New Directions in Liability Law

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A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract

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At any given time, potential and actual accident victims have rights that are determined by the contours of tort law. These rights create bargaining chips that are normally played by a claimant following an accident in return for a financial payment from the injurer or the injurer's insurer. The settlement, of course, exhausts the victim's tort rights. By contrast, only a few victims actually see their tort claims through to a trial in which a court determines their worth.

Potential victims do not ordinarily do anything with their rights; they simply hold onto them until an accident occurs. Indeed, in unusual situations where potential victims have already waived their rights through a preaccident exchange, many courts have been hostile to such deals and have refused to enforce the contract against the victim.[1]

This issue, of course, arises only after an injury has occurred and the injurer seeks to rely on the preaccident release from future tort liability that had been obtained from the victim. Judges rationalize setting aside those private agreements on the ground that they are protecting potential victims from their own ignorance and weakness in bargaining with parties who are better informed and stronger. Such protection is often necessary. But judicial intervention in private arrangements is misguided when it blocks exchanges that improve the position of both victims and injurers.

This essay discusses a potential market in unmatured tort claims that could correct many shortcomings of existing tort law. In brief, it envisions a market in which people who are otherwise adequately insured against accidents will sell their preaccident bargaining chips. This market would function mainly through transactions in which workers with good employee-benefit packages would sell their future tort claims to their employers, who in turn would sell them to (i.e., presettle them with) liability insurers.

Suppose, for example, that an employee misses several weeks of work and requires additional medical attention, because her physician carelessly failed to diagnose a broken arm. When such malpractice occurs today, she can sue the doctor for her lost income, her medical and other expenses, and her pain and suffering. If, however, the employee already has adequate health and temporary disability insurance, she would probably not consider her tort rights all that important to her well-being. For one thing, most of what she stands to recover in a lawsuit would result in double payment, would have to be repaid to her other insurance sources, or would be spent in the costs of litigation. Employees in her position with adequate first-party benefits might be eager to sell their tort rights for an appropriate price before the malpractice case arises.

Suppose that such transactions were respected and that this employee had previously elected to sell her tort rights to her employer. Although she could not sue the doctor, she would be assured of compensation for the medical costs and lost income from this injury (since the validity of the sale would depend on that protection). Because the sale is to the employer, her compensation would almost surely be provided through the regular employee-benefit package. The payment received for the sale of her tort rights would likely take the form of an employee-benefit package that is better or more generous than the benefit packages of fellow employees who retain their tort claims. If employees could dispose of their tort rights in this way, they would consider themselves better off and would not be candidates for judicial paternalism if they became victims of malpractice.

The market in tort claims ought not to end there, however. Assume that the employer, in turn, sells this victim's potential malpractice claims to the doctor's insurer (using the proceeds, at least in part, to fund a better employee-benefit package). When the accident occurs, there is no tort claim, because the doctor's insurer has already settled it in advance. The amount it pays the employer helps determine the amount of the doctor's malpractice insurance premiums.

Many deficiencies of current tort law could be corrected by such a market. If such a socially desirable market could be developed, surely it ought not to be hampered in a misguided attempt to protect the very people who could benefit by it.

The Potential for a Market in Unmatured Tort Claims

At least three deficiencies in current law provide the basis for a market in unmatured tort claims. First, when viewed as a system for compensating accident victims, tort law has many gaps. For example, drivers who suffer identical injuries have similar financial needs, whether the accident was caused by an icy road or by the negligence of another driver; yet the tort system permits recovery in only one of these cases. Most potential victims would prefer to close the gaps in their coverage and be protected against losses of both types. As a practical matter, however, it can be cumbersome to arrange for protection that merely fills in where tort law does not apply. Therefore, many people arrange for first-party protection (through their employer or private insurance). Once they have done so, tort law becomes superfluous in paying their out-of-pocket losses, as it was with the adequately insured employee in the medical-malpractice example described above. Many potential victims with adequate first-party protection would be happy to sell their tort rights to redundant awards for less than the amount that injurers now spend settling lawsuits.

Second, tort damages awarded by courts (or arranged through settlements) are capricious, especially in providing for pain and suffering. This unpredictability is unattractive to potential victims. Few of them seek to buy first-party insurance against pain and suffering. Again, it is reasonable to assume that potential injurers place a higher value on being rid of claims than most potential accident victims place on their rights to sue for such losses and that there is room for the two sides to strike a mutually beneficial deal.

Finally, the legal and related costs of tort disputes account for a high proportion of the stakes. The plaintiff's attorney alone routinely takes a third of the damage award. If these costs could be reduced or avoided, both injurers and victims could benefit.

Together these three deficiencies of the tort system afford considerable potential for a mutually beneficial exchange. A properly regulated market in such exchanges could reallocate legal rights to the advantage of both injurers and victims.

The Proposed Market

The primary participants in such a regulated market, although not necessarily the only participants, would be employers and insurance companies. The employers would buy up the preaccident bargaining chips of their employees, who are all potential tort victims. The only reason for them to want to buy their employees' tort rights against third parties would be to resell them to potential injurers and their insurance companies. Such a cash sale would effectively leave tort claims "presettled." (Since employers would probably not want to wind up with leftover claims, which would be inconvenient to press in court, their purchases from employees might be made contingent on resale. In this sense, the employer would be, in effect, the employee's agent.)

If a victim were certain to be adequately insured, courts would have no reason to invalidate bargains in which he waived his tort rights, any more than other kinds of bargains that are routinely enforced. The major "regulation" of this market, therefore, would be making the sale of unmatured tort claims conditional on the availability of other adequate compensation arrangements of a sort described below. To facilitate such exchanges, it must be clear that courts will enforce such contracts, so judicial cooperation is necessary if the market is to get off the ground.

Here is how this market might work. An employer could offer its employees a choice between two options. One plan would leave tort rights in place as they are, along with whatever health and income-replacement insurance the employer provides. In the other option, the employee would cede unmatured tort claims to the employer in exchange for either cash (in the form of higher wages or lower employee contributions to the benefit plan) or benefits, such as a higher income-replacement rate, lower health-plan deductibles or coinsurance obligations, and added health-care benefits like outpatient mental-health treatment and dental care. Details of the two plans would be worked out, as usual, by unions or other employee representatives.

Why involve employers in such a market? Why not have consumers negotiate directly with insurers? There are several reasons. First, employers have more bargaining power with liability insurers than individual employees would. Second, employers could dispose of the bargaining chips in mass quantities, and so more efficiently. Not only could employers get more money for those rights than employees acting alone, but they might also be better able to demand that insurers police the safety efforts of the potential injurers who are their clients. Third, employers already provide packages of health and disability benefits, and augmenting those benefits is the most sensible way to compensate employees for waiving their rights to sue. By integrating the added benefits into existing packages, employers could better approximate the kind of coverage their particular workers preferred.

The interests of employees would be protected in this system in several ways. First, the contemplated transfer of tort rights would be voluntary; courts would disallow arrangements in which the waiver of future tort claims against third parties is a requisite of employment. Second, the employers' bargaining power, together with potential competition in the market for tort rights, should help ensure that employees' tort rights fetch their full market value when sold. For example, if the injurer's insurance company refused to offer full value for the tort rights of potential victims, some other buyer (perhaps a law firm) might purchase them instead and press the claims as they mature. Indeed, the fear that tort rights will be snapped up at auction by successful plaintiffs' lawyers should help convince insurers to bid generously for the rights. In addition, employers would be motivated by self-interest to make the plan work well. They would be allowed to take a profit by selling the rights for more than they had invested. The wish to maximize the number of employees who chose the sale option, as well as ordinary concern for employee satisfaction, would give employers reason to make sure workers wind up better off. Finally, employers are themselves defendants in tort cases involving other companies' employees. By participating in the grand scheme, they could foresee a reduction in the cost of their own liability-insurance premiums and the burdens of defending against tort claims. Their own insurers would be presettling their tort liability by buying up other people's unmatured tort claims.

The advantage to liability-insurance companies would be considerable. By presettling claims, insurers would reduce the uncertainty of their obligations and save the transaction costs that they would have incurred from handling claims. Both factors would give liability insurers an incentive to buy up as many claims as they could.

Injurers would still pay for the harm they cause, and, as they do when they buy insurance today, they would continue to pay in advance. But they would pay less under the proposed market plan because of the savings in transactions costs.

Handling Less Serious Injuries

Personal-injury claimants can be classified into two groups — the 10 percent with serious injuries and the other 90 percent. Serious injuries may be defined as those in which the victim is disabled for more than six months, permanently impaired, or seriously disfigured.[2]

It seems that if people could be assured reasonable protection against the income loss and medical expenses caused by these less serious injuries, most of them would be prepared to dispose fully of their right to bring a tort suit for such harm. By selling their tort rights in such cases, people would mainly be surrendering compensation for pain and suffering. There are several reasons people would likely be willing to trade away such rights. First, people do not ordinarily seek to buy direct "first-party" insurance against pain and suffering from nonserious injuries. Second, while this suffering is very real for a time, it is generally a distant memory by the time compensation arrives. Third, much of what is presently paid ends up not in the victim's hands but in those of his lawyer. Under the proposed arrangements, money for a lawyer will no longer be necessary. Fourth, the right to claim such losses under today's tort system generates many nuisance claims and exaggerated charges that are ultimately demoralizing and costly to those who file genuine claims and ultimately demeaning to those who do not.

In less serious injury cases, moreover, there should be little trouble showing that the employee's insurance is adequate to cover the health and disability loss, the precondition for upholding tort claim sale. A rule of thumb might be to require that a victim have substantially complete coverage for at least six months of out-of-pocket losses. Were the details simply left to common-law development, courts might inquire as to what employee-benefit and insurance-company experts agreed were quality benefit packages and uphold tort-rights sales when the victim had at least that level of coverage. Legislative or regulatory participation in the definition of "adequate insurance" could, of course, lead to quicker agreement on the precise minimum.

Plans with reasonable deductibles and coinsurance provisions would presumably be allowed. For income replacement, these plans might mean, for example, that employees could be asked to use their accumulated sick leave for the first week of their disability; that wages (after taxes) need be replaced only at, say, an 85 percent basis; and that wages need be replaced up to only, say, twice the state average. For medical expenses, employees could be responsible for a $100 deductible or 10 to 20 percent coinsurance payments. In short, as long as employees receive high quality first-party protection, courts would be justified in validating the sale of their tort rights, even if some small portion of those out-of-pocket losses, which would have been compensated by tort-damages law, is left uncovered.

In fact, most employers (especially those of large and medium size) already guarantee their employees medical coverage for less serious injuries and, similarly, already have well-developed sick-leave and temporary-disability insurance plans. In such cases, employees do not need to be brought up to a higher standard of

protection as part of their payment for waiving their tort rights. Rather, they might be free to take more direct compensation by lowered employee contributions to the employee-benefit package, outright cash payments (possibly as higher wages), or new benefits beyond the legal minimum.

Once the market is functioning, employers should not have too much trouble reselling employee tort rights for less serious injuries. The appropriate buyers in the case of medical-malpractice claims would be easy to identify, since in any single locale there are typically few active liability insurers of doctors and hospitals. Indeed, where employees belong to health maintenance organizations through their workplace, the employer already has a direct contractual arrangement with potential medical-malpractice defendants. In such situations the health-care provider could, in effect, reduce the premiums it charged the employer for its health plan in exchange for waivers of tort liability from the participating employees. Other exchanges might create a new class of intermediaries who, for example, might form enterprises to purchase employees' unmatured tort claims for resale to manufacturers or, more likely, their insurers.

In the case of automobile accidents, employers might also deal directly with the liability-insurance carriers on behalf of their employees. Once again, in most locales relatively few automobile-liability insurers dominate the market. Another possibility would be for employees with adequate work-based protection to deal directly with their own automobile-insurance company. They could choose between an insurance policy that left their own tort rights intact and a policy that charged less in exchange for transferring to their own insurer their tort rights in less serious automobile accidents. For the latter policy, the insurer would in turn presettle future claims against other drivers' insurance companies. Once the system was set in motion, two insurance companies could trade the future claims of their policyholders against each other. By this method, private agreement could largely dispense with the tort system for less serious automobile accidents. For victims of such accidents a no-fault automobile-insurance scheme would, in effect, be put into place by private contract.

Some people may want to have their first-party protection for accidents attached to their automobile-insurance policy rather than their employment package. This seems an unlikely choice for anyone covered by adequate employee benefits. Hence, one would expect this to be a residual route to be taken primarily by those who do not have either adequate employee benefits or government benefits (such as Medicare) but who do own automobiles.

Serious Injuries

Separate consideration is required for the remaining 10 percent of injuries defined as serious. A traditional, otherwise generous employee-benefit package may not provide enough first-party protection for injuries that seriously disfigure, impair, or disable someone for more than six months. Therefore, a new and higher level of "adequate insurance" would be needed before sales of tort rights would be enforceable. There are two issues here. First, when employees suffer long-term disabilities, their health- and disability-insurance plans may not provide a high degree of out-of-pocket protection. Many employers that provide income protection against short-term employee disability do not provide protection against long-term disability. Furthermore, the person with a serious disability may stop working and thereby cease to participate in the health plan routinely provided to continuing employees. Without such protection, courts might not see it as sensible for workers to waive tort compensation and might refuse to uphold the sale of unmatured tort claims.

It is less clear, however, whether or not most employers would be willing to make the necessary insurance benefits available to their employees. Some currently do offer, or make available for purchase, both long-term disability income protection and continued access to the enterprise's group health plan for disabled former employees; they could thus satisfy the "adequate insurance" condition with little or no change in their existing program. These employers might be likely candidates to buy and resell the tort claims of employees for serious, as well as transient, injuries. An alternative arrangement might develop, however. While employers might be the ones to buy up less serious injury claims from their employees, insurers themselves (possibly working through unions or other employee groups) might organize efforts to buy up prospective serious-injury tort claims.

The second issue raises another complication. In serious-injury cases, many more people might insist on compensation that goes beyond out-of-pocket expenses before consenting to sell their tort rights. Therefore, at least at the outset, reasonable coverage for serious injury itself should probably be part of the "adequate insurance" definition for serious-injury cases. People would probably not, however, insist on an individualized, after-the-fact benefit determination of the kind that tort law now makes. Most would likely be content with some predictable, predetermined, generous but not extravagant schedule of benefits. One place to look for a comparison is in the accidental death and dismemberment policies that many employers sell or provide to their employees, which provide so much for loss of a finger, so much for loss of a hand, and the like. Another place to look is to workers' compensation; most states insist that benefits, in cases of permanent or partial disability, be provided for the impairment itself. In general, therefore, an insurance policy (or other arrangement) with payoff schedules similar to these examples ought to be deemed adequate to support the sale of unmatured serious tort claims.

Will Markets in Tort Claims Actually Work?

Once functioning, the market for unmatured tort claims could be even broader, extending perhaps to such torts as defamation or invasion of privacy. On the other hand, the market might be less active than its supporters may hope. At least in

the beginning, many people might be reluctant to presell their tort rights or might wish to sell only the rights to relatively minor claims.

A full market in unmatured tort claims for serious injuries might be considerably slower to take off. Meanwhile, people might begin to sell portions of their stake in such cases as part of the same transaction in which they sell rights concerning less serious injuries. For example, people might agree not to claim damages for losses covered by other sources of payment, not to seek pain and suffering damages of more than $150,000, and to waive their jury trial rights with respect to punitive damages. Since giving up these rights would enhance the worth of what employees were otherwise selling, they should realize more value for them. But unlike the complete sale of unmatured tort claims for serious injuries, the sale of such partial rights would not have to be linked to any guaranteed level of first-party protection. For even after such a sale, seriously injured victims could still sue in tort for uncompensated income losses and out-of-pocket expenses and for substantial general damages; judges would reasonably consider this to be adequate protection. At the same time, the ability to buy up partial claims, especially of the most unpredictable portions of liability, could appeal to liability insurers.

This essay has thus far concentrated on personal injury problems, but property damage is plainly another area ready for a market in unmatured tort rights. That market might operate best, however, through enterprises that now provide homeowners' and automobile insurance. Individually sold insurance policies are currently the main source of property-damage protection, unlike protection against physical injury, which is covered mainly by employee-benefit plans and social insurance. Such markets might operate similarly to the market previously described.

The goal of this essay is not to anticipate fully this imagined market's operation but to suggest how it might improve on the current allocation of tort rights. If officials were convinced of the case for such improvement, they might overcome their hostility to the waiver of tort claims and instead direct their energies to determining what level of insurance should be required of those who sell such claims. Although various definitions of "adequate insurance" have been suggested, many subtleties might eventually be taken into account in setting such standards, whether through legislative, administrative, or judicial decisions.

Another matter deserving brief mention is the quality of information that potential victims must be given about the tort rights that they sell. It is widely thought that consumers today do not have enough information to evaluate limitations on liability and waivers of tort rights that might appear in standard-form contracts for the purchase of consumer goods. The failure of the market to inform consumers is so severe that courts quite rightly will not generally enforce such limits. The proposals described here would not involve allowing manufacturers to include such waivers in most consumer contracts, since consumers could not be expected, in their direct dealings with manufacturers, to be made aware of the value of what they are giving up. Such contracts would still not generally be enforceable. A market organized through employers, however, would largely avoid these problems. Employees have a much better chance to look over a single plan for injury coverage rationally, the better to understand what they are gaining and forfeiting by the sale of their tort claims.

Liability insurers might find it appealing to band together to buy claims collectively and save on negotiating costs. If the market develops into what economists call a monopsony – one powerful buyer, many weak sellers – antitrust principles would be invoked to restrain market power. In any event, smaller insurers may find that they can compete only by pooling their buying efforts; such group activity would presumably be permitted.

Another problem involves "moral hazard" – the tendency of people to change their behavior when they are relieved of liability. At least two issues of moral hazard arise in the sort of market proposed here. First, after an injury victim sells his tort claims, he no longer has an incentive to participate in pressing them. The buyer of an employee's tort rights would not find them worth much if the employee was unwilling to help the buyer press a matured claim in court. This kind of problem, however, will not scuttle the proposal, because there are good ways to obtain cooperation were it needed. Buyers could come up with financial inducements or contractual clauses that would lead injury victims to participate in suits brought to enforce rights they have sold. Besides, when claims are finally sold to liability insurers, there is no longer the need for a lawsuit for the victim to assist.

A more serious problem could be that the presettlement of tort claims would erode incentives for injurers to take precautions. The reduction of precautionary effort is, of course, a cost of virtually any insurance system. There are a number of devices that counter this tendency, including coinsurance, deductibles, and experience rating. All of these devices would be available in the market proposed here. The value of an unmatured tort claim depends both on the probability that an accident will happen and on its severity. If a manufacturer relaxed its quality control in response to the presettlement of its tort claims so that more hazardous products found their way into the marketplace, it would soon find that the value of unmatured tort claims against it had increased. When those claims were presettled, insurers would have to pay more and in turn would demand higher premiums from the manufacturer in future years. This feedback mechanism would give a manufacturer a continuing incentive to maintain quality control.

A brisk market depends on the parties' ability to determine the value of the rights that are being exchanged. What should the insurers be willing to pay to presettle tort claims? And how should they allocate those costs to their insureds? Determining how much a large group of employees could gain from matured pressed tort claims would enable an employer to establish what insurers would have to pay to avoid that liability. Presumably, statistics and the market would combine to allocate that burden among the insurers and defendants. Once this market began, and as long as a significant part of the tort system were still functioning, there would be adequate information available on the likelihood and worth of any large group of employees' tort claims.

Since some people are more likely than others to be tort victims, their rights

are worth more, in principle. Yet highly individualized compensation between employers and employees is unlikely. Faced with standardized alternatives, the employees whose tort rights are most valuable will be the least inclined to sell them. Although eager sellers have less valuable rights to sell, and the buyer cannot set prices individually, the problem of adverse selection seems no more severe here than in other insurance markets.

Precedents

The idea of selling unmatured tort claims through employers to liability insurers may seem strange, but the notion of trading in tort rights has been advanced in many creative ways in recent years.

Most prominently, over the past fifteen years Professor Jeffrey O'Connell has proposed a great variety of elective no-fault schemes in which victims would trade their tort rights for a package of no-fault benefits that covered their out-of-pocket losses. Although some of O'Connell's proposals focus on deals that might be made *after* an accident,[3] others foresee exchanges beforehand. Among his proposals, for example, is one for a series of direct, voluntary, preaccident exchanges between potential victims and potential injurers, such as product sellers and physicians; in return for agreeing in advance not to sue, the victim would be entitled to specified no-fault compensation from the injurer if he is later hurt in ways covered by the contract.[4] The most important difference between this idea and the proposal of this essay is that the proposal here does not call for postaccident payment from injurer to victim.

Another O'Connell proposal calls for potential victims to sell broad tort rights to first-party insurers in exchange for a guarantee of income and medical-expense protection that would cover all accidents.[5] Again, there is an important difference: in the O'Connell plan, on the occasion of a tort, the first-party insurer would file a claim against the injurer or his insurer. Even if these claims were expeditiously settled among insurers, the settlements would have to be reached after accidents occur, thereby reviving the same difficult individualized determinations of fault, cause, and damages that plague the current system. Moreover, whereas the O'Connell plan emphasizes private first-party insurers as the buyers of tort rights and the providers of compensation, the proposal of this essay instead foresees employers' performing those functions. Of course, employers might well call on the products and services of first-party insurers to put together and underwrite employee-benefit packages.

In one specific area, O'Connell has made a proposal that is even closer to the one advanced here. He has envisioned the preaccident transfer of work-related products-liability claims from workers to product manufacturers, in a transaction that involves employers.[6] His basic idea here is that the manufacturers can pay for the unmatured tort claims with lower prices for their products, the benefit of which can be passed on, at least in part, to the employees. O'Connell assumes that, since employers already enjoy workers' compensation protection for such accidents, many of them would be willing to make this exchange. And where existing workers' compensation was considered inadequate, the employees could bargain for stronger across-the-board, employer-provided, workers' compensation benefits. This idea is designed only to cover job-related product injuries, not personal injuries generally.

The proposal outlined here goes farther in the direction taken by O'Connell, with a correspondingly more sweeping potential to end the need for postaccident wrangling between the side of the injurer (including his insurer) and the side of the victim (including his benefit provider).

Implementation Problems

Judges who find the arguments of this essay persuasive could, acting on their own, fashion a doctrine under which adequate insurance against a loss would defeat the presumption against enforcing bargains to sell unmatured tort claims. This route, however, would be much slower than legislation. In most states the courts would have to wait for an attempted sale of tort rights before passing on the idea. The haze of legal uncertainty, however, may prevent a market for tort claims from ever getting off the ground. A clear signal from the legislature, by contrast, might induce a quick response from markets. Furthermore, legislation can specify at the outset what will constitute "adequate insurance" — or at least establish an administrative agency that would adopt regulations to that end.

One difficulty with such legislation is that courts may still, out of misplaced sympathy for accident victims, allow them to recover in spite of a previous sale of tort claims. But there is reason to hope this would not happen. A prime source of sympathy, after all, is the fear that victims will go uncompensated. Under current rules of evidence, the knowledge that a victim has access to "collateral sources" of compensation is generally kept out of the courtroom. Yet under the proposal to market tort claims, since the courts would have to decide the adequacy of insurance, evidence about collateral sources would not only be admissible but would be the focus of the trial.

Serious political problems may interfere with such a legislative initiative. The coalition of insurers and manufacturers might favor the proposal, but they would have to turn their attention away from their current agenda of simply trying to roll back victim rights. Many of them may feel sufficiently optimistic about the prospects of outright victory in that roll-back campaign to dampen their enthusiasm for a plan that would merely provide more efficient resolution of existing claims. Moreover, even if most businesses and professional groups found the proposal an improvement on the current system, some, especially those that now have poor employee benefits, might fear that the plan would put new upward pressures on their labor costs. Finally, the interests of the defense bar might not coincide with those of the firms they represent.

Potential accident victims are not well organized politically. The plaintiffs' bar, which purports to represent them, will naturally be the chief losers in the proposed market for tort claims and can be expected to attack it in any public debate.

Consumer and labor interests might be receptive to the proposal, but they would have to forsake their current coalition with the plaintiffs' bar. In all, substantial political obstacles must be overcome before legislation could be passed to facilitate the proposal outlined here.

Conclusion

The idea of an employer-mediated regulated market in unmatured tort claims is worth consideration on its own merits, but it can also shed light on what society wants its injury-compensation system to look like. Such a market, if it worked as outlined above, would come to resemble a regime of universal first-party benefits structured to replace all or part of the tort system. If a consensus were to emerge about where an efficient tort-claims market would lead, one might be able to achieve that result directly through legislative action — leaving both injured and injurers as well off substantively as they would be in an efficiently functioning market but with even more of a savings in transactions costs.[7]

Notes

1. See, e.g., *Tunkl* v. *Regents of University of California*, 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441 (1963) and *Henrioulle* v. *Marin Ventures, Inc.* 20 Cal. 3d 512, 143 Cal. Rptr. 247, 573 P.2d 465 (1978).

2. A similar definition of "less serious injuries" is used, for example, in Michigan's automobile no-fault scheme. When combined with the first-party benefits under that plan, it has removed an estimated 89 percent of bodily injury claims from the tort system. See James Hammit and John Rolph, "Limiting Liability for Automobile Accidents: Are No-Fault Tort Thresholds Effective?," *Law and Policy* 7 (1985): 1, 7. That is the basis of the 90 percent and 10 percent figures in the text.

3. See, e.g., Jeffrey O'Connell, "A 'Neo No-Fault' Contract in Lieu of Tort: Preaccident Guarantees of Post Accident Settlement Offers," *California Law Review* 73 (May 1985): 898–916.

4. See, e.g., O'Connell, "Expanding No-fault Beyond Auto Insurance: Some Proposals," *Virginia Law Review* 59 (May 1973): 749–829.

5. See O'Connell, "Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Claims," *Washington University Law Quarterly* 4 (Fall 1978): 693–712; O'Connell and Janet Beck, "Overcoming Legal Barriers to the Transfer of Third-Party Tort Claims as a Means of Financing First-Party No-Fault Insurance," *Washington University Law Quarterly* 58: 1 (1979): 55–83; and O'Connell and Craig Brown, "A Canadian Proposal for No-Fault Benefits Financed by Assignment of Tort Rights," *University of Toronto Law Journal* 33 (1983): 434–59. See also O'Connell, "Transferring Injured Victims' Tort Rights to No-Fault Insurers: New Sole Remedy Approaches to Cure Liability Insurance Ills," *University of Illinois Law Forum* 3 (1977): 749–809.

6. See O'Connell, "Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and the Employees and Suppliers," *Insurance Law Journal* no. 644 (September 1976): 530–55; idem., "Transferring Injured Victims' Tort Rights to No-Fault Insurers: New Sole Remedy Approaches to Cure Liability Insurance Ills," *University of Illinois Law Forum* 3 (1977): 749–809; and idem., "The Interlocking Death and Rebirth of Contract and Tort," *Michigan Law Review* 75 (March 1977): 659–85. See also Clark Havighurst, "Private Reform of Tort-Law Dogma: Market Opportunities and Legal Obstacles," *Law and Contemporary Problems* 49 (Spring 1986): 143–72.

7. For a proposed legislative reform of tort law that would leave accident victims in largely the same position they would be in if the market proposed in this essay were really in operation, see Stephen D. Sugarman, "Serious Tort Law Reform," *San Diego Law Review* 24 (1987): 795–849; and "Taking Advantage of the Tort Law Crisis," *Ohio State Law Journal* 48 (1987): 329–63.