of settlement. But the corresponding advantage to claimants would cause them to have an equal incentive to increase their demands. Thus, the effect would tend to be to increase the amounts offered and demanded, and the amounts at which cases were settled when offers and demands met, but not to increase the percentage of disputes settled.

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1. See Zeisel, Kalven & Buchholz, Delay in the Court § 12 (1959).

This analysis applies not only to changing the rule with respect to when interest begins to run on a tort claim but also to other changes that tend to increase or decrease the value of a claim, whether expressed as attorneys' fees, penalty, or in some other way.

C. Structuring Incentives for Settlement

One of the reasons advanced for proposals for attaching obligations of interest and attorneys fees to tort liabilities has been an expected inducement to earlier settlement. As explained above (Section B), however, it appears more likely that the chief impact of measures affecting entitlements (such as awards of interest and attorneys fees) is on the amount rather than the timing of settlement.

One of the objectives of Pre-Trial Conferences initiated by courts has been to encourage settlement. The intervention of the trial judge (or another court official, such as a magistrate) may serve to overcome the reluctance of counsel for each party to take the first step in settlement negotiations for fear it will be interpreted as a confession of weakness, but such intervention does not alter the basis for the incentive to withhold one's best offer until the eve of formal dispute resolution. For this reason, a practice of holding Pre-Trial Conferences is more likely to affect the timing of only those settlements that in any event probably would have been made well before the eve of trial than to cause earlier settlement of cases that otherwise would have been settled only at the eve of trial. That is, counsel would tend to await Pre-Trial Conferences rather than themselves initiating settlement negotiations, and settlements timed around Pre-Trial

Conferences would tend to be those that would not have awaited trial even if Pre-Trial Conferences were not held.

Similarly, requiring arbitration as a prerequisite to jury trial tends to produce many settlements timed around the arbitration proceedings. It is less certain, however, that many among these settlements are cases that would have gone to trial had arbitration not been required. The cases settled around arbitration may instead tend to be those that would have settled around Pre-Trial Conferences or around counsel-initiated settlement negotiations had arbitration not been required.

It is a hypothesis worth exploring, however, that both Pre-Trial Conferences and arbitration as a prerequisite to jury trial do encourage a higher percentage of settlements well in advance of scheduled trial by causing the parties and their counsel to study their cases, and even to come close to preparing as if for trial, and thus to reduce the obstacle to settlement that flows simply from each party's lack of complete understanding of its own claims or defenses and the more so of claims or defenses of the opposing party.

Beyond all these familiar efforts, is it possible to devise incentive structures within the dispute resolution system that will induce settlement at a time before the dispute has made any substantial use of the limited resources of the dispute resolution system?

The key reason that many settlements are made only on the eve of trial or after trial has begun is that each party suspects that the other's best offer will not be made earlier. Can an institutional arrangement be devised that restructures incentives so each party has strong inducements to make the best offer, and to have good reason to believe the other party will do likewise, at some earlier time?

An inquiry into the percentages of civil cases in which jury trial is commenced and the case is settled before verdict would provide some indication of the potential dimensions of the savings of dispute resolution resources that might be affected if effective incentives to early settlement could be devised. The judicial resources committed to aborted trials could be put to other uses if the parties to most of these cases could be induced to make their best offers well in advance of trial. In addition, probably some additional dispute resolution resources, public and private, could be saved by inducing earlier settlements of cases that are now settled after they are set for trial and in circumstances that contribute to the unpredictability of trial calendars and lost time when none of the cases set for a particular time goes to trial.

Might it prove profitable to initiate a program of institutionally sponsored Settlement Procedures Agreements, with the stated aim of creating incentives for making genuine best offers early? As a basis for

exploring this possibility, consider the potential effect of an agreement between the parties of substantially the following terms: (1) Each party will deliver its "Filed Offer" of settlement to the Clerk in a sealed envelope by a specified date well in advance of the trial setting. When all Filed Offers have been submitted, the Clerk will open them and mail copies to all parties. If the offers overlap, the case is settled on a basis determined by a stated formula. (2) If the Filed Offers do not overlap and the parties have not settled within a specified period, the Clerk will appoint a mediator whose fee, as specified, will be taxed as costs unless otherwise agreed. The mediator will function for a limited period and will file a final report with the Clerk within 30 days. (2) If the case goes to trial and formal judgment, costs and attorneys fees will be awarded as follows: (i) If final judgment is less than the plaintiff's Filed Offer, all taxable costs will be awarded against the plaintiff; in addition, if the judgment was not as much as [75] per cent of the plaintiff's Filed Offer, plaintiff will be taxed with defense attorneys fees in an amount determined to be a fair assessment of the added costs of representation incurred after the closing date for Filed Offers. (ii) If final judgment against a defendant is more than the defendant's Filed Offer, all taxable costs will be taxed against that defendant (severally or jointly with other defendants); in addition, if the

judgment was more than [125] per cent of the Filed Offer, the defendant will be taxed with plaintiff's attorneys fees in an amount determined to be a fair assessment of the added costs of representation incurred after the closing date for Filed Offers. (iii) If final judgment is in an amount between the figures governed by subparagraphs (i) and (ii), the rules applicable to costs and attorneys fees will be those that would have applied had this agreement not been made.

The role of the mediator would be to explore with the parties the bases of their respective offers and the potentialities for arriving at some accommodation. The mediator would confer with the parties separately or jointly as seemed appropriate at various stages of negotiation within the 30-day period. Ideally the mediator should be a person whose capability of understanding the substantive issues in dispute would be clear, in order that the mediator might contribute creatively to the development of an accommodation rather than serving merely as an intermediary. Trial judges sometimes undertake to serve in this role, but many trial judges are reluctant to engage in mediation because of unease about impairing the trial judge's status as an openminded, impartial adjudicator if the case must be tried.

The key hypotheses underlying the suggestion for developing Settlement Procedures Agreements are the following: (1) In most cases the parties have a mutual interest in early resolution of the dispute, even though

the impact of delayed resolution may fall unequally upon them. Two observations are advanced in support of this hypothesis. First, costs of full-scale litigation, or even some less expensive alternative dispute resolution procedure, are substantial. The "pie" to be divided in settlement may thus be substantially larger than what remains to be divided between the parties after the dispute is carried all the way to a final decision on the merits. Second, the emotional implications of a full-scale dispute interfere with the alternative uses of the time and energies of the parties, increasing still more the disparity between the combined positions of the parties, after full-scale dispute resolution, and what their combined positions might have been after early settlement. (2) Recognizing their mutual interest in early settlement, the parties might willingly accept a suitable standard form of Settlement Procedures Agreement which gave each party some assurance that both parties would have incentives to make genuine best offers early. (3) In general, liability for the potential added costs of fees for the services of attorneys needed beyond the date of the Filed Offers can reasonably be used to create an incentive structure for genuine best offers. Parties should be free, however, to agree on different incentive structures that might be more suitable to their particular cases.

If experience with Settlement Procedures Agreements proved to be encouraging, consideration might be given

to mandatory rather than voluntary measures. A modest mandatory step might be the adoption of a rule of procedure, analogous to a pre-trial rule, requiring a hearing and a settlement procedures order. The settlement procedures hearing might precede heavy commitment of resources to discovery, thus adding the potential saving of discovery costs to the inducements to settlement.

Another possibility, more intrusive on the freedom of the parties, would be a rule requiring filed offers on terms similar to those discussed above, even without an agreement of the parties.

Questions for Exploration: Are the hypotheses underlying these suggestions sound? Are there better ways of devising incentive structures for early settlement? Might we profit from a study of procedures, currently in use in other legal systems, that are aimed at encouraging early settlement with minimal use of public resources for dispute resolution?

VI. Mandatory Alternatives

A. As a Condition of Jury Trial

A substantial number of jurisdictions have had some experience with a system requiring parties to submit to arbitration but with a right of appeal to a de novo jury trial. One of the underlying hypotheses is that in a high percentage of cases the arbitration award will be accepted by the parties as a final disposition or will serve as a basis for negotiations that lead to settlement. Also, in some instances a party claiming the right to jury trial after the arbitration award is charged, conditionally or unconditionally, with costs of the arbitration proceeding.

In evaluating the effectiveness of such a system, one should take account of the possibility that some percentage of the cases terminating with the arbitration award or in a settlement based upon it might have reached a termination before jury trial in some other way, had the arbitration procedure not been in place. Would a Pre-Trial Conference, for example, have brought the parties together, caused them to give attention to the case, and encouraged negotiations leading to settlement?

Even though data on dispositions will require careful assessment, however, it would seem useful to collect all readily available information on the record of dispositions associated with systems of arbitration or other alternatives as a condition for jury trial.

If such a system is effective in substantially reducing the load of cases otherwise set for jury trial, it has the obvious advantages of relatively low cost, in comparison with jury trial, and relatively high acceptability because of the availability of jury trial as a last resort. The chief disadvantage is that it does attach additional cost to one's election of jury trial. The conditions attached to the election, if onerous, would of course raise problems of consistency with constitutional guarantees of jury trial, where they apply.

B. As a Substitute for Jury Trial

Consideration of any alternative dispute resolution system as a substitute for jury trial in tort cases, where jury trial has traditionally been available, must take account of constitutional guarantees. They are more likely to be an effective impediment when no change is proposed other than such a change in the dispute resolution system than when a more basic change of substantive as well as procedural law is proposed. Thus, administrative tribunals are widely used in worker compensation systems and in some jurisdictions have survived attack without modification of state constitutions, though attacks were made not only under due process and equal protection clauses but also under clauses guaranteeing jury trial.

Dispute resolution within worker compensation systems has itself been sharply criticized. Rated on the eight procedural criteria suggested in Part I of this paper,[1] it does not fare as well as jury trial on the whole. In some times and places, it has rated no better than jury trial on timeliness; the comparative rating of the two in this respect depends on the public resources committed to the two systems. In general, however, it does cost less, both in public

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1. Part I, Section B, Subsection

CONTINUED

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and private resources. Probably the most severe criticisms - and the main source of a lower rating of acceptability than that for jury trial - have concerned the difficulty of maintaining as high standards of openness to full and fair hearings and as high standards of qualification for worker compensation hearing offices as for trial judges.

Arbitration has rarely been used as a mandatory substitute rather than a voluntary or conditional alternative to jury trial. Most "mandatory" arbitration systems have preserved the right to jury trial, though attaching conditions such as payment of arbitration costs as well as participation in arbitration proceedings as a prerequisite to jury trial.

Question for Exploration: Do any states make arbitration a substitute rather than merely a prerequisite to jury trial? If so, can we obtain useful information on experience thus far?

VII. Priorities Among Alternatives

Establishing priorities is a significant element in a canvass and evaluation of alternatives to judicial resolution of tort disputes. What are the more promising alternatives from the point of view of the benefits likely to be accomplished in relation to the resources committed to the task? What other methods of dispute resolution are most likely to achieve at least a sufficient degree of acceptability to be maintainable when all their costs, both tangible and intangible, are taken into account?

The intangible costs of mandatory use of alternatives to jury trial are high. The ultimate objective of the array of dispute resolution systems is to come as near as possible to achieving the ideal of justice. If costs could be disregarded - if we were not faced with the reality of limited resources - all disputes should be submitted to the form of dispute resolution optimally suited to achieving, in the maximum percentage of cases, outcomes consistent with the ideal of substantive justice. Given the reality of limited resources, however, costs must be taken into account. Nevertheless, when we decide to use a dispute resolution system less than optimally suited to the dispute, apart from considerations of costs, we are opting for what may be described pejoratively as "second-class justice." We are choosing not to pay the price of the system that would be optimal, apart from its higher costs. To those members of society who perceive

the adverse outcomes of their disputes as different and less favorable than would have occurred if the "first-class" system had been used, it will seem that their substantive rights were sacrificed because society was unwilling to commit adequate resources to the objective of doing justice.

If it also happens that criteria concerned with amounts in dispute, rather than the nature of the rights at issue, are used to determine which disputes receive full-dress attention and which receive less, the rules for assignment of disputes to one or another system will in appearance at least - and perhaps in substance as well - be biased against protecting interests that have relatively low value in a social calculus, even though they may have relatively high value for the persons holding them, because the sum of all the interests they hold is so low. A dispute resolution system that gives the appearance of such a bias against the poor has high intangible costs; one that in reality has such a bias, even higher intangible costs.

It is extremely difficult to fashion rules for differential treatment of different types of disputes and yet avoid both the fact and the appearance of bias against the interests of relatively low economic value. Because of this difficulty, it seems wise to give high priority to developing attractive optional low-cost dispute resolution systems rather than depending primarily on mandatory low-cost alternative systems. Plainly

the alternative type of resolution that is likely to use up least resources in the dispute resolution process itself and is most likely to achieve high ratings on acceptability of the process is settlement. Even though past efforts to institutionalize encouragement of settlement have had limited success, renewed exploration of the possibility of institutional encouragement of settlement seems appropriate. Next in acceptability among alternatives to judicial resolution of disputes are procedures mandated as conditions rather than as substitutes for jury trial. In some tort contexts, as well as more generally, arbitration and mediation as conditions of jury trial appear worthy of added attention. The most stringent remedies - mandatory substitutes for jury trial - will tend to rate lowest with respect to acceptability and should be seriously considered only as last-resort measures, with full evaluation of their intangible costs.

END