

**RIGHT AND WRONG WAYS OF DOING AWAY WITH  
COMMERCIAL AIR CRASH LITIGATION:  
PROFESSOR CHALK'S "MARKET  
INSURANCE PLAN" AND OTHER NO-  
FAULT FOLLIES**

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I. THE PROBLEM

**M**ANY COMMENTATORS have been justifiably critical of the way tort law operates in cases of domestic commercial airline crashes.<sup>1</sup> The indictment of the existing private litigation regime includes the following charges. The administrative costs that tort law generates in disposing of such claims are indecently great.<sup>2</sup> Victims

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<sup>1</sup> See, e.g., Note, *Domestic Commercial Aircraft Tort Litigation: A Proposal for Absolute Liability of the Carriers*, 23 STAN. L. REV. 569, 571 (1971) [hereinafter Note, *A Proposal for Absolute Liability*]. For criticisms of the tort system generally, most of which are applicable to the problem of air crashes, see, e.g., Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985); J. O'CONNELL, *ENDING INSULT TO INJURY—NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975).

<sup>2</sup> See Martin, *The Manufacturer's View of "No-Fault,"* 41 J. AIR L. & COM. 223, 234 (1974). "Most calculations show that the aviation accident victims, their estates, and heirs ultimately receive no more than fifteen percent to twenty percent of the total amount spent in insuring, defending, and paying claims and litigation." *Id.* An earlier inquiry revealed that plaintiffs received forty-seven cents of each dollar paid by the airline for insurance premiums, which would be reduced to approximately thirty cents on the dollar once their attorneys were paid. See Note, *A Proposal for Absolute Liability*, *supra* note 1, at 588-89. This latter estimate, however, does not include defendants' expenses in addition to their cost of insurance, including most importantly, their expenses of cooperation in mounting a defense. Moreover, it is not clear that either estimate considers the public costs attributable to handling air crash litigation.

In explaining why the benefit proportion of total costs is so low, some critics

and their heirs often wait intolerably long periods of time for compensation.<sup>3</sup> When eventually paid, this compensation varies considerably due to factors that many commentators believe should be irrelevant, such as the crash location, the victims' place of residence, the heirs' ability to endure the delay, or the talent of the claimant's lawyer.<sup>4</sup> Regarding such advocates, many often find revolting the sight (or report) of aggressive plaintiff lawyers setting up hospitality suites in major hotels located near the crash site in hope of garnering clients from among the grieving heirs.<sup>5</sup> Moreover, many find it both unseemly and inappropriately regressive that the families of deceased passengers who had been sitting next to each other and had paid the same amount for their tickets receive entirely different tort awards because of the decedents' different earning levels.<sup>6</sup> Furthermore, the

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focus on the fees the lawyers obtain. Others point to the high costs of investigation and expert witnesses brought about by the difficulty of proving one's case in air crash settings. Yet others note that costs cascade because of the tendency of commercial air cases to be marked by multiple defendants and cross complaints. The routine marketing and administrative costs associated with liability insurance are a factor as well.

<sup>3</sup> See Chalk, *A New Proposal for the Reform of Commercial Air Crash Litigation*, 50 J. AIR L. & COM. 219, 241-42 (1985).

<sup>4</sup> See Chalk, *supra* note 3, at 243-44; Kennelly, *Aviation—The Need for Uniform Legislation*, 48 J. AIR L. & COM. 613, 613-15 (1983) [hereinafter *Need for Uniform Legislation*]; Kennelly, *Litigation Implications of the Chicago O'Hare Airport Crash of American Airlines Flight 191*, 15 J. MAR. L. REV. 273, 274-77 (1982).

Because of the "collateral source" rule, many, but not all, air crash plaintiffs recover in tort for losses already compensated by other sources such as health insurance, disability insurance, life insurance, Social Security, etc. See generally Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966) (discussing methods of loss allocation among the injurer, the injured, and his collateral benefactor).

<sup>5</sup> See, e.g., Dallas Morning News, Aug. 8, 1985, at A1, col. 3 (San Francisco attorney, Melvin Belli, "set up shop" in a Dallas hotel two days after the crash of Delta Air Lines Flight 191). For further comments on the solicitation of plaintiffs in air crash cases and other alleged unsavory practices by lawyers in this field, see Martin, *supra* note 2, at 223-31. Some advocates of reform are highly offended by courtroom battles in which the parties dispute how much pain and suffering the air crash victim endured before his death. See Schwartz, *Professor O'Connell's Method for Ending Insult to Injury: Can It Solve the Air Crash Litigation Dilemma*, 41 J. AIR L. & COM. 199, 202 (1975).

<sup>6</sup> First and business class passengers typically pay more for their tickets than do economy or coach class passengers and, as a class, probably have higher earnings

substantive law in this area is in disarray. Courts typically require proof of negligence before air carriers are found liable but hold airplane manufacturers strictly liable if the crash arose due to a defect in the plane.<sup>7</sup> In instances when neither a defect nor negligence can be shown, as in cases of an unpreventable terrorist attack or unexpected bad weather, the tort system is not designed to provide any compensation from the airline industry. Yet, the victims and their heirs in such situations are in as much need as are those who have a tort remedy.<sup>8</sup> In short, I have little doubt that the flying public is paying much more for the tort system in the price of air travel than it receives in benefits from the tort law.<sup>9</sup> The problem, nonetheless, is

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that would be lost in case of a fatal crash. Nonetheless, considerable variation in income would exist within any group of passengers paying the same fare.

<sup>7</sup> Compare RESTATEMENT (SECOND) OF TORTS § 402A (1977) (imposing strict liability on manufacturers for product defects) with RESTATEMENT (SECOND) OF TORTS § 520A, comment e (1977) (limiting the strict liability of air carriers to ground damage). Sometimes passenger victims are able to rely upon *res ipsa loquitur* in negligence cases. In addition, proving a plane defective in a strict liability case is often very difficult. Thus, these factors narrow the differences in legal treatment between the two types of defendants. See Schwartz, *supra* note 5, at 200.

<sup>8</sup> Twenty years ago it was estimated that 7% of domestic commercial air crash claimants were failing to recover in tort. See Note, *A Proposal for Absolute Liability*, *supra* note 1, at 573 (relying upon International Civil Aviation (ICAO), Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and Hague Protocol, ICAO Doc. 8584-LC/154-2, at 124 (1966)). This 7% figure is probably misleadingly low for that era since the estimate did not consider the victims or their heirs who never filed a claim. Nor does the percentage take account of claimants who may have recovered dramatically discounted awards because of the weakness of their legal claim; such people are treated as successful claimants. Moreover, many cases remained pending at the time the report was compiled, raising the possibility that a higher proportion of those claimants eventually recovered nothing. In most recent tort cases involving the major airlines, either the air carriers or the manufacturers ultimately admit legal responsibility for the crash, even if they formally deny their negligence or the defectiveness of their airplane and fight among themselves over the funding of payouts to the claimants. For some confirmation of this position, see *Need for Uniform Legislation*, *supra* note 4, at 633. But even if the liability issue rarely goes to a jury, this fact does not prevent huge expenditures for discovery as the opposing lawyers jockey for the best negotiating positions on which to base the settlements.

<sup>9</sup> See generally Kennedy, *Accidents in Commercial Air Transportation—A Proposed Reform of the Liability and Compensation System*, 41 J. AIR L. & COM. 247, 248 (1975) [hereinafter *Accidents in Commercial Air Transportation*] (discussing shortfalls of the present tort system). This Article concerns personal injury and death but does not consider the problem of loss allocation for damage to or destruction of the air-

trying to agree upon a replacement system.<sup>10</sup>

## II. NO-FAULT SOLUTIONS?

### A. The "Typical" No-Fault Plan

One alternative to the existing tort system for domestic flights is the system which governs international flights. Under the international system established by treaty, a ceiling has been placed on the amount of recoverable tort damages in exchange for the imposition of strict liability on the air carrier.<sup>11</sup> This can be viewed as a type of a no-fault system since air carrier negligence is no longer relevant.

This solution differs from automobile no-fault plans, for example, in that auto accident victims assert claims on

craft or other property. Plainly, the loss of the airplane involves an enormous sum and contract law would seem to provide a suitable basis for resolving whether the carrier or manufacturers (and their insurers) should pay.

<sup>10</sup> I do not consider here the many proposals that are aimed at shoring up the present system through procedural reforms. The bolder of such reforms advocate a federal statute that would subject all domestic commercial air crash tort suits to federal jurisdiction, consolidate the claims of all victims of the same crash, and apply a single law to such cases. Milder versions look to the adoption of a uniform state law by many of the key states in air crash litigation. For a discussion of proposals of this sort, see Note, *Aviation Tort Liability: The Need for A Comprehensive Federal Aviation Liability Act*, 15 J. MAR. L. REV. 177, 184-86 (1982).

<sup>11</sup> The Warsaw Convention, as modified by the Hague Protocol and the Montreal Interim Agreement, provides that carriers are virtually absolutely liable for injuries or deaths to their passengers on international flights. In return, the tort claims of victims or their heirs are limited to \$75,000. See Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483, 483-90 (1973). See also, Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. app. § 1502 (1982); Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Sept. 28, 1955, 478 U.N.T.S. 371; Civil Aeronautics Board, Agreement 18900, Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, approved by Civil Aeronautics Board, Order No. E-23680 (May 13, 1966), reprinted in 49 U.S.C. app. § 1502 (1982). In recent years United States courts have allowed various plaintiffs to avoid that ceiling. See, e.g., Note, *The Warsaw Convention and Montreal Agreement Permit the Award of Pre-Judgment and Post-Judgment Interest in Addition to the \$75,000 Liability Limitation*, 50 J. AIR L. & COM. 375, 381 (1985). See generally DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell?*, 49 J. AIR L. & COM. 71, 76-81 (1983) (criticizing the Warsaw Convention's limitation of liability).

a first party basis from their own insurer,<sup>12</sup> whereas international air crash victims make claims against the airline or its insurer. The source of the insurance, however, is hardly critical. The international air crash situation is analagous to a workers' compensation plan. Under that no-fault scheme the victim also claims, not from his own insurance, but rather from his employer or its insurer.<sup>13</sup>

More important, then, are the differences between the award structure for international air crashes and other no-fault plans. The international system retains the tort system's basis for recovery, including pain and suffering damages, and simply caps the plaintiff's total award.<sup>14</sup> Although there is often no aggregate ceiling,<sup>15</sup> under workers' compensation, by contrast, wages are only partially replaced and tort-like compensation is not paid for pain and suffering.<sup>16</sup> In further contrast, no-fault auto insurance, as enacted in various states, both limits coverage to pecuniary losses and imposes a ceiling on recovery.<sup>17</sup> But, unlike workers' compensation, no-fault auto insurance plans additionally permit the victim to pursue his claim in tort;<sup>18</sup> and, unlike international air crash claims,

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<sup>12</sup> See generally O'Connell & Beck, *An Update of the Surveys on the Operation of No-Fault Auto Laws*, 674 INS. L.J. 129 (1979) (discussing operation of no-fault automobile laws).

<sup>13</sup> See generally J. CHELIUS, *WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION* 17-28 (1977).

<sup>14</sup> Under American law general damages of significant amounts are awarded, even in death cases. Although jurisdictions typically disallow recovery for "grief," some jurisdictions may award large sums for the heirs' loss of companionship and services and, when the facts plausibly justify the claim, the victim's severe pain and suffering before his or her death. See *Need for Uniform Legislation*, *supra* note 4, at 613-14.

<sup>15</sup> A number of states, however, limit death benefits to a maximum. See 2, 4 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION*, Ch. XI, § 64.00 & app. B, table 16 (1986).

<sup>16</sup> In many states, however, compensation paid for "impairments" in partial permanent disability cases seems to contain a pain and suffering component and is not limited solely to loss of earning capacity. See *id.* at Ch. X §§ 57.00, 58.00.

<sup>17</sup> See O'Connell & Beck, *supra* note 12, at 137.

<sup>18</sup> *Id.* Originally a compensation claim was more clearly the worker's sole remedy. Lately, however, several courts have carved out exceptions to the exclusive remedy rule, and now a not insignificant proportion of job accidents result in both workers' compensation and tort claims. See generally Note, *Exceptions to the Exclusive*

such suits are not subject to a ceiling. Thus, victims of negligent driving may recover for both *serious* pain and suffering and any other pecuniary losses that remain uncompensated by the no-fault auto insurance system.<sup>19</sup>

Clearly, it is impossible to say what is “the” no-fault alternative to tort law. Nonetheless, I do think it fair to say that most no-fault advocates would not choose the international air crash solution if asked to design a no-fault plan for domestic air crashes. The plan more likely would be one in which, *in exchange for his tort claim, the air passenger or his heirs would be entitled to recover from the carrier, regardless of fault and without limit, all or at least a generous proportion of income losses and all out-of-pocket expenses caused by the crash. Nothing would be paid for pain and suffering or other general damages.*<sup>20</sup> I will call this the “Typical” No-Fault Plan. This discussion, however, by no means exhausts the possibilities for eliminating consideration of both fault and tort law’s approach to damages.

### B. *The Standard Insurance Plan*

A different no-fault idea would require carriers to provide, along with every airline ticket, a standardized

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*Remedy Requirements of Workers’ Compensation Statutes*, 96 HARV. L. REV. 1641, 1648-53 (1983).

<sup>19</sup> See O’Connell & Beck, *supra* note 12, at 140-41. No-fault auto insurance jurisdictions typically bar tort awards for relatively small amounts of pain and suffering. As predicted by no-fault advocates, these thresholds seem to have led to a large drop in tort claims. See Hammitt & Rolph, *Limiting Liability for Automobile Accidents: Are No-Fault Tort Thresholds Effective?*, 7 LAW & POL’Y 493, 495, 504 (1985).

<sup>20</sup> See, e.g., *Need for Uniform Legislation*, *supra* note 4, at 633-36 (critical discussion of the Air Travel Protection Act). Under the no-fault plan proposed by William F. Kennedy, pain and suffering awards would be available only in injury cases involving permanent disability or disfigurement. *Accidents in Commercial Air Transportation*, *supra* note 9, at 252. Applying Professor O’Connell’s proposals for elective no-fault insurance to the air crash setting, air carriers seemingly would be exempt from tort suits if, in advance, they agreed to provide all passengers and their heirs the type of pecuniary damages envisioned by the proposal discussed in the text. See O’CONNELL, *supra* note 1, at 97. For examples of other no-fault proposals not otherwise noted here, see, e.g., Hardman, *Aircraft Passenger Accident Law: A Reappraisal*, 465 INS. L.J. 688 (1961); Graubart, *Liability for Aircraft Crashes*, 31 PA. B.A.Q. 11 (1959); Sweeney, *Is Special Aviation Liability Legislation Essential?*, (pts. 1 & 2), 19 J. AIR L. & COM. 166, 317 (1952).

amount of accidental death and injury insurance that would replace the victim's tort claim. I call this the Standard Insurance Plan. For example, each passenger might be given \$200,000 in insurance coverage for the risk of death. Since air crashes that cause any serious injuries often result in death,<sup>21</sup> this accidental death insurance would be the key benefit. Nonetheless, this plan also would provide ordinary disability and/or accident insurance protection for those injured but not killed—such as so many dollars a week for the duration of one's disability and/or so many dollars in a lump sum for listed dismemberments and other impairments.<sup>22</sup>

The Standard Insurance Plan would be an elegantly simple no fault scheme with many attractive features. Crash victims or their heirs could obtain prompt payment of a fairly substantial sum. The plan would be cheap to administer and virtually lawyer-free, at least in contrast to the tort system. Moreover, under this no-fault proposal, unlike today's system, each passenger would receive equal treatment.

### C. Chalk's "Market Insurance Plan"

Professor Andrew Chalk recently has proposed a quite different scheme. He recommends replacing existing tort litigation for commercial air crashes with what he calls the "Market Insurance Plan."<sup>23</sup> Although his proposal is irritatingly vague, the basic idea is that instead of suits for

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<sup>21</sup> Data from twenty years ago showed that fatalities accounted for more than 78% of the claims received by the airlines and for more than 89% of the amounts paid in damages. Note, *A Proposal for Absolute Liability*, *supra* note 1, at n.54. See also National Transportation Safety Board, Annual Review of Aircraft Accident Data (1981) (showing that approximately 58% of those involved in large air carrier accidents were either killed or seriously injured, while 35% suffered no injury and 7% suffered only minor injuries).

<sup>22</sup> In 1975 Congressman Dale Milford proposed a no-fault scheme for commercial air crashes that would provide a uniform (unspecified) amount to all death victims but would award injured victims amounts up to that ceiling based upon tort damage rules. Milford, *A No-Fault Aviation Insurance Plan*, 41 J. AIR L. & COM. 211, 216 (1975). This idea lies somewhere between the Warsaw Convention's solution for international air travel and the Standard Insurance Plan.

<sup>23</sup> Chalk, *supra* note 3, at 220.

damages, air crash victims and their survivors would recover from first party insurance, if any, that passengers have bought to cover such accidents.<sup>24</sup> In short, instead of having the law determine the amount of air crash insurance provided, as in the Standard Insurance Plan, each passenger would decide for himself or herself how much to obtain and would buy that coverage in the market from the carriers themselves, airport vendors, travel agents, etc.<sup>25</sup>

### III. THE FALLACY OF PROMOTING SAFE AIR TRAVEL AND PROPER RESOURCE ALLOCATION THROUGH COMPENSATION SCHEMES

#### A. *Air Crash Reform Proposals as Examples of Tailored Compensation Plans*

Contrasting the various solutions previously canvassed, the critical difference lies in who (or what) determines the amount of compensation paid. Under the Typical No-Fault Plan compensation is based, in the tradition of tort law, on an after-the-crash determination of the individual victim's legislatively allowable pecuniary losses. Under the Standard Insurance Plan the legislature specifies uniform sums in advance for all victims. Under Chalk's proposal the victim determines in advance the amount to be paid.

Despite their differences, all of these approaches share a common commitment to financing the scheme so that air crash compensation benefits are in some way attached to the cost of air travel. That is why all of these schemes are examples of "tailored compensation plans."<sup>26</sup> In such plans not only are benefits tailored to a special class of accidents, but also the benefits are meant to be paid for as part of the cost of engaging in the activity that leads to such accidents—whether, as in Chalk's plan by the air pas-

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<sup>24</sup> *Id.* at 239-40.

<sup>25</sup> For further discussion of Chalk's Market Insurance Plan, see *infra* notes 52-61 and accompanying text.

<sup>26</sup> See Sugarman, *supra* note 1, at 622-28.

senger directly, or, as in the other approaches, by the airlines who then seek to pass the costs on to the passenger in the ticket price.

“Tailored compensation plans” have been proposed for a wide range of injuries as varied as those caused by drug side effects,<sup>27</sup> railway crashes,<sup>28</sup> medical accidents,<sup>29</sup> and schoolyard mishaps.<sup>30</sup> In support of such “tailoring,” many claim that compensation of victims is not the only concern. First, supporters typically see a tailored financing mechanism as also promoting the safer conduct of the activity in question, such as air transport. Second, many supporters contend that it is “only proper” that activities (air travel in this instance) carry their full costs, including their accident costs.<sup>31</sup> Hence, I concede that to the extent that advocates of “tailored compensation plan” solutions to the air crash problem make similar claims, they have plenty of company.

Yet, I have concluded that tailored compensation plans, serving as a remedy for the problem of air crashes, are the wrong solution to the failure of tort law. To explain why, I will consider first the two key non-compensatory goals previously identified—safety and the proper allocation of costs. Initially, this examination will focus on the Typical No-Fault solution, the Standard Insurance Plan, and the existing tort system.<sup>32</sup> Subsequently, this Article will consider these two non-compensatory goals in connection with Professor Chalk’s plan.<sup>33</sup> Finally, having shown all such mechanisms to be rather unimportant to the achieve-

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<sup>27</sup> See, e.g., Fleming, *Drug Injury Compensation Plans*, 30 AM. J. COMP. L. 297 (1982); Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1 (1973).

<sup>28</sup> Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 HARV. L. REV. 705 (1916).

<sup>29</sup> See, e.g., Havighurst, “*Medical Adversity Insurance*” — *Has Its Time Come?*, 1975 DUKE L.J. 1233.

<sup>30</sup> Kimball, *Compulsion Without Protection or Recourse: The Case for No-Fault Accident Insurance for School Children*, 1975 UTAH L. REV. 925.

<sup>31</sup> Moreover, commentators often argue that a tailored no-fault scheme accomplishes the “internalization of costs” goal better than the tort system.

<sup>32</sup> See *infra* notes 35-51 and accompanying text.

<sup>33</sup> See *infra* notes 52-61 and accompanying text.

ment of those goals, the last part of this Article explores what a proper compensation system should look like. There I also find fault with tailored compensation schemes and propose reforms which concentrate on basic social insurance and the employee benefit system.<sup>34</sup>

### B. *Promoting Safe Air Travel*

Quite apart from either tort law or a typical no-fault substitute, various forces already promote safe commercial air travel.<sup>35</sup> First, most of those in charge of designing, building, maintaining, and flying airplanes surely feel moral obligations towards passengers and crew and would be mortified were their lack of care to cause an aviation disaster. Second, self-protection assures that the crew, who are also at risk in a crash, will take great care during the flight. Third, and possibly most important, considerable direct governmental safety regulation, primarily through the Federal Aviation Administration (FAA), governs the commercial air travel business.<sup>36</sup> Finally, ordinary market forces should guard against careless manufacturers and carriers. In theory at least, whether or not manufacturers and carriers are liable for the deaths and injuries caused by air crashes, these enterprises ought to be pressured to exercise great care because of the fear that an unsafe reputation could cause a dramatic loss of consumer patronage that would far more than outweigh the savings that would have been achieved by skimping on safety.

Indeed, Professor Chalk's economic model and empirical studies support this last factor. Assuming we accept

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<sup>34</sup> See *infra* notes 62-71 and accompanying text.

<sup>35</sup> See Schwartz, *supra* note 5, at 206; *infra* note 36 and accompanying text.

<sup>36</sup> The FAA has promulgated detailed regulations covering all aspects of large commercial aircraft operation. See 14 C.F.R. §§ 91.1-.311, 121.1-.713 (1986). The FAA also has regulations for air taxis and commuter airlines. 14 C.F.R. §§ 135.1-.443 (1986). Evidence that these regulations promote safety can be found in F. Munley, *Commuter Airlines Safety: An Analysis of Accident Records and the Role of Federal Regulation* (1976), reprinted in *Airline Deregulation and Aviation Safety: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 95th Cong., 1st Sess.* app. 8 at 360 (1977).

his results, Chalk's findings show that whenever a manufacturer's plane crashes due to an apparent defect in the plane, the price of the manufacturer's shares drops sharply on the stock market.<sup>37</sup> I agree with Chalk's interpretation of this result that this loss in value does *not* simply reflect the impending tort damages that now will have to be paid, although that may be part of the cause of the drop.<sup>38</sup> Rather, the drop in stock price importantly reflects a feared loss of future patronage on, and hence a loss of carrier demand for, that type of aircraft. Since enterprises want to avoid both current loss of share value and future loss of customers, this study shows how the stock market can provide a good feedback mechanism for stimulating safe air transport.

Thus, I conclude that moral, self-preservation, regulatory, and market forces probably make air travel as safe as feasible, at least without spending much more money than the traveling public is willing to pay.<sup>39</sup> Moreover, there is little reason to believe that the fear of civil liability under the present system, or concerns about higher costs under the Typical No-Fault Plan or the Standard Insurance Plan, add, or would add, to air travel safety. Since most air crash claims today are settled and since the National Transportation Safety Board investigates and reports upon all commercial air crashes, tort law clearly does not serve the functions of public condemnation or the publicizing of air carrier/manufacturer carelessness. In addition, of course, no-fault plans disavow the imposition of blame.

Tort liability, the Typical No-Fault solution, and the Standard Insurance Plan essentially represent, or would represent, additional, unpredictable costs of doing business, especially in the case of tort law. Enterprises in the air transportation business seek (or under a no-fault plan

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<sup>37</sup> Chalk, *supra* note 3, at 227-39.

<sup>38</sup> *See id.* at 231 n.41.

<sup>39</sup> For a discussion of these points in the context of tort law generally, see Sugarman, *supra* note 1, at 559-90.

would seek) to regularize these costs through insurance arrangements. But, as already noted, the funding of payments to victims is hardly the only cost a crash carries. Indeed, besides the potential loss of future business discussed above, carriers and manufacturers incur the important costs of lowered employee morale and the diversion of employee attention in the aftermath of the crash. These costs occur (or would occur) irrespective of the civil liability or no-fault benefit aspects of the event. In theory, an air carrier or manufacturer that would invest \$X in safety if it did not have to pay for its accident costs would invest \$X + Y when faced with the prospect of either tort or no-fault plan costs. I assert, however, that in practice enterprises are not able to cut things so fine or to make such distinctions—so that in the end Y does not really amount to anything.

Suppose air carriers and manufacturers were relieved of the cost of tort liability today and a no-fault plan were *not* put in its place. While I foresee that this could lead to a small reduction in the price of airline tickets, I do not foresee cutbacks in safety. I cannot envision exactly what safety procedures and practices the air industry would delete. Is there reason to think, for example, that British Airways, Lufthansa, and Air France are less safe airlines than United, American, and TWA because under the laws of Britain, Germany, and France the former carriers pay far less in tort damages in domestic crashes than their American counterparts?

This is not to say that all airlines and manufacturers today actually take all the care they might;<sup>40</sup> in fact, carelessness, to the extent it exists, continues despite tort liability. Indeed, some commentators claim that the fear of tort lia-

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<sup>40</sup> Three relatively recent books which have closely examined specific commercial air crash disasters argue that the industry could be safer than it is. J. NANCE, *BLIND TRUST* (1986) (claiming that deregulation has led to increased risks of aviation accidents); W. NORRIS, *WILLFUL MISCONDUCT* (1984) (discussing the crash of Pan American Flight 806 at Pago Pago on Jan. 30, 1974); P. EDDY, E. POTTER & B. PAGE, *DESTINATION DISASTER* (1976) (discussing the causes and consequences of the first jumbo jet disaster).

bility actually retards the development and introduction of newer and safer aircraft.<sup>41</sup> In the same vein, critics have charged that because the key commercial actors want to avoid civil liability, tort law actually promotes the cover-up of the causes of air crashes, which in turn threatens future danger to the flying public.<sup>42</sup> Surely, carelessness due to unavoidable human errors and management incompetence often occurs independently of tort law and, unfortunately, would continue under a no-fault system.<sup>43</sup> For these reasons, I reject the premise that tort law, the Typical No-Fault solution, or the Standard Insurance Plan has, or would have, an important positive impact on air safety.<sup>44</sup>

### C. *Allocating Its Accident Costs to Air Transportation*

Putting the question of safety aside for now, modern economic analysis has shown that the central purpose of making activities pay their way is to cause the activity to be priced "right." The idea is that if activities do not bear their accident costs, then they are, in effect, improperly subsidized in the same way as if their labor or materials costs were subsidized. The problem with such activities

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<sup>41</sup> Milford, *supra* note 22, at 214-15. See also Martin, *supra* note 2, at 232. But see Brennan, *No-Fault Insurance in Aviation Products and Services—One Insurer's Viewpoint*, 41 J. AIR L. & COM. 237, 240 (1975).

<sup>42</sup> Milford, *supra* note 22, at 212-14. *Contra* Brennan, *supra* note 41, at 238.

<sup>43</sup> A changed economic climate for the airline industry, caused partly by the increased competition that has stemmed from deregulation, may also lead, or already has led, to a degraded maintenance program by the carriers (or at least some of them). But, once again, this threat to air safety (which assumes that competitor pressure is outweighing consumer pressure) is independent of, and, if true, is occurring in the face of, tort law.

<sup>44</sup> A similar conclusion about tort law and safety is reached in Note, *A Proposal for Absolute Liability*, *supra* note 1, at 581-82. Without convincing argument, that author claims that a proper no-fault/absolute liability scheme actually might increase carrier safety efforts. Non-legal studies on air carrier safety essentially disregard the possibility that tort liability and/or insurance costs could contribute importantly to air safety. See, e.g., J. MEYER & C. OSTER, *DEREGULATION AND THE NEW AIRLINE ENTREPRENEURS* 88-101 (1984) (contrasting passengers' perceptions and statistical data on safety and implying a limited role, at most, for factors such as tort law and insurance costs). But see Kreindler, *Our Tort System and Aviation Safety*, 34 J. AIR L. & COM. 497, 502-03 (1968) (defending tort law as a promoter of safety written by one of America's leading air crash litigators).

being “too cheap” is not that those engaged in such activities will make unfair profits (which is unlikely), but rather that society’s resources will be misallocated. Too many resources will flow to the subsidized activity rather than to other unsubsidized activities. The trouble with misallocation is not so much a matter of fair treatment among railways, bus companies, and airlines, although competing business interests may complain if one gets what is thought to be an inappropriate break. Rather, overall consumer welfare supposedly is reduced when consumption patterns are diverted from the efficient allocation of resources achieved when all costs are internalized and each item carries its true market price.<sup>45</sup>

For example, assume that coal-fired electricity generating plants cause pollution and hydroelectric plants do not and that manufacturers of electricity do not pay for such pollution. All other things being equal, more resources likely will be devoted to coal-fired plants creating more pollution than if such costs were internalized. With internalization, by contrast, producers probably would shift to more hydroelectric plants or away from electricity to other energy sources. Whatever shift occurs will harm consumers of the formerly “subsidized” coal-produced electricity in the form of higher prices. Yet, the gain to the former pollution victims, who will now have cleaner air, is presumably greater.

The question of proper cost allocation in cases of passenger deaths and injuries from air crashes appears to be somewhat different from that arising in cases of air pollution. Only in the latter type of setting does the activity generate harm to outsiders. By contrast, since passengers are part of the air transport transaction, they, like purchasers who might be injured by consumer goods generally, initially internalize the accident costs of the activity *whether or not* the provider of the goods or services must

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<sup>45</sup> For a general discussion of the theory of externalities and their role in distorting the allocation of resources, see W. NICHOLSON, *MICROECONOMIC THEORY* 568-71, 641-47 (2d ed. 1978).

treat such accident losses as part of its cost structure. In other words, unlike outsider pollution victims, customers will either bear their actual losses as victims or else share those costs as a group through the presumably higher travel costs that accompany any mechanism of internalizing accident costs to the carriers (and manufacturers), whether it be tort law or a no-fault scheme. (This analysis also illustrates that, in the case of air passengers, the claim that "industry" should pay for these costs is largely a will-o-the-wisp.)

Still, as Dean Calabresi has pointed out,<sup>46</sup> if consumer victims bear accident costs in the form of actual losses, they may, at the time of purchase of the good or service, overlook that cost and thus, in our example, undercalculate the real price of air travel when making their transportation choice. This undercalculation could occur because people are not adequately informed about the probabilistic cost of an air crash or because they psychologically discount or entirely ignore the small risk to them as individuals. Moreover, individuals may well make alternative provisions for covering those losses through mechanisms that have nothing to do with air travel, such as through ordinary life insurance.<sup>47</sup> In such cases, since compensation for death risks from air travel would attract no marginal cost to the flyer, this also would tend to make the activity of flying "too cheap."

As a result, for the purpose of this analysis, I am willing to stipulate that, in theory at least, if the costs of injuries and deaths to passengers are not firmly attached to air travel, this form of transportation will be subsidized. What I am not willing to stipulate, however, and what I think makes this issue both intractable and ultimately irrelevant, is the claim that this type of air travel subsidy necessarily leads to allocating "too many" resources to this activity. The internalization argument can only sensi-

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<sup>46</sup> See, e.g., G. CALABRESI, *THE COST OF ACCIDENTS* 56 (1970).

<sup>47</sup> For a further discussion of consumers' choices in covering accident costs, see *infra* notes 52-71 and accompanying text.

bly apply when the activity is otherwise priced "right." If not, we do not know whether including the cost of injuries and deaths helps push the price to (or at least towards) its proper level, or whether instead this internalization makes air travel too expensive and thereby worsens the allocation of social resources.<sup>48</sup> In the case of air transport, market imperfections and other unintended or theoretically undesirable subsidies and/or charges probably already have caused this activity to be either too expensive or too cheap—but we can not tell which. After all, even with air fare deregulation, so many special non-market factors remain in the air transport field (and indeed in the competing transport sectors as well)<sup>49</sup> making the issue of the proper allocation of passenger crash costs a minor fly in a great deal of ointment.<sup>50</sup>

In sum, taking away tort liability costs and not imposing a no-fault plan's costs in its place would likely lead to both (slightly) cheaper air tickets and (slightly) more flying. Whether this would be a gain or a loss in the overall allocation of social resources, however, no one can confidently say. Besides, if the efficient allocation of air crash costs remained an important concern, it could be far better served by eliminating tort suits and simply adopting, not a no-fault plan, but rather a tax on air travel equal to the estimated cost of air transport accidents.<sup>51</sup>

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<sup>48</sup> When market failures exist other than the one sought to be cured, a correction of that one impediment will not lead to an optimal (or even preferred) allocation of resources. For a presentation of this result, see Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956-57).

<sup>49</sup> Factors in the air transport field include special landing charges and other taxes faced by airline companies; airport, airway, and aircraft purchase subsidies; and military development subsidies. Factors in the competing transport sectors include the national highway building program, Amtrak subsidies, and gasoline taxes. For a general discussion of factors that prevent the air transport industry from being truly competitive, see W. O'CONNOR, AN INTRODUCTION TO AIRLINE ECONOMICS (3d ed. 1985).

<sup>50</sup> In 1975 liability insurance cost large aircraft manufacturers "less than one half of one percent of their gross annual sales." Brennan, *supra* note 41, at 239. In 1964 fault liability insurance cost air carriers 23 cents per ticket. Note, *A Proposal for Absolute Liability*, *supra* note 1, at 589.

<sup>51</sup> Indeed, such a tax could more accurately impose the full social costs of air crashes on air travel than does the present tort system or than would the Typical

D. *Air Safety and Accident Cost Allocation Under the Chalk Plan*

Professor Chalk argues that because major air crashes are well publicized and because air passengers can readily choose among airlines and equipment, the market itself creates strong economic incentives for air safety. This argument leads him to reject the need for our society to rely upon either tort law or a no-fault plan for that purpose. With this ultimate conclusion I agree, although for the rather broader reasons given earlier.

Professor Chalk, however, also claims that his "Market Insurance Plan" will promote safety. I judge those prospects as extremely unpromising. Under Chalk's plan, for safety to be even theoretically pursued (1) air travel insurance will have to be provided in a way that is calculated to put economic pressure on airlines and aircraft manufacturers to be safer, and (2) people will actually have to purchase the compensation protection they want for this risk through the kind of insurance Chalk has in mind. Even if the first condition can be arranged (about which I am quite skeptical), the latter is highly implausible.

Although Chalk is very sparse on details, suppose first that he would insist that every carrier offer insurance for each of its flights. Assume further that all carriers would charge the same price for this insurance, at least for comparable flights.<sup>52</sup> Under this arrangement, since a carrier with a worse crash loss experience would face higher costs, then, in principle, fear of such costs would appear to give each carrier economic incentives to maintain or improve its safety record.<sup>53</sup> But this is not the end of the

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No-Fault system. In the latter two instances, the costs imposed are merely the outcome of award arrangements (and accompanying administrative costs) that are primarily determined with a different goal, compensation, in mind. A tax designed solely for proper resource allocation purposes would not be so hampered.

<sup>52</sup> Alternatively, assume that even if price differences existed for other reasons, a carrier with a worse loss experience would not dare charge more for its insurance *for that reason*.

<sup>53</sup> Note, that I do not mean by this discussion to give up my belief that these

analysis.

Realizing that many crashes are beyond the carrier's control and that crashes can be extremely costly and can occur quite unevenly among carriers, the airlines surely would look to regular insurance companies to reinsure them. Therefore, in order to prevent the airline industry from avoiding the above described economic incentives on behalf of safety, the regular insurance companies, in the Chalkian world, would have to impose inspection and other safety pressures (including, perhaps, experience rating of their insurance costs) on their carrier clients. Our experience with tort law, however, suggests that the effectiveness of this indirect pressure is highly doubtful.<sup>54</sup>

More realistically under Chalk's proposal, air travelers would be buying their flight-by-flight insurance, not from the airlines, but directly from regular insurance companies, either at the airport or perhaps via travel agents.<sup>55</sup> Under this arrangement these insurance companies would not likely have any any important leverage so as to be able to police the safety of the air carriers, whatever the insurers' theoretical leverage might be under the reinsurance arrangement described above. After all, a market for first party flight insurance already exists, although somehow one would not know it from Chalk's article. People currently can purchase such insurance at counters and from machines at most airports.<sup>56</sup> But, from the air safety per-

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sorts of economic pressures in fact would have no important further impact on safety—that is, beyond those efforts already prompted by other existing pressures. See *supra* notes 35-44 and accompanying text.

<sup>54</sup> See Sugarman, *supra* note 1, at 573-81 (discussing liability insurance and deterrence).

<sup>55</sup> Indeed, Chalk's assumption seems to be that commercial insurance companies (as compared with the carriers themselves) would be the key, if not the exclusive, sellers of this insurance to the traveling public. See Chalk, *supra* note 3, at 239-40.

<sup>56</sup> In 1976 nearly all of the 3.7 million policies, which cost United States consumers \$18 million, were sold by two companies, their subsidiaries, and franchises; Mutual of Omaha's company, Tele-Trip, accounted for about \$13.5 million of the total. See *Problems in the Sale of Travel Insurance at Airport Locations: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 95th Cong., 2d Sess. 219 (1978)* [hereinafter *Travel Insurance Hearings*].

spective, the experience with this market is not very promising. No evidence suggests that the sellers of existing flight insurance contribute in any important way to making airlines or aircraft manufacturers behave more carefully. Therefore, I would be very surprised to see flight insurance sellers heavily involved in safety promotion under Chalk's plan. Charging customers different prices for flight insurance depending upon the carrier and/or equipment selected by the customer is one possible response of insurance companies to differential risks.<sup>57</sup> This practice, however, has not developed in the existing flight insurance market and is not likely to do so under Chalk's plan.<sup>58</sup>

Nevertheless, even if Chalk were to work out a flight insurance scheme which has at least theoretical appeal from the safety promoting perspective, for the proper economic pressures to come into play, people would have to protect against the financial risk of air crashes by actually purchasing that sort of insurance. Just as most travelers today do not take care of their financial concerns

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<sup>57</sup> See Chalk, *supra* note 3, at 240. At one point Chalk appears to assume that exactly this sort of fine tuning in pricing would happen.

<sup>58</sup> Charging different prices would make the sales transaction quite cumbersome, indeed baffling to many passengers. Also, different pricing would force the insurers into strenuous battles with any carrier for whom a higher rate were proposed. Plausibly, the threat to differentiate among carriers could be used as leverage to give the insurers the ability to insist on inspections of carrier safety practices which Chalk blithely assumes would follow from his plan. See *id.*

Consider, however, these remarks from someone heavily involved in air travel liability insurance:

It would be a great act of effrontery to attempt to tell these folks [large manufacturers and scheduled carriers] how to build a safe airplane and how to run a safe airline . . . . [T]he state of the art has advanced to where it is not feasible for insurers to attempt routinely to judge engineering and operational conclusions on the frontiers of industry knowledge . . . . Punishment, deterrence and enforcement do not belong in a tort action.

Whitehead, *The Role of the Insurance Company in Air Safety*, 34 J. AIR L. & COM. 450, 451, 453, 455 (1968) (statement of the Vice President of United States Aviation Underwriters, Inc.). Consider as well this admission from another representative of the aviation liability insurance industry: "I must admit that the accident investigation area is one in which the aviation insurance industry has been derelict in its duty and can be justifiably criticized." Brennan, *supra* note 41, at 238 (statement of the Executive Vice President of United States Aviation Underwriters, Inc.).

about the risks of flying through the purchase of existing flight-by-flight insurance, it is inconceivable that most people would do so if Chalk's first party plan were in place and no tort rights were available.<sup>59</sup>

First, many air travelers, through their employment or through a separately acquired policy, already have a blanket life (or life and accident) insurance policy covering air crashes on any commercial flight they take.<sup>60</sup> Perhaps this kind of coverage would expand if tort claims were eliminated. Indeed, Chalk seems to envision that people could obtain insurance under his plan for more than one flight at a time.<sup>61</sup> Presently, however, the cost of this type of insurance is not tied to the individual airlines or equipment flown or to the number of flights flown. Thus, I find it hard to imagine that the market would yield fine-tuned, safety-oriented pricing under Chalk's plan. Nor is there any indication that these insurers have, or could have, important influences on the safety practices of the industry.

Second, the chances of promoting safe travel indirectly through pressures imposed by insurers are even less likely given the many travelers who do not consider the risk of an air crash as something needing separate insurance pro-

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<sup>59</sup> More than eight years ago it was estimated that only "1 of 100, at best" buy flight insurance at the airport. *Travel Insurance Hearings*, *supra* note 56, at 240. Estimates also indicate that 1.1% of passengers at Washington's Dulles and National Airports buy such insurance and that over time the proportion of people who purchase airport flight insurance is declining. *Id.* at 478, 508.

<sup>60</sup> Travel insurance covering business travel is an increasingly popular employee benefit. *Id.* at 224. Some credit card companies automatically provide flight insurance if the customer charges the flight on that card; others emphasize selling annual flight insurance policies to their cardholders. *Id.* Frequent travelers may select annual policies covering all flights during the year, rather than flight-by-flight policies, not only for the convenience but also for the lower cost. Airport vendors also sell annual policies, although as of eight years ago, at least, these policies typically would cost twice as much as essentially identical policies sold by many credit card companies and others through the mail. *Id.* at 548. Airport vendors also sell travel insurance for selected periods (*e.g.*, two weeks) covering accident risks on the ground as well as in the air. *See id.* at 269. Indeed, although 59% of the policies Tele-Trip sold in 1976 covered only a single scheduled flight, less Tele-Trip income was being generated from such policies than from either of its other two main airport products—annual flight insurance and the broader holiday insurance. *Id.* at 276, 549.

<sup>61</sup> *See Chalk*, *supra* note 3, at 240.

tection. Instead, these travelers protect themselves and their dependents through basic compensation and insurance devices such as ordinary life insurance, Social Security, and disability insurance. To the extent that people already have provided for themselves and their families through such basic compensation sources, Chalk surely would not force them to buy extra air crash insurance. After all, Chalk highly values allowing people to buy only the amounts of insurance they want. But, these collateral compensation providers are simply not in the business of promoting safe air travel.

The upshot is that under Chalk's scheme there is likely to be little use of insurance mechanisms that have any hope, even in principle, of promoting air safety. For the same reasons, Chalk's plan probably would be even worse than the Typical No-Fault Plan or the Standard Insurance Plan at internalizing the costs of air crashes into the price of air travel. In short, Chalk ought to abandon the idea of pursuing non-compensatory goals through whatever detailed insurance mechanism he settles on. Instead, the mechanism should be judged solely by its ability to provide compensation.

#### IV. APPROPRIATE COMPENSATION FOR AIR CRASH VICTIMS

##### A. *Victim Pre-Selection of the Benefit Level: The Chalk View*

Despite its elegant simplicity, the Standard Insurance Plan, which pre-specifies a uniform schedule of benefits for all air crash victims (*e.g.*, \$200,000 in case of death), fails to respond to the different compensation needs of the victims and their heirs. Importantly, these needs can vary both because of different dollar amounts of the losses that individuals incur and because of the alternative provisions that people have made for such losses. Since any legislatively pre-specified set of benefits for air crash victims would not reflect what most individual passengers would buy if they had the option, from the compensation perspective air passengers should not be forced to

purchase such uniform coverage when they pay for their flight. Indeed, Professor Chalk has followed this line of thought and has proposed arrangements under which individual passengers would choose, and pay for, their own level of coverage.

Yet, if each passenger makes an individual decision, as Chalk proposes, there would probably be extremely high administrative costs, especially if this decision is made for each flight the passenger takes.<sup>62</sup> Moreover, although Chalk's plan assumes that buyers of such insurance are well informed and behave rationally, airport-purchased insurance probably depends (and would depend), at least to a degree, on last minute fears and superstitions of passengers.<sup>63</sup> This concern would be only partly mitigated if

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<sup>62</sup> Chalk talks of administrative costs of "five to ten percent" of each premium dollar, implying benefit payouts of approximately ninety to ninety-five percent. Chalk, *supra* note 3, at 247. This estimate seems wildly unrealistic in view of the existing experience with airport-purchased flight insurance. In 1970 the New York Superintendent of Insurance pressured flight insurance sellers at New York terminals to raise their approximate loss ratios (*i.e.*, their ratio of benefits paid to premium dollars collected) from 25% to 40%. See W. YOUNG & E. HOLMES, CASES & MATERIALS ON THE LAW OF INSURANCE 45 (1985) (citing Matter of Air-Trip Ticket Accident Ins., N.Y. Dep't of Ins. (1970)). By 1978 it appeared that only New Jersey, with its nearby Newark airport, had imposed the same higher loss ratio. At that time, however, Mutual of Omaha officials testified that because of limited volume, commission requirements, and especially rental burdens for their airport locations, if states throughout the country were to go along with the New York rule, flight insurance sellers would no longer be able to provide counter service, presumably restricting their product to vending machines. *Travel Insurance Hearings*, *supra* note 56, at 253. Those hearings also revealed that during the 1972-76 period, Tele-Trip's loss ratio nationally was only 15.4%, although given the infrequency of air crashes, this five year period might be too short to make a judgment about the longer term loss ratio. *Id.*

<sup>63</sup> Many who buy this sort of insurance today are probably somewhat fearful of flying and treat the insurance purchase as a sort of prayer that they reach their destination safely. Apparently, the airlines originally supported and had their own airport counter employees sell this type of insurance as a way of assuring people of the safety of air travel. *Travel Insurance Hearings*, *supra* note 56, at 214-15. Indeed, Mutual of Omaha officials have reported that their company originally entered the flight insurance business, at least in part, at the instigation of members of Mutual's board of directors who were prominent in the aviation field and who wanted the company to help convince the public that air travel was safe by offering cheap insurance (or at least what would appear to be cheap insurance). *Id.* at 237. See generally Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 478-79 (1961) (one function of insurance is to provide insured with a "sense" of security).

passengers bought insurance from travel agents when they purchased their ticket.

Even multi-flight policies or blanket policies covering all flights fit uneasily in the informed consumer choice model. Those who now obtain this coverage automatically through their work are hardly making an individual decision. Given the sometimes questionable reputation of insurance products sold to the public through the mail, one may doubt whether flight insurance purchased in that way fits within the informed consumer model either.

Chalk also ignores the societal dissatisfaction that would arise if air travelers could elect to provide no protection for their survivors and thereby leave the survivors with radically lowered standards of living, perhaps even destitute and on the welfare rolls. Denying people that sort of freedom can be termed paternalistic. Nevertheless, there seems to be no general dissatisfaction on grounds of unwanted paternalism with other current practices that divert people's wages and force them to protect themselves and their families against both absolute and relative impoverishment when they must leave the workforce due to disability, death, or retirement. Employment-based schemes for life, health, and disability insurance and pension benefits and compulsory public programs like Social Security, illustrate the prevalence of paternalistic practices. In any event, since most people do have, and will continue to have, these and other kinds of income loss and medical expense benefits that cover losses from air crashes, Professor Chalk's plan can only be a supplementary compensation arrangement.

#### B. *No-Fault Benefits and Basic Social Insurance/Employee Benefits*

Like the Standard Insurance Plan, the Typical No-Fault Plan's effectively paternalistic nature probably would assure that an air crash did not throw the victim's heirs into poverty. Comparing the two, however, the Typical No-Fault Plan would be better tailored to the individual losses

caused by air crashes than would the Standard Insurance Plan with its legislatively pre-specified uniform package of benefits. For example, funds that would be paid to the estates of non-earners and earners with no dependents under the Standard Insurance Plan could be redirected to compensate survivors' real losses under the Typical No-Fault Plan.

Merely measuring after-the-crash losses does not suffice, however. The Typical No-Fault Plan also would ill serve individual need unless it were sensibly integrated with other basic sources of compensation like social insurance and employee benefits. The existence of such sources, however, diminishes the appeal of the no-fault solution. Indeed, since so many Americans already have basic social insurance arrangements and employee benefits, any air crash no-fault plan (like tort law today) would often be largely superfluous in replacing out-of-pocket losses. More precisely, when people working for what might be called "progressive employers" suffer death or injury in an air crash (or, indeed, are killed or disabled for nearly any other reason), their existing life insurance, occupational pension, and Social Security benefits already provide adequate income replacement benefits for them and their survivors. As a result, adding a compensation layer in the form of a no-fault air crash scheme either would result in duplicate benefits or would require cumbersome subrogation or deductibility arrangements.

As a matter of principle, most employee benefit and social insurance arrangements rest on the sensible view that individuals and their survivors equally need compensation whether death or personal injury comes from an air crash, a car crash, or a bathtub crash.<sup>64</sup> And, since the need for compensation is not limited to accidents, death and disabilities from other sources (illness, for example) are also covered. Indeed, in terms of the need for compensation,

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<sup>64</sup> Put differently, this view is the collective counterpart to the judgment of many individuals who do not find it sensible to separately protect against the special risks from air crashes, drug side effects, car injuries, etc.

no convincing principled basis exists for selecting certain kinds of disabling risks for special attention and protection.<sup>65</sup>

Our existing basic social insurance and employee benefit arrangements are not perfect, to be sure. For the reasons stated, however, their reform, rather than the adoption of a no-fault replacement for tort law, should gain our attention. The goal, simply stated, should be to put nearly everyone in a position reasonably comparable to those in "progressive employment."

### C. *Improving Basic Social Insurance and Employee Benefits*

Although this Article will not address the details, it will outline some points about needed reforms in our basic employee benefit and social insurance system in order to indicate where efforts might be directed. For example, survivor benefits now paid to heirs of low and moderate earners ought to be upgraded, either through an improved Social Security benefit formula or through mandatory private occupational pension supplements to Social Security.<sup>66</sup> The same reform should be enacted for

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<sup>65</sup> See generally Fleming & Sugarman, *Perspectives on Compensating Accident Victims*, in PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, COMPENSATING FOR RESEARCH INJURIES 195-98, 201 (1982) (United States); D. HARRIS, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984) (Great Britain); Ison, *Tort Liability and Social Insurance*, 19 U. TORONTO L.J. 614, 615 (1969) (Canada); Palmer, *What Happened to the Woodhouse Report?*, 1981 N.Z.L.J. 561, 568 (New Zealand).

The power of political interest groups, historical accident, the role of non-compensatory objectives, inertia, and the like, rather than principles of compensation, have given us the patchwork of actual and proposed cause-specific, fault-based, and no-fault schemes.

<sup>66</sup> In general, when a Social Security covered earner dies, his or her dependent surviving spouse is eligible for a pension if the survivor is either over age 62 or taking care of at least one child under age 16. For a worker whose earnings have been equal to the average in the economy for all of his or her worklife, the survivors' benefits to an eligible surviving spouse and one child are designed to total about 60% of the deceased earner's wages; a benefit of 41% of the wages of such a worker can be collected if the eligible surviving spouse is 65 or older. For someone with a full worklife history of earnings at the federal minimum wage, those benefits approximate 80% of income in the case of an eligible surviving spouse and child and 57% for an eligible surviving elderly spouse. See 49 SOC. SEC. BULL. 12-15 (Jan. 1986). As reasonable as these percentages might sound in the ab-

long-term disability benefits.<sup>67</sup> Improvements are also needed for brief periods of disability. The nation should adopt either a generous government run temporary disability insurance plan (modeled partly after those now in place in five states)<sup>68</sup> or a scheme requiring employers to provide all their workers either generous short-term sickness or all-purpose paid leave benefits.<sup>69</sup> Finally, improvements are needed in the protection provided to those (and their heirs) who have not yet found their niche in the paid work force, such as students, temporary home-

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stract, surviving dependents of low and moderate earners probably will not maintain living standard above the poverty level, especially when more than one surviving child remains.

With the addition of a private pension benefit of the sort typically provided by a progressive employer, however, ordinary American families should be reasonably well protected against the income loss caused by a breadwinner's death. A high earner probably needs additional protection to maintain the standard of living of his or her family in case of death. Such people can arrange additional protection, such as the purchase of life insurance, if they wish. While lower earners in theory could purchase life insurance that is adequate to provide for their surviving family members, they usually do not because of the pressure of paying for day to day living expenses.

Furthermore, workers' compensation schemes provide cash benefits to survivors when the worker was killed in an accident that arose out of his or her employment. *Id.* at 28-35. As illustrated by the air crash problem, however, such schemes discriminate between business air travelers and those who are flying for pleasure or family need.

<sup>67</sup> Social Security provides pensions to covered workers who suffer long term, total disability from whatever source. Social Security also pays additional sums for dependent family members. *Id.* at 12-15. Low and moderate earners and their families receive distressingly low actual benefits as compared, for example, with the poverty level. By contrast, average earners who also have good private pension benefits usually do reasonably well. High earners, as mentioned before, can buy private disability insurance as a supplement.

<sup>68</sup> California, Hawaii, New Jersey, Rhode Island, and New York have cash sickness programs that partially replace the incomes of those who are temporarily disabled by non-work causes. These plans complement workers' compensation schemes which exist in all states and pay wage loss benefits to those temporarily disabled by job injuries. *Id.* at 37-41. Unfortunately, even in those states with mandatory cash sickness programs, the benefit levels do not allow families to maintain their ordinary expenditure levels. As a result, most "progressive employers" provide sick leave benefits that usually replace an employee's wages in full. A nationwide cash sickness scheme, were it adopted, should sharply increase both the wage replacement rate and the ceiling on wages covered, as compared with existing state plans.

<sup>69</sup> For a fuller discussion of these ideas and my proposals for reform of short-term benefits, see Sugarman, *supra* note 1, at 642-51.

makers, the unemployed, and children.<sup>70</sup>

In sum, those who rightly feel dissatisfaction with the tort law's treatment of air crashes should not cast their sights so narrowly. If they would only look further, they would see the compensation problems (and tort failings) they notice are repeated elsewhere and ultimately call for wider solutions. With generous improvements in our basic social insurance and employee systems in place, not only would a Typical No-Fault Plan for air crashes, auto no-fault schemes, and other tailored compensation plans be pointless and unnecessary, but also tort remedies for personal injuries and death could be eliminated—not just for air crashes but for all other accidents.

On the other hand, even after improving our basic compensation arrangements, there might still be room for voluntary choice of the type that Professor Chalk's "market insurance plan" favors. If nothing else, our basic income protection schemes ought to have limits allowing individuals with a great deal of income at risk to protect that excess at their option and expense. If they wish to protect their extra income from loss through air crashes by buying flight insurance as Chalk envisions, I certainly would let them do so. Yet, I doubt many would buy it. Most of those high earners probably would be concerned, if at all, about risks to their income from much wider sources and so would arrange to protect themselves with appropriately broader first party plans.<sup>71</sup>

## CONCLUSION

Professor Chalk and various no-fault advocates too

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<sup>70</sup> Unlike the United States, many other industrialized countries provide, in one way or another, non-contributory, non-means tested cash and medical benefits for the disabled who have little or no attachment to the paid work force. *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD (1983).

<sup>71</sup> As one commentator noted, "Generally, special-purpose policies [including travel and/or flight insurance] are *not* recommended because they are so limited in coverage and because they are not needed if the broader commercial forms are used." D. BICKELHAUPT, GENERAL INSURANCE 256 (11th ed. 1983).

often fall into the trap of trying to promote compensation, safety, and the efficient allocation of resources with a single policy tool. As with today's tort system, the likely result is that none of these goals would be effectively promoted. This does not mean that no-fault advocates and Professor Chalk are wrong to conclude that we should work to eliminate tort suits for personal injuries and death, both in the air crash context and elsewhere. Tort law, however, should be replaced as a method for dealing with accidents, not by a series of tailored compensation plans, but by an improved system of social insurance and employee benefits. That system should deal generously with the financial losses caused by all disabilities and deaths—not, to repeat, merely with the consequences of one class of accidents. The separate goals of safety and efficient resource allocation plainly are still worth pursuing, but only through governmental and private actions which are divorced from our pursuit of the compensation goal.

# **Casenotes and Statute Notes**

