Book Review

INSPIRED TINKERING VERSUS HOLISTIC SOCIAL ENGINEERING: JEFFREY O'CONNELL AND THE AMERICAN TORT SYSTEM

[Review of J. O'CONNELL, ENDING INSULT TO INJURY (1975)]

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Professor Jeffrey O'Connell has written seven books in eight years on no-fault insurance.[1] The latest, *Ending Insult to Injury*, proposes a system of no-fault insurance for products and services. This proposal is one of the most ambitious yet to come from the O'Connell stable, which has bred a number of winners. This article respectfully suggests that it is time O'Connell gave up horse-racing and took up flying.

The locus classicus of no-fault automobile insurance in the United States was Professors Robert Keeton and Jeffrey O'Connell's *Basic Protection for the Traffic Victim*. That book was published in 1965. By the end of 1975, there were twenty-four states which had passed no-fault automobile statutes.[2] Not all of those programs would satisfy the fathers of no-fault, but there can be no doubt that Keeton and O'Connell have been responsible for a very important reform in the law. In his foreword to O'Connell's latest book, Daniel Patrick Moynihan describes no-fault automobile insurance as "the one incontestably successful reform of the 1960s."[3] Although obviously an overstatement, O'Connell's contribution is undoubtedly an important one.

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1. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965) [hereinafter cited as BASIC PROTECTION]; R. KEETON & J. O'CONNELL, AFTER CARS CRASH: THE NEED FOR LEGAL AND INSURANCE REFORM (1967); CRISIS IN CAR INSURANCE (R. Keeton, J. O'Connell & J. McCord eds. 1968); J. O'CONNELL & W. WILSON, CAR INSURANCE AND CONSUMER DESIRES (1969); J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE (1971) [hereinafter cited as THE INJURY INDUSTRY]; J. O'CONNELL & R. SIMON, PAYMENT FOR PAIN AND SUFFERING—WHO WANTS WHAT, WHEN AND WHY? (1972) (on a closely related subject); J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND (1975) [hereinafter cited as TORT LAW]; J. O'CONNELL, ENDING INSULT TO INJURY (1975) [hereinafter cited as ENDING INSULT]. It all started with O'Connell, *Taming the Automobile*, 58 NW. U.L. REV. 299 (1963), which should not be missed by devotees of O'Connell's style.

2. TORT LAW, *supra* note 1, at 278-85 & apps. II, III.

3. Moynihan, *Foreward* to ENDING INSULT, *supra* note 1, at xi.

The no-fault system introduced in *Basic Protection for the Traffic Victim* was designed to remove from the tort system all small and moderately-sized cases arising from traffic accidents and compensate them by means of compulsory first party insurance.[4] The latest proposal aims to introduce a similar concept to tort liability in general.[5] In *Ending Insult to Injury*, O'Connell proposes an *elective* system of no-fault liability. All potential tortfeasors are permitted to insure against their liability. The system of insurance will offer certain incentives to the insured to substitute elective no-fault liability for common law tort liability. For example, the elective no-fault liability would eliminate payment for pain and suffering, collateral sources, and the expense of determining fault and the value of pain and suffering.[6] Another important advantage, argues O'Connell, comes from reducing the stigma of liability, particularly important to professional people, such as medical practitioners.[7]

It seems fair to conclude from the proposals which O'Connell has made over the years that he has a deep antipathy towards the tort system. He does not frontally attack that system by his reforms; rather he digs away at the system from underneath, undermining its foundations to the point where collapse seems to be inevitable. Thus, the ultimate purpose of his reforms would seem to be the destruction of the tort system. Although this destruction ought to be undertaken, there are problems with O'Connell's proposals.

The key principle upon which he always operates is that "it probably will not be financially or politically feasible in the forseeable future to simply abolish the tort system and substitute compensation for accident victims from social insurance."[8] From this starting point, he proposes no-fault liability for limited areas of tort law. There are two problems with O'Connell's method: 1) is his initial premise that it is not financially or politically feasible to simply abolish the tort system correct and 2) if it is correct, will not the nature of his proposals influence the system which is likely to eventually replace the tort system? In that sense he is working toward an interim scheme. That being the case, he ought to think long and hard about the shape of the system he will finally end up with.

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4. BASIC PROTECTION, *supra* note 1, at 326.

5. The writer must confess a lingering admiration still for the devastating analysis made in the same year that Keeton and O'Connell's book appeared, of the compulsory element of these early reforms. Among other things, that analysis said: "In briefest form the argument is that anyone who accepts the principle of compulsory liability insurance is no longer in a position where he can logically or even psychologically reject an auto compensation plan." W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM—AUTO COMPENSATION PLANS 21 (1965). The new version of the argument is, of course, that anyone who accepts no-fault compensation plans for automobile accidents cannot resist the application of its principles to other fields, especially since it will be offered on an elective basis.

6. "[I]nsurance dollars are precious; there are probably never going to be enough to go around. It would be better, then, to use those dollars to replace dollars lost than to use them to replace something essentially irreplaceable by dollars, namely, pain and suffering." ENDING INSULT, *supra* note 1, at 122.

7. *Id.* at 98-99.

8. *Id.* at 172.

That it is not financially feasible to abolish the tort system is a presumption for which no hard evidence exists. The cost of abolishing the tort system in New Zealand has not proved to be exorbitant—indeed, the new comprehensive twenty-four hour system costs about the same as the less comprehensive systems it replaced.[9] There should be at least enough fat in the tort system in the United States to go a very long way towards financing a comprehensive scheme.[10] Indeed, if all those contingent fees (unknown in non-American common law jurisdicitions) were spent for their proper purpose of compensating the injured, there would be much more money to finance such a program. The particular thrust of this type of reform has always been to make existing money go further and better serve social needs without increasing the resources devoted to compensation.

There is more substance in the second point, namely, that it is not politically feasible to abolish the tort system. It cannot be denied that the political obstacles to reform of the tort system in the United States remain substantial. O'Connell has always tried to finesse the major problem: the inability to wrest personal injury from the hands of private insurers. It may be that he actually *likes* private insurance in the field. In the United States, the argument is always made that private insurers are efficient and are a much more desireable alternative than any state-run bureaucracy. Once again, this American view flies in the face of evidence overseas. For example, workmen's compensation in Canada has always been run by Crown corporations whose percentage of administrative expenses are very low indeed.[11] Economies of scale in administration are much easier to achieve in a centralized organization than in a polycentric insurance industry composed of many, often small, units. The trouble in the United States is that such proposals are often greeted with the tag "creeping socialism" and are never seriously considered. The appropriate riposte was made in an Australian Inquiry into compensation for personal injury:

> It does not seem to be appreciated that the basic concept of private *enterprise* is entirely lacking in an area where the whole of the pre-

9. In the year ended March 31, 1975, the Accident Compensation Commission collected $79,562,091, with another $2.67 million from investments. Total expenditures for the year amounted to $32,690,520, which meant that $48,568,029 was transferred to reserves. It will be quite a few years before the cost picture becomes complete. Each year produces a number of permanent cases and, until the universe of permanent cases comes under it, the scheme will not reach the plateau of its expenditures. That will take twenty years, although all estimates of cost were prepared on a "plateau" basis. For the first year's accounts, see *Report of the Accident Compensation Commission* for the year ended March 31, 1975, presented to the House of Representatives, Appendices to the *Journals of the House*, E. 19, at 11-15 (1975) (New Zealand) [hereinafter cited as *Report*].

10. For example, the fat in the Australian injury systems is dramatic. The estimated premiums for 1973-1974 for existing systems was $665 million. The cost of a twenty-four hour earnings-related injury scheme was estimated "on the plateau" at $325 million. I NATIONAL COMMITTEE OF INQUIRY, COMPENSATION AND REHABILITATION IN AUSTRALIA 229-32 (July 1974) [hereinafter cited as AUSTRALIAN INQUIRY].

11. The cost of administering Ontario's comprehensive system of workmen's compensation has been less than 7% of each dollar of income for many years. B. LEGGE, Q.C., THE CANADIAN SYSTEM OF WORKMEN'S COMPENSATION 15 (1972).

> mium income is supplied quite automatically by statutory decree. The insurers have no need to go out and find any part of the business and the only area for their enterprise relates to the share that each can raise from the other of the fund so provided for division between them. Loose and emotive talk of the socialization of business, labelled by the industry as its own preserve, is a palpable misuse of the language.[12]

None of this foreign experience affects Jeffrey O'Connell's approach; he wants to make the world a better place than when he found it and there can be no doubt that his proposals achieve that goal. Moreover, they are less offensive to vested interests than more comprehensive proposals. Because he advocates a system of *elective* no-fault liability, they are certainly more compatible with American views of private market alternatives and options. How much and what kind of freedom is promoted by allowing potential tortfeasors to elect between traditional tort liability and no-fault liability, both forms of which they will insure against, does not appear to be immediately evident. But viewed from a social welfare perspective, the idea of options seems a peculiar one indeed. Furthermore, the option that O'Connell offers in his present proposal is not necessarily a good one. It is a tortfeasor's option, not an injured person's option. If the tort system provides an inadequate remedy, it seems that it should be altered by a collective public decision and not by the individual private decision of a potential tortfeasor. It is not easy to see how potential victims as a class will influence the decision.

The central ambivalence in O'Connell's approach flows from the point that he wants to make change, but not so great a change that he stirs up opposition likely to prevent his change from being put into effect.[13] This is the tendency which has caused Moynihan to call him "an inspired tinkerer."[14]

Although tinkering may be the only thing which is practical in the United States, O'Connell now owes his public a duty to outline what he sees as the ultimate pattern of personal injury law in the United States. He has done enough to transform the existing shape of it; now he should let the fly out of the bottle. In short, the time has come for O'Connell to stop tinkering and turn into a holistic social engineer.[15] If O'Connell believes that the American tort system must be

12. AUSTRALIAN INQUIRY, *supra* note 10, at 112-13.

13. Thus, O'Connell has proceeded on the basis that if you cannot abolish all of the tort system, it is best to abolish some of it. However, it could be argued that the very success of no-fault automobile insurance should give inspiration and ammunition to those who would abolish tort altogether, the point being that O'Connell may have out-foxed himself. The success of his own first proposals may have altered the climate to the extent that much more ambitious measures can now be launched.

14. Moynihan, *Foreward* to ENDING INSULT, *supra* note 1, at xi.

15. K.R. Popper makes the distinction between two types of social engineering, "Utopian engineering" and "piecemeal engineering." I K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 157 (1963). The use of the word "holistic" in the text probably suggests the former rather than the latter. What is emphasized is that "piecemeal engineering" can be too narrowly focused and that engineering does not become "Utopian" simply because it deals with *all* of a problem. Indeed, Popper would probably regard programs dealing with income maintenance in all its aspects as "piecemeal" social engineering. *See id.* at 159. In any event, O'Connell now has sufficient experience at his disposal after many piecemeal adjustments to proceed to draw up a blueprint of his final model. Popper would

scrapped or completely reconstructed let him tell of what his blueprint consists. He has now reached the limits of piecemeal improvisation. The difficulties of implementing a comprehensive plan are not quite as extraordinary as he might think.

A profitable comparison may be made with the experience of New Zealand. New Zealand has passed a law which provides twenty-four hour coverage for all victims of accidental injury, however that injury occurs and whether it is the result of fault or not.[16] No one is permitted to bring any common law proceedings in tort.[17] Everyone receives earnings-related compensation together with modest lump sums for pain and suffering and loss of bodily function.[18] Compensation by way of a lump sum cannot exceed $17,000 but the periodic payments can go on for the duration of the claimant's span of working life. The earnings-related compensation is set at 80% of lost earnings with an earnings limit of $15,600, a figure which exceeds the annual earnings of the vast majority of wage and salary earners in New Zealand. The scheme is funded by levies on employers, motor vehicle owners and a small

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probably not approve of the word "holistic" in the sense in which it is used in this article. *See* K. POPPER, THE POVERTY OF HISTORICISM 64-70 (1961). In the text of this article, "holistic" means the entire field in which the piecemeal reform is proposed.

16. Accident Compensation Act of 1972, No. 43, 1 N.Z. Stat. 521.

17. The means by which this is achieved are instructive. The Accident Compensation Act of 1972, section 5 provides:

> 5. Act to be a code—(1) Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.
>
> (2) Without limiting the generality of subsection (1) of this section, the action for loss of services (known as the action *per quod servitium amisit*) and the cause of action for loss of consortium (known as the action *per quod consortium amisit*) are hereby abolished.
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> (3) Nothing in this section shall affect—
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> (a) Any action which lies in accordance with section 131 of this Act; or
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> (b) Any action for damages by the injured person or his administrator or any other person for breach of a contract of insurance; or
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> (c) Any proceedings for damages arising out of personal injury by accident or death resulting therefrom, if the accident occurred before the 1st day of April 1974.
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> (4) No person shall have cover under this Act in respect of personal injury by accident if the accident occurred before the 1st day of April 1974.
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> (5) Where in any proceedings before a Court a question arises as to whether any person has cover under this Act, the Court shall refer the question to the Accident Compensation Commission for decision, and the Commission shall have exclusive jurisdiction to determine the question.
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> (6) The Commission may, on the application of any person who is a party to any proceedings or contemplated proceedings before a Court, determine any such question.
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> (7) Subject to Part VII of this Act, a subsisting decision of the Commission under subsections (5) and (6) of this section shall be conclusive evidence as to whether or not the person to whom the decision relates had cover under this Act.

Id. § 5.

18. *Id.* §§ 119-20.

Note

FIRST PARTY TORTS—EXTRA-CONTRACTUAL LIABILITY OF INSURERS WHO VIOLATE THE DUTY OF GOOD FAITH AND FAIR DEALING

I. INTRODUCTION

During the past twenty years the insurance industry has come under increased judicial scrutiny.[1] The inequities and "bad faith" which this scrutiny revealed have led courts to afford greater protection to insureds against unfair insurance industry practices. This has been accomplished through the expansion and development of the insurers' implied covenant of good faith and fair dealing[2] and the adaptation of tort remedies to insurance relationships.[3]

In its nascent stages the insurance industry occupied a favored position with the judiciary.[4] In the 1950's, however, courts began recognizing the need to equalize the relationship between insured and insurer. As judicial opinions increasingly scrutinized the conduct of insurers, the doctrine of bad faith emerged as a central concept in evaluating insurance industry practices. Early decisions enunciated the requirement that insurers give equal consideration to their own interests and to those of the insured.[5] Failure to do so constituted one element of bad faith and might render insurers liable to their insureds. Over the past two decades, this liability has evolved in three major stages: (1) contractual liability for breach of the covenant of good faith and fair dealing;[6] (2) tort liability for intentional infliction of mental distress;[7] and

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1. *See, e.g.*, Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); Henke v. Iowa Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168 (1959).

2. *See, e.g.*, Henke v. Iowa Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168 (1959). *Henke* presented a case of first impression in Iowa, but relied for its reasoning on cases from other jurisdictions. *See* Olympia Fields Country Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649, 60 N.E.2d 896 (1945); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952); Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930).

3. *See* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (Ct. App. 1970).

4. *See* T. O'DONNELL, HISTORY OF LIFE INSURANCE IN ITS FORMATIVE YEARS 21 (1936); Hirsch, *Strict Liability: A Response to the Gruenberg-Silberg Conflict Regarding Insurance Litigation Awards*, 7 SW. U.L. REV. 310 (1975). [hereinafter cited as Hirsch, *Insurance Litigation Awards*].

5. *See* note 1 *supra*.

6. *See, e.g.*, Henke v. Iowa Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168 (1959).

7. *See* Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972); Fletcher