Washington Law Review

Volume 56 | Issue 2

3-1-1981

The Lawsuit Lottery, by Jeffrey O'Connell (1979)

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THE LAWSUIT LOTTERY

By Jeffrey O'Connell. New York: Free Press, 1979.
Pp. xiii, 271. $10.95.

Reviewed by Cornelius J. Peck*

The dustjacket for this already provocatively entitled book continues with the additional legend: "Only the Lawyers Win—Most people get nothing. A few get too much. A proposal for reform." This addition to the title of the book gives appropriate, if not exact, warning that a reader is about to fall under the influence of a spell-binding author, whose sense of theatre equals that of the lawyers whose exploits he exposes. It does not, however, prepare one for his serious analysis, arguments, and proposals concerning how law should distribute the losses of accidental injuries which occur in our society.

Professor Jeffrey O'Connell, now a member of the University of Virginia Law School Faculty (formerly a member of the faculty of the School of Law of the University of Illinois), is probably best known for his coauthorship of the Keeton and O'Connell no-fault automobile accident reparation plan.[1] He has presented us with a book on this occasion which falls into three parts. The first part describes in devastating fashion the current operation of the tort law system for assigning responsibility for accidental injuries. He next moves to a description of how no-fault automobile accident reparation plans of various states have performed in recent years. Thereafter, taking a judgment that some no-fault automobile accident reparation plans have worked well, he moves to a consideration of how no-fault insurance concepts might be put to use in other contexts.

Professor O'Connell's account of the manner in which disputes concerning liability for accidental injury are now settled in American courts is fascinating, awe-inspiring, horrifying, and chilling, as well as disgusting. The author must have intended it to be all of that and to trigger strong emotional reactions to descriptions of the perils, the chicanery, the low emotional appeals, and the outright fraud which occur in the trial of suits concerning accidental injury in courts today. An affected reader's concern might well be that some practicing lawyers will read the book, not to gain the understanding of the irrationality of the process in which they are

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1. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965). Professor O'Connell has been a prolific author, and citations to his many writings on no-fault accident reparation plans would result in an impressive, space-

engaged, but instead to learn how they might more effectively make use of that irrationality.

For example, O'Connell describes how Philip Corboy, a very successful plaintiff's personal injury lawyer practicing in Chicago, makes constant use of a portable lectern to establish himself as an authority figure. That same lawyer generally keeps a seriously injured plaintiff out of the courtroom and the jury's sight to permit the fullest shock of his impaired, injured condition during a limited time before them. This also prevents the jury from gaining from more continuous observations any impression that the plaintiff may have learned to live with his incapacitating injuries. Defense counsel resort to similar strategems, such as having a lower level supervisor constantly at counsel's table to suggest that this humble and very human individual is the one who will be sacrificed if the judgment goes against his corporate employer. Undoubtedly reprehensible and unethical is the reported gambit of one defense counsel who had his "attractive blond secretary" come into the courtroom in the presence of the jury, sit next to the widower plaintiff suing for the wrongful death of his wife, and pat the widower's hand after a short discussion. Eschewing sex discrimination, this same attorney apparently arranged to have an attractive young man chat with a plaintiff widow who was suing for the wrongful death of her husband.

The Ford Motor Company takes its lumps in the author's description of its failure to disclose information concerning the knowledge it had from tests conducted by its English subsidiary concerning the failure of fuel tanks in rear-end crashes of its 1966 Fairlane and Mustang models. General Motors comes out no better in an account of its production of records and documents in such voluminous quantities that the purpose must have been to frustrate the discovery which the rules of civil procedure contemplate.

The reliance in this country on the jury for resolution of accident litigation is likewise subjected to a devastating criticism. Juries decide cases without instructions on important matters such as the presence of insurance, the tax consequences of their awards, the effect they should give to future inflation, or the responsibility for payment of attorneys' fees and costs. The collateral source rule deprives them of the information that some losses have been recovered from insurance or other sources. The instructions given concerning the rules governing liability are framed for understanding by lawyers, not by lay jurors, or even worse, solely to

filling footnote. Another book of which he is a co-author, J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND (1976), contains a collection of scholarly writings examining the possibilities of extending the no-fault accident reparation concept to fields other than automobile accidents.

meet the tests which will be imposed by appellate judges. The juries have been selected by counsel, not for the purpose of making rational and intelligent decisions, but instead to the extent possible to ensure that they have biases and prejudices which favor the interests of counsel's client. It is depressing to contemplate what large incomes can be earned by a sensitive or intuitive judgment about probable biases of persons supposedly selected for their objectivity and impartiality.

American trial judges come in for similar criticism. Their lives are dull and dreary, as they preside over a monotonous succession of automobile accident cases. Competent lawyers may accept appointment to the bench, but many soon leave, unable to accept the role of observer and umpire to which our state court judges are so frequently assigned. Most appointments are political rather than merit based decisions. The result is that judges have less competence than lawyers who practice before them, who refer to judges as "Your honor" while harboring contemptuous and derogatory thoughts about their abilities and personalities. For some reason, not fully explained, the author concludes that the English system of appointment from the ranks of barristers produces a higher level of judicial performance.

The author's comments about the American judiciary come from a general despair and are not criticisms applicable only to the problems of accident litigation. However, that weakness in the judiciary may have a greater irrational effect in suits for personal injury between insured or corporate defendants and injured individuals, conceived by an arrogant judge to be either deserving or non-deserving, than it has in suits on business transactions between parties of relatively equal appeal.

Professor O'Connell finds a similarity between the current adversarial trial of personal injury cases and the ancient trials by ordeal and combat. Personal injury lawyers, like professional gladiators, enjoy the combat and passionately believe they are serving society by championing the causes of severely injured accident victims. The difficulty of the performance, the risk of loss, and the nobility of their cause provide for them the justification of the enormous incomes they derive on a contingent fee basis (incomes of $350,000 or more per year are not unusual). Of course, the very successful plaintiff's attorneys carefully select those cases which will produce large judgments or settlements, and leave the others to less competent attorneys. Those lawyers in turn may make their clients' recoveries even less tolerable because of their ineptness and a willingness to settle without trial. Substantial referral fees, even though unethical, are said to be regularly and frequently paid by the successful plaintiff's attorneys to lawyers who performed no legal services. Despite its faults, however, O'Connell believes the adversarial system suits the American char-

acter. We are not a homogeneous population, but instead a people divided in ethnic groups, hostile and suspicious, and quite willing to resort to something like warfare to assert what are conceived to be rights against others. Change to a more rational system of providing assistance to those who have been accidentally injured will meet strong opposition.

Professor O'Connell next reviews the attempts which have been made to replace the adversarial litigation model for dealing with automobile accident losses with a no-fault auto insurance plan. Most of those plans he deems to be inadequate, either because they are modified no-fault plans which eliminate only relatively few claims based on fault or because they are add-on plans, which take away none of the existing tort remedies but instead provide only additional no-fault benefits. The Michigan law is the closest to a pure no-fault accident reparation plan, and it receives O'Connell's approval.[2]

The Michigan law now has no limitation on payment of an accident victim's medical expenses, and provides a maximum of approximately $53,000 for wage losses. Cost comparisons with insurance under a fault-finding system are difficult to make because only a relatively small portion of the average motorist's insurance premium is devoted to personal injury coverage, the bulk of it being devoted to payment for property damage in collisions, etc. The indications are, however, that Michigan motorists enjoy the very liberal protection against accident losses at a cost no greater, and probably less, than the former cost of traditional liability insurance with a limit of only $20,000. The payments made go to compensate for actual economic losses rather than the ephemeral claims of pain and suffering of those who receive settlements because of the nuisance value of their claims.[3] Reviewing studies performed by others, O'Connell credits no-fault plans generally with speeding the payment of claims and eliminating the need for lawyers' services. Although fifty-five percent of Michigan residents responding to a poll expressed dissatisfaction with the state's no-fault plan, that dissatisfaction is traced largely to application of that plan to property damage claims rather than its application to personal injury claims. By a seventy-nine to ten percent margin, those polled favored curtailing the fault system's right to compensation for pain and suffering, from which a substantial portion of the liberal

2. For a more detailed survey of the operation of automobile no-fault accident reparation plans, see O'Connell & Beck, *An Update of the Surveys on the Operation of No-Fault Auto Laws*, 1979 INS. L. J. 129.

3. For more arguments that recovery of damages for pain and suffering should be limited or eliminated, see Peck, *Compensation for Pain: A Reappraisal in the Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974).

medical and economical compensation is financed. The author's conclusion is that no-fault accident reparation plans work better for automobile personal injury claims than does the existing fault-based system.

But why, Professor O'Connell asks, limit a good idea to but one type of accident claim? A greater inefficiency of the current tort system's reliance upon proof of fault to obtain compensation can be found in both products liability and medical malpractice claims. Litigation of a product liability claim, he argues, is more complicated and more expensive than litigation of an auto accident claim, so much so that most persons injured by a defective product never file suit. Nevertheless, premiums for product liability insurance have been rising at an alarming rate, approaching three percent of the sales price for some types of industrial machinery. The medical malpractice crisis has perhaps received even more publicity, and while premiums have risen to $20,000 a year or more for individual doctors, only 28 cents of a premium dollar goes to compensating injured victims. As with auto accident payments under the fault system, there is no assurance that products liability and medical malpractice payments are distributed in any fair proportion for losses actually suffered. The solution, O'Connell suggests, is to adopt and adapt the no-fault systems of workers' compensation and auto reparation to these categories of losses, making payment only for economic losses and not for pain and suffering.

A special complication exists for such a proposal with respect to medical malpractice and products liability claims. It is that of determining what constitutes an injury in the course of medical treatment or what constitutes an injury properly allocable to the manufacture of a product.[4] A comprehensive social insurance covering all injuries might solve the problems, but this is viewed unlikely, given the ethnic and class rivalries existing in the United States. On the other hand, Americans have long been receptive to market solutions for problems, and O'Connell proposes that we put the market to use in solving these problems.

This is a proposal that Professor O'Connell earlier explored in a number of law review articles.[5] The idea is not shocking, he suggests, because

4. For a more detailed discussion of the problems, see J. O'CONNELL, ENDING INSULT TO INJURY 97–101 (1975); Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590 (1973); Havighurst, *Medical Adversity Insurance—Has Its Time Come?* 1975 DUKE L. J. 1233. A possible solution to the problem of what constitutes a compensable medical injury is a compilation of a list of compensable medical events. The problem of determining what injuries are properly allocable to the use of a product is less tractable. *See* Blum, *Book Review*, 43 U. CHI. L. REV. 217, 218–23 (1975) (reviewing J. O'CONNELL, ENDING INSULT TO INJURY).

5. *See, e.g.*, O'Connell, *Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Tort Claims*, 1978 WASH. U. L. Q. 693; O'Connell, *Supplementing Workers' Compensation Benefits in Return for and Assignment of Third-Party Tort Claims—Without an Enabling Statute*, 56 TEX. L. REV. 537 (1978); O'Connell, *Transferring Injured Victims' Tort Rights to No-Fault Insurers: New "Sole Remedy" Approaches to Cure Liability Insurance Ills*, 1977

it is already used in the form of the contingent fee system in tort litigation in the United States. In fact an injured victim now sells between one-third to one-half of his claim to the attorney he retains to represent him under a contingent fee agreement. The contingent fee system has obtained an uneasy acceptance in the United States, but greater legal barriers exist against outright assignment of personal injury claims and these O'Connell recognizes must be overcome.[6]

Under O'Connell's proposal, an insurance company would offer an insured no-fault coverage of medical expenses and economic loss for a premium plus assignment of any fault-based claim that the insured might acquire upon suffering an injury. The insurance company would pursue the insured's claim against any person liable to the insured, and would pay the insured the amount of any economic loss in excess of the policy limits which it recovered from the tortfeasor. The complex questions of liability for fault and the appropriate damages for pain and suffering would still have to be settled, but O'Connell optimistically expects that this would be accomplished much more informally and expeditiously because the settlement negotiations would usually be conducted by the professionals representing two insurance companies. Sale of no-fault insurance would be promoted by labor unions, credit unions, workers' compensation insurers, and various professional organizations, which would assure fair treatment of insureds because of the continuing relationship of the insurance company and the promoting agency.

Somewhat inexplicably, Professor O'Connell ends his book with a chapter in which he expresses his reservations about the insurance industry, the attitudes and abilities of the persons attracted to such work, and the ability of the industry to respond in a humane manner to demands made upon it. Possibly this is his hedge against criticism that one is naive to attempt to enlist the insurance industry in establishing a no-fault reparation system based on market responses. He concludes that whatever the limitations of the insurance industry, an individual dealing with a company which has insured him is likely to receive better treatment than that individual would from the legal profession. In an appendix he continues his reservations with a discussion of the disputes which might arise be-

U. ILL. L. F. 749; O'Connell, *Contracting for No-Fault Liability Insurance Covering Doctors and Hospitals*, 36 MD. L. REV. 553 (1977); O'Connell, *Alternatives to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501 (1976); O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Products Liability Woes for Employers and Their Employees and Suppliers*, 1976 U. ILL. L. F. 435. His most recent exploration of the problem is O'Connell & Beck, *Overcoming Legal Barriers to the Transfer of Third-Party Tort Claims as a Means of Financing First-Party No-Fault Insurance*, 1978 WASH. U. L. Q. 55.

6. For O'Connell's most recent analysis of the problem and suggestions of techniques available to the judiciary for eliminating the barriers to assignment, see O'Connell & Beck, *supra* note 5.

tween an insured and a no-fault insurer about how a sum received in settlement from a tortfeasor or its insurer should be allocated to economic and non-economic loss. His proposed solution to this difficult problem includes use of arbitration.

A greater weakness in his proposal receives no discussion. The dynamics of the tort settlement process differ from those of the marketplace. A defendant or a defendant's insurer settles a case not because of conviction that the sum paid is what is justly due and owing to the accident victim. The sum is paid because the defendant or defendant's insurer reaches the conclusion that the chances of the victim receiving substantially more are so great that, after discounting that possible recovery by the chance of a defense victory, and adding the costs of litigation, it is prudent to settle at the proposed sum.[7] This judgment turns on appraisals of how good the various witnesses, particularly the plaintiff, will be, and the appeal of the injured victim to the sympathies and emotions of the jury. These in turn will be much affected by how involved the victim is in obtaining compensation for the injuries suffered. An accident victim who has assigned his claim for pain and suffering to his no-fault insurer will probably not make a good witness if litigation becomes necessary, and it will not take the professionals representing insurance companies long to recognize this. The same is true with respect to other portions of the victim's claims in which he has no personal interest. The result will probably be that the market will not operate in the manner contemplated by Professor O'Connell.

These reservations about his specific proposal for harnessing the market to provide no-fault insurance by no means extend to his masterful demonstration of the irrationality of the traditional tort system as applied to the major problems of the accident reparation. Nor are they meant to challenge his fundamental message that a change must be made and new solutions found. Experience with no-fault automobile accident reparations has demonstrated that an existing insurance industry can successfully be subjected to fundamental changes in concepts of compensation and methods of operation which many persons did not believe possible when Professor O'Connell and his colleague, then Professor, now Judge Keeton, undertook their pioneering work of promoting the no-fault concept. Professor O'Connell's book will serve well to educate the general public and alert it to the need for change with respect to reparation for other accident losses, even if his specific proposal is not adopted.

7. P. HERMANN, BETTER SETTLEMENTS THROUGH LEVERAGE 9–10, 122–24, 130–32 (1965); C. PECK, CASES AND MATERIALS ON NEGOTIATIONS 3–5 (2d Ed. 1980).