1975

Book Review (reviewing Jeffrey O'Connell, Ending Insult to Injury (1976))

Walter J. Blum

REVIEW

Ending Insult to Injury, JEFFREY O'CONNELL, University of Illinois Press, Chicago, 1975. Pp. xx, 254. $7.95.

Walter J. Blum†

In *Ending Insult to Injury*, a book addressed to a wide audience, Jeffrey O'Connell provides an ingenious preliminary blueprint for establishing beachheads of no-fault insurance coverage outside the area of automobile accidents, to which it is now confined.

O'Connell, who (along with Robert E. Keeton) instilled life into the concept of no-fault auto insurance,[1] acknowledges that the conditions that enabled the launching of an auto compensation plan are peculiar to the auto accident situation. In the vast majority of auto accidents the injury to the victim is readily linked to the activity of driving a car. Moreover, most motorists already carry a good deal of liability insurance, and a large percentage of all auto victims are hurt while driving or riding in cars covered by liability insurance.[2] The essence of the no-fault auto plan innovation was to switch much of this insurance from third-party liability coverage to first-party accident coverage. In most cases a victim would then seek compensation from the carrier that underwrote protection for the car he occupied at the time of an accident; his recovery under the insurance would be divorced from the conduct of the drivers involved in the accident.[3]

The proponents of no-fault auto plans contended that this transformation could be engineered without an increase in the cost of insurance if victims were denied recovery for certain types of damage compensable under the traditional tort system, such as pain and suffering, loss of earnings above a certain ceiling, or damages for which the victim was entitled to payment from other sources. The key trade-off was to provide limited compensation for all (or nearly all) auto accident victims by reducing the recovery available to the smaller number of victims who could succeed in

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† Wilson-Dickinson Professor of Law, The University of Chicago.

[1] 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 71 (1975) [hereinafter cited as J. O'CONNELL].

[3] R. KEETON & J. O'CONNELL, *supra* note 1, at 273-74.

actions under the fault principle. This trade-off was buttressed by the expectation that the average cost of processing a reparations claim would be lessened under the no-fault system, which did not call for establishing fault or translating pain and suffering into dollars, so that a larger fraction of the premium dollar would end up (more promptly) in the pockets of victims instead of in the hands of lawyers and others who participated in the processing of claims.[4]

O'Connell's plan in *Ending Insult to Injury* is to extend this trade-off to those accident victims who suffer injuries connected either with the use of products other than autos or with the consumption of services. In the present climate it is most unlikely that legislation could be passed to compel such a trade-off, primarily because the high cost of the insurance would obviously raise the prices of the services and goods. Rather than fight on this front, O'Connell proposes the enactment of legislation that would enable manufacturers or sellers of products and providers of services to elect the trade-off for those victims whose injuries are connected with their product or service.[5] An enterprise (or professional person) electing the trade-off would have to institute and finance the equivalent of no-fault insurance coverage for any injury encompassed by the election.[6] The victim whose injury came within the terms of the trade-off could recover under this insurance, but he would lose a substantial part of whatever rights he would otherwise have had under the usual tort rules. Recovery would be limited to those economic losses (presumably limited by some ceiling) and those medical expenses not compensable from other sources—such as an employee health plan, an accident or medical insurance policy, a government program, or the like. In the case of enterprises engaged in activities designated as "ultra-hazardous," the trade-off might even be compelled by legislation rather than left on an elective basis.[7]

The following illustration may be useful in illuminating this pioneering proposal for an elective trade-off. Smith bought at retail a soundly constructed household ladder manufactured by a company that had opted for the trade-off.[8] At another store he pur-

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[4] *Id.* at 274-84.

[5] J. O'CONNELL at 97.

[6] According to O'Connell this election could be broad or narrow, depending solely on the choice of the manufacturer or provider of services. *Id.* at 99, 104.

[7] *Id.* at 127.

[8] The choice of a ladder as the no-fault product is not as fanciful as it might seem at first glance. As O'Connell notes in listing a number of potentially dangerous consumer products, 125,000 to 200,000 injuries a year result from the use of ladders. *Id.* at 19. Elsewhere O'Connell also describes ladder manufacturing as an enterprise "entailing distinctive risks of personal injury." *Id.* at 90.

chased sport shoes that fit him poorly, and, not long ago, pursuant to an examination, he acquired new eyeglasses that blur his vision slightly. On a fair day Smith, fortified by a few beers, tries out the ladder. Upon reaching the top his foot slips out of the new sport shoe; he then tries to wiggle his foot back into the shoė but is impeded by the distortion of vision attributable to the new eyeglasses and perhaps by an impairment in motor response attributable to drinking the beer; in the end he falls off the ladder and sustains very serious injuries. Under present law Smith would have no possibility of recovering from the manufacturer or retailer of the ladder, he would probably not be able to recover from the shoe store, and his prospects of recovering from the optometrist or the local tavern would be equally remote. Under the proposed new regime, however, Smith could get compensation for his injuries from the insurance funded by the producer of the ladder—a company that made and marketed a product that was sound in design and construction.

The details set out in the blueprint for this novel extension of the no-fault trade-off are far from complete. O'Connell has noted many practical problems and has attempted to outline or suggest possible ways of handling them.[9] An alert reader is sure to think of numerous additional difficulties, but I wager that O'Connell would be able to devise intriguing means for dealing with these as well. By the time this exercise is over, however, there will be a strong temptation to conclude that the total prescription is a monumentally complex arrangement for accomplishing a very strange result. Note again the illustration: a victim recovers under insurance funded by the manufacturer of a product that is flawless, even though the accident is bound up with somewhat flawed conduct on the part of other enterprises or on the part of the victim himself; the legal rights of the victim are fixed at the option of the manufacturer, with whom the victim has no direct dealings; and further, the amount of the victim's recovery is measured after taking account of the other sources of reparation available to him, although they could not have been known in advance by the insurer. It is even possible that the victim himself was not aware that the manufacturer had arranged things for him in this fashion.

Despite the perplexities of detail, the major outlines of the blueprint are sufficient for exploring the premises that underlie the proposed extension of no-fault insurance arrangements.

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[9] *Id.* at 145-66.

O'Connell states the case with vigor.[10] The starting proposition is that it is vitally important to provide victims of misfortune with the means to get adequate medical treatment and to offset their real economic losses up to some (moderate) level. The most direct method for achieving this result would be to enact a comprehensive social security system that put a floor under income and covered medical expenditures (with or without the imposition of an ability-to-pay test). Such a program, however, is frightfully expensive even if illness apart from accidents is excluded; it is admittedly uneconomic in the sense that it does not put pressure on enterprises to reduce accidents associated with the goods and services they supply; and, most important, it is not in the cards politically.[11] There is no denying that over the years more and more protection has been made available to victims through piecemeal government programs, employee plans, voluntary insurance policies and the like. Large gaps in protection nevertheless remain, and O'Connell insists that a program is needed now to reduce these open spaces. No-fault insurance plans are designed to serve this purpose. The consumers of goods and services might well have to bear added costs as a result of the no-fault coverage. But, O'Connell argues, part of the cost can be defrayed by eliminating or reducing the need for liability insurance (or its equivalent), part by saving on administrative expenses, and part by cutting back on the amounts recovered by some victims.

Appealing as this argument might be to those concerned with the plight of accident victims, it should invite attention to a number of troublesome questions.

First: To what extent can this reasoning draw support from economic considerations?

O'Connell correctly notes that broad social security protection for accident victims, accompanied by the elimination of all tort liability (except for intentionally caused harms), would be undesirable from an economic point of view because the enterprisers—the producers and sellers of goods and providers of services—would have no incentive to hold down accident costs. An uneconomic allocation of resources would result. Elective or compulsory no-fault insurance, he believes, could avoid this problem by placing accident costs on the enterprisers so that they, out of self-interest, would presumably take measures to reduce their insurance costs by designing safer products, being more careful, and so forth.[12] In the current vocabu-

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[10] For a summary see *id.* at 171-75.

[11] *Id.* at 73-80.

[12] *Id.* at 76-78.

lary of economics, the accident costs would be internalized to particular enterprises and would not be left external to the commercial pursuits that gave rise to them.

But, as O'Connell is well aware, this analysis is hardly complete.[13] To bring about the optimum allocation of resources in meeting existing consumer demands, it is important both to place accident costs on the "proper" enterprises and to encourage those enterprises to minimize accident costs, but only as calculated after taking account of all the costs of effectuating any improvement in "safety." There is little reason to believe that the no-fault insurance program will achieve these ends. Consider again the illustration of Smith's fall from a well-constructed ladder. It is hard to comprehend how the cost of the accident is attributable to the manufacturer of the ladder; indeed, it seems more reasonable to associate the cost with the merchant who did a bad job in fitting the shoes, with the optometrist who was somewhat off-target in prescribing the eyeglasses, with the brewer who concocted (or the tavern that sold) the beer, or with the lifestyle of Smith himself. If the ladder manufacturer accepts the burden by electing a no-fault plan, one is hard put to imagine how it would attempt to minimize accident costs. Conceivably it might produce a household ladder that came equipped with safety straps; but if it thought there was a market for such an item presumably it would already be producing a deluxe model. To be sure, if ladders were classed as ultra-hazardous products and brought under a compulsory no-fault insurance arrangement, the manufacturer might modify its operations and perhaps adopt the safety strap feature. But this reclassification could force the company to incur additional costs that far exceeded the accident costs rationally associated with using ladders (rather than with wearing shoes or using eyeglasses or drinking beer or doing other things). One not impressed with economic calculations might nevertheless accept the extreme view that accident costs connected in any way with the use of ladders should be placed on the ladder industry. In that event it should be emphasized that such a position calls upon consumers of ladders to pay more for safety than they would otherwise consider desirable. And whatever the price of the "improvement," we can now be sure that not all ladder users would snap on the straps mandated for their safety.[14]

All this is to point out that O'Connell, despite numerous refer-

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[13] *Id.* at 120, 141-44.

[14] Recent experience with automobile seat belts has demonstrated the difficulties involved in compelling the use of safety devices by the public.

ences to the economic aspects of accident costs, cannot and apparently does not expect to get much support for his program from notions of internalizing rather than externalizing such costs. There simply is no reason to think that a cluster of no-fault plans for products and services will yield a "better" allocation of resources than would a wide-ranging social security program covering all accident victims.

Second: How can an elective no-fault plan, as it applies to victims who have no choice in the matter, be justified as fair?

Although the election to come under a no-fault plan is to be made by enterprises that supply goods and services, there is a sense in which consumers would have a choice concerning no-fault insurance. The purchaser of a ladder, for example, presumably could choose to buy either a ladder produced or sold by an enterprise that elected the no-fault option or a ladder produced or sold by firms that had rejected that option. Inasmuch as the purchaser can be thought of as representing the household in acquiring the ladder, only a slight stretch of reality would be required to hold all members of the purchaser's immediate family to the consequences of his choice. Perhaps a somewhat greater stretch of mind is necessary to put borrowers of the ladder or subsequent purchasers of the (used) ladder into the same class as members of the household. Lawyers especially might not be greatly troubled by treating the borrower's rights as being derived in part from the position occupied by the original purchaser-lender.

But now consider the total stranger who is severely injured when Smith, the purchaser, falls off the ladder (while wearing badly fitting shoes and using mildly inappropriate glasses and having drunk the beers). Why should the rights (if any) of the victimized stranger, vis-à-vis the producer of the ladder, turn on Smith's decision to buy a no-fault ladder rather than an uninsured ladder? This question might elicit a response more quickly when cast in terms of auto accident victims. Would anyone contend that there is a sound basis for defining the legal rights of a pedestrian-victim by reference to whether the owner of the car that hit him had voluntarily chosen to bring his auto under an elective no-fault plan? Surely that result would be widely viewed as unjust. The lack of justice would be all the more sharply perceived if the victim's rights against the *producer* of the car were made to turn on the voluntary choice of the motorist. A variety of legal relationships between auto manufacturers and third-party victims of car accidents are defensible. But there does not seem to be any reason to have that relationship determined by an implicit choice made by a motorist in purchasing a car.

Third: Is no-fault insurance that is tied to lines of products and services superior to a broad form of accident insurance?

This question goes close to the heart of the O'Connell program. No-fault insurance, regardless of how it is packaged, is largely accident insurance. In the ladder illustration, the manufacturer took out the insurance (or was a self-insurer) but Smith, the purchaser of the product, indirectly paid the premium insofar as the insurance cost was reflected in the price of the product. The protection of those in the Smith household is roughly equivalent to that accorded by an accident policy, bought directly by the Smiths, covering the family for any accident connected with use of the particular ladder. The protection that the manufacturer, by electing a no-fault plan, has accorded parties outside the immediate Smith family or household—strangers, guests and the like—is also in the nature of accident insurance; it is protection indirectly charged to Smith for the benefit of all these other parties.

It is obvious that if elective (or compulsory) no-fault plans for goods and services gain acceptance, a great array of narrowly defined accident insurance plans will crisscross the society. Such a result might be desirable if it led to a better allocation of resources from an economic perspective. As already pointed out, however, the case for so concluding is weak when no-fault plans are compared with a system of social security protection for accident victims. The case seems even weaker when no-fault plans are compared with a broad-coverage accident insurance arrangement.

A chief virtue of broad-coverage accident insurance is that it does not call for establishing a multitude of provincial and unavoidably overlapping insurance pools. There is no need to deal here with the almost endless problems involved in straightening out the many-faceted relationships among these pools and the many-faceted relationships between no-fault areas and the areas still governed by traditional tort liability rules. A sufficient glimpse of a few of these problems might be caught if, in the original illustration, it is assumed that not only the ladder but also the shoes and the services of the optometrist, to say nothing of the beer, were covered by no-fault protection.

Another virtue of broad accident insurance is that premium rates could be set more rationally than would be possible in a system that ties accident insurance to particular products and services. To some extent the differences in accident risks to which various households are exposed could be taken into account. It might be possible, for example, to reflect in rough fashion the ownership of such goods as bicycles, bathtubs, stairways and so on. The rates could also be accommodated to the number of persons in the household, the distribution of their ages, and the like. And, not least important, the rates could be adjusted to take account of any medical expense or economic loss protection already available to the household.

No doubt O'Connell would be delighted if all or almost all households decided to purchase insurance of this variety—coverage, it should be noted, not far different from that already developed by the insurance industry. But of course the fact is that most households are unwilling to buy broad-coverage accident insurance or enough of it to satisfy O'Connell. To reach the level of his protection goal it would surely be necessary to compel purchase of an "adequate" amount of accident insurance.

A compulsory plan (which I introduce for analysis rather than for advocacy) is not wholly visionary. There would clearly be mechanical and administrative obstacles to be overcome in enforcing the legal obligation to carry protection, but developments in electronic data processing are steadily advancing the practicality of the scheme. While there are certainly constitutional issues to be resolved, they are not the decisive hang-up at this juncture. The real barrier is that the legislators are not about to force their constituents to buy broad-coverage accident insurance, being aware that few persons not already carrying such insurance are eager to spend their scarce resources on that commodity. All things considered, in our society it is much more probable that an enlargement of protection against misfortunes from accidents will take the form of expansion in social security coverage, financed through taxation, rather than compulsory accident insurance, financed through forced payment of premiums.

Fourth: How is it possible for elective no-fault insurance plans to succeed if people are unwilling to buy broad-coverage accident insurance?

Although I doubt that elective no-fault insurance will win any appreciable acceptance, it is nonetheless worthwhile to speculate as to why there is even a possibility of its success. The relevant question might be phrased in terms of the ladder illustration: why would Smith be willing to pay for no-fault ladder accident insurance covering his household and others (and pay for comparable no-fault accident insurance on a wide variety of the goods and services he buys) but be unwilling to purchase insurance to protect his household in case of any type of accident?

A possible answer is that Smith might think he is striking a kind of bargain in which he waives the conditional common law tort rights that he and other potential victims have against the manufacturer and seller of a flawed ladder in return for the certainty of no-fault insurance protection. Smith might even believe that this is an even exchange so that no reason exists for the price of the ladder to increase. Perhaps he has read somewhere that the expanded insurance protection is financed by the "savings" derived by cutting down on the recovery potential for victims under the common law and by reducing the costs of administering the reparations system.

To test the appeal of such an exchange, a second glance at a compulsory broad-coverage accident insurance plan is instructive. Assume this time that the plan is accompanied by the elimination of all tort liability for products or services (other than responsibility for intentional harms); assume also that the level of protection under the plan is set so that the aggregate of funds needed to provide that amount of protection just equals the "savings" realized from the elimination of tort liability and from any net reduction in administrative costs that attend the change in systems. Can anyone seriously believe that today this "bargain" would find widespread acceptance? I suggest that most people would react negatively because it would sharply offend their sense of "corrective justice" toward accident victims, a sense that still permeates our society.[15]

Another possible reason for believing that elective no-fault might succeed is that the relevant economic calculation will not be performed, or performed correctly, by the typical consumer. In buying the ladder of company *X*, which has opted for no-fault, instead of buying a comparable ladder made by company *Y*, which has rejected no-fault, Smith probably cannot determine how much he is paying for the no-fault coverage. Suppose, however, that manufacturer *X* markets its product both with and without no-fault protection, permanently marking each ladder with an appropriate notation. It is not unreasonable to assume that a protected unit would bear a higher price tag than an unprotected unit. Again it should be asked whether many consumers would buy this insurance—not only on ladders, but on bathtubs, bicycles and so on. If the typical person would be resistant to buying general accident insurance, it is a good guess that he would be at least equally opposed to paying for no-fault coverage on a host of particular goods and services.

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[15] An illustration from O'Connell may be helpful in demonstrating this proposition. O'Connell reports that, at a symposium on no-fault insurance, he was asked what recovery would be granted to a retiree who lost an arm to a defective power tool manufactured by a company that had opted for the no-fault trade-off. O'Connell's reply was, that since the victim had no out-of-pocket damages (he had no earnings to lose and his medical expenses were presumably taken care of by Medicare), he would recover nothing. J. O'CONNELL at 118.

But perhaps not. The average consumer—and here the crux of the no-fault strategy is conceivably close at hand—may be misled by the seemingly small "extra" charge for each item on his shopping list. Having in mind these purchasers, as well as those who are simply unable to ascertain the amount of any buried surcharge, it is possible that producers and sellers of goods and suppliers of services will conclude that the election of a no-fault plan is an economic decision in their own best interests.

If this is indeed the ultimate hope for the success of elective no-fault plans, I find little cause for rejoicing. Adequate protection for accident victims (as well as victims of other misfortunes) is a commendable goal for society, and in forcefully reminding us of many shortcomings in the present state of things Jeffrey O'Connell performs an important role. But if the goal cannot be attained openly and directly—as by the extension of social security or the imposition of a broad-coverage accident insurance plan—should we sneak up on that goal by fooling an unsuspecting public through a complicated maze of price adjustments that defy understanding?

Such a policy, I submit, would not end, but rather would add, insult to injury.