Michigan Law Review

Volume 78 | Issue 5

1980

The Lawsuit Lottery: Only the Lawyers Win

Michigan Law Review

Book Notices

THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN.* By *Jeffrey O'Connell*. New York: The Free Press. 1979. Pp. ix, 271. $10.95.

I am grateful to Professor Jeffrey O'Connell. Three times in the past few years my insurance company has paid me promptly and fully for damages suffered in automobile crashes. In each case, my no-fault insurance policy spared me the dubious pleasure of litigation. And that policy exists today because Professor O'Connell's pioneering efforts in 1965[1] have borne fruit in the nation's automobile insurance laws.

Professor O'Connell has continued his campaign to reform the "accident industry." Five years ago, he suggested allowing manufacturers and professionals to elect no-fault liability rather than common-law tort liability for their products and services.[2] Any enterprise could escape fault-based liability by promising to give no-fault reimbursement for all economic losses that might arise from enterprise-related injuries. The enterprise would not be liable for any non-economic losses such as pain and suffering. Perhaps unsurprisingly, that plan received criticism from both sides of the accident compensation debate. Defenders of the fault system labeled the proposal a "first step towards placing all members of society at the mercy of an industrial and commercial monolith."[3] And radical reformers complained that O'Connell's plan did not take the ultimate step of replacing the tort system with a comprehensive income-maintenance system.[4] In his latest book, *The Lawsuit Lottery: Only the Lawyers Win*, O'Connell responds to his critics by proffering a new and ingenious way to compensate accident victims without regard to fault.[5]

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* This book review was prepared by an Editor of the *Michigan Law Review*.—Ed.

1. *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

2. J. O'CONNELL, ENDING INSULT TO INJURY: NO FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975).

3. Corboy, *The Expanding Universe of Jeffrey O'Connell: Backing into a Brave New World*, 1976 U. ILL. L.F. 74, 74 (1976). *See also* Schwartz, *Professor O'Connell's No-Fault Plan for Products and Services: Have New Problems Been Substituted for Old?*, 70 NW. U. L. REV. 639 (1975); Blum, Book Review, 43 U. CHI. L. REV. 217 (1975); Cooperrider, Book Review, 22 WAYNE L. REV. 189 (1975).

4. *See* Palmer, *Inspired Tinkering Versus Holistic Social Engineering: Jeffrey O'Connell and the American Tort System*, 25 DRAKE L. REV. 893 (1976).

5. The book is a distillation of ideas that Professor O'Connell developed in numerous articles over the past five years. *See, e.g.*, O'Connell, *Supplementing Workers' Compensation Benefits in Return for an Assignment of Third-Party Tort Claims — Without an Enabling Statute*, 56 TEXAS L. REV. 537 (1978); O'Connell, *Harnessing the Liability Lottery: Elective First-Party No-*

In the first half of his book, O'Connell challenges both the process of fault determination and the values underlying it. He condemns litigation as capricious, cruel, and inefficient. The receptiveness of juries to emotional appeals, the propensity of those in the accident business to falsify, and the ineptitude of many lawyers and judges all lead to capricious decisions. The delay inherent in litigation only aggravates the financial and emotional problems that attend the accident. O'Connell identifies the victim's two greatest needs as prompt compensation and rehabilitation. Litigation delays foster anxiety over mounting debts and force the claimant to relive the accident over and over, dwelling on the pain and suffering it caused. The process encourages debilitation rather than rehabilitation. Finally, litigation is wasteful. Only a fraction[6] of the tort liability insurance dollar is received by the few victims who obtain a judgment. The costs of determining fault and appraising pain and suffering eat up most of the insurance dollar.

Professor O'Connell advocates a policy fundamentally different from that underlying fault-based liability. The concept of fault is morally judgmental; tort systems seek to do justice between wrongdoer and wronged. O'Connell, on the other hand, believes that accidents are morally neutral and that all accident victims should be compensated. For him, the most damning criticism of the tort system is that only a few accident victims — those with valuable, fault-based claims — recover their losses.[7] However, fault-based liability serves two other goals besides a just distribution of losses: deterrence and allocative efficiency.[8] Critics have called O'Connell "insensi-

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Fault Insurance Financed by Third-Party Tort Claims, 1978 WASH. U. L. Q. 693 (1978); O'Connell, *Transferring Injured Victims' Tort Rights to No-Fault Insurers*, 1977 U. ILL. L.F. 749; O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, 56 NEB. L. REV. 23 (1977); O'Connell, *The Interlocking Death and Rebirth of Contract and Tort*, 75 MICH. L. REV. 659 (1977); O'Connell, *Contracting for No-Fault Liability Insurance Covering Doctors and Hospitals*, 36 MD. L. REV. 553 (1977); O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501 (1976).

6. For example, only 28 cents of the malpractice insurance dollar ends up in the hands of the victims. P. 179.

7. Professor Luke Cooperrider has noted that the tort system was not designed to give compensation for accident victims. "Tort law is a system of conflict resolution, by nature contentious. It is difficult to see how it could be otherwise, or how it could come to be thought of as a likely machine for the efficient treatment of massive social problems." Cooperrider, *supra* note 3, at 194. Defenders of the tort system say the system is successful precisely because few accident victims receive compensation. It is intended to be a system of limited liability, to apportion losses on the basis of fault. *See* Henderson, *"Crisis" in Accident Loss Reparations Systems: Where We Are and How We Got There*, 1976 ARIZ. ST. L.J. 401. Those scholars suggest that delays, lack of access for small claimants, and other such problems should be fixed by improving the system, not by placing compensation on an insurance rather than liability basis. *See* Green, *No-Fault: A Perspective*, 1975 B.Y. L. REV. 79 (1975); Schwartz, *supra* note 3; Corboy, *supra* note 3.

8. *See* Posner, *A Comment on No-Fault Insurance for All Accidents*, 13 OSGOODE HALL L.J. 471 (1975).

tive" to these policies.[9] The second half of the book attempts to meet those criticisms by proposing a system of no-fault compensation for accident victims that preserves fault-based liability for producers.

Professor O'Connell proposes that insurance companies sell no-fault policies that give limited reimbursement for all economic losses that the insured suffers in accidents. For example, a policy could be limited to injuries inflicted by particular products or services on their purchasers. The policies would not reimburse for non-economic losses, such as pain and suffering, or for losses compensated by collateral sources. In return, the insured would transfer to the insurance company any tort claims against third parties. The insurer could prosecute these claims and collect both economic and non-economic damages. Moreover, the insurer would agree to use any recovery of economic losses to compensate the insured for economic losses that exceed the no-fault coverage. If the insured feels that the insurance company has not vigorously pressed the economic claim (or has settled for low economic damages, which go to the insured, in return for high non-economic damages, which the company keeps), the insured can demand arbitration with the company over the value of the claim. "By this device the insured will be guaranteed whatever level of no-fault benefits he wished to purchase, plus whatever amounts of economic loss in excess of that limit he is eligible for under a fault-finding claim" (p. 188).

One may wonder where the insurer obtains the money to compensate victims lacking fault-based claims. O'Connell's scheme generates this surplus by cutting transaction costs, by eliminating double recoveries, and by eliminating noneconomic recoveries. It would also decrease the cost of determining fault because large insurance companies are "more likely to settle the matter expeditiously by informal means and without expensive litigation. . ." (p. 188).

One may also wonder whether consumers will yield their rights to pain and suffering damages in exchange for no-fault coverage. O'Connell notes that at present, plaintiffs must sell one third of their claims to recover anything.[10] He argues that most consumers would prefer a plan that offers prompt, certain reimbursement for at least some and perhaps all economic losses over a system that gives delayed recovery of larger awards (a third of which goes to their lawyer) for those few "lucky" victims who happen to have a valid tort claim against a wealthy third party.

Professor O'Connell's plan manifests several desirable features in addition to its capacity to compensate all accident victims. First, it is voluntary. No consumer would be coerced into yielding any com-

9. *Id.*

10. The contingent fee is essentially a sale by the claimant of a portion of his claim to the lawyer in return for representation.

mon-law rights. Voluntariness increases the likelihood that courts will uphold these proposed no-fault policies. Second, producers would continue to incur fault liability. Thus, O'Connell's scheme seems to serve the goals of deterrence and allocative efficiency as well as the present system. Finally, it is practical. O'Connell claims that no implementing legislation is necessary. He is confident that it is in the economic interests of insurers and consumers to agree to such policies. Although he might prefer a sweeping no-fault system such as New Zealand's,[11] Professor O'Connell concludes that such a revolutionary change is not likely in America and that even with its imperfections, his first-party, elective no-fault system is "infinitely superior to the lawyers' fault-finding system" (p. 213).

If successful, Professor O'Connell's proposal would probably solve many problems that plague fault-based compensation systems. However, several steps in Professor O'Connell's analysis invite criticism. Perhaps most susceptible to attack is Professor O'Connell's assumption that consumers will purchase the no-fault policies. Historically, consumers have shown little inclination to buy first-party personal injury coverage. Their disinclination is probably related to the price of such policies. Professor O'Connell argues that a dollar would buy more coverage under his plan than under a conventional plan because the consumer would also surrender the right to sue. Yet the value will have to be significantly higher to entice people to buy coverage that they have shunned in the past. Secondly, Professor O'Connell may be too bold when he asserts that the costs of determining fault and valuing pain and suffering will be significantly lower when two insurance companies are the opponents at trial. Moreover, by giving the insured a right to demand arbitration with the insurance company, his plan adds an entirely new proceeding, the cost of which may swallow up any savings from reduced litigation. Finally, the financial soundness of the plan depends to a large degree on the fund accumulated out of pain and suffering awards. Professor O'Connell asserts that insurance companies pressing the claims of their customers would continue to reap huge awards for pain and suffering. But even with procedural safeguards to shield the jury from knowledge of the true party in interest, the awards could be expected to drop. Greater acceptance of O'Connell's proposal would bring greater citizen awareness that the injured victim is only a nominal plaintiff for the unsympathetic insurer. Consequently, no-fault insurance rates would rise to make up the difference.[12] The system would drift closer to a comprehensive

11. For a description of the comprehensive no-fault system in New Zealand, see Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977).

12. This rise might be tempered if enlightened jurors realized that large noneconomic damage awards would tend to lower their insurance rates under O'Connell's plan.

social insurance plan and would undermine the policies of deterrence and allocative efficiency — a prospect that might not disturb Professor O'Connell, whose primary concern is for the "lonely, frightened, wounded accident victims" who now go uncompensated (p. 188).

Whatever the merits of O'Connell's proposal, *The Lawsuit Lottery* will certainly draw widespread attention. The book is a pleasure to read. The author's rhetoric[13] may offend some, but his writing is clear and concise. He also has a sense of drama. He weaves stories and gossip about the personalities involved in the accident business — the victims, lawyers, judges, and tow truck operators — into a coherent pattern. At times he may deduce too much from isolated incidents, but on the whole he is fair, arguing his views persuasively and attempting to meet opposing arguments squarely. Executives in the corporations whose business is to spread the costs of accidents should consider this book with care. If O'Connell is right, we all have a lot to gain.

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13. The following passage typifies the author's style:
"[P]erhaps the most distressing aspect of the common law's system of personal injury insurance is that it compounds its problems by requiring everyone, in effect, to buy fault-finding insurance, which, from the individual's point of view, is largely worthless and horrendously expensive, even though some people hit the jackpot."
P. 196.