

MEDICAL INJURY COMPENSATION: BEYOND ‘NO-FAULT’

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I. INTRODUCTION

If I am injured in the course of medical investigation or treatment, I may be eligible to receive compensation for some of the adverse consequences of my injury—at least, if I live in a developed country. In most such countries, there exists some form of state-administered compensation scheme for medical injuries. However, even within the developed world, there is considerable variation in the eligibility criteria for compensation. Different countries would, for example, respond very differently to the following pair of cases.

Case 1. Mr. Smith suffers a brain haemorrhage as a result of a genetic defect in the arteries supplying his brain. He is taken immediately to hospital where he is rushed to the operating theatre, unconscious, to have the blood drained from his skull. During the course of the operation, the surgeon negligently damages the part of his brain that controls his right leg. Though Smith subsequently recovers from his haemorrhage, the damage inflicted by the surgeon leaves him with a permanently paralysed leg.

Case 2. Mrs. Jones, like Mr. Smith, suffers a brain haemorrhage as a result of a genetic defect. Jones too is rushed to the operating theatre, and, as with Smith, the surgeon damages the part of her brain that controls her right leg. In Jones’ case, however, the damage is not due to negligence on the surgeon’s part. It is instead an unusual side effect of good surgical practice: the surgeon (correctly) believes that it is necessary to damage this part of the brain in order to stop the haemorrhage and thus save Jones’ life. The result, however, is the same. Jones recovers from the haemorrhage, but is left with a permanently paralysed leg.

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In most Anglophone jurisdictions, Smith would be eligible to receive compensation through a court-based tort law system, whereas Jones would be left to make do with the ordinary social security and public healthcare arrangements. The difference in treatment arises because tort systems typically endorse the 'fault criterion' according to which the victim of an injury is awarded compensation, paid by the injurer, only if she can establish that the injurer in question was *at fault* for her injury. Plausibly, Smith could establish this.¹ Jones, however, surely could not.

In a second group of jurisdictions, including Sweden, Denmark, Norway, Finland, France, New Zealand, Florida and Virginia, the fault criterion has been eliminated, at least for some kinds of medical injury. These moves have been taken to their greatest extent in New Zealand, where a statutory accident compensation system has for over 30 years compensated medical injury on a *no-fault* basis:² the scheme provides compensation to medical injury victims without regard to whether their injuries can be attributed to the negligence or other wrongdoing of a medical professional,³ and if a claim for compensation is successful, that compensation is paid from an account maintained through general taxation.⁴ Under the New Zealand scheme, Smith and Jones might well both receive (equal) compensation, and the negligent surgeon would escape the requirement to pay compensatory damages. The surgeon could, however, be referred for criminal or medical disciplinary investigation.⁵

¹ Negligence is standardly taken to ground an attribution of fault. Besides negligence, the other major grounds are recklessness and intentional harm. For discussion, see P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th edn (Butterworths 1999) at 25–28.

² The New Zealand scheme is administered by the Accident Compensation Corporation under the Injury Prevention, Rehabilitation, and Compensation Act 2001. For two excellent analyses of the scheme, see G. W.R. Palmer, 'New Zealand's Accident Compensation Scheme: Twenty Years On' (1994) 44 *University of Toronto Law Journal* 223; S. Todd, 'Privatization of Accident Compensation: Policy and Politics in New Zealand' (2000) 39 *Washburn Law Journal* 404.

³ To be eligible for medical injury compensation under the New Zealand scheme, a claimant must establish that her injury was a 'treatment injury': that is, an injury due to treatment that was not 'a necessary part, or ordinary consequence, of the treatment'. See The Injury Prevention, Rehabilitation and Compensation Amendment Act (No. 2) 2005 s. 32, esp. s. 32(1)(c). For discussion, see K. Oliphant, 'Beyond Misadventure: Compensation for Medical Injuries in New Zealand' (2007) 15 *Med. L. R.* 357.

⁴ Accident Compensation Corporation, 'How ACC is funded' (available at <http://www.acc.co.nz/about-acc/WCM000119?ssSourceNodeId=4249&ss-SourceSiteId=1494>, last accessed 30 December 2007). Some other no-fault schemes are funded by levies on medical professionals.

⁵ Injury Prevention, Rehabilitation, and Compensation Act 2001, s. 284.

The debate between tort and no-fault approaches has become a prominent feature of the academic commentary on medical injury compensation.⁶ It has also been taken up by policy advisory bodies and professional groups.⁷ Taken at face value, the dispute is one about what kind of injury compensation system should be adopted. However, I will suggest that arguments deployed by the proponents of no-fault systems in fact support the abandonment of injury compensation altogether. Thus, I will suggest, the dispute should be re-cast as one about whether medical injury compensation systems should exist at all. To focus on the distinction between tort and no-fault approaches is, I will argue, to significantly underplay what is at stake.

Medical injury compensation is not, of course, the only locus for the contest between tort and no-fault systems. There are, for example, similar controversies regarding compensation for the victims of motor vehicle injuries.⁸ Moreover, injury compensation reforms often transcend the boundaries between different types of injuries. For example, the introduction of no-fault medical injury compensation in New Zealand was merely part of a wider move to no-fault: the New Zealand scheme has from its inception also covered the victims of workplace, sporting, motor vehicle and other accidental injuries. It should be

⁶ See, for example, R.R. Bovbjerg, F.A. Sloan and P.J. Rankin, 'Administrative Performance of "No-Fault" Compensation for Medical Injury' (1997) 60 *Law and Contemporary Problems* 71; D.M. Studdert, E.J. Thomas, B.I.W. Zbar, J.P. Newhouse, P.C. Weiler, J. Bayuk *et al.*, 'Can the United States Afford a "No-Fault" System of Compensation for Medical Injury' (1997) 60 *Law and Contemporary Problems* 1; W.J. Gaine, 'No-fault Compensation Systems' (2003) 326 *British Medical Journal* 997.

⁷ See, for example, J.R.S. Pritchard, *Liability and Compensation in Health Care: A Report to the Conference of Deputy Ministers of the Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care* (University of Toronto Press 1990); British Medical Association, *Report of the Working Party on No Fault Compensation for Medical Injuries* (British Medical Association 1991); Department of Health, *Making Amends: A Consultation Paper Setting Out Proposals for Reforming the Approach to Clinical Negligence in the NHS: A Report by the Chief Medical Officer* (Department of Health 2003) (available at http://www.dh.gov.uk/en/Consultations/Closed-consultations/DH_4072363, last accessed 30 December 2007); Department of Health, *Clinical Negligence: What Are the Issues and Options for Reform* (Department of Health 2001); Committee on Banking and Insurance, *Florida's Motor Vehicle No-Fault Law* (Report No. 2006-102) (The Florida Senate 2005).

⁸ See, for example, Insurance Research Council, *Compensation for Automobile Injuries in the United States* (Insurance Research Council 1989); R.A. Devlin, 'Some Welfare Implications of No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec' in G. Dionne (ed.), *Contributions to Insurance Economics* (Kluwer 1992); J.D. Cummins, R.D. Phillips and M.A. Weiss, 'The Incentive Effects of No-Fault Automobile Insurance' (2001) 44 *Journal of Law and Economics* 427.

unsurprising, then, that many authors have tried to assess the merits of tort law and no-fault as general approaches to injury compensation.⁹

In this paper, I will not draw any conclusions about this wider debate between tort and no-fault approaches to compensation. I will argue only for a reformulation of the debate about *medical* injury compensation. However, I limit the argument in this way solely for pragmatic reasons. First, since there is likely to be considerable resistance to any attempt to re-structure the tort v. no-fault debate, it seems sensible to argue for a reformulation of *part* of the debate as a first step. Second, my argument relies on certain parallels between the situation of those injured by others and those suffering illnesses or other incapacities that were purely natural in cause. These parallels will be particularly obvious to those working in the medical sphere: both the injured and the naturally incapacitated frequently present to similar medical establishments, suffering from similar symptoms and requiring similar treatment.

Finally, before proceeding to my argument, a disclaimer. My background is in medicine and moral philosophy, not the law, so this is necessarily a somewhat amateurish contribution to what has been a heavily legal debate. The perspective of the paper is also, perhaps, one that will seem unfamiliar to some legal thinkers: it is unashamedly an attempt to explore and where possible defend my intuitive judgment that both tort-based and no-fault medical injury compensation schemes treat the victims of natural misfortune unfairly. In my anecdotal experience, this intuition is somewhat more difficult to elicit among legally trained people than among either moral and political philosophers or medical practitioners. Nevertheless, I think the intuition and the conceptions of fairness on which it can be grounded are sufficiently widely endorsed that their implications for injury compensation policy are worth exploring.

II. FAIRNESS AND NO-FAULT

As noted above, my focus in this article will be on *medical* injury compensation. However, my argument takes its start from a classic *general* critique of tort law presented by the Woodhouse Commission—the architect of New Zealand’s no-fault scheme.¹⁰ The Commission

⁹ J.L. Coleman, ‘Justice and the Argument for No-Fault’ (1974) 3 *Social Theory and Practice* 161; Royal Commission on Civil Liability and Compensation for Personal Injury (Chairman: Lord Pearson), *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Cmd. 7054-1 1978); Credit Suisse First Boston, *Accident Compensation: Options for Reform*, a report prepared for the New Zealand Business Roundtable (New Zealand Business Roundtable 1998).

¹⁰ The full title of the Commission was ‘The Royal Commission to Inquire into and Report upon Workers’ Compensation’, however it is normally called after its chairman, the Honourable Justice Owen Woodhouse.

outlined a range of practical difficulties encountered by tort law. It noted, for example, that though tort systems were committed to the fault criterion, they failed to impose the costs of injury compensation on those at fault, both because of the widespread (and in some cases compulsory) uptake of liability insurance by those who were likely to cause injuries,¹¹ and because the legal tests for negligence were poor proxies for actual moral fault.¹² Moreover, though the fault criterion was often defended on the ground that it created a disincentive to careless action, there was little evidence to support the claim that tort systems reduced the frequency of injuries.¹³ Finally, any supposed advantages of the tort approach came at a considerable cost: the court-based process was expensive to administer,¹⁴ the long and arduous process of pressing a case may have impaired the rehabilitation of injured claimants,¹⁵ and the susceptibility of the procedure to chance meant that it was difficult to predict the outcome of a particular claim.¹⁶

In addition to these predominantly pragmatic objections to tort law, the Commission was also concerned about the *justice* or *fairness* of the fault criterion. It was worried about the way in which the criterion made the provision of compensation dependent on the cause of an injury, and not on its effects:¹⁷

Few would attempt to argue that injured workers should be treated by society in different ways depending on the cause of the injury. Unless economic reasons demanded it the protection and remedy society might have to offer could not in justice be concentrated upon a single type of accident to the exclusion of others.

In the absence of such economic reasons, the Commission complained '[i]t cannot be regarded as just that workmen sustaining equal losses should be treated unequally by society'.¹⁸ And in its strongly worded recommendations for reform, it thus recommended an expanded system in which the victims of all injuries would be included within the bounds of the injury compensation scheme: 'wisdom, logic, and

¹¹ Royal Commission to Inquire into and Report upon Workers' Compensation, *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (1967) (hereafter, '*The Woodhouse Report*') at paras 82, 88.

¹² *Ibid.*, paras 82, 84–85, 87–88.

¹³ *Ibid.*, para 91. See also para 90.

¹⁴ *Ibid.*, paras 111–112. See also Bovbjerg, Sloan and Rankin, *op. cit.*, n. 6, 71.

¹⁵ *The Woodhouse Report*, paras 82, 106–110, 124–125. See also Bovbjerg, Sloan and Rankin, *op. cit.*, n. 6, 90–93.

¹⁶ *The Woodhouse Report*, paras 82, 92–102.

¹⁷ *The Woodhouse Report*, para 6. See also, for example, J.G. Fleming, 'Is There a Future for Tort?' (1984) 44 *Louisiana Law Review* 1193, 1203–1204.

¹⁸ *The Woodhouse Report*, para 57. See also paras 6, 17, 42–46, 55, 84–86.

justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment'.¹⁹

The thought I want to pursue is one that I take to be implicit in the Commission's comments: that it is unfair to deny injured persons compensation purely on the grounds that their injuries were not the fault of other persons. The force of this claim as applied to medical injury can be brought out by recalling the cases of Smith and Jones. Smith and Jones suffer similar medical conditions, undergo similar operations and end up with similar complications. If Smith is awarded a large sum of compensation that is denied to Jones, we could imagine Jones asking why she is treated less favourably. And the only answer we could give her is that her injury, unlike Smith's, was not caused negligently. But of course, this answer might well strike her as completely unsatisfactory: that her injury did *not* result from negligence was hardly within her control, so it might seem unfair that she is disadvantaged as a result.

It is difficult to remain unmoved by this complaint. There is a powerful and widely shared conception of fairness according to which any relative disadvantage (or at least any important and state-mandated relative disadvantage) is unfair if it was not within the control of its victim.²⁰ And Jones' disadvantage (relative to Smith) was clearly not within her control.

III. EXTENDING THE ARGUMENT FROM FAIRNESS

Applied to the case of medical injury, the fairness-based argument for no-fault runs as follows: to compensate the victims of wrongfully caused medical injuries (as in the case of Smith) while excluding the victims of faultlessly caused medical injuries (as in the case of Jones) is unfair to the latter. Therefore, if we compensate wrongfully injured patients, we should also compensate the victims of faultlessly caused medical injuries. Assuming that we should indeed compensate the

¹⁹ *Ibid.*, para 4.

²⁰ This conception of fairness, or something very close to it, is adopted by many protagonists in the debate on moral luck. See, for example, D. Enoch, 'Luck Between Morality, Law, and Justice' (2007) 9 *Theoretical Inquiries in Law*, Article 2; Robert Kane, 'Review: Responsibility, Reactive Attitudes and Free Will: Reflections on Wallace's Theory' (2002) 64 *Philosophy and Phenomenological Research* 693, 694, 697; D. Statman, 'Introduction' in D. Statman (ed.), *Moral Luck* (State University of New York Press 1993) at 2–3. Luck egalitarians develop this conception of fairness into a comprehensive theory of distributive justice. See, for example, R.J. Arneson, 'Equality and Equal Opportunity for Welfare' (1989) 56 *Philosophical Studies* 77; G.A. Cohen, 'On the Currency of Egalitarian Justice' (1989) 99 *Ethics* 906, or, for a predecessor to these theories, H. Spiegelberg, 'A Defense of Human Equality' (1944) 53 *Philosophical Review* 101.

former, it follows that we should compensate the latter, as no-fault schemes do.

Note, however, that even no-fault schemes exclude from compensation the victims of injuries or illnesses that were purely natural in cause, and it seems possible to argue that this exclusion is also unfair.²¹ Consider the following case:

Case 3. Williams, like Smith and Jones, suffers a brain haemorrhage as a result of a genetic defect. He too is rushed to hospital. However, his haemorrhage is particularly severe, and before he can be taken to the operating theatre, the part of his brain which controls his right leg is irreversibly damaged. Thus, like Smith and Jones, he is left with a paralysed leg, though in his case, the paralysis is a result of the genetic condition (and subsequent haemorrhage), not of its treatment.

We can re-apply the fairness-based argument to show that, if we are to award compensation to Smith and/or Jones, then we should also award compensation to Williams. Like Smith and Jones, Williams has suffered a brain haemorrhage, and, also like the other two, he has been left with a paralysed leg. Admittedly, Williams' incapacity was not caused by a surgeon (negligent or otherwise), but this fact was hardly within his control.

The suggestion that Williams should be compensated might seem strange, it is natural, at least in legal contexts, to think that compensation is necessarily a response to some harm previously inflicted by the compensator. I will, however, understand compensation more broadly so as to include any attempt to restore a person to some better situation that she previously enjoyed, or that she is imagined to have enjoyed prior to the natural and social lottery of birth. (Those who find this definition implausible may simply read 'compensation-like benefit' whenever I use the word compensation.) On this understanding, we can quite sensibly ask whether the victims of natural misfortune ought to be compensated. And it is my contention that, if we are prepared to invoke the argument from fairness in support of no-fault medical injury compensation, then we should also invoke it in support of compensating those incapacitated through natural misfortune. Indeed, it seems possible that the argument from fairness could be used to defend the compensation of all persons suffering disadvantages that were not within their own control, regardless of whether those disadvantages take the form of physical incapacity (as opposed to social disadvantages such as unemployment), and regardless of whether they

²¹ I henceforth use 'incapacity' as an umbrella term for injury and illness.

were congenital or acquired. On this view, only self-inflicted incapacities and disadvantages—or those that could have been avoided by their victims—would be excluded.²² However, in what follows, I will focus on the case of those incapacitated after birth through natural misfortune, for example, due to the manifestation of a genetic disease.

IV. POLICY IMPLICATIONS

Thus far, nothing I have said is new: others have pointed out the apparent unfairness of excluding those incapacitated through natural misfortune from no-fault medical injury compensation schemes, and from no-fault injury compensation schemes more generally.²³ Indeed, some have been moved, partly by this concern, to advocate the reform of no-fault schemes.²⁴

However, the precise connections between fairness-based concerns and the various policy proposals that they have motivated remain relatively unexplored. Most authors either focus on the unfairness of existing no-fault schemes, making only brief and speculative reform proposals, or recommend detailed reforms but without basing these on a clear argument from fairness-based premises. Perhaps for this reason, there is considerable disagreement about what policies considerations of fairness support.

It seems worthwhile, then, to consider where the fairness-based argument really does lead. What are its implications for medical injury compensation policy?

The unfairness generated by no-fault schemes arises from the fact that those schemes treat the victims of natural misfortune less favourably than the victims of comparable medical injuries. There are obviously

²² I assume here that self-inflicted injuries are within the control of their victims—in fact, some may not be.

²³ See M.A. Franklin, 'Replacing the Negligence Lottery: Compensation and Selective Reimbursement' (1967) 53 *Virginia Law Review* 774; Cane, *op. cit.*, n. 1, 418–422; C.H. Schroeder, 'Causation, Compensation and Moral Responsibility' in D. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford University Press 1995) at 347, esp. at 350, 355; J. Harris, 'The Injustice of Compensation for Victims of Medical Accidents' (1997) 314 *British Medical Journal* 1821; R. Avraham and I. Kohler-Hausmann, 'Accident Law for Egalitarians' (2006) 12 *Legal Theory* 181, esp. at 204–213.

²⁴ A.L. Miller, 'Should Social Insurance Pay Compensation for Pain and Suffering?' (1982) 31 *International and Comparative Law Quarterly* 550; Law Commission (New Zealand), *Personal Injury: Prevention and Recovery—Report on the Accident Compensation Scheme* (Report No. 4, Law Commission, 1988); Royal Commission on Social Policy (New Zealand), *Report of the Royal Commission on Social Policy: Future Directions* (1988), 757; Palmer, *op. cit.*, n. 2, 234; Harris, *op. cit.* n. 22; A. Merry and A. McCall Smith, *Errors, Medicine and the Law* (Cambridge University Press 2001) at 210–211.

two ways of resolving this unfairness: compensate the victims of natural misfortune or deny compensation to the medically injured. But as we have seen, those who invoke the fairness-based argument for no-fault assume that at least some victims of medical injuries ought to be compensated. Suppose that this assumption is correct. It would follow that the right response to the unfairness of no-fault medical injury schemes is to expand those schemes, not to disband them.

This is the response favoured by many who take fairness to be an important consideration in determining compensation policy.²⁵ The Woodhouse Commission itself appears to have been attracted by this option,²⁶ and there have been some tentative political moves towards expansion of the New Zealand scheme.²⁷

It is evident, however, that some major difficulties would surround any attempt to include the naturally incapacitated within compensation schemes. Perhaps the most obvious problem is that of cost. A scheme which compensated more people would *ceteris paribus* require greater funding, and the cost difference is likely to be substantial since the number of people incapacitated through natural misfortune dwarfs the number of people currently covered by even the most extensive no-fault medical injury compensation schemes.

Given the cost implications, it seems clear that, to be economically and politically feasible, an expanded compensation system of the sort being considered here would have to offset the increase in coverage with a significant decrease in the generosity of compensation benefits. There would be no question of attempting to restore all eligible loss victims to their pre-loss situation, as tort law systems do. Even existing no-fault schemes have had to compromise on this objective: they typically offer less generous benefits than those provided under tort law.²⁸

²⁵ See, for example, Law Commission, *op. cit.* n. 23; K.S. Abraham and L. Liebman, 'Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury' (1993) 93 *Columbia Law Review* 75, esp. at 107ff.

²⁶ The Woodhouse Commission appears to have excluded victims out of caution (or perhaps, strategy) rather than principle. It hoped that the boundaries of the New Zealand scheme would be expanded to include natural incapacity at a later date: See *The Woodhouse Report*, para 290(a): 'It is possible to argue that if incapacity arising from accident injury is to be the subject of comprehensive community insurance, then interruption of work for reasons of sickness or unemployment, or other causes which cannot be guarded against should equally be included'. See also para 290(b) and Todd, *op. cit.*, n. 2, 493. An Australian Committee, also chaired by Justice Woodhouse, did recommend the introduction of a no-fault scheme including both injury and illness. See, *The National Committee of Inquiry on Compensation and Rehabilitation in Australia, Report* (1974), vol. 1, paras 39, 226, 347.

²⁷ See, for example, Todd, *op. cit.*, n. 3, 414, 493; New Zealand Labour Party, *Policy Statement: Labour on ACC* (1999).

²⁸ See, for example, Todd, *op. cit.*, n. 2, 416–418, 425.

The benefits provided by an expanded system would arguably have more in common with the benefits provided by social security and public healthcare systems. These benefits are sometimes linked to the previous situation of the recipient, but, at least in the Anglophone jurisdictions, they could not rightly be characterised as attempts to restore any actual or hypothetical *status quo ante*, and they therefore do not qualify as *compensation* payments at all. The coverage of an expanded system would also be similar to that of existing social security and public healthcare systems, or at least, the parts of those systems which respond to incapacity: both would cover a wide range of injuries *and* illnesses.²⁹ Thus, a scheme supported by the argument from fairness would, I think, be more aptly described as a supplementary social security and public healthcare system than as an injury compensation scheme.

Moreover, since both the nature and coverage of the benefits provided by the expanded no-fault 'compensation' scheme would compare with those provided by existing social security and public healthcare systems, there would be little justification for maintaining it as a distinct scheme. There might be a case for funding medical injury benefits from a different source than other forms of state assistance.³⁰ However, a difference in funding arrangements would hardly justify the maintenance of a distinct medical injury compensation scheme. Indeed, there would remain a strong positive case for merging an expanded 'compensation' scheme into existing social security and public healthcare systems, where these exist: doing so would save on administrative costs. Perhaps the money saved could be used either to augment the benefits provided by social security and public healthcare systems, or to reduce taxpayer contributions.

At first sight, then, it appears that where the fairness-based argument really leads is not, as sometimes thought, to a dramatically expanded version of existing no-fault medical injury compensation schemes, but to the abandonment of medical injury compensation altogether, with the possible diversion of the funds saved to social security and public healthcare systems. If this is right, the debate about what sort of injury compensation scheme to adopt should be re-cast as a debate about *whether* to retain any medical injury compensation scheme.³¹

²⁹ One difference in coverage might be that an expanded compensation scheme, justified by the fairness-based argument, would presumably exclude the victims of self-caused or avoidable incapacity, whereas social security and public healthcare systems typically include such persons. See *supra* n. 20.

³⁰ One possibility is that injurers could be required to bear the costs of benefits provided to their victims, even if considerations of fairness would require that those benefits be no more generous than those available to the naturally incapacitated. For a similar proposal, see Harris, *op. cit.* n. 22.

³¹ Stephen Sugarman and Terrence Ison have defended similar conclusions in the context of the wider debate between no-fault and tort law, though not explicitly on fairness-related grounds. See S.D. Sugarman, 'Doing Away

V. SOME RESPONSES

The defender of no-fault medical injury compensation might, of course, try to resist my claim that her fairness-based arguments commit her to the abandonment of injury compensation. She might note that a line demarking the limits of compensation cover has to be drawn somewhere, and claim that existing no-fault schemes draw it in as good a place as any.³² This response would perhaps be plausible if there were no positive reason to draw the line at any particular location, but according to the fairness argument, there is such a reason: we should draw the line so as to include all whose situation is relevantly similar to those already covered. As we have seen, this would entail including those incapacitated through natural misfortune, as well, perhaps, as those disadvantaged in any other way that was not within their control.

At this point, an advocate of no-fault compensation might turn to a pragmatic political argument, claiming that, despite being difficult to justify, the existing boundaries of no-fault schemes are at least widely accepted in countries that operate such schemes. However, this claim would be at odds with the evidence: in both New Zealand and Sweden—arguably the countries with the most stable and popular no-fault systems—defining the boundaries of medical injury compensation has been a persistent problem.³³

Perhaps a more promising line of response would see the proponent of no-fault medical injury compensation distancing herself from the fairness-based argument altogether and defending her preferred system on independent grounds. In the remainder of this section, I will consider various alternative arguments for no-fault; perhaps it will be possible to find some argument that does not telescope into an argument for the abandonment of medical injury compensation altogether.

As it happens, however, some of the leading alternative arguments for preferring no-fault compensation to tort law are also quite consistent with the abandonment of medical injury compensation. Consider, for example, an argument presented by Jeremy Waldron in his oft-cited 'Moments of Carelessness and Massive Loss'.³⁴ Waldron notes that,

with Tort Law' (1985) 73 *California Law Review* 555; T. Ison, *The Forensic Lottery* (Staples Press 1967), esp. at chapter 4.

³² See Todd, *op. cit.*, n. 2, 495: '[t]he boundaries to the [New Zealand] accident compensation scheme as they presently exist may be hard to defend, but there is no natural limit upon which all can agree. A line has to be drawn somewhere, and wherever it is it will create difficulties and anomalies in relation to cases that are excluded'. See also Cane, *op. cit.*, n. 1, 334–336.

³³ See Todd, *op. cit.*, n. 2, 412–414, 493–495; Studdert, Thomas, Zbar, Newhouse, Weiler, Bayuk *et al.*, *op. cit.*, n. 6, 10–13; Oliphant, *op. cit.*, n. 3.

³⁴ J. Waldron, 'Moments of Carelessness and Massive Loss' in D.G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford University Press 1995). See

since tort systems link compensatory damages to the severity of the injury that has been caused (rather than the culpability of the injurer's conduct), they may impose on injurers much greater compensation burdens than they deserve to bear. This point might, he tentatively suggests, be adduced in support of shifting to a no-fault approach.³⁵ However, though the problem of excessive penalties could be avoided by moving to a no-fault system, it could also be avoided by doing away with compensation altogether. No-fault schemes avoid imposing excessive penalties by severing the tight connection between penalties for injurers and compensation payments for the injured. But replacing injury compensation schemes with (perhaps augmented) social security and public healthcare systems would also sever this link.

Consider alternatively the pragmatic arguments for no-fault cited by the Woodhouse Commission and others: tort systems face high administrative costs, have uncertain outcomes, may involve prolonged and arduous court proceedings, *etc.* There are different ways in which we might interpret these arguments. On one view, they are being invoked to support the claim that tort systems actually do more harm than good—their negative effects outweigh any positive ones. If true, this would certainly provide grounds for disbanding tort systems, but it would not justify their replacement with no-fault schemes. We could just as well avoid the harms inflicted by tort law systems by doing away with injury compensation altogether.

There is, however, an alternative way of understanding the Commission's pragmatic arguments, and one that may be friendlier to the defender of no-fault medical injury compensation. On this second interpretation, the suggestion is simply that tort systems are rather inefficient means of achieving their own goals, and that no-fault schemes might, paradoxically, be better than tort systems at achieving the goals of tort law.

Whether this claim is correct will depend on what we take the goals of tort law to be. Here, commentators are divided. On one popular view, the aim of tort law is to enforce the special obligations that (wrongful) injurers have towards their victims.³⁶ On this view, it is difficult to see

also *The Woodhouse Report*, para 85: 'it is a curious fact that . . . the extent of liability is not measured by the quality of the defendant's conduct, but by its results. Reprehensible conduct can be followed by feather blows while a moment's inadvertence could call down the heavens'.

³⁵ See Waldron, *op. cit.*, n. 34, 407–408.

³⁶ See, for example, G.C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 *Southern California Law Review* 193, 193–194. Keating claims that 'ordinary morality links responsibility for harm done with the duty to repair that harm' (at 193) and that the justice-based justifications for tort law 'acknowledge a *prima facie* link between responsibility for having inflicted injury and responsibility for repairing the

how no-fault schemes could be considered an alternative means to the ends of tort law, since no-fault systems remove any direct connection between the penalties borne by injurers and the payments made to their victims. The victims of wrongful medical injuries will be compensated under no-fault schemes, but that compensation will come not from the injurer but from a fund sustained by the general population, or, in some cases, the whole medical profession. Similarly, though wrongful injurers may, under no-fault systems, be required to bear some kind of penalty (such as a criminal or professional disciplinary sanction), this will not normally take the form of a payment made *to the injurer's victim*.

On an alternative view, medical injury compensation systems (including tort law) should be regarded as having two quite separate functions: one being fulfilled by the penalisation of wrongful injurers—the function here is normally thought to be the prevention of medical injury—and the other being to provide compensation to the victims of wrongful injuries. Call this the ‘two-function’ view.³⁷ If we accept this view, then it is, I think, plausible that no-fault schemes *are* more efficient means to the ends of tort law than is tort law itself.

Consider, to begin with, the function of medical injury prevention. Tort systems are often defended on the grounds that they deter people from injuring one another.³⁸ Clearly, though, the imposition of compensatory damages is not the only way of deterring or preventing medical injury. Other legal penalties—such as criminal or professional sanctions—may also play a deterrent role, as may moral blame. Injury may also be prevented by policies that have nothing to do with deterrence, but instead institute educational or institutional reforms designed to remove social and psychological causes of injury (limits on doctors’

injury inflicted’ (at 193–194). The special relationship between the injurer and his victim is also emphasised, and adduced in support of tort law, in J.J. Thomson, ‘Remarks on Causation and Liability’ (1984) 13 *Philosophy and Public Affairs* 101; T. Honoré, ‘Responsibility and Luck: The Moral Basis of Strict Liability’ (1988) 104 L.Q.R. 530; E.J. Weinrib, ‘Understanding Tort Law’ (1989) 23 *Valparaiso University Law Review* 485, esp. at 512; J. Coleman, ‘The Mixed Conception of Corrective Justice’ (1992) 77 *Iowa Law Review* 427, esp. at 433–438; S.R. Perry, ‘The Moral Foundations of Tort Law’ (1992) 77 *Iowa Law Review* 449, esp. at 497ff.; J.L. Coleman, *Risks and Wrongs* (Cambridge University Press 1992) at 354; E.J. Weinrib, *The Idea of Private Law* (Harvard University Press 1995), esp. at 75–76, 80–83, 114–144; A. Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press 1999), esp. at 56–57, 65, 80–84.

³⁷ For the two-function view, see Palmer, *op. cit.*, n. 2, 254–255; Avraham and Kohler-Hausmann, *op. cit.*, n. 22; M.A. Franklin, ‘Replacing the Negligence Lottery: Compensation and Selective Reimbursement’ (1967) 53 *Virginia Law Review* 774, 795.

³⁸ Some would argue that deterrence is the *raison d’être* of tort law. See, for example, R.A. Posner, ‘A Theory of Negligence’ (1972) 1 *Journal of Legal Studies* 29.

working hours, hospital safety campaigns, *etc.*).³⁹ It has even been argued that moving away from tort law could in fact aid medical injury prevention by, for example, reducing excessively defensive medical practice⁴⁰ and allowing easier collection of data on the institutional and psychological causes of injury.⁴¹ It is thus unclear, from a theoretical point of view, whether we should expect tort systems to facilitate medical injury prevention more effectively than their no-fault counterparts. The empirical evidence is also unclear.⁴² However, there is little evidence that tort systems are associated with lower medical injury rates than no-fault regimes.⁴³ It thus seems that tort systems may lack any significant deterrent effect, or that any deterrent effect that they do have may be offset by other injury-promoting effects which no-fault systems lack.

On the compensation provision side, there are also reasons to think that no-fault schemes do better than their tort law counterparts. No-fault systems typically have much lower administrative costs than tort systems, and they thus allow more compensation to be paid for the same overall cost.⁴⁴ Of course, that compensation is also spread over a larger group of people, so if the compensatory aim of tort law is solely to compensate the victims of *wrongful* medical injuries, then it is not clear that no-fault schemes satisfy this aim better than tort

³⁹ Gaine, *op. cit.*, n. 6, 998.

⁴⁰ See G.T. Schwarz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994) 42 *UCLA Law Review* 377, 401–403; Cane, *op. cit.*, n. 1, 366–367; Merry and McCall Smith, *op. cit.*, n. 23, 215–216.

⁴¹ See Gaine, *op. cit.*, n. 6; B.A. Liang, 'Error in Medicine: Legal Impediments to US Reform' (1999) 24 *Journal of Health Politics, Policy and Law* 27, esp. at 33–35, 39–44; J. Fitzjohn and D.M. Studdert, 'A Compensation Perspective on Error Prevention: Is the ACC Medical Misadventure Scheme Compensating the Right Sort of Injury?' (2001) 114 *New Zealand Medical Journal* 432.

⁴² See D. Dewees and M. Trebilcock, 'The Efficacy of the Tort System and its Alternatives: A Review of the Empirical Evidence' (1992) 30 *Osgoode Hall Law Journal* 58; Schwarz, *op. cit.*, n. 40; Merry and McCall Smith, *op. cit.*, n. 23, 213–214; M.M. Mello and T.A. Brennan, 'Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform' (2002) 80 *Texas Law Review* 1595.

⁴³ See C. Brown, 'Deterrence in Tort and No-Fault: The New Zealand Experience' (1985) 73 *California Law Review* 976, esp. at 984–1002; Mello and Brennan, *op. cit.*, n. 42; Gaine, *op. cit.*, n. 6, 998; F.A. Sloan, S.S. Entman, B.A. Reilly, C.A. Glass, G.B. Hickson, H.H. Zhang *et al.*, 'Tort Liability and Obstetricians' Care Levels' (1997) 17 *International Review of Law & Economics* 245–260. Compare R.A. Devlin, 'Some Welfare Implications of No-Fault Automobile Insurance' (1990) 10 *International Review of Law and Economics* 193; F.A. Sloan, B.A. Reilly and C.M. Schenzler, 'Tort Liability versus Other Approaches for Deterring Careless Driving' (1994) 14 *International Review of Law and Economics* 53.

⁴⁴ See P.C. Weiler, H.H. Hiatt, J.P. Newhouse, W.G. Johnson, T.A. Brennan, L.L. Leape *et al.*, *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* (Harvard University Press 1993) at 106.

systems: no-fault schemes may be able to pay out greater total amounts of compensation, but much of that compensation will go to persons who were not the victims of wrongful injuries.⁴⁵ Counterbalancing this, however, is the fact that, under tort systems, only a small minority of those eligible for medical injury compensation actually file a claim for damages.⁴⁶ No-fault schemes present lower barriers to potential claimants and may therefore compensate more of those who would have been eligible for compensation at tort law than do tort systems.

Let us grant, for the sake of argument, that by adopting the two-function view, one can persuasively argue that no-fault medical injury compensation systems better achieve the aims of tort law than do tort systems. We should also grant that this argument does not telescope into an argument for further expanding the boundaries of compensation, and ultimately abandoning medical injury compensation altogether, for according to this argument, the compensatory goal of both tort law and no-fault schemes is to compensate the victims of *wrongful* medical injuries. No-fault schemes obviously compensate many other persons besides, but they do this only because this is the most efficient way of ensuring that compensation gets to those for whom it is intended: the wrongfully injured. There is, on this view, no need to assume that the victims of faultlessly caused medical injuries actually have any direct moral claim to compensation, and there is thus no pressure to further extend the boundaries of compensation so as to include the victims of natural misfortune.

Notice, however, that though the argument under consideration does not *itself* extend into an argument for the abandonment of medical injury compensation, anyone who advances it does leave himself open to fairness-based objections. Someone concerned that incapacitated persons not be treated unfavourably based on factors beyond their

⁴⁵ Studdert and collaborators conservatively estimate that even a highly restrictive no-fault system (of the sort existing in Sweden) would pay compensation to at least two to three times as many people as existing tort law schemes. See Studdert, Thomas, Zbar, Newhouse, Weiler, Bayuk *et al.*, *op. cit.*, n. 6, 32.

⁴⁶ Results from a large retrospective study conducted in Utah and Colorado during the 1990s indicated that only 2.5% of patients eligible for compensatory damages in those states filed claims at tort law. This figure increased to 3.8% when patients whose injuries caused no significant or serious disability were excluded. See D.M. Studdert, E.J. Thomas, H.R. Burstin, B.I.W. Zbar, E.J. Orav and T.A. Brennan, 'Negligent Care and Malpractice Claiming Behavior in Utah and Colorado' (2000) 38 *Medical Care* 250. Results from an earlier study in New York State indicated that at most 13% of those eligible for compensation in that state filed suits. See A.R. Localio, A.G. Lathwers, T.A. Brennan, N.M. Laird, L.E. Hebert, L.M. Peterson *et al.*, 'Relation between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III' (1991) 325 *New England Journal of Medicine* 245.

control might ask *why* the aim of compensation systems should be to compensate only the victims of wrongful injuries, rather than the victims of all medical injuries and all other comparable kinds of misfortune. It is not clear how anyone who accepts the two-function view can respond. If compensation systems had a single aim—to enforce the special obligations of wrongful injurers to their victims—then there would be an obvious ground for excluding from compensation the victims of natural misfortune: since no one caused that misfortune, no one has a special obligation to fund its compensation. But once one accepts the two-function view, this line of response is blocked. On that view, the justification for providing compensation payments is distinct from the justification for imposing compensatory damages on wrongful injurers. Presumably, then, the justification for providing compensation is to be found not in the wrongdoing of the injurer, but in the situation of the injured: perhaps compensation serves to satisfy unmet need, to alleviate undeserved suffering or to restore equality. But these justifications for compensation apply as much to the victims of natural incapacity as to those wrongfully injured by others. Limiting compensation to the latter thus seems arbitrary.

What the proponent of the no-fault approach requires is an argument that does not extend into an argument for the abandonment of medical injury compensation, and that is also able to block any independent fairness-based argument for abandoning it. I am aware of one argument which may satisfy these conditions.

Recall that proponents of tort law sometimes attempt to justify their preferred system of medical injury compensation by appealing to the view that (wrongful) injurers have special obligations towards their victims. As we have seen, no-fault systems cannot be justified by appeal to this view. Since no-fault systems sever the connection between the compensation payments made by injurers and the payments received by injury victims, they fail to enforce the special obligations that injurers allegedly have. Proponents of no-fault compensation may, however, be able to appeal to an amended version of the special obligations view: they might claim that it is not only individual (wrongful) injurers who have obligations to their victims, *societies* also have special obligations towards those injured through practices adopted by those societies. Arguably, no-fault medical injury compensation schemes *do* enforce these special *societal* obligations, since they effectively require society-at-large to bear the costs of compensating persons who have been injured through a *social* practice: that is, medicine.⁴⁷ Moreover, if the argument

⁴⁷ See Cane, *op. cit.*, n. 1, 333–334; Todd, *op. cit.*, n. 2, 493–495; Merry and McCall Smith, *op. cit.*, n. 23, 209–211.

for no-fault medical injury compensation is based on these special societal obligations, then no-fault schemes may justifiably exclude from compensation the victims of natural misfortune. Their exclusion would be justifiable on the grounds that society is not causally responsible for those misfortunes, and therefore lacks any special obligation towards their victims.

I do not think, however, that this argument from special social obligation can provide a satisfying justification for no-fault medical injury compensation. The problem is this: if societies have special obligations to compensate those injured through (sometimes) harmful social practices, then individuals also have similar obligations towards those harmed through their own individual conduct. It is difficult to imagine any argument for the existence of such special obligations at the societal level that would not also apply at the individual level. Indeed, those who defend special societal obligations often do so by drawing parallels between societal agents and individual persons.⁴⁸ But if *individuals* have special obligations to compensate those whom they have harmed, then there is at least a *prima facie* justification for tort law. After all, tort law could be regarded as a way of enforcing those special individual obligations. Thus, though an appeal to special societal obligations might justify the introduction of no-fault compensation, it also suggests a parallel justification for tort law. The argument therefore appears to support not the *replacement* of tort systems, but their *augmentation* with no-fault schemes. This poses a challenge to proponents of no-fault compensation, most of whom instead advocate replacement. Perhaps this challenge can be met. Perhaps, for example, it can be shown that special societal obligations should be enforced, while individual ones should not. However, this is work that remains to be done.

VI. TORT LAW V. THE ABANDONMENT OF MEDICAL INJURY COMPENSATION

It is difficult to find any way in which one can defend no-fault medical injury compensation schemes in a way which justifies excluding the

⁴⁸ Thomas Pogge explicitly draws an analogy between the special obligations of individuals and the special obligations of societies. He claims that 'your moral reason to mitigate the injuries of an accident victim is stronger if you were materially involved in causing his or her accident', then continuing 'I assert an analogous point also in regard to any social institutions that agents are materially involved in upholding... we should design any institutional order so that it prioritises the mitigation of medical conditions whose incidence it substantially contributes to'. See T. Pogge, 'Relational Conceptions of Justice: Responsibilities for Health Outcomes' in S. Anand, F. Peter and A. Sen (eds), *Public Health, Ethics and Equity* (Clarendon 2004) at 135.

naturally incapacitated from such schemes. But, if my arguments above are sound, the only feasible way of removing this exclusion involves giving up on medical injury compensation, relying instead on social security and public healthcare arrangements. It thus seems plausible that the debate between tort law and no-fault approaches to medical injury compensation ought to be re-formulated as a debate between maintaining tort law or abandoning medical injury compensation altogether.

How that debate should be settled is, of course, a further question. Many sophisticated arguments have been developed in order to defend tort systems. These appeal *inter alia* to reciprocity and fairness in risk imposition;⁴⁹ to contractualist procedures that balance liberty and security;⁵⁰ to economic theories of deterrence;⁵¹ and to agency-based conceptions of corrective justice.⁵² I cannot systematically assess these arguments here. I do, however, want to end by suggesting that the issue between tort law and the abandonment of medical injury compensation ought to be a live one; though it is at odds with current practice, the abandonment of medical injury compensation should be considered a serious option.

We can begin by noting that any argument for preferring tort-based medical injury compensation to the abandonment of medical injury compensation will have to reject the two-function view—the view that the burdens and benefits of compensation serve different functions. As we have seen, accepting the two-function view leaves one without the resources to respond to fairness-based arguments for expanding the scope of compensation. The defender of tort law should, then, accept some alternative view, and the most prominent candidate is the view that both sides of the compensation coin—the burden for the medical injurer and the benefit for the medically injured—serve the common goal of ensuring that wrongful injurers fulfil their special obligations

⁴⁹ See G.P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537; Keating, *op. cit.*, n. 36. See also Honoré, *op. cit.*, n. 36, 537–543; Ripstein, *op. cit.*, n. 36, 2, 10, 30–31, 42–93.

⁵⁰ See Ripstein, *op. cit.*, n. 36, 6–9, 55–63.

⁵¹ See Posner, *op. cit.*, n. 38; J.P. Brown, 'Toward an Economic Theory of Liability' (1973) 2 *Journal of Legal Studies* 323; S. Shavell, 'Strict Liability versus Negligence' (1980) 9 *Journal of Legal Studies* 1; J.H. Arlen, 'Reconsidering Efficient Tort Rules for Personal Injury: The Case of Single Activity Accidents' (1990) 32 *William and Mary Law Review* 41.

⁵² See Honoré, *op. cit.*, n. 36, esp. at 543–545; Coleman, 'The Mixed Conception of Corrective Justice', *op. cit.*, n. 36, esp. at 442–443; Perry, *op. cit.*, n. 36, 497ff.; Weinrib, *The Idea of Private Law*, *op. cit.*, n. 36, 83–144. 'Corrective justice' is, in these theories, understood as a realm of justice that is distinct from distributive or retributive justice.

to their victims. Several leading theories of tort law do indeed embrace this view.⁵³

But do medical injurers really have these special obligations to their victims (as opposed, say, to some more general obligations to alter their practice)? And if so, what is their nature? In what follows, I offer one argument for the view that, if medical injurers have special obligations to their victims, they are not the sorts of obligations that could be enforced by tort law. I do not claim that this argument is decisive. There may be some good objection to it, or some stronger countervailing argument. But I hope that my argument does enough to establish that attempts to justify the tort approach to medical injury compensation by reference to such special obligations are not *obviously* persuasive.

My argument begins by granting that, intuitively, wrongful injurers—whether they are medical professionals or not—do have special obligations to their victims. Consider the following non-medical case:

Scenario 1. Anne, an irremediably reckless cyclist, is cycling in her usual dangerous fashion one day when she strikes a pedestrian, Ben, knocking him to the ground. At precisely the same time, another pedestrian in the vicinity, Claire, is struck by an unusually strong gust of wind. She too falls to the ground. As a result of their falls, Ben and Claire are incapacitated to an equal degree. Realizing what has happened, Anne decides that she must assist one of them. However, she cannot assist them both. She decides to assist Ben, the person whose fall she caused.

In this scenario, Anne has clearly done something morally wrong: namely, she has recklessly knocked Ben to the ground. However, I suspect many would also say that, in helping Ben up, she has done something right, and perhaps that this partially mitigates her previous wrongful act. But consider now the following amended version of the scenario:

Scenario 2. All is as in Scenario 1, except this time Anne chooses to help Claire rather than Ben.

Here again, Anne has acted wrongly in recklessly knocking Ben to the ground. And many might also say that, in helping Claire up, Anne has done something right. However, I think most people will want to say that Anne's response in Scenario 2 does less to offset her earlier wrong than did her response in Scenario 1.

⁵³ See, for example, Honoré, *op. cit.*, n. 36; Perry, *op. cit.*, n. 36, esp. at 497ff.; Weinrib, *The Idea of Private Law*, *op. cit.*, n. 36, esp. at 75–76, 80–83, 114–144; Ripstein, *op. cit.*, n. 36, esp. at 56–57, 65, 80–84.

One way of explaining this intuitive difference between Scenarios 1 and 2 would be to suppose that, over and above any obligations that Anne has to assist both Ben and Claire, she has some additional special obligation towards Ben. Moreover, it is natural to think of this special obligation as an obligation that Anne has to 'make amends for' or 'put right' the loss that she has wrongfully caused. This, of course, is precisely the sort of obligation which tort-based systems of medical injury compensation seem to enforce. Thus, it might seem that the above-mentioned intuitive responses to Scenarios 1 and 2 give some support to the view that people sometimes have special obligations of the sort that might justify tort systems.

There is, however, an alternative explanation for the intuitive difference between Scenarios 1 and 2. To bring out this explanation, I want to propose a variant of Scenario 2:

Scenario 3. All is as before except that this time Anne pays so little attention to where she is cycling that she fails to see which of Ben and Claire she has struck. She simply feels her bicycle come to an abrupt halt, and then notices two people lying on the road in front of her. Realizing what must have happened, she decides she should help whichever of the two persons she has knocked down. She hazards a guess, and as it happens, she chooses to help Claire, whose fall she did not cause.

What should we say about Anne's response in this scenario? Should we, as in Scenario 2, attribute a (minor) moral failure to Anne on the grounds that she chose to help Claire (whose fall she did not cause) rather than Ben? My intuition is that we should not. Rather, I think we should say that, given her intention to help the 'right' person, her response is morally on a par with her response in Scenario 1. The fact that she chose to help the wrong person seems irrelevant to the moral assessment of her conduct. But if the facts about whom Anne actually ends up saving are irrelevant in Scenario 3, then surely they are also irrelevant in Scenarios 1 and 2. It seems that we can no longer attribute a moral failure to Anne in Scenario 2 merely because, in that case, she chose to aid Claire (whose fall she did not cause) rather than Ben (whose fall she wrongfully caused).

How, then, can we account for the intuition that Anne is guilty of a greater moral failing in Scenario 2 than in Scenario 1? One answer to this question would run as follows. We generally expect that those who wrongfully harm others should show some remorse for those harms. Moreover, when we see evidence of such remorse, as when someone attempts to make amends for her actions, we frequently soften the attitude that we take towards the wrongdoer. Perhaps in Scenario 1, where Anne chooses to assist Ben, we assume that she does so in

part because she is remorseful for what she has done. We might also make this assumption regarding Scenario 3, in which we are told that Anne *wishes* to assist whoever she has struck. Though, as it happens, she chooses to help the wrong person, we can retain the thought that she was *attempting* to make amends for her action. In Scenario 2, however, it is difficult to sustain the assumption that Anne's action is motivated (in part) by her remorse. Perhaps, then, to the extent that we morally disapprove of her decision to help Claire in that case, we do so simply because we interpret it as evidence of a lack of remorse on her part.

If this is the correct explanation of our intuitive judgments, then those judgments no longer support the existence of special obligations of the sort that tort-based systems of medical injury compensation enforce. Perhaps medical professionals who wrongfully injure their patients have a special obligation towards their victims—an obligation to feel remorse—but an obligation to feel remorse is not, and need not imply, an obligation to compensate. Admittedly, the provision of compensation might *communicate* remorse, but it is not a necessary component of it; one can feel remorse without providing compensation. Moreover, an obligation to feel remorse is not the sort of obligation that could be enforced by tort law. Being *required* to compensate one's victim—as under tort law—is quite consistent with feeling no remorse for one's action. Indeed, being required to pay such compensation might even discourage feelings of remorse to the extent that the injurer may feel that, having paid compensation, she has been let off the hook as far as her obligations to her victim are concerned.

There might, of course, be some independent argument for the view that those who wrongfully cause medical injuries have special obligations *to compensate* their victims—some argument that does not rely on our intuitions about cases such as Scenarios 1–3.⁵⁴ However, I doubt that any such argument will have the initial plausibility that a direct appeal to intuition can have. Thus, if I have succeeded in undermining the *intuitive* case for the existence of special obligations to compensate, I think I will have done enough to call into question the obviousness of the view that there are such obligations and that these justify tort law. It would then be reasonable to conclude that the issue that I have raised between tort law and the abandonment of compensation should not *obviously* be resolved in favour of tort law: serious consideration should be given to the prospect of abandoning injury

⁵⁴ For criticism of some theoretical arguments for the existence of such special obligations to compensate, see Avraham and Kohler-Hausmann, *op. cit.*, n. 22; Schroeder, *op. cit.*, n. 22.

compensation altogether, perhaps diverting the saved funds to social security and public healthcare systems.

This might seem an unlikely result, especially to those in jurisdictions where medical injury compensation has never seriously deviated from the tort law paradigm. But it should be remembered that both tort law and no-fault medical injury compensation are relatively recent innovations—they are not permanent fixtures on the institutional landscape.⁵⁵ Moreover, since their initial introduction, some of their functions have been taken over by developing social security and public healthcare systems, as well as by alternative mechanisms for preventing medical injury. I am merely suggesting that we should consider whether to make this takeover complete.

FUNDING

Funding to pay the Open Access publication charges for this article was provided by The Wellcome Trust.

⁵⁵ For example, in the United States, tort law was not recognisable as a distinct branch of the law until the late nineteenth century. Nor had the now-dominant concept of negligence been delineated before that time. See, for example, G.E. White, *Tort Law in America* (Oxford University Press 1980) esp. at 3, 13–19.