

Confronting the Insurance Crisis

The insurance industry confronts an antagonistic public. California voters, who pay high insurance premiums and suspect that insurers are gouging them, passed an initiative that limits the right of an insurer to choose the price at which it can offer to sell a policy. According to the president of the National Insurance Consumer Organization, "more than 40 consumer organizations, from well-known national groups to small state-oriented groups, are seeking changes in insurance laws and regulations" based on the California initiative. In one form or another, then, the California initiative threatens to spread across the nation.

The California incident cannot be understood simply in terms of a desire among voters for cheaper insurance. Voters have fastened upon the insurance industry and not on other businesses that sell expensive products. Consumers believe that insurance premiums are *unfairly* expensive.

Insurers, on the other hand, maintain that inefficiencies in the tort system rather than their own greed best explain increases in premiums. To defend this view, they invoke the work of social scientists who have compiled evidence of inefficiency and waste in the tort system. They then argue that the tort system must be reformed.

Evidence of inefficiency or waste, however, does not in itself justify changes in regulations that govern tort and insurance. The public tolerates some inefficiency where the alternative would be to sacrifice concern with moral decency and rights, and it apparently regards the tort system as a device for vindicating the individual's right not to be unfairly harmed. Proposals for tort reform must, therefore, square with the public goals and values that underlie the tort system.

However important these goals and values may be, the approach most states now take in aiding accident victims, an approach which relies heavily upon the tort system, grows more expensive each year. Until recently, stable and hence inconspicuous insurance premiums have hidden the costs of the American response to accidents, but as insurance prices soar, we can no longer avoid social decisions about how to pay for these costs. If Americans continue to endorse the tort system as the primary vehicle for protection against accident costs, then insurance premiums — which ultimately pay for that protection — will increase. On the other hand, if we find that this system is not an appealing way to provide the kind of protection we want, then it is time to consider mechanisms that are less expensive and more efficient than those found in the current tort system.

The Tort System as a Compensation Device

The public blames a variety of social woes — including corporate bankruptcies, the refusal of municipalities to provide needed services, and the withdrawal of useful pharmaceuticals from the market — on escalating tort and insurance costs. Certainly one cannot deny that the prospect of tort liability has a chilling effect on the provision of many goods and services—especially the products of modern technology, including pharmaceuticals, chemicals, and nuclear power. Why does the tort system seem to hound these products?

One explanation stems from the nature of the products involved. While many of these products improve health and contribute to social welfare, they also expose a few individuals to increased risk. Use of a vaccine, for example, might decrease the incidence of a particular disease and thus diminish morbidity, but in a few instances the vaccine might itself cause serious side-effects. The vaccine might produce a net benefit in lives saved, then, but cause paralysis, disfigurement, or death to some who would have been better off without the vaccine.

When jurors are asked whether the manufacturer of such a vaccine should be liable for the harm it does, their sympathies tend to lie with those who suffer, and juries therefore may find against manufacturers. As the law stands, however, a manufacturer may be liable for a harm only if it was negligent or its product was defective. While legal scholars still debate the precise interpretation of negligence, strict liability, and other standards of liability in tort cases, most commentators agree that these standards ultimately imply a cost-benefit test: decisions about manufacturer liability require weighing the social costs and benefits of the manufacturer's product or conduct.

Juries, however, seem reluctant to weigh costs against benefits. The reasons for this reluctance are various. First, a jury may be moved by compassion or sympathy for the injured party, and thus put the interest of that individual before those of society as a whole. Second, juries may not be sensible to the riskiness of life — they may suppose that for every harm that anyone suffers, someone else must be responsible and should pay to make the victim whole. Third, juries may look for "deep pockets," neglecting to consider that money drawn from insurance comes from individuals. Finally, society, whether expressing itself in jury decisions or in statutes, is willing to spend far more to prevent "artificial" than "naturally" occurring hazards, thus buying much less safety than it might at the same cost.

Jury bias against man-made risk creates a disincentive for the production of risky but socially useful technologies, and it prompts manufacturers to withdraw some useful products from the market. It may also cause insurance prices to escalate, along with the price of insured products. Some commentators maintain that to avoid the impact of these jury biases, we should take decisions about product liability out of the hands of juries and turn these over to regulatory agencies, which are better equipped to engage in "unbiased" cost-benefit analysis.

Clearly this suggestion makes most sense on the assumption that the aim of the tort system is to create incentives that encourage manufacturers to sell only products whose social benefits exceed their costs — including the costs of accidents. But one might, instead, believe that the goal of tort law is to compensate victims or to redistribute risk or to redistribute wealth. What one counts as an attractive tort reform depends on what one regards as the proper goal of the tort system.

In any case, juries act on their preference that the tort system be used as a device for compensating accident victims. Unless those of us who wish to improve the tort system learn to accommodate or work around the

jury preference for compensation, we risk the prospect that jurors will use the tort system to serve aims that it cannot efficiently serve.

Assessing the Tort System as a Compensation Device

No matter how attractive one may find the compensation function of the tort system, one must take seriously strong reasons against social reliance on tort as a device for paying all claims for compensation. One reason, already noted, is that the threat of paying such compensation may serve to discourage manufacturers and others from engaging in socially valuable but risky activity.

Tort actions are now so expensive, moreover, and involve so many transaction costs that any good they achieve is bound to be vastly overpriced. Successful tort claimants get merely 30 to 40 percent of the money that enters the tort system. The rest goes to pay administrative costs, including legal fees, court costs, and the salaries of insurance company employees who devote their time to seeing claims through the legal process. As a vehicle of compensation the tort system compares poorly with one of its main competitors, first-party insurance, in which 70 to 80 percent of money that



NED'S

CONSUMER HOT LINE



Dear Ned,
Boy, am I steamed!
About 3 days ago,
I sent Acme Pencils
11¢, and I never
got my pencil/. What
should I do?

Steamed-up Guy



Dear Ned,
Recently, while I
was sharpening an
Acme pencil, the
point simply fell
out. Any advice?

Hot Under
the Collar



Dear Ned,
Soon after I received
my Acme pencil (11¢),
it rolled off the desk
and onto the floor.
Upon retrieving it, I
hit my head on the
desk. Can I hold
Acme responsible?

Boiling Mad

N. Chant

Dear Steamed,
Sue them for
everything they've got.

Ned

Dear Hot,
Drop everything
you're doing and sue,
sue, sue.

Ned

Dear Boiling,
This is what's known
as an open-and-shut case.
If you don't sue them,
I will.

Ned

enters the system eventually goes to accident victims.

Typically, money paid for "pain and suffering" constitutes the largest portion of an accident victim's tort recovery. When the tort system requires payment for pain and suffering, the potential tortfeasor then in effect purchases insurance (or self-insures) to protect himself from the prospect of paying these kinds of damages. The cost of this insurance passes on to consumers through higher product prices. Yet it seems doubtful that people think that insurance against pain and suffering would be worth buying. In fact, there exists no demand for first-party insurance against pain and suffering. Thus, in paying the price of a product that includes a judicially imposed premium for insurance against pain and suffering, consumers are compelled to purchase insurance that few would purchase freely. This adds another reason to believe that the tort system, as it currently exists, requires the public to spend money on items it does not want to buy. While the idea of the tort system as a device for vindicating common law rights against "pain and suffering" may express admirable sentiments, it is an open question whether these are sentiments that we can afford to vindicate in so inefficient a way.

The tort system, of course, ignores the enormous number of accident victims who have no good prospects for recovery in court. But there may seem to be no morally relevant difference between a person who suffers an illness through exposure to natural elements in the environment and a person who suffers that same illness when it is caused by human activity: both are equally needy and may deserve our help. Through the tort system, we apparently express a social preference in favor of those whose injuries or illnesses have been caused by human activity. From the perspective of the accident victim, this seems arbitrary. Why should he be penalized because nature or chance, rather than a human being, caused his illness or injury?

In response to the charge that the tort system perversely fastens upon the misery of those whose accidents were caused by human activity, one may say that the system's sole function is to take money from those who wrongly cause harm and then give it to victims of that harm, and that this function bears no relevance to the scope of social duty to provide aid in other circumstances. On this view, tort law is a matter of correcting a moral imbalance between a tort victim and his injurer, and nothing more.

Proponents of the "corrective justice" interpretation of the tort system must recognize, however, that funds will exist to pay legitimate claims only if society does not preempt the tort system by providing, e.g., through a mandatory insurance scheme, aid to victims of accident or illness regardless of causation issues. Adoption of such a scheme would express a social judgment that the interests of victims of natural accidents and the interests of tort victims are equally worth protecting. It remains an open question whether such preemption would compromise the rights of tort victims as they are conceived under the "corrective justice" approach.

Alternative Approaches to Compensation

Many commentators suggest, as a way to cut through the Gordian knot, that society institute a broad no-fault approach to insurance and tort reform. In two well-known instances, attempts have been made to supplant or supplement tort law through insurance schemes that pay for injuries regardless of fault: workers' compensation and no-fault auto accident programs. In each instance, the prospective accident victim makes a mandatory trade, in which he forgoes the common law right to damages and, in exchange, receives the right to prompt recovery of economic loss, along with payment of his attorney's fees. The victim then receives relief from the common law requirement that he prove that his accident was someone else's fault. The virtue of no-fault, at least in theory, is that it provides the important compensation benefits that we associate with the tort system, but avoids the enormous transaction costs and unpredictability of the tort system. It is time seriously to consider whether the morally legitimate aims of the tort system could be well served by reshaping that system so that it more closely resembles a no-fault regime.

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In many jurisdictions no-fault auto compensation programs have succeeded in providing quicker and more certain coverage than that provided through traditional tort liability systems. Nobody, however, regards no-fault as a complete success. Too often, no-fault represents an unstable legislative compromise. Many no-fault programs, for example, limit an accident victim's common law rights only minimally; "add on" programs of this sort, of course, increase insurance costs rather than lower them. And many no-fault programs deprive the accident victim of any meaningful recovery.

Strong arguments can be made that workers' compensation programs provide payment that is both cheaper and better than compensation provided through comparable components of the traditional tort system. Inadequacies in workers' compensation awards, however, apparently contribute to the recent explosion in product liability suits. Injured employees, dissatisfied with the puny recovery available from their employers for on-the-job injuries, look elsewhere — that is, to those who manufacture the products they use at work — to get compensation for their injuries. Legislators and judges, who sympathize with the plight of industrial accident victims, see little reason to limit

"end runs" around the workers' compensation system.

Whatever the merits and shortcomings of no-fault regimes, one might suspect that they do not have a rosy future. In the recent California election, a no-fault initiative was decisively defeated, and in legislatures, momentum for no-fault plans has virtually disappeared. The current political unpopularity of no-fault may be a short-term consequence of poorly designed no-fault systems and voter anger at insurers: often the public regards no-fault proposals as mere reductions

in accident victims' rights, i.e., nothing more than a boon for insurers and business.

Nevertheless, as the tort and insurance crises worsen, the possibility of defensible and workable no-fault programs must be taken seriously. A huge variety of no-fault plans exists. A careful analysis of the ways such plans can be structured, coupled with attention to the ethical and social goals they must serve, may show no-fault to be a plausible alternative to the present impasse.

— Alan Strudler

Is Advertising Manipulative?

One common charge brought against advertising is that it is manipulative: even when it is not outright fraudulent, it works on us somehow sneakily and inexorably, getting us to want what somebody else wants us to want, persuading us to buy what somebody else wants us to buy. But surely other people try to get us to want things all the time and exercise all different kinds of persuasive — not to mention coercive — power over us. What in particular is meant by the charge of manipulation, so that people are bothered when they feel they've been its victim? It is not easy to specify exactly what makes some sorts of advertising cross the line from morally acceptable persuasion to morally suspect manipulation. The charge of manipulation, we shall see, can be used to carry several quite different accusations, which may or may not be validly addressed to advertising.

Manipulation as Covert Persuasion

Sometimes we mean by "manipulation" any attempt at persuasion that is in some way covert, where the person doing the persuading wants to hide from its targets the fact that that is indeed what he intends. The manipulator doesn't lie about any actual facts about the external state of the world; instead he deceives others about the internal state of his own desires and intentions. A classic example here is Tom Sawyer's persuading his friends to take on his chore of whitewashing Aunt Polly's fence by pretending that he himself thinks whitewashing is glorious fun.

We might object to attempts at covert persuasion on two grounds. First, they might lead people to make substantively worse decisions and to take substantively worse actions than they would otherwise have done. Certain exceptions aside, covert processes in general are not as reliable as open attempts at persuasion. The suspicion will be ever present that if the program

someone is selling were so wonderful, she wouldn't have to resort to covert tricks to sell it. As often as not, one thinks, this suspicion will be well founded.

A second worry about covert persuasion is that it may make us feel that we have been led to undertake some action less than voluntarily. Tom's friends wouldn't have whitewashed the fence if they had known he wanted them to do it; they could claim, therefore, to have been misled about some crucial feature of the circumstances and so to have failed to give their full informed consent to the enterprise. But whether we think covert persuasion makes us act involuntarily depends on whether we think other people have an obligation to exercise persuasion overtly. If they've done nothing wrong by hiding their intentions from us, we can't complain that they've violated our autonomy in the process.

Do we want to condemn the deception involved in covert persuasion? One might think, after all, that deception about one's own desires and intentions is a more acceptable species of deception than deception about some external fact of the matter; we are not dealing here with the bold-faced lie. My own desires and intentions are paradigmatic of the private; isn't it my business whether or not I want to make them public?

Whether covert persuasion counts as morally wrong will depend in the end on the extent to which we think one has an obligation to be open and straightforward with others, on the degree to which transparency is expected in human relationships. The answer will vary according to the kind of relationship in question — intimate, friendly, business, frankly adversarial — and the presuppositions and assumptions that govern that kind of relationship.

Relatively little advertising counts as manipulative in this first sense. For one thing, most adults recognize advertisements for what they are: usually straight-