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Victor E. Schwartz

PROFESSOR O'CONNELL'S METHOD FOR ENDING INSULT TO INJURY: CAN IT SOLVE THE AIR CRASH LITIGATION DILEMMA

VICTOR E. SCHWARTZ*

INTRODUCTION

PROFESSOR Jeffrey O'Connell of the University of Illinois has produced a major work of tort law reform. It is a book entitled *Ending Insult to Injury—No-Fault Insurance for Products and Services.* It was published by the University of Illinois Press in February, 1975. O'Connell obtained grants for his project from the John Simon Guggenheim Memorial Foundation, the Foundation for Insurance Research, Study and Training of the League Insurance Group of Detroit, and the Center for Advanced Study of the University of Illinois.

O'Connell launches a devastating critique of the entire tort-litigation system in the book. He then supplies a cure for those difficulties. He does not specifically address himself to the problem of personal injuries caused by commercial airline crashes. Rather, his focus is on products liability and medical malpractice. This article will attempt to apply both O'Connell's criticisms and his solutions to the area of injuries caused by airline crashes. Finally, it will indicate some of the problems that might arise if O'Connell's no-fault system were substituted for the present tort litigation approach.

I. THE PRESENT SYSTEM AND ITS DEFICIENCIES

As the reader is aware, in a suit against an airline for personal injuries caused in an accident, liability is based on negligence. In

* Professor of Law, University of Cincinnati. J.D., Columbia, 1965. Author of the treatise COMPARATIVE NEGLIGENCE (The Allen Smith Company 1974) and co-author, PROSSER AND WADE, CASES AND MATERIALS ON TORTS (6th ed. to be published by The Foundation Press, Inc. in 1976).

order to recover from the airline carrier, the plaintiff must prove that the airline failed to use "reasonable care" and that this failure was the proximate cause of the accident.

To assist the plaintiff with problems of proof, some courts have applied the doctrine of *res ipsa loquitur*. Assuming that the crash occurred on a clear day and under circumstances where accidents would not ordinarily happen in the absence of negligence, the burden of proof on the issue of reasonable care may shift to the airline. But most aircraft accidents do not happen under those circumstances—there is bad weather or other adverse conditions. Further, even if the *res ipsa* doctrine is applied, the airline may be able to show that the accident was not due to its fault, but rather was brought about by other causes. Stuart Speiser, an authority who has studied this field, boldly advises plaintiffs' attorneys *not* to rely on *res ipsa*.[1]

Of course, the injured party may be able to avoid the burden of proving "fault" altogether if he can show that the airplane itself was "defective" within the meaning of Section 402(a) of the Restatement of Torts (Second) (strict products liability). He then sues the aircraft manufacturer or possibly the manufacturer of a component of the aircraft. If plaintiff can prove that the crash was caused by a "defect," he may have a cause of action.

Nevertheless, as most practitioners know, strict liability under 402(a) promises more in theory than it delivers in fact. After a crash has occurred, it is difficult to pinpoint a defect in construction. We are not dealing with a soda pop bottle that has exploded!

In sum, whether plaintiff is attempting to prove fault against the carrier or a defect in a 402(a) case against an aircraft manufacturer, he will face many serious obstacles in developing his proof. What was the responsibility of the aircraft traffic control system? What effect did meteorological phenomena have on the accident? What is the relationship between the technical variables of aerodynamics and the cause of the accident? Frankly, few lawyers (and perhaps even fewer judges and very few jurors) have mastered this growing body of knowledge.

While the advent of flight recorders and National Transportation Safety Board investigations has helped plaintiffs in their search

[1] S. SPEISER, RES IPSA LOQUITUR § 10.11.

for the facts, they will not—standing alone—prove his case for him. Plaintiff's counsel will have to hire experts to assist him both before and during trial and the cost will be substantial.

Under the present system, plaintiff usually does not expend any out-of-pocket money. His case is handled on a contingent fee basis. Nevertheless, that fee does reduce the amount of his recovery—as much as 50 percent in some jurisdictions. Aside from plaintiff's recovery being reduced, it also is often delayed. When there has been a death of a male "breadwinner"—the unfortunate victim in a typical air crash case—there is a vital need for immediate compensation to the widow. This may cause her to agree to a settlement that is not entirely fair.

While some plaintiffs receive less than they should under the present system, some are not compensated at all. First, there is the group of persons who have received relatively minor injuries in an aircraft accident. Because their potential damage award is low, they may not be able to obtain competent counsel to pursue their case. Second, there are those who suffered death or serious injury, but recover no damages. This group is much smaller than those who are injured in other kinds of accidents—estimates indicate that it may be as low as 7 percent.[2] Nevertheless, those 7 percent are part of what might apepar to be a lottery. After all, a passenger has no real control over his fate once he is on board an ordinary commercial aircraft. The passenger or his representatives ordinarily do not lose their case because decedent was contributorily negligent or because he assumed the risk; rather, the case is lost because he cannot prove negligence against the carrier or the government or a 402(a) claim against the aircraft manufacturer.

The present tort litigation system may not only work to the disadvantage of plaintiff, but also may impose undue costs upon defendants. They must pay, directly or indirectly, a substantial amount of money for attorneys to defend them. Further, some of the damages that they must pay may not represent the plaintiff's actual pecuniary losses. First, the plaintiff may obtain a "double recovery" where an item of damage has been already paid by a collateral source. Second, in cases where plaintiff may have lived for a

[2] *See Note, Domestic Commercial Aircraft Tort Litigation: A Proposal For Absolute Liability of the Carriers,* 23 STAN. L. REV. 569, 573 (1971).

period of time after the accident, a substantial amount of money may be awarded for "conscious pain and suffering." For those uninitiated in the law, it is a spectacle to watch a survival action with experts on both sides swearing whether a decedent lived long enough to experience "conscious" pain and suffering. The individual, of course, is no longer there to collect. How does this compensate a victim?

Throughout his book, O'Connell stresses the theme that the amount of plaintiff's recovery in court is not based on his true needs. He caustically observes that "a lawyer quickly learns that padding on medical costs is really as good as coining money—no real risk to anyone."[3] He quotes veteran personal injury attorney Verne Lawyer's trial practice advice in regard to how plaintiff should dress in court.[4] O'Connell observes, with total cynicism: "What the plaintiff's appearance has to do with the amount of his suffering is something that Verne Lawyer does not undertake to explain."[5]

In sum, O'Connell would charge the present "tort" litigation approach to commercial airline crashes with the following deficiencies:

1. Liability turns on complicated fact situations with concomitant expense and delay.
2. There is a class of defendants whose instinct is to resist settlement unreasonably.
3. The expense of litigation is such that only large claims are brought. Persons who receive minor injuries in aircraft accidents may be unable to obtain counsel who will find it worth their while to pursue the claim.
4. Too small a percentage of the money paid into the liability insurance system actually goes to pay injured plaintiffs. Most of it is used for attorney's fees and insurance company overhead.[6]

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[3] J. O'CONNELL, ENDING INSULT TO INJURY—NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES 51 (1975) (herein after cited as O'Connell).

[4] *Id.* at 54.

[5] *Id.*

[6] *See generally* O'Connell at 56-69.

II. Alternatives to the Tort-Litigation System

Assuming these represent valid criticisms of the present system, what are the alternatives? Some propose that the common law of torts shift all aircraft accidents to a strict liability basis. In other words, both the airline carrier and the manufacturer would be strictly liable if an individual were injured in an aircraft. O'Connell does not find this approach very appealing—he makes a rather cogent argument that it is simply arbitrary law and imposes too great a financial burden on defendants without a corresponding benefit to plaintiffs. O'Connell believes that it is time to move away from common law methods of compensating for injuries and turn to "ambitious legislation for reform." He indicates that we should no longer rely "so much on the tortured, torturous, even torturing tort system with its case by case common law crawl—a system from which law professors derive so much fascination, law practitioners so much income, and the general public so few benefits."[7]

In regard to legislative solutions, O'Connell rejects the New Zealand approach of putting the accident costs under social security.[8] He notes that the potential cost of such a system would be astronomical. In this regard, he observes that national health insurance proposals always cost more than their sponsors allege, and do not cover the wage loss which is 79 percent of the cost of most injuries.[9]

Cost consideration aside, O'Connell believes that it would be unwise to have all injuries paid out of an undifferentiated pool of insurance.[10] The activity or industry responsible, herein airline carriers, would not in any way be made to pay for the losses it causes.

Surprisingly, O'Connell also rejects the no-fault automobile insurance system that he and Robert Keeton proposed in the book *Basic Protection for the Auto Victim*—variants of which have been enacted in a number of states. O'Connell does note that: "No army of trial attorneys or timid insurance executives will stop [no-fault automobile insurance] now."[11]

There are two reasons why no-fault automobile insurance sys-

[7] O'Connell at 67.

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

[9] *Id.* at 75.

[10] *Id.* at 78-80.

[11] *Id.* at 70.

tems would be inapplicable to aircraft passenger injuries. First, there was widespread use of liability insurance by automobile owners prior to no-fault. It was relatively easy to transfer that existing liability insurance into no-fault loss insurance. Put more graphically, very often *both* actors in a particular accident (two cars) were already covered by an insurance system. This situation is not true with passengers and commercial airlines or aircraft manufactures. Secondly, automobile accidents involve a rather distinctive activity wherein the statute can readily identify who is to pay for what loss. As a number of speakers at this Symposium have stressed, this can be an extraordinarily complex problem in the context of air crash litigation.

O'Connell also rejects massive "enterprise" liability wherein each enterprise would have to pay for *all* the injuries it generates without regard to fault or defect. This, he believes, would be much too costly and involve overwhelming problems with respect to the issue of causation.

III. The O'Connell Plan for Ending Insult to Injury

O'Connell then introduces his basic proposal which he calls "Elective No-Fault":

> Any enterprise should be allowed to elect . . . to pay for injuries it causes on a no-fault basis. It would elect to make payment regardless of any fault on its part, or any fault on the part of the victim.[12]

The enterprise would be allowed to select some or all of its typically created risks and agree to pay all out-of-pocket losses when an injury results from those risks. Thus, an airline could indicate it would pay up to a certain amount of damages on a no-fault basis whenever death or bodily injury to a passenger resulted from a crash that occurred during the course of transportation. To the extent that the airline made this selection, it would make no payment for any amount covered by a collateral source and it would make no payment for pain and suffering. Most importantly, to the extent the airline made this election, it would be shielded from a tort suit by the victim.

O'Connell speculates that while an enterprise that made the

[12] *Id.* at 97.

election would end up paying many more victims than it does at present, it probably would reduce its total payment. O'Connell would throw in a few more "sweeteners" that would be most important in the context of commercial airline accidents. Term life insurance might be regarded as a "collateral source." Recovery for loss of wages might be limited to $200.00 a week as long as permanent disability lasted, with correspondingly lesser amounts for temporary or partial losses.

Finally, the enterprise would benefit because the "stigma of liability" would be substantially reduced or removed. No longer would an airline be paying because it was negligent nor would an aircraft manufacturer be paying because its product was "defective." Rather, compensation would be awarded on the neutral ground that the airline or manufacturer was a partial "cause of an accident."

O'Connell's system might make good economic sense for the airline carrier industry or the aircraft manufacturing industry because the operations of both give rise to expectable risks that can be readily defined.

There are a few more enticements that O'Connell has thrown in in order to obtain industry support for his proposal. He would allow enterprises to experiment with this system. First, they would set the limitations on their no-fault coverage. Secondly, they could limit the application of no-fault liability to injuries incurred in certain geographical areas in order to gain a "control group." Thirdly, they could set limitations based on time. Thus, an aircraft manufacturer could limit his "no-fault" insurance in terms of the number of years his product is on the market.

O'Connell believes that accident victims will readily give up payments for "pain and suffering" and the right to have double recovery in order to get prompt and certain payment for real out-of-pocket losses. He offers a survey conducted in Illinois that gives some support to his claim.[13]

O'Connell and others who propose no-fault systems would probably contend that the deterrent aspect of tort law is not needed with regard to air accidents. The no-fault proponents would concede that in the past the fault system was essential because it forced

[13] *Id.* at 116.

airline carriers to pinpoint the cause of the accident and take corrective action.

Tort law's deterrent function may be fulfilled by at least three programs at present. First, the NTSB publishes an airline accident report that is usually detailed and comprehensive. The Federal Aviation Administration can take appropriate action on the basis of that report. Secondly, the inspection requirements of the Federal Aviation Administration are supposed to guard against defective airframes. Thirdly, the FAA's periodic maintenance requirements are a substantial check against accidents.

Moreover, an airline that elected no fault would always be liable for damages in case of crashes. It would be encouraged to investigate accidents freely and immediately and share with other carriers information that it obtained. Airlines would have no-risk personal economic incentives to find out whether the crash was "their own fault," the fault of the manufacturer of the airframe, or of the government.

While O'Connell's elective no-fault system would be established by the legislature, it would give great power to airlines and aircraft manufacturers to determine for themselves how much no-fault coverage they wish to have. An Insurance Commissioner would regulate administrative problems that might arise.

Again, the airline or manufacturer would have a number of incentives to adopt this system because:

1. It would not have to pay any amount of damage that was covered by a "collateral source."
2. It would not have to pay for pain and suffering.
3. It would avoid the in-court cost of determining fault or the existence of a defect in the aircraft.
4. It would avoid the stigma of liability.

In connection with the fourth element, no one could preclude common law liability for intentionally caused injuries—however, this would seem relatively insignificant with regard to airlines or aircraft. If the airline or aircraft manufacturer were grossly negligent, however, it would still have the benefit of its "no-fault" shield. O'Connell and others who have drafted "no-fault" insurance systems would define intent quite narrowly.

O'Connell finds an analogy for his system in so-called "elective"

workmen's compensation laws. He admits that the analogy is not entirely congruent for in most states that have *elective* workmen's compensation laws the worker can decline to choose the benefits it provides and preserve his rights under the common law (very few workers have done this).[14] Nevertheless, O'Connell believes that as a practical matter potential victims of accidents caused by products or services are not in a position to make this election. While one might question this observation as applied to passengers on airlines, his system would not work as a practical matter if some passengers *could* elect not to participate.

Most recently, O'Connell has suggested that his system be attempted without *any* legislative guidelines at all.[15] In other words an airline, through notice to its passengers, might *impose* no-fault on its potential victims. The manufacturer of aircraft would give very general notice in advertisements about its products. While this technique might be regarded as unconscionable under the Uniform Commercial Code (*prima facie* under UCC 2-719(3)) or attacked by regulatory agencies, O'Connell believes that it should be upheld because it imposes the same "bargain" on potential victims that has long been recognized as fair and just in workmen's compensation and most recently acknowledged under no-fault automobile insurance.

IV. Some Problems With the O'Connell Plan

Perhaps the attraction of O'Connell's plan (or its insidiousness) lies in its surface simplicity. If one digs below the surface, however, one can find a number of rather serious problems. Let me suggest my top "six."

First, the book does not present a statute. Many plans that sound rather attractive in book form run into serious problems when one has to sit down and draft how they will work in practice.[16]

Second, many persons might question why airlines, aircraft

[14] *Id.* at 117.

[15] O'Connell, *Elective No-Fault By Contract—With or Without An Enabling Statute*, 1975 U. Ill. L. For. 59.

[16] Since the time this speech was delivered Professor O'Connell has produced a statute. *See* O'Connell, *An Elective No-Fault Liability Statute*, (1975) Ins. L.J. 261. The statute is very helpful in filling in some of the practical details of O'Connell's proposal, but it also is illustrative of the observation made in my original speech. An evaluation of the statute must await another day.

manufacturers and other potential tortfeasors should be allowed to benefit from the collateral sources that have been paid for by victims. In effect, tortfeasors would be allowed to externalize some costs of accidents they cause by using the victims' money because the victim has paid for the insurance provided by the collateral source.

Third, O'Connell's system may place too much power in the hands of the airlines and reduce the deterrent impact of tort law. The assumption that tort law is superfluous in the area of airline accidents is based on argument only. Do we want to give it a test? The recent situation involving the DC 10 cargo door defect may suggest that more, not fewer, incentives for safety are needed. Does the specter of the large common law tort award serve as a true auxiliary deterrent function?

Fourth, although O'Connell discusses problems relating to indemnity and contribution, they deserve more attention.[17] How are claims to be handled between those who elect and those who do not elect to participate in the no-fault system? Between two parties who elect no-fault? More specifically, how do we handle airline claims against manufacturers of aircraft, manufacturers of aircraft components or the United States government? Assuming the general approach is to put the cost of the injury on the party that caused the accident (which O'Connell suggests), will the costs and time involved in potential contribution and indemnity claims substantially compromise the economic efficiency of the O'Connell proposals?

Fifth, what about the grossly negligent or reckless defendant—should it be allowed to escape tort liability merely by electing "no-fault"?

Sixth, will a claim that might be worth a reasonable amount above the threshold be handled in a fair and just manner? For example, suppose an airline "elects" to be covered by no-fault up to $200,000. A victim has a $225,000 claim. Since the airline will be able to "deduct" the $200,000 from any payment it makes, is there sufficient incentive for a lawyer to go through the expensive process of trying an aircraft litigation case when the potential "added" recovery is only $25,000?

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[17] O'Connell at 152-56.

CONCLUSION

There are strengths and weaknesses in O'Connell's plan. Attorneys who earn their living on the basis of the tort-litigation system are likely to conclude that the weaknesses outweigh the strengths. Nevertheless, they and all persons interested in tort law will find it worthwhile to read and understand O'Connell's proposals. They have more substance than most ideas that flow from academia.