8. Alternative compensation schemes from a comparative perspective

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1. INTRODUCTION

There is a good argument that this chapter is not about comparative tort law.¹ The preceding chapters highlight the key features of tort law as a manifestation of corrective justice and private law reasoning. They set out the conditions under which a person who suffers a loss may claim before an ordinary court against the author of his misfortune, for compensation of the harm caused by the defendant or imputable to him. Conversely, the present chapter considers the alter ego of this model or, to be more specific, the different logic and structure of compensation for accidental harm that has emerged over the past 125 years, on the margins of the main event of tort law as corrective justice.

It is fair to say that these margins are very crowded. Alternative schemes of compensation are found in almost every country around the world. They come in all shapes and sizes – the basic structure of tort law has been set aside for some types of accidental injury in a broad range of circumstances. In all of their diversity, these regimes are defined in opposition to tort law and its fundamental characteristics. The present chapter thus entails a comparative exploration of ‘alternative’ or ‘other’ schemes of compensation. Because ‘otherness’ or what-is-not-tort-law is arguably very broad, this exploration cannot proceed further without some clarification of its conceptual boundaries.²

I focus here on publicly organized regimes, established by legislation, that carve out of ordinary tort law any claim for compensation that would otherwise fall within its scope. More specifically, this chapter addresses regimes that now provide direct compensation to victims of defined tortious hazards, independently of any attribution of responsibility to the author of the injury. A few recurring characteristics unite these regimes, although each characteristic may not be featured within each regime.³ The compensation provided by these regimes is generally subject to upper or categorical

¹ In this chapter, I use the words ‘tort law’ as short hand to refer to private law rules that govern the compensation of wrongful injury. I mean to include rules of this nature in any legal tradition, and the words ‘tort law’ should not be understood as a reference to such rules as they exist in the common law tradition.


³ Anthony Ogus defines Public Compensation Schemes along the same lines in A. Ogus, ‘Shifts in Governance for Compensation to Damage – A Framework for Analysis’ in Wilhem van
limits that come short of full reparation of the harm. Payments are often made through a public agency, without recourse to ordinary courts or lawyers. The compensation is drawn from a fund that may be financed through the contributions of potential victims, or potential risk-creators, or both, on the logic of risk-pooling. Under such regimes of social insurance, the ordinary right of action in tort is often set aside completely.

These provisional conceptual boundaries exclude three categories of alternative compensatory mechanisms that I shall not address here. First, to the extent that the aim is to explore regimes that subtract certain types of accidental harm from the reach of ordinary tort law, it is more coherent not to include in this discussion the multiple circumstances in which compulsory public or private insurance is paired with strict liability in tort (understood here as the imputation of civil liability to a person who has not committed a personal wrongdoing). In many settings, this strategy was a first response to the realization that tort law was not responding adequately to problems arising from recurring accidents tied to ordinary social interaction, such as work-related injuries. Nonetheless, formally speaking these shifts occurred within tort law, and the resulting regimes are not truly alternatives to it. In that sense, the focus here is on no-fault compensation, rather than no-fault liability.

Secondly, the emergence of legislative compensation regimes as alternatives to tort law must be distinguished from the expansion of state-provided compensation for hazards and events that would not normally be addressed through tort law. Storms, hurricanes, forest fires, landslides and floods produce individual losses that are typically beyond the reach of tort law. In this respect, the flurry of ad hoc and ex post compensation schemes established by the state to address the consequences of such natural events and catastrophes are not alternatives to tort law – unless, of course, they constitute a response to claims brought against the state for its own tortious failure to protect citizens against these hazards. Where the state is not at fault, the indemnification of victims of natural disasters is better captured by the ideas of solidarity and social security.

Thirdly, the focus here is on regimes through which the state organizes compensation for tortious harm, outside of tort law, and this excludes another group of compensatory mechanisms, tied to non-state actors. Obviously, the set of alternatives designed to achieve tort law’s basic remedial or compensatory aims is much wider than the set of existing legislative regimes. One might imagine many informal ways in which communities respond to accidental injury outside of the traditional boundaries of tort

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law, from a fatalistic choice to let the loss lie where it lands, all the way to charity and voluntary sharing of the cost of misfortune. A pluralist account of the relationship between tort law and other compensatory regimes would have to embrace these non-state, non-formal community responses to injury, with particular attention to such responses in the setting of developing countries. Again, mindful of the pitfalls inherent in overly ambitious comparative efforts, I focus here on the legislative sidestepping and reconstruction of tort law through social insurance regimes. For my modest purposes, these regimes constitute the ‘alternative’, at least in this relatively narrow sense.

What does comparative law have to say about these alternatives to tort law? There is now a rich body of recent scholarship that engages in careful and comparative examination of the emergence, content and operational details of legislative schemes of compensation in relation to occupational hazards, automobile accidents, medical misfortunes, environmental damage and crimes against the person.

From a methodological point of view, this scholarship is both traditional and distinctive. It resorts to the traditional tools of comparative law: a culturally sensitive map of similarities and differences, on a variable (macro/micro) scale; a dynamic rendition of dissemination effects (‘legal transplants’) and reciprocal influences; a functionalist diagram of the forces pushing and pulling the configuration of legal solutions to what appears as a basic, if not necessarily universal human problem. Applied to the context of state schemes of compensation, these traditional tools nonetheless yield distinctive insight, tied to the legislative nature of the objects under consideration. At the macro level of legislative regimes addressing accidental injury, all problems are explicitly framed as public policy questions. A comparative overview of these schemes shifts the focus from doctrinal issues to systemic issues. Comparative insight moves away from the foundational myths of legal traditions, often fixated, at least in Western countries, on the characteristics of civil law and common law. Different points of convergence and divergence come to light. The political, economic and social forces at play in the emergence of legislative reconstructions of tort law are more transparent than in the shifts of private law doctrine within the judicial context. And, at least theoretically, the comparison of legislative regimes poses different kinds of questions – with potential empirical answers – about costs, scope of coverage, statistical occurrence of the relevant hazards, and the gap between the legal rule and its implementation, particularly in the context of legal transplants.

I do not mean to revisit or summarize this scholarship, nor to attempt to provide a comprehensive account of alternative schemes of compensation across boundaries and over the course of the past century. Rather, my modest aim is to draw from this scholarship a number of recurring themes that can be organized into an analytical grid for comparative purposes.

The first part of the chapter explores the key questions that inevitably arise in setting up a legislative scheme of compensation, and looks for patterns in the emerging responses. The second part draws from comparative scholarship to identify and group the factors that influence those responses and the accompanying shifts over time and space in the interaction between tort law and other schemes of compensation.

2. SURVEYING THE LANDSCAPE: ALTERNATIVE COMPENSATION SCHEMES AS CHOICES

In spite of their diversity, all alternative compensation schemes are the product of a number of legislative choices that can be organized around three broad themes. First, because these schemes are meant to address events that would otherwise remain subject to the basic rules of private law, an alternative compensation scheme expresses a legislative choice to carve out a specific type of accidental harm or hazard from the general rules of tort law. The first task here is thus to identify the categories of harmful events that have attracted the attention of the state. Secondly, once a type of accident is deemed to be an appropriate target for social insurance intervention, any legislative compensation scheme must clarify its interaction with tort law and circumscribe the scope of each regime in dealing with the victim and the author of the misfortune. Thirdly, and finally, the scope of compensation provided in the scheme in respect of different types of losses must be determined. What losses does the scheme cover, and for how much? Some comparative insight can be drawn on each of these three levels.

A. The Domain of Alternative Compensation Schemes

Alternative compensation schemes emerged historically in a sequence that is readily ascertainable. The first type of accidental harm to be carved out of the ordinary rules of tort law was the industrial injury. Social insurance regimes for work-related injury appeared in Germany at the end of the 19th century, and were established in almost every jurisdiction in the world, first in Europe, then in Australia, New Zealand and North America, and eventually in Asia, South America and Africa over the course of the 20th century. In many cases, coverage was eventually extended to a range of occupational diseases viewed as the unavoidable consequences of exposure to risks associated with certain industrial activities, most notably mining. In the first decades of the 20th century, the possibility of extending the model of social insurance to injuries caused by motor vehicles was considered in a number of industrialized Western countries, particularly in Germany, New Zealand and Canada. The first legislative efforts to introduce compulsory, publicly organized, no-fault compensation for victims of road accidents came to fruition after World War II, and accelerated over the next 20 years, particularly in the USA. At the same time, a parallel reflection focusing on the situation of victims of violent crimes began in the United Kingdom, culminating in the

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8 For an overview, see Stephen Sugarman, ‘Quebec’s Comprehensive Auto No-Fault Scheme and the Failure of the United States to Follow’ (1998) 39:2–3 Cahiers de Droit 303 at 305.
9 Some jurisdictions, like the Province of Québec, in Canada, retain a very comprehensive and generous no-fault regime for automobile accidents. Other jurisdictions, such as many American states, have significantly scaled back the earliest social insurance efforts in this area. See Oliphant, supra note 2 at 52, and Sugarman, supra note 8.
 creation of a public compensation scheme in the mid 1960s, and spreading to many European countries and to Canada soon thereafter.

Over the next decade, while the relative costs and benefits of no-fault regimes came under scrutiny, particularly in the United States, the logic of social insurance nonetheless extended to medical misfortunes and to the negative outcomes of immunization programmes. In the mid 1970s Sweden introduced an alternative compensation scheme for medical mishaps, and other Nordic countries followed suit. By that time, with legislative schemes putting an expanding set of accidents beyond the reach of tort law in many jurisdictions, the question of horizontal equity had inevitably arisen: why were some categories of victims compensated through social insurance while others were still required to initiate legal recourses before ordinary courts?10 Only New Zealand answered this question with a legislative regime that acknowledged the inherent unfairness of such differentiation. The high water mark for social insurance regimes replacing tort law was thus reached in 1974, with the introduction in New Zealand of a comprehensive scheme for the compensation of bodily injuries arising from a broad spectrum of accidents, including industrial, automobile, medical and domestic injuries.11

This very broad scope and rationale for social insurance as an answer to accidental injury did not take hold. In the decades that followed, new regimes providing compensation for the consequences of otherwise tortious events were introduced, but the focus had shifted from systemic, recurring losses arising from ordinary social risks, like industrial and traffic accidents, to isolated or exceptional events generating massive losses that presented different challenges for tort law. The 1990s were dominated by the crisis of HIV/AIDS contamination of blood banks across the world, while the consequences of high profile terrorist acts such as 9/11 captured the attention of public decision-makers after the year 2000. Nowadays, new public compensation funds provide relief against the consequences of mass environmental torts, from massive oil spills to nuclear energy disasters, misfortunes that may now be viewed as part of a set that also includes natural catastrophes.

Can one draw any broader insight from this summary list of legislative choices across time and national boundaries? Multiple factors are at play in the emergence of these alternative schemes, and one must be cautious not to see patterns where there is only coincidence. Nonetheless, three broad conclusions emerge.

First, it is fair to say that alternative compensation schemes have experienced a shift over the past 50 years, from structured public responses to structural social problems to something like ad hoc public responses to one-time catastrophic events. Judging from the recurrence of such targeted solutions, across boundaries, it appears that in determining what new types of accidents should be carved out of the regime of tort law, legislators in many jurisdictions no longer think of state compensation for accidental injury as an integrated component of the larger social security net, or the product of rational deliberation about the proper scope of social insurance.


11 For details on New Zealand’s regime, see Oliphant, supra note 2 at 68–75.

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Secondly, because alternative schemes of compensation remove certain types of hazards and harmful events from the domain of tort law, the determination of the scope of application of the legislative regime is a recurring problem for legislators at the time of creation of the regime, and for adjudicators in the implementation of the regime. In debates reminiscent of litigation on insurance coverage, the issue arises in every context in which alternative schemes have emerged, introducing within this different logic some of the classical language of causation known to tort law. In the context of workers’ compensation, the boundaries of what is work related are sometimes fraught with difficulties, particularly with respect to occupational diseases and their causal connection to certain types of activities. The same problem arises in the context of alternative compensation for traffic accidents, where the statutory lynch pin is the connection between the injury and the use or operation of a motor vehicle. Dealing with this type of issue, from a statutory drafting point of view, requires a choice between a categorical standard that describes the event in general terms, and a more specific list of events that fall within the scope of the legislative scheme. The experience of alternative compensation for losses in the medical context provides a rich illustration of this dilemma, with endless debates on the boundaries of medical misadventures and treatment injuries.

12 While the issue is often phrased in terms of causation (was the accident caused by the operation of an automobile? Is the negative outcome medically caused?), the answer is typically driven by other considerations. The victim may seek to avoid a regime that provides less than full reparation, while the author of the harm may seek, conversely, to escape ordinary tort liability. The adjudicator may be concerned to give proper effect to the alternative schemes’ social purposes.

13 This is especially the case for some work-related diseases such as cancer. For example, the issue of work-related disease arose in the case of the 9/11 fund, where a number of firefighters and other emergency workers had developed illnesses as a result of their intervention. These illnesses were not covered by the fund, but have recently been the object of a legislative response. For detailed treatment, see Kenneth Feinberg, What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11 (New York: Public Affairs, 2005) at 42, and Anemona Hartocollis, ‘Zadroga 9/11 Health Care Law Takes Effect’ The New York Times (1 July 2011) online: The New York Times, at http://cityroom.blogs.nytimes.com/2011/07/01/911-health-care-law-takes-effect/.

14 For example, a recent decision of the Supreme Court of Canada in respect of Quebec’s no-fault compensation regime for bodily injuries addresses the question of whether an injury is compensable within the statutory scheme, rather than under ordinary rules of civil liability, when the event was caused by a tree falling on a car, killing the occupant. Westmount (City) v. Rossy, 2012 SCC 30. The judgment refers to several lower court decisions exploring the boundary between events connected to the use of an automobile and events in which the use of an automobile is irrelevant. The possible scenarios are infinite.


A third conclusion is painfully obvious: the complexities of determining the proper domain of alternative compensation schemes are, in many ways, a rich country’s problem. Looking across boundaries, it is apparent that poor and emerging countries do not have the luxury of wondering how broadly to extend their social security net. While workers’ compensation regimes are in place just about everywhere on the planet, there are very few special regimes for traffic hazards, medical injuries, environmental hazards or victims of crime outside of the rich industrialized societies.17 In many developing countries, workers’ compensation regimes cover a very small proportion of the population, as many of the poorest employees work in the informal economy or belong to migrant populations that are excluded from coverage.18

B. The Coordination of Tort Law and Alternative Compensation Schemes

The legislative enactment of an alternative compensation scheme involves a second category of choices, related to the coordination of the scheme with general (and presumably residual) rules of tort law. This issue can be contemplated from two distinct perspectives: first, from the point of view of the victim, and, secondly, from the point of view of the author of the injury.

Examined from the point of view of the victim, the question is whether the legislative scheme should exclude, overlap with or merely supplement tort law.19 Here again, historical iterations of these schemes offer a variety of answers. At one end of the spectrum, as mentioned above, some of the earliest workers’ compensation regimes merely introduced compulsory third-party insurance, coupled with strict liability of the employer, and would not today be described as alternative compensation schemes. At the other end of the spectrum, in the jurisdictions where workers’ compensation regimes truly morphed into social security in the first half of the 20th century, the parallel or alternative recourse to tort law was progressively eliminated.20


19 A slightly different question is the extent to which tort law indemnities are coordinated with social security regimes that provide relief for misfortunes of life regardless of their cause. In particular, the cumulation of tort indemnities with social security coverage raises significant difficulties in many jurisdictions.

20 For comprehensive comparative studies of this issue in relation to the laws of the UK, the Netherlands, Belgium and Germany, see Engelhard, supra note 4, and R.I.R. Hoop, ‘Shifts in the Compensation of Medical Adverse Events’ in Wilhem van Boom and Michael Faure, eds, Shifts in Compensation Between Public and Private Systems (New York: Springer, 2007) 155.
decades, the most comprehensive social insurance regimes for road accidents also excluded private law claims, at least for bodily injuries.\textsuperscript{21}

In time, the issue of coordination between tort law and other compensation regimes moved well beyond the simple choice to exclude or not parallel tort claims. Indeed, after the 1960s, and particularly in the context of compensation for automobile accidents, proposals regarding the relationship between tort law and social insurance became increasingly complex, intertwining the two so as to achieve optimal compensation and deterrence. The impact of emerging instrumental approaches to tort law, particularly law and economics, is not to be neglected in this respect. Today, some regimes are no more than stopgap measures, designed to kick in only where an ordinary claim under tort law is not viable, such as when the wrongdoer is insolvent or unknown.\textsuperscript{22} Other regimes provide an option to the victim, \emph{ex ante} or \emph{ex post}, either to benefit from a compensation fund and renounce all tort claims, or to seek compensation through a claim in private law.\textsuperscript{23} A third type of regime tolerates the combination of claims, by providing basic compensation and allowing the victim to seek further and fuller reparation from the wrongdoer in ordinary court.\textsuperscript{24}

The coordination of tort law and alternative compensation scheme is not limited to the situation of the victim, and to the issue of parallel or optional rights of action in

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\bibitem{4} The fund set up to provide compensation to the victims of 9/11 was described as a ‘voluntary alternative to lawsuits’. Feinberg, \emph{supra} note 13 at 20. Feinberg also notes that legislation strongly discouraged lawsuits by setting a cap on the airlines and the World Trade Center’s liability. \emph{Id.} at 18. This type of choice is also common in regimes addressing automobile accidents. See Dewees, Duff and Trebilcock, \emph{supra} note 16 at 54–62. See also Pavel Peykov, ‘Choice in Automobile Insurance: Tort vs No-Fault Coverage’ \emph{Saskatchewan Institute for Public Policy Briefing Note}, December 2002.
\bibitem{5} Some US states and Canadian provinces have either ‘add-on’ or ‘threshold’ compensation schemes. The scheme can either guaranty minimal indemnities with no restriction on the right to sue in tort (add-on), or preclude right to sue unless injury is beyond a certain threshold (either monetary or ‘physical’ – based on gravity of accident). If the injury is above the threshold, then the victim can sue for negligence for the amount exceeding the threshold. See Dewees, Duff and Trebilcock, \emph{supra} note 16 at 22. See also Oliphant, \emph{supra} note 2 at 52.
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ordinary law. Examined from the point of view of the wrongdoer or the party who would otherwise be accountable for the injury, the question of coordination of alternative compensation schemes with tort law turns on the degree of accountability that remains for this agent. Should the wrongdoer be financially accountable, in one way or another, for the loss that he may have caused? In tort law, the bond between victim and agent arguably serves as an antidote to moral hazard, because causing harm to another brings consequences to the wrongdoer. But this bond is potentially severed in alternative compensation schemes, where the victim receives payment from a collective fund without bringing the wrongdoer to account for it. The concern that divorcing compensation of the victim from accountability of the wrongdoer might trigger an increase in risky behaviour was raised from the earliest days of legislative reconfigurations of tort law in every jurisdiction. This concern involves legislative choices on at least three levels.

At the first, and most obvious, level, the alternative compensation regime must determine the extent to which the agent of the harm must contribute to the compensation fund in proportion to the risk actually generated by his behaviour, so as to provide him with necessary incentives to take precautions against avoidable injuries.\textsuperscript{25} Some of the earliest regimes of workers’ compensation were built on the logic of insurance, with contributions from employers who were the source of risk, and modulated premiums that reflected the risk experience of different types of economic activities.\textsuperscript{26} Conversely, mid 20th century regimes tended to move in the direction of flat premiums in a number of jurisdictions.\textsuperscript{27} At the peak of legislative reconfiguration of tort law, particularly in the context of automobile injuries, no-fault regimes took less account of wrongful behaviour in the funding of the regimes, and included first-party

\textsuperscript{25} At the other end of the spectrum, there are regimes where funding is not connected at all to the behaviour of the wrongdoer. The French regime for victims of crime, for instance, is funded through an additional contribution to all property insurance contracts, a system which was described as ‘une logique plus financière que juridique’. See Y. Lambert-Faivre, ‘Droit du dommage corporel: systèmes d’indemnisation’, 5e edition [Paris: Dalloz, 2004] at 996. In Belgium, the regime is funded through a contribution (‘solidarity tax’) from all people declared guilty of offences. See Katherina Buck, ‘State Compensation of Crime Victims and the Principle of Social Solidarity’ 13 Eur J Crime, Crim L & Crim J 148 at 171.

\textsuperscript{26} For example, Germany introduced compulsory insurance in 1881, in response to growing dissatisfaction on the part of both employers and employees with the previous liability-based system. See Engelhard, supra note 4 at 13. The 1901 Dutch Industrial Accidents Act also introduced mandatory liability insurance for employers, with contributions based on risk. \textit{Id.} at 29. In contrast, the insurance logic in Britain faced strong opposition because it was felt that it did not provide incentives for employers to improve safety standards. \textit{Id.} at 23. The 1897 Liability Act did encourage many British employers to take out liability insurance, but it was not made mandatory as in Germany. \textit{Id.} at 26. The Belgian system, set up in 1903, similarly made insurance voluntary rather than compulsory. \textit{Id.} at 33.

\textsuperscript{27} Social security insurance was introduced in Britain in 1911, with contributions through flat rates. See Engelhard, supra note 4 at 26. Furthermore, following the Beveridge Report, the British government reformed both social security in 1946 and the specific regime for employees in 1948, which was funded by employees, employers and the state through taxes. \textit{Id.} at 38. Similarly, the Netherlands reformed its system in the 1960s to rely on flat rates. \textit{Id.} at 42. However, in Germany, contributions remained dependent to some extent on the level of risk in a given industry. \textit{Id.} at 47.
Comparative tort law

(or potential victim) contributions, or funding from the public treasury underwritten by the community at large. Some of these regimes have now witnessed a reintroduction of experience-based rates.

On a second, related, level, choices must be made with respect to the circumstances in which the victim would be, in the ordinary regime of tort law, partly or fully to blame – that is, accountable – for his injury. Not surprisingly, legislative schemes providing compensation to victims of crimes often exclude cases in which the victim was also a participant in criminal activity. Alternative compensation regimes for road accidents sometimes impose restrictions on the right to an indemnity wherever the victim’s negligence or intentional wrongdoing is one of the causes of the occurrence. Conversely, most of the regimes addressing work-related injuries compensate victims for their losses, without penalty, even when they are attributable to their own negligent behaviour.

Finally, the reintroduction of accountability for causing harm involves legislative choices at a third level in the coordination of tort law and alternative compensation schemes. In a number of instances, legislative regimes specifically enable the fund to recover whatever indemnity was paid to the victim from the author of the misfortune.

28 The New Zealand scheme is funded through several means, including a levy on petrol, employers, motor vehicle licence holders and employees – each in separate accounts in logical connection with potential victims or risk-creators. See Oliphant, supra note 2 at 73. The Quebec no-fault scheme is funded primarily through a fee on motor-licence holders and vehicle registration through a flat rate. See Robert Tétrault, ‘Comportement criminel et régimes étatiques d’indemnisation’ [1998] 39 C. de D. 261 at 269.

29 This is especially the case for workers’ compensation systems, which are often integrated into publicly paid health coverage. For example, in the UK, the scheme was subsumed into general welfare in the postwar years. See Oliphant, supra note 2 at 46. It is also the case for most criminal victim compensation schemes.

30 See also Hoop, supra note 20, at 107–109, on the shift in workers’ compensation in the Netherlands. The system relied on flat fees after 1967, but was virtually privatized in 1996 (the employer pays 70 per cent of the injured worker’s salary) and experience-based rates were reintroduced in 1998.

31 Article 8 of the 1983 European Convention on the Victims of Violent Crimes states: ‘Compensation may be reduced or refused on account of the victim’s or the applicant’s conduct before, during or after the crime, or in relation to the injury or death.’ Online: Council of Europe at http://conventions.coe.int/Treaties/en/Treaties/Htm/116.htm. Katherina Buck also notes that in most European countries, ‘ordinary criminals… may be refused state compensation because of their criminal record as such’, regardless of whether it is connected with the incident under consideration. Supra note 25 at 169–170. See also J. Goodey, ‘Compensating Victims of Violent Crime in the European Union with a Special Focus on Victims of Terrorism’ (2003), online: National Centre for Victims of Crime at http://www.victimsofcrime.org/. Finally, this is also the case in Quebec: ‘les avantages prévus par la loi ne peuvent etre accordés si la victime a, par sa faute lourde, contribué à ses blessures ou à sa mort’. See Tétrault, supra note 28 at 269.

32 For a discussion of this issue within the comprehensive Quebec automobile no-fault regime, see Tétrault, supra note 28 at 269.

33 Regimes in France, Belgium and Portugal are less generous in this respect. See Gardner, supra note 22 at 417.
under ordinary rules of tort law and recusory rights of action. Where this right of recusory action is granted to the fund, it appears to be seldom used.  

What are we to make of this complex interaction of tort law and social insurance? It is fair to say that the direction of legislative choices related to the coordination of tort law and alternative schemes of compensation also marks the late 20th century shift in perspective highlighted above, in which alternative compensation regimes become ad hoc solutions to functional problems of tort law, rather than the expression of a different logic of solidarity. During the heydays of social insurance, many regimes reflected a fundamental reconfiguration of the community’s response to some types of accidents, as unavoidable social risks to be shared by all. The trouble with tort law was not that it was an ineffective or inefficient way to compensate victims, but that its corrective justice foundation was incompatible with proper conceptions of social solidarity. In that context, the possibility of a residual role for tort law was often excluded.

By contrast, in this post-welfare state environment, the more recent regimes are better described as plugins or modular extensions to tort law, designed to fix problems or to add functionalities without challenging the basic assumptions of private law. In that context, the most effective (or most efficient) coordination of tort law and insurance is an open question to be answered empirically, with the help of managerial logic and social science insight. The intricate weaving together of tort solutions with alternative compensation schemes manifests the instrumental qualities of legislative compensation regimes – what is the most efficient way to achieve both compensation and deterrence? – rather than the ideological reshaping of states’ responsibility to address the consequences of social-risk injuries and mass torts.

Within this instrumental conception of alternatives to tort law, state compensation schemes become increasingly vulnerable to financial constraints and the limits of public funding. There are obvious political limits to the capacity of the state to finance alternative compensation schemes through general taxation. In difficult financial periods, the temptation is great to shift back a portion of the burden onto the subset of the general public whose activity is most closely connected to the risk, and to scale

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34 Even when the fund has a right of subrogation, it appears to be relatively rarely used. For example, a number of French schemes have such a right, especially in case of gross fault or negligence. See, e.g., Marion Guigue et al., ‘La réparation du dommage: bilan de l’activité des fonds d’indemnisation’ (2009), online: Mission de recherche droit et justice at http://www.gip-recherche-justice.fr/catalogue/PDF/rapports/186-RF_Hauteville_fonds_indemnisation.pdf at 55. Yet they are far from being used as much as they could be. Id. at 68–69. Concerns include costs and administrative complexity. Id. However, the ONIAM, the French scheme for medically adverse events, has expressed a desire to use this right more and has raised the proportion of cases that give right to a recusory action. Id. at 70.

In Quebec, the automobile accident compensation fund can only exercise its right to recusory action for accidents taking place outside Quebec or involving non-Quebec residents. Criminal Act Compensation Funds also have such a right in both France and Quebec. See Lévesque, supra note 15 at 894. However, while the French regime is rather efficient at recovering damages, the Quebec fund has simply abandoned its right after concluding that the costs exceeded the benefits. Id.

35 On the epistemological shift that these new social schemes manifested, see François Ewald, l’État Providence (Paris: Bernard Grasset, 1986).
back the ambitions of alternative schemes. They become one compensatory mechanism among many solutions, to be coordinated with tort law on the basis of cost–benefit analyses of ever increasing sophistication.

C. The Scope of Coverage

I have outlined the basic legislative choices that relate to the domain of alternative schemes of compensation, and to their coordination with tort law. The creation of an alternative compensation scheme involves one final type of legislative choice, in the determination of the scope of coverage for the different negative consequences of the accident. The question of the scope of coverage arises within tort law as well, of course, but it is hidden behind the abstraction of foundational principles that dictate full reparation for all negative consequences of wrongdoing. Despite the principle of *restitutio in integrum*, compensation within tort law generally falls far short of full reparation, both in terms of the heads of damages for which compensation may be claimed, and in terms of liquidation and actual payment of the damages that are owed to the victim. In the context of legislative schemes of compensation, the premise of full reparation – convincing or not – is not maintained. These schemes are typically presented as compromises, designed to achieve some compensation for the greater number, rather than full compensation for the few. Although victims benefit from easier access to an indemnity within such regimes, they may lose out on the scope of coverage. Difficult legislative choices determine what is left out.

In this respect, three elements are noticeable in the different iterations of alternative compensation schemes over the course of the 20th century.

First, the regimes addressing bodily injuries generally focus on relief for past and future loss of earnings, in the form of an annuity calculated, typically, on the basis of earnings prior to the accident, with a maximum insurable wage. Medical costs that may not be covered by social security often form part of the indemnity as well. Most regimes also provide support benefits for the immediate next of kin of a victim who is killed in an accident.36 The earliest workers’ compensation regimes, in this respect, were targeted to alleviate the poverty that would otherwise strike the victims of industrial accidents who could not successfully litigate their tort claim in ordinary courts. Conversely, non-pecuniary consequences of bodily injuries, such as pain and suffering, loss of amenities or loss of enjoyment of life, are rarely compensated in the

36 Provisions for relatives in case of death are generally included in most existing compensation schemes: for example, as early as 1897, the British Worker’s Compensation Act included the payment of a lump sum in case of death. Oliphant, *supra* note 2 at 49. Most criminal victim schemes, such as those of New South Wales, Western Australia and Victoria (but not of Tasmania) include such provisions. See Maxine Kersh, ‘Empowerment of the Crime Victim: A Comparative Study of Victim Compensation Schemes in the United States and Australia’ [1993–1994] 24 Cal W Int’l L J 345 at 355. Quebec’s criminal acts compensation scheme gives next of kin a lifelong pension. Lévesque, *supra* note 15 at 889. However, the French regime is more likely to compensate even distant kin for non-pecuniary loss and indemnities are quite generous. *Id.* at 890.
comprehensive regimes that address recurring social risks such as occupational accidents and diseases, road accidents and crimes against the person.\(^{37}\)

Secondly, the scope of coverage provided by the alternative compensation scheme must be viewed in coordination with other dimensions of the social security net in the relevant domestic setting. For instance, in jurisdictions with extensive and free public healthcare, medical costs resulting from accidental harm will be taken care of through social security, and will not be included within the indemnification of victims. It is also easier to conceive of socialization of the risk of material loss (say, property damage arising from natural disasters) where personal injury, illness and disability already yield social security payments.\(^{38}\) For similar reasons, the scope of coverage provided by alternative compensation schemes will also vary depending on whether it is viewed as one component of social security, or as state-organized first-party or third-party insurance. In the former case, as mentioned above, the indemnities will tend to focus on alleviation of poverty and loss of earnings. In the latter case, indemnities will more closely approximate tort law indemnities and full reparation. For instance, the fund established in the USA to address the losses of victims of the terrorist attacks on the World Trade Center must be viewed as a vehicle for state-assisted settlement of tort claims, rather than as one component of social security.\(^{39}\) The scope of coverage, within this fund, is much wider than is typical within alternative compensation schemes.

Thirdly, most alternative schemes tend to focus on the consequences of bodily injury, and do not provide compensation for damage to property, underlining a hierarchy of what is deemed to be of value. The emergence of alternative compensation schemes for the consequences of natural catastrophes and environmental disasters, including the involuntary dissemination of genetically modified seeds, may signal a new direction in this respect, providing minimal coverage for property damage that may be ignored by the insurance market.\(^{40}\) Nonetheless, this expansion only shows that alternative compensation schemes are imagined as responses to the random cruelty of fate. When property losses are clearly imputable to human wrongdoing or bad faith, even in the context of mass torts, the state’s desire to rescue its citizens from misfortune is less intense. The relative indifference of contemporary states to the situation of citizens who have lost all their savings, pension funds and assets in the financial crisis and

\(^{37}\) Quebec allows compensation for non-economic loss in automobile accidents, unlike US schemes. Oliphant, supra note 2 at 60. The comprehensive New Zealand regime also provides a lump sum for non-pecuniary loss (although was temporarily cancelled between 1992 and 2000). Id. at 74. Most compensation schemes for victims of crime in Europe do not give damages for non-pecuniary loss. See Buck, supra note 25 at 166.


\(^{39}\) Feinberg, supra note 13 at 181.

fraudulent behaviour of the last five years provides a strong case in point. Private litigation, mostly in the form of class actions, is viewed as the proper response.

So far, I have presented alternative compensation schemes as complex legislative choices, along a few lines that recur from jurisdiction to jurisdiction, yielding a very diverse set of answers: what types of accidental injuries to carve out of tort law, how to coordinate tort law and legislative schemes in respect of those injuries, and what coverage to provide those who sustain those injuries and losses. But alternative compensation schemes must also be understood as outcomes, the result of multiple factors and pressure that combine in different ways to yield the great diversity of regimes that have emerged over the past century.

3. EXPLAINING THE LANDSCAPE: ALTERNATIVE COMPENSATION SCHEMES AS OUTCOMES

I turn now to the second part of the overview, away from the substantive content of alternative compensation schemes, to consider from a comparative perspective the factors that can explain their emergence. There is, of course, considerable variability in the range of alternative compensation schemes from one country to the next. Any effort to explain why some regimes take hold in some jurisdictions and not in others is bound to be quite partial. Nonetheless, it is possible to organize into four broad categories the different factors that can be said to influence the emergence and development of alternatives to tort law. Political, social and economic factors reside in a first category. Ideological shifts can be grouped in a second category of factors. Patterns of dissemination or circulation of legislative models and ideas constitute a third category of factors. Finally, the legal and institutional context of tort law in a given jurisdiction plays a significant role, and the different factors that explain alternative regimes as a response to the failures of tort law can be grouped in a fourth category. I explore each category in the remainder of this chapter.

A. Political, Social and Economic Factors

Examining the emergence of alternative compensation schemes over the past century and across national boundaries is bound to reveal that, to the extent such regimes share similar characteristics, they are not the product of a coherently articulated theory of compensation for injury. On the contrary, the history of these alternative regimes

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41 No state appears to have developed a no-fault scheme for losses on the financial market, although various market authorities have set up ‘insurance of last resort’ schemes. See for example the Financial Services Compensation Scheme in the UK (online at: http://www.fscs.org.uk/) or the Fonds d’Indemnisation des Marchés Financiers in Quebec (online at: http://www.lautorite.qc.ca/en/submit-claim.html). A recent financial scandal in Quebec, the ‘Norbourg’ affair, prompted the government to suggest reforming the current regime in order to give citizens better protection. See Bureau d’Assurance du Canada, ‘Consultation sur l’indemnisation des consommateurs de produits et services financiers’ (7 March 2012) online: Bureau d’assurance du Canada at http://www.bac-quebec.qc.ca/documents/Mem-indemn-prod-serv-financ.pdf.
suggests that many, if not all, were established and developed in response to particular political, social or economic conditions that were not necessarily replicated elsewhere.

First, and perhaps most obviously, alternative schemes of compensation are more likely to emerge in social and economic settings in which the failures of tort law can more readily be grasped. The more victims fail to receive compensation for wrongful injury, the more likely it is that tort law will be seen as a failed enterprise. In that sense, the variable emergence of regimes of compensation is tied to some degree to the level of economic development of a given jurisdiction. Workers’ compensation can more easily emerge when extensive industrialization produces massive personal injuries on a recurring, statistically measureable basis. The same can be said of automobile accident compensation, in relation to the intensity of use of motor vehicles and the development of transportation infrastructures. More cars, more roads, more accidents: they all point to more victims. A similar parallel could be drawn for damages caused by environmental mass torts or nuclear energy. There is no causal sequence, here, in the sense that the multiplication of massive or recurring losses does not in and of itself dictate that they be compensated outside of tort law. They must first be socially and legally constructed as a problem that tort law cannot adequately address. Nonetheless, it is clear that particular socio-economic conditions facilitate the emergence of alternative compensation regimes.

Secondly, and in a similar vein, alternative compensation regimes are also in many cases a response to specific crises that result from – or are created by – extensive media attention. Massive oil spills, exceptional terrorist acts, blood contamination scandals, repulsive criminal acts, immunization programmes bring to light the fate of victims that cry out for a collective response that facilitates compensation. In well-documented processes reminiscent of availability bias in psychology, the emergence of many alternative compensation schemes is thus tied to ‘incident politics’ that depend on the features of random public events and collective (and perhaps irrational) reactions to them.42

Thirdly, variations in the scope and range of alternative schemes of compensation from jurisdiction to jurisdiction also turn on interest group politics, and on the pressure, resistance and political capital that can be mustered by key actors in the polity. From early workers’ compensation regimes, possibly triggered by a fear of the proletariat and as an effort to thwart socialist success in Germany,43 to consumer movements driving automobile injury compensation in North America,44 to political campaigns raising awareness to the dire situation of victims of crime45 or Black Lung Disease,46 there is an indisputable causal connection between shifts in power, specific political goals and activism, on the one hand, and legislative outcomes in the form of alternative regimes of compensation, on the other. In this respect, key economic actors protecting their

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43 See Engelhard, supra note 4 at 13.
44 See Rabin, supra note 10 at 703.
45 See Hall, supra note 15 at 169.
46 See Rabin, supra note 10 at 704.
corporate interests, such as the Bar, the medical profession and the insurance sector, are
important formants in the fate of alternative compensation schemes in every juris-
diction. It is not unusual for an alternative scheme to be advocated from a concern that
a particular valuable industry or activity – say, obstetrics, or nuclear energy, or
pharmaceutical innovation – is no longer viable if it remains subject to the vagaries and
excesses of tort law. In the USA, in particular, market regulation justifications have
been used both to justify and to undermine specific alternative compensation
schemes.47

A final political factor relates to the capacity of the state to fund alternative
compensation schemes and their administration, when the burden is placed on the
public purse. Shifts in economic conditions, and shifting perceptions of the political
acceptability of public debt and deficits, have had a significant impact on the growth
and, more frequently, contraction of alternative compensation regimes. Arguments
about the collective ‘affordability’ of the regime played a decisive role in the changing
geometry of New Zealand’s comprehensive compensation scheme, for instance.48

B. Ideological Context

The emergence and changing scope of alternative compensation schemes also turn on
shifts in ideological contexts at different periods. As stated above, the mere fact of
increasing numbers of accidents and victims cannot explain legislative choices to
address their compensation outside of the basic regime of tort law. The lack of success
of those victims in receiving compensation through ordinary private law recourses must
first be viewed as a problem, a failure of the logic of corrective justice. Recurring
injuries in specific contexts must first be conceived as the manifestation of a social risk,
as the by-product of ongoing social interaction. The idea of risk prevention must first
be understood as requiring systemic intervention, rather than ex post imputation of
individual blame. In that sense, the development of alternative compensation schemes is
tied to the ebb and flows of the welfare state, and to the reconfiguration of the idea
of individual injury as a burden that must be shared and prevented by the community.
Progressive and solidarity justifications of this nature are manifest in the development
of workers’ compensation in the early 20th century, in no-fault automobile accident
regimes in the decades that followed, and in the emergence of the comprehensive
compensation regime in New Zealand. A similar ideological basis, in which the state
assumes a direct responsibility to protect citizens from the harmful consequences of
crime, might explain in part the emergence of legislative compensation schemes in that
field, although there was much resistance in the UK in articulating it as such.49 More
fundamentally, the stronger historical presence of socialization of risks in Continental

47 For an example in the context of medical liability, see Frank A. Sloan et al, ‘Public
48 See Oliphant, supra note 2 at 68–72.
49 Indeed, compensation in the UK was described initially as ‘ex gratia’ payments from the
state rather than an admission of responsibility. Brian Williams, Victims of Crime and
Europe and Scandinavian countries, compared with the United States and the UK, reflects divergent conceptions of the role of the state in the organization of social and economic interaction.

Conversely, the contraction of the welfare state in the latter half of the 20th century, and the rise of neo-liberal ideology in many Western countries, explain in large measure the decline of the idea of socialization of risks. The reintroduction of the logic of corrective justice in state-organized automobile compensation in the USA\(^{50}\) and the paucity of new alternative compensation schemes introduced in the past two decades illustrate this ideological shift.

C. Dissemination Effect

Traditional tools of comparative law point to a third set of factors determining the distribution of alternative compensation schemes in different jurisdictions. Does the exploration of alternative schemes across jurisdictional boundaries reveal any patterns of ‘legal transplants’ that might be explainable through dissemination theory?

The context here relates to legal transplants or dissemination of legislative models and ideas, rather than to the circulation of basic private law concepts and rules through judicial appropriation. Questions of fit, meaning and effectiveness of the transplant within the adoptive system are likely to be different in this distinct setting, but the key vectors of dissemination remain relevant. Shared language, shared legal tradition, geographical proximity, patterns of regional influence, prestige and economic leverage are all likely to facilitate the circulation of alternative compensation schemes from one jurisdiction to the next.\(^{51}\)

In this respect, one can find the indicia of a few lines of communication in the comparative history of alternative compensation schemes. First, distinct types of workers’ compensation regimes circulated within Continental Europe, from Germany to the Netherlands and northern Europe, and from France to Belgium.\(^{52}\) The UK regime for industrial injuries occupies a separate position, with measurable impact within the Commonwealth (Canada, New Zealand and Australia, in particular).\(^{53}\) A different pattern of dissemination took no-fault automobile accident compensation from New Zealand and Canada to the USA, while France and countries within its sphere of

\(^{50}\) Patrick Atiyah warned of a ‘conservative backlash’ in the early 1980s. See P. Atiyah, ‘No Fault Compensation: A Question that Will Not Go Away’ [1980] Ins LJ 625 at 627. Indeed, this was especially visible in the United States, where many states returned from no fault to tort in the 1980s, including Nevada, Pennsylvania, South Carolina and Connecticut. See Oliphant, \textit{supra} note 2 at 58.

\(^{51}\) See generally Michele Graziadei, ‘Comparative Law as the Study of Transplants and Receptions’ in Mathias Reimann and Reinhard Zimmermann, eds, \textit{The Oxford Handbook of Comparative Law} (Oxford: Oxford University Press, 2006) at 441.

\(^{52}\) Belgium offers a useful case study, in this respect, moving from an early regime of strict liability, along French lines, to a mandatory public scheme along German lines later on. See Hoop, \textit{supra} note 20, at 133–135.

\(^{53}\) Oliphant, \textit{supra} note 2 at 44.
influence never followed suit.54 State indemnification of victims of crime first emerged in the UK and spread across to the Commonwealth and Continental Europe, in the latter case under the impetus of European authorities. Slightly different legislative regimes emerged in Europe as responses to the consequences of terrorism, particularly in France and Italy.55 Alternative compensation schemes for medical and pharmaceutical injuries have been primarily successful in northern European countries, but not elsewhere.56 New Zealand stands pretty much alone among common law countries, with a history of socialization of risk that is unparalleled elsewhere. And it appears that, beyond workers’ compensation, a variety of political, economic and social obstacles stand in the way of dissemination of alternative schemes of compensation in the Global South and Asia.57

D. Legal and Institutional Context

A final set of factors influencing the emergence and development of alternative schemes of compensation relate to the domestic legal and institutional context in each jurisdiction. In view of the other sets of factors I have just outlined, it is simplistic to assume that these schemes emerge as responses to failures of tort law and extra-contractual liability. Indeed, political, social, economic, ideological and dissemination factors will often determine whether a particular outcome of private law is represented as a failure or a problem to be addressed. Nonetheless, it would also be simplistic to assume that the principles, rules and institutions of private law that govern the compensation of wrongful harm in a given jurisdiction are irrelevant to the emergence of alternative compensation regimes. That is true on two levels.

First, alternative compensation schemes are often advocated as responses to the failures of tort law. What is wrong (or presented as such) with one’s private law determines the enthusiasm with which one looks for alternatives. Because of the variations in the positive law and institutional setting of torts across boundaries, what constitutes such a failure is necessarily variable from jurisdiction to jurisdiction.

54 Id. at 51–60. For details on how legal systems may adopt legal solutions from other states, see Ugo Mattei, ‘Legal Systems in Distress: HIV-Contaminated Blood, Path Dependency and Legal Change’ (2001) 1:2 Global Jurist Advances 1 at 2–6.
yielding somewhat different pressures and legislative responses from one place to the next. To be more specific, the failures of tort law identified by scholars and other advocates relate both to the process of private law adjudication of torts and compensation, and to the substantive law of torts. With regard to process, the concern relates to efficiency comparisons between tort law and public insurance schemes as modes of distribution of compensatory awards. The ordinary processes of tort law coupled with private liability insurance are presented as inefficient and costly. Private claims adjudicated through ordinary court proceedings, yielding payments from the defendant’s insurance company, generate significant ‘transaction costs’ when viewed as a mechanism to spread the loss among a defined pool of risk-creators. The more costly and inefficient private law processes are in the relevant jurisdiction, the more likely it is that arguments will emerge to replace them with administrative solutions.

Advocates of alternative schemes of compensation also find failures of tort law in the substantive rules of the private law regime, and those are also variable from one jurisdiction to the next. The primary argument, here, rests on fairness: deserving victims cannot succeed within ordinary tort law and are left without compensation. The argument is systemic, in the sense that it identifies categories of wrongful injury in which the conditions of civil liability cannot easily be met. The source of the injury may not be easily characterized or proven to be wrongful, as in the case of industrial accidents. The causal link between wrongdoing and the injury may not be easily established, as in the case of medical or pharmaceutical injuries. The wrongdoer may be typically insolvent, as in the case of crimes against the person or traffic accidents. The closer tort law is to a lottery, the more likely it is that alternatives will be advocated. In that sense, the different scope that is given to various modulations of the law of torts in each jurisdiction plays a role in the emergence or absence of alternative compensation schemes. The rule that contributory negligence was an absolute bar to recovery in the common law led to a critical re-assessment of the law governing industrial accidents and work-related injuries. Conversely, the presence of effective rules of strict liability within general private law may obviate the need for alternative compensation schemes. In France, for instance, a creative interpretation of the Civil Code yielded a strict liability regime for automobile accidents that was viewed as an effective compensation mechanism for the better part of the 20th century.

Differences between the substantive and procedural laws of different countries are relevant to the emergence of alternative compensation schemes at a second level, which relates to the capacity of private law to respond to the challenges from within itself. In this respect, the margin of manoeuvre varies from one legal tradition to the next. Scholars have already highlighted that positive conceptions of the state and a more robust administrative apparatus make it more likely that legislated alternative compensation schemes will be considered favourably and implemented. Conversely, greater tolerance for the creative and corrective role of judges in relation to the fundamental principles and rules of tort law could make alternative schemes unnecessary. Judges may create a new strict liability basis, or adopt novel interpretation of an abstract and

58 See Hoop, supra note 20 at 113.
59 See Gardner, supra note 22 at 422–423.
60 See Mattei, supra note 54 at 10.
less entrenched Civil Code.\textsuperscript{61} Conceptions of institutional competence are most relevant, in this context. Are judges better placed than legislators in finding solutions to systemic failures of tort law?\textsuperscript{62} Are judicial solutions more effective when the problem emerges over an extended period of time (say, the compensation of automobile accident victims), as opposed to crises that call for immediate solutions (say, the contamination of blood with the HIV virus)? Finally, the reception of novel procedural devices may provide effective avenues to deal with some of the institutional problems tied to private law regimes, including the costs of litigating those claims in court. In this respect, the variable fate of class action regimes over the past three decades can be tied to shifting attitudes towards new alternative schemes of compensation. In the USA, in particular, the problem of mass torts, which sometimes generates calls for alternative compensation schemes, is now addressed through highly visible class action procedures, and shifts the discourse away from legislative socialization of some risks.\textsuperscript{63}

4. CONCLUSION

A brief comparative overview of alternative schemes of compensation over the past century does reveal a number of recurring themes, both in the shape of questions that arise when such schemes are created and in the factors that drive their emergence. Looking forward, three new aspects emerge, each one the mirror image of one of the characteristics of alternative schemes of compensation. First, alternative compensation regimes are almost by definition legislative solutions to problems encountered within domestic tort law. The next phase in addressing problems of this nature may well be regional or global, with transnational regimes addressing problems that transcend national borders. Secondly, alternative compensation regimes have focused until now on monetary indemnities, but one can anticipate new ways of addressing systemic harm and mass torts through non-monetary remedies, such as forward-looking measures addressing community well-being for aboriginal victims of abuse in Canada. Thirdly, and perhaps most significantly, alternative schemes have focused on \textit{ex post} compensation, often matching the indemnification of victims with deterrence and prevention of harmful conduct. In the next few years, renewed attention to regulatory frameworks, and to the precautionary principle, may tilt the balance in favour of \textit{ex ante} intervention.\textsuperscript{64}

\textsuperscript{61} Id. at 10–11.
\textsuperscript{62} See Rabin, \textit{supra} note 10 at 731. Rabin points to a renewed faith in the superior institutional competence of the legislative forum, when compared with the judiciary’s capacity to address the failures of tort law.