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A COMMENT ON NO-FAULT INSURANCE FOR ALL ACCIDENTS

RICHARD A. POSNER*

In most of their writings on no-fault insurance, Professor O'Connell and his collaborator Professor Keeton have concentrated on the mechanics of implementing various no-fault schemes. O'Connell's paper for this meeting is in that vein. The question whether it would be desirable to abandon the fault principle for accidents caused by defective products or improper medical treatment is hardly discussed, and certainly not systematically. An affirmative answer is presumed and the discussion moves on to the details of implementation.

This seems to me an unfortunate emphasis, although perhaps one congenial to legal training and temperament. It is especially unfortunate when one moves out of the automobile-accident context, where no-fault insurance was first proposed, and into areas like products liability and malpractice, which, as I shall try to show, raise distinct questions.

O'Connell's insensitivity (if I may speak bluntly) to the basic policy issues involved in the debate over no-fault insurance is illustrated by the way in which he moves from no liability to strict liability apparently without awareness that these are significantly different principles. In the automobile-accident context no-fault insurance has meant abrogating tort liability and compelling the victim to buy accident insurance. O'Connell rejects such an approach for non-automobile accidents as too costly and proposes instead that manufacturers be permitted to elect to be strictly liable for accidents caused by their products, but at a reduced schedule of damages. The analogy is worker's compensation, not no-fault insurance. But I suspect that to Professor O'Connell worker's compensation, no liability, and strict liability are pretty much the same thing since they all do away with the fault principle which for him is the principal goal of reform.

I shall attempt here, perhaps too briefly, to disentangle what seem to me to be the major policy questions in the legal control of two types of personal injury that O'Connell discusses — injury resulting from a malfunctioning product and injury induced by medical treatment.

These are both areas where the fault principle is firmly embedded and where, while it would be easy to understand what would be meant by a proposal to substitute no liability, the very meaning of "strict liability" is a puzzle. Although we speak of strict liability for product accidents, the term is a misnomer. Liability is limited to defective products and the determination whether a product is defective resembles the usual negligence determination.

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To be sure, the manufacturer's liability includes defective components supplied by other manufacturers in circumstances where his failure to discover the defect cannot be judged blameworthy; but this aspect of strict liability has its counterpart in *respondeat superior* in the ordinary negligence context.

What would it mean to say that a manufacturer should be strictly liable for the consequences of accidents resulting from the use of his *non*defective product? If *A* hits *B* with a baseball bat, would the manufacturer of the bat be liable for *B*'s injury? Would he be liable if *A* (non-negligently) dropped the bat on his own toe? Suppose a manufacturer of tires guaranteed that his tires would not blow out in normal use for 20,000 miles: would he, under O'Connell's proposal, be liable for an accident that occurred after 100,000 miles of normal use, or after 15,000 miles of driving at high speeds over ungraded roads? I assume the answer in all of these cases is 'no'. But that makes me wonder what exactly Professor O'Connell is proposing. A similar puzzle would arise with respect to a proposal to impose strict liability for medical mishaps. Suppose the proper treatment for some ailment involves a drug that has harmful side effects. Is the physician liable for those side effects? That seems an absurd result. But if he is not liable I do not see what meaning can be assigned the notion of strict liability for injuries arising from medical treatment.

Passing these difficulties, I come to what to me are the fundamental questions that must be answered in designing a system of legal control of personal injuries: what are the likely effects on the safety, and the prices, of products and of medical treatment if manufacturers and health-care providers are made strictly liable for injuries resulting from product use or medical care? At first glance it might appear obvious that enlarging the liability of a seller will induce him to increase the safety of his product but there are two reasons for doubting that this is necessarily true. First, if the alternative to strict liability is some form of negligence liability and if negligence, roughly speaking, means failure to take cost-justified precautions, why should the imposition of strict liability induce the seller to take additional precautions? To avoid being adjudged negligent, he will already be taking those precautions that cost less than the savings in reduced accident liability. Strict liability will not induce him to take additional precautions — precautions that are by definition not cost-justified to him — since if the savings in reduced liability are smaller than the costs of averting that liability, he is better off accepting the increased liability and forgoing the additional precautions. This assumes, to be sure, that sellers of products and of medical services are rational calculators of their self-interest. I find the assumption quite plausible, as does O'Connell. Certainly the usual arguments made against treating the average automobile driver as nicely calculating the costs and benefits of alternative levels of safety lose much of their force when applied to manufacturers, hospitals, and physicians.

Second, the products and medical-treatment contexts differ from the automobile-accident context in that there is a pre-existing seller-buyer relationship between injurer and victim. The seller of a potentially dangerous product can be viewed as selling a combination of two products, one of which has a negative value to the consumer. There is the product itself, but tied to it is the danger of a mishap resulting from its use. The maximum price

that the consumer will pay for the product is the sum of the values of these two goods (one a bad). Clearly, the safer the product, other things being equal, the higher the price for the package that the seller can command.

This suggests that the optimum level of product safety will be supplied without any intervention by the legal system, save perhaps to prevent misleading claims relating to product safety. Suppose that the use value of a widget is $1 and the expected accident cost of using the product is one cent.[1] Then the most the consumer will pay for a widget is 99 cents. Suppose that the sort of accident to which widgets are prone occurs and that the consumer sustains an accident that costs him $10,000. Has he cause to complain to the widget producer? He does not. He was compensated for bearing the risk of an accident by being permitted to purchase widgets for 99 cents instead of $1. His situation is the same as that of the person who goes to a baseball game and thereby assumes the risk of being beaned. Presumably if there were no such risk the price of a baseball ticket would be (infinitesimally) higher.

Now suppose that widget producers are made strictly liable for any accidents to consumers using their product. In effect, the widget producer is being forced to sell a new package, consisting of (1) the use value of a widget, (2) the expected accident cost, and (3) an insurance policy against that accident. The value of the new package is $1. But the cost to the consumer has not changed. The higher price simply buys an insurance policy that he would otherwise have had to pay for out of his own pocket. The output of widgets will not be changed, nor will the safety incentives of the widget industry be altered.

This analysis suggests that the choice of the rule of liability is less important in a sales context (including the sale of medical care) than in accidents between persons not in a sales relationship. But it may not be wholly unimportant. There is a rather technical objection to strict liability in the sales context, which I have discussed elsewhere and will not try to go into here; it has to do with differential attitudes toward risk.[2] There is also an objection to no liability. In order for consumers to be able to choose that mixture of use value and danger that maximizes their satisfactions, they have to know something about the relative dangers of competing products. But because product accidents are (happily) extraordinarily infrequent, most consumers have only the vaguest idea of the relative dangers. The producer who has a safer product therefore cannot rely on the consumer to discover its greater safety on his own. The usual method by which producers draw attention to nonobvious improvements in their products is by advertising. But the producer who advertises a safer product runs the risk of alerting

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[1] The expected accident cost is the product of the likelihood of an accident's occurring and the cost of an accident if it does occur. A consumer having an aversion to risk would demand greater compensation for bearing this risk than the expected accident cost, and a risk-preferring consumer would be willing to accept less. Thus the example in text assumes a risk-neutral consumer.

[2] Strict liability, assuming that disclaimers of liability are prohibited, in effect forces the producer to insure the consumer against an accident. A risk preferrer, however, prefers the risk of an accident to the certainty of insurance and he is made worse off by a compusory insurance scheme. See Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972) at 90-91.

the consumer to a danger of which he may have been unaware; after all, safer implies dangerous. Safety advertising is thus a double-edged sword and this may limit not only the amount of such advertising but the incentive to market safer products. Strict liability eliminates this problem by making the consumer's knowledge of product safety irrelevant. Though the consumer has absolutely no knowledge of product danger, strict liability will induce the producer to compare the costs and benefits of possible safety improvements and to introduce those that are cost-justified — those, that is, that will reduce his net liability costs.

A similar problem exists in the medical area, compounded by the great uncertainties that surround many forms of medical treatment and the prohibition against advertising by physicians. While in theory one could dispense with malpractice liability and permit doctors and patients in effect to negotiate the desired standard of care, the incompleteness of the customer's knowledge and the absence of effective channels by which competing health-care providers might communicate the requisite information to the customer may argue for imposing liability for failure to follow standard methods of treatment.

O'Connell would evidently prefer no liability in both the products and medical-care contexts if society would accept the price tag for compulsory accident insurance covering the two areas. But if the foregoing analysis is correct no liability would reduce the incentives to take precautions and would increase the social loss from defective products and improper medical treatment. His proposal for permitting injurers in these areas to limit their liability to what he calls 'out-of-pocket' expenses works in the same direction. He seems to think that if strict liability would make an injurer liable in twice as many cases as would negligence liability, but the extent of his liability in each case was halved, nothing would have changed but the distribution of compensation among accident victims. This is incorrect. As suggested earlier, imposing strict liability may not result in any reduction in the total number of accidents. But halving the cost of every accident for which the injurer would be liable under a negligence system will cause him to revise downward the benefits to him of preventing each accident, and with the benefits of precautions now lower, he will take fewer precautions and there will be more accidents.

Let me try to summarize my reactions to O'Connell's proposal. It is possible that abrogating tort liability for defective products and medical malpractice would not affect the safety of products or of health care. Then the only question would be whether, having eliminated a form of insurance against these types of hazard, society should force potential victims to buy insurance policies. But it is also possible, and I would venture to guess likely, that abrogating tort liability in these areas would result in an increase, above efficient levels, in the number of product and medical mishaps. I would consider this a most unfortunate by-product of our zeal to force people to insure themselves against accidents. Finally, I have difficulty understanding what precisely O'Connell means when he proposes to substitute 'strict liability' for our present system of liability for defective products and for medical malpractice — short of a complete guarantee against injury consequent upon the use of a product or the receipt of medical treatment.