# Blood Money, New Money, and the Moral Economy of Tort Law in Action

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This article reports the results of a qualitative study of personal injury lawyers in Connecticut. Building on the results of an earlier study of lawyers in Florida, "Transforming Punishment Into Compensation: In the Shadow of Punitive Damages" (Baker 1998), the Connecticut study describes and explores the implications of professional norms and practices that govern tort settlement behavior. In particular, it examines the moral and practical barriers to collecting "blood money" (money from individual defendants, as opposed to liability insurance companies), as well as explanations for victims' apparent ability to partially trump the claims of subrogating workers' compensation and health insurance carriers. The results pose a challenge to the conventional understanding that tort law in action is a simpler, more streamlined version of tort law on the books. In addition, the results suggest that compensation and retribution figure far more prominently in tort law in action than does the deterrence emphasized in much of the theoretical and doctrinal literature.

That personal injury litigation revolves around liability insurance has become almost a truism among tort teachers, scholars, and practitioners alike. As both scholars and practitioners report, personal injury lawyers rarely bring a case unless there is an insured defendant (or a solvent self-insured organization) on the other side (Shapo 2000:165; Stapleton 1995:824; Baker 1998). Indeed, tort law analysts are so confident that liability insurance captures the bulk of the personal injury universe that they regularly use liability insurance claims files and liability insurance statistics to document, describe, and otherwise measure the dynamics, cost, and prevalence of personal injury litigation (Abraham & Liebman 1993; Saks 1992; Hughes & Snyder 1995; Kessler 1999).

At the same time, however, we continue to teach that tort law's claim to corrective justice rests on the moral principle that individuals should provide compensation for harm they wrongly

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cause others (Coleman 1992:329, 361; Perry 1992b; Weinrib 1983). And, even though we know that tort law in action is in some sense "really" about liability insurance, we also know that many defendants do not have enough liability insurance to compensate the people they injure (Conard et al. 1964; Sugarman 1993:666). Thus, unless all but the well-to-do are judgment proof (a situation that is belied by the ready availability of credit cards, mortgages, and other forms of consumer credit), we might expect that a significant part of the personal injury universe would be financed by "real money" from "real people"; that is, out-of-pocket payments by uninsured or underinsured individual defendants.[1]

This study uses qualitative data from a series of in-depth interviews with personal injury lawyers to examine the place of real money from real people in personal injury litigation. In the process, it begins to map a fascinating, previously unexplored aspect of personal injury practice: the moral code that is implicit in the various kinds of money that are generated and disbursed in personal injury litigation. These kinds of money include the "blood money" and "new money" featured in the title, as well as insurance money, lawyers' fees, collateral sources, doctors' and chiropractors' bills, and a host of different subrogation or lien currencies.

"Blood money" is a term many of my respondents used for what I have been calling real money from real people—money paid directly to plaintiffs by defendants out of their own pockets. As their term reflects, *blood money* hurts defendants in a way that money paid on behalf of a defendant by a liability insurance company cannot. For that reason, blood money is an entirely different currency than what lawyers refer to as "insurance money."

The blood money story teaches us that the *source* of money makes a difference in tort litigation. Depending on the context, blood money can be worth much more than insurance money, or much less. Claims to insurance money are closely tied to tort doctrine and statutory entitlements; claims to blood money bear a much looser connection to formal law. Bargaining for insurance money takes place very much in the shadow of law (Cooter et al. 1982:225); bargaining for blood money turns more on commonsense morality and practicality. For readers who respond to tactile images, insurance money can be imagined as cold, hard, and flat; blood money as hot, soft, and highly textured.

"New money" is new insurance money, paid on top of old. New money comes into play when a plaintiff has already received health insurance or workers' compensation benefits that must be

[1] Of course, "real people" ultimately bear the costs of liability insurance claim payments, but as this study reflects, claimants and lawyers do not subjectively experience insurance money as coming from "real people." For similar findings in connection with first-party insurance, see Baker & McElrath 1996.

repaid, or when there are underinsured motorists (UM) benefits available on top of a defendant's inadequate liability insurance. The new money story teaches us that the *recipient* as well as the source of money makes a difference in tort litigation. When new money is at issue there often are competing claims on a defendant's assets. Not only the plaintiff but also a workers' compensation or health insurance company or a health care provider may expect to be paid. Settlements compromise those claims in predictable ways that do not necessarily track tort doctrine or statutory entitlement. Although claims to new money are more closely tied to doctrine and entitlement than are claims to blood money, plaintiffs' claim on new money often exceeds that which would be granted by formal tort law.

The common denominator among blood money, insurance money, and other forms of money in play in tort litigation is that they have both a moral and, for lack of a better word, *practical* valence that makes them only imperfect substitutes for one another. As the sociologist Viviana Zelizer has explored in her study of household finance, all money is not the same (1994:215–16, 1985:163, 1979:48). In the tort settlement process money is affected both by its source (blood money versus insurance money) and by its recipient (new money versus subrogation money).

Although this study hardly contradicts the claim that liability insurance dominates personal injury litigation, it does suggest that tort analysts have not yet succeeded in wresting all the significance out of that situation. Real money from real people accounts for a very small fraction of tort settlement dollars. Nevertheless, plaintiffs' legal right to exact blood money retains an important role in the tort settlement process. In combination with a strong norm against paying blood money in a negligence case, the plaintiffs' legal claim to blood money motivates all the repeat players in the litigation process to arrive at a settlement within the liability insurance limits.

These and related norms and practices help to explain the paradoxical importance of blood money in tort litigation, despite the fact that so little blood money actually changes hands. In addition, these norms and practices challenge the conventional understanding that tort law in action is a simpler, streamlined, and more administrable version of what the legal realist Roscoe Pound (1910) called the "law on the books" (see also Ross 1970). As this study demonstrates, tort law in action sometimes draws moral distinctions that are more finely grained than those drawn by tort doctrine.

This study also corroborates, indirectly, some of the insights described in Kritzer's research on the relationship between contingency fee lawyers and their clients (1998a, b). As his research shows, understanding the ways the interests of client and lawyer converge and diverge requires entering the world of the lawyer.

Along these lines, some of the patterns of behavior reported here appear, at first blush, to favor lawyers over clients. But, as I explain, it would be wrong to draw such a simple conclusion from the data.

This article proceeds in four parts. The first part describes the qualitative research methods used in this study and links it to an earlier study that explored other aspects of the relationship between tort law in action and insurance. The second and third parts report findings regarding blood and new money, respectively. Part four summarizes some of the implications of this research for our understanding of tort law in action.

## I. Research Method

This report is based on in-depth, semi-structured interviews with thirty-nine personal injury lawyers in Connecticut conducted in 1999. These interviews were informed by thirty similar interviews conducted in South Florida in 1996 (Baker 1998). The interviews covered many topics related to personal injury practice. Significant areas of focus included case selection, insurance, subrogation, settlement, and client relations.

The lawyers were identified in snowball fashion, beginning with references from lawyers with close ties to the University of Connecticut School of Law and radiating outwards. The initial goal was to select a cross section of personal injury lawyers on the defense and plaintiffs' side. That goal changed in two ways during the course of the Connecticut interviews. First, based on the significance of workers' compensation liens in Connecticut personal injury practice, I included three workers' compensation subrogation specialists who worked in defense firms. Second, after repeatedly hearing what seemed to be a one-sided "blood money" story, I began asking defense lawyers for the names of plaintiffs' lawyers who might give me another perspective and, thus, deliberately biased my selection in that direction.

Eighteen of the respondents currently practice exclusively on the plaintiffs' side in personal injury matters; fifteen of the respondents practice exclusively on the defense side; three of the respondents do both plaintiffs' and defense work; and three of the respondents have a workers' compensation practice focused largely on subrogation (i.e., helping workers' compensation insurance companies to be repaid by the responsible party's liability insurance carrier). All but one of the defense lawyers and most of the plaintiffs' lawyers practice exclusively in the area of personal injury. Two of the plaintiffs' lawyers had practiced on the defense side earlier in their career. Two of the defense lawyers had once practiced on the plaintiffs' side, and one had been an insurance adjuster.

Clearly, this was not a random sample of personal injury lawyers, but my goal was an in-depth exploration of case selection, management, and settlement strategy, not the measurement of predefined variables. I attempted to balance the respondents according to the part of Connecticut in which they practiced,[2] the size of their firms, and the size and type of cases they typically handled. In addition, on the defense side I attempted to balance in-house and outside counsel and to obtain a wide variety of liability insurance company "clients."[3] On the plaintiffs' side, I attempted to balance the lawyers according to the source of their business (e.g., television advertising, lawyer referrals). I am under no illusion that the respondents' answers provide a thoroughly accurate description of what they do. I interpret the interview records as reflecting what the lawyers think they do (or would like me to think they do), which is certainly worth considering as we attempt to understand tort law in action.

### A. Replicating the Florida Study

This study began as an effort to replicate in Connecticut an earlier study conducted in South Florida that also focused on the role of liability insurance in shaping tort law in action. In brief, the Florida study concluded that (1) liability insurance policy exclusions for intentional acts encourage plaintiffs and defendants to proceed in negligence rather than intentional tort, and (2) implied liability insurance exclusions for punitive damages encourage parties to compromise punitive damages claims for higher compensatory damage settlements, with the result that (3) punitive damages and intentional tort claims are rarely tried to verdict. More generally, the Florida study explored how liability insurance affects how plaintiffs' lawyers select cases and how plaintiffs' and defense lawyers manage and settle cases. In particular, the study described how plaintiffs' lawyers exploit the conflicts of interest between defendants and their insurers and how defense lawyers are recruited to assist defendants and plaintiffs in the preservation of insurance coverage (Baker 1998).

The first goal of the Connecticut interviews was to determine whether the role of liability insurance in Connecticut tort practice differs in any significant way from the role of liability insurance in Florida tort practice. At least with respect to the areas under investigation, the answer was a clear "no." Like plaintiffs' lawyers in Florida, plaintiffs' lawyers in Connecticut consider the existence of liability insurance in deciding whether to take a case,

[2] Because I focused on personal injury specialists, my respondents primarily worked in urban and suburban offices.

[3] Whether the liability insurance companies that pay the defense lawyers are "clients" or "third-party payers" is a controversial question (see Silver & Syverud 1995; Pepper 1997).

shape their cases to fit the coverage available, exploit the conflicts of interest between defendants and their insurance companies, and, where possible, work with defense lawyers to ensure that the available liability insurance covers any settlements or verdicts.

Like defense lawyers in Florida, defense lawyers in Connecticut recognize the potential conflicts of interest inherent in being paid by insurance companies to defend individuals, consider the defendant, and not the liability insurance company, to be their true client,[4] and report that their most important objective is to protect that client's assets (which involves cooperating, to an extent, with plaintiffs' lawyers in shaping the claim to fit the available liability insurance coverage). In addition, the Connecticut lawyers, like the Florida lawyers, report that plaintiffs' lawyers typically use punitive damages and intentional harm claims primarily as leverage in negotiations, and do not emphasize these claims when cases go to trial, in large part because liability insurance typically does not cover punitive damages claims in Connecticut. Accordingly, this research replicates the findings reached in the Florida study.

### B. Beyond the Florida Study

The Connecticut interviews explored two additional topics in greater depth than the Florida interviews: the circumstances in which individual defendants are asked to pay their own money to plaintiffs and the ways that lawyers balance the subrogation claims of workers' compensation and first-party insurers against the plaintiffs' desire for "new money." Aside from their intrinsic interest and importance in shaping the settlement of personal injury claims, these topics are significant because they illustrate how tort settlements are systematically shaped by moral distinctions and professional norms that supplement those present in tort doctrine. Indeed, as already noted, these results contradict the conventional understanding of tort law in practice as a simplified version of formal tort law.

In addition, these topics illustrate the importance of open-ended, qualitative research. I did not enter into the interviews planning to examine the different types of money in play in personal injury litigation. Indeed, I had never heard of blood money or new money, nor had I focused on what, as a result of this research, now seems painfully obvious to me about the different currencies used to settle personal injury claims. Talking and—more important—*listening* to lawyers in practice is an essential aspect of understanding the role of law in society.

[4] As one Connecticut defense lawyer put it, "The insured is your client, and is your only client; the carrier is just a customer."

## II. Blood Money

"Blood money" is a term that some personal injury lawyers use to describe money that individual defendants pay from their own funds. Here is an example from an interview with a defense attorney:

> Q: Do you ever have cases where your defendants are not insured?
>
> A: Those are terrible. Yes, I have. Those are the worst. I did two of those in a row for an attorney, who is now a judge, who had people who for some reason or other forgot to renew their insurance, and was driving the car without insurance. I think they were both like that. Those are terrible. Those are absolutely the worst. Without that umbrella behind you, you don't even want to try. You're petrified. Normally, when you try these cases, even if somebody's only got a twenty policy or fifty policy,[5] if it goes over, the insurance company just pays. But, when there is nothing there, you walk in and they just automatically assume because you're there that there is insurance. I almost want to wear a badge saying, "There is no insurance here." *This is what we call blood money, instead of insurance company money. We call it blood money because it is coming out of their pockets.*

Insurance money is something that all personal injury lawyers talk about. Blood money is a hidden subject that lawyers have to be pressed to talk about. When they do, most plaintiffs' lawyers claim that they try not to go after blood money, and most defense lawyers back that claim up, as the following excerpts describe:

> We don't do it often. And if you talk to every responsible plaintiffs' lawyer in the state, I'll bet it's rare. (plaintiffs' lawyer)
>
> It's hard to take somebody's house away. I mean, you know, people with kids and mothers and fathers, and they worked their whole lives, probably, to acquire that home. I mean, it's not easy. . . . (plaintiffs' lawyer)
>
> I mean there's a, what we used to call, *an unwritten union rule* that you take the coverage and you go home. (defense lawyer)
>
> It really doesn't happen too often. Guys will call and say, "What's the policy?" That's it, and then [they] go away. But we do have situations where they go out and put an attachment on the house. You got a heavy case and you find out that there's only a hundred policy[6] and your people don't have any under-

[5] Lawyers refer to insurance policies according to the size of the insurance limits. A "twenty" policy is the Connecticut statutory minimum automobile insurance policy, which pays up to $20,000 per person injured in an accident, up to a total of $40,000 per accident (Conn. Gen. Stat. §§ 38a-334-5 and 14-112). If two people are injured, this "20/40" policy would pay up to $20,000 each. If more than two people are injured, the policy would pay no more than $40,000 in total. A "fifty" policy pays up to $50,000 per person and $100,000 per accident.

[6] A "hundred" policy has limits of $100,000 per person, $300,000 per accident.

> insured,[7] and there's nowhere else to go. But there's a lot of money in the house. It's rare, because usually if you got a big house, you got a big policy. Sometimes it happens and they go after the houses, too. Not too often. *It's almost like an unwritten code of lawyers that you don't go after those.* . . . But there's no rule on that. It's just sort of been something that I think I was taught by my bosses and you see it among the plaintiffs' lawyers. They're the ones. (defense lawyer)

As we will see, there are situations in which the "union rule" or "unwritten code" permits, and perhaps even encourages, collecting blood money, but not in the ordinary negligence case.

My initial reaction was, "What about your clients' interests here?" At least as taught in law school, tort law assumes in the first instance that it is defendants themselves who pay. Of course, we *know* that typically there is insurance, but insurance is treated as an after-the-fact redistribution of financial responsibility, not as an element of liability (Bovbjerg 1994: 1678; Stapleton 1995). The dramatic exception to that is the risk-spreading logic of strict liability (Calabresi 1970), but true strict liability principles are of limited application in tort law.[8] Tort law asks defendants to pay because they did something *wrong* and, in the process, injured the plaintiff (Coleman 1992; Perry 1992a, 1992b; Weinrib 1983). Combining tort law's conclusion that the defendant was a wrongdoer with the lawyer's ethical obligation of diligence[9] makes these plaintiffs' lawyers' reluctance to pursue blood money at least potentially problematic:

> Q: Now where are the clients on this? I can see—I definitely understand and respect the view—although it's new to me. What about a client who says "I don't care about the doctor. I want my money. Take his house?"
>
> A: Yeah. It's probably a client I wouldn't represent because I'd lay it out right from the beginning, this is not about vengeance and this is not about—in order to take someone's house, you know, the legal hurdles you'd have to jump over are very significant. You got to get the verdict, you've got to get a judgment, you've got to go through an appeal, and it's just on and on and on. And at some point

[7] "Underinsured" refers to underinsured motorists insurance, which is a form of first-party insurance that pays if the beneficiary is tortiously injured by a person with inadequate liability insurance. A further discussion of underinsured motorists insurance appears in Part III.

[8] E.g., at least in the design defect and warning areas, products liability is moving away from strict liability toward a risk-utility approach that is very similar to negligence (see Henderson & Twerski 1992:1530–35).

[9] E.g., Connecticut Rule 1.3, "Diligence," states that "a lawyer shall act with reasonable diligence and promptness in representing a client." The comment to this rule elaborates that "a lawyer should act with . . . zeal in advocacy upon the client's behalf." However, such zeal is not unbounded, and the comment further states that "a lawyer is not bound to press for every advantage that might be realized." The Restatement Third, Law Governing Lawyers § 28(d), "Duties of Competence of Diligence," notes that "zealous" representation is aspirational and includes general competence and diligence.

> . . . , but my own experience is that in cases that go as far as verdict, that is where they are tried to jury verdict, the client and the lawyer become very close. When you try a medical malpractice case, by the time you're done, you and the client know each other very well. And at least my own experience is that, whether I've won the case or lost the case, I have earned my client's respect. They understand how hard I work for them and for myself. And my experience is that once having been through that crucible of fire, they accept my advice. And they have their day in court and once they've had their day in court, the bitterness tends to leave. They've been vindicated. (plaintiffs' lawyer).

Encapsulated in this response—which is well worth rereading—is much of the essence of the plaintiff personal injury bar's explicitly moralized, complicated, self-serving, and not entirely satisfactory answer to the challenge that lawyers' preferences to avoid blood money places them in conflict with their clients.

One part of the answer to this challenge was to acknowledge that, notwithstanding the lawyer's preference, it is the client who gets to make the decision whether to pursue personal assets. Lawyers don't have to represent clients who want blood money,[10] but if they do, they have to follow those clients' directions. A second—perhaps problematic—part of the answer is the claim that the lawyer can manage the relationship so that the client comes to adopt the "right" view in the end. In this regard, another plaintiffs' lawyer described how he and others feel as follows:

> I think there is a predisposition to prefer to take it [money] from an insurance company as opposed to an individual, and there is a certain discomfort level if you are taking it from a person. *I mean, that is not to say you don't do it, you have a client that wants you to do it, then you do it, but I think there is probably some sense of trying to dissuade the client from chasing some of the individuals.* I mean, unless it's a bad person. (plaintiffs' lawyer)

One implicit aspect of the role of the professional is teaching the client what it means to be a good client, and clients undoubtedly are open to suggestion, consciously or not, in this regard. Good clients, desirable clients, don't want blood money (except in certain circumstances we will explore—note the qualification in the statement above: "unless it's a bad person"). For those who are not able to see the wisdom of this approach, practical considerations are packaged with the moral ones, so that the client, who would like to go after blood money in a morally inappropriate case, is steered away.[11]

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[10] E.g., respondent 15 (one of the two who declined to be taped) said that he would turn away a client who wanted to collect more than the insurance money in a negligence case.

[11] This reflects an inevitable power imbalance between attorney and an injured client. The client hires the attorney to solve her particular problem, and looks to the attorney for guidance and advice. After all, the attorney knows the language and ways of the law, and the client does not. Law is a complex language and enterprise, and attorneys

The sections that follow explore the main aspects of these answers to my challenge in greater detail: the claim that most plaintiffs don't want blood money; the claim that the preference for avoiding blood money is a moral one; and the claim that, morality aside, it is not in plaintiffs' interest to pursue blood money.

This is a complicated, interesting subject because there is something admirable about the refusal to take real money from a real person except in an "appropriate" case. Indeed, it was refreshing to find that plaintiffs and their lawyers made moral distinctions among kinds of money, particularly because these distinctions contradict the popular image of plaintiffs and their lawyers as "greedy graspers" eager to destroy unlucky people's lives.

### A. The Claim That Plaintiffs Usually Don't Want Blood Money

Many respondents began a discussion of blood money by reporting that, even without their interventions, plaintiffs usually prefer not to go after blood money. All but one of the defense lawyers confirmed that was their impression as well. The responses below are typical.

> Plaintiffs are not, you know, always the greedy animals that they're . . . , that they are sometimes painted to be. And you know, it is not unusual for a plaintiff to say, "Hey, look. I don't want to take Millie's house." You know, "Take the insurance and that's it . . ." Even in a classic stranger case. There is a whole lot of clients who don't want to take someone's house. I think there is a level of human kindness. I mean, for most people, money is not the sole motivating force in the world. (plaintiffs' lawyer)
>
> Most clients don't want to take away a doctor's house or attach his pension and so forth. What they're looking for is compensation for what happened to them, and if they can't get sufficient compensation, at least they're getting something. We don't want—They're not vindictive. (plaintiffs' lawyer)
>
> I've been practicing law for nineteen years. I can think of [only] a couple of examples. So, I would say most often a plaintiff doesn't want to take the money out of the defendant. Often the plaintiff doesn't want the defendant's money so much as he wants the insurance company's money. (defense lawyer)

often act paternalistically toward their clients, and clients often internalize attitudes of the attorney (Sarat & Felstiner 1995). Even though, under Model Rule 1.2, a client defines the objectives of representation and the attorney defines the tactics or means, under Model Rule 1.4b the attorney must provide the client with sufficient information to make informed decisions about the representation (including the client's goals). If the attorney is disinclined to take "blood money," she will inevitably signal this to the client, and the client may make a decision "informed" by the attorney's disdain for blood money. For a discussion of how attorneys may consciously or unconsciously affect how their clients make decisions, see Wasserstrom, 1975:15–24;. Bok 1978).

Of course, there are situations in which plaintiffs are "after blood," but all but a very few of the respondents reported that this does not happen in an ordinary negligence case—such as a routine auto accident, a doctor who made an understandable mistake, or a "slip and fall."

### B. The Morality of Blood Money

All respondents reported that there are different kinds of money, with different moral values, at stake in personal injury litigation. The two poles of personal injury money are blood money and insurance money. Absent fraud, the lawyers report that they never have a moral problem pursuing insurance money in a personal injury case.

> From the moral order, what does insurance do? We attempt to spread the risk in society, underwriting undertakes to determine what the risk is. The carrier is being paid for taking a certain risk, and he's making payment based on his underwriting policies with respect to that risk, and he's still usually making money. That's a little different [from] dipping into someone's everyday bread. That was the purpose of insurance. (defense lawyer)
>
> It is easier to collect from an insurance company than it is to go against the individual and try to garnish wages, foreclose on a home, as well as other things that most people aren't interested in doing, whereas the insurance companies, they're like a bank. (defense lawyer)

For these lawyers, collecting liability insurance money is what tort litigation is all about. As even defense lawyers emphasized, liability insurance money exists for the purpose of paying claims:

> And that's what we do. We pay claims. It doesn't bother me in the least when the check goes out. That's what we do. (defense lawyer)

Blood money is different from insurance money, because blood money hurts the defendant:

> I think that with most people who have been involved in accidents, you know, I don't think they have any desire to hurt people. I think they look at it and say, "There's money to be had here." And, you know, "We'll take the money that we can get,"—assuming the case is worth that amount of money. But I've rarely seen anybody that just stands on principle and says, you know, "I think I should get so much money. I don't care how much insurance you have." (defense lawyer)

Indeed, all but a few of the respondents asserted that hurting the defendant—taking blood money—requires more justification than a simple mistake.[12]

[12] Counting respondents here is methodologically problematic. I did not set out to interview a "random" sample. In addition, as I discuss later, after repeatedly hearing what

> I mean, the bottom line in our view of the vast majority of professional med[ical] malpractice cases, and I don't think I've ever had an exception to this, is that you have a physician who makes an error. And the day any of us can get to the end of the month and say we didn't make a single error, you know, congratulations! Okay? And unfortunately in medicine the results can be catastrophic. But the concept that the doctor ought to be ruined financially is, I think, foreign to the way we all think. And the concept here is that you carry insurance to spread the risk for society so that no one family or individual absorbs the whole cost of it. The physicians all pay their premiums . . . so that the physician doesn't get ruined and the plaintiff doesn't get ruined, but at least the plaintiff can live a life with some dignity, and so forth and so on. (plaintiffs' lawyer)

There is a sense here of "Two wrongs don't make a right." "Accidents happen." "Life goes on." The morally appropriate course of action is to take the money that is there specifically for accidents—insurance. But, don't compound the problem—or, as one respondent said, don't spread bad karma—by injuring the defendant and his or her family on top of the victim.

> I don't know if you want to call it karma. I don't know what you want to call it. I just don't like the idea. Insurance is one thing, but then you really, don't get me wrong, people have to be responsible for their actions. That really hits home. Suppose you have a situation where some woman or some man, maybe they are older, they back out of their driveway and cause an accident and, for some strange reason, they only have $100,000 in insurance. And you have a huge case where it was legitimately an accident. That guy could lose his house. *I hope I don't have a situation like that.* (plaintiffs' lawyer)

### *1. Lawyers Who Dispute the Code*

During the initial months of the study, all of the plaintiffs' lawyer-respondents reported that they had never collected blood money, and all of the defense lawyers reported that they had never paid blood money, except in a case involving a grievous wrong. Eventually, I found a defense lawyer with a different story. The lawyer agreed to give me the names of lawyers who were "known" for going after blood money.

> A: Let me tell you. I can pick up the phonebook right now and dial the guys that don't honor it.
> Q: And what characterizes the guys who don't? I mean, what's going on with the people who don't honor it?
> A: This thing that you mentioned before. My client. My client. My client is more important than ethics, the profession, our image, or whatever. I'm out there to do a good job for my client. And if my client has been injured, then they're

I thought to be a one-sided story about blood money, I sought out people who would offer another view.

> entitled to this money, come hell or high water. I'm gonna get it. And the hell with the bar association, the hell with our image, the hell with ethics, the hell with anything. I'm gonna do it for my client. And I think that's basically it. I don't really think it's a money thing.

With his help, I found two plaintiffs' lawyers who disagreed with the unwritten code against pursuing blood money. A third appeared later in the ordinary course of my snowball recruitment. In addition, I also interviewed one defense lawyer who disagreed with the view that there was anything morally problematic with pursuing personal assets in an ordinary negligence case.

The principled explanation for going after blood money in an ordinary case is the formal one discussed previously. Combining tort law's understanding of fault with the lawyer's ethical obligation of diligence makes pursuing personal assets entirely permissible from the perspective of formal law. Indeed, from that perspective, not the lawyer who goes after blood money, but the lawyer who *refuses* to pursue blood money, or who discourages her clients from asking her to do that, may be the lawyer who is breaching the code.[13]

The following are excerpts from interviews with plaintiffs' lawyers who disagreed with the common practice of avoiding blood money in an ordinary negligence case:

> A: My question is: Are they fulfilling their ethical responsibility to their own client? Then they shouldn't be handling the case. He shouldn't handle the case, then. I mean, I could understand him not wanting—then don't take.
>
> Q: Why? What is it that leads someone not to want to do it?
>
> A: I mean, it's not easy, but you can't—you've got to be detached in that regard because if the injury that was caused by the tortfeasor justifies that amount of money, then, I mean, you know, the tortfeasor's done something wrong. Basically, they've done two things wrong. They caused the injury, number one. And, number two, they didn't have themselves adequately insured. So, should the injured party take responsibility for that or should the tortfeasor? My—*listen, my duty is to the client.* (plaintiffs' lawyer)
>
> Q: Some people say they won't go after people's assets.
>
> A: That's not my feeling. I mean, I think that's a decision that individuals make. I mean, why should you be able to immunize yourself by not buying insurance? Yeah. It's, you know, "Tell it to the Bankruptcy Court" is what I say. And that's not, it doesn't mean the person is any less hurt.

[13] Of course, lawyers may refer "not only to law, but also to other considerations such as moral, economic . . . factors that may be relevant to the client's situation" (Model Rule 2.1). Thus, the true ethical problem here arises only if lawyers do not fully and fairly advise their clients of their legal rights regarding blood money so as to enable the clients to make an informed decision about what money to pursue from third parties (see Connecticut Rules of Professional Conduct, Rule 1.4b).

Q: What about a case where there's, you know, decent insurance, but the accident is just massive? You know, with the auto, someone's got the 100/300 or even the 300 policy, and those damages, and that's not enough because the person is badly injured?

A: I've had a lot of those where I've just, if I can get it [the insurance money] with a phone call or two, I generally give it to the person, and if there's no other place to go, that's that. I mean, although it is legal to do, I don't approve of taking the fee. Just personal, my own personal decision.

Q: Right. And suppose the defendant's got a house?

A: I'd take it.

Q: Really?

A: I wouldn't have any second thoughts about it at all. I mean, that's, you know, that's ——there are risks in life and that's not something I control. (plaintiffs' lawyer)

Q: Have you actually ever collected from an individual defendant, as opposed to an insurance company or corporation?

A: Oh sure.

Q: What kinds of cases?

A: Oh, silly individuals who don't carry adequate insurance and sometimes who are underinsured and have houses. Yeah, I had a rear-ender where somebody had a 25/50, which was inadequate. My own client was on a comp case; we had to pay back the comp carrier,[14] and she got rear-ended waiting to get on the Merritt [Freeway] and I collected from the tortfeasor over and above his policy. *Did I throw him out of his house? No. Would I if he had pushed me to it? Sure. Why not?* (plaintiffs' lawyer)

Notwithstanding a willingness to pursue blood money in an ordinary case, each of these lawyers recognized that their willingness to do so breached what others regard as a moral code. Indeed, in a comment that struck me with great force during the interview, one respondent equated his efforts to collect blood money with that of adjusters who delay paying claims of old people because those claims will be worth so much less once they die: "I take the houses. They make people die." This followed a discussion of how "cruel" it is (in his words) for insurance adjusters to delay paying claims of older people.[15]

[14] As will be explained in greater detail in the "new money" discussion, the law in Connecticut and other states grants worker's compensation carriers the right to be repaid out of any tort settlement or verdict for the benefits they provided to an injured worker in connection with the same accident. See infra Section III.

[15] This remark came in the following context:

> People need the money. And it means much more for them to get this amount of money now than it would to get more money later. So, I'd say that would be the number one factor. Age might play into it, too. If somebody's old, they [insurance adjusters] wait it out for them to die. It's cruel. I take the houses; they make people die. So, but I mean that's a factor. And for somebody who's old, getting the money means a lot.

My colleague Jim Stark observes that lurking in these responses may be the idea of a reciprocal moral code: "If insurance adjusters would play (and pay) in good faith and in a

Thus, although these lawyers disagreed with the others regarding their obligations with respect to blood money, they confirmed the moralized nature of tort settlement currencies. Significantly, their primary complaint about the other lawyers seemed to be that the others were not tough enough to do what they needed to do.

### C. The Claim That Pursuing Blood Money Is Not in Plaintiffs' Financial Interest

The respondents also stressed the practical problems in collecting real money from real people. The following is a representative explanation from a plaintiffs' lawyer as to why, as a practical matter, he has never collected blood money:

> This woman is coming in tomorrow; she has to make the decision. Does she want to pursue this guy on a personal basis? It's not going to make any difference, because if she pursues him on a personal level . . . the guy who caused all this happened to be a teacher, an elementary musical [*sic*] teacher. Makes about $45,000 a year; he's got three kids. He's got no equity in his house, and he's got an old car. If she pursues him, what's going to happen is, she'll get a judgment. It's going to be for a lot more than $100,000, and he's going to go into bankruptcy. And when he goes into bankruptcy, he's going to keep his house, he's going to keep his car, and he's going to keep, under the statute, $15,000.[16] You can't tap into his IRA, if he has one, his 401K if he's got one for school, for his group, his employment. So what advantage is there for the client to do that? Plus, she can get the $100,000 now, or she can wait four years and get $100,000. So, for that reason I've never been in a situation where I've taken personal liability.

Yet, as the dissenters emphasized, some defendants do have money worth going after:

> Q: Do people even have money to get?
>
> A: Some of them do, sure. I mean, there are houses that can be attached, judgment liens are filed. Now, you may have to be patient. If you've got a judgment lien, sooner or later somebody wants to refinance. I mean when mortgage rates started to fall we were getting paid off on judgment liens like crazy because everybody wanted to refinance and take advantage of the low rates, so of course you can collect. (plaintiffs' lawyer)

timely manner, I would forgo blood money. But, to the extent they don't, 'All's fair in love and litigation.'" In that sense these blood money outliers seem to have a more politicized view of the tort/insurance system as a whole; hatred of "the system"—i.e., insurers in most instances—may motivate them as much or more than client zeal.

[16] Under the Connecticut exempt property statute, $75,000 in home equity, $1,500 in automobile equity, most retirement or pension accounts, $1,000, and a number of other forms of property are exempt from creditors (Conn. Gen. Stat. § 52-352(b) [2000]).

When pressed, most respondents conceded that many defendants do have at least some assets that could be pursued, but they stressed that pursuing those assets was not worth the effort.

> Most people don't have much more than their house and their car and their clothes and their furniture. The clothes aren't worth anything and their furniture isn't worth anything, their car isn't worth anything. *They* [plaintiffs and their lawyers] *don't want to take the house. They* [the defendants] *may have a small savings. Psychologically, they* [plaintiffs] *are probably not going to go after it. There's a lot of threatening and posturing, but they don't go after it.* (defense lawyer)

Thus, the story is more complicated than some of the respondents suggested. It's not that defendants are without any assets (though that may have been true for the particular defendant he described), but rather that many plaintiffs' lawyers and their clients do not derive enough benefit from taking those assets to justify the cost involved. Significantly, that cost includes a psychological or moral component.

*1. Delay: Defendants Won't Pay Significant Money without a Verdict*

The respondents reported that pursuing blood money required so much more effort, because collecting from an individual requires going to trial. Liability insurance companies generally have authority to settle a claim, as long as the insurance policy is large enough to cover the settlement amount (Jerry 1996: 763). Once the plaintiff demands more than the insurance limits, however, the case cannot be settled unless the defendant agrees.

> Number one, it means going to verdict. You have to go to verdict. No one is going to settle, giving you their personal assets. So you have to go to verdict and that means a five-year wait. So by the time you go to verdict and wait five years—I mean let's say they had a 100/300 policy and you had one client, so you had $100,000 available, and the people with lower policy limits tend to have less than those assets, so if they have a house that has $60,000 worth of equity. . . . Let's say if you took that $100,000 today and invested it, in five years you could make the $60,000 that you're talking about that you may ultimately get by going to verdict.[17] (plaintiffs' lawyer)

Yet, apart from the judgment liens reported by the respondent on the preceding page, almost every example of blood money the respondents reported during the interviews was a preverdict

[17] Note that this response fails to consider the prejudgment interest. Under Connecticut law, if the plaintiff makes a formal offer of judgment that is refused by the defendant, and if the jury returns a verdict that is greater than that offer, the plaintiff is entitled to receive prejudgment interest from the date of the offer of judgment. (see Conn. Gen. Stat. § 52-192a [1999]). Generally, insurance carriers are obligated to pay this interest in addition to the policy limits. Neglecting this complexity is another example of how "practical" problems are packaged in a way that produces a desired result.

settlement. Thus, at least some defendants in fact *will* contribute some money to settle a claim when the plaintiff refuses to settle for the liability insurance policy limits. From a purely cost-benefit perspective this makes sense. A rational defendant placed in this situation might well think of the personal contribution as a form of insurance that protects him or her from the risk of a much larger personal liability.

What is going on is more complicated than the simple story of "no assets" and "delay" many of the respondents discussed. Often, defendants do not have very many assets that fall outside the statutory exemptions, but they do have some. Yes, there is additional delay involved in collecting blood money, but the delay is attributable in significant part to the moral code against collecting personal assets and, therefore, is not an entirely *independent* complement to the moral objection to blood money.

Let me explain this last point using a respondent's words. Some defense lawyers reacted with great indignation to demands for blood money:

> Blood money! And I have a lawyer who[m] I knew for 15, 20 years who[m] I haven't spoken to since this situation came up one time. There's a guy who was in defense work with us; probably co-defended on I don't know how many cases with him. And he left that firm to go out on his own. And he was suing my guy. We had a $100,000 policy with Aetna. It was a dogbite case. Maybe it was only a 50 policy or whatever. And he took over the case. And we offered him the policy and he wanted more. He wanted another $10,000 or $15,000. *At first I thought it was a mistake, and I called him up and I said,* "[name omitted] *what, are you kidding? Fifty is fifty is fifty is fifty, that's all we got! Take it and go away!"* And apparently since he was no longer under the umbrella and he was out starting his own law firm, he had made a deal with the referring attorney that he would try the case, but he didn't get a fee unless he got over the offer. So, the offer had been fifty. So my guy had to . . . ended up paying another $15,000 out of his own pocket to settle this case. And I've never spoken to him [the lawyer] since. (defense lawyer)

As a result of such reactions, it is difficult to get individual defendants to pay, because the lawyers believe that, in the end, the plaintiffs won't insist. Not because defendants don't have anything to squeeze, but rather because the moral economy of personal injury practice makes serious (as opposed to performative) demands for blood money an unusual thing. As a result, it may take some time for the defense lawyer to realize that the plaintiff is not simply posturing.

The difficulty of sorting out posturing from serious demands for blood money is exacerbated by insurance law's duty to settle, which makes such posturing an ordinary part of the tort settlement process (Baker 1998:231–32). The duty to settle implied in

ordinary liability insurance policies makes insurance companies responsible for paying judgments that exceed the liability insurance policy limits, if a reasonable insurance company would have settled the case within those limits (Syverud 1990:1116–17). This duty sets up a predictable settlement dynamic in which the plaintiff offers to settle for the limits of the policy and then threatens to go after the assets of the defendant as a way of placing pressure on the insurance company to settle. Plaintiffs' lawyers are quite matter-of-fact about this dynamic.

> I think if you put enough heat on them, and do it the right way, you get them in a position where the personal counsel will say to the counsel,[18] "Look, my client purchased a policy here, and he expects to have coverage. They are willing to settle this case within the limits. Now, you may evaluate it differently. I think this guy is at serious risk. He has a house. He has a pension plan, stock. You are running a big risk here. That is why he got this policy. You are supposed to look out for his best interest[s]. You are not settling this case. This case should be settled. We want from you—if you are going to take this hard line—that if this goes over the policy limits, you are going to make good for it." (plaintiffs' lawyer)

> The only time I ever attached someone's house [was] to put pressure on the insurance company to cough up the policy. Or sometimes they're being completely unreasonable. You've got a big case, clear liability, there's a million dollar policy, or a million three, whatever it is, and you've got a heavily insured defendant, obviously, and they've got big assets, they've got a big home, and the company is playing games when they really ought to tender the policy limit. So you attach the house to send a message to the insurance company. And you usually send a message to the defendant, who may not be paying attention, that they ought to be talking to their insurance company and finding out why their insurance company is not doing what they were paid all those years to do—which is to get them out of this mess. (plaintiffs' lawyer)

Although the duty to settle is evaluated on a reasonableness standard (Syverud 1990:1123–24), the lawyers spoke as if it was subject to a strict liability standard (cf. Whitford 1968). As a result, once the plaintiff makes an offer to settle within limits, it appears that all the lawyers involved assume that the insurance company will "make good" on any judgment, so the defendant is not actually exposed. Indeed, plaintiffs' lawyers often are so confident of this that they will set a very short deadline on any offer

[18] "Personal counsel" is a lawyer hired by an insured defendant at that defendant's own expense. Typically, insured defendants with assets to protect hire a personal counsel when there is a serious conflict of interest between the insured and the insurance company. A demand in excess of the policy limits can be such a situation (see Baker 1997–98).

to settle within limits, in the hopes of "setting up" the ability to collect more than the policy limits.[19]

One plaintiffs' lawyer put this colorfully, as follows:

> There are times I call up the insurance company and say, "Look, there's no UM here, so do me a favor, don't offer me the twenty.[20] I dare you. Please don't do this. As a matter of fact, your mother wears army boots" . . . if that's going to do it. (plaintiffs' lawyer)

The result is that adjusters and defense lawyers interpret threats to go after a defendant's assets as strategic behavior aimed at gaining an advantage over the insurance company, not as a serious threat to squeeze equity out of a defendant's house. Combined with a belief that respectable plaintiffs' lawyers do not take real money from real people, the result is vigorous resistance from defense counsel and almost inevitable delay in reaching any settlement involving blood money.

*2. Sometimes There Are Other, Easier Targets*

Perhaps the most persuasive practical explanation for avoiding blood money is the existence of other, easier, targets. In an automobile insurance accident, the plaintiff may have her own underinsured motorists coverage. If so, the plaintiff's own insurance company will pay once the defendant's policy is exhausted. As a result, there is little incentive to collect from the individual defendant (unless, of course, the plaintiff is "out for blood"). As one respondent put it, "That money that you got from the person that's underinsured would be set off against your own policy." Thus, the existence of UM reinforces the no blood money rule. In other cases, particularly medical malpractice, there may be institutional defendants that can be pursued in addition to the underinsured individual defendant.

In addition, there is always the hope that the defendant's liability insurance carrier will negligently refuse to settle within limits, which induces plaintiffs' lawyers to offer to settle within limits, even when they hope that the insurance company will refuse. As one attorney noted,

[19] In jurisdictions such as in Connecticut that impose a prejudgment interest penalty on rejected offers of judgment, (Conn. Gen. Stat. § 52-192a [1999], this early settlement offer will typically be framed as an offer of judgment.

[20] If the plaintiff has UM (underinsured motorists coverage), the plaintiff's own insurance company steps in to replace the defendant's liability insurance. For example, if the defendant has a 20/40 policy and the plaintiff has $500,000 in UM coverage, the defendant's insurance company will pay the first $20,000 of the plaintiff's damages and the plaintiff's own insurance company will pay the rest (up to $500,000), as long as the defendant is legally responsible for the accident. When plaintiffs have UM, plaintiffs' lawyers typically want to collect whatever insurance the defendant has very quickly so that they can then turn their sights on their client's UM carrier. If the plaintiffs do not have UM, as in the example given by one respondent, plaintiffs' lawyers are more interested in "setting up" the defendant's insurance company for failure to settle within the policy limits.

> If they don't [take a policy limits settlement offer] and your case is really worth more than twenty, let's say. You know what? They're really doing me a favor. Now they've increased the value of the case that's worth, pretty clearly, fifty, let's say, and very early on they decline my offer of judgment; if 30 days passes, which is the law, and they don't take that $20,000, well now, I'm not going to let them off the hook for that fifty. And they really are at risk for getting hit. "Oh no, my exposure's only twenty. You wait. Try it." They always pay me more . . . always pay me more. That is a classic mistake. (plaintiffs' lawyer)

It is important that all these targets are easier to deal with in a moral as well as a practical sense.

> What's going on is, the reality is, that they can get the money from someone else and therefore it is easy to take that position. Of course, I'm not in that position. I'm on the other side. But I think that it's easier to get the money from the insurance company, and then you don't have to worry about the stigma, if that's the right word; but at least you're able to sleep at night knowing that you didn't take somebody's house or their car. (defense lawyer)

Ultimately, the reported practice of almost never pursuing personal assets seems to rest on moral as well as practical grounds. After all, there is an entire credit industry that is dedicated to squeezing money out of people who don't have any. Thus, it is simply not true that most defendants cannot be forced to pay *something*. On the other hand, there are undeniable obstacles to collecting real money from real people, and insurance money is so much easier to collect.

*3. Does the blood money "union rule" favor plaintiffs' lawyers at the expense of their clients?*

The discussion so far has largely taken the respondents at face value, leaving unanswered a fairly obvious question about the "practical" explanations for the no blood money rule. Why should the fact that the lawyer has to work harder to get blood money be a reason for a plaintiff to be satisfied without it? Settling early for the insurance money would seem to increase plaintiffs' lawyers' effective hourly wage at the expense of their clients, because plaintiffs' lawyers receive contingent fees that do not distinguish between insurance money and blood money.

Yet, that conclusion rests on an assumption that the current contingency fee practice in Connecticut would remain the same if the blood money rule were to change. If more plaintiffs began demanding that their lawyers pursue blood money, plaintiffs' lawyers might adapt their contingent fee arrangements to reflect the higher costs of collecting blood money. Thus it is inappropri-

ate to conclude on the basis of these interviews that the "union rule" necessarily raises lawyers' hourly wage.

It is even more inappropriate to conclude on the basis of this evidence that the no blood money rule benefits lawyers *at the expense of* plaintiffs. Even assuming plaintiffs would in the long run pay the same contingent fee for blood money as for insurance money, evaluating whether the rule harms plaintiffs would require estimating the amount of the blood money the plaintiff could collect, the time value of the insurance money that is delayed, and the length of the delay—all of which are very difficult to measure. Moreover, if the respondents are accurate, plaintiffs prefer not to pursue blood money in an ordinary negligence case. Therefore, we have to leave in suspense the question of whether plaintiffs' lawyers resistance to pursuing blood money is against the interests of their clients and must focus instead on the significance of the strong evidence that blood money and insurance money are very different settlement currencies.

### D. Some Money Is Less Bloody Than Others

As some of the respondents' excerpts have already suggested, personal injury lawyers draw moral distinctions among categories of personal assets. The most "bloody" money is home equity from someone who is not seen as wealthy.

> I think that the only time that it happened was in that case, and that was because there was some kind of pre-appellate argument conference where the other lawyer suggested that he [the client] pay ten [thousand] out of his pocket to get to a number, and he agreed to it, and, you know what? I did not like it at all. I felt very uncomfortable with it. I shouldn't say that because you are supposed to serve your client's interest, but I would much prefer—*I mean I wouldn't want to take someone's house.* I know people do that and I guess you are supposed to do what is best for your client, but fortunately we have not been faced with that situation. (plaintiffs' lawyer)

Connecticut's homestead exemption allows a debtor to keep only $75,000 in home equity (Conn. Gen. Stat. § 52-352b [t]) so there are many underinsured defendants who are, at least theoretically, at risk of losing their home as a result of a tort judgment. Yet, not one of the lawyers I interviewed had ever heard of anyone losing their home in this way.[21]

[21] The homestead exemption itself (and tort law in action's extension of that exemption) undoubtedly reflects a deep-seated cultural understanding of the sanctity of the home. See, e.g., *Butterworth v. Caggiano* ("in light of the historical prejudice against forfeiture [and] the constitutional sanctity of the home . . . we hold that . . . the Florida Constitution prohibits civil or criminal forfeiture of homestead property"); *U.S. v. James Daniel Good Real Property* (1993) (Thomas, J., concurring and dissenting) ("Respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic") (*quoting Entick v. Carrington* [C. P. 1765]).

Bank and investment accounts, however, seem less sacrosanct.

> I've had client situations where clients have told me that they didn't want to foreclose on someone's house. I've had that happen on several occasions. But I've never had a client tell me, if a person had a bank account, and it was obviously a wealthy individual, that they didn't want the money. If they didn't want to foreclose on somebody's house—because I think that—or take their car,[22] because it's hard to take somebody's car, and there's something about a house that—and a home that makes people not want to do that. But if the guy has one million dollars in the bank or a lot of General Motors stock, I think a lot of people would want it. (plaintiff and defense lawyer)

What is going on here is a sense of proportion and responsibility. Although injuring someone clearly hurts, so does taking someone's house or car. The more money the defendant has, however, the less taking that money hurts—the practical moral equivalent of the economic concept of the declining marginal utility of money. This means that the more money you have, the more insurance you should buy, and, moreover, that it may be rational for an ordinary middle-income person to buy the mandatory minimum automobile liability insurance.

### E. It's Not Blood Money If You Chose Not to Buy Enough Insurance

A similar sense of proportion and responsibility explains a related finding: In the moral economy of personal injury practice, pursing personal assets is appropriate when the defendant failed to purchase adequate insurance. This finding reflects a moral judgment that people have a responsibility to purchase insurance. The failure to meet that responsibility is itself a wrongful act, justifying the punishment that is understood to be an inherent part of taking real money from real people.

> The only time I've ever pursued personal assets was in a motor vehicle case where the person was uninsured, unlawfully, and did a very serious injury, and we felt that it was appropriate because we felt a bad thing [i.e., the failure to purchase insurance] was present. But other than that, I've never done it. (plaintiffs' lawyer)

This moral obligation to insure does not require individuals to purchase enough insurance to cover any claim. Otherwise, it would always be appropriate to pursue individual assets whenever the insurance was used up. Instead, it requires individuals to purchase an "adequate" amount of insurance.

How much is enough? My interviews do not provide a clear answer, but they do provide a way to think about it. The mini-

[22] Connecticut exempts only $1,500 in auto equity from collection, so many people are, at least theoretically, at risk of losing their car in a tort suit (Conn. Gen. Stat. Ann. §52-352b [j]).

mum is whatever it takes to claim, credibly, that you have satisfied your moral obligation to insure. Ordinary people have an obligation to purchase insurance in ordinary amounts. Wealthy people have an obligation to purchase insurance in larger amounts.

> If it is somebody of substantial means who has got the 20/40 . . . they are playing the system. (plaintiffs' lawyer)
>
> If a lawyer or doctor chooses to go bare, which is an economic decision to put more money in[to] their own pockets and not pay their premiums, then I probably would go after them because that's wrong, because they are now not protecting—it's now not just being negligent, they're making a conscious decision that if they screw up, they're not going to protect their client or their patient. And they did that so that they could make more money. Because the premiums are not that onerous, certainly not for lawyers. (plaintiffs' lawyer)

It is appropriate to pursue wealthy people's assets in "low limit" situations for two reasons: first, they have a greater responsibility to purchase insurance; second, the money that the plaintiff takes is worth so much less to them than to the plaintiff.

> One case that comes to mind was a young boy who was in a horrible car accident and was in a coma, and as far as I know is probably still in a coma six or seven years later, and the tortfeasor had a $100,000 insurance policy, which the company was willing to pay early on, and the parents were obviously upset because their medical bills were astronomical. They did not have complete insurance coverage on a lot of it and asked us to run an assets check on the defendant and, low and behold, the defendant owned like 12 pieces of property. And it always boggled my mind that he could have that limited insurance with that amount of real estate hanging out there. So we attached a lot of his property, and ultimately the guy paid a significant amount of money out of his own pocket. (plaintiffs' lawyer)

For most people, a million dollar umbrella policy seems to be enough to protect them against an ordinary accident case.

> I think the feeling is that no matter how bad the injuries are, if you collect a million dollars, to go after someone's house for another $100,000 in equity or to attach their wages, it just isn't worth it. (plaintiffs' lawyer)

For an obstetrician, however (and by extension for others in similar situations), a million dollars is not enough because of the enormous harm that can result from a mistake in delivering a baby.

> We have a case now where a doctor testified at his deposition that his group got together and they consciously made a decision to have million dollar policies despite the fact that they are obstetricians and they know that their exposure is greater, because they understood that if they only carried a million dollars, the case would settle for a million dollars and they would be better off. And under those circumstances, where someone

> has made that kind of a conscious decision to be underinsured, I would feel less compunction about going after them, and the client probably would also. (plaintiffs' lawyer)[23]

### F. Sometimes, Blood Money Is the Point

All the respondents agreed that there were some circumstances in which collecting blood money was morally appropriate. As with tort doctrine, the blameworthiness implicit in the blood money practice appears to be a product of two factors: the degree to which the defendant's conduct breached social norms and the seriousness of the resulting injury. Nevertheless, these findings regarding blood money provide a significant supplement to the ordinary understanding of the moral economy of tort law. As tort doctrine reflects, a simple mistake makes all the difference whether one victim is entitled to compensation through the tort system and another is not.[24] Nevertheless, tort doctrine alone does not determine whether the person who made the mistake will be held *personally responsible* for that compensation. Something more than tort doctrine's simple negligence is required.

The respondents reported that rape and other assaults that result in serious harm are the clearest cases that justify pursuing blood money. Drunken driving, however, was the most common example they had encountered in their practice.

> Parents and relatives of people who are killed by drunk[en] drivers want blood. They really want blood. I forgot what question of yours initiated this, but in those cases, the clients themselves have an interest in gouging, to make the point to the person and to have the word get out, usually to other youths, that "Holy shit! Jones's father lost his house." (plaintiffs' lawyer)
>
> [In these situations] people are just out for blood. I mean, it's their child, it's their spouse, and something egregious has happened. This isn't just an accident. Say it's somebody [who] is dead drunk, plowing into them, that causes an accident. I can see where they can [unintelligible] and *they want more than just the insurance coverage.* (plaintiffs' lawyer)

[23] Another, less moralistic, way to think about "how much liability insurance is enough" is to balance the assets potentially exposed to a tort judgment against the size of the insurance policy, in light of the length of time to trial. From a purely practical perspective, the goal is to be able to offer a plaintiff a large enough potential settlement early on, so that the additional amount that could be collected following a trial is not worth the wait. As this way of thinking about the insurance question illustrates, absent prejudgment interest, trial delays systematically favor defendants over plaintiffs and, thus, should produce lower liability insurance premiums. Plaintiffs' lawyers attempt to change this dynamic in individual cases by making offers of judgment, which start the prejudgment interest clock ticking in a tort case. It is significant that offers of judgment are typically for the insurance policy limits (or less); thus, they reinforce the "no blood money" practice.

[24] Indeed, some are critical of tort-based compensation on just this ground (see Atiyah 1997).

> I mean I draw a distinction between, in my mind, between the guy who isn't paying attention and rear-ends you at the light and the guy [who] has been sitting in a bar for four hours and who is in the bag. I think there is a difference. I know I have got a whole lot less problem with chasing a guy who is driving drunk than I do in chasing the person that happened to have been on their cell phone. (plaintiffs' lawyer)

Death and serious injury claims are also more likely to prompt a demand for blood money, even in the absence of obviously intentional wrongdoing (or stigmatized wrongdoing, such as drunken driving [see Gusfield 1981]), and not only because such claims present higher damages. In a death case, blood money is appropriate without any aggravated fault.

> We've done it [sought blood money] on a couple of death cases. For some reason families seem to want to exact something out of the individual beyond the insurance policy. It may not be a lot. I think the most we've ever asked for is like $25,000 beyond say a $300,000 [insurance payment] on a death case, but it was their way of retribution, as silly as that may sound.[25] (plaintiffs' lawyer)

For serious injuries short of death, plaintiffs' lawyers typically look for some element of aggravated fault, even if it does not rise to the level of drunken driving. The following example from the same plaintiffs' lawyer reflects this expectation that there must be at least something egregious about the defendant's conduct:

> Generally, [the defendant has caused] tragic injuries. I'm thinking of one where a young kid was rendered a quadriplegic in a swimming pool accident, and the people were actually supervising a party, like a high school graduation party or some such, and they were actually there and they were allowing drinking; kids got crazy as teenagers [do], and the poor youngster ended up in a wheelchair. And the homeowners' coverage, I think, was $300,000, which obviously didn't even touch the value of the case, and we did attach property there because the people [plaintiffs] insisted on it, and we did get the payment because it was a fairly nice house and there was a good amount of money there; but we generally, and maybe it's just a personal preference, but we don't like doing it. (plaintiffs' lawyer)

In this case, blood money was appropriate in this lawyer's eyes because the parents had been grossly negligent and the client horribly injured. Even in that case, however, the plaintiffs took

[25] Of course, one thing that the blood money story teaches is that "retribution, as silly as that may sound" plays a significant role in shaping tort law in practice. Although I will leave further discussion of this point to the concluding section, it should be clear already that, if my respondents are right, tort law in practice is concerned far more with retribution than with deterrence, at least in cases involving individual defendants. Indeed, the blood money story suggests that retribution concerns may also temper the quest for compensation.

"only about $25,000," which was much less than the total amount of money that they could have taken.[26]

As this reflects, blood money has a different value to clients than does insurance money. In an ordinary case, blood money appears to be worth less than insurance money (because of the associated delay and moral cost). But, when plaintiffs are "out for blood," the value of blood money exceeds that of insurance money, as the following statements reflect:

> The plaintiff was someone who was harboring a lot of ill will about this accident. That, you know, the young girl completely in the wrong had injured him and all that and actually *the fact that personal money was coming from the defendant made him feel a lot better and made that money more worthy or more valuable to the plaintiff than just the insurance money.* (defense lawyer)
>
> And again, it's less about the money than it is about somehow seeking accountability directly from the individual. I mean, *the coverage just doesn't cut it because it is not coming out of the person's pocket.* (plaintiffs' lawyer)

"Compensatory damages" are not only just about compensation, at least when it is the defendant herself who has to pay. They are also about retribution.[27]

The fact that plaintiffs are out for blood does not mean, however, that defendants actually have to pay. Indeed, it is in just these kinds of cases that, from the defendants' perspective, defense lawyers earn their fees. They do so by working on (and sometimes with) plaintiffs' counsel to compromise the case for the insurance money.

> You get the same kind of assault situation. You get a DWI [driving while intoxicated] . . . you know, a bad one. Not the little bit over the limit kind of case. Those kinds of cases—if you've got a plaintiff who is, I don't want to say vindictive, but I mean they have taken this to heart and they're not letting you off by having your insurance bail you out. Sometimes you have to deal with that. Then other times you say to them "That's life. Either you take it or you don't." *Usually their own counsel will work on them, because the last thing they want to see is an uncollectable judgment.* It doesn't happen very often. (defense lawyer)

Notice the role ascribed to the plaintiffs' lawyer here. According to this respondent, the defense and plaintiffs' lawyers work together to recruit the plaintiff into going along with the "union rule." Thus the strength of the "union rule" may result in defendants avoiding personal responsibility even in cases in which the "moral code" demands that blood money be paid.

As this last excerpt suggests, the heightened value to the plaintiff of blood money creates a potential conflict of interest

[26] The respondent could not remember exactly how much the defendants could have paid, only that it was "significantly more" than they did pay.

[27] This conclusion is also supported by jury research (Wissler et al. 2001).

between plaintiffs and their lawyers that goes beyond the fact that the lawyers have to work harder to collect blood money than to collect insurance money. The "union rule" way of thinking about blood money suggests that plaintiffs' lawyers do value blood money *less* than they do insurance money not only because it is more difficult to collect. Indeed, a former Connecticut defense lawyer who read an earlier draft of this article commented on the "union rule" as follows:

> It is important to develop a good working relationship with the plaintiff's counsel so that she can go back to her client and exert pressure [regarding]: the "value" [of the case], and you can go back to the carrier/customer and exert similar pressure. The "union rule" is a manifestation of the tight relationships in the bar, where the lawyers "manage" things efficiently, and often without complete understanding by their principals who are either "greedy and emotional plaintiffs" or "tightfisted and mean-spirited carriers."[28]

One way of looking at the process of dissuading a client from seeking blood money is as a process of aligning the client's value scale to those of the personal injury bar. Perhaps the respondents' possibly exaggerated claims about difficulty and delay are a way that plaintiffs' lawyers lead clients to discount the value of blood money so that it approaches that assigned to it by the bar.

## III. New Money

> New money is what's going to be available for the plaintiff. Not necessarily after the legal fees, but after you pay back everything that they owe: comp[ensation] liens, welfare liens, state liens, you name it. And the only money that I've ever seen a client interested in is what they're going to get in their hand. (plaintiffs' lawyer)

The blood money story focused on the moral difference between money *taken from* insurers (or large institutional defendants) and money taken from individuals, but the "new money" story focuses on the moral difference between money *provided to* victims and money provided to insurers pursuing subrogation claims. New money norms systematically privilege plaintiffs' need for compensation over the subrogation and defense interest of insurers.

The respondents discussed new money most often in connection with workers' compensation, underinsured automobile insurance, and health insurance. Before turning to the interviews, it may be helpful to review the structural dynamics of these three situations.

*Workers' compensation.* Many accidents handled by personal injury lawyers take place in the course of employment. A classic

[28] E-mail from additional respondent January 11, 2001.

example is the truck driver who gets run over while making a delivery. In that situation, the driver is legally entitled to receive workers' compensation benefits (medical care and some lost wages) and also to sue the person who ran him or her over. But if the worker/driver recovers in tort, the workers' compensation carrier is entitled to be repaid in full for the benefits it provided. (Conn. Gen. Stat. Ann. § 31-293(a)). Typically, the injured worker starts receiving workers' compensation benefits immediately. (If there is a delay, it generally will be for wage loss benefits, not the medical benefits.) Thus in any employment-related personal injury case, at least some compensation payments will have been made by the time the plaintiff's lawyer takes the case. In a serious injury case, those payments will be substantial. In this context, the new money is the money left over after the defendant's insurance company pays back the compensation carrier (which paid the "old money" to or on behalf of the plaintiff).

*Underinsured motorists (UM) insurance.* This is insurance that steps into the place of the inadequate insurance of a negligent driver who injures a beneficiary of a UM policy.[29] Like auto insurance generally, UM insurance covers two sets of people: (1) anyone who happens to be an occupant of a specified vehicle, and (2) the members of the specified household (or employees of the specified business) regardless of where they are. For example, UM insurance covers anyone who permissibly (a much-litigated concept) uses the policyholder's car and it covers the policyholder even while he or she is walking, riding a bike, or riding in someone else's car (Widiss & Keeton 1988).

UM benefits are available only after a victim has obtained all the available liability insurance money from the defendant; and the amount of the available UM benefit is reduced by the amount of the liability insurance payment. For example, if I have $100,000 per person UM limits and I am injured in an auto accident by Bob, who has $50,000 bodily injury limits, I must first collect the $50,000 from Bob's insurance before I can collect from my UM carrier. My UM carrier's potential exposure is reduced by the amount of Bob's policy, so the most my UM carrier would be obligated to pay me is $50,000.[30] All the money my UM carrier pays me is "new money" because I have already been paid some money ("old money") by Bob's liability insurance carrier.

*Health insurance.* The legal rules regarding the repayment of health benefits provided in connection with a tortious injury dif-

[29] UM insurance also provides "uninsured" motorists coverage, which pays in the event that the defendant is completely uninsured (or the defendant cannot be located) (see Widiss & Keeton 1988:399).

[30] It is possible in Connecticut to purchase something called "conversion coverage," which makes UM excess to any liability payments (meaning that the available UM limits are not reduced by the amount of the defendant's insurance) (see Conn. Gen. Stat. § 38a-336a [1999]). According to my respondents, very few people purchase conversion coverage.

fer according to the nature of the plaintiff's health coverage. If the health benefits were provided by private insurance or by an employee benefit plan governed by state law then state law will govern repayment rights. In Connecticut, which has eliminated the collateral source rule for health benefits (see Conn. Gen. Stat. §§ 52-225a & 52-225b), there is no right of reimbursement, and the value of health insurance benefits provided to a tort plaintiff is deducted from any judgment.[31] Accordingly, when a plaintiff has received state-law governed health insurance benefits in Connecticut, the new money dynamics are similar to the underinsured motorists insurance situation just discussed. The amount of money the defendant is required to pay is reduced by the benefits the plaintiff previously collected, and therefore all the money the defendant has to pay is new money.

If the health benefits were provided by a health benefit program that is exempt from state tort law, the plaintiff most likely will be required to repay the health benefits.[32] In this situation, the new money dynamics are similar to that in the workers' compensation situation (with some important exceptions that I will explore later).

### A. Workers' Compensation and New Money

The respondents reported that workers' compensation is the collateral source with the most significant impact on personal injury practice. Health insurance is more ubiquitous, but the sums involved in any particular case are smaller, and health insurers (and employee benefit plans) rarely get directly involved in a case. In contrast, workers' compensation insurance companies, or "comp carriers" as they are known informally, retain lawyers to protect their subrogation rights, and these lawyers often participate in settlement discussions, including pretrial conferences held in judges' chambers.

In Connecticut, as in most other states, the employer has the first priority on any tort payments made in connection with an injury for which compensation was paid, after deducting the

[31] Cf. *Alvarado v. Black* (1999) (holding that plaintiff was entitled to an offset to reflect the amount of premiums her employer had paid on her behalf to purchase her health insurance under statutory law).

[32] It is hard to overstate the complexity of U.S. health care law. The health benefits would be exempt if they were provided by Medicare or Medicaid, or by a self-insured employment benefit program. If Medicare provided the health benefits, there will be a federal lien on the tort payments. If Medicaid provided the health benefits, there will be what my respondents referred to as a "welfare lien" on the tort payments. If the health benefits were provided as part of an employment benefits package that is exempt from state law, the health plan typically will have contractual rights to subrogation. Most employment-based health plans are governed by ERISA (the Employee Retirement Income Security Act), which exempts self-funded plans from state law. Most large, private sector employer health plans are self-funded and, thus, exempt from state law (see Farrell 1997; Parmet 1993).

costs of bringing the tort action (Conn. Stat. Ann. §31-293[a]).[33] (Employers typically assert these rights through the insurance company the employer uses to fulfill its workers' compensation obligations, so it is the workers' compensation carrier rather than the employer that is involved.) In other words, the statutory rule is that the employee-plaintiff only gets paid once workers' compensation benefits have been fully repaid. Yet, my respondents universally reported that this rule is honored mainly in the breach, except in the unusual instance in which a case with a lien is tried to judgment.[34] In practice, plaintiffs and workers' compensation carriers have more equally balanced claims on tort payments, so they share the risk of undercompensation. This "relaxation" of the statutory priority is discussed in Section 1. Section 2 addresses the related finding that liability insurance carriers often increase the amount they will pay to settle a claim when there are workers' compensation benefits that must be repaid. What these two findings have in common is the privileging of money for victims (new money) over money to or from insurance companies.

*1. The "Rule of Thirds"*

As discussed previously, the statutory rule is that the plaintiff is paid only after the workers' compensation carrier has been repaid. In practice, however, when settlements provide less money than needed to compensate plaintiffs in full, plaintiffs and workers' compensation carriers share the available funds. The rule of thumb that encapsulates how this works in practice is what the respondents called the "rule of thirds."

> That means that whatever money . . . the defendant was going to put up is split three ways. The plaintiff's attorney gets a third, which statutorily he gets fees and costs firsts. The comp carrier gets a third of whatever that money off their lien, and then the plaintiff puts a third in his pocket. That we've done. (defense lawyer)

The rule of thirds typically comes into play in one of two situations: Either the plaintiff's damages exceed the available liability insurance coverage or the case against the defendant has significant problems. In both cases, the available tort payments are less than the plaintiff's damages, and the plaintiff and the comp carrier split what is available, even though the workers' compensation statute says that the comp carrier should be repaid in full before the plaintiff gets anything.

It is important to be clear that many of my respondents stressed that the "rule of thirds" is not a mechanical rule that is

[33] Note that this includes attorneys' fees. For a review of other jurisdictions, see Larson 2001 § 117.01[1].

[34] This finding is also supported by Kritzer 1998a:809.

applied in every situation and that the exact division of settlement proceeds in any particular case depends on the facts of that case.[35] Acknowledging this complication, the basic point holds true: plaintiffs regularly obtain a larger share of the proceeds of tort settlements than they are entitled to under the workers' compensation lien statute.

The obvious question this practice raises is, "Why do workers' compensation carriers so routinely compromise their statutory rights?"

Compromise is easiest to understand in the case of a weak tort claim. With a weak tort claim, the carrier compromises because something is better than nothing, as the following excerpt graphically reflects:

> You're not talking about a case where you can make some money. You're talking about a case where everybody says, "Holy shit, we better get out of this!" and "If we try this case, we're going to end up with a goose-egger! Chances are we are going to end up with a goose egg.[36] I'm not going to get any money. My client's not [going] to get any money. And you, the comp carrier, you're not going to get any money, either." They're very amenable to that kind of stuff. (plaintiffs' lawyer)

The carrier cannot take for itself all the money the defendant is willing to pay to settle the case because the plaintiff will not be willing to settle without some new money. When liability is questionable, a trial poses great risks for everyone involved.

> The reality of the situation is that if they [the comp carrier] are going to be difficult, the plaintiff is not going to get any money, and the plaintiff has no incentive. And the lawyer representing the plaintiff is in a bad mood, too. The case goes in poorly; the result is they do terrible. Okay. I mean so they need the cooperation, as a practical matter, of everyone. And, you know, there's a human factor that they realize that, you know. And I think it's

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[35] As one lawyer put it:

> If you have a comp lien of $100,000 and you have a $50,000 offer, obviously you're going to have to go to the compensation carrier and say, "Hey, look, you know, we can only pay you back $15,000. I'll take $15,000 myself and we'll give the client 20, and you'll get 15 and that's all we can do." That is in the ordinary course of business do-able. There's a chance they can lose the case. If you come up to them with some sort of reasonable—you don't want to say to them, "There's insurance of $250,000, I'm going to take a fee of $83,000 and we want you to compromise your comp lien, which is $100,000 and take $5,000." Obviously, that's not going to work. "I'll cut my fee, and I'll take $40,000 and I want you to cut your lien from a hundred down to 30." Whatever. You have to come to them with something that makes sense in terms of fairness. You shouldn't be trying to get the advantage of the other person all the time. It should be some kind of reasonable settlement given all the facts in the case. (plaintiffs' lawyer)

It is interesting that in Arkansas, Minnesota, Montana, and Wisconsin, workers have a statutory entitlement to at least one-third of any tort judgment, regardless of the size of the workers' compensation benefits that have to be repaid. (See Larson § 117.10[1] n. 6.) If the dynamics explored in this section are correct, workers in those states are likely to receive more than a third in many settlements.

[36] A "goose egg" is a colloquial term for "nothing, a big fat zero."

> almost setup so it is found money for them, too. "Money is already spent. Let's see how much we can get back and at least we're getting this." Everybody's a hero that way. Whereas if the case is ever tried and lost and money could have been gotten back—I mean, it's all the negatives for the lawyer. (defense lawyer)

In other words, the workers' compensation carrier compromises in order to receive a smaller, certain, amount, rather than a larger, uncertain, amount. The share of the settlement amount the carrier accepts in compromise is smaller than the statute provides because the plaintiff has significant control, not only over whether the case settles but also over how large the judgment will be in the event the case does not settle.

Carriers also compromise because a settlement can provide relief from possible future benefits for the same injury. Unlike tort damages, workers' compensation benefits are paid over the duration of the employee's injury or disability, rather than being paid in a lump sum; thus, the workers' compensation carriers' obligation to pay is continuing.[37] In many situations the plaintiff will not have fully recovered from the injury and, therefore, the workers' compensation claim will still be open. As a condition of agreeing to a settlement that gives the plaintiff new money, the workers' compensation carrier can demand that the plaintiff enter into a "stipulation" terminating the carrier's obligations with respect to the injury as a condition of compromising the lien in the tort suit.[38] Alternatively, the workers' compensation statute authorizes the carrier to deduct the proceeds of any tort payments against future workers' compensation payments (Conn. Gen. Stat. Ann. § 31-293(a)[2]). In either case, sharing the proceeds of the tort settlement with the plaintiff costs the workers' compensation carrier less than might first appear.

Why a comp carrier compromises when the problem is low-liability insurance limits is less intuitively obvious. The Connecti-

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[37] Even if the plaintiff is no longer receiving any workers' compensation benefits, there is often a possibility that the plaintiff could have a related injury in the future (known as a "second injury" in the trade), in which case the carrier on the claim for the first injury would be obligated to contribute to the benefits for the second injury. This potential obligation can also be eliminated with a stipulation that trades future workers' compensation benefits for money today. Note that this situation can present a conflict of interest between the plaintiff-worker and the plaintiff's lawyer, who works on a contingent fee basis, because the lawyer would receive a contingent fee on the settlement that would not be received from the future workers' compensation benefits.

[38] This practice is confirmed in the leading Connecticut Workers Compensation practice guide:

> It is often the practice that in settlement discussions or at a civil pre-trial the intervening employer, usually through its insurer, will reduce its claim in direct proportion to that contributed by the plaintiff-worker and/or tortfeasor defendant. While not required to do so, it is often the case that in exchange for reducing or eliminating (highly unlikely) its claim, the worker will be required to enter into a stipulation with the employer and close out his or her workers compensation case. (Severino 1994:166)

cut statute gives the comp carrier first claim on the money and authorizes the carrier to bring an action against the defendant in the event the plaintiff does not (Conn. Gen. Stat. Ann. § 31-293(a)(2)). Thus, the carrier has the formal right to leave the plaintiff with nothing from the tort action and no apparent incentive to share the defendant's limited liability insurance with the plaintiff.

Yet, according to my respondents, a workers compensation carrier does have an incentive to share with the plaintiff in a low limit situation. There are four reasons for this incentive. First, the carrier cannot settle unless the plaintiff agrees and, as in the questionable liability situation, plaintiffs have no incentive to settle unless they get some new money. Sharing the proceeds of a small insurance policy with the plaintiff may be less expensive than litigating to judgment to collect the whole proceeds. A carrier that attempts to free ride on the work of the plaintiff's lawyer and then collect the full value of the policy faces an impossible situation:

> The comp lawyer is weak. Because the comp lawyer didn't do anything to prepare the case for trial. Doesn't have the witnesses and doesn't know how to try the case. He's relying on his degree—well "degree" may be a bad word—the desire of the plaintiff to get money and the desire of the plaintiff's lawyer to get money and, hopefully, they won't both fold out of the case. Because if they ever did fold out of the case if they ever did turn to the comp lawyer and say "Try the case," his competence is now worth close to zero. So it's a bluff. It's a bluffing game. And who's gonna bluff. Who's got the courage to stare the other person down. (defense lawyer)

Second, as in the weak liability situation, when the worker has an open workers compensation claim, sharing the settlement proceeds with the plaintiff costs the carrier less than it might at first seem. The carrier may be able to obtain a stipulation closing the workers compensation claim:

> Q: What is the incentive for the comp carrier to go along with the rule of thirds in a low limit situation?
>
> A: For one thing, they'll tie it into a stipulation. In most situations there is a future continuing obligation. With a stip they can close their file so that they don't face a future unlimited exposure. (defense lawyer)

Third, in many cases the carrier needs the plaintiff in the tort suit even if the carrier is prepared to do the work to take the case to trial. Typically, the plaintiff is a crucial witness and the person the jury identifies with. Absent the possibility of new money, the plaintiff has little incentive to cooperate; and, if the plaintiff is not cooperating with the carrier, the defendant has less reason to worry about an adverse verdict.

> I just don't see them saying, "We want to wipe out the policy and leave you, Mr. Plaintiff, with nothing." I've never seen it happen. The plaintiff is badly hurt, the lien is more than the policy limit and the carrier says, "We want it all." I can't imagine that there's a lot of incentive on the plaintiff's part to work up the claim. (defense lawyer)

Finally, all the other participants in the tort suit—the plaintiffs' lawyer, the defense lawyer, and, if necessary, the trial judge—work together to pressure the carrier to compromise in favor of the plaintiff.

> I think that, just in a knee-jerk way, most people that do a lot of this work view [workers' compensation] liens as flexible, and when they turn out not to be, in those cases when they don't [compromise], they get everyone pissed off because their expectations have been thwarted. "What do you mean, you're not going to compromise!! Everybody takes fifty cents on the dollar with workers' comp! What are you talking about? . . ." And they say, "Well I'm sorry but [company name omitted] just doesn't compromise," and then the judge screams and yells, "I want to speak to your manager. . . ." Even the judges are on board on this. (plaintiffs' lawyer)

Although this professional norm undoubtedly derives from the recognition that, in practice, the plaintiff has a greater claim on new money than the workers' compensation statute would suggest (and thus is not an independent reason for that enhanced claim), the norm reinforces that claim by shaping the expectations of the repeat players in the settlement process.

*2. Workers' Compensation Liens and the Size of Tort Payments*

> It's not because it is really worth more, but it's because the economics of the situation are such that it has to work that way. (plaintiffs' lawyer)

Workers' compensation benefits do not change the physical nature of an accident, but they do change the social relations of the resulting injury, with significant ramifications for everyone involved. The plaintiff benefits immediately, because, as the respondents reported, whatever complaints anyone may have about workers' compensation carriers, they generally pay claims much faster than do liability insurance carriers. The injured worker's health care expenses are covered immediately, and in many cases a substantial percentage of any lost wages are covered immediately as well.

Workers' compensation also affects potential tort defendants and their liability insurance companies (and, therefore, everyone who pays liability insurance premiums). Some people who might have brought a tort action may decide not to because workers' compensation provided enough benefits that a tort suit is not worth the effort (cf. Sloan & Hsieh 1995). Thus, in some very

difficult-to-quantify sense, workers' compensation keeps claims against third parties as well as employers out of the tort-liability insurance system.

In cases in which workers decide to bring a tort action in addition to recovering workers' compensation benefits, however, the benefits can increase the damages the liability insurance carrier has to pay. Workers' compensation can increase the damages in a tort case in three ways: First, by taking care of plaintiffs' health care and lost wages, workers' compensation places them in a much stronger negotiating position.

> Q: What are other kinds of situations in which a defense lawyer, or adjuster, more accurately, would know that you would want out of it so therefore they can get cheaper settlements?
>
> A: The most obvious one is [that] the person needs the money. And that, you know, definitely happens and is definitely a factor. And people will settle for less than their case is worth just to get money . . . sometimes for really improper reasons, I mean, for instance, I mean the person has some kind of like drug or alcohol problem or wants to get divorced, or whatever other human reason that you can't control them. They just want out. And then others are for true and good reasons. People need the money. And it means much more for them to get this amount of money now than it would to get more money later. So I'd say that would be the number one factor. (plaintiffs' lawyer)

Second, by covering plaintiffs' health care needs, workers' compensation ensures that the plaintiff receives adequate treatment. This has important consequences. The cost of the plaintiffs' health care treatment is higher than it would be otherwise (which increases the damages). In addition, the workers' compensation carrier provides a centralized record of all that treatment. As one plaintiff's lawyer put it, the comp carrier is a "deep pocket" that helps him put the case together.

> In one sense it's easier, because the comp marshals the specials so well,[39] pays for the reports. I've got a deep pocket. They'll pay for all the reports I want and they keep track of all the medicals for me and see to it that my client gets proper therapy, physical therapy; but I've got to pay them back. (plaintiffs' lawyer)

Finally, and perhaps most controversially, workers' compensation increases the settlement value of cases because plaintiffs tend to discount the value of the compensation benefits they received in the past when deciding whether to settle a case today. Comments of several of the respondents illustrate how this works in practice.

[39] The "specials" the lawyer is referring to are the medical expenses and lost wages of the plaintiff.

> The liens—typically workers' comp liens—play a big role in you trying to settle cases. This distorts things to some extent. The value's gonna be inflated because, "Look, my guy's gotta pay $10,000 back to them. I get my third and then my guy's left with nothing." So you're bumping this value up to give him what would customarily come into his pocket without a lien. (defense lawyer)
>
> It's just like the person who gets a lawyer. The value of the case doesn't change. For an example, I use the example of the case that's worth $5,000 to the plaintiff, in the plaintiff's pocket. The value of the case is still $5,000. But it's more expensive to settle because you have to pay another $1,300 right to the lawyer. (defense lawyer)
>
> You know, you got a $40,000 lien. You're not about to settle the case for $40,000 or $60,000 because there's nothing going into the client's pocket. (plaintiffs' lawyer)
>
> I think value is priced just apart from that [liens]. But, when you get down to what it takes to settle, then it affects things. You got to pay another hand, and, to some extent, [the] plaintiff has been paid some money for which he or she will not have to repay. So, it helps, sometimes, grease the deal. (plaintiffs' lawyer)

In sum, tort law in action is more generous with new money than is the workers' compensation statute because of the dynamics of the tort settlement process. As the respondents reported, if the plaintiff has little or nothing to lose by going to trial, the plaintiff will go to trial; and trial poses substantial risks for the defendant, the defendant's liability insurance carrier, and the comp carrier. The defendant and the liability insurance company face the risk of a generous jury verdict, and the comp carrier faces the risk of a defense verdict. To get the certainty that settlement provides, both are willing to pay additional new money to the plaintiff.[40] The result is, at least according to these respondents, that cases with workers' compensation liens settle for a larger amount than cases without them.[41]

### B. Health Insurance and New Money

The health insurance new money situation is complicated by the existence of different statutory regimes. As previously noted, if on one hand the health benefits provided to a plaintiff are governed by Connecticut law, they are deducted from the dam-

[40] Although the interviews did not address compromises by plaintiffs' lawyers in sufficient depth to provide a confident description, my sense was that plaintiffs' lawyers were also more willing to compromise their fees in this situation as well. They were earning a fee based on both the plaintiff's and the compensation carrier's share, and they risked losing both those shares at trial.

[41] This should be a testable claim, provided that liability insurance company records reliably contain information sufficient to compare cases and reliably indicate whether there is a workers' compensation lien.

ages awarded. In that case, there is no subrogation claim, and the new money dynamics I have explored do not apply.

The Medicare, Medicaid, and ERISA laws, on the other hand, allow subrogation. Medicare and Medicaid subrogation is explicitly authorized by federal law (see 42. U.S.C.A. 2651). ERISA, which governs most employee benefit plans, makes subrogation rights a matter of contract, and the respondents reported that the ERISA plans they have encountered allow subrogation.[42] Forms of health insurance that permit subrogation are similar to workers' compensation, with the important difference that these health insurers tend not to get involved in the tort litigation and are less susceptible to the horse-trading atmosphere that results in the rule of thirds.

The interviews produced few insights into the dynamics of health insurance subrogation comparable to those of the dynamics of workers' compensation subrogation. Nevertheless, there are some findings worth reporting.

First, and not surprisingly, my respondents confirmed that having health insurance is like having workers' compensation in terms of facilitating treatment and marshalling the damages evidence:

> Q: Does whether your client have health insurance affect your ability to make a case?
>
> A: Absolutely. Absolutely. The natural result is "build up" a case. For example, we represent a kid who, when he was 19-years-old and doing mixed jobs for somebody painting, walked into a retail propane store and . . . he had nothing to do with it . . . but one of the people had cut a propane line to a propane heater, and the guy came in and fired up a cigarette and the place blew up. This kid's got about $90,000 worth of bills because he got burned badly. A young girl is also in there, the girlfriend, in fact, of the guy who cut out the space heater, [and she also] had insurance. So she could get proper care for her injuries. She's got about $500,000 [in medical expenses]—she was involved in the same explosion; her injuries are a little worse, she lost her foot. My guy had significant burns and required all kinds of grafting. But he couldn't get the treatment. And to look at him you can tell that he has not got[ten] the treatment he needs. And he has told me over the years, "Look, I still have nightmares. I should be getting some type of psychological or psychiatric treatment." I'm like, "You're right. But, there's nowhere I can get it." In the long run, may be we can get him a lot of money, but it would have been nice to get him the proper treatment as we go. How it affects the bottom line? Somebody—at some point in time at a pretrial—we're gonna to walk in there

[42] See, e.g., *Cuttings v. Jerome Foods, Inc.*, 993 F2d 1293 (7th Cir. 1993) (under the ERISA plan, subrogation is a matter of contract interpretation).

> and they're gonna say, "His case is worth X number of dollars. He only had $90,000 worth of medical treatment. Whereas Miss A had $500,000 worth of medical treatment. Her case is worth more." That's not a really good indicator. In fact she does have greater harm, but not by that indicator. It's not such a wide gap by that indicator.[43] (plaintiffs' lawyer)

Second, (and also not surprisingly) plaintiffs who do not have health insurance often also lack other resources and, as a result, are in a rush to settle the case, which weakens their bargaining position:

> Q: How is the dynamic different with your clients, the ones that don't have health insurance?
>
> A: Well, they're poorer, to begin with. So, it's hard to say whether it's [they are in a rush to settle] because they're poorer or because they don't have health insurance. If somebody's wealthy, they'll hold out and get the full value. By the same token, if somebody had health insurance, they're more likely to [hold out] also. But I don't know. I would say that the predominant factor is not the health insurance, it's the lack of resources. So they can't hold out for too long. (plaintiffs' lawyer)
>
> It's practical experience. It's a matter of practicality. If you put yourself in their position and you were making four bucks an hour, or eight bucks an hour, and you need $1,500 now to put food on the table, as opposed to $3,000 later and you might lose your job because you gotta take two weeks off from work, you're probably going to take the money now. (plaintiffs' lawyer)

Given that health insurance is highly correlated with income, this dynamic exacerbates the regressive nature of tort-based compensation (Abel 1990).

Finally, the elimination of the collateral source rule for health insurance may have made it more difficult for some plaintiffs to find a lawyer willing to take their case. Historically, the collateral source rule meant that proceeds from health insurance or workers' compensation could not be used to reduce the amount of damages the defendant owed the plaintiff. The effect of the collateral source rule was to increase the damages paid by defendants' liability insurers (and also to allow workers' compen-

[43] As this response suggests, plaintiffs without health insurance are able to obtain some treatment. Emergency treatment is provided as a matter of right under federal law, and some medical providers are willing to provide treatment in return for a "letter of protection" from the plaintiff's lawyer. The letter of protection informs the provider that the lawyer is handling the plaintiff's tort claim and that the lawyer will pay the provider out of any tort recovery. Lawyers differ in their willingness to negotiate with providers at the time of settlement in order to increase the new money paid to the plaintiff. In general, my respondents were more willing to ask an alternative medical provider (such as a chiropractor or massage therapist) than an allopathic medical provider (such as an internist or surgeon) to cut his or her fee, both reflecting and reinforcing the traditional bias in U.S. culture against "alternative" medicine.

sation and health insurers to recover some of their costs). In 1985, Connecticut enacted a statute that repealed the collateral source rule for health insurance payments, so payments made under health insurance contracts are now deducted from the total damage award in a Connecticut tort case (Conn. Gen. Stat. § 52-225a). This reform took away from plaintiffs and their lawyers the strongest part of their damages claims:

> Used to be in the old days, you know the jury is going to give you the $100,000 in medical bills, so there's—your fee's involved in that—and then you're rolling for the rest if you do convince the jury. But at least you got the hundred [thousand]. Today, you don't get that, so that is a consideration. Usually, from my perspective, I don't like to let that affect my decision, but it does. When someone comes in and says, "Look, there's $100,000 worth of meds here, all collateral sources, he's got a 5% [disability as a result of the accident] and it's not a great liability case." Now you got to take the $100,000 and put it aside, cause it doesn't count. Now you've got a 5% [disability] with not a great client and questionable liability. No, that's not worth rolling. The $100,000 doesn't make it much more risky for the defendant to try it because they're not going to pay that. They're going to get a credit for it. (plaintiffs' lawyer)
>
> The case I had with the, that woman, the defendants are walking into that case with a $28,000 cushion. Whatever I get for the verdict, they are going to knock $28,000 off. Say I try the case and get a $60,000 verdict, they knock $28,000 off. Boom. It's gone. And that is a further risk to the plaintiff. Cause the jury is not going to get that. "Here, there is the $28,000 in meds. Let's give her enough for her meds." (plaintiffs' lawyer)

If, in fact, a jury does award the plaintiff only the amount of the medical expenses, and if those medical expenses were paid by a health insurer subject to Connecticut law, that award would give the plaintiff—and the plaintiff's lawyer—nothing.[44]

## IV. Conclusions and Implications: The Moral Economy of Tort Law in Action

The presence of different currencies with different values in the tort settlement process reveals a new facet of law in action. Money has different values according to its source and intended recipient. Liability insurance money is not the same as blood money. Subrogation money is not the same as new money. Money to pay chiropractors' bills is not the same as money to pay doctors' bills.[45] And (although this was not explored in this re-

[44] It is important to note, however, that in a situation in which the defendant's liability insurance limits are inadequate, the repeal of the collateral source rule provides a significant benefit to plaintiffs, because it eliminates any claim that the health insurer might have to a portion of the liability insurance money.

[45] See supra note 43.

port) money to pay lawyers' fees is in a category all by itself (Kritzer 1998). Moreover, compensatory damages are valued according to a host of things beyond the harm done to the plaintiff: the size of the defendant's liability insurance policy, the wrongfulness of the defendant's conduct, the presence or absence of subrogation claims, the plaintiff's need for the money, and, in some cases, the amount of the defendant's other assets.

Beyond problematizing the common view that law in action is simpler than law on the books, this study also extends the central conclusion of the earlier Florida study: Insurance systematically shapes tort litigation in a way that goes beyond simply spreading risk (Baker 1998; see also Pryor 1997, 1999; Syverud 1994). As a result of a century's experience with liability insurance, there is a norm among tort practitioners that tort litigation is *supposed to be* primarily about collecting insurance money, not blood money. Before liability insurance, all tort suits against individual defendants involved real money paid by real people. Surely some of that money might have been termed "blood money," with all the retributive overtones that term suggests, but not all. It is only against the liability insurance norm that tort damages paid by real people are regarded primarily as punishment, and only secondarily as compensation.

The liability insurance norm means that, except for institutional defendants or an outrageous wrong, liability insurance has become a prerequisite for tort liability. It also means that liability insurance limits function as a cap on tort damages and that tort claims are shaped to match the available insurance coverage, with the active participation of both the plaintiff's and the defendant's lawyers. The plaintiff's lawyer shapes the claims to match the coverage because that's the easiest way to get the plaintiff paid (Baker 1998). The defense lawyer cooperates because that's the way to make sure that the defendant does not have to pay blood money.

Although very little blood money is paid, this does not mean that blood money is unimportant to personal injury litigation. A credible claim that a trial could result in a legal obligation to pay blood money provides a significant inducement to settle. It motivates the defendant and the defense lawyer to place pressure on the insurance company to offer the policy limits (Baker 1998: 320). Moreover, because the plaintiff and the plaintiff's lawyer ordinarily value blood money less than insurance money, they are very likely to accept any resulting early offer of the policy limits.

This situation appears to benefit all the repeat players in the tort litigation system. Liability insurance companies and plaintiffs' lawyers get quicker settlements, and defense lawyers get fewer dissatisfied clients. Quicker settlements benefit insurance companies by lowering defense costs and clarifying reserves; they

benefit plaintiffs' lawyers by reducing the time between client intake and payment and, accordingly, reducing uncertainty. Although defense lawyers as a class earn smaller fees, they face less risk. Because individual defendants in the end are rarely asked to pay blood money, they rarely sue their lawyers for incompetently handling their defense.

Of course, defendants benefit from the no blood money rule as well. Whether plaintiffs benefit is a much more complicated question. There are undoubted advantages to faster settlements, but it is possible that the "union rule" benefits lawyers by increasing their effective hourly wage at the financial expense of plaintiffs. It is important to be clear, however, that the results of this study do not provide a basis for drawing that conclusion, for the pragmatic reasons described earlier. In addition, if plaintiffs in fact do value blood money less than insurance money, they would *prefer* to leave blood money "on the table."[46] Thus they, too, may benefit from the quicker settlements that result from the "no blood money" dynamic.

As most readers will by now have intuited on their own, the new money and blood money norms are mutually reinforcing. The fact that plaintiffs almost never collect blood money makes them unwilling to settle unless a substantial portion of the liability insurance money is for them—i.e., is "new money." Additionally, the fact that plaintiffs are able to obtain a substantial amount of new money reduces their incentive to pursue blood money.

Note that the new money norms appear to benefit individual plaintiffs at the expense of institutional payers, violating the repeat player bias predicted by Galanter (1974:99–104). Of course, this norm benefits plaintiffs' and defense lawyers by encouraging settlements (thereby exposing them to less risk). It also appears to benefit the perceived interests of judges, who reportedly help the plaintiffs' and defense lawyers in order to avoid cluttering their calendars with extra trials. Thus it may be that the plaintiffs are simply fortuitous beneficiaries of some repeat players (plaintiffs' and defense lawyers and judges) ganging up on others (employers and workers' compensation carriers).

Both the blood money and new money practices treat insurance money differently than money belonging to or targeted for real people, indicating an "extra" redistributive tilt of tort law in action. Since real people ultimately pay insurance money (in the form of increased insurance premiums or prices for goods), the actual tilt is between liability and workers' compensation payers on the one hand and beneficiaries on the other. Of course, liabil-

[46] It is important to be clear that this study provides evidence only of what personal injury lawyers report that plaintiffs want, which is, at best, indirect evidence of those preferences.

ity insurance limits impose significant limits on this redistribution.

These interviews also suggest some tentative conclusions about how personal injury lawyers understand tort law in action in cases involving individual defendants. For practicing lawyers, tort law in such cases appears to be almost entirely about compensation, except in the egregious case. In the egregious case, the lawyers are more likely to describe "going for blood" in retributive terms than they are to discuss deterrence. The one exception is the case in which the "wrong" is the failure to purchase (enough) insurance, and there the deterrence is directed not at unsafe behavior, but at insurance purchasing. Thus, at least according to the practitioners of the art, it seems that tort law in action is less concerned with deterrence than tort doctrine and theory would suggest.

These interviews suggest, moreover, that tort law in practice has only a tenuous link with the corrective justice theories propounded by legal theorists (Weinrib 1995:134–35; Perry 1992b; Coleman 1992). These theorists all stress the importance of tort law's emphasis on the particular defendant's duty to pay for the harm to the particular plaintiff—what Galanter and Luban have felicitously referred to as "poetic justice" (1993:1438). Coleman and Perry are careful to take insurance into account by declaring that corrective justice is not inconsistent with someone else (such as an insurance company) discharging the defendant's duty to pay (Coleman 1992; Perry 1992). Nevertheless, they would be unlikely to conclude that corrective justice is consistent with a defendant unilaterally limiting the extent of her duty to pay (which is what happens when a person purchases an insurance policy with a low limit).

Instead, tort law in action seems more consistent with Coleman's earlier (and apparently now abandoned) "annulment" approach to corrective justice. That approach grounded the morality of tort law in the annulment of wrongful harms and, thus, was indifferent to the defendant's responsibility to pay for the harm. Tort law in action most closely approximates the annulment approach in the case of automobile accidents, in which plaintiffs are entitled to collect the full range of tort damages from their own UM (uninsured or underinsured) policy, as long as the accident was someone else's fault. Indeed, by suggesting that tort law in action embodies an annulment approach to corrective justice, this research supports the expansion of the uninsured motorists concept to other fields (such as, significantly, violence against women [Wriggins 2001]) in which defendants predictably have inadequate liability insurance.

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