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Book Reviews: Ending Insult to Injury: No Fault Insurance for Products and Services

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BOOK REVIEWS

ENDING INSULT TO INJURY: NO FAULT INSURANCE FOR PRODUCTS AND SERVICES. By Jeffrey O'Connell.† Urbana, Illinois: University of Illinois Press. 1975. $7.95. Pp. 254. Reviewed by Eugene J. Davidson.‡

Our system for handling product and malpractice liability claims is, at best, chaotic. It fosters fraud, chicanery and overreaching by plaintiffs, defendants and their lawyers. It encourages defendants to stonewall or engage in conspiracies of silence, thereby denying many plaintiffs justifiable compensation for injuries. It likewise encourages plaintiffs to malinger and to pad medical bills with unnecessary or even illusory treatments. Stories of sly or unethical tactics of insurance claims agents and defense counsel are without number as are the tales of equally sly and unethical tactics of injured (and not so injured) claimants, their counsel and runners.[1] That juries are inconsistent or capricious, and, perhaps, irrational[2] is too well-known to require documentation.

Equally well-known is that our product liability and malpractice litigation system is unnecessarily protracted and costly to both plaintiff and defendant with the public ultimately paying the bill in the form of abandoned claims, higher insurance premiums and higher prices. Perhaps the only beneficiaries of the present system are those lawyers who specialize in this area of the law.

We do not need anyone to remind us of these verities. What we need is someone to devise a better system—one which will avoid the present evils without creating new evils of equal or greater magnitude. Many think that this is not possible. They would paraphrase Mr. Churchill's homily and say "our present system is the worst of all systems except for all others." Jeffrey O'Connell is not one of these. Brandishing the pen of a true believer, he brings us salvation in the form of No-Fault.

No-Fault is not new to Professor O'Connell. By his own admission, this is his seventh book in eight years on this subject, and he begins his preface with the candid "Good heavens, another book on no-fault insurance from O'Connell! It is a little embarrassing. . . ."[3] But as Daniel Patrick Moynihan observes in the Foreword to the book,[4] in America when one thing works, try it again on something new; nothing succeeds like success;[5] you can't argue with success.

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1. An interesting defense of the conduct of plaintiff's counsel may be found in a "Dear Jim" letter printed in Selected Readings on the Legal Profession, p. 130 (West Publishing Co., 1962).
2. One wag is alleged to have said about jury verdicts: "Only the Lord and the jurors can justify their actions and half the time even the Lord cannot."
3. P. xxii.
4. P. ix.
5. Originally written by Alexander Dumas the Elder in Ange Pitou, vol. I, p. 72 (1854).

If automobile No-Fault has been successful and Professor O'Connell decrees it to be a success, then it should succeed in *any* kind of accident, particularly product and malpractice accidents which he believes are specially suited to No-Fault. To this extent he sees product liability and malpractice No-Fault as logical extensions of automobile No-Fault even though he acknowledges substantial differences between them, including Professor Robert E. Keeton's salient observation that it is relatively simple to pinpoint causation in a motor vehicle accident whereas it is not necessarily so simple in medical malpractice claims.

No-Fault, as proposed in *Ending Insult to Injury*, an intriguing title, is remarkably simple. Manufacturers and doctors would select the risks they wish to subject to No-Fault and the public would be foreclosed from making a claim against the manufacturer or doctor based on fault or defect. Negligence, strict liability and breach of warranty claims arising from the product or service would be barred. Those injured would be compensated for their actual out-of-pocket losses, for example medical expenses and loss of earnings for which they are not otherwise compensated. Their contributory negligence or assumption of risk would not bar this compensation.

Obviously this system would broaden the class eligible for compensation due to product or service injuries, just as it would reduce the amount those injured presently may be able to recover. Professor O'Connell sees this as a necessary and desirable trade-off. He believes the result will reduce the producers' financial exposure. Whether he is correct in this assumption is anybody's guess. However, because of the uncertainty attendant to the producers' financial risks, he hedges by suggesting means whereby they would be permitted to minimize their potential liability. Some of these include permitting the producer to elect which products would be subject to No-Fault, for how long and the extent of No-Fault benefits for which he will be liable, as well as setting a threshold for No-Fault claims.[6]

While this No-Fault may be fair to manufacturers and doctors and more than fair to those whose claims under our present system are too small or without present legal justification, is it fair to those who suffer substantial injury due to undeniable negligence? Why should a negligent manufacturer or doctor go scott-free because the victim was sufficiently prudent to purchase medical insurance that pays his total out-of-pocket expenses and his employer does not dock him for lost time? If he suffers a disability, should it be ignored because it will not affect his earning power?[7] Is this not rewarding the guilty at the expense of the victim? What about the deterrent effect of a potential major claim to encourage care? This market deterrence has been a factor in product

6. *E.g.*, a limitation on loss of wage payments of $200 per week for total permanent disability and lesser amounts for partial or temporary disability. p. 98.

7. Interestingly, a manual laborer who suffers an arm injury would be entitled to loss of wages but Professor O'Connell more than likely would not be so entitled since he probably could continue to teach despite this type injury.

design. These are but a few of the objections to No-Fault that can and most likely will be made.

Ending Insult to Injury recognizes all of the objections your reviewer could conjure up while reading the book and more, and meets them head-on. He even discusses[8] the constitutionality problems his proposal will encounter. There are many who will scoff at the author's explanations, justifications, and rationalizations, but he does not shirk from defending No-Fault from these potential critics.

Professor O'Connell is an evangelist preaching the gospel of No-Fault. He makes no effort to conceal his evangelistic fervor. This may be unfortunate because it causes him to appear to lack perception and objectivity. On the other hand, it may be that a less forceful presentation would not gain the attention he believes No-Fault deserves. No-Fault product liability and malpractice may not be the solution to the evils of our present system, but we cannot be certain without fully exploring and debating Professor O'Connell's proposal. And we cannot explore and debate the proposal without reading. The book and No-Fault should not be dismissed out-of-hand as "pie in the sky." Less than fifty years ago flying to the moon was not only "pie in the sky," it was prima facie evidence of madness. Who knows?

8. Written with James E. Souk.

PRODUCT LIABILITY: Law, Practice, Science. Edited by Paul D. Rheingold† and Sheila L. Birnbaum,†† Practicing Law Institute, New York City, 1975. Pp. 1113. $25.00. Reviewed by Eugene J. Davidson.‡

Ecclesiastes[1] tells us that "To everything there is a season." The season for product liability litigation is at hand. As Judge Eldridge states in the introductory article to this symposium issue, "Increasingly, the courts and the legislatures have turned their attention to the area of product liability . . ."[2]

The public has cause to question why almost half a century had to elapse before the seeds sown in Judge Cardozo's classic opinion in *McPherson v. Buick Motors, Co.*[3] would begin to mature. Even after this lengthy period there remain many practicing lawyers who are not familiar with the nuances of product liability. Their problem may stem from the dance-like manner in which our common law develops. Two

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1. *Ecclesiastes* 3; 1.
2. P. vii, *supra*.
3. 217 N.Y. 382, 111 N.E. 1060 (1916).