

1975

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Recommended Citation

Melvin I. Friedman, *No-Fault Products Liability - Plaintiffs' Point of View*, 41 J. AIR L. & COM. 219 (1975)
<https://scholar.smu.edu/jalc/vol41/iss2/6>

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NO-FAULT PRODUCTS LIABILITY— PLAINTIFFS' POINT OF VIEW

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NOW THAT automobile no-fault has been implemented in some states, a debate is commencing regarding its extension to other fields, principally products liability and medical malpractice. It seems that the debate has started even before it has been demonstrated that automobile no-fault has made a positive contribution to our society. In any event, I am of the opinion that no analogy can or should be drawn between the automobile case and products liability cases. Moreover, to adopt any of the proposals that have been made to date would be wholly reactionary and would nullify the progress made in this country toward greater manufacturer responsibility stemming from such landmark cases as *MacPherson*,¹ *Henningsen*² and *Greenman*.³

One proposal in the products liability field has been made by Professor Jeffrey O'Connell who is well known as the co-author of The Keeton-O'Connell (automobile no-fault) Plan. Professor O'Connell has outlined his proposal with respect to products liability in a recently published book entitled *Ending Insult to Injury*.⁴

O'Connell argues that many of the problems engendered in "compensating" the victim of an automobile accident under the present tort system have equal application in the products liability field. Payment is often delayed. Proof of fault or defect is difficult. Proof of pain and suffering is also difficult, and some persons go uncompensated while others are overcompensated.

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¹ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

² *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

³ *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 67, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

⁴ J. O'CONNELL, *ENDING INSULT TO INJURY* (1975).

Professor O'Connell presents the possibility of eliminating the tort system entirely in favor of paying wage loss and medical expenses through social security. He finds this solution politically impracticable because national health insurance, which covers only medical expenses, already has a price tag that has stalled its implementation. He also rejects a straight no-fault plan covering all manufacturers irrespective of fault or defect because too many manufacturers would not want this open-ended approach.

Undaunted, O'Connell proposes a scheme of elective no-fault. The enterprise can choose whether or not it will be covered, and can even select the specific risk that it wants covered by no-fault! The enterprise electing no-fault will pay out-of-pocket losses, reduced by payments from collateral sources. This means that the enterprise will not pay for any losses until other sources—workmen's compensation, social security, the injured persons own health insurance—are exhausted. The *quid pro quo* will be the certainty of some recovery, but will eliminate damages for pain and suffering.

It is submitted that the premises upon which Professor O'Connell's proposal is based are faulty. All of the automobile no-fault legislation to date has excluded serious injuries and death from coverage. The typical products liability case involves either serious injury or death.⁵ Automobile no-fault is a compromise which tends to get the smaller case out of the courts. The retention of the tort system for serious injuries reflects, I believe, a public policy to fully compensate tort victims of an accident resulting in major injuries. Full and fair compensation cannot be obtained without damages for pain and suffering.

Professor O'Connell contends that some victims of accidents get too much money for pain and suffering because of the generosity of juries. The court in *Griffin v. U.S.*⁶ addressed the issue of compensation for pain and suffering directly. In discussing the damage award to be made to a plaintiff who was rendered a quadriplegic after taking polio vaccine, the court stated:

As to pain and suffering and the ability to enjoy life's pleasures before as after the accident, this Court notes that Mary Jane Griffin cannot leave her home except on rare occasions and that she

⁵ O'Connell, incidentally, does not specifically address himself to death cases.

⁶ *Griffin v. United States*, 351 F. Supp. 10 (E.D. Pa. 1972).

cannot enjoy, obviously, any of life's pleasures, requiring physical exertion from any of her paralyzed limbs. She suffers excruciating physical pain from time to time and is always in danger of being subjected to that pain. She undergoes the kind of mental suffering that only a quadriplegic who had lived an active life before her paralysis can know. She is completely aware, she is completely alert, she is sensitive to every nuance of both physical and mental anguish. She has become completely dependent on other persons, even to her bowel and bladder functions. She has become her husband's jailer. She knows these things. She can look forward to being nothing but these things. The law says that she must be compensated in money for her damages, for the law knows only to compensate in money for damages which are really beyond value.⁷

In the *Griffin* case, the court, not a jury, came to the conclusion that the plaintiff's pain and suffering for the past nine years and for twenty-eight years in the future would be compensated by payment of \$1,200,000. Under Professor O'Connell's proposal, the *Griffin* defendant, if it had elected no-fault, would only pay for the plaintiff's medical expenses. There was no out-of-pocket wage loss in *Griffin* because the plaintiff was a wife and mother. Other victims of product defects would be limited to recovery of medical expenses if they were not working. Thus, a totally disabled child who had never worked before would similarly be limited to recovery of his medical expenses.

Under our tort system, individuals or corporations are held responsible for the damage that they inflict through their fault. Everybody is answerable to the community for the damage inflicted by fault. Under the present system, a manufacturer is answerable to the community if he fails to act reasonably. He knows or should know in making a decision regarding safety that if he fails to act reasonably he will be held answerable. Under Professor O'Connell's proposal, the enterprise that opts for no-fault will have no such incentive.

I do not dispute that products liability litigation is sometimes protracted. It is, however, no more protracted than other types of litigation such as antitrust and securities litigation. When it is protracted, the delay is often due to recalcitrant defendants or their insurers who want to hang on to their money as long as possible, and

⁷ *Id.* at 36-37.

not to the difficulty of proving fault or defectiveness. One solution to undue delay, if it is truly a major concern, would be to implement the Rhode Island procedure of awarding interest to the successful plaintiff from the date suit is commenced.

Professor O'Connell is also concerned that some victims of accidents get nothing at all. This can be due to an infinite variety of reasons, one of which may simply be that the product was not defective and the manufacturer was not negligent. If so, why should the manufacturer have to pay?

Frankly, I find shocking the proposal that a manufacturer can elect what risks he will cover. The election is one-sided. The purchaser or user will not be given a choice. Obviously, only the enterprise that will ultimately pay less will elect to be covered. The incentive that the tort system has in the prevention of accidents will be lost. This loss, to put it mildly, will be particularly unfortunate in the field of aviation where the adversary process has played a major safety role.

I also find Congressman Milford's proposal to impose absolute liability on the airlines up to a maximum amount inexplicable. It places the entire burden of aviation accidents on the airlines and the traveling public. The airlines can, of course, speak for themselves, but the traveling public should not be asked or required, as they would be under Congressman Milford's proposal, to buy insurance to protect themselves in the event that an airline or a manufacturer is at fault in causing an accident. The airlines and manufacturers have adequate insurance and they have prospered without arbitrary limits on damage recoveries.

The tort system in this country has its faults, but it is the envy of the world. It would be truly unfortunate if that system and the safety of the public were sacrificed by the no-fault plans that have recently been advanced.