

# An Irrational Combination: The Relative Expansion of Liability Insurance and Contraction of Loss Insurance

JEFFREY O'CONNELL\* AND JAMES GUINIVAN\*\*

In *Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation*,<sup>1</sup> Alfred F. Conard, James Morgan, and their colleagues completed the first comprehensive study of systems of compensation for injury and illness in the United States. The study compiled data for the amount of benefit payments made in the year 1960 by the major systems of compensation, including tort liability on the one hand and loss insurance on the other,<sup>2</sup> including workers' compensation, private loss insurance (such as health and disability insurance), sick leave, social insurance (such as Medicare and Medicaid), public assistance, veterans' benefits, and other public and private health care and disability sources. The desire to bring this valuable study up to date resulted in *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*,<sup>3</sup> in which the senior author of this Article and a co-author compiled comparable data for the year 1982, summarizing developments in injury and illness reparation since 1960. In this current Article, we undertake the task of updating the data concerning benefit payments by the various systems, partly just to check the overall situation by further tracking. Our main purpose in this Article, however, is reflected in the final footnote to the earlier article: "The senior author expects shortly to do a further piece expanding on the significance—from a general, as well as tort law perspective—of the relative roles of tort liability insurance and other forms of public and private [loss] insurance,"<sup>4</sup> such as health and disability coverages.

An important finding from the Conard-Morgan study was the dramatic rise from 1940 to 1960 in private health insurance and social insurance payouts compared to the slower growth in liability insurance payouts.<sup>5</sup> Ironically, the results of the further

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\* John Allan Love Professor of Law, University of Virginia. B.A., 1951, Dartmouth College; J.D., 1954, Harvard University.

\*\* Associate, Pepper, Hamilton & Scheetz, Washington, D.C. B.A., 1976; J.D., 1988, University of Virginia.

The authors wish to express their appreciation to Professors Alfred C. Conard of the University of Michigan Law School, and Kenneth Abraham and John Monahan of the University of Virginia Law School, who graciously read and commented on an earlier draft of this Article. We also received invaluable help from research assistant Edmund Graff, University of Virginia Law School, Class of 1989. The authors, of course, are responsible for any errors of fact or judgment that may remain.

1. A. CONARD, J. MORGAN, A. PRATT, C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964) [hereinafter CONARD & MORGAN].

2. Tort liability insurance is payable based on the defendant-insured's faulty conduct or product, with consideration also given to the claimant's fault. Loss insurance, on the other hand, is payable without reference to fault on anyone's part (lacking intentional—or perhaps other egregious—conduct on the claimant's part). For a description of loss insurance systems, see O'Connell & Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J. 913 (1986).

3. *Id.*

4. *Id.* at 949 n.192.

5. CONARD & MORGAN, *supra* note 1, at 66–74.

It should be noted that in 1960 a significantly greater share (80%) of total tort personal injury compensation was for injury in auto accidents than was the case in 1982 (70%) or 1984 (68%). See *infra* Appendices A, B, C. Although tort compensation as a whole grew by 1562% from 1960 to 1982 and by 26% from 1982 to 1984, auto liability for personal injury only grew by 1360% and 22% over the same periods (compared with increases of 1380% and 13%, respectively, for the universe of all compensation systems). Clearly, the explosion in the tort system has been fueled primarily by

tracking up to 1984 show a high relative growth rate in tort liability insurance compared to loss insurance. That contrast should make us all question our society's unconscious decision to expand, relatively speaking, our worst compensation system. We call the tort liability insurance system our worst compensation system because it has high transaction costs coupled with dilatory and fortuitous payment (or lack thereof). This makes it incongruous indeed to stint simultaneously on systems which are better from those same points of view. It should also be noted that expanded loss insurance benefits exacerbate liability insurance problems by subsidizing liability insurance claims (especially when coupled with the contingent fee); *i.e.*, a party well covered by loss insurance benefits is a much more aggressive, persistent, and ultimately successful tort claimant.<sup>6</sup>

In light of the findings contained herein, we offer a suggestion of how to use the leverage of growing tort liability insurance to contract its worst aspects while correspondingly expanding it insofar as it can be shaped to mirror and supplement loss insurance.

Table 1 presents a summary of the amounts paid in 1960, 1982, and 1984 by the major categories of loss-shifting systems examined by Conard and his colleagues.<sup>7</sup> The table also shows what percentage of the universe of all reparation systems each category constituted in each of the three years.

Table 2 shows what proportion of the total was gained or lost by the principal loss-shifting systems during the periods 1960 to 1982 and 1982 to 1984.

As Table 2 indicates, during the period from 1982 to 1984, private loss insurance grew even faster (as a percentage of the total loss reparation pie) than did tort liability. But tort liability, which took twenty-two years (from 1960 until 1982) to grow from 7.9 percent to 8.8 percent of all reparations systems (an increase of just under one percent), took only two more years to gain another percentage point. Admittedly, during the same two years, private loss insurance grew more, by 1.9 percent of the whole. But it must be noted that private loss insurance in 1982 represented a much larger share (29.1 percent) of the total reparation picture than did tort (with only 8.8 percent), so that the growth in tort was much more significant than that in private loss insurance. In fact, although private loss insurance grew from 29.1 percent of the total to 31.0 percent, this was far from recapturing the 36.5 percent share held by private loss insurance in 1960. Tort liability, by contrast, has been rising steadily since 1960.<sup>8</sup>

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increases in nonauto fields, which were a relatively insignificant part of the tort picture in 1960. Indeed, it may be the case that without the enactment of no-fault auto statutes in several states, automobile liability payouts—and total tort payouts—would have been much higher. In effect, restraints on the expansion of auto liability have helped to disguise dramatic expansion in other areas. See TORT POLICY WORKING GROUP, U.S. DEP'T OF JUSTICE, AN UPDATE ON THE LIABILITY CRISIS 43-44 (1987). Two such "crisis" areas are products liability and medical malpractice, which have shown a tremendous increase both in number of successful lawsuits and in average damage awards. *Id.* at 33-36; see also O'Connell & Barker, *supra* note 2, at 929.

6. See *infra* notes 20-22 and accompanying text.

7. More detailed tabulations—and references to sources—are set forth in Appendices A (for 1984), B (for 1982), and C (for 1960). The figures do not add up exactly due to rounding.

8. Even if the 1982-84 trends continued to the year 2004, private loss insurance would only account for 38.5% of all reparations systems, just a little more than the 36.5% share it held in 1960, while tort would have grown from 7.9% to 13.3% of the total. See *infra* Table 1 and Table 4.

Table 1  
Benefits Paid for Injury and Illness by Principal Loss-Shifting Systems,  
1960, 1982, 1984

Columns do not add perfectly due to rounding.

	Amount (dollars in billions)			Percentage of Total		
	1960	1982	1984	1960	1982	1984
Total Tort (including no-fault)	1.9	31	39	7.9%	8.8%	9.8%
Workers' and Other Employment-Mandated Compensation	1.3	18	21	5.4%	5.0%	5.3%
Private Loss Insurance	8.7	103	125	36.5%	29.1%	31.0%
Sick Leave	1.2	11	11	5.1%	3.0%	2.8%
Social Insurance	4.3	109	117	18.1%	30.8%	28.9%
Public Assistance	1.5	39	45	6.3%	11.0%	11.1%
Veterans' Benefits	1.8	19	21	7.3%	5.4%	5.1%
Other Public Health	2.3	13	13	9.4%	3.7%	3.2%
Private Health	1.0	11	11	4.0%	3.0%	2.8%
Total	24	354	404	100%	100%	100%

Table 2  
Change in Percentage of All Loss-Shifting Systems

	1960-1982	1982-1984
Total Tort	+ .9%	+ 1.0%
Workers' and Other Employment-Mandated Compensation	- .4%	+ .3%
Private Loss Insurance	- 7.4%	+ 1.9%
Sick Leave	- 2.1%	- .2%
Social Insurance	+ 12.7%	- 1.9%
Public Assistance	+ 4.7%	+ .1%
Veterans' Benefits	- 1.9%	- .3%
Other Public Health	- 5.7%	- .5%
Private Health	- 1.0%	- .2%

Perhaps one reason why tort shows such steady and unimpeded growth in contrast to the more restrained growth in private and social insurance, is that the latter systems can be limited by the public's refusal to pay higher premiums or to vote for higher taxes.<sup>9</sup> These systems are expanded only by affirmative decisions to pay premiums and taxes, which are set on the basis of the total cost of the systems. The tort system, in contrast, expands with individual decisions by judges and juries to compensate loss—decisions made with little or no eye to the overall cost of the system.

9. Taxes are relevant to insurance systems, not only because (1) taxes fund social insurance, but also because (2) insurance premiums paid by businesses are tax-deductible and therefore subsidized by the taxpayers, and (3) benefits are not taxable even when they replace lost income (which would have been taxable).

Table 3  
Increase (or Decrease) in Principal Loss-Shifting Systems, 1982-1984

	Amount (dollars in millions)	Percentage
Total Tort (including no-fault)	+\$ 8,175	+26.1%
Workers' and Other Employment-Mandated Compensation	+ 3,602	+20.3%
Private Loss Insurance	+ 22,476	+21.9%
Sick Leave	+ 782	+ 7.4%
Social Insurance	+ 7,870	+ 7.2%
Public Assistance	+ 5,874	+15.0%
Veterans' Benefits	+ 1,614	+ 8.4%
Other Public Health	- 200	- 1.5%
Private Health	+ 300	+ 2.8%
Total	+\$50,493	+14.3%

Table 4  
Compensation Paid by Principal Loss-Shifting Systems, 2004<sup>10</sup>  
(assuming continuation of 1982-84 trends)

	Amount (millions of dollars)	Percentage of Total Benefits
Total Tort (including no-fault)	\$121,219	13.3%
Workers' and Other Employment-Mandated Compensation	57,391	6.3%
Private Loss Insurance	350,098	38.5%
Sick Leave	19,209	2.1%
Social Insurance	195,575	21.5%
Public Assistance	103,681	11.4%
Veterans' Benefits	36,921	4.1%
Other Public Health	11,000	1.2%
Private Health	14,200	1.6%
Total	\$909,294	100%

The significance of the increase in tort liability may be illustrated by a look at Table 3, which shows how much each loss-shifting system increased in absolute terms during the period 1982 to 1984. As can be seen, the tort system led the increase, growing nearly twice as fast as the universe of all systems (26.1 percent as compared to 14.3 percent). Workers' compensation, private loss insurance, and public assistance also grew significantly.

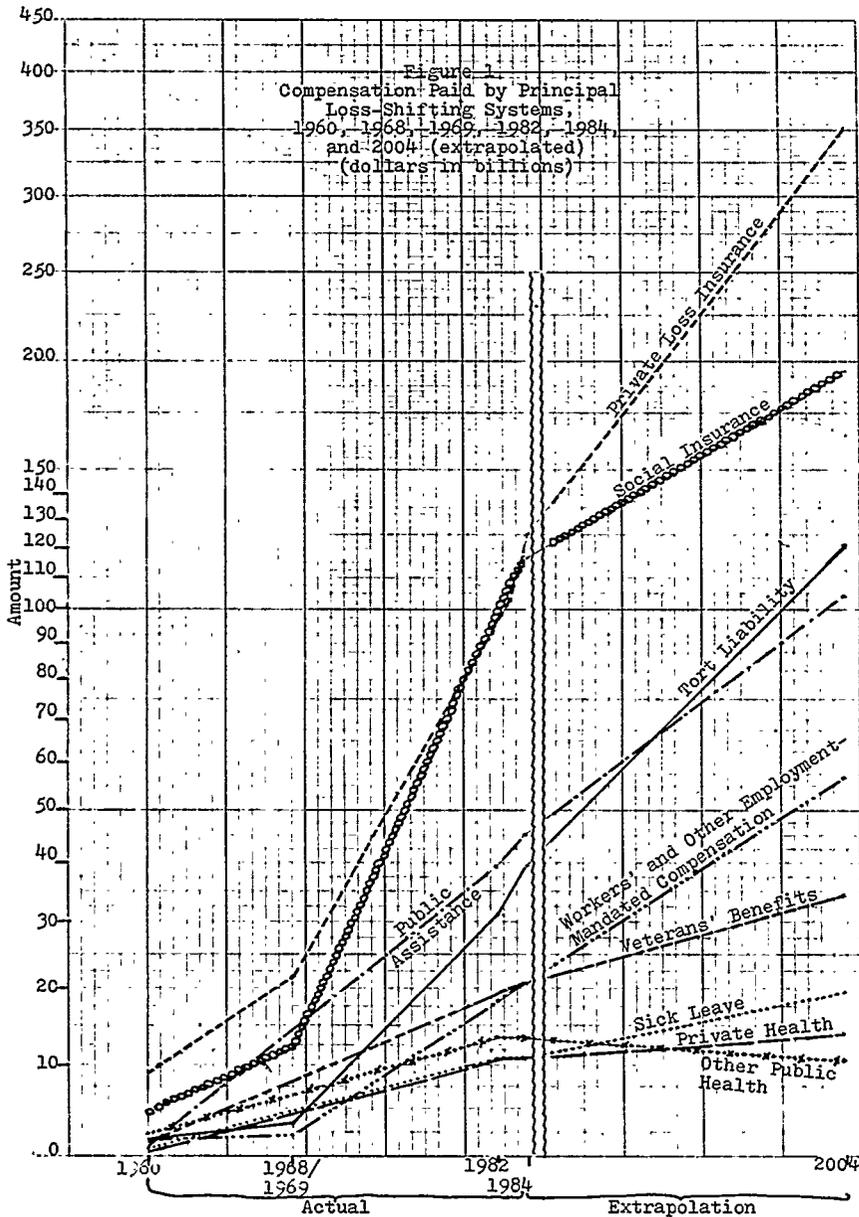
Table 4 (which the reader should compare to Table 1) illustrates more vividly the

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10. For comparable figures for 1960, 1982, and 1984, see Table 1 and Appendices.

disproportionate recent increase in tort compensation, as contrasted with the less dramatic increase in other loss-shifting systems, by extrapolating the trends shown from 1982 to 1984 to a period of twenty-two years (corresponding to the period between the original study in 1960 and the 1982 update). This extrapolation is not offered as a prediction, but simply as an indication of the direction taken by the 1982-84 trends; indeed, it would be very surprising if the rate of increase did not level off for some compensation systems and turn upward for others.

Figure 1 below graphically displays these trends. The chart in this figure shows



the amounts paid by major loss-shifting systems in 1960, 1982, and 1984,<sup>11</sup> plus benefit amounts for selected loss-shifting systems in the years 1968 and 1969.<sup>12</sup> The chart then illustrates the extrapolation reported in Table 4, showing what would happen if the trends of the two years from 1982 to 1984 were continued through 2004. At the rate tort liability was growing between 1982 and 1984, by 2004 it would be exceeded only by private loss insurance and social insurance—and it would be gaining on both these systems.

We are constantly confronted in popular and technical journals with several competing and yet complementary facts: (1) The inadequacy of insurance for health care in the United States;<sup>13</sup> (2) the rising costs of even that inadequate coverage;<sup>14</sup> and (3) the prodigious costs involved in meeting the shortfall between supply and demand for such coverage.

And all this concerns only health care; it says nothing about the huge unmet losses from lost wages following injury or illness. For a typically seriously injured person in the United States, wage loss generally outstrips health care costs, constituting about three-quarters of economic losses from defective products, medical malpractice, or serious auto accidents.<sup>15</sup> And if health care insurance is inadequate in

11. See *supra* Table 1 and accompanying text.

12. In 1968, automobile bodily injury insurance benefits amounted to \$2.7 billion, and workers' compensation benefits to \$2.4 billion. O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 810-11 (1973). In 1969, private loss insurance benefits were \$22 billion, social insurance benefits were \$12.2 billion, and nonautomobile bodily injury liability insurance benefits were \$738 million. *Id.* These amounts are also reported in J. O'CONNELL, *ENDING INSULT TO INJURY: NO FAULT INSURANCE FOR PRODUCTS AND SERVICES* 79 nn.39-41, 43, 44 (1975) [hereinafter J. O'CONNELL]. (In Figure 1 above, the 1968 amounts for auto liability payouts are combined with the 1969 amounts for nonauto liability payouts.)

13. About 37.2 million persons, or 15.5% of all Americans, had no health insurance in 1985 according to the Senate Committee on Labor and Human Resources. Washington Post, Oct. 4, 1987, at H1, col. 3; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 8 (Table 2). Even those with insurance may find that it fails to cover a large part of their medical bills; elderly patients, for example, must pay out of their own pockets the quarter of their medical expenses which is (on average) left uncovered by Medicare and by private health insurance. N.Y. Times, Nov. 1, 1987, § 4 (Week in Review), at 7, col. 1. It is too soon to tell exactly what total fraction of expenses will remain uncovered after the recent passage of the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683, which did not significantly cover long-term nursing care. The elderly are especially hard hit by costs of nursing care, which account for 42% of their out-of-pocket medical costs. N.Y. Times, *supra*.

14. The cost of medical insurance is a function of medical costs generally, so that, all other things (in particular, the costs of administering insurance) being equal, an increase in health care costs will push up the price of insurance premiums. From 1981 to 1986, the cost of medical care rose 44%, and that of prescription drugs rose 59%, while the Consumer Price Index for all items rose only 17.6% over the same period. N.Y. Times, *supra* note 13. This increase inevitably pushes health insurance premiums up, as was illustrated dramatically in September 1987, when the Reagan administration sought a 38.5% increase in premiums for health insurance under Medicare. N.Y. Times, Sept. 15, 1987, at A1, col. 6. *But see Accident and Health Premiums*, BEST'S REVIEW, LIFE/HEALTH INSURANCE EDITION, Dec. 1987, at 92, for the claim that premiums did not rise sufficiently in 1986 to keep pace with health costs (with insurers consequently suffering severe underwriting losses). Either way, costs of health care are on the rise.

15. The consistency of the mix of medical versus wage loss in various types of cases has been striking: for medical malpractice cases, 70.8% of injury losses have been wage loss, 27.1% medical loss, and 2.1% other expenses. INSURANCE SERVICES OFFICE, REPORT OF THE ALL-INDUSTRY COMMITTEE, SPECIAL MALPRACTICE REVIEW: 1974 CLOSED CLAIM SURVEY, TECHNICAL ANALYSIS OF SURVEY RESULTS 54 (1976). For product liability cases, 72.0% of injury losses have been wage loss, 22.5% medical loss, and 5.5% other expenses. INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 45, 48 (1977). These figures closely match those for serious automobile accidents of 74% of injury losses for wage loss, 22% for medical loss, and 4% for other losses. See U.S. DEP'T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES: A REPORT TO THE CONGRESS AND THE PRESIDENT 6 (1971); the auto figures were computed using the losses listed in *id.*, Table 2 for Medical Expense, Wage Loss and Other Expenses (excluding property damage).

the United States disability insurance covering wage loss is even much more exiguous—and even much less likely to improve.<sup>16</sup>

Finally, it must also be pointed out how inadequate is life insurance for the typical family in the United States.<sup>17</sup>

Yet, despite—nay, even *because* of—all this inadequate first-party loss insurance coverage, a much less efficient form of insurance, purporting to cover medical and wage loss from death, illness, and injury, expands—namely, tort liability insurance.<sup>18</sup>

In a measure it is because judges and juries see the victims of illness and injury (or their survivors) so inadequately covered by loss insurance that they invoke liability insurance as the only alternative for covering huge, unmet losses.<sup>19</sup> And yet, irony of ironies, the growth of first-party loss insurance coverage does not lessen the growth of liability insurance but *expands* it! Adding to systems of social and private loss insurance exacerbates tort liability insurance by subsidizing further and more aggressive tort litigation by loss insurance recipients now insulated from dire need by that very same loss insurance. This fact, when combined with hiring a lawyer at a no-risk, contingent fee, means that loss insurance recipients are no longer induced to settle their tort claims for comparatively low and quick payments.<sup>20</sup> Thus, there are indications that no-fault auto insurance has served to subsidize and thereby inflate the very tort liability it was designed to deflate.<sup>21</sup> But the best evidence of this phenomenon is provided by the huge rise of third-party liability suits by payees of workers' compensation insurance: almost half of all product liability payments (42 percent) are made to those already covered by workers' compensation—society's most comprehensive and generous scheme of social insurance.<sup>22</sup>

What is to be done about the anomaly of the overly restricted growth of loss insurance coupled with the overly expansive growth of liability insurance?

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16. In 1984, 59.3 million persons had some form of short-term disability income protection (including sick leave), and only 22.9 million had any kind of long-term disability income protection. HEALTH INSURANCE ASS'N OF AMERICA, 1986-1987 SOURCE BOOK OF HEALTH INSURANCE DATA 14 (Table 1.5). This was out of a total of 106.7 million employed workers. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 374 (Table 637).

17. Although 85% of American families (and 70% of adult Americans) were covered by life insurance in 1985, AMERICAN COUNCIL OF LIFE INSURANCE, 1986 LIFE INSURANCE FACT BOOK 6, the amount of protection owned by these families equalled less than 26 months of disposable personal income per family, *id.* at 15, even though an industry rule of thumb holds that the average family needs enough insurance to cover four to five years' income, S. PORTER, SYLVIA PORTER'S NEW MONEY BOOK FOR THE 80s 930-31 (1979).

18. See *infra* notes 20-22 and accompanying text.

19. Inadequate coverage from loss insurance for serious injuries is indeed often the case. J. O'CONNELL, *supra* note 12, at 145-47. See also O'Connell & Barker, *supra* note 2, at 917-18. Even so, judges and juries are usually shielded from knowledge of what private loss insurance benefits are available to individual victims appearing as plaintiffs before them. So even in those cases where a victim is completely (or nearly completely) compensated for economic losses by nontort sources, see, e.g., *id.* at 916, 918, judges and juries are encouraged to assume that the victim is exclusively or predominantly dependent on tort payment.

20. This is not to say that greater bargaining power for tort claimants (especially seriously injured ones) is necessarily bad; what we do question is whether, if society is to provide greater aid to such injured parties, traditional tort litigation is the best way to do it.

21. See O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 70-72 (1986).

22. INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 63 (1977); U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT, at VII-85 (1977); O'Connell & Barker, *supra* note 2, at 933.

At the outset, a proposal should be considered for curbing the excesses of tort liability insurance, without shutting off a means of supplementing often inadequate loss insurance. Under this proposal, defendants in personal injury suits will be encouraged to offer promptly to pay injury victims' economic losses above their collateral sources of loss insurance, periodically as such excess losses accrue, plus an hourly fee for the claimants' lawyers. If a defendant does not make such a prompt offer, defenses based on a claimant's fault will be forfeited; in addition, the defendant must pay the winning plaintiff's lawyers' contingent fee in addition to the award itself. On the other hand, a defendant making such an offer will foreclose further pursuit of a tort claim in the normal situation; a plaintiff refusing to accept such an early offer must then prove a case of faulty conduct or product by both a heightened standard of (1) care (gross or wanton conduct) and (2) proof (beyond a reasonable doubt, or at least by clear and convincing evidence). In addition, a losing plaintiff and his counsel will be jointly and severally liable for defendant's counsel fee.<sup>23</sup>

Under this proposal, then, liability insurance is still available to pay losses not met by loss insurance but now does so in a manner similar to such loss insurance, *i.e.*, payable promptly and periodically for economic—not noneconomic—loss, with far less spent on transaction costs in determining issues of faulty conduct or products and the value of pain and suffering. And yet cases of egregious, quasi-criminal conduct, where recompense limited to normal insurance reimbursement is arguably not sufficient, are left to vindication by pursuit of tort claims under appropriate quasi-criminal criteria of fault and proof.

Recently, there has been strong interest—both at the state and federal levels—in mandating health insurance benefits both for the unemployed and for employees (mostly employed by small businesses) who do not receive health insurance as a fringe benefit. In Massachusetts, for example, Governor Michael Dukakis proposed in September 1987 a bill that would require nearly all employers to provide health insurance for their employees. A new state agency would cover the unemployed and anyone else lacking health insurance coverage.<sup>24</sup> A similar proposal has been advanced by Senator Edward M. Kennedy (D-Mass.) at the federal level.<sup>25</sup> At both

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23. For further elaborations of this scheme, see O'Connell, *Balanced Proposals for Product Liability Reform*, 48 OHIO ST. L.J. 318 (1987); O'Connell, *A Correct Diagnosis of the Ills of Liability Insurance—and a False Cure*, 63 NOTRE DAME L. REV. 161 (1988). On the subject of compensation schemes' effect on deterrence, see especially these two articles respectively at 323–24 and 174–75.

24. Washington Post, Sept. 10, 1987, at A15, col. 1. The Dukakis plan, in modified form, was recently adopted as a part of Mass. Gen. L. ch. 23 (1988).

Such a plan—or any similar proposal at the state level—may face an obstacle in the Federal Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, Title I, § 2, 88 Stat. 832 (1974), codified at 29 U.S.C. §§ 1001–1462 (1982 & Supp. 1986) which preempts state regulation of employee benefit plans, Pub. L. No. 93-406, Title I, § 514(a), 88 Stat. 897 (1974), codified at 29 U.S.C. § 1144(a) (1982). Nevertheless, this preemption does not prohibit states from taxing and regulating insurance, including health insurance, ERISA, Pub. L. No. 93-406, Title I, § 514(b), 88 Stat. 832 (1974) (as amended by Pub. L. No. 93-473, Title III, § 302(b), 96 Stat. 2613 (1983) and Pub. L. No. 98-397, Title I, § 104(b), 98 Stat. 1436 (1984), codified at 29 U.S.C. § 1144(b) (1982 & Supp. 1986)); it also arguably permits states to tax employers or employees in order to set up a state-administered system of health care, allowing a credit against this tax for privately provided health benefits. See Bovbjerg & Kopit, *Coverage and Care for the Medically Indigent: Public and Private Options*, 19 IND. L. REV. 857, 906–09 (1986).

25. See S. 1265, 100th Cong., 1st Sess. (1987); H.R. 2508, 100th Cong., 1st Sess. (1987); see also Hamilton, *Business in Healthy Debate Over Insurance*, Washington Post, Oct. 4, 1987, at H1, col. 3. The Senate Committee on

the federal and state levels, such proposals are being stoutly resisted as too costly to both private employers and the government.<sup>26</sup>

Could a compromise be reached, reflecting the very real need for assurance of broad scale health insurance, despite its impact on higher health insurance costs, with a corresponding reduction in liability insurance costs? At the same time, could we encourage liability insurance benefits to be used to promptly and efficiently supplement insurance payments when health insurance and other forms of loss insurance (including disability coverage) prove inadequate? Such a goal could be achieved by legislating that employers (and the state), when providing health insurance that meets the standards set by the mandatory health insurance legislation, will be allowed to deter tort claims by any beneficiary of the mandatory health insurance by making early offers to pay periodically such a tort claimant's net economic loss. That way, there will be a reduction in liability insurance costs to the extent private employers and the state are providing health insurance that meets legislative standards, with substantial, and for some, increased, health insurance costs.

Note that a more modest experimentation with this device could call for only the state, when a tort defendant, to be allowed to make early offers of net economic loss, thereby deterring tort claims against the state, only to those whose health insurance is being paid by the state (those who are unemployed or otherwise without health insurance). This mirrors a federal no-fault health care bill introduced into recent Congressional sessions<sup>27</sup> which would allow health care providers to forestall, by offering to pay net economic loss, the medical malpractice claims of those whose health insurance is funded by the federal government, including those covered by Medicare, Medicaid, veterans' and other military benefits, and CHAMPUS (Civilian Health and Medical Program of the Uniformed Services), which provides coverage for military dependents.

### *Conclusion*

It is not our contention that under the proposal advanced above any reduction in liability costs will by any means exactly correlate with increases in costs from loss insurance mandated under proposals such as those advanced by Senator Kennedy, Governor Dukakis, and others. Rather, our thesis is only that whereas liability insurance dollars should be available to supplement often inadequate amounts of private and social loss insurance, unless liability costs are thus utilized under proposals of the type we advance, the rising availability of loss insurance will serve to increase liability costs—a wasteful tendency too long tolerated as our society grapples with rising insurance costs and needs.

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Labor and Human Resources voted February 17, 1988, to report S. 1265 to the full Senate. *Senate Labor OKs Mandated Benefit Measure*, 46 CONG. Q. WEEKLY REP. 363-67 (Feb. 20, 1988).

26. See, e.g., Feldstein & Feldstein, *The Wrong Target for Catastrophic Insurance*, column in Washington Post, Oct. 28, 1987, at A19, col. 1 (catastrophic health insurance for Medicare recipients criticized as too costly); N.Y. Times, Oct. 11, 1987, § 1, at 37, col. 1 (Earlier Dukakis proposal rebuffed by legislators alarmed at its cost); Hamilton, *supra* note 25, at H1, col. 3 (U.S. Chamber of Commerce claims federal bill mandating insurance through employers would lead to reductions in pay, other benefits, and hiring levels).

27. See, e.g., H.R. 3084, 99th Cong., 1st Sess. (1985).

Appendix A  
Benefits Paid for Injury and Illness  
by Principal Loss-Shifting Systems, 1984  
(dollars in millions)

	Survivor	Disability	Medical	Total	% of All Benefits
<b>Tort Liability<sup>1</sup></b>					
Auto Personal Injury					
Insured Payments	—	—	—	\$26,521 <sup>2</sup>	
Uninsured Payments	—	—	—	318 <sup>3</sup>	
Other Insured Personal Injury Liability Payments					
Medical Malpractice	—	—	—	2,572 <sup>4</sup>	
Other	—	—	—	7,827 <sup>5</sup>	
Railroad and Motor Carrier Personal Injury Claims				2,251 <sup>6</sup>	
<b>Total Tort Liability</b>				<u>39,489</u>	<b>9.8%</b>
<b>Workers' and Other Employment-Mandated Compensation<sup>7</sup></b>					
Workers' Compensation	1,590	11,569	6,370	19,529 <sup>8</sup>	
State Temp. Disab. Ins.	—	1,800	—	1,800 <sup>9</sup>	
R.R. Temp. Disab. Ins.	—	42	—	42 <sup>10</sup>	
<b>Total Workers' and Other Employment-Mandated Compensation</b>	<u>1,590</u>	<u>13,411</u>	<u>6,370</u>	<u>21,371</u>	<b>5.3%</b>
<b>Private Loss Insurance<sup>11</sup></b>					
Individual Policies	8,803	1,253	4,841	14,897	
Group Policies	7,655	3,907	98,879	110,441	
<b>Total Private Loss Ins.</b>	<u>16,458<sup>12</sup></u>	<u>5,160<sup>13</sup></u>	<u>103,720<sup>14</sup></u>	<u>125,338</u>	<b>31.0%</b>
Sick Leave <sup>15</sup>	—	11,389	—	11,389 <sup>16</sup>	<b>2.8%</b>
<b>Social Insurance<sup>17</sup></b>					
OASDI	33,917	17,779	—	51,696 <sup>18</sup>	
Railroad Retirement	1,679	681	—	2,360 <sup>19</sup>	
Federal Civil Service	2,963	4,080	—	7,043 <sup>20</sup>	
Other Federal	536	1,446	—	1,982 <sup>21</sup>	
State/Local	903	1,987	—	2,890 <sup>22</sup>	
Medicare A	—	—	33,050	33,050 <sup>23</sup>	
Medicare B	—	—	17,854	17,854 <sup>24</sup>	
<b>Total Social Insurance</b>	<u>39,998</u>	<u>25,973</u>	<u>50,904</u>	<u>116,875</u>	<b>28.9%</b>
<b>Public Assistance<sup>25</sup></b>					
Medicaid	—	—	33,891	33,891 <sup>26</sup>	
General Assistance	—	—	1,658	1,658 <sup>27</sup>	
SSI	—	7,392	—	7,392 <sup>28</sup>	
Other	—	—	2,000	2,000 <sup>29</sup>	
<b>Total Public Assistance</b>	<u>—</u>	<u>7,392</u>	<u>37,549</u>	<u>44,941</u>	<b>11.1%</b>
Veterans Benefits <sup>30</sup>	3,230 <sup>31</sup>	10,578 <sup>32</sup>	6,973 <sup>33</sup>	20,781	5.1%
Other Public Health	—	—	13,000	13,000 <sup>34</sup>	3.2%
Private Health <sup>35</sup>	—	—	11,200	11,200 <sup>36</sup>	2.8%
<b>Total All Systems</b>				<b>\$404,384</b>	<b>100%</b>

## SOURCES FOR APPENDIX A

1. See O'Connell and Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J. 913 (1986). Because of the lump sum nature of tort awards, these benefits cannot be separated into the components of survivor, disability, and medical benefits. Note too that the figure for tort awards reflects compensation for noneconomic loss (such as pain and suffering), which does not fall under any of the three subcategories, and does not include certain uninsured tort payments (such as product liability or medical malpractice damages paid by self-insuring institutions). Even including noneconomic damages, however, tort payments comprise only about one tenth of the total reparations systems expenditures.

2. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 500 (Table 848).

Reported figures for auto liability insurance benefits paid include insurance payouts to compensate for bodily injury under uninsured motorist, underinsured motorist, and no-fault auto coverage, as well as under third-party liability policies. Letter from Pamela Loos (A.M. Best Co.) to Jeffrey O'Connell (Jan. 25, 1988) (copy on file with the Ohio State Law Journal); letter from Mavis Walters (Insurance Services Office) to Jeffrey O'Connell (Mar. 3, 1988) (copy on file with the Ohio State Law Journal).

Uninsured motorist coverage was developed by the insurance industry in the 1930s, at the urging of the New York Insurance Department, to deal with the problem of injury in auto accidents caused by negligent but "judgment-proof" drivers, who neither carried liability insurance nor owned sufficient assets to compensate their victims. A.L. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 1.8 (2d ed. 1987). The coverage would be provided by an endorsement to the standard auto liability policy.

In the event of an accident caused by the negligence of an uninsured driver, this endorsement would protect the purchaser (and other insureds as defined by the policy) by placing any insured person in the position the insured person would have been in had the other motorist carried the minimum coverage required by the state financial responsibility laws. Thus, recovery under the proposed endorsement was predicated on, and was within the framework of, the existing negligence system: the right to recover for injuries caused by an uninsured motorist or a hit-and-run driver from an insurer issuing such an endorsement depended on showing that the claimant was legally entitled to recover.

*Id.* This coverage has become widely available and is now provided for by legislation in 49 states. *Id.* at § 2.1.

According to figures received from A.M. Best Co., Oldwick, New Jersey, no-fault benefits represented 10.4% of all bodily injury auto insurance payments in 1984. Letter from Pamela Loos, *supra*. Multiplying this ratio by total payments for auto liability payments yields an estimate of \$2.76 billion paid for no-fault auto claims in 1984.

3. This figure was computed by assuming that the personal injury payments by motorists themselves, apart from liability coverage or from uninsured motorist coverage, amounted to a sum equal to 1.2% of the insured personal injury payments. (This same formula was used by Conard, Morgan, and their colleagues in their 1960 study. A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPAIRATION 50 n.54 (1964) [hereinafter CONARD & MORGAN]. So: \$26,521 million X 1.2% = \$318 million.

4. 1985 BEST'S AGGREGATES AND AVERAGES, PROPERTY-CASUALTY 105. Calculated by multiplying Net Premiums Written (\$1,775 million) by a combination of Pure Loss Ratio (112.1%) and the Loss Adjustment Expense (32.8%). So: \$1,775 million X 144.9% = \$2,572 million.

5. *Id.* at 107. Same formula used as in note 4. So: \$6,479 million X 120.8% = \$7,827 million.

6. We could not find a source for this information, so we have given a figure equal to 5.7% of total tort liability, which is the percentage of 1960 tort awards paid by railroads and motor carriers. See CONARD & MORGAN, *supra* note 3, at 48.

7. For an explanation of this category, see O'Connell & Barker, *supra* note 1, at 931-33.

8. SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN, 1986 ANNUAL STATISTICAL SUPPLEMENT 258 (Table 170).

9. *Id.* at 252 (Table 165). The figure given is for benefits paid under short-term disability insurance which employers in California, Hawaii, New Jersey, New York, Puerto Rico, and Rhode Island are required by state law to provide for their employees. This insurance protects employees unable to work because of nonoccupational injuries and illness. See C.A. WILLIAMS, JR., J. TURNBULL & E. CHEIT, ECONOMIC AND SOCIAL SECURITY, SOCIAL INSURANCE AND OTHER APPROACHES 255-66 (5th ed. 1982) [hereinafter WILLIAMS] for a further explanation of these insurance plans.

10. SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN, 1986 ANNUAL STATISTICAL SUPPLEMENT 252 (Table 165). The figure given is for benefits provided under insurance which railroads are required by federal law to provide their employees to protect them in the case of short-term disability caused by nonoccupational injury or illness. See WILLIAMS, *supra* note 9, at 434-35 for a further explanation of this insurance.

11. For an explanation of this category, see O'Connell & Barker, *supra* note 1, at 934-36.

12. Total death benefits from private insurance companies, veterans' life insurance, and fraternal and savings bank life insurance were \$18,700 million, of which \$7,655 million came from group insurance policies and \$11,045 million came from other plans. AMERICAN COUNCIL OF LIFE INSURANCE, 1986 LIFE INSURANCE FACT BOOK 41, 44, 104-05. Under plans other than term insurance, death benefits include a return of savings roughly approximated by the amount of reserves released by death in insurance company accounts. The ratio of reserves released by death to total death benefits was 20.3% for companies reporting to the New York Insurance Department in 1984. N.Y. (STATE) INSURANCE DEP'T, 1984 ANNUAL

REPORT OF THE SUPERINTENDENT OF INSURANCE TO THE LEGISLATURE, STATISTICAL TABLES FROM ANNUAL STATEMENTS (unpublished), Tables 4 (pt. 1), 10b (reserves released by death = \$1,925 million; total death benefits = \$9,467 million). Assuming that the same ratio applies to total nongroup death benefits, loss-shifting death benefits for nongroup insurance would be \$8,803 million (= \$11,045 million - (.203 x \$11,045 million)), which is the figure reported in the Table.

Group policies provide almost entirely for loss shifting, CONARD & MORGAN, *supra* note 3, at 50 n.58, so we have made no adjustment to the amount of group life insurance benefits paid.

13. HEALTH INSURANCE ASS'N OF AMERICA, SOURCE BOOK OF HEALTH INSURANCE DATA, 1986 UPDATE, at 10-11 (Tables 2.1, 2.2).

14. *Id.* The figure reported for group policies (\$98,879 million) was reached by combining the total benefit payments by all insurers for medical expense (\$96,006 million) with those for dental expense (\$7,714 million) and reducing this figure by the amount of medical expense paid by individual and family policies (\$4,841 million). The figure for group policies excludes an estimated duplication in reported benefits, as explained in a note to Table 2.1 in the Source Book.

15. For an explanation of this category, see O'Connell & Barker, *supra* note 1, at 936-38.

16. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 355 (Table 603) (1983 figures). Of the total figure, \$6,490 million was provided in sick leave for government employees, and \$4,899 million was provided in sick leave for workers in private employment. *Id.*

17. For an explanation of this category, see O'Connell & Barker, *supra* note 1, at 938-46.

18. SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN, 1986 ANNUAL STATISTICAL SUPPLEMENT 252 (Table 165). (OASDI means Old Age, Survivors', and Disability Insurance.).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (1983 figures, 1984 unavailable).

23. *Id.* at 238 (Table 151).

24. *Id.* at 240-41 (Table 153) (derived by adding totals for figures labelled "persons aged 65 and older" and "disabled persons" under heading "all services").

25. For an explanation of this category, see O'Connell & Barker, *supra* note 1, at 946-48.

26. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 359 (Table 611).

27. No updated figures are yet available, so the figure reported in the table is 3.69% of the total figure for public assistance, the same proportion as in the 1982 update.

28. SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN, 1986 ANNUAL STATISTICAL SUPPLEMENT 269 (Table 184). (SSI means Supplemental Security Income.) Figures represented in the table include federal and state SSI payments for general disability (\$7,143 million) and for blindness (\$249 million), but do not include SSI old age payments.

29. HEALTH CARE FINANCING ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, HEALTH CARE FINANCING REVIEW, Fall 1985, at 20 (Table 8).

30. For an explanation of this category, see O'Connell & Barker, *supra* note 1, at 948-49.

31. SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN, 1986 ANNUAL STATISTICAL SUPPLEMENT 252 (Table 165).

32. *Id.*

33. ADMINISTRATOR OF VETERANS AFFAIRS, 1984 ANNUAL REPORT 9, 70. This figure excludes expenditures for service-connected diseases and injuries. (The Conard-Morgan study similarly excluded service-connected expenditures. CONARD & MORGAN, *supra* note 3, at 51-52 n.62.).

The figure given was computed by taking the cost of VA-provided medical care (\$8,301 million, ADMINISTRATOR OF VETERANS AFFAIRS, 1984 ANNUAL REPORT 9) and reducing it by the percentage of service-connected injuries and illnesses treated (16.0%, *id.* at 70).

34. The figure given includes \$8.4 billion reported for expenditures by "State and local hospitals" (not offset by other revenues) and \$4.6 billion reported for "Other public programs for personal health care," including "program spending for maternal and child health; vocational rehabilitation medical payments; temporary disability insurance medical payments; Public Health Service and other Federal hospitals; Indian health services; alcoholism, drug abuse, and mental health; and school health." Levit, Lazenby, Waldo & Davidoff, *National Health Expenditures 1984*, HEALTH CARE FINANCING REVIEW, Fall 1985, 1, 20, 22 nn.4-5.

35. This category covers "[s]pending by philanthropic organizations, industrial inplant health services, and privately financed [health] construction." *Id.* at 10, 11 n.1 (Table 3).

36. *Id.*

Appendix B  
Benefits Paid for Injury and Illness  
by Principal Loss-Shifting Systems, 1982  
(dollars in millions)

	Survivor	Disability	Medical	Total	% of All Benefits
<b>Tort Liability</b>					
Auto Personal Injury					
Insured Payments	—	—	—	\$ 21,807	
Uninsured Payments	—	—	—	261	
Other Insured Personal Injury Liability Payments					
Medical Malpractice	—	—	—	1,994	
Other	—	—	—	5,467	
Railroad and Motor Carrier Personal Injury Claims			—	1,785 <sup>1</sup>	
<b>Total Tort Liability</b>				<u>31,314<sup>2</sup></u>	8.8%
<b>Workers' and Other Employment-Mandated Compensation</b>					
Workers' Compensation	1,500	9,825	4,820	16,145	
State Temp. Disab. Ins.	—	1,568	—	1,568	
R.R. Temp. Disab. Ins.	—	56	—	56 <sup>3</sup>	
<b>Total Workers' and Other Employment-Mandated Compensation</b>	<u>1,500</u>	<u>11,449</u>	<u>4,820</u>	<u>17,769</u>	5.0%
<b>Private Loss Insurance</b>					
Individual Policies	7,726	1,385	3,572 <sup>4</sup>	12,683	
Group Policies	<u>6,953</u>	<u>4,144</u>	<u>79,082</u>	<u>90,179</u>	
<b>Total Private Loss Ins.</b>	<u>14,679<sup>5</sup></u>	<u>5,529</u>	<u>82,654</u>	<u>102,862</u>	29.1%
Sick Leave	—	10,607	—	10,607	3.0%
<b>Social Insurance</b>					
OASDI	33,612	17,338	—	50,950	
Railroad Retirement	1,644	668	—	2,312	
Federal Civil Service	2,507	3,664	—	6,171	
Other Federal	424	1,428	—	1,852	
State/Local	739	1,035	—	1,774	
Medicare A	—	—	30,875	30,875	
Medicare B	—	—	<u>15,071</u>	<u>15,071</u>	
<b>Total Social Insurance</b>	<u>38,926</u>	<u>24,133</u>	<u>45,946</u>	<u>109,005</u>	30.8%
<b>Public Assistance</b>					
Medicaid	—	—	29,399	29,399	
General Assistance	—	—	1,442	1,442	
SSI	—	6,126	—	6,126	
Other	—	—	<u>2,100</u>	<u>2,100</u>	
<b>Total Public Assistance</b>	—	<u>6,126</u>	<u>32,941</u>	<u>39,067</u>	11.0%
Veterans Benefits	3,113	10,203	5,851	19,167	5.4%
Other Public Health	—	—	13,200	13,200	3.7%
Private Health	—	—	10,900	10,900	3.1%
<b>Total All Systems</b>				<b>\$353,891</b>	<b>100%</b>

## SOURCES FOR APPENDIX B

This table is taken from O'Connell & Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J. 913, 924 (1986) and accompanying notes, except for corrected figures as noted in the following footnotes for any changes made necessary by such corrected figures. Complete source information may be consulted in the original. Percentages have been adjusted. Percentages do not total 100% due to rounding.

1. This figure is corrected from \$1,783 million, as given in O'Connell & Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J., 913, 924 (1986).

2. This figure is corrected from \$31,312 million, as given in O'Connell & Barker, *supra* note 1 at 924.

3. This figure is corrected from \$58 million, as given in O'Connell & Barker, *supra* note 1 at 924.

4. This figure is corrected from \$3,512 million, as given in O'Connell & Barker, *supra* note 1 at 924.

5. Total death benefits from private insurance companies, veterans' life insurance, and fraternal and savings bank life insurance were \$16,622 million, of which \$6,953 million came from group insurance policies and \$9,669 million came from other plans. AMERICAN COUNCIL OF LIFE INSURANCE, 1984 LIFE INSURANCE FACT BOOK 37, 40, 100-01. Under plans other than term insurance, death benefits do not simply reflect a shifting of loss but include a return on savings roughly approximated by the amount of reserves released by death in insurance company accounts. The ratio of reserves released by death to total death benefits was 20.1% for companies reporting to the New York Insurance Department in 1982. N.Y. (STATE) INSURANCE DEP'T, 1982 ANNUAL REPORT OF THE SUPERINTENDENT OF INSURANCE TO THE LEGISLATURE, TABLES FROM ANNUAL STATEMENTS 28, 86 (Tables 4 (pt. 1), 10b) (reserves released by death = \$1,527 million; total death benefits = \$7,613 million). Assuming that the same ratio applies to total nongroup death benefits, loss-shifting death benefits for nongroup insurance would be \$7,726 million (= \$9,669 million - (.201 x \$9,669 million)), which is the figure reported in the table. (This differs from the figure of \$7,776 million reported in O'Connell & Barker, *supra* note 1, at 924, because at the time the article was written, the authors did not have access to the figures cited for reserves released by death and therefore made an estimate.)

Group policies are almost entirely for loss shifting, *id.* at 925 n.9, so no adjustment was made to the amount of group life insurance benefits paid.

Appendix C  
Benefits Paid for Injury and Illness  
by Principal Loss-Shifting Systems, 1960  
(dollars in millions)

	Survivor	Disability	Medical	Total	% of All Benefits
<b>Tort Liability</b>					
Auto Personal Injury					
Insured Payments	*	*	*	\$ 1,494	
Uninsured Payments	*	*	*	18	
Other Insured Personal					
Injury Liability Payments	*	*	*	269	
Railroad and Motor Carrier					
Personal Injury Claims				103	
<b>Total Tort Liability</b>				<u>1,884</u>	7.9%
Workmens' Compensation	105	754	435	1,294	5.4%
<b>Private Loss Insurance</b>					
Individual Policies					
Group Policies	1,761	386	446		
	<u>1,115</u>	<u>619</u>	<u>4,403</u>		
<b>Total Private Loss Insurance</b>	2,876	1,005	4,849	8,730	36.5%
Sick Leave Payments	—	1,209	—	1,209	5.1%
Social Insurance	2,954	1,379	—	4,333	18.1%
Public Assistance	90	876	530	1,496	6.3%
Veterans Benefits (nonservice-connected)	357	882	521	1,760	7.3%
<b>Public Health Service Facilities</b>					
General Hospital and Hospital Care					
Medicare			2,174		
Medical Rehabilitation			59		
			<u>18</u>		
<b>Total Public Health Service Facilities</b>			2,251	2,251	9.4%
<b>Private Health Service Facilities</b>					
Industrial In-plant Services					
Philanthropic			265		
			<u>700</u>		
<b>Total Private Health Service Facilities</b>			965	<u>965</u>	4.0%
<b>TOTAL ALL SYSTEMS</b>				<u>\$23,922</u>	100.0%

\*Segregated amounts not reported

Source: A. CONARD, J.N. MORGAN, R.W. PRATT, JR., C.E. VOLTZ, AND R.L. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* 48-49 (1964). Conard and Morgan's voluminous source references are not reproduced but may be consulted in the original.

