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The Glaring Gap in Tort Theory

ABSTRACT. The glaring gap in tort theory is its failure to take adequate account of liability insurance. Much of tort theory fails to recognize the active and central role that liability insurance plays in tort law and litigation, or mentions liability insurance only briefly. Liability insurance is treated as exogenous to tort law itself—as if it were merely a contingent source of outside financing, like a bank that passively guarantees a loan. It is no exaggeration to say that liability insurance played a defining and (in our view) salutary role in creating modern tort liability. Modern tort liability would not look at all as it does today if liability insurance had not existed and influenced tort law's development in the ways that it did.

This Article calls upon tort scholars of all theoretical and methodological stripes to address the significance of liability insurance by incorporating consideration of liability insurance into their work. We first lay the groundwork for understanding liability insurance's significance by describing the role that liability insurance plays in the life cycle of a tort claim, sketching the contemporary incidence of liability insurance and commercial self-insurance. We then provide a novel contribution to the tort law literature by identifying a collection of important judicial opinions that have made express reference to the availability (or unavailability) of liability insurance in precedent-setting, liability-expanding, and liability-limiting tort cases. We further identify the ways that liability insurance historically has influenced, and continues to influence, the shape and scope of tort law. We specifically identify a number of significant tort law doctrines and practices, such as the thin-skull rule, that we argue would never have persisted in the absence of liability insurance. Given this evidence, we argue that it is liability insurers who—paradoxically—have fueled the continuing expansion of American tort liability that began more than a century ago.

We then examine modern tort theory, much of which fails to take adequate account of liability insurance. We explain how to begin filling the gap in tort theory that results from omitting consideration of or inadequately considering liability insurance, showing how liability insurance can appropriately figure in both deontic and consequentialist theories of tort liability. Only by greater recognition and candid acknowledgment of the role that liability insurance plays in tort cases can tort theory provide an accurate picture of the field that it seeks to describe.

Finally, we offer lessons for the courts, calling not only for more open acknowledgment of the significance of liability insurance in judicial opinions but also for a radical change in trial practice by proposing that judges explicitly consider record evidence (including the availability of liability insurance) on the insurability of the risk at issue in tort cases.

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INTRODUCTION

We can take the mystery out of the matter right away. The glaring gap in tort theory[1] is its failure to take adequate account of liability insurance. Although liability insurance plays a substantial role in the life cycle of tort claims, it does not feature prominently in any leading tort theory. Liability insurance not only influences judicial decisions about whether and when there should be liability—as courts have recognized for decades, some openly and some only implicitly—but also influences the tort system in other ways that tort theory has barely recognized.

By our estimate, liability insurance pays as much as eighty to eighty-five percent of all tort damages.[2] Yet given that most academic discussions of tort theory make little or no reference to liability insurance, much tort theory is either unaware that liability insurance pays most tort claims, or, apparently, considers this fact largely irrelevant. Other tort theory makes reference to liability insurance, but does so without rigorously examining the many ways in which liability insurance influences tort liability, beyond being a mere source of funding.

Just as importantly, much of the torts literature also has failed to recognize how liability insurance and liability insurers actively influence the course and dynamics of tort litigation—both before a tort claim is made, and throughout the course of subsequent litigation. Then, after trial, liability insurers decide whether to take appeals on behalf of their policyholders and whether to fight appeals by plaintiffs who have lost at trial. Liability insurers thus decide when to take the risk that plaintiffs will make new law on appeal that expands liability.

1. By the term "gap" in tort theory, we simply mean that current theory is missing something that would provide a more complete account of liability insurance as a highly important component of tort liability. By tort "theory," we mean an effort to explain what tort law, or some aspect of tort law, is ("positive" theory), or should be ("normative" theory), by relying on comparatively general principles or ideas. Thus, some theories of tort law attempt to describe what tort law *as a whole* is, to identify its purposes, or to sketch the normative structure that tort law reflects. But tort law theory may instead consist of efforts to address the character of a *particular aspect* of tort law, such as liability for negligence, at a high level of generality. Under this understanding, theory is mostly found in tort law scholarship and is rarely court-made, though occasionally judicial opinions may rise to the level of theory. For example, Justice Roger Traynor's famous *Escola* concurrence might be thought to sketch a normative theory of products liability. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-45 (Cal. 1944) (Traynor, J., concurring). Accordingly, this Article focuses on the gaps in academic theory and addresses courts primarily in the context of how they already take account of liability insurance and how they might more effectively do so. We see no practical need to elaborate further, because—like tort theory—much academic writing about tort law, whether or not it could properly be termed theory, makes little or no reference to the many different ways in which this Article shows that liability insurance figures in tort law.

2. *See infra* Part I.

And liability insurers have been playing this role and having this kind of influence for more than a century. Thus, the role of insurers goes far beyond the simplistic idea that liability insurance is just a source of funds available only after a tort claim has been resolved.[3] In short, both quantitatively and qualitatively, liability insurance has always had a fundamental influence on the shape and scope of tort liability.

Yet much of tort theory has little or nothing to say about liability insurance.[4] For example, Professors John Goldberg and Benjamin Zipursky, two of the most prominent tort theorists writing today, devote less than two pages to discussion of liability insurance in their book about civil recourse theory.[5] Professor Gregory Keating's most recent book on tort theory also mentions liability insurance only briefly and engages in almost no analysis of its current or historical role in the tort system.[6] Even when tort theorists mention liability insurance, often it is

3. *Cf.* JULES L. COLEMAN, RISKS AND WRONGS 206 (1992) (distinguishing insurance "as an institution that arises in order to enable individuals to discharge their substantive duties under the law" from insurance as an independent goal of tort law).

4. Some time ago, when tort theory was mostly concerned with tort policy rather than tort law philosophy, there was (mixed positive and normative) discussion of the availability of liability insurance and its role in the tort system. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); Steven Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120 (1982); Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948). And responses thereto. *See* Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 683 (1985) ("Tort law's conceptual apparatus of cause, duty, standard of care, and fault . . . precludes consideration of the litigants' wealth, virtue, or need . . . . [T]he invoking of insurance undermines this conception of tort law by draining the parties' relationship of its immediacy."). We elaborate further on these prevailing theories in Sections III.A.1 and III.B.1. Our aim in this Article is to reinvigorate this discussion and debate in tort theory, particularly in light of courts' invocation of insurability of risk as a normative factor in assessing liability (as discussed in Section II.A).

5. *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 273-76 (2020), which, in a section entitled "Does Tort Law Survive Routinization?," addresses liability insurance without any effort at quantification, and indicates that liability insurance "complements or reinforces the operation of tort law." For further discussion of civil recourse theory and its limited engagement with insurance, see *infra* Section III.A.

6. GREGORY C. KEATING, REASONABLENESS AND RISK: RIGHT AND RESPONSIBILITY IN THE LAW OF TORTS 279, 286 (2022). Nor does his trenchant critique of law-and-economics deterrence theory engage with the role of liability insurance. *See* Gregory C. Keating, *Corrective Justice: Sovereign or Subordinate?*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 46-47 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2021). Nonetheless, some of Keating's work on enterprise liability does make substantial reference to liability insurance. *See, e.g.*, Gregory C. Keating, *Products Liability as Enterprise Liability*, 10 J. TORT L. 41, 54-55 (2017) (invoking analogies to insurance in discussing products liability's role in tort law) [hereinafter Keating, *Products Liability*]; Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1286 n.6 (2001) (mentioning insurance as an analogy for enterprise liability); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1268 n.7

mentioned only briefly and treated as exogenous to tort law itself, as if liability insurance were merely a contingent source of outside financing.[7] This approach views liability insurance like a bank that passively guarantees a loan rather than what it is in reality: an active and, often, arguably the most important ingredient of, and influence on, tort liability itself.

The stakes here are significant. Positive tort law theories aim to provide as complete a picture as possible of what tort law and tort liability are. Therefore, these theories should provide an account of the role played by liability insurance. Without accounting for liability insurance, a positive tort theory is incomplete and therefore inaccurate. And to the extent that a normative tort theory envisions what the scope and nature of tort liability should be, then omitting the role that liability insurance will play in that vision will render the theory unrealistic. For the courts and for the tort system, the doctrinal evolution of tort law is at stake. The issue is whether courts will address new risks by routinely considering the insurability of liability for those risks, as many, but not all, courts, have long done.

It is possible to differ about how much some of the torts literature recognizes the existence and influence of liability insurance, and how much does not.[8]

(1997) (discussing insurance as part of analyzing whether enterprise liability provides optimal deterrence).

7. *See, e.g.*, Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 370 (1992) (mentioning that the demands of corrective justice may be discharged by "insurance contracts"); Benjamin C. Zipursky, *Coming Down to Earth: Why Rights-Based Theories of Tort Can and Must Address Cost-Based Proposals for Damages Reform*, 55 DEPAUL L. REV. 469, 480 (2006) ("There is much more to being a citizen in a legal system that has tort law than paying a premium on your products and services and getting money when you suffer a certain kind of loss.").

8. Tort and insurance scholars have drawn attention to liability insurance as a pivotal background institutional feature of tort law. *See, e.g.*, Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 3-13 (2005) [hereinafter Baker, *Liability Insurance*] (identifying how liability insurance strongly influences whether plaintiffs bring suit, what torts they allege, and how much they seek to recover); Tom Baker, *Where's the Insurance in Mass Tort Litigation?*, 101 TEX. L. REV. 1569, 1578-81 (2023) [hereinafter Baker, *Where's the Insurance*] (empirically supporting the unique role of insurance in mass tort cases as opposed to other types of cases); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U L. REV. 805, 809 (2011) (discussing the insurance-like function of widespread personal injury settlements as compared to no-fault auto insurance); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO J. LEG. ETHICS 1485, 1542-45 (2009) [hereinafter Engstrom, *Run-of-the-Mill Justice*] (analyzing the workings of these personal injury firms); Nora Freeman Engstrom & Michael D. Green, *Tort Theory and Restatements: Of Immanence and Lizard Lips*, 2 J. TORT L. 333, 357 (2021) ("Like an old fence post covered in ivy, liability insurance and tort law are inexorably tangled, and they stand together to offer one another mutual support."); Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L.

Suffice it to say that, for the most part, liability insurance stays in the background of much tort theory, and that analysis of liability insurance does not figure in an important way in any contemporary tort theory. Our point is that liability insurance should be much more frequently and extensively in the foreground of tort theory. We therefore aim to show how liability insurance figures in tort liability, and why it should be an important and characteristic ingredient of any theory of tort liability that attempts to account for tort liability as it actually exists, or how tort law became what it is now. We use the term "ingredient" in reference to liability insurance's role in tort law because the analogy to a recipe fits almost perfectly.[9] For example, "cake" is made with flour. There is such a thing as what is sometimes called "flourless cake," but it is an unusual version, arguably even an imitation, of cake. Its very name emphasizes the absence of one of the characteristic ingredients of "cake."[10] Similarly, mortgage financing is not a formally necessary feature of home ownership in the United States. It is logically possible to own a home without financing its purchase through a mortgage loan. But eighty percent of homebuyers finance their purchases with mortgage loans.[11] To describe the nature of homeownership in the United States without reference to mortgages would be to provide a fundamentally incomplete and misleading

REV. 1571, 1600-02 (2004) (detailing the effect of liability insurance on settlement, but not on the substantive law).

And some scholars have taken a more normative approach, linking insurance to underlying aims of tort law in select domains. *See, e.g.*, Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 624-34 (1998) (undertaking a sustained analysis of insurance and economic incentives in tort through the lens of enterprise liability); Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 111-13 (2010) (noting the varied influences of first- and third-party insurance on tort incentives); Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627, 644-46 (2016) (evaluating whether a hyperaccurate form of "personalized insurance," facilitated by big data, would advance the aims of tort law); *see also infra* Section III.B.1 (discussing consequentialist theorists' engagement with liability insurance).

However, none of these accounts has highlighted liability insurance not only as a background institutional feature but also as an active force driving the evolution and shape of substantive tort doctrine, including as a factor directly considered by courts. Nor have these prior accounts called for an overarching reckoning with tort theory.

9. Engstrom & Green, *supra* note 8, at 334, use the term "tort soup" in a similar but not identical way to how we describe liability insurance as an "ingredient" of tort liability.

10. *See, e.g.*, *Definition of Cake*, GOOGLE (2023), https://www.google.com/search?client=firefox-b-1-d&q=definition+of+cake [https://perma.cc/Y7S8-FWKH] (defining cake as "an item of soft, sweet food made from a mixture of flour, shortening, eggs, sugar, and other ingredients, baked and often decorated").

11. *See Highlights from the Profile of Home Buyers and Sellers*, NAT'L ASS'N REALTORS (2023), https://www.nar.realtor/research-and-statistics/research-reports/highlights-from-the-profile-of-home-buyers-and-sellers [https://perma.cc/TP6C-Z92F].

portrait of this phenomenon. So it is with contemporary tort liability. Liability insurance is a characteristic ingredient that is central to tort liability.

In addition, it is no exaggeration to say that liability insurance played a defining role in creating modern tort liability, and that modern tort liability would not look at all like it looks today if liability insurance had not existed and influenced tort liability's development in the ways that did.[12] To the extent that tort law is a "law of wrongs," as Professors Goldberg and Zipursky insist,[13] it might still be a law of wrongs if liability insurance had never existed, but it would not be the law of wrongs in contemporary tort law. The wrongs would be different, and the law governing them would be different, because the way the courts think about what should count as a tortious wrong has been influenced by the presence and availability of liability insurance. And to the extent that tort law is concerned with creating incentives and deterring harmful conduct, as prominent consequentialist tort theorists (including one of us) have argued,[14] tort law would have a different shape as well, because liability insurance has always employed important methods of achieving these goals, including risk-based pricing.[15] For these reasons, this Article aims to demonstrate the ways in which liability insurance should be included in accurate and meaningful theories of tort law, whatever they are.

We appreciate the fact that some tort theorists may not address liability insurance because they are sometimes addressing the narrow question of what comprises the logical, normative structure of tort law.[16] Liability insurance is excluded from this structure, apparently, because it is possible to conceive of tort law rules as they are stated in judicial opinions and treatises without reference to

12. For a study of the interaction of liability insurance and tort law since modern tort law came into existence, see KENNETH S. ABRAHAM, THE LIABILITY CENTURY (2008).

13. GOLDBERG & ZIPURSKY, *supra* note 5, at 2.

14. *See, e.g.*, CALABRESI, *supra* note 4, at 155; Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423 (2021) [hereinafter Sharkey, *Modern Tort Law*]; Catherine M. Sharkey, *The Irresistible Simplicity of Preventing Harm*, 16 J. TORT L. 143 (2023) [hereinafter Sharkey, *Irresistible Simplicity*].

15. *See* Kenneth S. Abraham & Daniel Schwarcz, *The Limits of Regulation by Insurance*, 98 IND. L.J. 215, 235-41 (2022); Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 437-38 (2005) (discussing insurance companies' provision of "risk management" services).

16. Thus, discussion of insurance is entirely absent from the prominent rights-based accounts of ARTHUR RIPSTEIN, PRIVATE WRONGS (2016) and ERNEST J. WEINRIB, CORRECTIVE JUSTICE (2012). *See also* GOLDBERG & ZIPURSKY, *supra* note 5, at 10 (stating as the authors' purpose to show how the institutional structure, rules, and concepts of tort law "mesh" with one another). For elaboration, *see infra* Section III.A.1.

liability insurance.[17] Even so, the plethora of tort cases—from state and federal courts across myriad jurisdictions—in which judges explicitly mention insurance as relevant to their doctrinal determinations challenges this framing.[18] That said, if the goal of these tort theorists is to identify some abstract essence of tort law, analogous to the Platonic essence of cake or home ownership, we have little to say relevant to that form of theorizing.[19] What matters to us here is the way in which liability insurance is, in a very real sense, a characteristic ingredient of most tort liability as we know it today, discussed explicitly by courts in key doctrinal disputes, and often an unacknowledged ingredient of the rules that courts adopt.

In our view, the role played by liability insurance in tort has been and continues to be beneficial. Liability insurance spreads the risk of tort liability, often helps to promote safety, ensures compensation for some tort victims who would otherwise not be compensated, and enables planning and budgeting that would require reserving or encumbering of assets if liability insurance could not be relied on by potential defendants to fund tort liability. The insurance-facilitated expansion of tort liability has been a byproduct of liability insurance's characteristics. But our project is mainly positive and descriptive with regard to liability insurance, albeit designed to spur its incorporation and elaboration in descriptive and normative tort theories.

Our analysis proceeds in four parts. Part I is largely concerned with the scope and nature of the liability insurance that covers the parties and potential parties to tort suits. This Part lays the groundwork for our analysis by describing the role that liability insurance plays in the life cycle of a tort claim, sketching the contemporary incidence of liability insurance and commercial self-insurance, and estimating that liability insurance pays as much as eighty to eighty-five percent of all tort costs.

Part II turns from the parties and their liability insurance to the courts and tort law doctrine. Part II highlights liability insurance's central role in developing tort doctrine. It opens with an extended sampling of significant judicial opinions chosen for expressly referencing the availability (or unavailability) of liability

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17. *Cf.* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 604 (1985) ("[E]xponents of corrective justice often have a naïve air about them. Like judges in the courtroom they are blind to the vast systems of insurance on both sides of the tort equation.").

18. *See infra* Section II.A.

19. Richard Rorty famously uncovered the flaws in philosophy's claim to be the adjudicator of the foundations of knowledge in other disciplines. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 3-7 (1979). In this tradition, we do not claim that we are displacing theories about the essence of tort law or climbing onto the top of the conceptual pyramid. Nor do we think that a putative distinction between tort "law" and tort "liability" is worth drawing in this context. We are instead offering an addition to existing tort theory that, in our view, provides a richer and more complete understanding of what is being described.

insurance and being precedent-setting, liability-expanding, or liability-limiting tort cases. It then identifies and analyzes the ways that liability insurance historically has influenced, and continues to influence, the shape and scope of tort law, singling out important tort law doctrines that would never have persisted in the absence of liability insurance. Part II concludes by demonstrating how, through the exercise of their duty to defend their policyholders and their right and duty to settle claims under their policies, liability insurers have long been and continue to be the real parties in interest in the vast majority of tort suits. We argue further that, paradoxically, through their effort to combat tort liability in individual lawsuits, liability insurers have fueled the expansion of American tort liability that began over a century ago.

Parts III and IV move beyond the descriptions in the first two Parts to offer an original critique, and opportunities for reform, of tort theory. Part III establishes that existing tort theories fail to capture the influence of liability insurance discussed in Parts I and II. Part III then begins to fill the resulting gap in tort theory. Specifically, Part III shows how liability insurance can present challenges to, and appropriately figure into, both deontic and consequentialist theories of tort liability. We attempt to explain how deontic theories could integrate liability insurance into their frameworks, though we see our effort mainly as a challenge to deontic theorists either to accept or to explain the reasons for their rejection of our contentions. Turning to consequentialist theories, we focus on the interaction between liability insurance and the deterrent aims of tort liability. We suggest the ways in which, despite the moral hazard that liability insurance creates, liability insurance and deterrence can fruitfully coexist and even prove synergistic.

Finally, in view of our contention that accounting for liability insurance is consistent with both deontic and consequentialist tort theories, Part IV offers lessons for the courts to follow in taking liability insurance into account, whether they are operating under deontic or consequentialist assumptions. It begins with some thoughts about the reasons courts historically have been more reticent in their opinions about acknowledging the influence of liability insurance than we believe they ought to be. We call not only for more open acknowledgment of this influence in judicial opinions but also for holding that evidence of market availability of the form of insurance that would cover the form of tort liability at issue is admissible as an addition to the record, though not brought to a jury's attention. This change will be regarded by some as revolutionary, but in fact it would simply make formally available to the courts what they often consider informally and outside the evidentiary process. Indeed, it is a matter of common sense that something as important and influential as the insurability of the risk at issue in a tort case be part of the record in that case rather than being a matter of speculation or assumption, as it has been in some of the cases we canvass. This Part then examines the considerations that affect whether the courts should expect liability insurance against potential new forms of liability to develop. The core lessons are that a new form of liability must either fall into a preexisting category of insurance coverage or generate sufficient demand for insurance to warrant the costs entailed in creating insurance to cover it. In addition, moral hazard and informational uncertainty considerations also may play a role in influencing the liability insurance market.

I. THE ROLE OF LIABILITY INSURANCE IN THE LIFE CYCLE OF A TORT CLAIM

This Part describes the pervasive and fundamental influence of liability insurance on tort litigation and the payment of tort claims. It considers how liability insurance figures in the entire life cycle of tort claims, even before a tort claim is made or a tort suit is instituted; how liability insurance is purchased; who purchases it; and how much tort liability is funded by liability insurance.

This analysis reveals that liability insurance is far more than a merely contingent source of funding for tort liability. Very few tort suits are brought against individuals unless they have liability insurance.[20] Liability insurers defend their policyholders in tort litigation and have the sole power to decide whether to go to trial or settle a tort suit.[21] Liability insurers, therefore, choose whether to pay tort judgments or appeal them and what arguments to make on appeal, no matter whether the policyholder is an appellant or respondent. In turn, liability insurers determine whether to risk having new tort law created at the appellate level. And given the widespread incidence of liability insurance that we sketch, liability insurers pay most tort costs. It is no exaggeration, therefore, to say that liability insurance plays an enormous role in most tort claims, and that it is in fact an "ingredient" of tort liability in the way that we are contending.

A. *Liability Insurance Before, During, and After Trial*

The existence of liability insurance strongly influences whether a potential plaintiff decides to make a tort claim, how a case is handled before and during trial, and what happens on appeal. Describing tort litigation, and therefore tort law, without reference to liability insurance would be to omit one of its central

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20. *See* Baker, *Liability Insurance*, *supra* note 8, at 5.

21. KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW & REGULATION 651 (7th ed. 2020) (discussing liability insurers' right to determine whether to settle suits against their policyholders).

features.[22] The following account demonstrates the involvement of liability insurance and liability insurers in tort claims from the outset.

1. *The Decision to Make a Tort Claim*

One of the principal impacts of liability insurance is its effect on the decision to make a tort claim against any individual in the first place. With the exception of a few people who have substantial assets, there is little point in making a claim against an individual who is not covered by liability insurance. Without liability insurance, most individuals cannot pay a tort claim. From a damages perspective, it is pointless to make a claim or file a tort suit against an uninsured individual because the demand for payment would go unmet.[23] In our experience, most attorneys strongly prefer not to represent plaintiffs who have potential claims against uninsured individuals. And most attorneys can determine if an individual is insured with relative ease. Insurance information is typically exchanged at the scene of an auto accident, for example, and a follow-up call to the insurer in question will yield at least tentative confirmation of the existence of insurance coverage. Similarly, almost all people who own their own homes are required by their mortgage lenders to have the homeowners insurance we describe below, which includes liability insurance.[24] Determining whether a potential defendant is a homeowner may be slightly more difficult, but not appreciably so.

The smaller the amount of a potential claim, the more likely it is to be resolved by a settlement between an unrepresented claimant and a liability insurer's in-house personnel, or by the claimant's attorney and in-house personnel. Indeed, where only property damage to a claimant's vehicle is at issue, it is not uncommon for a claims-adjustor to investigate the circumstances of the accident and, if liability is clear, to arrange for direct payment to a car repair shop where the vehicle is awaiting repair. On the other hand, if the claimant has received payment from their own auto insurer under the first-party (collision) coverage provided by the policy, settlement negotiations will be carried on entirely between the claimant's and the defendant's insurers.[25] Thus, liability insurance is

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22. *See* ABRAHAM, *supra* note 12, at 38 (indicating that liability insurers' involvement in the tort system has become "very nearly . . . constitutive of the system's character").

23. *See* Baker, *Liability Insurance*, *supra* note 8, at 5.

24. *See* ABRAHAM, *supra* note 12, at 178.

25. For a discussion of the different claims-adjustment processes discussed in this paragraph, see generally H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS (1970). For a discussion of the process by which high-volume, low-stakes plaintiffs' attorneys sometimes settle cases, see generally Engstrom, *Run-of-the-Mill Justice*, *supra* note 8; and Issacharoff & Witt, *supra* note 8.

so important to small tort claims by individuals that sometimes the individual claimant is taken almost entirely out of the picture.

Almost all tort liability, measured by the number of tort claims made[26] or by the amount of tort costs paid,[27] consists of negligence liability for bodily injury or property damage. And virtually all of the bodily injury and property damage that ordinary individuals tortiously cause is covered, at least prima facie, by either auto or homeowners and renters liability insurance.[28] There are, of course, many other torts aside from negligence liability for bodily injury and property damage that are covered by liability insurance—including products liability, traditional strict liability, and increasingly other forms of liability such as defamation and cyber liability. There are only a few notable exclusions in homeowners policies—for example, involving intentionally caused injury, communicable disease, and controlled substances (as well as for auto- and business-related

26. A 1995 U.S. Department of Justice study found that automobile accident cases constituted 60% of all state tort cases, premises liability 17%, products liability 3%, toxic substances 2%, and medical malpractice cases 5%. Property damage cases were 5% of the total, and financial loss or injury to reputation cases constituted the remaining 3%. The majority of tort cases involving personal injury (64%) or property damage (60%) were auto torts. *See* Steven K. Smith, Carol J. De Frances, Patrick A. Langan & John Goerdt, *Tort Cases in Large Countries,* BUREAU JUST. STAT. SPECIAL REP., U.S. DEP'T JUST. 1-2 (Apr. 1995), https://bjs.ojp.gov/content/pub/pdf/TCILC.pdf [https://perma.cc/BT9C-LPWA].

A later 2005 study of cases that went to trial showed a similar breakdown, with "intentional tort," "false imprisonment," "conversion," "slander/libel," and "other" constituting only 12% of all the cases, with auto, medical malpractice, premises liability, products, and animal-attack cases constituting the remaining 88%. Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts, 2005*, BUREAU JUST. STAT. BULL., U.S. DEP'T JUST. 3 (Nov. 2009).

While these studies are somewhat dated, more recent survey data from the National Center for State Courts confirm roughly the same proportions. *See, e.g.*, *State Court Caseload Digest 2018 Data*, NAT'L CTR. FOR STATE CTS. 7 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/PL8P-GP2R] (auto tort: 62%; premises liability: 13%; malpractice: 5%); *State Court Caseload Digest 2016 Data*, NAT'L CTR. FOR STATE CTS. 6 (2018), https://www.courtstatistics.org/__data/assets/pdf_file/0029/29819/2016-Digest.pdf [https://perma.cc/9BZ7-J9FU] (automobile: 60%; malpractice: 4%; product liability: 1%; other tort: 35%).

27. The U.S. Chamber of Commerce and Towers Watson studies cited *infra* at note 55, for example, do not even bother to quantify the percentage of dollars that are not paid for personal injury or property damage, which in the studies cited *supra* in note 26 constituted only three percent of all tort cases.

28. See *infra* Section I.B.2. Injuries caused by domestic violence—one of the leading causes of death of women aged fifteen to forty-four and a leading cause of death of pregnant women—are a significant exception. *See* Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39, 45 (2018). A key impediment to victims of domestic violence suing their abusers is the lack of liability insurance coverage given the intentional acts exclusion. *See* Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 124 (2001).

liability, which are covered by auto and CGL policies).[29] Consequently, the torts involving bodily injury or property damage that do not involve at least the potential for recovery from the defendant's liability insurer are batteries, deliberate trespassing, and negligence committed by uninsured drivers or by tenants who have not purchased renters insurance. It is nonetheless misleading not to recognize the indirect influence of liability insurance even on certain of the intentional torts, for it is common for plaintiffs to try to plead around intent requirements and thereby to plead into the defendant's liability insurance.[30]

The first action that makes sense for a lawyer consulted by a potential claimant is to determine whether the potential defendant is insured. If not, then it is unlikely the lawyer will take the case. In short, for potential claims against individuals, the existence of liability insurance is essentially an absolute prerequisite. There is no tort liability, and no payment, without it.

The same is not true of claims against large enterprises and entities, most of which would be likely to have sufficient assets to pay routine tort claims even if they were not covered by liability insurance. Even when the potential defendant is insured, the liability insurance of sizeable enterprises and entities is likely to be subject to deductible or "self-insured retention" (SIR)[31] that requires the policyholder to pay routine claims up to a specified maximum.[32] Consequently, in contrast to claims against individuals, liability insurance is not at all a prerequisite to making a tort claim against most enterprises or entities. Lawyers are likely to proceed to make claims that they consider viable without the need to confirm the existence of liability insurance, even though liability insurance is either in the

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29. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 218; Baker, *Where's the Insurance*, *supra* note 8, at 1577 (finding that the liability insurance for the "mass tort part of the tort liability system" is provided through reinsurance of defendants' captive insurance companies and high-level insurance excess of their self-insured retentions, captive insurance policies, or "fronting" policies). Baker's findings about the lack of any direct role played by insurers in mass-tort litigation is important but applies only to mass-tort litigation, itself reports qualifications on its findings, and involves only forty-eight interviewees, just seven of whom were defense lawyers who would have had the opportunity to observe the direct influence of liability insurers. *Id.* at 1572, 1576-78.

30. *See generally* Baker, *Liability Insurance*, *supra* note 8; Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721 (1997); W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 587 (2023) (proposing the establishment of the tort of negligent rape, in part as a means of circumventing liability insurance policy exclusions applicable to liability for intentionally causing harm).

31. A self-insured retention is a dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will respond to a loss. *Self-Insured Retention (SIR)*, INT'L RISK MGMT. INST., https://www.irmi.com/term/insurance-definitions/self-insured-retention [https://perma.cc/46BT-GM8U].

32. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 522.

foreground or the background depending on the structure of the defendant's liability insurance program.

2. *Pre-Trial and Trial*

Standard liability insurance policies[33] provide that the insurer has both the right and the duty to defend the insured against any suit seeking damages that would be covered by the policy if the suit were successful.[34] Because of its right and duty to defend, the insurer is not a mere source of financial guarantee, standing in the background in the event that a suit against its policyholder is successful. On the contrary, the liability insurer makes all litigation and coverage-related decisions. From the moment an insured party gives its liability insurer notice that a claim has been made or a suit has been filed against it, the insurer is in control of every step in the process.

Not all suits against commercial policyholders work the same way as suits against individuals, because individuals' liability insurance is not subject to a deductible or SIR. Large commercial policyholders often defend routine tort suits themselves, until the amount of a deductible or SIR for the policy year is exhausted by defense costs and/or indemnity paid by the policyholder. Then the primary insurer's duty to defend attaches.[35] But in the kinds of suits that are likely eventually to trigger that duty—major products liability, toxic tort, pollution liability, and class action suits—the insurer may or may not get involved from the outset, if the potential liability exceeds the applicable deductible or SIR.[36] In fact in suits involving liability for multiyear injury, such as toxic exposure, more than one policy year may cover the alleged liability, and therefore more than one liability insurer may bear a duty to defend.[37] In our experience, this is often handled by each insurer paying a portion of the insured's defense costs, with the insured defending itself rather than any particular insurer undertaking the defense alone.

The significance of the right and duty to defend cannot be completely appreciated, however, without considering them along with the insurer's privilege to

33. With the exception of directors and officers liability insurance. *Id.* at 572.

34. *Id.* at 615.

35. Excess insurers have no duty to "drop down" until the layer of insurance underlying them has been exhausted. This will only happen if the plaintiff settles, so ordinarily it is only the primary that ever defends. *Id.* at 667, 689.

36. *See generally* Baker, *Where's the Insurance*, *supra* note 8 (describing the unusual role insurance plays in mass tort litigation).

37. ABRAHAM & SCHWARCZ, *supra* note 21, at 509. The insurer's privilege to settle, however, is qualified by its liability for failing to accept reasonable offers of settlement that result in judgments in excess of the policy limits. *See infra* Section II.B.2.b.

settle claims and suits against the policyholder. Insurance policies afford the insurer a right to defend because the insurer is defending not only the policyholder, but its own money.[38] And policies afford the insurer the privilege to settle because sometimes it will make more sense, all things considered, for the insurer to pay to settle a claim or suit if the plaintiff agrees to accept an offer, than to continue to spend money defending against the suit. The insurer needs a right to defend in order to protect its own money, and it needs a privilege to settle in order to save needless expenditures on defense and avoid exposure to greater liability. The combined effect of the insurer's defense and settlement rights is to render individuals and small-to-medium size businesses who are defendants something close to figureheads in most tort suits, with the liability insurer being in total control and the real party in interest.

3. Appeal

Liability insurers not only decide which suits to defend and which suits to attempt to settle, but they also decide which adverse judgments to pay, which adverse judgments to appeal, and what arguments to make on appeal. Consequently, liability insurers, not insured defendants, are in near-total control of the defense's side of the precedent-setting, tort law-making process. The result is that, because liability insurers are repeat players in the tort system and have been since nearly the very moment when tort law emerged as a separate field, liability insurers decide when to try to make new law that limits liability and when to risk having plaintiffs making new tort law that expands liability.

B. Liability Insurers Are the Source of the Vast Majority of Tort Payments

Most liability insurance is provided to both individuals and entities under a series of standard-form policies that have been developed over a long period of time and are sold through intermediaries.[39] Liability insurers pay virtually all of the billions of dollars of tort liabilities that individuals incur each year and the majority of liabilities incurred by commercial and other entities.

1. How Liability Insurance Is Purchased and Who Purchases It

There are a number of different forms of liability insurance. Liability insurance for businesses was introduced in the United States in the mid-1880s, in the

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38. ABRAHAM & SCHWARCZ, *supra* note 21, at 651.

39. *See id.* at 40 (discussing the standard-form character of most property and liability insurance policies).

form of "Employers Liability" insurance protecting businesses against tort liability to their employees.[40] Coverage of liability to nonemployees was quickly added. This latter form of liability came to be what this form of policy was all about once workers' compensation was adopted in nearly all states between 1910 and 1920, because employers no longer needed insurance against liability in tort for injuries suffered by their employees.[41] This was then called "public liability" insurance, but was renamed Comprehensive General Liability (CGL) insurance in 1940[42] and Commercial General Liability (also CGL) in 1986.[43] All those policies, from the beginning, have covered liability for bodily injury and property damage, with a few ancillary coverages added over time.[44] This is the principal form of insurance that U.S. businesses and other entities purchase to cover themselves against tort liability.

From virtually the moment that motor vehicles were introduced, auto liability insurance has been available.[45] Today, for individuals, the principal form of insurance against tort liability is auto liability insurance, because that is the principal form of tort liability that individuals face. As we indicate below, the small amount of nonauto tort liability that individuals face (in their private, rather than business or professional capacity) is covered by the liability portions of homeowners and renters insurance.

The purchase of liability insurance that covers individuals is routinized and regular. In order to register a motor vehicle, the owner must certify that it is covered by liability insurance in a specified minimum amount (in most states, $25,000 for liability to one individual, $50,000 for liability to more than one individual, and $10,000 for property damage liability), covering all permissive drivers.[46]

Similarly, in order to obtain and maintain mortgage financing for their homes, purchasers must obtain homeowners insurance,[47] which automatically

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40. ABRAHAM, *supra* note 12, at 28.

41. *Id.* at 33, 39-40.

42. *Id.* at 155.

43. *Id.*

44. ABRAHAM & SCHWARCZ, *supra* note 21, at 464.

45. Auto liability insurance was not compulsory in most states until the 1960s, however, and the percentage of drivers who purchased only increased over time. ABRAHAM, *supra* note 12, at 71-74.

46. ABRAHAM & SCHWARCZ, *supra* note 21, at 713-14.

47. Ninety-three percent of all homeowners have such insurance. *Insurance Fact Book*, INS. INFO. INST. 90 (2021), https://www.iii.org/sites/default/files/docs/pdf/insurance_factbook_2021.pdf [https://perma.cc/X2ZS-6A9Z].

includes liability insurance, often in the amount of $100,000.[48] Renters insurance is much less widespread. The best estimate we have found is that only forty percent of renters are covered by such insurance.[49] Many people purchase "umbrella" policies that cover liability in excess of the monetary limits of their basic auto liability, homeowners, and renters policies.[50]

Commercial, business, and professional insurance are purchased through intermediaries; some are agents representing insurers, and others are brokers representing applicants and policyholders.[51] In our experience, comparatively small businesses tend to purchase both a primary CGL insurance policy and an umbrella policy providing coverage in excess of the primary. Large businesses employ brokers to put together a coverage "program" with primary and multiple layers of excess CGL, Directors & Officers liability insurance, and sometimes other forms of liability insurance, such as Cyber Liability.[52] Over the last decade or so, pharmaceutical and medical-device manufacturers are thought by some observers not to have purchased any low-level liability insurance, and perhaps none at all,[53] although they may well be covered, effectively, by reinsurance purchased by their own captive insurance companies. In our experience, professional liability insurance tends to be sold as a single, primary policy to individuals and small firms or practice groups through agents, and in layers to larger firms, often through brokers.

Virtually all of the insurance coverage we have just described is provided under standard-form policies that contain the same provisions for all policyholders.[54] Even large entities buy standard-form policies, sometimes subject to slight adjustments in coverage, because the efficiencies associated with the process are advantageous. Among other things, standardization facilitates price comparison, and longstanding case law interpreting standard-form policy provisions

48. Karen Axelton, *What Does Homeowners Liability Insurance Cover?*, EXPERIAN (Aug. 15, 2021), https://www.experian.com/blogs/ask-experian/what-does-homeowners-liability-insurance-cover [https://perma.cc/4U48-RTXZ]; Ted C. Jones, *Renter's Insurance and Another Top-10 List—States with the Most (and Least) Expensive Renters Insurance*, STEWART (Feb. 29, 2020), https://www.stewart.com/en/insights/2020/02/28/renters-insurance-and-another-top-10-list-states-with-the-most-and-least-expensive-renters-insurance.html [https://perma.cc/GAU8-XK76].

49. Jones, *supra* note 48.

50. *See* Broadbent v. Broadbent, 907 P.2d 43, 44 (Ariz. 1995).

51. ABRAHAM & SCHWARCZ, *supra* note 21, at 67.

52. *See id.* at 667.

53. Baker, *Where's the Insurance*, *supra* note 8, at 1575 (reporting the impressions of some of the lawyers Baker interviewed for his study).

54. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 40.

enhances the predictability of coverage claims and reduces the amount of coverage litigation that would be necessary if policy provisions were not standardized.

2. *The Sources of Tort Payments*

There are few systematic studies of the incidence of liability insurance. Moreover, we are not comfortable relying on any of the studies that quantify the incidence of self-insurance, which tends to be estimated at an implausibly high rate.[55] Our own estimate is that about eighty to eighty-five percent of annual

55. The most recent study attempting to quantify the extent of self-insurance is, in our view, implausibly high. *See Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM (Nov. 2022) [hereinafter *Tort Costs in America*], https://instituteforlegalreform.com/wp-content/uploads/2022/11/Tort-Costs-in-America-An-Empirical-Assessment-of-Costs-and-Compensation-of-the-U.S.-Tort-System.pdf [https://perma.cc/SR3X-LUDT]. Because the U.S. Chamber of Commerce has long favored tort reform, it is in its members' interest for cost estimates to be larger than a neutral study might produce. That study provides an estimate of tort costs in 2020 paid through self-insurance by commercial entities of $143.2 billion per year, with an estimate of total tort costs of $443 billion per year. *Id.* at 22. Thus, the study in effect estimates that commercial entities pay 52% of their tort costs ($143.2 billion out of $274 billion). *Id.* In our view these estimates are unduly high, at least in part because they rely on unexplained and unquantified estimates of the amount of these entities' exposure to liability in excess of the amount of their insurance. *Id.* at 8 n.16. An earlier version of the study made an even higher—and in our view, hyperbolic—estimate that commercial entities self-insure 69% of their tort costs. *Costs and Compensation of the U.S. Tort System*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM (Oct. 2018), https://images.law.com/contrib/content/uploads/documents/292/34551/Chamber-study-Costs-and-Compensation-report.pdf [https://perma.cc/W73U-L7KE]. That study provided an estimate of 2016 tort costs paid through self-insurance by commercial entities of $180 billion per year, with an estimate of total tort costs of $429 billion per year. *Id.* at 20. The study estimated that commercial entities pay 69% of their tort costs ($170 billion out of $246 billion) and that their insurers pay 31%. *Id.*

An older set of studies contains lower and somewhat more plausible estimates of both self-insured and total tort costs. *See U.S. Tort Cost Trends 2011 Update*, TOWERS WATSON 14, https://www.casact.org/sites/default/files/old/studynotes_towers-watson-tort-cost-trends.pdf [https://perma.cc/RV68-5FDQ] (reporting total 2009 tort costs of approximately $252 billion and self-insured costs of approximately $47 billion, or 19% of the total). Few individuals pay tort costs out of their own pockets. Consequently, virtually all of the self-insurance payments would have been by commercial entities, and would have been 35.6% of their costs, with insurance paying 64.4%. *Id.* at 16. Intuitively and based on our experience, even this 35.6% figure for 2009 seems high to us, especially since the Towers Watson study was prepared by a firm whose clients are likely to favor tort reform. However, it does seem likely that the proportion of self-insured tort costs has increased since that time, as this was the consistent trend for decades. *Id.* Consequently, we estimate that currently, roughly 40% of commercial entities' tort costs are self-insured, recognizing that this estimate may still be a bit high, but much more nearly in the ballpark than the U.S. Chamber estimate of 69%. This might also be a higher estimate than is warranted, but because our argument in this Article is that most tort payments are made by liability insurance, our 40% rather than 35% selfdirect tort costs—which we define as payments to claimants plus the costs of defense—are paid by liability insurance.[56] The bases for our estimate are as follows.

a. Individual Tort Liability

First, virtually all individual tort liability is auto liability.[57] Auto liability insurance is required in all U.S. states.[58] Total annual premiums paid for the liability insurance component of private passenger auto insurance in 2019 were $147 billion.[59] About 75% of this figure, or $110 billion, is paid for claims and defense expenditures.[60] In contrast, annual premiums for the sources of insurance against other forms of individual liability—homeowners and renters insurance—were approximately $96 billion.[61] But only about 2% of payouts by these forms of insurance, or approximately $1.9 billion, are for tort liability, as distinguished from payments to policyholders for damage to their own property.[62] Thus, of the roughly $112 billion paid for individual tort liability annually ($110

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insurance estimate is "conservative" in the sense that this is an estimate about the percentage of tort payments that are *not* made by liability insurance, and leads to a conservative *underestimate* of the percentage of tort payments that are insured. In fact, the percentage we provide, 80-85%, might well be even higher.

56. *See* calculations *supra* note 55. There are a few studies of the "costs" of the tort system that include such additional expenditures as insurance company administrative expenses. *E.g.*, *Tort Costs in America*, *supra* note 55; *U.S. Tort Cost Trends 2011 Update*, *supra* note 55. Because our concern here is not with defining or calculating the total costs of the tort system, but with the percentage of insured and self-insured liability, we set the definitional issue aside.

57. Because medical malpractice liability is incurred by professionals, we classify and quantify it in our discussion of commercial and entity liability, although often the defendant in malpractice cases is an individual.

58. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 157.

59. *Insurance Fact Book*, *supra* note 47, at 72. This is an accurate measure of tort payouts inasmuch as insurers' combined ratio—the ratio of payouts plus defense expenses to premiums—was 101.6 in 2019. *Id.*

60. *Id.* at 79 (reporting a loss and loss adjustment expense ratio of 75.5% and clarifying that the remaining portion of premiums do not constitute payments to claimants or defense expenses).

61. *Id.* at 90 (indicating annual homeowners premiums of $93 billion). We have had to do our own calculations for the renters insurance component. Average annual renters insurance premiums in the U.S. are $187, and roughly 40% of tenants have renters insurance. *See* Jones, *supra* note 48. There are roughly 45 million tenant households in the U.S. *See Homeowners vs Renters Statistics*, IPROPERTY MANAGEMENT (Nov. 22, 2023), https://ipropertymanagement.com/research/renters-vs-homeowners-statistics [https://perma.cc/W453-Y5UU]. If 40% of those households (approximately 18 million) are insured, and they pay an average premium of $187, then total renters insurance premiums are approximately $3.44 billion.

62. *Insurance Fact Book*, *supra* note 47, at 104.

billion plus $1.9 billion), roughly 98% is for auto liability and 2% for other forms of individual tort liability. Of this, virtually all of the liability is paid by insurance, because individuals rarely pay for tort settlements or judgments themselves.[63] Thus, by our estimate, roughly 100% of the annual $112 billion paid for individual tort liability is paid by liability insurance.

b. Commercial Tort Liability

Second, for tort liability incurred by commercial entities, the picture is a bit different. Although commercial entities incur liability for such torts as defamation, invasion of privacy, fraud, and malicious prosecution, the total sums paid for these liabilities appear to be so small in comparison to liability for bodily injury and property damage that they are not even included in standard estimates of the tort costs—whether insured or uninsured—that these entities incur.[64]

As for commercial entities' liability for bodily injury and property damage, we estimated earlier that as much as 40 percent[65] of the tort costs that commercial entities pay is in effect self-insured, either literally or through captive insurers, although we indicated our view that the actual percentage is probably smaller.[66] Commercial insurance premiums for nonauto liability insurance were about $92 billion in 2019,[67] and premiums for commercial auto insurance were about $29 billion.[68] One hundred and five percent, or $97 billion, of the former ($92 billion) are for tort costs,[69] and about 75% (about $22 billion out of $29

63. As Tom Baker has shown, the portion of tort judgments that is in excess of the amount of insurance available to insured individual defendants is rarely collected. *See* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC. REV. 275, 281-82 (2001).

64. *See Tort Costs in America*, *supra* note 55, at 38 (referring to tort claims as those that are "insurable"); *U.S. Tort Cost Trends 2011 Update*, *supra* note 55, at 2 (referring to tort claims as actions for "negligence").

65. *See supra* note 55.

66. *See supra* note 55.

67. This consists of (1) $61 billion in premiums for "Other Liability," which we refer to as coverage under CGL policies that includes products liability insurance, (2) $3 billion in premiums for freestanding products liability insurance, (3) $16 billion for the liability portion of Commercial Multi-Peril insurance, (4) $9 billion for professional liability, along with (5) our own rough estimates for the liability portions of Farmers Multi-Peril and Cybersecurity insurance of $2 billion and $1 billion, respectively. *Insurance Fact Book*, *supra* note 47, at 122-36.

68. *Id.* at 74.

69. *See id.* at 122 (indicating a combined ratio of roughly 105 for these different types of commercial insurance, meaning that for every $1 of premium the insurer took in, the insurer paid out $1.05, with profit being earned on invested premiums).

billion) of commercial auto premiums are for tort costs, for a total of about $119 billion ($22 billion plus $97 billion) in annual insured commercial tort costs.

c. *Totals*

Third, combining the foregoing estimates of insured individual tort costs of $110 billion and insured commercial tort costs of $119 billion means that total annual insured tort costs are about $229 billion. Using our estimate that as much as 40% of commercial tort costs (40% of $119 billion, or $47 billion) and 0% of individual tort costs are self-insured (i.e., paid but not insured) leads to the conclusion that total annual tort costs ($229 billion insured plus $47 billion self-insured) are $276 billion, with $231 billion ($276 billion total minus $47 billion self-insured), or about 84%, being insured, and about 16% ($47 billion out of $276 billion) being self-insured. This is the basis for our estimate that roughly 15-20% of total individual and commercial tort costs are self-insured (i.e., paid but not insured), and 80-85% are insured.

In short, for all individuals and most businesses, liability insurance is effectively the exclusive source of payment of tort costs. And even for large businesses, liability insurance pays the majority of tort costs. Moreover, as we demonstrate next, liability insurance is not only the nearly exclusive source of payment of most tort costs. It influences the development of substantive tort law doctrine and the conduct of tort litigation in other highly significant ways.

II. LIABILITY INSURANCE AS A CHARACTERISTIC FEATURE OF MODERN TORT LIABILITY

It might be thought that, if liability insurance is as important an ingredient of tort liability as we have been contending, there would have been many more express references to liability insurance in classic tort opinions than tort scholars have noted. With the major exceptions we noted earlier,[70] however, prominent tort scholars often have failed to see, or failed to see as significant, what has always been there hiding in plain sight.[71] As we will show below, there has been

70. *See supra* note 8.

71. In some of their work, the authors themselves sometimes have made less reference to liability insurance than this Article is now urging. For example, insurance goes only lightly mentioned in KENNETH S. ABRAHAM & G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY (2022) and is absent from Catherine M. Sharkey, *Personalized Damages*, U. CHI. L. REV. ONLINE (Mar. 9, 2022), https://lawreviewblog.uchicago.edu/2022/03/09/bp-sharkey [https://perma.cc/2JGG-QACC].

considerable reference to liability insurance, and to the absence of it, in significant tort opinions, from the mid-twentieth century to contemporary times.[72]

It is important to recognize, however, that the influence of liability insurance has also extended and still extends far beyond appellate courts "chasing" liability insurance through the creation of legal doctrines that expand liability. The influence of liability insurance has been fundamental in other ways that are not revealed merely from reading state and federal court opinions. The spread of liability insurance helped create the conditions under which more suits could be brought and more cases could be appealed. Therefore, the courts were presented with more opportunities to expand liability in situations in which the existence of liability insurance made the expansion meaningful.[73] In such settings, there often would have been no need, or occasion, for courts to make reference to liability insurance, even though the availability of liability insurance was one of the very conditions that brought tort cases to court.

In addition, liability insurance has been and continues to be an ingredient of and influence on the development of tort liability in two other equally important ways. First, if it were not for liability insurance, a number of highly significant tort law doctrines and practices probably would not exist; these doctrinal fundamentals never would have persisted in the absence of liability insurance. Second, liability insurance fueled the massive twentieth-century expansion of tort liability through the subtle but enormously important interaction of the liability insurer's duties to defend and to settle tort suits against their policyholders.

A. Liability Insurance in Significant Opinions

Tort scholars are quite familiar with the notion that changing social conditions lead to the recognition by courts of new duties and the erosion of others. It sometimes is a challenge, nonetheless, to identify the precise factors that courts in any particular case give conscious or unconscious weight in determining whether to impose or not to impose tort duties. General factors include the moral blame attributable to the potentially liable party; the extent to which the threat of liability will deter future injury-causing conduct; the comparative capacity of

72. *See* Catherine M. Sharkey, *Dynamic Tort Law*, 109 VA. L. REV. 465, 478 (2023) (reviewing ABRAHAM & WHITE, *supra* note 71) ("When it comes to assessing the 'birth' of new torts or even the expansion of antiquated torts into new realms—what we may term 'new torts in older torts clothing'—two factors predominate: (1) preventing harm or minimizing new societal risks of harm and (2) the role of insurance.").

73. ABRAHAM, *supra* note 12, at 4; Kenneth S. Abraham & G. Edward White, *Rethinking the Development of Modern Tort Liability*, 101 B.U. L. REV. 1289, 1294 (2021).

the parties to bear or spread the loss; administrative cost and convenience; and the availability of insurance against the liability involved.[74]

Perhaps because the availability of liability insurance is often at the tail end of such lists, it usually stays in the background of tort theory or is not mentioned at all. Many courts *do* mention liability insurance, however, and (as we show below) have long done so. Others do not mention insurance even when, as one commentator observed long ago, they are "pregnant with liability insurance"[75] and there seems to be little doubt that liability insurance has been influential. For example, it seems extremely likely to us that in its deliberations in the prominent *Kline v. 1500 Massachusetts Avenue Apartment Corp.* case about whether to impose a duty on landlords to exercise reasonable care to protect their tenants from intruders, the D.C. Circuit would have considered the fact that landlords had or could easily obtain insurance against this new liability.[76] Similarly, it is

74. Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on Torts 359 n.24 (W. Page Keeton ed., 5th ed. 1984); *see* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. Rev. 1873, 1878 (2011) (concluding on the basis of "[a]n examination of fifty-one jurisdictions (the fifty states and the District of Columbia)," that "duty almost universally is articulated [by courts] as a multi-factorial policy decision, just as Prosser so famously described").

Academic consideration of the insurance factor can be traced at least as far back as William L. Prosser, Handbook of the Law of Torts 184 (1941) ("The real problem, and the one to which attention should be directed, would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff. Because these defendants are in large measure public utilities, governmental bodies, industries, automobile drivers, and others who by rates, prices, taxes or insurance are better able to distribute the loss to the general public, many courts may reasonably consider that the burden should rest upon them, and experience no great difficulty in finding a 'duty' of protection."). More extensive consideration began at least as early as 1956:

> The ultimate question is whether such a duty *should* be imposed as a matter of policy. This in turn will depend on the balancing of several factors, namely, the burden it would put on defendant's activity; the extent to which the risk is one normally incident to that activity; the risk and the burden to the plaintiff; the respective *availability and cost of insurance to the two parties*; the *prevalence of insurance in fact*; the desirability and effectiveness of putting *the pressure to insure on one rather than the other*, and the like.

2 Fowler V. Harper & Fleming James Jr., The Law of Torts 1052 (1956) (second and third emphases added).

75. Comment, *The Doctrine of Parental Immunity: Rule or Exception?*, 10 DePaul L. Rev. 55, 60 (1960).

76. *See* 439 F.2d 477 (D.C. Cir. 1970). Indeed, the landlord raised—and attempted to rebut—the insurability point in its brief submitted to the court. *See* Brief for Appellee at 9, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (No. 23401) ("Certainly, in considering the practical administration of such a rule of law, one may decide that the solution should be bottomed on the doctrine that among parties the one best able to bear or distribute highly likely, in our view, that in its deliberations in *Ybarra v. Spangard*,[77] the California Supreme Court considered the possibility that when no one in a group of individual defendants could satisfy the burden of proving that they had not committed malpractice, each defendant would have malpractice insurance protecting them against any such seemingly onerous liability. In both cases the obvious additional burdens that liability would nominally have placed on the defendants would naturally have led judges to consider the possibility that the defendants would not be funding their liabilities out of their own pockets. Yet neither *Kline* nor *Ybarra* ever mentions the relevance of liability insurance.[78] In short, identifying only the courts that have expressly mentioned liability insurance in their opinions is tantamount to revealing only the tip of the iceberg.

It is true that other courts reject (impliedly or expressly) the availability of liability insurance as irrelevant,[79] reflecting a "jurisprudential bias"[80] against the

the loss should be liable. The availability of insurance is one basis for this thesis. However, recent developments indicate that this is a castle that may well be built on sand. It now becomes more and more difficult to obtain insurance in various areas; and when it is obtainable, the cost becomes prohibitive.").

77. 154 P.2d 687 (Cal. 1944) (holding that evidence supporting an inference that one or more of a group of healthcare providers had committed malpractice that injured the plaintiff was sufficient to satisfy the plaintiff's burden of production).

78. *Kline* did mention that the landlord would be justified in passing the increased costs of security to its tenants. 439 F.2d at 488 ("The landlord is entirely justified in passing on the cost of increased protective measures to his tenants, but the rationale of compelling the landlord to do it in the first place is that he is the only one who is in a position to take the necessary protective measures for overall protection of the premises."). But liability insurance goes unmentioned.

79. *See, e.g.*, Kreski v. Mod. Wholesale Elec. Supply Co., 415 N.W.2d 178, 188 (Mich. 1987) ("Putting aside the question whether the availability of liability insurance is a proper basis for a rule of law, we reject this argument [for abolishing the 'fireman's rule'], as have all the courts discussing it."); Schofield v. Merrill, 435 N.E.2d 339, 345 (Mass. 1982) ("The ready availability of insurance and a sympathetic plaintiff should not allow us to undermine the fundamentals of negligence law. Thus we reject the suggestion of some authorities that the insurability of the landowner's risk of liability warrants abolishing the trespasser classification."); Brunner v. Hutchinson Div., Lear-Siegler, Inc., 770 F. Supp. 517, 524 (D.S.D. 1991) ("The whole purpose of insurance becomes distorted when the presence of insurance encourages new kinds of liability. . . . [J]udicial activity in this connection will quite simply occur at a cost to society in the form of increased premiums and the necessity of purchasing insurance coverage to guard against new forms of liability."); Dille v. St. Luke's Hosp., 196 S.W.2d 615, 620 (Mo. 1946) (reasoning that charitable immunity is not just based on concerns about the depletion of charity resources, but is also based on public policy justifications; therefore, it is not impacted by liability insurance).

80. Gerald R. Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588, 600 n.49 ("The problem at a deeper level may reflect a jurisprudential bias by courts against allowing themselves to be influenced by the existence of insurance. Our law has always prided itself on equality of treatment of rich and poor alike. In much of our

relevance of insurance. And some courts conflate the goal of spreading loss through the imposition of enterprise liability with the functions of liability insurance.[81] This is what Professor Tom Baker has called insurance as "metaphor."[82]

However, the courts have been considering the availability of liability insurance in making decisions about tort liability – not as a metaphor, but literally and expressly – for many decades. Other things being equal, courts seem more willing to impose (or extend) tort duties to risks traditionally covered by liability insurance. And they seem correspondingly more reluctant to do so where the availability of insurance is questionable or nonexistent.[83] At least some courts, then, are ahead of most tort theorists in recognizing the significance of insurance as a characteristic ingredient of tort liability. Tort theorists of all stripes – particularly those attuned to the fit of their theory of choice with how courts actually decide cases – should account for the insurance factor.[84]

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legal history, this may have meant that the rich man is to be protected by law from worse treatment than that received by the poor man.").

81. *See, e.g.*, Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 101 (D.C. Cir. 1972) ("[T]here is continual movement away from *fault* as the governing principle for allocation of losses, in favor of enterprise liability or the distribution of losses over a larger segment of society through insurance.").

82. Baker, *Where's the Insurance*, *supra* note 8, at 1591.

83. To be sure, the unavailability of insurance is not dispositive. The courts have imposed duties upon entities for uninsured risks, especially when other key factors – such as prevention of harm – weigh in favor. *See, e.g.*, Hoff v. Vacaville Unified Sch. Dist., 68 Cal. Rptr. 2d 920, 926 (Ct. App. 1997) (imposing liability on school for failing to supervise one of its students who injured a nonstudent off campus and stating, "The general unavailability of commercial insurance is the only reason to use the status of the victim as the gatekeeper for imposing liability [against a school] for negligent supervision where, as here, the on-campus behavior requiring supervision could just as easily harm a student as a nonstudent. This is not enough, in our opinion, to deny protection."). The California Supreme Court did, however, reverse this decision. It held that "school personnel who neither know nor reasonably should know that a particular student has a tendency to drive recklessly owe no duty to off-campus nonstudents." Hoff v. Vacaville Unified Sch. Dist., 968 P.2d 522, 529 (Cal. 1998).

84. Tort scholars – even those whom we credit as recognizing synergies between liability insurance and tort law, *see supra* notes 4 & 8, have overlooked courts' explicit consideration of insurability of the risk as a normative criterion for tort liability.

Two scholars analyzing common law systems outside of the United States have commented on courts' invocation of the insurance factor – one disapprovingly, the other, approvingly. *Compare* Jane Stapleton, *Tort, Insurance and Ideology*, 58 MOD. L. REV. 820, 820 (1995) (describing the claim in British cases of a relationship between torts and insurance and arguing that "neither actual insurance nor insurability are or should be relevant to the reach and shape of tort liability"), *and id.* at 826–27 & n.21 (citing Richardson v. West Lindsay DC [1990] 1 WLR 522; Pac. Assocs. v. Baxter [1990] 1 QB 993, 1032; Launchbury v. Morgans [1973] AC 127, 137), *with* John Murphy, *Contemporary Tort Theory and Tort Law's Evolution*, 32 CAN. J. L. & JURIS. 413, 417-18 (2019) (noting that liability insurance or lack thereof seems to influence

The ways in which the courts expressly consider liability insurance in making decisions about tort liability fall into three distinct, though obviously related, categories. First, courts take the availability of liability insurance into account in deciding to recognize a duty of care or otherwise hold in favor of the imposition of liability. Second, courts determine (sometimes correctly, sometimes not) that liability insurance is not available to cover a potential liability and, at least partly for this reason, decide against recognizing the new form of liability. Third, courts indicate that they do not have sufficient information to determine whether liability insurance is or would be available to cover a potential liability and, again at least partly for this reason, decide against recognizing the new form of liability. In the discussion that follows, we provide a new and extensive sample—but only a sample—of the numerous tort cases in which the availability of liability insurance figures prominently and expressly in the judicial opinions that resolve the disputes at issue.

1. *The Availability of Insurance Favors Liability*

By far the most common references to liability insurance occur in judicial decisions that break down the barriers to or otherwise expand tort liability. To illustrate, we have drawn examples of the influence of different forms of liability insurance in different major areas of tort liability: products liability insurance, premises liability insurance, and auto liability insurance, corresponding to important doctrines regarding duty and no duty in the forms of liability they insure. There is no magic to our selection of exemplary categories. The ones we have chosen represent major forms of liability insurance and tort liability, but other examples abound.[85]

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the underlying tort law standard that the court articulates) (citing Marc Rich & Co. v. Bishop Rock Marine Co. [1996] 1 AC 211 (HL); Various Claimants v. Catholic Child Welfare Soc'y [2013] 2 AC 1 (UKSC)).

85. In future work, we intend to explore additional areas. Two doctrines at the top of our list are vicarious liability and punitive damages, which we have written on in other contexts. *See, e.g.*, Catherine M. Sharkey, *Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages*, 53 VAL. U. L. REV. 1, 6-7 (2018) (discussing courts' penchant for assigning vicarious liability to the cheapest cost avoider); Sharkey, *supra* note 15 (exploring insurability of punitive damages). For examples of cases in which courts have discussed the issues of vicarious liability and punitive damages, see *Rodgers v. Kemper Constr. Co.*, 124 Cal. Rptr. 143, 148 (Ct. App. 1975) ("California has adopted the rationale that the employer's liability should extend beyond his actual or possible control over the employees to include risks inherent in or created by the enterprise because he, rather than the innocent injured party, is best able to spread the risk through prices, rates or liability insurance."); and *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 100 (W. Va. 2014) ("The existence of punitive damages insurance coverage is relevant to several of the factors used to evaluate a punitive damages award. Not only does it impact whether the punitive damages remove the profit achieved

a. *Products Liability*

The classic judicial statement regarding the importance of insurability came in 1944 from the California Supreme Court in Justice Traynor's famous concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*.[86] In an appeal involving liability in negligence for injuries caused by an exploding soda bottle, Traynor argued that there should be strict liability for injuries caused by defective products, because (among other things) "the risk of injury can be insured by the manufacturer."[87] Nineteen years later, in a majority opinion by then-Chief Justice Traynor, the court followed his advice.[88] The enormously influential § 402A of the *Restatement (Second) of Torts* then followed in adopting strict products liability, indicating that the "burden of accidental injuries" can be "treated as a cost of production against which liability insurance can be obtained."[89] Other states soon followed. Clearly, the availability of insurance was a major factor in the evolution of the law in this area.[90]

from the wrongful conduct, but it also bears a relation to the wealth of the defendant and the deterrent effect of the punitive damages award insofar as it reduces the financial burden on the defendant to pay the award.").

86. 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).

87. *Id.* at 441.

88. Greenman v. Yuba Power Prods., Inc., 377 P. 2d 897, 901 (Cal. 1963).

89. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965).

90. *See* RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 668 (12th ed. 2020) ("Soon after the Second Restatement was adopted, products liability law entered a period of rapid expansion. The three dominant themes in debates leading up to the Second Restatement focused on the role of manufacturers: their market power; their capacity to obtain insurance, and their ability to internalize the costs of accidents associated with their products."); *see, e.g.*, Bell v. Jet Wheel Blast, 462 So.2d 166, 171 (La. 1985) ("[One] basic goal[] of . . . strict products liability . . . [is] the placing of the burden of accidental injuries caused by defective products on those who market them, to be treated as a cost of production against which liability insurance can be obtained."); Walton v. Avco Corp., 610 A.2d 454, 458 (Pa. 1992) ("The social policy reflected in the imposition of the seller's liability is clear. When a product is released into the stream of commerce, it is the seller or manufacturer who is best able to shoulder the costs and to administer the risks involved. Having derived a benefit from engaging in business, they are particularly able to allocate the losses incurred through cost increases and insurance."); Kemp v. Miller, 453 N.W.2d 872, 876 (Wis. 1990) ("[T]he seller is in the paramount position to distribute the costs of the risks created by the defective product he is selling. He may pass the cost on to the consumer via increased prices. He may protect himself either by purchasing insurance or by a form of self-insurance." (citation omitted)); Thomas v. Mallett, 701 N.W.2d 523, 558 (Wis. 2005) ("[T]he Pigment Manufacturers are in a better position to absorb the cost of the injury. They can insure themselves against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business."); *see also* Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 312, 362 (1990) (noting that "liability insurance is an institution that may

And the availability of liability insurance has continued to be influential. A number of courts have held that the availability of insurance is a factor to be considered in applying the risk-utility test to determine whether a product is defective. For example, the Georgia Supreme Court has held that the "feasibility of spreading loss in setting a product's price or by purchasing insurance" is relevant to the determination.[91] New Jersey has an identical rule, stated in virtually identical language.[92]

Liability for bodily injury caused by exposure to asbestos has been a source of litigation for fifty years.[93] A number of courts have made explicit reference to liability insurance in decisions about this form of liability. For example, in *May v. Air & Liquid Systems Corp.*, the Maryland Court of Appeals held that "the availability of insurance counsels in favor of imposing a duty."[94] The defendants in that case had argued that "'liability for coverage for asbestos risks has been unavailable in the market at any price' since the mid-1980s"; but the petitioner presented evidence that "insurance was generally available to cover the risks of asbestos at the time [the defendants] sold their pumps to the Navy."[95] Similarly, in *In re New York City Asbestos Litigation*,[96] the New York Court of Appeals embraced a manufacturer's duty to warn about the dangers of the combined use of two

have enticed the judiciary into making an unfortunate mistake" in expanding products liability).

91. Banks v. ICI Americas, Inc., 450 S.E.2d 671, 675 n.6 (Ga. 1994); *see also* Certainteed Corp. v. Fletcher, 794 S.E.2d 641, 644 (Ga. 2016) (citing Banks v. ICI Americas, Inc., 450 S.E.2d 671, 675 n.6 (Ga. 1994)).

92. *See* Cepeda v. Cumberland Eng'g Co., 386 A.2d 816, 827 (N.J. 1978), *overruled on other grounds by* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 153 (N.J. 1979). Courts in other states have likewise considered insurance as relevant to the risk-utility design defect test. *See, e.g.*, Calles v. Scripto-Tokai Corp., 864 N.E.2d 249, 264 (Ill. 2007) (collecting cases); Ray v. BIC Corp., 925 S.W.2d 527, 533 n.10 (Tenn. 1996); Tabieros v. Clark Equipment Co., 944 P.2d 1279, 1309 (Haw. 1997).

93. The seminal case was decided in 1973. *See* Borel v. Fiberboard Prods. Corp., 493 F.2d 1076, 1076 (5th Cir. 1973).

94. 129 A.3d 984, 994 (Md. 2015).

95. *Id*. Petitioners provided evidence that, not only was such insurance available, but defendants had obtained such coverage. Indeed, as the court recognized, the defendants "implicitly acknowledge[d] in their brief that they [have] some pre-1986 insurance coverage available to them." *Id.* Defendants' having obtained coverage is, of course, probative of whether insurance is available to the *category* of entities of which defendant is a member, which is the relevant inquiry.

96. 59 N.E.3d 458 (N.Y. 2016).

manufacturers' products, "especially given that they can obtain insurance coverage for this type of liability."[97]

A recent asbestos-related issue has been take-home liability: whether to impose liability on an employer when asbestos, to which an employee has been exposed, causes harm to third parties such as members of the employee's family. For example, in 2016, in *Kesner v. Superior Court of Alameda County*, the California Supreme Court decided that an employer that uses asbestos in the workplace has "a duty of care to protect employees' household members from exposure to asbestos through off-site contact with employees who carry asbestos fibers on their work clothing, tools, vehicles, or persons."[98] Defendants argued that insurance for asbestos-related injuries "is no longer widely available, as the insurance industry has revised its standard CGL policies to exclude asbestos."[99] But the court insisted that the relevant policies were "those that were available to defendants at the time of exposure."[100]

On a more conceptual level, defendants raised the concern that "the magnitude and uncertainty of potential liability make insuring against it impossible."[101] The court's rejoinder was firm: "[I]t is not obvious that secondary asbestos exposure poses greater uncertainty in terms of potential claimants and total liability than, say, the negligent release of chemicals into the air or negligent contamination of groundwater."[102]

Finally, in a landmark drug liability 2017 decision, *T.H. v. Novartis Pharmaceuticals Corp.*, the California Supreme Court held that a brand-name manufacturer could be held liable for deficiencies in its warning label in an action brought by someone who took the generic (not brand-name) version of the drug, given that generic drugs must, per federal law, bear the same label as the brand-name drug.[103] According to the California Supreme Court,

> the brand-name drug manufacturer "is in the best position to discover and cure deficiencies in its warning label, to bear the cost of injury resulting from its failure to update and maintain the warning label, *to insure*

97. *Id.* at 473. The court also commented that "there is no evidence before us that judicial approval of a duty to warn about the hazards of the combined use of two manufacturers' products, if sensibly confined, would saddle manufacturers with an untenable financial burden." *Id.*

98. 384 P.3d 283, 288 (Cal. 2016).

99. *Id.* at 296.

100. *Id.*

101. *Id.* (emphasis omitted).

102. *Id.*

103. 407 P.3d 18, 47-48 (Cal. 2017).

> *against the risk of liability*, and to spread any increased cost widely among the public."[104]

The court seemed to place the burden on the brand-name drug manufacturer to overcome an assumption of insurability of the relevant risk:

> Novartis offers no reason why a brand-name drug manufacturer would be unable to insure against the risk of warning label liability. Presumably, a brand-name manufacturer already insures against the risk of liability arising from a deficient warning label when a drug is introduced and the manufacturer has a monopoly over that market. It is far from clear why the brand-name drug manufacturer's exposure would become fatally uncertain merely because the brand-name manufacturer is sharing the market with generic manufacturers.[105]

The court, moreover, seemed to take judicial notice of the existence of CGL policies that would cover the category of brand-name drug manufacturers for liability even after they no longer produced the drug:

> Novartis identifies no reason why it could not insure against the effects of any negligence related to the warning label for its drug. Commercial general liability insurance policies cover injuries that accrue from multiple occurrences over a period of years, and tail coverage is available for injuries caused by the insured that did not manifest themselves until well after the manufacturer either sold the product or shut down its operations.[106]

In sum, the availability of liability insurance has figured prominently in the development and expansion of products liability for three-quarters of a century and has been expressly stated to be a relevant consideration in numerous significant decisions.

b. Immunities

One of the principal fields in which the availability of liability insurance influenced the courts to change the law and permit the imposition of liability involves the various forms of immunity from liability that existed in the earlier common law. Courts have increasingly recognized that rigid, judicially imposed immunities are out of step with the prevalence of various forms of third-party

104. *Id.* at 34 (emphasis added).

105. *Id.* at 35.

106. *Id.* at 45 (citations omitted).

liability insurance. The vast majority of states have completely abrogated spousal immunity and have recognized significant exceptions to parental, charitable, and governmental (or sovereign) immunity—three categories examined below.[107] While sometimes such immunity abrogation is effectuated by statute, our focus here is on decisions by common-law courts that explicitly invoked and relied (at least in part) on the proliferation of liability insurance as a ground for abandoning or sharply curtailing immunity doctrines.

i. Parental Immunity

Courts have long relied on the availability of liability insurance to justify carving out exceptions to parental immunity. In particular, courts have noted how liability insurance mitigates the familial "peace and tranquility" concern that inspires the immunity doctrine, while simultaneously addressing the "familial exchequer" concern given that liability (and perhaps defense litigation costs as well) will be paid by the insurer.

In the seminal case of *Dunlap v. Dunlap*, a sixteen-year-old boy, employed by his contractor/builder father, was injured after a scaffold collapsed and sued his father for negligence.[108] The father had "paid insurance premiums for indemnity against a master's liability to the son."[109] As noted by the New Hampshire Supreme Court, "If the insuring policy is in the usual form, it not only relieves the father from liability to pay the judgment, but also takes from him both the duty and the right to interfere with the defense of the action in any way."[110] The court concluded that "[t]he suit is maintainable because the enforcement of his liability has been made innocuous. Making it innocuous is the precise object of taking

107. With regard to spousal immunity, see EPSTEIN & SHARKEY, *supra* note 90, at 1235, which notes that by 1997, only four states maintained spousal immunity (Georgia, Massachusetts, Nevada, and Vermont), and that since then, these states have carved out major exceptions to the doctrine). For parental immunity, see Herzfeld v. Herzfeld, 781 So. 2d 1070, 1703 nn.5-7 (Fla. 2001), which notes that eleven states had completely abrogated parental immunity, seven states had never fully embraced the doctrine, and nearly two thirds of the states had significant exceptions thereto. For charitable immunity, see Bradley C. Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 L. & SOC'Y REV. 969, 972-74 (1979), which notes that "[b]y 1975, only seven states retained the doctrine in full, while five more had partial immunity. Thirty-five states had abrogated or rejected the doctrine, while three still had no rulings on the matter." On sovereign immunity, see Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982), which notes that "practically all of the states have abrogated and abolished the sovereign immunity doctrine. The vast majority has done so completely, some have retained certain prohibitions. There are only six [including Mississippi] which have not taken any action or have not clarified their positions."

108. 150 A. 905, 905 (N.H. 1930).

109. *Id.* at 912.

110. *Id.* at 912-13.

the insurance."[111] As if to preemptively rebut criticism, the court added: "Can the fact of insurance take a defense away from the insured? It can when that defense is the imminent danger of financial loss (in fact and not merely in legal theory), through a judgment in the suit."[112]

Similarly, the early cases of *Lusk v. Lusk*[113] and *Worrell v. Worrell*[114] abrogated parental immunity where public-liability insurance was present in both and was probably the controlling factor in the decisions. In *Lusk*, a sixteen-year-old girl was injured by the alleged negligent operation of a school bus owned by her father, under contract with the board of education to transport school children.[115] The West Virginia Supreme Court, recognizing the justification for parental immunity as "in the interest of parental discipline and control and of domestic harmony," suggested that "a different situation arises where the parent is protected by insurance in his vocational capacity."[116] With a nod to *Dunlap*, the court reasoned that "no need exists for parental immunity," and "when the reason for a rule ceases the rule itself ceases."[117]

By the late 1920s, automobiles were on the roads in significant numbers and involved in accidents that caused bodily injury and property damage. A body of cases then looked to the existence of automobile insurance as grounds for

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111. *Id.* at 913.

112. *Id.* at 914.

113. 166 S.E. 538 (W. Va. 1932).

114. 4 S.E.2d 343 (Va. 1939).

115. *Lusk*, 166 S.E. at 538. As noted by the court:

> He and the board carried an indemnity insurance policy with the defendant Guaranty Company, which insured them against loss and/or expense arising from claims for damages of "any person," except their employees, for bodily injuries, etc., in consequence of an accident attributable to the operation of the bus. The policy contained the usual direct public liability clause in the form prescribed by the state road commission.

Id.

116. *Id.* at 538-39. According to the court:

> This action is not unfriendly as between the daughter and the father. A recovery by her is no loss to him. In fact, their interests unite in favor of her recovery, but without hint of "domestic fraud and collusion" . . . . There is no filial recrimination and no pitting of the daughter against the father in this case. No strained family relations will follow. On the contrary, the daughter must honor the father for attempting to provide compensation against her misfortune. Family harmony is assured instead of disrupted.

Id. at 539.

117. *Id.* at 539.

abrogating parental immunity.[118] In *Worrell*, the Virginia Supreme Court drew an explicit parallel to both *Dunlap* and *Lusk*, where "recoveries were allowed on the grounds that the torts complained of were committed in each case by a parent in his vocational capacity, and that liability insurance covering tortious acts in such capacity removed all reasons for immunity."[119] The court also looked to "the statutes of this State providing for compulsory insurance indemnity to passengers of a common carrier for damages resulting from the negligent operation of its vehicles," which the court reasoned "evidence a purpose and policy to afford protection to all such persons from damages arising in tort from the relationship of passenger and carrier."[120]

In the words of the Alaska Supreme Court in 1967:

> To persist in adherence to family-harmony and parental-discipline-and-control arguments when there is automobile liability insurance involved is in our view unrealistic. If there is insurance there is small possibility that parental discipline will be undermined, or that the peace of the family will be shattered by allowance of the action.[121]

By 1971, the Virginia Supreme Court was even more emphatic, reasoning that "[t]he very high incidence of liability insurance covering . . . motor vehicles, together with the mandatory uninsured motorist endorsements to insurance policies" had "made [the] rule of parental immunity anachronistic when applied to automobile accident litigation."[122] And, even if not dispositive, other courts have looked to the prevalence of liability insurance as a significant factor in considering abrogating parental immunity.[123]

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118. The early auto liability insurance policies covered liability for operation of the vehicle, and later added coverage of liability for harm caused when a vehicle was parked. Similarly, for a time only the owner of the insured vehicle was covered and only when driving the insured vehicle. Soon, however, coverage of liability for driving other cars was added, and the owner's insurance was modified (through an "omnibus clause") to cover anyone driving the insured vehicle with permission. *See* ABRAHAM, *supra* note 12, at 78.

119. *Worrell*, 4 S.E.2d at 350.

120. *Id.*

121. Hebel v. Hebel, 435 P.2d 8, 15 (Alaska 1967).

122. Smith v. Kauffman, 183 S.E.2d 190, 194 (Va. 1971).

123. *See, e.g.*, Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971) ("[W]e cannot overlook the widespread prevalence of liability insurance and its practical effect on intrafamily suits. Although it is obvious that insurance does not create liability where none otherwise exists . . . it is unrealistic to ignore this factor in making an informed policy decision on whether to abolish parental negligence immunity."); Elam v. Elam, 268 S.E.2d 109, 111 (S.C. 1980) ("Although the existence of liability insurance does not translate into automatic liability, it is a relevant factor to be considered by this Court in evaluating the continued vitality of a court-created common law doctrine.").

ii. Spousal Immunity

The rise of automobile insurance was likewise a significant factor in abrogating spousal immunity.[124] With such liability insurance, causes of action between spouses would neither threaten household harmony nor deplete the family "exchequer."[125] Indeed, some courts went further to claim that "[d]omestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage."[126] So influential was insurance on courts' decisions to abrogate spousal immunity that the *Restatement (Second) of Torts* commented in 1965: "The number of these decisions has been on the increase in recent years and has been encouraged by the spread and general use of liability insurance, particularly in automobile cases."[127]

iii. Charitable Immunity

More than the intrafamily immunities, charitable immunity rests principally on financial concerns, namely to protect the funds of charities.[128] Courts have

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124. The abrogation of spousal immunity was also significantly affected by the passage of the Married Woman's Act and the rise of the women's rights movement. *See* Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101 (1999); *see also* Joan T. Schmit & Katherine L. Phelps, *Two-Way Causality Between Insurance and Liability*, 69 MARQUETTE L. REV. 33 (1985) (commenting that abrogation of spousal immunity was heavily influenced by statutory developments, especially as compared with abrogation of parental immunity, which was more heavily weighted toward common law courts).

125. *See, e.g.*, Merenoff v. Merenoff, 388 A.2d 951, 959 (N.J. 1978) ("The danger of marital disruption becomes almost academic where liability insurance is available . . . we do not believe that, because general liability insurance covering household and non-automobile accidents is not as widespread as automobile insurance, this should leave claims for tortious injury arising from domestic negligence barred and unredressed."); Briere v. Briere, 224 A.2d 588, 590 (N.H. 1966) (discarding the depletion of the family exchequer argument).

126. Immer v. Risko, 267 A.2d 481, 485 (N.J. 1970); *see also* Shook v. Crabb, 281 N.W.2d 616, 619 (Iowa 1979) ("If insurance is carried, the possibility of [marital] discord is minimized as the recovery would in most cases be paid by the carrier. Under such circumstances, denying a cause of action would actually be more likely to cause marital difficulties.").

127. RESTATEMENT (SECOND) OF TORTS § 895F cmt. f (Am. L. Inst. 1979); Shearer v. Shearer, 480 N.E.2d 388, 393-94 (Ohio 1985) (citing *Restatement* commentary).

128. The "trust fund theory" for charitable immunity holds that "the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thwarting the donor's intent, as the result of negligence for which he was in nowise responsible." Wendt v. Servite Fathers, 76 N.E.2d 342, 344-45 (Ill. App. Ct. 1947). A broader "public policy" rationale holds that "it is better for the community and the public in general that an individual suffer and bear his loss rather than that the offending charitable institution should suffer in damages and so impair, theoretically at least, its ability to offer its charity on as wide a scale as possible." *Id.* at 346.

held that liability insurance eliminates this concern.[129] Thus, for example, while the Colorado Supreme Court would not "transgress the public policy that requires immunity from tort liability of associations with trust funds dedicated to charity," it nonetheless would not shield from liability "a charitable institution [that] has contractually, and perhaps for the benefit of third parties, insured against its negligence."[130] Moreover, the court reasoned that, by imposing liability, courts will encourage procurement of insurance: "it is a wise precaution for such associations, in connection with their relation to those whom they serve, to protect themselves with insurance against injury resulting from their negligent acts, and the procurement of such safeguard should be encouraged."[131] And whereas the Mississippi Supreme Court would not "make the *existence* of liability insurance the criterion of liability," it nonetheless "emphasize[d] its *availability* . . . as a persuasive argument in favor of applying the general law on the subject of negligence in suits against charitable institutions."[132] As was the case with intrafamily immunities, then, courts have often highlighted the availability of insurance as a relevant (if not dispositive) factor in waiving charitable immunity.[133]

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129. *See, e.g.*, *id.* ("Hospitals and other charitable corporations can safeguard their trust funds by liability insurance, and many of them do so."). In *Wendt*, the defendant appeared to have waived immunity by taking out a liability insurance policy which expressly stipulated that the insurance company, either in the adjustment of claims or in the defense of suits against the insured, should not interpose the defense of immunity unless requested by the insured to do so. There is nothing in the record to indicate that any such request was made." *Id.* at 349. The court held, more generally, that "where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available. *Id.*

130. O'Connor v. Boulder Colo. Sanitarium Ass'n, 96 P.2d 835, 836 (Colo. 1939). In *O'Connor*, a patient brought an action against a sanitarium for alleged negligent care and treatment. The court noted that the plaintiff "alleged that a judgment against the institution would in no way affect the association's charitable trust fund, for the reason that it had, for a money consideration, secured a contract of insurance indemnifying it against all liability for the torts of its agents in the conduct of the hospital business." *Id.* at 835; *see also* Vanderbilt Univ. v. Henderson, 127 S.W.2d 284, 287 (Tenn. Ct. App. 1938) (imposing liability if charities are protected by insurance).

131. *O'Connor*, 96 P.2d at 836.

132. Mississippi Baptist Hosp. v. Holmes, 55 So. 2d 142, 153-54 (Miss. 1951).

133. *See, e.g.*, Georgetown College v. Hughes, 130 F.2d 810, 824, 828 (D.C. Cir. 1942) ("While insurance should not, perhaps, be made a criterion of responsibility, its prevalence and low cost are important considerations in evaluating the fear, or supposed ones, of dissipation or deterrence . . . . This slight additional expense cannot have the consequences so frequently feared in judicial circles, but so little realized in experience.").

Nonetheless, the expense of insurance has been invoked as part of a public-policy based justification for retaining charitable immunity, at least in certain circumstances. *See, e.g.*, Albritton v. Neighborhood Ctrs. Ass'n for Child Dev., 466 N.E.2d 867, 873 (Ohio 1984) (Locher, J.,

iv. Governmental Immunity

The relationship between governmental liability and immunity is complex, but the availability of liability insurance often figures in it. As with the other immunity doctrines, liability insurance's "ability to spread costs and pool experience is an important factor in abrogating sovereign immunity."[134]

Statutes sometimes waive governmental immunity up to the amount of insurance coverage purchased, which itself is often mandated by statute.[135] Notwithstanding the significant role played by statutory waivers of governmental immunity and/or insurance mandates, common law courts do sometimes weigh in on the further abrogation of immunity.

For example, in *Pruett v. City of Rosendale*, the Mississippi Supreme Court joined forty-four other states that had abolished or limited sovereign immunity.[136] The court "directed" the legislative branch to devise a plan for the dismantling of sovereign immunity. Drawing attention to the link between insurance and abrogation of immunity, the court "hasten[ed] to say that the legislature ha[d] authorized a certain few of the agencies and political subdivisions to carry insurance and also abolished the immunity of the sovereign to the limit of the insurance carried."[137]

And, in abolishing sovereign immunity, the New Mexico Supreme Court opinion in *Hicks v. New Mexico* addressed the argument that "the elimination of sovereign immunity will result in an intolerable financial burden upon the State" by stating, "[w]e believe it is safe to say that adequate insurance can be secured

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dissenting) ("Until today's opinion [abrogating charitable immunity] this court has recognized, as a matter of public policy, that not all charitable organizations could shoulder their burdens and still pay insurance premiums and legal fees in the face of potential negligence liability.").

134. *See* Schmit & Phelps, *supra* note 124. In their 1985 article, Schmit and Phelps remarked upon the two-way causality between municipal liability and insurance availability:

> The relationship between municipal liability and the availability of insurance is difficult to ascertain. Often the extent of liability is determined by the amount of insurance coverage purchased. This is misleading, however, because the amount of insurance purchased is often statutorily specified. The limit of liability may also be statutorily specified so that it coincides with insurance coverage.

Id. at 42.

135. *See* Daniel J. Kenny, Note, *Dangers, Duties, and Deterrence: A Critique of State Sovereign Immunity Statutes*, 99 N.Y.U. L. REV. (forthcoming 2024) (analyzing these insurance-dependent statutory waivers of sovereign immunity).

136. Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982).

137. *Id.* at 1047.

to eliminate that possible burden in a satisfactory manner."[138] Thus, the availability of liability insurance assured the court that it was making the right decision in abrogating sovereign immunity.

c. *Premises Liability*

The old common-law duty distinctions based on the category of plaintiff entrant onto the land—invitee, licensee, and trespasser—have eroded in many jurisdictions,[139] sometimes based in part on the availability of insurance against liability that previously had not been imposed.[140]

Rowland v. Christian is the landmark torts decision that abolished the common law's typical tripartite classification scheme for determining the scope and content of any duty owed by an owner or occupier of land on the basis of whether the entrant was a trespasser, licensee, or invitee. Reversing a grant of summary judgment for the defendant, the California Supreme Court held that the occupier's liability was no longer controlled by the legal status of the entrant, but instead depended upon whether the owner or occupier of real property acted in a reasonable manner in view of the likelihood of injury to others. The court reasoned that the common-law classifications did not reflect the social factors thought to be important in the assessment of liability, which it listed as the closeness of connection between the injury and the possessor's conduct, the moral blame attached to such conduct, the policy of preventing future harms, and "the availability, cost, and prevalence of insurance for the risk involved."[141]

The plaintiff in *Rowland* was a social guest of Christian's who was injured while turning the handle of a faucet in his friend's apartment. So, why do friends sue friends? As Professor Robert Rabin pointed out:

> The answer is at once both unsurprising and surprising. Unsurprising, in that Christian was only a nominal defendant; she turns out to have had renter's insurance. At the same time, it is rather surprising that she

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138. Hicks v. State, 544 P.2d 1153, 1155 (N.M. 1975). Indeed, the court emphasized the importance of slow change, so as to facilitate the procurement of insurance. *See id.* at 1159 (citing Spanel v. Mounds View Sch. Dist., 118 N.W.2d 795, 804 (Minn. 1962)) ("We believe that it is more equitable if they are permitted to plan in advance by securing liability insurance or by creating funds necessary for self-insurance.").

139. Kenneth S. Abraham, The Forms and Functions of Tort Law 269 (6th ed. 2022).

140. *See* Sharkey, *supra* note 72, at 486 ("Courts and scholars cited *Rowland* to support the proposition that the insurability of the landowner's risk of liability warranted the collapse of the tripartite classification system (in whole or in part).").

141. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

> had such insurance at all. It was quite uncommon for big-city apartment renters of modest means to carry liability insurance in the early 1960s.[142]

Courts subsequently cited *Rowland* to support the proposition that the insurability of the risk of premises liability warranted the collapse of the tripartite classification system (in whole or in part).[143]

Moreover, courts have traced that line of reasoning forward to further delineate the contours of premises liability. Thus, in 2010, when the Massachusetts Supreme Judicial Court discarded that state's distinction between natural and unnatural accumulations of snow and ice in favor of the general-premises liability standard of reasonable care, it reasoned: "a property owner would not likely rely on the natural accumulation rule in deciding whether to clear walkways, stairs, and parking lots, or in procuring insurance coverage for slip and fall injuries arising from snow and ice."[144]

A special rule (harkening back to 1892) governing premises liability is the so-called "fireman's rule," which precludes firefighters and police officers from recovering from premises owners for injuries arising out of the risks inherent in their professions.[145] In early decisions challenging the rule, courts expressed reservations that the abolition of the fireman's rule would place an undue burden on a single negligent individual.[146]

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142. Robert L. Rabin, Rowland v. Christian*: Hallmark of an Expansionary Era*, *in* TORTS STORIES 83 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

143. *See, e.g.*, Wylie v. Gresch, 236 Cal. Rptr. 552, 567 (Ct. App. 1987) ("Insurance is readily available to landlords for property that they have leased which can include injuries to the tenants for which the landlord is liable."); O'Leary v. Coenen, 251 N.W.2d 746, 749 (N.D. 1977) (listing among "[r]easons cited for abandoning the common law categories" that "public opinion today favors assigning enterprise liability or distributing losses over a greater segment of society through insurance in lieu of forcing the entrant to suffer such burden"); *see also* Rabin, *supra* note 142, at 94 ("Although there is no magic formula for balancing the *Rowland* factors, I would speculate that here, as in many other areas of accident law, liability insurance—that duty factor quietly introduced explicitly as a general policy consideration into California tort law for the first time in *Rowland*—has borne great weight.").

144. Papadopoulos v. Target Corp. 2, 930 N.E.2d 142, 156 (Mass. 2010).

145. *See* EPSTEIN & SHARKEY, *supra* note 90, at 327; Gibson v. Leonard, 32 N.E. 182, 189 (Ill. 1892) (holding that a firefighter who entered private property while performing his job was a "licensee" and, as such, the property owner had duty only to "refrain from willful or affirmative acts which are injurious").

146. Thus, in the seminal case of *Krauth v. Geller*, 157 A.2d 129, 131 (N.J. 1960), the court opined: "[I]n the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause" conditions requiring a response by a public safety official. *See also* Hopkins v. Medeiros, 724 N.E.2d 336, 341 (Mass. App. Ct. 2000) ("The underlying rationale [of the firefighter's rule] was that landowners would otherwise be forced to carry the unreasonable burden of preparing for the infrequent and unforeseeable visits of such rescuers.").

Later opinions (often dissents) began to appreciate the significant role that insurance plays in this context.[147] As the Michigan Court of Appeals recognized, "Many fires arise on business premises or as a result of commercial activities and such commercial ventures will normally carry liability insurance that would cover a fireman's tort action."[148] Thus, the court concluded, "In the case of such

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147. Powerful dissenting opinions proliferated throughout the late 1970s and 1980s. *See, e.g.*, Walters v. Sloan, 571 P.2d 609, 216 (Cal. 1977) (Tobriner, C.J., dissenting) ("[A]lthough some courts have been apprehensive that the abolition of the fireman's rule will necessarily place an unreasonable burden on a single negligent tortfeasor, these decisions appear to ignore the significant role that insurance presently plays in spreading the risk of loss among policyholders." (citation omitted)); Hannah v. Jensen, 298 N.W.2d 52, 56 (Minn. 1980) (Scott, J., dissenting) ("[D]ram shop insurance will most likely cover any damages sustained by a police officer . . . ."); Chapman v. Craig, 431 N.W.2d 770, 773 (Iowa 1988) (Larson, J., dissenting) ("I believe there is considerable doubt that the thought of possible tort liability would even enter the mind of a citizen contemplating a call for help. That is especially true now, it seems to me, when virtually all property owners are covered by insurance against premises injuries."); Berko v. Freda, 459 A.2d 663, 673-74 n.5 (N.J. 1983) (Handler, J., dissenting) ("[T]he majority is unable to articulate any substantial reason why insurance coverage should not be given great weight in recognizing the viability of a cause of action."); Thomas v. Pang, 811 P.2d 821, 827 (Haw. 1991) (Padgett, J., dissenting) ("Let us make no mistake about what this case really involves. It involves the liability insurance policies of those in control of the premises where the fire occurred. The majority, by this decision, judicially legislates in favor of negligent landowners, negligent contractors, and their personal liability insurance carriers, and against non-negligent fireman doing his duty under the law.").

Moreover, whereas in the late 1990s "almost half of the states had adopted the rule, and only three had rejected it," by 2015 "at least ten states ha[d] since statutorily abolished the rule or narrowed its scope." Cristen C. Handley, *Back to the Basics: Restoring Fundamental Tort Principles by Abolishing the Professional-Rescuer's Doctrine*, 68 ARK. L. REV. 489, 507 (2015). Here, we maintain our focus on common law decisions, which expressed disapproval of the doctrine, in particular, leaning into the insurance rationale.

As with each of the areas explored above, not all courts are of a piece with regard to the relevance of insurance. *See, e.g.*, Fordham v. Oldroyd, 171 P.3d 411, 415-16 (Utah 2007) ("We do not find the general availability of insurance sufficient to justify creating an exception to a professional rescuer rule for automobile accidents. It is the nature of the rescuer-rescued relationship and not the presence or absence of insurance that serves as the public policy value animating the professional rescuer rule.").

148. Kreski v. Modern Wholesale Elec. Supply Co., 390 N.W.2d 244, 250 (Mich. Ct. App. 1986) (citations omitted) (quoting *Walters*, 571 P.2d at 619 (Tobriner, C.J., dissenting)). *Kreski* was reversed by the Michigan Supreme Court. 415 N.W.2d 178, 188-89 (Mich. 1987). The Michigan Legislature then joined the ranks of several states that abolished the doctrine by statute. *See* MICH. COMP. LAWS ANN. § 600.2965 (West 2015) ("The common law doctrine that precludes a firefighter or police officer from recovering damages for injuries arising from the normal, inherent, and foreseeable risks of his or her profession is abolished."); *see also* FLA. STAT. ANN. § 112.182(1) (West 2023); MASS. GEN. LAWS ANN. Ch. 41, § 111F (West 2018); MINN. STAT. ANN. § 604.06 (West 2023); N.J. STAT. ANN. § 2A:62A-21 (West 2023); N.Y. GEN. OBLIG. LAW § 11-106 (McKinney 2023). For other statutes limiting the application of the doctrine, see CAL. CIV. CODE § 1714.9(a)(2) (West 2023); NEV. REV. STAT. ANN. § 41.139 (West 2023); and VA. CODE ANN. § 8.01-226 (West 2023).

commercial enterprises I can perceive no justification for failing to treat the negligent injury of a fireman as much a 'cost of doing business' as the negligent injury of any other person in the course of the commercial operation."[149] The court also remarked that "comprehensive 'homeowners' policies available to the average homeowner or renter commonly contain personal liability coverage that would shield a negligent individual from the full brunt of the fireman's claim."[150]

Following this line of reasoning in rejecting the fireman's rule, the Connecticut Supreme Court opined:

> [W]e recognize that most homeowners are insured against the risk of people being injured on their property due to the fault of the homeowner. The homeowner is able to insure against such a risk. Therefore, it hardly constitutes double taxation when a homeowner's insurance carrier must pay money to a person injured on the homeowner's property due to the homeowner's negligence. Given these facts, public policy considerations strongly suggest that the firefighter's rule should be, at the very least, limited to premises liability claims.[151]

Moreover, the court added: "Even in premises liability cases, however, the double taxation argument fails because . . . most homeowners have insurance to cover people who may be injured on their property through the homeowner's negligence."[152]

Finally, some courts also have imposed potential liability on social hosts who furnish alcohol to others, based on the general duty of care created by the common law. Thus, as expressed by the Idaho Supreme Court: "Unquestionably . . . there exists a strong public policy to prevent future injuries of this nature, and we may assume that insurance coverages (doubtless increasingly costly) will be made available to protect the social host from civil liability in this situation."[153]

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149. *Kreski*, 390 N.W.2d at 250 (quoting *Walters*, 571 P.2d at 619 (Tobriner, C.J., dissenting)).

150. *Id.*

151. Sepega v. DeLaura, 167 A.3d 916, 932-33 (Conn. 2017).

152. *Id.* at 933 n.14; *see also* Doe v. McKesson, 339 So. 3d 524, 543-44 (La. 2022) (Crain, J., concurring) (noting that courts, as relevant to imposition of duty in light of the "professional rescuer's doctrine," consider the factor "whether the alleged tortfeasor or the victim is better positioned to analyze the risks involved . . . and, thus, take precautions to avoid them or to insure against them").

153. Slade v. Smith's Mgmt. Corp., 808 P.2d 401, 411 (Idaho 1991). Insurance, moreover, likewise features in cases coming out the other way. Thus, a concurring judge in *McGuiggan v. New England Telephone & Telegraph Co.*, 496 N.E.2d 141 (Mass. 1986) (Lynch, J., concurring), which decided against extending liability, asked: "To what extent, if any, should the reasonable availability of insurance affect the policy decision to impose liability?" *Id.* at 148. He elaborated:

And the New Jersey Supreme Court decided to impose social-host liability only prospectively, reasoning that "[h]omeowners who are social hosts may desire to increase their policy limits; apartment dwellers may want to obtain liability insurance of this kind where perhaps they now have none."[154]

In short, the various settings in which the courts have considered the availability of liability insurance relevant to premises liability reflect the importance of *Rowland*'s seminal analysis and its influence over the decades.[155] The courts have openly and clearly recognized that insurance should figure into their determinations of whether and when to abrogate the old common law restrictions on this form of liability.

2. *The Unavailability of Insurance Cuts Against Liability*

The importance of insurance to decisions about tort liability is reflected not only in cases in which liability is imposed because insurance is available, but also in cases in which liability is not imposed, wholly or in part, because liability insurance is thought (sometimes correctly and sometimes not) to be unavailable. In those cases, the courts were reluctant to expand liability because of their concern that liability insurance either was not or might not be available to cover the new liability.

An early and salient case underscored the importance of the absence of insurance. In *Ryan v. New York Central Railroad Co.*,[156] the court applied the New York rule that limited liability for damage caused by a negligently set fire to the first building damaged by the fire and denied liability—on what seemed to be proximate-cause grounds—for damage that went beyond the first building. The court cited a number of justifications for the rule, but one was that "[a] man may

> A social host is by definition not in a commercial setting where furnishers of goods or services can protect themselves from the catastrophic effects of liability by obtaining adequate insurance. The homeowners of the Commonwealth are already sorely burdened and their ability to protect themselves from catastrophic loss may be limited to restricting the activities that are permitted on their property.

Id. at 147.

154. Kelly v. Gwinnell, 476 A.2d 1219, 1225 (N.J. 1984).

155. The influence of *Rowland* has extended far beyond premises liability. *See* Cardi, *supra* note 74, at 1878-79 ("Although the 'California factors' first arose in the context of cases involving economic harm and landowner liability, . . . thirteen jurisdictions now apply the factors in any case in which the existence of a duty is deemed questionable under the circumstances. Moreover, although early courts used the California factors to impose a duty where one had not previously existed, the factors are now commonly used also to deny liability in cases where accepted law might otherwise impose a duty.").

156. 35 N.Y. 210 (1866). *Ryan* occupies a place in the torts canon. *See* EPSTEIN & SHARKEY, *supra* note 90, at 416.

insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them."[157] A modern observer would find this argument perplexing, since liability insurance could perform that same function. But liability insurance would not be introduced in the United States until the mid-1880s, almost twenty years after *Ryan*.[158] Until then, the scope of liability for negligently set fires had to be limited, because liability was uninsurable. In time, the rule would be abandoned.

This concern has echoed down the decades. For example, in the *Kesner* case extending an employer's take-home liability for asbestos exposure suffered by family members of an employee that we discussed earlier,[159] the court declined to extend liability beyond members of the employee's household. There, the court held, "[w]e are mindful that recognizing a duty to all persons who experienced secondary exposure could invite a mass of litigation that imposes uncertain and potentially massive and *uninsurable* burdens on defendants, the courts, and society."[160]

In other products-liability settings, the courts have taken Justice Traynor's *Escola* concurrence seriously, looking at whether liability insurance would be available to cover a liability under consideration. For instance, in *O'Neil v. Crane Co.*, the plaintiff sought to impose strict liability on a manufacturer who supplied a nondefective product that was later used with a defective product that caused injury. There, the California Supreme Court remarked that it was "doubtful that manufacturers could insure against the 'unknowable risks and hazards' lurking in every product that could possibly be used with or in the manufacturer's product."[161] The court relied heavily on its earlier asbestos decision, *Anderson v.*

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157. *Ryan*, 35 N.Y. at 216.

158. Abraham, *supra* note 12, at 28.

159. *See supra* notes 98-102 and accompanying text.

160. Kesner v. Superior Court, 384 P.3d 283, 302 (Cal. 2016) (emphasis added).

In a similar vein, the California Supreme Court reined in the scope of liability for negligently inflicted emotional distress (NIED), highlighting insurability concerns. *See* Thing v. La Chusa, 771 P.2d 814, 826-27 (Cal. 1989) ("In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.").

161. O'Neil v. Crane Co., 266 P.3d 987, 1007 (Cal. 2012) (quoting Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 559 (Cal. 1991)). In *O'Neil*, a manufacturer of valves and pumps used in Navy warships was sued for wrongful death allegedly caused by asbestos released from external insulation and internal gaskets and packing used with the pumps and valves, all of which were products made by third-party manufacturers. The plaintiffs alleged the manufacturer of the pumps and valves should be held strictly liable and negligent because it was foreseeable that asbestos products would be used in conjunction with their products and workers would be harmed by the exposure.

Owens-Corning Fiberglas Corp.,[162] in which the court rejected "[t]he suggestion that losses arising from unknowable risks and hazards should be spread among all users to the product, as are losses from predictable injuries or negligent conduct" as "not feasible."[163] The court indicated that "[n]ot the least of the problems is insurability," elaborating:

Dean Wade stated the dilemma but provided no solution:

> How does one spread the potential loss of an unknowable hazard? How can insurance premiums be figured for this purpose? Indeed, will insurance be available at all? Spreading the loss is essentially a compensation device rather than a tort concept. Providing compensation should not be the sole basis for imposing tort liability, and this seems more emphatically so in the situation where the defendant is no more able to insure against unknown risks than is the plaintiff.[164]

And, prior to *O'Neil*, a California appellate court, likewise leaning heavily on *Anderson*'s invocation of the uninsurability of "unknowable risks and hazards" standard, rejected imposing a duty to warn of the dangers of a combined product.[165] The court pointed out that petitioner "ha[d] not addressed whether respondents would be able to obtain insurance against the type of liability she proposes."[166] In the face of the lack of any record evidence on the question, the court speculated: "Because it may often be difficult for a manufacturer to know what kind of other products will be used or combined with its own product, respondents might well face the dilemma of trying to insure against 'unknowable risks and hazards.'"[167] The court thus concluded that the insurance factor "also weighs against imposition of liability."[168]

In *Air & Liquid Sys. Corp. v. DeVries*, 1586 U.S. 446 (2019), in a similar factual context, the U.S. Supreme Court upheld liability on the bare-metal product manufacturer, "turn[ing] to first principles from tort theory" and "drawing heavily from Judge Guido Calabresi's 'cheapest cost avoider' theory." Sharkey, *Modern Tort Law*, *supra* note 14, at 1423. The dissent cited *O'Neil*. 586 U.S. at 461 (Gorsuch, J., dissenting) (quoting *O'Neil*, 266 P.3d at 991) ("In the words of the California Supreme Court, consumer welfare is not well 'served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell.'").

162. 810 P.2d at 559.

163. *Id.* at 559 n.14.

164. *Id.* (quoting John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 755 (1983)).

165. Taylor v. Elliott Turbomachinery Co., 90 Cal. Rptr. 3d 414 (Ct. App. 2009).

166. *Id.* at 423.

167. *Id.* (citing *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 559 (Cal. 1991)).

168. *Id.* at 440.

The Washington Supreme Court came to the same conclusion. In *Braaten v. Saberhagen Holdings*,[169] the court was swayed by several considerations, including that the manufacturers did not manufacture, sell, or otherwise distribute the replacement packing and gaskets that contained the asbestos to which the plaintiff was exposed; nor did the manufacturers market the product causing the harm. The court reasoned that the manufacturers "could not treat the burden of accidental injury caused by asbestos in the replacement products as a cost of production against which liability insurance could be obtained."[170]

Similarly, the dissent in *T.H. v. Novartis Pharmaceuticals Corp.* (discussed above)[171] took issue with the majority's assessment of the insurability of the risk, emphasizing that "there is no precedent for coverage against claims arising from *another company*'s product."[172] The dissent urged, even if "insurance might be available in theory," in reality, "the policy would have to cover a potentially enormous future risk that the insured would have no ability to mitigate."[173] Moreover, "[d]efining the covered events could also be difficult, given that the potential plaintiffs would have no relationship with the insured."[174] Thus, "[a]t the very least, the coverage would be difficult to manage and extremely costly."[175] To make matters even worse, according to the dissent,

> even if appropriate insurance does become available, the majority's holding will require that pharmaceutical companies maintain it on all drugs for several years after they have stopped selling the products and realizing a profit. The high cost of insuring against the majority's extension of the liability will almost certainly drive up the prices for prescription drugs.[176]

This echoed concerns raised by the dissent in *Wyeth, Inc. v. Weeks*, a case in which the Alabama Supreme Court upheld innovator liability: "[G]iven the near impossibility of formulating bulletproof labeling, insurability represents a

169. 198 P.3d 493 (Wash. 2008).

170. *Id.* at 501.

171. *See supra* notes 103-106 and accompanying text.

172. 407 P.3d 18, 54 (Cal. 2017) (Corrigan, J., dissenting in part).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

concern: cost spreading would further burden the shrinking share of customers for the brand-name drug . . . ."[177]

The Iowa Supreme Court was likewise skeptical that brand-name drug manufacturers could feasibly insure against the risk of failure-to-warn liability in connection with consumption of the generic version of its drug. In *Huck v. Wyeth, Inc.*, the court refused to recognize a duty of care on the part of the brand-name manufacturer, which "d[id] not have the opportunity to treat the risk of producing the product as a cost of production against which liability insurance can be obtained."[178]

Any number of other decisions have been reluctant to impose tort liability because of their concern that insurance against a potential liability is or would be unavailable.[179] As we will indicate below, in discussing our proposal to admit evidence of the availability of insurance against the general form of liability at issue in a case,[180] we think that some of the cases in which the courts have thought that insurance is unavailable are ill informed. But that is beside the point here: the courts in question clearly think that the availability or unavailability of liability insurance is directly relevant to the question of whether liability should be imposed.

3. *Courts' Uncertainty About the Availability of Liability Insurance Makes Them Reluctant to Expand Liability*

Sometimes the courts simply have no evidence of whether insurance is available. In a case in which the court nonetheless seemed to expand the affirmative duty to rescue, the court still expressed hesitance: "We have no information on the question of the availability, cost, and prevalence of insurance for the risk, but

177. 159 So. 3d 649, 706-07 (Ala. 2014) (quoting Lars Noah, *Adding Insult to Injury: Paying for Harms Caused by a Competitor's Copycat Product*, 45 TORT TRIAL & INS. PRAC. L.J. 673, 688 n.69 (2010)).

178. 850 N.W.2d 353, 378 (Iowa 2014) (quoting AMERICAN LAW OF PRODUCTS LIABILITY § 5:10 (3d ed.)).

179. In a case involving whether romantic partners have a duty to warn third parties about threats from intimate partners, the California appellate court remarked, "Insurance coverage for this sort of risk is certainly unusual; this is not the sort of risk ordinarily contemplated by either the insured or the insurer." Koepke v. Loo, 23 Cal. Rptr. 2d 34, 39 (Ct. App. 1993). And in a case where the California appellate court refused to recognize a parental duty to protect third parties from attacks by their children, the court remarked that "[p]laintiffs do not assert that parental liability insurance is prevalent." Smith v. Freund, 121 Cal. Rptr. 3d 427, 434 (Ct. App. 2011).

180. *See infra* Part IV.

note that the liability which is sought to be imposed here is that of employee negligence, which is covered by many insurance policies."[181]

Similarly, in *Vasilenko v. Grace Family Church*, the California Supreme Court held that "a landowner who does no more than site and maintain a parking lot that requires invitees to cross a public street to reach the landowner's premises does not owe a duty to protect those invitees from the obvious dangers of the public street."[182] In deciding the case, the court considered the insurance factor was in equipoise, "weigh[ing] neither for nor against imposing a duty here."[183] The court remarked that "[n]either party has provided sufficient information to settle the question of insurance one way or the other; we can conclude only that insurance could be available to the landlord, the invitee, and the driver."[184]

A later California court indicated that

> [A]lthough it is probable insurance would be available, there is no obligation for us to consider evidence of the pest control liability insurance industry because there is no record upon which to base such a determination. Other courts facing an absence of evidence regarding liability insurance have concluded "[w]e cannot, therefore, evaluate this factor one way or the other."[185]

Presumptions of insurability have been invoked as well in a number of decisions addressing the fireman's rule, discussed earlier. For example, the Michigan Supreme Court (when reinstating the rule) noted: "Further, while many fires may arise on business premises, the obverse is also true. Many fires arise on nonbusiness premises, with the owner or occupant having no avenue to pass along the

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181. Soldano v. O'Daniels, 190 Cal. Rptr. 310, 316 (Ct. App. 1983); *see also* Lucero v. Holbrook, 288 P.3d 1228, 1235 (Wyo. 2012) ("Finally, the appellants present no facts or analysis indicating whether motor vehicle insurance covering these circumstances—harm caused by the theft of one's vehicle left with its motor running in a private driveway—is available, prevalent, or costly.").

182. 404 P.3d 1196, 1205 (Cal. 2017).

183. *Id.* at 1204.

184. *Id.* Given the fact that the California Supreme Court has drawn repeated attention to the *Rowland* "insurance factor," it is somewhat surprising to see that litigants still neglect to bring this information before the court. Thus, in 2023, in *Kuciemba v. Victory Woodworks, Inc.*—a case raising an issue of first impression whether an employer owes a duty of care to prevent the spread of COVID-19 to employees' household members—the California Supreme Court drew attention to the fact that "the parties do not discuss this [insurance] factor directly" and concluded: "Given the dearth of information available at this time, we are unable to draw any firm conclusions as to whether this factor supports imposing a duty." 531 P.3d 924, 949-950 (2023).

185. Formet v. Lloyd Termite Control Co., 110 Cal. Rptr. 3d 551, 558 (Ct. App. 2010) (quoting Laabs v. S. Cal. Edison Co., 97 Cal. Rptr. 3d 241, 256 (Ct. App. 2009)).

cost of liability insurance as a cost of doing business."[186] And a Maryland court, holding that a store clerk's duty to summon assistance for a police officer who was being assaulted was not barred by the fireman's rule: "We have no information on the question of the availability, cost, and prevalence of insurance for the risk, but note that the liability which is sought to be imposed here is that of employee negligence, which is covered by many insurance policies."[187]

The Southern California Gas Company (SoCalGas) saga in the California courts, in which different courts speculated about the availability of first-party and liability insurance, also illustrates a version of this kind of speculation about the availability of insurance when there is no record evidence on the subject.[188] In late 2015, an underground storage facility used by SoCalGas for the storage of natural gas sprung a leak that resulted in vast amounts of damage to personal and real property in the nearby community of Porter Ranch and, ultimately, a mass exodus of residents which led to the destruction of that neighborhood's local economy.[189]

Business victims filed a class action against SoCalGas in the California Superior Court to recover economic losses they suffered as a consequence of the temporary relocation of Porter Ranch's residents, who were their customers. Importantly, the business victims did not allege property damage or personal injury. They sued to recover lost income resulting from SoCalGas's leak.[190] The plaintiffs' claims sounded in strict liability for ultrahazardous activity, negligence, negligent interference with prospective economic advantage, and violations of California's Unfair Competition Law.[191] SoCalGas demurred, arguing that the first three causes of action were barred by the "economic loss rule" because the company owed no duty to the business victims for purely financial losses.[192]

186. Kreski v. Modern Wholesale Elec. Supply Co., 415 N.W.2d 178, 188 (Mich. 1987). That said, the court rejected availability of insurance as a ground for abolishing fireman's rule: "Putting aside the question whether the availability of liability insurance is a proper basis for a rule of law, we reject this argument, as have all the courts discussing it." *Id.*

187. Griffith v. Southland Corp., 617 A.2d 598, 605 (Md. App. 1992), *aff'd and remanded*, 633 A.2d 84 (Md. 1993).

188. Southern California Gas Leak Cases (The SoCalGas Leak Cases), 441 P.3d 881, 883-87 (Cal. 2019). For elaboration of this case example, see Sharkey, *Irresistible Simplicity*, *supra* note 14, at 155-58.

189. *See In re* Coordination Proceedings Special Title (Rule 3.550) S. Cal. Gas Leak CA, No. JCCP4861, 2017 WL 2361919, at *3-5 (Super. Ct. L.A. Cnty.) (hereinafter Trial Court Order); Southern California Gas Leak Cases, 227 Cal. Rptr. 3d 117, 119-20 (Cal. Ct. App. 2017).

190. *SoCalGas*, 227 Cal. Rptr. 3d at 119-20.

191. *Id.*

192. *Id.*

Judge Wiley, the trial judge, expressed doubt (albeit cryptically) as to whether the business victims in *The SoCalGas Leak Cases* could have acquired first-party insurance to cover their purely economic losses, noting that "the injury was not part of the [business victims'] ordinary business risk."[193] In contrast, Justice Cuéllar of the California Supreme Court characterized the imposition of the economic loss rule (and denial of recovery to the business victims) as a means of incentivizing future business victims to procure first-party insurance: "Now certain that a lawsuit seeking purely economic losses of this sort will not succeed, businesses operating near a natural gas storage facility—or a dam, shipping lane, oil well, and so forth—may be more inclined to buy insurance covering profits they stand to lose if disaster strikes."[194] Cuéllar might have considered whether business income/interruption insurance covering interruption by civil authority (e.g., the Los Angeles County Health Department ordering SoCalGas to "establish a relocation program for nearby residents" of Porter Ranch)[195] could have been purchased by the putative victims in *The SoCalGas Leak Cases*—and whether such coverage could have extended beyond the businesses themselves being forced to shut down operation.

From this vantage point, Judge Wiley and Justice Cuéllar were of a piece with regard to the significance of the prevalence and availability of first-party insurance for economic losses to the question whether SoCalGas owed a duty to the business victims for purely economic losses. At the core of their disagreement lies what is essentially an empirical disagreement regarding whether the harm causing purely economic losses was the kind of harm that *could* have been insured by the putative victim. But there was no evidence in the record on that issue. Both courts were therefore forced to speculate.

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193. Trial Court Order, *supra* note 189, at *17.

194. *SoCalGas*, 441 P.3d at 895. Justice Cuéllar stopped short of undertaking a more rigorous inquiry into the kinds of insurance that were available to the business victims before him. Further, in his brief description of the kind of insurance he seeks to incentivize through the imposition of the economic loss rule, Justice Cuéllar appeared to equivocate between commercial property insurance for businesses—which typically provides coverage only for losses resulting from tangible physical damage to property—and insurance for businesses that covers economic losses arising from harms caused by neighboring industries—which goes further, but usually limits coverage of economic losses to those resulting from damage to real and personal property. *See id.* at 895-96.

195. Trial Court Order, *supra* note 190, at *3. If the business victims in *The Southern California Gas Leak Cases* could have acquired insurance for business interruption by civil authority owing to the government-imposed relocation of the residents of Porter Ranch—rather than a government-imposed shutdown of the businesses' operation—then they could have insured for the purely economic losses for which they sought recovery from SoCalGas.

The foregoing sample of tort cases in which the courts expressly referred to the availability or unavailability of liability insurance, or the absence of evidence about it, leads us to make three points: courts frequently make reference to these matters in deciding tort cases; insurance is a significant factor in many court decisions despite being undertheorized; and because the courts are not rigorously informed by evidence about the availability of insurance, they do not always have a firm basis for the assumptions they make about this question. We will have more to say about this last point in Part IV.

B. The Quiet and Unexpressed, but Pervasive Influence of Liability Insurance

There is an entire additional domain of tort litigation that liability insurance dominates, but on which the courts rarely have occasion to comment on or even recognize: the indirect influence of liability insurance on the persistence of certain tort law doctrines, and the more direct but sometimes hidden influence of liability insurers' duties to defend and settle on the development of tort liability. This domain has in a sense determined what has taken place in the courts. First, there is a strong argument that, if it were not for liability insurance, certain significant tort law doctrines and practices would never have persisted into our time. They would long ago have been abolished or modified. Our contention that these doctrines and practices would not have persisted in the absence of liability insurance is obviously counterfactual. We have no way of proving that these doctrines would not have persisted in the absence of liability insurance, because there was liability insurance and the doctrines did persist. Our contention is based on informed intuition that we believe many others would share.

It required no express recognition of or reliance on the availability of liability insurance for the courts to leave these doctrines and practices in place, especially if no one ever challenged them. The influence of liability insurance in supporting the persistence of tort law as it developed therefore could go universally unacknowledged in judicial opinions, in part because the influence was essentially invisible. Here, liability insurance was not mentioned, and did not need to be mentioned, in judicial opinions, because the existence of liability insurance was responsible for what *did not* happen.

Second, liability insurers' duty to their insureds to defend and the duty to settle came to be such important features of tort litigation that they rendered liability insurers the real parties at interest in tort suits, creating a set of incentives that fueled and continues to fuel the expansion of tort liability in ways that required no express recognition in judicial opinions for this dynamic to operate. In fact, plaintiffs are permitted to make liability insurers the actual defendants in two "direct action" states.[196] So few states permit this, at least in part, out of concern for the potential prejudice that would result if the jury knew that the defendant was covered by liability insurance.[197]

1. *The Persistence of Liability Insurance-Dependent Tort Doctrines and Practices*

In addition to the increased incidence of tort liability, and the vastly greater expenditure on tort liability that resulted from the existence of liability insurance, a number of significant tort law doctrines and practices would have a radically different shape if liability insurance had never existed. We think that at least four fundamental features of tort law would have been different: the thin-skull rule, application of the same negligence standard to both individuals and entities, the imposition of liability for the same compensatory damages regardless of the degree of a defendant's negligence, and the rule that each party pays its own counsel fees, regardless of case outcome.[198] Indeed, these features of tort law are so fundamental that it is no exaggeration to say that, in the absence of liability insurance, not only would tort costs be much lower than they are today; more importantly, tort law itself would be a very different body of law than it turned out to be. Instead, the alliance of tort liability and liability insurance has had a more sizable impact, with the beneficial effects that we noted earlier.[199]

a. *The Thin-Skull Rule*

The defendant in a tort case is liable to the plaintiff for all the harm that proximately results from the defendant's tortious conduct, even if the extent of

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196. *See* LA. STAT. ANN. § 23:1162 (2023); WIS. STAT. § 632.24 (2023).

197. *See* Alston Johnson, *The Louisiana Direct Action Statute*, 43 LA. L. REV. 1455, 1537 (1983) ("Certainly there is the risk of an 'insurance verdict,' in which either the determination of the liability issue itself or the quantum issue is skewed by the jury's knowledge of the existence of insurance. . . . Louisiana long ago determined to accept the risk of an 'insurance verdict' by the passage of the Direct Action Statute itself, and it has made the existence of insurance discoverable through the ordinary processes."); Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357, 358 (1960) ("The principal objection to direct-action statutes is that juries will unfairly evaluate testimony when the defendants facing them are not individuals with probably meager resources, but corporations with presumptively extensive assets, with the result that the number and size of plaintiffs' verdicts will be unduly augmented.").

198. *See generally* Kenneth S. Abraham, *Tort Luck and Liability Insurance*, 70 RUTGERS U. L. REV. 1, 2-5 (2017) (discussing the relationship between uncertainty in tort law—"tort luck"—and the availability of liability insurance).

199. *See supra* pp. 3009-10 (noting the beneficial effects of liability insurance).

that harm was unforeseeable.[200] This so-called "thin-skull" (or "you take your victim as you find him") rule imposes liability that may be wholly disproportionate to the degree of wrongdoing attributable to the defendant and to the amount of harm that could reasonably have been anticipated.

For individual defendants and small businesses, unlimited liability for an unforeseeable extent of harm in the absence of liability insurance would usually have been financially catastrophic. Although the severity of injury caused by negligent behavior is statistically correlated with the degree of an actor's wrongdoing, from instance-to-instance the severity of injury that actually occurs is variable. An automobile collision may injure a plaintiff who is extremely vulnerable to injury, or a plaintiff who is a weightlifter who withstands the impact and emerges with only minor injury; a collision in which the defendant was driving thirty miles per hour over the speed limit may cause minor bodily injury on one occasion but cause death on another occasion. Liability insurance transforms the variability of the severity of injury resulting from negligent conduct into a liability insurance premium that reflects the probability distribution of injury severity—in effect, an average.

It is therefore difficult to imagine that the thin-skull rule would have developed or persisted in the absence of liability insurance. Some form of foreseeability limitation on damages would likely have been adopted by the courts,[201] or legislated caps on damages of the sort that were adopted in some states beginning in the 1980s[202] would have been enacted many decades earlier. Application of the thin-skull rule is one of the factors that fueled the increase in the size of tort awards during the twentieth century, and thereby contributed to the expansion of tort liability during this period. In the absence of the thin-skull rule, tort awards would have been lower, and the incentive to bring tort suits at all would have been depressed. Instead, because there was liability insurance, the thin-skull rule developed, persisted, and helped to fuel the growth of tort liability and tort costs.

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200. *See* DAN B. DOBBS, THE LAW OF TORTS 464 (2000); ABRAHAM, *supra* note 139, at 64-65; EPSTEIN & SHARKEY, *supra* note 90, at 442-43.

201. Consider, in this light, how courts have imposed limitations on liability for take-home asbestos and negligent infliction of emotional distress, where insurability was in doubt. *See supra* note 160.

202. ABRAHAM, *supra* note 139, at 247; Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 396, app.1, at 496-97 (2005) ("A majority of states have imposed some kind of cap or limitation on the amount of damages that plaintiffs can recover in a lawsuit. Sometimes these caps apply to all civil suits; more frequently, however, they apply only to medical malpractice suits.").

b. The Same Negligence Standards Applicable to Both Individuals and Entities

Tort law applies a one-size-fits-all standard in negligence cases: the reasonable care, or ordinary care, standard. The standard is objective; it is not dependent on the state of mind or individual characteristics of the defendant.[203] And although the resources and capacities of the defendant are not automatically excluded from consideration, often evidence on these matters is inadmissible, and tort law certainly does not mandate that these defendant-specific inputs be taken into account.

If liability insurance had not existed, sizeable enterprises and entities would have been able to handle the liability resulting from the objective standard, just as they do now. But ordinary individuals would have had more difficulty doing so, especially in connection with auto liability, the principal form of negligence liability that individuals face. Under the objective, reasonable care standard, ordinary inadvertence in driving will often result in liability for harm that results.[204] This would be a harsh, uninsured penalty for the kind of careless driving that occurs frequently among reasonably competent and careful drivers. The average driver commits an act of negligence (usually without causing injury) almost every time they get behind the wheel.[205] In the absence of the ameliorating effect of liability insurance in such situations, tort law might well have found a means of relaxing the objective standard in auto liability, perhaps at least through jury instructions recognizing that everyone commits inadvertent mistakes when driving, through making evidence of safe-driving history admissible in mitigation of liability, or otherwise.

Other adjustments might have been made as well, either instead of or in addition to such modifications. Compliance with custom might have been a defense to individual tort liability, both for auto and other torts. The collateral source rule might have been displaced, so that individuals had no liability for costs, such as those for medical care and lost wages, that were already paid to

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203. Oliver Wendell Holmes famously defended the objective standard of care for reasonableness. *See* EPSTEIN & SHARKEY, *supra* note 90, at 119-26 (reprinting OLIVER WENDELL HOLMES, THE COMMON LAW 77-84, 88-96 (1881)).

204. ABRAHAM, *supra* note 139, at 70.

205. In a Department of Transportation study conducted some years ago, for example, drivers were covertly observed during one to two miles of city driving. Of the group, "48% were judged entirely safe, 41% committed more safe driving acts than unsafe ones, 9% committed an equal number . . . and 1% drove unsafely more than safely." In total, then, 51% committed at least one unsafe act in less than two miles of driving. DAVID KLEIN & JULIAN A. WALLER, CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES 64 (1970) (internal quotations omitted).

plaintiffs by their own, first-party sources of compensation.[206] Alternatively, stricter requirements of proof governing foreseeability in proximate cause might also have been applied, thereby reducing the scope of liability facing individuals, as distinguished from businesses and other entities. None of these adjustments was needed, however, because liability insurance did exist.

c. *Damages Are Not Proportional to the Degree of a Defendant's Negligence*

In assessing the defendant's conduct, tort law on the books does not distinguish between different degrees of negligence. A defendant is either negligent or not negligent.[207] A slightly negligent defendant faces the same liability as a much more negligent defendant. Liability insurance handles the potential unfairness of this approach by translating the differences into insurance premiums. Other things being equal, the more negligent a given party is, the greater the likelihood that this party's conduct will cause injury, the more severe that injury will be, and the higher that party's liability insurance premiums will be. In a world without liability insurance, however, the appeal of calibrating the amount of damages for which the defendant is liable to the degree of negligence attributable to the defendant is obvious. Undoubtedly the use of juries for fact finding might have helped to achieve the same result in under-the-table fashion, but it seems unlikely that this would have been sufficient to ward off more formal and systematic reform.

A model for calibrating damage awards to the degree of negligence attributable to each party to a lawsuit already exists. For roughly the last half-century, comparative negligence has quantified the degree of plaintiffs' negligence in comparison to the defendant's, and reduced the plaintiff's recovery accordingly. To do this, 100% of the causal negligence attributable to the parties must be divided into two parts, or more than two parts if there are multiple defendants.[208] The result is that, in a sense, the degree of negligence attributable to defendants is capable of quantification through comparison.

The problem is that this approach depends on not only the defendant, but also the plaintiff, being negligent. If only the degree of the defendant's negligence is at issue, however, damage calibration does not occur, and calibration through comparison of fault is impossible. Nonetheless, it is possible to imagine that, in the absence of liability insurance, a different approach to awarding partial damages calibrated to the degree of the defendant's negligence might have

206. *See* ABRAHAM, *supra* note 136, at 249.

207. *Id.*

208. *Id.* at 180.

developed. One approach might have been to ask the jury to locate the defendant's negligence on a continuum running from "slightly negligent—more than 0 percent damages" to "very negligent—100 percent damages" and to award a percentage of the plaintiff's damages corresponding to the point on the continuum selected by the jury to reflect the degree of the defendant's negligence. There might have been other feasible approaches as well. In this way, defendants would have shouldered financial responsibility proportional to the degree of negligence attributable to them, in a manner roughly analogous to the predictions of negligence that turned out to be reflected by liability insurance premiums. The availability of liability insurance, however, obviated any need for development of this approach.

d. Each Party Pays Its Own Fees and Costs, Regardless of Outcome

The "American rule" on fees and costs is that each party pays its own counsel fees and costs, even if that party achieves complete success in a suit.[209] The effect is that successful tort plaintiffs under the contingent-fee system pay their own counsel, and plaintiffs' counsel charges nothing if the suit yields no settlement or recovery. Defendants also pay their own counsel, with liability insurance paying defense costs for individuals, and for commercial entities once their deductible or SIR is exhausted.[210]

Without liability insurance to cover defense costs, however, it seems unlikely that ordinary individuals who successfully defended tort suits against them would have been left to pay their own counsel fees. It is true that the American rule does not apply in other systems where liability insurance also is available. But we are not contending that liability insurance always leads to the American rule—only that in the absence of liability insurance, the American rule would not have persisted in our system.[211]

The notion that a plaintiff could bring a groundless, or at least unsuccessful, suit against a defendant, and pay no penalty whatsoever even while a completely victorious defendant was left to pay possibly substantial counsel fees out of their own pocket, would have been unacceptable. Eventually, plaintiffs would have

209. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993) ("Each party is only obligated to pay his or her own attorney's fees, regardless of the outcome of the litigation.").

210. *See* discussion *supra* Section I.A.2.

211. We recognize, moreover, that fees have a long and complicated history that goes far beyond tort law. *See generally* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877 (2017); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9 (1984).

been made responsible for at least a portion of a successful defendant's counsel fees. Unsuccessful defendants, in turn, might have been responsible for plaintiffs' counsel fees. Far more than the current rules, these alternative fee-shifting rules would have discouraged plaintiffs from bringing tort suits, especially in risky instances in which a new basis for imposing liability would have to be established on appeal, with all the attendant legal costs of attempting to do so. The result would have been to impede the development of tort liability far more than it actually was impeded.[212]

2. *Liability Insurers as the Real Parties in Interest: Fueling the Expansion of Tort Liability*

Earlier we briefly indicated that liability insurers' duties to defend and privilege to settle tort suits involved them in suits in ways that interacted to drive the expansion of tort liability. We now explain in more detail how and why this occurred.

Their involvement in the defense and settlement of tort suits makes liability insurers the real parties in interest in such suits, although in most states they are not the nominal defendants.[213] Liability insurers pay defense costs, settlement costs, and judgments. The policyholder/defendant is a mere figurehead. In addition, just as significantly, the ways in which liability insurers are involved, and the courts' imposition of a duty to settle on top of the insurance-policy-based privilege to settle, has had the effect of fueling the expansion of tort liability in subtle but enormously important ways.

a. *The Duty to Defend*

Liability insurers reserve an express right to defend in their policies, because a suit against the policyholder puts the insurer's money at stake.[214] In addition, liability insurers are repeat players in the system and have developed expertise

212. Thus, Richard Painter summarized important considerations shaping the international debate on contingent fees as follows:

> Critics argue that contingent fees encourage litigation, inflate jury verdicts, overcompensate lawyers, and encourage unethical practices . . . . Proponents instead argue that contingent fees assure that plaintiffs who cannot afford lawyers have access to the courts [and] give lawyers incentives to work more diligently for their clients.

Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 627-28 (1995).

213. The exceptions are the "direct action" states of Wisconsin and Louisiana. *See supra* text accompanying note 196.

214. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 615.

and information that individual policyholders lack. If policyholders were permitted to defend themselves over the objection of the insurer, they might take less care and invest less in defense than would be optimal, because they would not bear the cost of defending ineffectively.[215] That would increase insurers' costs and result in increased premiums across the board.

Accompanying the insurer's *right* to defend is the insurer's *promise* to defend, embodied in the express *duty* to defend. Thus, liability-insurance policyholders are purchasing not only indemnity insurance, but also litigation insurance—protection against the cost of contesting liability. The duty to defend is enormously valuable for individual and small-business policyholders, who typically could not afford to pay their own counsel and therefore could not effectively contest even totally groundless suits.[216]

Once a suit has been filed and the insurer has been given notice of it, the insurer must make a determination whether the suit satisfies what is known as the "potentiality" test—whether any of the allegations in the plaintiff's complaint would be covered if the suit were successful.[217] This means that even utterly groundless suits must be defended, as long as the suit has the potential, in this sense, to be covered. Often the insurer undertakes an investigation of the facts and allegations prior to making that determination. If the suit satisfies the potentiality standard, then the duty to defend attaches and the insurer is obligated to defend. If the suit does satisfy the potentiality test, then the insurer has a duty to defend the whole suit, even if some of the allegations would not be covered even if they were proved to be true.[218]

If there is doubt, then the insurer may defend subject to a "reservation of rights," which preserves the insurer's right to contest coverage itself if the suit is successful.[219] The judicially created rule that an insurer that defends subject to a reservation of rights may later contest coverage encourages insurers to defend suits even where they have doubts about coverage, so that they can avoid possible liability for breaching the duty to defend. In some states, a liability insurer who turns out to have breached its duty to defend not only owes the policyholder its costs of self-defense but loses its right to contest coverage itself.[220] These rules

215. *See* ABRAHAM, *supra* note 12, at 37.

216. Whether there is a duty to defend a mere "claim," based on a phone call or demand letter, rather than a "suit," varies from state to state. Nonetheless, once an initial tort claim is made and the potential defendant's liability insurer is given notice of the claim, the insurer may investigate the claim. RESTATEMENT OF THE LAW: LIABILITY INSURANCE § 13 cmt. f (AM. L. INST. 2019) [hereinafter RLLI].

217. *Id.* § 13; ABRAHAM & SCHWARCZ, *supra* note 21, at 623.

218. *See* RLLI, *supra* note 216, § 13.

219. *Id.* § 15; ABRAHAM & SCHWARCZ, *supra* note 21, at 624.

220. ABRAHAM & SCHWARCZ, *supra* note 21, at 625.

are a reflection of the importance of the protection that the duty to defend provides to policyholders. Once involved, even if defending subject to a reservation of rights, the liability insurer exercises influence in a variety of ways, for the question whether a tort suit is covered is normally resolved only after that suit has gone to trial or settled by the insurer.[221]

Whether the policyholder is an individual or an enterprise, once a suit is filed, typically the insurer hires outside counsel to defend the insured. Most liability insurance policies (and virtually all auto liability, homeowners liability, and CGL insurance policies) cover the costs of defense "outside" limits, meaning that expenditures on defense do not reduce the amount of insurance ("indemnity") the policy provides.[222] Defense costs therefore can, in theory, exceed the actual amount of the insurance a policy provides. If the plaintiff insists on going to trial and appealing (assuming the verdict is for the defendant), then the insurer must continue defending.[223] For individual policyholders who are sued in tort, therefore, the existence of a duty to defend means that a liability insurer is almost always defending them, throughout the suit.

b. The Duty to Settle

As previously discussed, liability-insurance policies reserve to the insurer the privilege to settle suits against the policyholder. The policyholder has no right to force the insurer to settle, and the policyholder has no right to prevent the insurer from settling if the insurer decides to do so.[224] The liability insurer is therefore far more than a mere guarantor of the policyholder/defendant's potential obligation to the plaintiff; the liability insurer is the actual defendant in all but name.

In addition, however, in the early decades of the twentieth century the courts began to impose on liability insurers a duty owed to its insureds to settle that went beyond the mere privilege to settle.[225] This duty requires liability insurers to accept an offer by the plaintiff to settle a tort suit for a sum within the policy limits, if the amount of the offer is reasonable under the circumstances. Under the duty to settle, if a liability insurer rejects such an offer and at trial the plaintiff is awarded a verdict in excess of the policy limits, the insurer is liable for the entire sum awarded in damages, including the amount that exceeds the policy

221. *Id.* at 624-25.

222. RLLI, *supra* note 216, § 14(3).

223. *Id.* § 18 cmt. h.

224. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 651.

225. *See* Abraham & White, *supra* note 73, at 1328-29.

limits.[226] Thus, suppose that a liability insurer rejected an offer by a plaintiff to settle for $9,000, the defendant was insured for $10,000, and at trial the jury awarded the plaintiff $50,000 in damages. If the $9,000 offer to settle was reasonable in light of the plaintiff's probability of success and expected damages, then the liability insurer owes the full $50,000, notwithstanding the fact that the insurer had sold and the policyholder had paid a premium for only $10,000 of coverage.

The imposition of a duty to settle on liability insurers has had two important effects. First, for obvious reasons, the advent of the duty has increased insurers' willingness to settle cases for sums within the policy limits, in order to avoid their new, potential, above-policy-limits exposure. An insurer that might have previously rejected a settlement offer with impunity, because it could in effect externalize to the policyholder most of the risk of rejecting it, now has to think twice about doing so. This is because the insurer would now bear the full cost of rejecting a reasonable offer to settle, not just the amount of any subsequent judgment falling within the policy limits. Since the insurer's potential exposure did not now end at the amount of the liability insurance it had sold to the policyholder, the insurer's calculation of the amount that it made sense to offer in settlement sometimes was shifted higher. Average settlements naturally increased, and as that occurred, more tort suits became worth instituting.[227]

Second, just as the duty increased the incentive for insurers to settle suits against their policyholders, and to settle such suits for more than they would have settled in the absence of the duty, it sometimes created a countervailing incentive on the part of plaintiffs. In cases in which the policyholder was an individual, and the plaintiff's expected damages far exceeded the amount of the defendant's liability insurance, the plaintiff had no way to recover all those damages except by getting the defendant's insurer to breach its duty to settle, proceeding to trial, and securing a verdict for all of the plaintiff's damages. That way the insurer would be liable for all of the plaintiff's damages, rather than only the amount covered by the policy.

For example, suppose the defendant had liability insurance with a policy limit of $20,000, but the plaintiff anticipated that, if successful at trial, the jury would make an award of $100,000 in damages. The only way for the plaintiff to be paid the latter sum would be to offer to settle for less than $20,000 (say, $19,000), hope that the defendant's insurer would reject the offer, proceed to trial and secure a verdict of $100,000, and then sue (as subrogee of the policyholder/defendant) the defendant's liability insurer for breaching its duty to

226. *See* RLLI, *supra* note 216, § 27(1).

227. *See* Abraham & White, *supra* note 73, at 1329-32.

accept a reasonable offer of settlement.[228] If that suit were successful, then the plaintiff would have $100,000 in damages, in the form of $20,000 covered by the policy, and $80,000 as damages for the insurer's breach of the duty to settle.

The result was that sometimes plaintiffs made what came to be called "set-up" offers to settle – offers that plaintiffs actually hoped the liability insurer defending the suit would reject, but that had the potential later to be found reasonable in the event that the suit against the policyholder brought in a judgment for a sum in excess of the policy limit.[229] Interestingly, the advent of the duty to settle and the creation of set-up offers in certain cases would have created more litigation, not only in the form of certain tort suits going to trial more often than they would have in the past, but also as breach-of-the-duty-to-settle disputes that would not have existed before there was a duty owed to the insured to settle.

In addition, the kinds of cases in which insurers rejected offers to settle would disproportionately have been those with the potential to change tort law by expanding liability. This is because liability insurers were (and are) more likely to reject offers to settle in cases relying on new and unestablished legal theories, since there is a greater probability in such cases that the insurer will ultimately prevail through the application of existing rules limiting or precluding liability and secure a judgment (at trial or on appeal) of no liability. The greater prospect of ultimately defeating such suits reduced the amount that the insurer would have been willing to offer to settle them. It seems likely that this dynamic made it more likely that cases involving new theories of liability would be pursued all the way to appeal rather than settled, and that some of these theories would be accepted by the courts and established as new law.[230] Moreover, because the prospect of recovery for breach of the duty to settle increased plaintiffs' potential payoff from pursuing appeals, there would have been more appeals seeking to expand liability, because the potential cost effectiveness of taking an appeal would have increased.

We cannot say, and we doubt that anyone can say, how frequently this happened. But it likely happened as tort liability developed during the twentieth century, and it may well have happened a lot. Even a quick look at some of the mid-twentieth-century cases that sought to (and usually did) expand the scope of tort liability reveals how often they involved individual defendants whose

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228. *See* RLLI, *supra* note 216, § 36 cmt. b.

229. *See id*. § 24 cmt. d (describing the practice without using the term "set-up" offer); Abraham & White, *supra* note 73, at 1330 (describing the function and operation of set-up offers); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1169-70 (1990) (same).

230. It is true that insurers sometimes settle cases asserting new legal theories in order to avoid having a new theory accepted by an appellate court. Our point is that this did not always happen, and that when it did not happen, the prospect of recovering for breach of the duty to settle contributed to this outcome.

liability insurance was probably insufficient to cover the full amount of the plaintiff's damages: *Daniels v. Evans*,[231] *Breunig v. Am. Fam. Ins. Co.*,[232] *Martin v. Herzog*,[233] *Ybarra v. Spangard*,[234] *Summers v. Tice*,[235] *Dillon v. Legg*,[236] *Rowland v. Christian*.[237] A set-up offer and possible subsequent breach of the duty to settle a claim may well have been lurking in the background of some, and perhaps many, of these and other celebrated appellate cases expanding the scope of tort liability.

All of these developments fueled a cycle in which the prospect of increased tort liability encouraged more actors to purchase liability insurance, and to purchase more of it. With more liability insurance in place for higher amounts of coverage, the average amount that plaintiffs sought to recover would have increased, and liability insurers would have settled for higher sums, with both types of increases further fueling the cycle. In short, for good or for ill (depending on one's perspective), there was, and continues to be, a tort-liability-and-liability-insurance spiral.[238]

Liability insurers' involvement in tort cases for over a century also reflects a paradox in that process. In any given case, the liability insurer that has decided to appeal seeks to win by preventing any proposed expansion of tort liability, and by reversing the judgment below. But ironically, over time the liability

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231. 224 A.2d 63, 66 (N.H. 1966) (holding that an adult standard of care applies to minors involved in adult activities such as driving).

232. 173 N.W.2d 619, 626 (Wis. 1970) (holding that an individual operating a car under mental delusions could be liable for negligence as long as she had sufficient forewarning that she might be delusional, and indicating that, "[a]t the initial conference in chambers outside the presence of the jury, the trial judge made it clear he had no sympathy with the defendant's position and criticized the company for letting the case go to trial rather than paying the claim. On other occasions, outside the hearing of the jury, the [judge] evidenced his displeasure with the defense and expressed his opinion that the Insurance Company should have paid the claim. However, he stated he was going to try not to say a word before the jury which would hint that the Insurance Company was 'chincy'").

233. 126 N.E. 814, 814 (N.Y. 1920) (holding that unexcused violation of a safety statute is negligence per se).

234. 154 P.2d 687, 688 (Cal. 1944) (holding that a plaintiff who experienced malpractice-caused injury had met his burden of production by showing that one of several healthcare providers had caused the injury).

235. 199 P.2d 1, 1-2 (Cal. 1948) (imposing liability on each of two negligent hunters without requiring the plaintiff to prove which hunter had caused the injury).

236. 441 P.2d 912, 914-15 (Cal. 1968) (holding that a driver whose negligence had caused the death of the plaintiff's daughter was liable for the plaintiff's emotional distress, despite the fact that the plaintiff was not in the zone of physical danger).

237. 443 P.2d 561, 563 (Cal. 1968) (holding that premises' occupants owe a duty of reasonable care not only to invitees, but also to trespassers and licensees).

238. *See* ABRAHAM, *supra* note 12, at 4.

insurance industry has benefitted, and continues to benefit, from losing. That is, the more that tort plaintiffs win on appeal, and the more that tort law expands, the larger the amounts of liability insurance that potential defendants will buy, the more that liability insurance will cost, and the larger the revenue base of the liability insurance industry will be.[239] That dynamic has played out consistently over time. For example, the $170 billion-per-year auto liability insurance industry that figured in our tort-cost calculations in Part I would not be what it is today if tort litigation and tort liability had not expanded so substantially in the course of the twentieth century.[240] In the long run, then, liability insurers in the aggregate have won, and continue to win, by losing.

III. FILLING THE GAP IN MODERN TORT THEORY

Parts I and II demonstrated and examined the enormous role that liability insurance has played, and continues to play, not only in financing tort liability, but also in influencing the shape and scope of tort liability. Courts are, at least in some instances, out ahead of tort scholars in terms of recognizing the significance of liability insurance in the development of tort doctrine. In this Part, we turn to the particular ways in which different forms of tort theory can begin to take account of liability insurance as a central ingredient of tort liability. We expect that, to the extent scholars incorporate liability insurance into theory, courts will be further emboldened to acknowledge openly and highlight the impact of the insurance factor, as we advocate in Part IV.

The two main categories of contemporary tort theory are the deontic approaches, which hold that corrective justice or civil recourse are at the core of tort liability, and consequentialist approaches, which hold that deterrence of unsafe conduct and prevention of harm is a principal feature of tort liability. Most tort scholars would agree, we think, that most of tort theory fits into one of these two categories. As we consider each approach in turn, it is worth recognizing that individual scholars have differing views about details that are important to their particular theories. Our discussion attempts to be as faithful to these nuances as is feasible given our broader aims.

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239. *See* Abraham & Schwarcz, *supra* note 15, at 263-64; Ariel Porat & Ronen Avraham, *The Dark Side of Insurance*, 19 REV. L. & ECON. 13, 13-17, 26-41 (2023); Catherine M. Sharkey, *The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zipursky*, 60 DEPAUL L. REV. 695, 703 (2011) ("The last thing an insurance company should clamor for is the end of tort liability, for the insurance business would dry up alongside. Insurers want predictability, not diminished liability.").

240. *See* Abraham & White, *supra* note 73, at 1307-10 (chronicling increases in auto-liability insurance premiums during the twentieth century).

A. Deontic Theories: Corrective Justice and Civil Recourse

Tort liability is bilateral in corrective justice and civil recourse theory, involving the relationship between an injurer and a victim.[241] According to deontic theories, the core of tort law is responsibility—usually responsibility to a victim for committing a wrong. Whether a category of potential defendants has access to liability insurance is thus either completely or largely irrelevant, and the availability of insurance is certainly not a stand-alone basis, or normative factor, for the imposition of tort liability.[242]

1. Prevailing Views

Modern deontic theory was in a sense a reaction to the rise of consequentialist law and economics. For example, Guido Calabresi's *The Cost of Accidents* "ushered in a sustained era of criticism of the traditional 'bilateral' (or 'bipolar') view of torts."[243] One of Calabresi's key insights was that there was no necessary link between compensating victims and deterring or punishing injurers.[244] And, most significant for our purposes here, Calabresi held up the widespread availability of liability insurance as evidence of movement in this direction in the realm of automobile accidents.[245]

241. Tort adjudication is bilateral because the wrongs to which it responds are bilateral: they are a matter of what the defendant has done to the plaintiff. The transactional nature of wronging underlies the transactional nature of tort litigation, and so explains why the particular plaintiff recovers from the particular defendant.

242. A representative deontic statement of this position is Ernest J. Weinrib. *See* Weinrib, *supra* note 4, at 683 ("Tort law's conceptual apparatus of cause, duty, standard of care, and fault . . . precludes consideration of the litigants' wealth, virtue, or need. . . . [T]he invoking of insurance undermines this conception of tort law by draining the parties' relationship of immediacy."). For other representatives of this view, see also COLEMAN, *supra* note 3, GOLDBERG & ZIPURSKY, *supra* note 5; KEATING, *supra* note 6; RIPSTEIN, *supra* note 16; and WEINRIB, *supra* note 16.

243. Sharkey, *supra* note 15, at 414.

244. CALABRESI, *supra* note 4, at 22-23, 297.

245. *Id.* at 302 ("[T]he allowance of insurance for faulty parties is clear indication that this notion [that justice does not require that individual injurers compensate individual victims] is accepted."). Indeed, "the general acceptance of insurance strongly suggests that we do not worry too much about whether the individual faulty party pays his victim, so long as the victim is paid." *Id.* at 304-05; *see also* Guido Calabresi & Spencer Smith, *On Tort Law's Dualisms*, 135 HARV. L. REV. F. 184, 187 (2022) (arguing that insurance makes tort law "less relational," but conceding it is nonetheless legitimate to recognize wrongs).

It is no exaggeration to say that most deontic scholars, then and now, judging from what they say or omit,[246] do not consider liability insurance to be an ingredient of tort liability. Jules Coleman, as standard-bearer for corrective-justice scholars in the period following publication of *The Costs of Accidents*, responded:

> There is another way of looking at the relationship between insurance and tort law. . . . According to this account, it is important to distinguish between insurance as an institution that arises in order to enable individuals to discharge their substantive duties under the law and insurance itself as a goal of tort law, as capable of providing independent grounds for imposing substantive duties under the law.[247]

And, Coleman insisted, "[b]ecause insurance depends on the existence of liability rules, it cannot provide a ground or reason for imposing liability in one way rather than another."[248]

On this view, liability insurance lies only in the background, outside of the relationship between the parties, as does the defendant's (and plaintiff's) wealth, and the impact that the imposition of liability would have on other actors in the future. And so the corrective-justice "pure rights theorists" such as Professors Ernest Weinrib and Arthur Ripstein continue to insist.[249]

In contrast, Professors Goldberg and Zipursky, the chief architects of civil recourse theory, emphasize that they are offering a "hermeneutic" or "interpretive" account of tort law,[250] with a focus on "what tort law is and what it says."[251]

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246. *See* COLEMAN, *supra* note 3; GOLDBERG & ZIPURSKY, *supra* note 5; KEATING, *supra* note 6, RIPSTEIN, *supra* note 16; WEINRIB, *supra* note 16.

247. COLEMAN, *supra* note 3, at 206.

248. *Id.* at 207.

249. *See generally* RIPSTEIN, *supra* note 16; WEINRIB, *supra* note 16. On Weinrib's and Ripstein's account, corrective justice seeks to explain a distinctive mode of reasoning in which courts in the common law world, especially outside of the United States but by no means exclusively so, process a tort claim by looking at what transpired between the parties. The transactional nature of wronging underlies the transactional nature of tort litigation, and so explains why the particular plaintiff recovers from the particular defendant. Weinrib's central claim is that in analyzing a tort dispute, the court focuses exclusively on the transaction—on the relation between the parties—and so will not look to any factor that is particular to only one of them, such as wealth, need, or other sources such as insurance. *See* Weinrib, *supra* note 4, at 683; Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 VAND. L. REV. 401 (2007) (lamenting that the rise of realist and instrumentalist and economic theories in law schools has made its way into U.S. law, generating cases in which courts look at something other than the relation between the parties).

250. GOLDBERG & ZIPURSKY, *supra* note 5, at 10.

251. *Id.* at 301; *see also* University of Connecticut School of Law, *New Ideas in Insurance: John Goldberg and Benjamin Zipursky*, YOUTUBE (Nov. 1, 2022), https://www.youtube.com/watch?

But their account does not account for the myriad cases in which courts expressly say that the prevalence (or absence) of liability insurance is relevant to their determination of what tort law "is."[252] They themselves gloss over this important feature of tort legal doctrine.[253]

2. *Filling the Gap*

As an initial matter, we would contend that, in connection with the liability of individuals, in most instances, the presence of liability insurance enhances corrective justice and access to civil recourse, broadly conceived. In the absence of liability insurance, most drivers and homeowners would be judgment proof and could not compensate their victims. There would be no point in suing them because wrongdoing would not be corrected, and civil recourse would not be available for the same reason.[254] The liability insurance of individuals, for which they have paid premiums, makes corrective justice possible, and provides an avenue for civil recourse. For businesses and entities that could pay tort liabilities even if they were not insured, liability insurance is neutral in this respect. It is simply a means by which these parties undertake to correct injustices they have committed or pay damages to which injured parties have been given civil recourse.

More critically, as to the wrongs that deontic theory holds are central to the meaning of tort liability, one of our contentions is that tort liability would not

v=ZvLeAqqCICE [https://perma.cc/6E8A-35LC], at 03:10; Benjamin C. Zipursky & John C.P. Goldberg, *Thoroughly Modern Tort Theory*, 134 HARV. L. REV. F. 184, 190 (2021) (describing their approach as "an account of how judges decide and should decide tort cases").

252. *See supra* Section II.A. In earlier work, Goldberg and Zipursky argue that it is inappropriate for courts to consider whether "'duty' in a certain context will lead to a rise in liability insurance premiums for those in defendant's class." John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 729 (2001). This fits with their overarching thesis that a proper duty analysis should exclude any "consequences for liability insurance premiums." *Id.* But apart from their recognition of (and objection to) the fact that, in "many cases . . . courts 'balance' various policy factors, such as the factors listed by [*Rowland*]," they do not otherwise engage with courts' invocation of insurability of the relevant risk as a normative factor in determining tort liability. *Id.* at 694-95.

253. Nor is it a sufficient response for Goldberg and Zipursky to insist that "the presence of a word or idea is not a blank check to fill in whatever the judge herself or himself believes is right" when defining new torts, or recognizing new wrongs. GOLDBERG & ZIPURSKY, *supra* note 5, at 253. Judges' acknowledgement of liability insurance as significant to their determinations of tort duties need not devolve into a "blank check."

254. *See generally* Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957 (2020) (identifying this consequence as a reason to more robustly insure against wrongs). Goldberg and Zipursky concede that liability insurance can play an important role by ensuring that sufficient money is available for redress. University of Connecticut School of Law, *supra* note 251, at 14:45.

have the same substance and scope in the absence of liability insurance. In deontic terms, that comes close to saying that what counts as a "wrong," if tort law is a law of wrongs, has been heavily influenced, and will continue to be influenced, by the availability of liability insurance. Goldberg and Zipursky come close to agreeing that this is the case in at least one respect, by suggesting briefly that the harshness of tort liability's imposition of sometimes-enormous liabilities is mitigated by liability insurance.[255] They also suggest that liability insurance can help hedge against the risk that having what might be called a "sharp-edged" law of wrongs in tort would not always be acceptable to society.[256] To us, the implication of their position may well be that what would count as a wrong might be different if liability insurance were not so generally available. We wonder whether corrective justice theorists would make the same concession; and if not, the burden should be on them to explain how their account of justice wrestles with the stark disproportionality of the imposition of outsized damages and various tort doctrines (such as the thin-skull rule) absent liability insurance.[257]

Deontic theories, and civil recourse theory in particular, do not seem to take a strong position about what should count as a wrong.[258] Goldberg and

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255. *See* GOLDBERG & ZIPURSKY, *supra* note 5, at 275-76 (suggesting that liability insurance makes tort law more socially acceptable by softening mismatches between outsized damages and limited fault). In their book, they liken insurance to bankruptcy as a sort of backstop undergirding an independently coherent system of tort law. *Id.* at 275. Goldberg and Zipursky, moreover, acknowledge "synergies" between the regimes of liability insurance and tort liability. University of Connecticut School of Law, *supra* note 251 at 15:09, 28:02, 29:21.

256. University of Connecticut School of Law, *supra* note 251, at 10:56, 12:17. Put another way, insurance "allows people to ameliorate or mitigate the risk that . . . they [will] commit one of these sharp-edged" torts, such as trespass. *See also* GOLDBERG & ZIPURSKY, *supra* note 5, at 275-76 ("Laws that enable persons to enter into contracts for the purchase of liability insurance similarly help ease concerns about tort law's demanding aspects.").

257. We recognize the limited nature of the concession. We have little doubt that Goldberg and Zipursky's recognition of liability insurance as a force that tempers a preexisting, longstanding, and (relatively) static tort liability in no way opens the door to their recognition of liability insurance as something that facilitates the recognition of new wrongs.

Nor do we believe that rights-based theorists such as Weinrib and Ripstein would be moved. On their account, when one person wrongs another, there is harshness everywhere. Although it may well be true that the defendant's liability is out of proportion to the defendant's fault, the plaintiff's loss is out of far greater proportion to the plaintiff's lack of fault. On such an account, harshness does not constitute a form of unfairness.

258. Professor Coleman conceded that corrective justice has nothing to say about what should count as a wrong. Rights-based theorists (such as Professors Weinrib and Ripstein), however, do characterize what rights are protected by tort law, namely rights to body and property, as well as in cases such as public nuisance, the rights one has as a member of the public. *See generally* RIPSTEIN, *supra* note 16 (providing a characterization of what counts as a wrong in tort and an explanation of all of them and how they are interrelated). They offer explanations of why these rights are invaded by certain types of acts, as well as why something like the thin-

Zipursky, for example, argue that the wrongs that tort law redresses are "legal" wrongs and not necessarily moral wrongs.[259] Goldberg and Zipursky have clarified:

> The way judges usually [define tort law], and should do so, is to expound the common law. This is not a matter of finding the objective truth as to which acts really are wrongs, but of constructively carrying forth ideas, principles, and norms that are already in the law.[260]

How then, we ask, can the significance of liability insurance be excluded, to the extent it has infiltrated as an "idea, principle or norm" by which courts define and justify tort liability?[261]

In contrast, Professor Gregory Keating has proposed a theory of tort that embraces a "fundamental principle of political *morality*" whereby "[e]veryone owes everyone else a duty of reasonable care because everyone is entitled to equal concern and respect, and everyone has an equally urgent interest in the physical integrity of their person."[262] In a recent article, Keating suggests that "the central puzzle of affirmative duty law" is whether duty is "the deposit of forward-looking policies" or "the expression of principle."[263] Keating insists—turning a blind eye to any actual influence of insurance in the opinions that he discusses—that duty is, and ought to be a matter of general principle.[264]

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skull rule and the ultrasensitive-plaintiff rule are built into the idea of one independent person wronging another by interfering with the independence of the other.

Professors Goldberg and Zipursky's civil recourse theory is more threatened by our account; namely that the recourse that an aggrieved plaintiff achieves is not actually against the person who wronged the plaintiff but rather against the insurance company. Because they separate wrongs and remedies as they do, they cannot respond (as do Weinrib and Ripstein) that every element of the litigation follows the elements of the wrong that the plaintiff committed.

259. GOLDBERG & ZIPURSKY, *supra* note 5, at 206.

260. Zipursky & Goldberg, *supra* note 251, at 189.

261. *Cf.* Sharkey, *Modern Tort Law*, *supra* note 14, at 1431 (arguing, in light of Goldberg and Zipursky's conception of a legal wrong, that "it is difficult to understand why [they] insist on ruling out the failure to take cost-justified safety precautions as the most fruitful (or even viable) definition, or path to a definition, of a 'wrong'").

262. Gregory C. Keating, *Putting "Duty" Back on Track*, 16 J. TORT L. 301, 319 (2024) (emphasis added). Keating elaborates (in a way that demonstrates, to us, a predisposition to resist incorporation of liability insurance into tort theory): "We cannot sacrifice someone's physical integrity just because it would secure a socially desirable objective—less expensive tickets to Taekwondo competitions or less expensive liability insurance, say." *Id.* at 318-319.

263. *Id.* At 321.

264. *See id.* at 321-22. As we noted earlier, in other works Keating does make reference to liability insurance, specifically with respect to its role in enhancing the fairness of enterprise liability. *See supra* note 6.

And herein, lies the rub, we fear. Deontic theories exclude instrumental and policy-based considerations, including liability insurance, from core "principles" of rights, responsibility, or morality. Embracing the influence of insurance could thus be considered inconsistent with the deontic notion that tort liability is a matter of principle and not policy. Or, an even graver threat if Weinrib presciently foretold that "[t]he rise of insurance as a factor in tort litigation is a harbinger of the attenuation of the hold of private law as a ruling component of the American legal experience."[265] Our hunch is that, partly for this reason, deontic theorists will reject the notion that liability insurance should be an ingredient of their theories.[266] We nonetheless believe our account requires some accommodation or response on the part of deontic theories, perhaps along the lines we have sketched out above.

B. Consequentialist Theories: Deterrence

The second main theoretical approach contends that tort law is heavily concerned with the deterrence of unsafe conduct. In contrast to the deontic theorists, we have not identified any consequentialist who takes the position that liability insurance has *no* bearing on tort liability. At the same time, most consequentialists have discussed liability insurance either as a substitute for tort or as a loss-spreading mechanism at odds with deterrence goals, rather than as an important ingredient of an overarching consequentialist tort theory.

1. Prevailing Views

To be sure, consequentialist theorists provide something of a counterweight to the overall inattention to insurance in the field of torts that we have flagged. Here, we provide a skeletal summary, designed simply to frame what we still find wanting.

Some consequentialist scholars have discussed tort as insurance, highlighting the instrumental, loss-spreading rationale of tort.[267] Or, pushing this

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265. Weinrib, *supra* note 4, at 687.

266. *Cf. id.* at 684 ("Deploying insurance considerations to resolve tort disputes thus entails an instrumentalist and legislative conception of law.").

267. *See generally* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992) (assessing the rise of products liability from tort as insurance perspective); *see also* Mark A. Geistfeld, *Reformulating Vicarious Liability in Terms of Basic Tort Doctrine: The Example of Employer Liability for Sexual Assaults in the Workplace*, 99 N.Y.U. L. REV. (forthcoming 2024) (manuscript at 18), https://ssrn.com/abstract=4550922 [https://perma.cc/4ZFC-XTNB], ("[T]he premise that the enterprise is in the best position rationale further, some scholars have discussed insurance as a competitor, displacing tort, as in the case of workers' compensation and no-fault auto insurance.[268] Nonetheless, the conceptualization of tort as insurance is different from what we have in mind in terms of liability insurance as an ingredient of a consequentialist theory. Nor is it captured by the robust theoretical law-and-economics literature exploring insurance versus deterrence tradeoffs in products liability[269] and enterprise liability.[270]

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to bear injury costs by spreading them via small price increases . . . a compensatory mechanism with the same desirable properties as other insurance arrangements.").

268. *See, e.g.*, Keating, *Products Liability*, *supra* note 6; Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 FORDHAM L. REV. 1857, 1898-1907 (2004) (discussing these social insurance systems as "enterprise liability beyond tort"); Schwartz, *supra* note 266, at 636–37; Schwartz, *supra* note 90, at 361 n.206. Schwartz, moreover, took the position that liability insurance is most defensible not from a deterrence perspective, but as a normative guarantee of redress for victims: "As far as deterrence is concerned, the economists are wrong: it cannot be concluded that liability insurance is a priori efficient. . . . [L]iability insurance can be most clearly justified if tort law is appreciated in ethical rather than merely economic terms." *Id.* at 315.

269. Sharkey, *supra* note 202, at 400-01, summarizes this rich literature:

> [S]ome law-and-economics commentators [such as George Priest, Alan Schwartz, and Richard Epstein] argue that, at least in the quasi-contractual realm of products liability . . . tort liability is not needed to regulate care because customers know the quality (and inherent risks) of the goods and producers can create signals through prices (i.e., lower-priced goods carry more risk). In that case, damages serve mainly to insure against injuries. And the justification for compensating noneconomic losses is weak, it is argued, because people facing a risk of serious permanent injury or death will insure against economic losses, but not noneconomic losses. . . .
>
> The "no deterrence" view, however, is contested by other law-and-economics commentators [such as Mark Geistfeld] who emphasize that noneconomic damages payments do in fact serve an important deterrence function. . . . If tort liability is needed to regulate care, it follows that no basis exists for getting entirely rid of noneconomic damages paid to the victim.

Compare, e.g., Richard A. Epstein, *The Legal and Insurance Dynamics of Mass Tort Litigation*, 13 J. LEGAL STUD. 475, 490-91, 506 (1984) (describing the overlap between tort and contract law), George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 YALE J. ON REGUL. 237, 252 (1992) (describing market competition unaffected by legal regulation), *and* Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 408 (1988) ("[S]trict liability requires consumers to purchase more insurance and more safety than their better informed selves would want."), *with, e.g.*, Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 786 (1995) (explaining how tort law promotes deterrence), *and* Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1791 (1995) ("[A]lthough several significant impediments prevent the emergence of a robust market for insurance against pain-and-suffering losses, consumers in fact *do* demand such insurance.").

270. *See also* Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1369 (1982) (asserting that enterprise

We recognize the well-established theoretical insight that the deterrent effect of the threat of tort liability may be undermined by liability insurance, given that insurance generates moral hazard—the tendency of an insured actor to exercise less care to avoid incurring a loss than the actor would have exercised if it were not insured.[271] However, liability insurance attempts to combat moral hazard through a number of devices. These include risk-based pricing (of which basing premiums on past losses, or "experience rating," is a common example), under which the premiums charged depend on the risk posed by the policyholder.[272]

Liability insurance thus does not automatically undermine deterrence, and sometimes promotes it, in ways that are consistent with much consequentialist theory. Given the empirical reality of the significant influence of insurance on the life cycle of tort claims as well as its invocation by courts, it seems incumbent on consequentialists to recognize the centrality of liability insurance for the

liability will induce victims to file suit in the first place, thereby greatly bolstering the deterrence effect of the tort system by encouraging its utilization). *See generally* Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993) (discussing the shortcomings of private insurance for products liability and consumer warranties); Geistfeld, *supra* note 8 (questioning whether enterprise liability should replace strict liability for abnormally dangerous activities).

271. The seminal article on moral hazard in the law and economics literature is Steven Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120 (1982). *See also* ABRAHAM & SCHWARCZ, *supra* note 21, at 8; Sharkey, *supra* note 15, at 434-35; Schwartz, *supra* note 90, at 350-51 n.162 (noting that law-and-economics theorists "concede[] the premise relied on by many tort scholars: that liability insurance can frustrate deterrence," given "the law's willingness to sacrifice deterrence for the sake of insurability"); Sugarman, *supra* note 17, at 573 n.67 (noting that uninsured "actors would either disregard the prospect of tort liability or else rashly assume that they could somehow maneuver out of any lawsuits. This 'denial' approach to potential liability undermines its role as a deterrent."); Michael J. Trebilcock, *The Role of Insurance Considerations in the Choice of Efficient Civil Liability Rules*, 4 J. L., ECON., & ORG. 243, 249 (1988) (noting how insurance considerations "make the quality of the defendant's conduct irrelevant").

272. *See, e.g.*, Schwartz, *supra* note 90, at 363 (acknowledging the deterrence potential of dynamically priced insurance premiums). *See generally* ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 101-29 (2001) (discussing dynamically priced insurance based on the insured's risk-creation); Ben-Shahar & Porat, *supra* note 8 (same); Alexander B. Lemann, *Coercive Insurance and the Soul of Tort Law*, 105 GEO. L.J. 55 (2016) (same).

The extent to which risk-rating and other devices—including partial insurance, and coverage restrictions—can influence moral hazard, by incentivizing policyholders to lower the risk they pose and thereby save money on insurance, varies enormously. *See* Abraham & Schwarcz, *supra* note 15, at 235-46. Some rating variables are out of the policyholder's control in the short run, the long run, or both—the kind of vehicle insured, and the territory in which the policyholder lives, for example. And even for variables that are under the policyholder's control, the premium savings that can be obtained by modifying the variable may be uncertain, thus rendering behavioral change less likely. This is especially the case when premiums are experience-rated. Without feedback as to how to reduce losses, experience-rating may create strong incentives in theory. But if it is only accompanied by blunt signals, the incentives may have nowhere to go. *Id*. at 243-44.

doctrinal evolution of tort and to incorporate into their deterrence theories liability insurance as a prominent normative factor driving tort liability.[273]

2. *Filling the Gap*

Not only is it the case that, as a general matter, courts are ahead of most tort theorists in recognizing the significance of insurance as a characteristic ingredient of tort liability. But the same holds true, albeit to a more limited extent, with regard to courts' recognition of a link between insurance and the deterrence or prevention of harm rationales in tort law.

We think that liability insurance likely had an important impact on deterrence and safety incentives during the period of tort law expansion in the twentieth century. In his famous concurrence in *Escola*, Justice Traynor clearly thought that liability insurance was consistent with deterrence, and many other courts have agreed.[274] In the 2016 *Kesner* take-home asbestos case, which we

273. *See, e.g.*, Sharkey, *supra* note 72, at 485 ("The role of insurance is especially linked to deterrence or prevention of harm rationales in tort law. . . . [S]eparate and apart from any loss-spreading role played by insurance[], might there be an explicit feedback loop whereby insurance fuels the deterrent impact of tort liability?").

Here, while we would agree with Professor Stapleton's descriptive claim that "the relevant landmark [U.S.] judgments are . . . bursting with a diverse menu of reasons supporting the expansion of liability (even when strict), among which the compensation of certain injuries and deterrence of certain conduct (such as supply of 'defective products') are clearly the most prominent," we emphatically disagree with her normative argument that "the insurance measure is not only inconsistent with the restorative measure of damages (which these courts unquestioningly bestow on plaintiffs), but is also inconsistent with the deterrence goal." Stapleton, *supra* note 84, at 834-35.

Likewise, while we endorse Professors Engstrom's and Green's descriptive account that "[l]ike an old fence post covered in ivy, liability insurance and tort law are inexorably tangled, and they stand together to offer one another mutual support," we disagree with their normative view that insurance is an "exogenous force that influenced, and continues to influence, the fabric of tort" wholly unconnected to deterrence theory as a "foundational tort principle." Engstrom & Green, *supra* note 8, at 357.

274. *See, e.g.*, Lokey v. Breuner, 243 P.3d 384, 386 (Mont. 2010) ("Placing a duty on the waving driver to either exercise due care before directing another driver or decide that it is not safe to do so, could prevent future harm in similar circumstances. There is little burden placed upon the waving driver—he could decide under the circumstances to not stop in the road and motion another to turn and could refrain from gesturing another driver to turn if the safety of the turn were questionable. The consequences to the public of imposing a duty are minimally burdensome and there is a potential increase in safety. Lokey asserts that Welles had insurance to cover the occurrence."); Doe v. McKesson, 339 So. 3d 524, 543-44 (La. 2022) (Crain, J., concurring) (finding that courts consider, as relevant to imposition of duty in light of the "professional" rescuer doctrine, the factor "whether the alleged tortfeasor or the victim is better positioned to analyze the risks involved . . . and, thus, take precautions to avoid them or to insure against them").

discuss above, the California Supreme Court carries this thread into the twenty-first century, tying Traynor's rationale with Calabresi's: "Such allocation of costs [to the defendant who is able to procure liability insurance] serves to ensure that those 'best situated' to prevent such injuries are incentivized to do so."[275]

Consequentialist tort theorists should address head-on the potential for liability insurance to continue to have this deterrence impact in new areas of tort liability in the future. Here we elaborate specific considerations in assessing the potential for liability insurance to enhance deterrence theory.[276]

First, virtually all individuals and many very small businesses—plumbers, lawn services, luncheonettes, etc.—are (and always have been) effectively judgment-proof except for their liability insurance. For example, most drivers do not have the assets to satisfy a tort claim. That is why, as we indicated earlier, there are so few tort suits against uninsured individuals. But an increase in auto liability insurance premiums is a specific, smaller cost that individuals can pay. The prospect that liability insurance premiums will increase if a driver is in an accident would therefore have more impact on driving safety and activity levels than the threat of tort liability itself would have in the absence of liability insurance. In effect, for most individuals and very small businesses, liability insurance not only employs devices that reduce the moral hazard that insurance creates; liability insurance probably actually reduces accident levels.[277]

Second, liability insurers have the capacity to aggregate risk-related information obtained about the universe of policyholders as it accumulates, as part of the process of underwriting and premium setting.[278] In any situation in which

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275. Kesner v. Superior Court, 384 P.3d 283, 297 (Cal. 2016) (citing Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1994) (Traynor, J., concurring); GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970)). Likewise, the New Jersey Supreme Court, when imposing social host liability in *Kelly v. Gwinell*, 96 N.J. 538 (1984), discussed *supra* text accompanying note 154, reasoned that "the dissent's emphasis on the financial impact of an insurance premium increase on the homeowner or the tenant should be measured against the monumental financial losses suffered by society as a result of drunken driving." *Id.* at 557. Specifically, the court reasoned: "By our decision we not only spread some of that loss so that it need not be borne completely by the victims of this widespread affliction, but, to some extent, reduce the likelihood that the loss will occur in the first place." *Id.*

276. On the other hand, sometimes, arguably, insurers shift risks rather than decrease risks. *See generally* Porat & Avraham, *supra* note 239.

277. *See* Abraham & Schwarcz, *supra* note 15, at 271. *See generally* S. Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45 (1986) (discussing the problem of liability for uninsured individuals); Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 TEX. L. REV. 1375 (1994) (same).

278. *See* Abraham & Schwarcz, *supra* note 15, at 236; *see also* Peter Z. Grossman, Reed W. Clearley & Daniel H. Cole, *Uncertainty, Insurance and the Learned Hand Formula*, 5 LAW, PROBABILITY & RISK 1, 1-3 (2006) (arguing how insurance provides necessary, aggregated guidance to courts and litigants regarding the danger of certain activities, optimal precautions to take, and liability insurers have more information than policyholders regarding certain methods of reducing risk, and that information cannot be appropriated by competitors,[279] liability insurers have an incentive to communicate that information to policyholders, either through "coaching" policyholders or as part of their interacting over premiums or on an ongoing basis. Sometimes such coaching[280] and risk-rating refinement[281] would be cost effective.[282]

In part, the amount of insurer involvement in risk-management is a function of the nature of the insurer. Genuine mutuals, such as municipal risk pools that cover police liability,[283] seem to be more involved in risk-management than conventional insurers, perhaps because of the credibility their policyholders perceive them to have.[284] And in part, the amount of involvement in risk-management that occurs is a function of the cost and threat of tort liability, as captured in the magnitude of premiums charged for liability insurance: the greater the threat of tort liability, the more cost effective premium refinement and individualized coaching will be.

For example, during the course of the twentieth century, and especially when products manufacturing was less sophisticated than it is now, manufacturers probably often benefited from these kinds of services, and many still may

therefore—under the Hand Formula—the threshold below which a lack of caution becomes legally cognizable negligence); ARIEL PORAT & OMRI BEN-SHAHAR, PERSONALIZED LAW: DIFFERENT RULES FOR DIFFERENT PEOPLE (2021) 32 ("Insurance services are perhaps the pioneers in personalized treatments, which is not surprising given the wealth of personal data the industry has. Insurers 'rate' policyholders . . . . With the advent of digital data collection, the personalization has become more intensive, focusing on policyholders' conduct.").

279. Some forms of aggregation take place collectively, thereby avoiding the appropriation problem completely. During the first three-quarters of the twentieth century, "rate bureaus" did this, by compiling loss and claim data and preparing recommended premiums for different forms of insurance. Eventually they combined, and by 1970, a single super-bureau, the Insurance Services Office, undertook and continues to undertake this task, although it no longer prepares actual rates. ABRAHAM & SCHWARCZ, *supra* note 21, at 40-41.

280. For a discussion on coaching, see Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 210-11 (2012). Recognition of this role is not limited to deterrence theorists. *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 5, at 276 ("[L]iability insurance at times serves to reinforce tort obligations. Because insurers are often the ones who stand to pick up the 'tort tab,' they frequently monitor or incentivize their insureds to promote compliance with applicable tort duties.").

281. For a discussion on risk-rating refinement, see generally KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 67-83 (1986).

282. Sometimes, however, it would not be cost effective and does not occur. *See* Abraham & Schwarcz, *supra* note 15, at 255-60.

283. *See* John Rappaport, *How Private Insurers Regulate Police*, 130 HARV. L. REV. 1539, 1569 (2017).

284. *See* Abraham & Schwarcz, *supra* note 15, at 233-34.

benefit.[285] Another important example comes from the 1980s, when medical malpractice insurers, employing research conducted by the American Society of Anesthesiologists based in part on closed malpractice claims, were able to help reduce certain anesthesia-related harms that might well have continued to occur in the absence of this form of insurance.[286] Similarly, contemporary environmental liability insurers conduct audits and inspections as part of their underwriting and premium-setting process which creates safety incentives that would have been missing in the absence of liability insurance.[287]

Third, liability-insurance premiums are specific, whereas the threat of uninsured tort liability is vague. Therefore, in some situations the incentive to take steps to reduce premiums may well have a greater impact on the reduction of loss through changes in safety and activity levels than would occur in the absence of insurance. For example, the changes in anesthesia procedures mentioned above could be translated into concrete medical-malpractice-insurance premiums, whereas it would take much longer for the effects of behavioral changes to be seen in reduced levels of tort liability, especially when the occurrence of medical-malpractice claims is a statistically unlikely occurrence for any individual physician. Thus, liability insurance can serve a notice function, providing policyholders with information about the magnitude of the liability risks they pose and, depending on the circumstances, the steps they can take to reduce risk and thereby reduce insurance premiums.[288]

Finally, liability insurers can act collectively, in ways that business enterprises (and certainly individuals) sometimes cannot or will not, to conduct research and development into methods of reducing losses, and to lobby government to adopt safety mandates.[289] The Insurance Institute for Highway Safety, for example, has conducted research into crashworthiness and other dimensions of auto safety that is less likely to have occurred if there had been no auto liability

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285. *See* Ben-Shahar & Logue, *supra* note 280, at 218-19.

286. Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L REV. 381, 411 (1994) (citing John H. Eichorn, *Prevention of Intraoperative Anesthesia Accidents and Related Severe Injury Through Safety Monitoring*, 70 ANESTHESIOLOGY 572, 575-77 (1989)).

287. *See* Ben-Shahar & Logue, *supra* note 280, at 225-26.

288. *See* Abraham & Schwarcz, *supra* note 15, at 237.

289. *See id.* at 260-61.

insurance.[290] The same is true for the work of Underwriters Laboratories for certain other products.[291]

In summary, there is little question that, in important respects, liability insurance has actually reduced the incidence of certain kinds of tortiously caused loss during the period of its existence. It is difficult to know precisely how much, or where, this has occurred. But liability insurance has the potential to continue having these kinds of effects in the future, not only in connection with existing forms of tort liability, but also new, future liabilities.

Of course, we should not be overly sanguine about this possibility, because liability insurance does create moral hazard, and insurers often can only reduce that effect, rather than having a net-positive effect on safety. An example is the rise of telematics, with its capacity to monitor policyholder behavior in real time, which could prove to be a game changer in the future, though it has been employed mainly in auto liability insurance thus far, and has faced some resistance due to privacy concerns.[292]

Another example is cyber liability insurance, for which there were high hopes as a loss reducer roughly a decade ago, but which has not yet fulfilled its promise in this respect.[293] That said, it may take courts' assertion of new duties to

290. That organization was founded in 1959 by three insurance industry groups representing more than 500 auto insurers and continues to be wholly funded by insurers. *See Member Groups*, INS. INST. FOR HIGHWAY SAFETY, https://www.iihs.org/about-us/member-groups [https://perma.cc/M5KD-F2WV].

291. Underwriters Laboratories (UL) was initially founded with economic support of several insurers. But UL's growth has largely transcended these insurance-focused origins; it is now funded principally through other sources of revenue, such as fees paid by manufacturers who acquire one of UL's safety certifications. *See* Press Release at 3, UL Rsch Insts., *Underwriters Laboratories Names Dr. Charlotte M. Farmer to Head Operations* (Dec. 15, 2021), https://ul.org/news/underwriters-laboratories-names-dr-charlotte-m-farmer-head-operations [https://perma.cc/VK84-XP2P] ("We fund our work through grants, the licensing of standards documents and the business activities of our wholly owned subsidiary, UL Inc. . . . .").

292. *See* Abraham & Schwarcz, *supra* note 15, at 245-46.

293. *See* Tom Baker & Anja Shortland, *Insurance and Enterprise: Cyber Insurance for Ransomware*, 48 GENEVA PAPERS ON RISK & INS.—ISSUES & PRAC. 275, 284-87 (2022) (finding that cyber insurance has focused more on containing liabilities and restoring IT systems than on enhancing security against ransomware); Abraham & Schwarcz, *supra* note 15, at 231-32 (citing studies showing lack of effective insurance involvement in preventing cyber losses). But there are efforts. One example is the partnership between Microsoft, which developed "Secure Score" to rate the security settings of commercial customers that use Office 365, and Hartford Financial Services Group Inc., the first company to announce publicly that it will use Microsoft's Secure Score as a factor in determining premiums for cyber insurance. *See* Jay Greene, *Microsoft to Rate Corporate Cybersecurity*, WALL ST. J. (Feb. 10, 2017, 1:00 PM ET), https://www.wsj.com/articles/microsoft-to-rate-corporate-cybersecurity-1486749600 [https://perma.cc/UF5M-XLTP].

safeguard information or provide reasonable data security—perhaps relying on the insurability of the relevant risks—to spur the cyberinsurance market into full gear.[294] At the same time, it is also important to recognize that many victims of cyber attacks may themselves be the "'least cost avoiders' given their ability to insure for such losses, for example via business interruption insurance."[295] Indeed, in some situations, the "no duty" economic loss rule "provides incentives for potential plaintiffs to exercise optimal care and to self-insure efficiently."[296]

Importantly, however, the question we are addressing is not whether liability insurance has had or can in the future have a net *overall* effect of reducing losses, but whether the existence of liability insurance fits within theories of tort liability that see deterrence as an important ingredient, and arguably an important purpose, of tort liability. The above analysis answers that question clearly: liability insurance sometimes promotes deterrence; whether and when it has done that or will do so in the future are empirical questions that are relevant to decisions about what tort liabilities should be preserved, what tort liabilities should be reduced or eliminated, and what tort liabilities should be expanded or created.

Deterrence theories of tort liability that omit consideration of liability insurance therefore are missing an important component of a complete portrait of tort

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294. *See* Catherine M. Sharkey, *Can Data Breach Claims Survive the Economic Loss Rule?*, 66 DePaul L. Rev. 339, 343 (2017) ("[T]his Article raises the question whether, as a more robust third-party liability insurance market emerges in response to a greater threat of tort liability, insurers will engage in further risk management, exerting more potent regulatory control."). Consider, in this regard, the reasoning of a Georgia federal district court, which recognized an expansive "legal duty to safeguard information" in *In re The Home Depot, Inc. Customer Data Security Breach Litigation*:

> To hold that no such duty existed would allow retailers to use outdated security measures and turn a blind eye to the ever-increasing risk of cyber attacks, leaving consumers with no recourse to recover damages even though the retailer was in a superior position to safeguard the public from such a risk.

No. 14-md-2583, 2016 WL 2897520, at *4 (N.D. Ga. May 18, 2016).

295. Sharkey, *supra* note 72, at 484. Recall this argument in the *SoCal Gas Leak Cases*, discussed in Section II.A.3.

296. Catherine M. Sharkey, *In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule*, 85 U. Cin. L. Rev. 1017, 1041-42 (2018) ("First, business interruption losses are the kind of losses that occur regularly even absent any wrongdoing; putative victims thus develop experience and expertise in terms of managing and reducing them. Second, such losses tend to accumulate over time; as a result, victims tend to operate over a long term horizon in terms of mitigating them. Taken together, the victim can structure its operations—for example, by maintaining spare parts, excess capacity, and alternative operating modes—so as to minimize any compounding of losses."); *see also* Restatement (Third) of Torts: Liability for Economic Harm § 7 cmt. b (Am. L. Inst. 2020) ("[T]he victims of economic injury often can protect themselves effectively by means other than a tort suit. They may be able to obtain first-party insurance against their losses, or recover in contract from those who do have good claims against the defendant.").

liability. Consequentialist theory could benefit from the recognition that liability insurance and deterrence have a complex and varied relationship that, depending on the context, does not necessarily result in less deterrence than would exist in the absence of liability insurance.

IV. LESSONS FOR THE COURTS: LIABILITY INSURANCE IN THE FUTURE OF TORT LIABILITY

Our main purpose in this Article has been to show that liability insurance is a characteristic ingredient of tort liability, and that theories of tort law can and should recognize this to be the case. Liability insurance certainly is a source of funding, as theorists tend to recognize, and the predominant source at that. But we have tried to show that liability insurance's reach into tort law is far deeper than solely as a funding source. For many years, however, some commentators have been suggesting that the absence of reference to liability insurance in judicial opinions is evidence that liability insurance has rarely been an influence on courts' decisions about the proper nature and scope of tort liability.[297] And as we have discussed, other tort theorists have simply ignored this influence. The significant judicial opinions we identified in Part II that expressly note the significance of liability insurance for their decisions help refute this contention. But we think that, nonetheless, the influence of liability insurance has often gone unexpressed by courts. We contended in Part III that consideration of liability insurance is consistent with both deontic and consequentialist tort theories, and should be pursued by both approaches. It follows that, whether a court's express or implied assumptions are deontic or consequentialist, judicial consideration of the availability of liability insurance will not violate these assumptions.

This Part addresses a cluster of considerations related to this proposition. In Section IV.A, we explore the reasons that courts often make no reference to liability insurance, even while its existence may have influenced their decisions. This leads us to suggest that the almost fetishistic ban on the mention of liability insurance in tort litigation should be relaxed, so that the norm can accommodate more candid recognition of the role played by liability insurance. We therefore propose that the parties be permitted to introduce into the record evidence of the availability, or nonavailability, of liability insurance against the form of tort liability that is at issue in their case.

297. *See, e.g.*, W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 589 (5th ed. 1984) ("Although liability insurance undoubtedly has had its effect, a dispassionate observer . . . might quite as readily conclude that the impact of insurance upon the law of torts has been amazingly slight."); *see also* Stapleton, *supra* note 84, at 820 (arguing that insurance is not and should not be relevant to tort liability).

We then turn in Section IV.B to the other lessons that can be learned by the courts and others considering the relation between possible expansions of tort liability and liability insurance. These lessons naturally divide into categories reflecting the two sides of the market. On the demand side, the key lesson is that, in order to be covered by liability insurance, a new liability must either fall into a preexisting form of coverage, or there must be sufficient demand for insurance against liability for the new tort to warrant the costs entailed in creating a new source of insurance for it. On the supply side, threats to the insurance function posed by potential moral hazard and by information uncertainty may hinder the development of insurance against new liabilities.

A. Reasons for the Absence of Express Reference to Liability Insurance

Courts do not mention liability insurance as frequently as we think it actually plays a role in their decisions. There are a number of reasons for this silence on the issue. First, it is likely that the dearth of academic discussion of liability insurance in work about tort theory contributes to this phenomenon. Even when there is no direct connection between academic theory and judicial decisions, focus on a subject in academic work may sometimes legitimize a similar focus in the courts.

Second, we think that courts often honor the frequently followed fiction that common-law decisions are to be based on precedent and principle, not on policy considerations. Mentioning the availability of liability insurance as a factor in decisions about the proper scope of tort liability would conflict with this fiction. A statement that the expansion of liability is desirable, in part because of the availability of insurance against the liability, would not maintain the fiction. It is possible that the longstanding prohibition on reference to liability insurance at trial—on the ground that it might prejudice the jury—has reinforced this concern, though the prohibition has no direct relevance to what the courts might say themselves.[298] As we noted earlier, the prejudice concern is probably also

298. Consider, in this regard, the Fourth Circuit's explanation of why the district court was justified in excluding considerations of insurance (from the list of factors considered by the New Jersey Supreme Court in *Cepeda v. Cumberland Engineering Co.*, 386 A.2d 816 (N.J. 1978), discussed *supra* note 92), when deciding whether a tort duty exists:

> Fed. R. Evid. 411 specifically provides that proof of insurance or non-insurance is not admissible "upon the issue whether the person acted negligently." West Virginia case law is in accord: "the jury should not be apprised in any way that the defendant is not insured against liability . . . ."

Pulice v. Wood/Chuck Chipper Corp., No. 96-2026, 1997 U.S. App. LEXIS 15171, at *10 (4th Cir. June 23, 1997) (citations omitted).

partly responsible for the failure of most states to adopt direct-action statutes that permit making liability insurers the actual defendants in tort suits.[299]

Third, during much of the twentieth century, many courts probably were of the view that, where tort liability went, there would automatically already be liability-insurance coverage of new liabilities, or liability insurance for them would be soon to follow. Whether or not that was true, this assumption made it unnecessary to talk about the role that liability insurance was playing in decisions about the proper scope of tort liability. A new liability could be anticipated to fit seamlessly into preexisting insurance without any express reference by the courts creating the new liability.

In this category are many of the new liabilities, or new theories of liability, that were created or recognized during the twentieth century, arising out of *Ybarra v. Spangard*,[300] *Summers v. Tice*,[301] *Soldano v. O'Daniels*,[302] *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,[303] *Greenman v. Yuba Power Products, Inc.*,[304] *Tarasoff v. Regents of the University of California*,[305] *Sindell v. Abbott*

299. *See supra* note 197 and accompanying text.

300. 154 P.2d 687 (Cal. 1944); *see supra* notes 77-78 and accompanying text.

301. 199 P.2d 1, 5 (Cal. 1948) (establishing the doctrine of alternative liability, noting that "[i]f defendants are independent tort feasors and thus each liable for the damage caused by him alone . . . the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment"); *see supra* note 235 and accompanying text.

302. 190 Cal. Rptr. 310 (Ct. App. 1983) (imposing a duty on business establishments to allow the use of their telephones by good Samaritans seeking to contact emergency services by distinguishing between nonfeasance and malfeasance). *Soldano* briefly addressed insurance. *Id.* at 315-16; *see supra* note 181 and accompanying text.

303. 439 F.2d 477 (D.C. Cir. 1970) (placing upon landlords a duty to take protective measures against criminal activity on premises). The court did not expressly mention liability insurance—though the issue was briefed. *See supra* note 76 and accompanying text.

304. 377 P.2d 897, 901 (Cal. 1963) (implementing the strict-liability regime outlined in Justice Traynor's *Escola* concurrence and noting that "[t]he purpose of such [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves"); *see supra* note 88 and accompanying text.

305. 551 P.2d 334 (Cal. 1976) (imposing a duty to warn third parties on mental-health professionals). *Tarasoff* cites the *Rowland* insurance factor in its duty analysis. *Id.* at 342.

Laboratories,[306] and *Daniels v. Evans*,[307] for example. In each instance, an existing form of liability insurance—CGL, homeowners, or medical-malpractice insurance—would have covered the new liability or new theory of liability, virtually automatically. For example, auto-liability insurance policies cover liability for damages imposed because of bodily injury and property damage arising out of an "auto" accident.[308] The additional liability that resulted from *Daniels*'s adopting an adult standard of care for minors involved in adult activities would have been covered automatically. Similarly, CGL insurance policies cover liability for damages imposed because of bodily injury and property damage caused by an occurrence, which essentially means anything that happens accidentally.[309] Thus, when strict products liability was adopted in *Greenman*, CGL insurance policies automatically covered it. The addition of an express strict products-liability exclusion would have been necessary in order to preclude insurance against the new form of liability. But of course, that never happened. Standard liability-insurance policies covering products liability contain no such exclusion.[310]

Finally, insurance is a technical subject about which many courts probably understand that they have little expertise.[311] And given the fiction that courts do

306. 607 P.2d 924 (Cal. 1980) (imposing market-share liability on drug manufacturers). In dissent, Judge Richardson drew attention to the potential increase in insurance premia. *See id.* at 941 (Richardson, J., dissenting) ("Moreover, considerable doubts have been expressed regarding the ability of the drug industry, and especially its smaller members, to bear the substantial economic costs (from both damage awards and high insurance premiums) inherent in imposing an industry-wide liability" (citation omitted)).

307. 224 A.2d 63 (N.H. 1966) (declining to extend reduced duty based on age to minors who engage in activities normally undertaken by adults).

308. ABRAHAM & SCHWARCZ, *supra* note 21, at 695.

309. *Id*. at 467, 481.

310. *See id.* at 468-72.

311. Federal-court judges might be at an even greater disadvantage than state-court judges for whom tort law and insurance constitute a significant portion of their docket. For a variety of reasons, more products-liability cases are making their way into federal court. *See* Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1014 (2007) (noting that "products liability trials take place roughly equally in state and federal courts" (citing Thomas C. Cohen, *Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts* (manuscript at 18) https://ssrn.com/abstract=912691 [https://perma.cc/WR6U-4RBS] (noting that while a mere 9% of tort jury trials are litigated in federal district courts, "[a]lmost half of product liability trials (46%) that reached a verdict in 1992, 1996, and 2001 were handled by the federal courts"))); *cf.* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415-20 (2006) (describing the emergence of "federalized common law," especially for "national market" products-liability cases removed to federal courts pursuant to the Class Action Fairness Act). This trend is likewise reflected in data from the Civil Statistical Tables for the Federal Judiciary, noting an increase in tort actions from 44,686 (2002), to 51,860 (2012), to 105,267 (2022). *See Caseload* not make policy, nor base their decisions on policy considerations such as the availability of liability insurance, there would naturally be little or nothing in the record or briefs on appeal addressing the availability of insurance against a proposed new liability. Courts would therefore have been given little guidance regarding the potentially technical considerations that bear on the availability of insurance for any particular liability.

It should come as no surprise, therefore, that we think it was and is a mistake for courts to rule out express consideration of liability insurance in making their decisions. Candor requires more open acknowledgment of the role played by liability insurance in judicial decisions. And more open acknowledgment would also lead to more sensible decision-making because (along with the evidentiary proposal we make below) it would lead to placing accurate information before the courts. Most importantly, however, a prerequisite for more open consideration and acknowledgment is relaxation of rules that preclude inclusion of information about liability insurance in the record.[312] We have in mind here information about the general existence of liability insurance against the form of tort

Statistics Data Tables, U.S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?page=4 [https://perma.cc/4C9B-UHKP] (providing statistics in tables titled "US District Courts: Civil Cases Filed by Jurisdiction, and Nature of Suit").

312. Existing rules address disclosure and discoverability of any insurance covering the defendant, but not insurance availability more generally, and preclude admissibility of the former. In the federal courts, all parties are required to disclose, prior to formal discovery, "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." FED. R. CIV. P. 26(a)(1)(A)(iv). Subsequent case law has clarified that this general rule requires disclosure of the contents of insurance agreements, not merely the policy limits. *See* Richard L. Marcus, *Relevancy to the Subject Matter—Existence and Limits of Insurance*, *in* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL § 2010 (3d ed.), Westlaw (database updated Apr. 2023). Despite mandatory disclosure to other parties under the Federal Rules of Civil Procedure, the Federal Rules of Evidence nevertheless prohibit the admissibility of "[e]vidence that a person was or was not insured against liability . . . to prove whether the person acted negligently or otherwise wrongfully." FED. R. EVID. 411. Rule 411 permits a trial court to admit evidence of liability insurance where it may be used for another purpose like "proving a witness's bias or prejudice or proving agency, ownership, or control." *Id.* Following the 1970 amendment of Federal Rule of Civil Procedure 26(b), nearly every state amended its rules to permit discovery of liability-insurance coverage. *See* Thomas v. Oldfield, 279 S.W.3d 259, 264 (Tenn. 2009) (noting that "forty-eight states and the federal rule" allow discovery of liability insurance). Tennessee is the only American jurisdiction where insurance coverage has not become discoverable as a matter of course through rule amendments. *See id.* at 262 (holding that liability insurance coverage is not subject to discovery because it is inadmissible under Tennessee Rule of Evidence 411). Utah, the only other jurisdiction holding out on mandatory insurance disclosure when *Thomas* was decided, has since amended its rule. *See* UTAH R. CIV. P. 26(a)(1)(D).

liability at issue, perhaps in the form of what has been called a Brandeis brief.[313] In our view, this information would consist of what have classically been called "legislative" facts that do not pertain to the facts of a particular case.[314] In any event, "adjudicative" facts pertaining to a particular case are subject to judicial notice outside the other rules of evidence, if they are from sources whose accuracy cannot reasonably be questioned.[315] The fact that insurance against cyber liability is available and what such insurance tends to cover, for example, would fit within one of these exceptions.

Moreover, admission of such evidence would correct the inevitable misconceptions under which courts that actually consider the availability of insurance sometimes labor.[316] We are struck by the misconceptions that were revealed in some of the cases we canvassed earlier. For example, the court in *Novartis* seemed unaware that drug companies currently do not purchase conventional liability insurance subject to moderate deductibles or SIRs.[317] The court in *O'Neil* seemed to think, mistakenly, that insurance against liability for "unknowable risks and hazards" was unavailable and not feasible.[318] And the courts in *The*

313. For an account of the paradigm of a Brandeis brief, see Marion E. Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783 (1958). We do not mean to suggest that evidence of the defendant's liability insurance should be admissible for consideration by the jury. That is a separate matter unaffected by our proposal.

314. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942).

315. *See* FED. R. EVID. 201(b); Kenneth S. Abraham, *Plain Meaning, Extrinsic Evidence, and Ambiguity: Myth and Reality in Insurance Policy Interpretation*, 25 CONN. INS. L.J. 329, 351-52 (2018).

316. *See, e.g.*, Nelson v. Nelson Hardware, Inc., 467 N.W.2d 518, 528 (Wis. 1991) (Steinmetz, J., concurring) ("The majority would apparently assert that used goods sellers should simply purchase insurance coverage against possible strict product liability claims that might be brought against such sellers. This 'solution' fails to recognize that the ability of an enterprise to insure itself is predicated on the availability of insurance. The majority position would assume such insurance is available and affordable. There is no clear basis for such an assumption.").

317. *See supra* text accompanying notes 103-106. Nor did the parties offer the kind of evidence of insurability we are suggesting. Instead, Novartis warned the court that imposing a duty would "wreak havoc" on products-based liability insurance markets. Reply Brief on the Merits at 25, T.H. v. Novartis Pharms. Corp., 407 P.3d 18 (Cal. 2017) (No. S233898), 2016 WL 6773109, at *25; Petition for Review at 24, *Novartis*, 407 P.3d 18 (No. S233898), 2016 WL 3208752, at *24 ("[T]he additional expense of insuring against such liability . . . could place the cost of medication beyond the reach of those who need it most."). And plaintiffs argued that neither the "passage of time" nor the "subsequent negligent acts of one or more successor manufacturers" rendered the claim uninsurable. Plaintiffs' Consolidated Answer to Amicus Curiae Briefs in Support of Respondent at 67, *Novartis*, 407 P.3d 18 (No. S233898), 2017 WL 665332, at *67.

318. *See supra* text accompanying note 161. In its opening brief, the defendant-manufacturer simply offered a legal argument: "[M]anufacturers[ ] who did not manufacture, sell, or otherwise distribute [the products] . . . did not market the product causing the harm and could

SoCal Gas Leak cases seemed incompletely informed, at best, of the scope and availability of business interruption and contingent business interruption insurance.[319]

It is important to emphasize that we are not suggesting that juries be made aware of the liability insurance coverage that protects the defendant in the case at hand. Rather, evidence regarding the existence of a form of liability insurance would be relevant to the legal decisions made by the trial and (especially) appellate courts, not to questions of fact for the jury. In our experience, expert reports are often submitted in support of motions, for example, without ever being placed before the jury. We envision something like motions for partial summary judgment on the question whether insurance against the type of liability at issue is available.

Nor are we suggesting that whether the defendant's liability insurance would cover any particular liability imposed on the defendant in the case at hand be adjudicated. That would complicate litigation and pose wholly unnecessary issues, such as whether the defendant's insurer would have a defense against this particular defendant's claim for coverage.[320] Rather, evidence of liability

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not treat the burden of accidental injury . . . as a cost of production against which liability insurance could be obtained." Opening Brief on the Merits at 27-28, O'Neil v. Crane Co., 266 P.3d 987 (Cal. 2012) (No. S177401), 2010 WL 11691412, at *27-28 (quoting Braaten v. Saberhagen Holdings, 198 P.3d 493, 501 (Wash. 2008)).

319. *See supra* text accompanying notes 193-195. The plaintiffs raised doubts as to whether they were "eligible" for "business-interruption insurance," and as to whether affected businesses had "sufficient resources to purchase enough coverage to protect against the type of catastrophic disruptions at issue here—unlikely in the extreme." Plaintiffs' Consolidated Answer Brief in Response to Amici Briefs Filed in Support of SoCalGas at 20, *The SoCal California Gas Leak Cases*, 441 P.3d 881 (Cal. 2019) (No. S246669), 2013 WL 12377059, at *20. SoCalGas countered that at least "large companies" have "access to first-party insurance to protect against economic interruption" and suggested that business interruption insurance is available provided that the first-party insured businesses can estimate their potential losses, which "many smaller enterprises" cannot. Respondent Southern California Gas Company's Response to Briefs of Amici Curiae at 21, *SoCalGas Leak Cases*, 441 P.3d 881 (No. S246669), 2018 WL 5635589, at *21.

320. We take the point that tort theorists—especially those of the corrective justice/civil recourse ilk (if they have indeed come this far with us!)—who are primarily concerned with doing justice between the parties might object that tort law should be explicitly concerned not only with the theoretical availability of liability in the marketplace, but also with the practical availability ex ante of such coverage for specific defendants. Thus, for example, if a particular defendant was unable to purchase any (or sufficient amounts of) liability insurance ex ante for some practical reason—ranging from climate change limiting the availability of homeowners insurance, to limited availability of auto coverage in minority neighborhoods, to temporary market disruptions due to a particularly hard market—that should matter in terms of the extent to which tort law should impose expansive liability in that particular case. Here, perhaps our true consequentialist inclinations are reflected, as we are primarily interested in courts' setting tort liability rules for all actors in society (not only the parties before the court).

insurance that is generally available to parties in the defendant's position, not whether the defendant has such insurance, should be made available to courts.

We understand that in some situations our proposal initially may work to the advantage of defendants who have ready access to experts. But most individual tort defendants are already being defended by auto or homeowners insurers; the availability and scope of these forms of insurance usually will not be at issue. And for corporate defendants, access to experts should not be too great a problem. In any event, over time that problem will be remedied, as such defendants gain access to and experience with experts on insurance and insurance markets.

Such liability insurance evidence is relevant to decisions about the proper scope of tort liability. Without that information in the record, the courts in tort suits are either working in partial darkness or are encouraged to do their own research out of the purview of the parties.[321] The result is either uninformed or nontransparent decision-making.

B. How Courts in Tort Cases Should Think About Liability Insurance

It is useful to analyze the question whether liability insurance will be available for a new liability from the standpoint of both demand and supply. On the demand side, liability insurance will cover certain new liabilities automatically, unless insurers decide to exclude the new liability. For other new liabilities, however, new liability insurance may not be created unless there is sufficient demand for coverage against them. On the supply side, both moral hazard and informational uncertainty may be obstacles.[322]

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321. Thus, Judge Richard Posner has observed that some "information tends to fall somewhere between facts that require adversary procedure to determine and facts of which a court can take judicial notice," candidly acknowledging that "judges and their law clerks often conduct research on cases, and it is not always research confined to pure issues of law, *without disclosure* to the parties." Rowe v. Gibson, 798 F.3d 622, 628 (7th Cir. 2015) (emphasis added).

322. Two other prerequisites to insurability are also likely in most instances to be beyond the ability of courts to take into account. The first concern is adverse selection—the greater tendency of those who know that they are at disproportionate risk of suffering loss to seek insurance. Insurers combat adverse selection mainly by obtaining information about applicants that enables them accurately to assess the risk they pose and then to charge risk-rated premiums. Whether insurers would be able effectively to combat adverse selection in insurance against a new form of liability is a question that even insurers probably could not know for certain when contemplating offering such insurance.

Another threat to insurability is correlated risk. Insurance operates in reliance on the law of averages. As long as the risk each policyholder poses is low and is independent of the risk posed by other policyholders, then some policyholders will suffer insured losses but most will not. The profits earned from insuring the latter will enable the insurer to pay the former. If the risk posed by policyholders is correlated, however, then the insurer will either suffer crushing losses or earn enormous profits. Correlated risk has rendered some kinds of insurance

1. *The Demand Side: The Prerequisite of Substantial Demand*

As we have indicated, standard commercial liability and homeowners insurance policies provide "general" liability insurance. They insure broadly against liability for bodily injury and property damage. Auto liability insurance insures broadly against liability arising out of an auto "accident." A new form of liability for bodily injury or property will tend to be automatically covered, unless a new exclusion is added. Demand is probably least important when this is the case, because inertia favors inaction: without the introduction of affirmative changes in existing coverage language, the new liability will be covered.

New forms of tort liability for intangible loss are another matter. Here, inertia disfavors insurability, even of limited expansions of liability for emotional loss. Auto and homeowners policies do not already cover liability for pure intangible loss, and CGL insurance policies cover only some limited, specified forms of liability for intangible loss.[323] The standard-form versions of these policies made no adjustment providing coverage when, over a period of decades, the courts began to recognize a narrow cause of action for "pure" negligently inflicted emotional distress (NIED) – that is, NIED that did not result from physical impact or injury, but from witnessing injury to another.[324]

We have found no explanation by the insurance industry for the failure of this form of insurance to be added to existing policies, but in our view the reasons are fairly obvious and illustrate a more general point. First, cases involving this form of liability are rare, as nearly as we can tell. The costs to insurers of

difficult or impossible to insure, but not others. For example, property insurance policies exclude coverage of loss caused by flood, because the same can damage many different properties. On the other hand, standard CGL insurance policies cover products liability, despite the fact that design defect liability is likely to involve a considerable number of units of a particular product, rather than the occasional one-off manufacturing defect.

The most accurate generalization we can offer about this process is that what happens initially is not necessarily what will happen over the long term.

323. These are false arrest, detention, or imprisonment; malicious prosecution; wrongful eviction; publication of material that is defamatory or constitutes an invasion of privacy; use of another's advertising idea; and infringing on copyright, trade dress, or slogan in an advertisement. However, coverage of these forms of liability is subject to a number of exclusions. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 472-73, 481.

324. *See* Dillon v. Legg, 441 P.2d 912, 923-25 (Cal. 1968). The Court cut back on the broader *Dillon* rule in *Thing* – in part based on insurability concerns. *See supra* note 160.

Most of the courts that have addressed the issue have held that coverage of liability for "bodily injury" does not comprehend liability for emotional distress, even when followed by physical manifestations of the emotional distress, such as nausea, sleeplessness, etc. *See, e.g.*, Liberty Corp. Cap. Ltd. v. Peacemaker Nat'l Training Ctr., LLC, 348 F. Supp. 3d 585, 591-92 (N.D. W. Va. 2018); Haecker v. Safeco Ins. Co. of Am., 676 F.3d 724, 727-29 (8th Cir. 2012).

adding coverage—revising their policies, getting the revisions approved in fifty states, gearing up to make actuarial calculations that would help them determine how much to increase premiums—might not well be worth the additional premiums they could charge.

Second, the new form of liability is not only comparatively rare, but obscure. Although the demand for the standard forms of liability insurance is probably quite inelastic, the marginal prospective policyholder would probably not value the additional coverage, even if the addition could have been effectively communicated to policyholders. Any increased premiums resulting from the additional coverage would have been perceived as a pure price increase, rather than an increased price for increased coverage.

It might be feasible to add insurance against liability for some other new forms of liability for negligently caused intangible injury to certain existing forms of liability insurance, but not to all. CGL insurance policies already provide a thin grab bag of coverages against liability for certain intangible harms. In principle, others could be added. Homeowners policies contain no such coverage, but here, too, in principle, certain forms of standard coverage could be added. However, if not everyone would desire such coverage, then making it a part of the standard policy would force some people to buy it anyway. Yet making it optional would add a transaction cost to the marketing of homeowners insurance that might not be worthwhile.

But it probably would not be feasible to add standard coverage of other potential new forms of liability to existing policies. Cyber liability is a good example. Initially, the demand for liability insurance was low because most defendants assumed they were protected from tort liability by the "no duty" economic loss rule. Some courts then began to impose duties to protect against security breaches.[325] When this form of liability began to emerge, not all CGL policyholders wanted to purchase coverage against it. At first, an optional endorsement providing coverage was developed. But after a time, this approach became unsuitable and freestanding cyber insurance was developed and marketed.[326] The process of developing such coverage is a major undertaking, and requires that sufficient demand for the coverage exist or be anticipated in order to justify the investment necessary, long before any premiums are earned. Cyber insurance premiums (typically for a combination of liability insurance and first-party

325. *See supra* note 294 and accompanying text.

326. *See* Kenneth S. Abraham & Daniel Schwarcz, *Courting Disaster: The Underappreciated Risk of a Cyber Insurance Catastrophe*, 27 CONN. INS. L.J. 408, 438 & nn.123-25 (2021).

coverage) grew sixty-one percent in 2021.[327] But it remains to be seen whether such a thin sliver of new liability will satisfy this precondition.

2. *The Supply Side: Moral Hazard and Uncertainty*

As we argued in Part III, liability insurance is consistent with, and actually reinforces, the purposes of tort liability. But liability insurers must continually combat the moral hazard that may be generated by insurance through various forms of risk-rating and other devices. And sometimes, insurance against a new tort liability would create more moral hazard than insurers can effectively combat, or public policy can tolerate being insured. In addition, even when, in theory, insurers might be able to effectively combat moral hazard, in practice, insurers may lack the information necessary to engage in the risk rating that would enable them to do so.

a. *Moral Hazard*

Insurance against many potential new forms of liability for intentionally caused intangible loss would be uninsurable as a matter of public policy.[328] In contrast, vicarious liability for intentionally caused bodily injury and property damage is insurable under the law of some states, and in some instances is insured under CGL insurance policies.[329] Certain liability insurance policies, sold offshore and therefore outside U.S. jurisdiction, have filled some of these gaps by providing insurance against liability for punitive damages imposed for causing bodily injury or property damage.[330] It is possible that similar offshore sources of coverage would be available to cover new liabilities for intentionally caused intangible loss notwithstanding the moral hazard involved, but that is far from a sure thing.

Nevertheless, liability for intentional cyber invasions or sex discrimination falling outside the purview of Title VII and IX's limitations to employment and education settings, for example, would likely be imposed, if it were imposed, because of the degree of wrongdoing associated with these forms of conduct.

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327. *See* Erin Ayers, *US Cyber Insurance Premiums Grew 61% in 2021: NAIC*, ADVISEN FRONT PAGE NEWS (Nov. 3, 2022), https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/451218715.html?rid=451218715&list_id=1 [https://perma.cc/LK4Y-45Y4]. Cyberinsurance policies typically cover both first- and third-party losses arising from a cyber incident. Initially, the first-party component attracted more attention. More recently, there is evidence that the market for third-party liability insurance is growing. *See* Sharkey, *supra* note 294, at 343 n.11.

328. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 103.

329. *See* Sharkey, *supra* note 15, at 428-30.

330. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 104.

The availability of insurance against these new kinds of liability could reasonably be viewed as undermining the very purposes for imposing the new liabilities—requiring wrongdoers to compensate their victims and deterring future wrongdoing. In short, courts should not expect liability for new intentional torts to be insurable, since courts themselves are likely to declare them not to be.

In contrast, liability for negligently caused harm does not generally pose excessive moral hazard. Insurers are accustomed to insuring against liability for negligence. They combat the moral hazard that insurance against liability for negligence creates through the various forms of risk-based pricing that we described earlier. Other factors are therefore relevant to the insurability of new torts that are actionable even in the absence of intent to cause harm. Obviously, however, not all new liabilities will push insurance into providing coverage.[331]

b. Information Uncertainty

Insurers need information about risk levels in order to set a price for insurance against a new liability, and at the outset of a new liability insurers may not have that information. Thus, occasionally insurers may add an exclusion applicable to the new form of liability until the data they need becomes available, or because they have become alarmed by a few instances of liability that they had not anticipated. For example, as cyber hacking and associated liability emerged, and policyholders made claims against insurers under their CGL policies, an exclusion for this kind of liability was added to the policies.[332] Alternatively, but even less frequently in our experience, insurers may refrain from adding exclusions but raise premiums in anticipation of their new exposure.

On the other hand, it is possible for new liabilities to be created that, due to uncertainty, turn out to undermine the insurance function and that do result in

331. For example, we are skeptical that insurance coverage would follow if courts were to recognize a tort of negligent rape, as proposed by Professors Jonathan Cardi and Martha Chamallas. *See* Cardi & Chamallas, *supra* note 30, at 594-99. First, modern homeowners policies do not only contain general-purpose intentional act exclusions. They also have recently added a provision excluding coverage of liability for "'[b]odily injury' or 'property damage' arising out of sexual molestation." *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 218. This exclusion would almost certainly preclude coverage of liability for negligent rape. Second, if the tort of negligent rape were recognized, it seems extremely likely that liability insurance policies that might otherwise cover liability arising out of the new tort would be revised so as to exclude coverage even more clearly than the sexual molestation provision in current homeowners policies does. Even apart from the moral hazard such coverage could create, insurers would have no interest in being seen to indemnify rapists, even if the result were to make more compensation available to the victims of rape. And, in our view, state insurance regulators would be unlikely to approve such insurance if insurers were to offer it.

332. *See* Abraham & Schwarcz, *supra* note 326, at 438.

the addition of new exclusions from existing coverage, or that do not generate development of insurance against the new form of liability. Various forms of liability for pollution—both common law tort liability for bodily injury or property damage, and statutory liability for the cost of pollution cleanup and site remediation, especially under the federal CERCLA regime—fell into this first category in the 1980s. The development of these liabilities eventually generated the incorporation of an "absolute" pollution exclusion into CGL and a number of other forms of insurance coverage.[333] In the latter category we might place liability for negligent infliction of emotional distress.

Exactly why these liabilities ended up not being insured has been the subject of considerable debate.[334] The scope of coverage provided by existing liability insurance policies is contestable, and whether new insurance will arise to cover a new liability is dependent on a variety of complex factors. It would be farfetched for courts to anticipate that highly controversial liabilities will automatically be or will continue to be insured. On the other hand, while liability insurance does not always follow tort liability, uncertainty is far from the obstacle to the development of new forms of liability insurance that it is sometimes thought to be. Insurance may well operate best when there is a fixed-in-advance distribution of determinable risks.[335] But insurance can operate, and has operated, in the face of considerable actuarial uncertainty.[336] The courts would do well to recognize these possibilities, but not to rely on specific predictions about them. The courts certainly should take warnings that a new form of liability will destabilize the insurance market or be "uninsurable" with a grain of salt. Liability insurance often develops to fill a need, despite predictions to the contrary.

CONCLUSION

The conceptual systems that tort theory constructs may be useful, but they are sometimes significantly incomplete. We have provided the additional

333. *See* ABRAHAM & SCHWARCZ, *supra* note 21, at 554 (discussing the addition of an "absolute pollution exclusion" to CGL insurance policies in the mid-1980s).

334. *See generally* Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Exclusion in Context and in Accord with its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1, 44 (1998) (intervening with, among other things, a "common sense comprehensive contract theory to the pollution exclusion").

335. *See, e.g.*, Tom Baker, *Uncertainty>Risk: Lessons for Legal Thought from the Insurance Runoff Market*, 62 B.C. L. REV. 59, 62 (2021) (paraphrasing the conventional wisdom on this issue); Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 946-47 (1988) (expressing the conventional wisdom on the issue).

336. Baker, *supra* note 335, at 106 (indicating that the insurance industry "so regularly operates in the realm of uncertainty that this ideal type should be abandoned as the model of how insurance generally works").

building blocks that much of tort theory needs in order to fill in the gaps. We have examined the different and important ways that liability insurance has influenced, and continues to influence, the development of tort liability, the actual operation of tort litigation, and the shape and scope of tort doctrine. We have shown that, far from ignoring liability insurance in the way that tort theory often has, the courts recognize the availability or nonavailability of liability insurance and take it into account in deciding when to impose and to limit the expansion tort liability. We have explained how both deontic and consequentialist theories of tort law can and should take liability insurance into account. And we have made recommendations to the courts that would help them more systematically take liability insurance into account when making decisions about the scope of tort liability. It is now time for much of tort theory to come out of the abstract world in which it has been operating by recognizing the central role that liability insurance plays in tort litigation, in the making of tort doctrine, and in the continual expansion of tort liability. Only through this recognition can tort theory come closer to reflecting tort reality.