A MARKET IN PERSONAL INJURY TORT CLAIMS

Marc Shukaitis

Discussion Paper No. 17

5/86

Program in Law and Economics
Harvard Law School
Cambridge, MA 02138

The Program in Law and Economics is supported by a grant from the John M. Olin Foundation.

A Market in Personal Injury Tort Claims

M. Shukaitis*

Abstract. Personal injury tort victims today are prohibited from receiving compensation by selling their tort claims to third parties who would then pursue the tortfeasors. Such a market in tort claims could provide superior compensation to a tort victim who needs immediate compensation, who is risk averse, and who now can bargain only with the tortfeasor. A market would raise concerns that there might be an increase in nuisance suits and total litigation, that purchasers might take advantage of unsophisticated tort victims, and that the very act of selling personal injury tort claims might be thought offensive.

*Third year law student and John M. Olin Fellow, Harvard Law School

A Market in Personal Injury Tort Claims

M. Shukaitis

Introduction

Millions of Americans suffer each year from personal injuries caused by tortious acts. Under today's law, a tort victim may not sell his personal injury claim to a third party who would then pursue the claim against the tortfeasor. To receive compensation, a personal injury tort victim must choose between settling with the tortfeasor or litigating to a court judgment.

Both litigation and settlement, however, have serious disadvantages from the tort victim's point of view. The delay and uncertainty of litigation reduce the attractiveness of litigation for victims who need immediate compensation and who are risk averse. Although settlement may provide quick and certain compensation, the price of settlement may be a lower recovery: settlement places tort victims who need immediate compensation and who are risk averse in a poor bargaining position.

Allowing victims to sell their claims to third parties, that is, allowing a market in personal injury tort claims, would have significant advantages for tort victims. Compared with litigation, tort victims would be able to receive immediate and certain compensation by selling their claims to purchasers in the market. Compared with settlement, tort victims would receive compensation at a market price closer to what they would expect

to receive from a court judgment. Thus, compensation by the tort system would be made less dependent upon the tort victim's ability to withstand delay and uncertainty.

A tort market would have other effects as well. Victims who now do not pursue their claims because of ignorance of their rights or a lack of resources might receive compensation. Also, by increasing the costs of tortfeasors, a market would increase deterrence against harm-causing activities.

A market could also lead to an increase in litigation of spurious claims as well as an increase in total litigation. Unscrupulous claim purchasers might take advantage of unsophisticated tort victims who are unable to make informed choices. Finally, some people may find the very act of selling personal injury tort claims offensive.

Part I of this paper briefly examines the legal framework which now bars the operation of a market in personal injury tort claims. Part II discusses the potential effects such a market would have. Part III discusses the arguments bearing on allowing a market. Part IV offers an opinion about how the potential benefits and drawbacks of the market should be weighed and concludes that state legislatures should encourage the development of a market in personal injury tort claims.

I. The Law Today

Following a long common law tradition, state laws today act to bar the operation of a market in personal injury tort claims. Most state courts prohibit the assignment of personal injury tort claims either out of a professed fear of maintenance, champerty, and barratryl or on the theory that personal injury claims do not "survive" and only actions which survive can be assigned.2 In most states, the prohibition against assignment of personal injury tort claims flows from judicial interpretation of common law and public policy3, but a few states explicitly ban the

---

1 See, e.g., Hospital Serv. Corp. of R.I. v. Pennsylvania Ins. Co., 101 R.I. 708, 227 A.2d 105, 109 (R.I. 1967); North Chicago St. Ry. Co. v. Ackley, 171 Ill. 100, 49 N.E. 222, 226 (Ill. 1897); Rice v. Stone, 83 Mass. 566, 569 (Mass. 1861); Berlinski v. Ovellette, 164 Conn. 482, 325 A.2d 239, 242 (Conn. 1973); Collins v. Blue Cross of Virginia, 213 Va. 540, 193 S.E.2d 782, 785 (Va. 1973); Dahms v. Sears, 13 Or. 47, 11 P. 891, 897 (Or. 1896).

"Maintenance" exists when a person "without interest" in a suit assists a party in litigation. "Champerty" is maintenance plus an agreement to share in the proceeds of the suit. Lahocki v. Contee Sand & Gravel Co., 398 A.2d 490, 507 (Md. Ct. Spec. App. 1979). "Barratry" is repeated maintenance or champerty. State ex. rel. Carr v. Cabana Terrace, Inc., 153 So.2d 257, 259 (Miss. 1963).

2 See, e.g., Employers Casualty Co. v. Moore, 60 Ariz. 544, 142 P.2d 414 (Ariz. 1943); Haymes v. Halliday, 151 Tenn. 115, 268 S.W. 130 (Tenn. 1925); Catalfano v. Higgins, 182 A.2d 637 (Del. Super. Ct. 1962); Nordling v. Johnston, 205 Or. 315, 283 P.2d 994 (Or. 1955).

3 See, e.g., Forsthove v. Hardware Dealers Mutual Fire Ins. Co, 416 S.W.2d 208 (Mo. Ct. App. 1967); Hospital Service, 227 A.2d 105.; Southern Ry. Co. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (N.C. Ct. App. 1984).

assignment of personal injury actions by statute.[4] And even where transfer of personal injury tort claims is permitted, the limits on such transfer prevent the formation of a market in tort claims.

A. Common Law Fear of Maintenance, Champerty, and Barratry

Prohibitions against maintenance[5] have been inherited from English common law doctrines developed in the fifteenth and sixteenth centuries due to concerns that otherwise disinterested parties were stirring up litigation for harassment and profit.[6] Conditions in England at that time gave courts considerable reason to bar third parties from participating in the litigation process. Resourceful lords commonly profited from supporting litigation in a system which gave the rich tremendous advantages in litigation. Witnesses could be bought because perjury was not a crime,[7] the judicial system was expensive and highly technical,[8] and direct corruption of juries and judges was widespread.[9]

---

[4] See, e.g., **Ga. Code Ann.** sec. 85-1805 (Supp. 1985); **N.Y. Gen. Oblig. Law** sec. 13-101 (McKinney 1978) ("Any claim or demand can be transferred, except in one of the following cases: 1. Where it is to recover damages for a personal injury....").

[5] For convenience, the term "maintenance" will be used to refer to maintenance, champerty, and barratry.

[6] See Holdsworth, The History of the Treatment of Choses in Action by the Common Law, 33 **Harv. L. Rev.** 997, 1007 (1920).

[7] Note, The Law of Maintenance and Champerty and the Assignment of Choses in Action, 10 **Sydney L. Rev.** 166, 166 (1983).

[8] Holdsworth, supra note 8, at 1007.

[9] See Note, The Law of Maintenance and Champerty and the Assignment of Choses in Action, supra note 9, at 166.

To discourage this injustice, the common law broadly prohibited the assignment of choses in action[10,11], a category including personal tort actions as well as most contract and property tort actions. The common law condemnation of maintenance was also an effort to discourage both the remnants of feudalism and the nascence of capitalism in England.[12]

In recognition of business needs, the English common law slowly loosened the interpretation of maintenance prohibitions to allow the assignment first of debt actions and then of property tort claims.[13] Judicial integrity and social conditions have improved markedly since the development of the common law prohibitions, to the point where one must question whether there is any vitality remaining in the rationale of prohibiting assignments to avoid maintenance.[14]

---

10 Choses in action are rights to bring legal action to recover money or property. The term choses in action includes contract and tort actions. See Holdsworth, supra note 6.

11 See Lott v. Kees, 165 So.2d 106, 108-9 (Ala. 1964); In Lampet's Case, 10 Co. Rep. f. 48a (1613), Lord Coke declared that the prohibition derived from the aversion of the "sages and founders of our law" to the "multiplying of contentions and suits." While the fear of maintentance spurred the development of the prohibition against assignment, the early origins of the prohibition lie elsewhere. See text infra at note 92.

12 See Radin, Maintenance by Champerty, 24 **Calif. L. Rev.** 48, 65-66 (1935).

13 Radin, supra note 12, at 1021.

14 See Casserleigh v. Wood, 14 Colo. App. 265, 59 P. 1024, 1026 (Colo. Ct. App. 1900) ("The progress of law, enlightenment, and civilization during the last few hundred years has, however, to a large extent, obviated the necessity of these stringent rules.... [In the United States] there are no privileged or aristocratic classes, all being equal before the law;

B. Common Law Assignability/Survivability Equivalence

Under the common law, a person's death terminated any cause of action for a personal tort which the victim could have asserted before his death[15]--a cause of action for personal tort was thus said not to "survive" the injured party's death. The common law's reasons for refusing to allow the survival of personal tort actions are obscure but involve notions of a tort remedy as meting out punishment and revenge.[16] Revenge was thought possible only by the injured person and, after the tort victim's death, the Crown was expected to punish the tortfeasor. While the survival doctrine originated in English common law, the equivalence of survival and assignability of causes of action is peculiarly an American doctrine.[17] In 1828, the U.S. Supreme Court declared in Comegys v. Vasse that: "In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment...."[18]

---

and it has never been charged that there was fear in this country of the courts being improperly dominated by such influences as were dreaded by our ancestors a few hundred years ago"). See also Radin, supra note 12, at 66.

15 W. Prosser, Law of Torts 898 (1971).

16 Id.

17 See H. Weinberg, Tort Claims as Intangible Property: An Exploration from an Assignee's Perspective, 64 **Ky. L.J.** 49 (1975) at 59-74 for a detailed examination of the historical assignability/survivability equivalence.

18 Comegys v. Vasse, 26 U.S. 193, 213 (1828).

Following this Comegys dictum, many American courts adopted the equivalence of survivability and assignability. As one court has noted, however, "[t]he reason for this equation between survivorship and assignability is seldom explained."[19] Indeed, given that the rationales for denying survival of personal tort actions rest largely on archaic conceptions of tort law, courts and policymakers should consider the merits of assignability and survivability separately.

Survivability restrictions have been legislatively eased in many states to allow personal injury tort claims to survive.[20] Courts in some of these states have blindly followed the equivalency doctrine, holding that a statute which permits survival authorizes assignment.[21] Other courts have rejected the survivability/assignability equivalence where state laws permit survi-

---

19 Geertz v. State Farm Fire and Casualty, 253 Or. 307, 451 P.2d 860, 862 (Or. 1969).

20 **Ky. Rev. Stat.** sec. 411.140 (1972); **Mich. Comp. Laws Ann.** sec. 600.2921 (West 1985 Supp.); **S.C. Code Ann.** sec. 15-5-90 (Law. Co-op 1976); **Wis. Stat. Ann.** sec. 895.01 (West 1983); **Wash. Rev. Code** sec. 4.20.046 (1983). The Washington legislative history records that "the humanitarian aspects of permitting survival of the remaining actions which do not survive far outweighs [sic] the fear of the insurance companies that they may have to increase their rates." Harvey v. Cleman, 65 Wash.2d 853, 400 P.2d 87, 89 (Wash. 1965). Washington's unusual statute permits the survival of all actions, but an assignee may not recover for the pain and suffering of the injured victim. In practical terms, the statute thus eliminates the purchase or sale of most personal injury claims because a purchaser would be unable to compensate a victim for pain and suffering.

21 See, e.g., Davenport v. State Farm Mutual Automobile Ins. Co., 81 Nev. 361, 404 P.2d 10, 12 (Nev. 1965); Doremus v. Atlantic Coast Line Railroad Co., 242 S.C. 123, 130 S.E.2d 370, 379 (S.C. 1963).

val, analyzing assignability as a separate policy choice.[22]

C. Subrogation and Other Lawful Claim Transfers

Some courts allow the functional equivalent of assignment of personal injury claim rights in the limited context of subrogation by an insurer[23]. A tort victim compensated for his injuries by his insurer retains a cause of action against the tortfeasor for the harm done. Either contractually or equitably, the cause of action may be subrogated to the insurer to the extent of the insurer's payment. While some courts allow subrogation of personal injury claims[24], other courts do not[25], arguing that subrogation of a personal injury claim is equivalent to assignment of

---

22 See, e.g., Forsthove, 416 S.W.2d at 217; Southern Farm Bureau Casualty Ins. Co. v. Wright Oil Co., 454 S.W.2d 69, 71 (Ark. 1970); City of Richmond v. Hanes, 203 Va. 102, 122 S.E.2d 895, 899 (Va. 1961). The Forsthove court declared: "We think the reasons for the applicability of such a public policy are as fundamental and as necessary today as in the days of the origin of this rule. We do not think economic or social changes since its origin make the reasons for this humane rule anachronistic." 416 S.W.2d at 217.

23 Subrogation is the right that one party has against a third party following the payment of a legal obligation which was owed by the third party. **Windt, Insurance Claims and Disputes** sec. 10.05 (1982).

24 See, e.g., Hospital Service, 227 A.2d at 110. See generally, **Donaldson, Casualty Claim Practice** (1984) at 627-630.

25 See, e.g., Travelers Indemnity Co. v. Chumbley, 394 S.W.2d 418, 425 (Mo. Ct. App. 1965) (allowing an exception to the "long-recognized and well-established legal principle prohibiting assignment...[would lift] the lid on a Pandora's box crammed with both practical and legal problems.")

the claim and similarly should be prohibited.[26]

In a few states, courts have allowed the assignment of personal injury tort actions, typically through the interpretation of state survival statutes. Courts in New York have in effect permitted assignment by interpreting a New York statute which forbids the transfer of a personal injury claim[27] as not precluding the assignment of the proceeds of the claim.[28]

Even in the states which permit assignment of personal injury tort claims, courts and legislatures have erected significant barriers to the development of a market in tort claims. In Texas, for instance, although personal injury tort claims can be "bartered, sold, and contracted for,"[29] barratry laws prohibit solicitation of claims.[30] Other states which permit assignment of tort claims bar the purchase of tort claims by market partici-

---

26 For a discussion of the differences between subrogation and assignment, see Kimball, The Extension of Insurance Subrogation, 60 **Mich. L. Rev.** 841, 866-867 (1962).

27 **N.Y. Gen. Oblig. Law** sec. 13-101 (McKinney 1978). See note 4, supra.

28 Williams v. Ingersoll, 89 N.Y. 508 (1882); Stathos v. Murphy, 26 A.D.2d 500, 276 N.Y.S.2d 727 (N.Y. App. Div. 1966). Other states which have considered New York's approach have rejected it as "a distinction without a difference." Harvey, 400 P.2d at 90. See also Karp v. Speizer, 132 Ariz. 599, 647 P.2d 1197, 1199 (Ariz. Ct. App. 1982); McGhee v. Charley's Other Brother, 161 N.J.Super. 551, 391 A.2d 1289, 1293 (N.J. Super. Ct. Law Div. 1978), aff'd 171 N.J. Super. 454, 410 A.2d 46 (N.J. Super. A.D.1979).

29 McCloskey v. San Antonio Traction Co, 192 S.W. 1116 (Tex. Civ. App. 1917).

30 **Tex. Penal Code Ann.** sec. 38.12 (Vernon 1974). See text infra at notes 80--89 for a discussion of the evolution of Texas law.

pants through maintenance, champerty, and barratry statutes.[31] Courts in two states appear to prohibit an assignee of a personal injury claim from recovering more than the consideration the assignee paid to the tort victim[32], thus effectively preventing a market by removing the profit incentive of a potential claim purchaser.[33]

---

31 See, e.g., **N.Y. Jud. Law** secs. 488, 489 (McKinney 1983); **S.C. Code Ann.** sec. 16-17-10, sec. 40-5-340 (Law. Co-op. 1976); **Miss. Code Ann.** sec. 97-9-11 (Supp. 1985).

32 D'Angelo v. Cornell Paperboard Products Co., 19 Wis.2d 390, 120 N.W.2d 70 (Wis. 1963) (voiding as against public policy an assignment in excess of what an insurer paid the injured insured for the claim); City of Detroit v. Bridgeport Brass Co., 28 Mich. App. 74, 184 N.W.2d 278, 281 (Mich. Ct. App. 1970) (holding that a personal injury claim may be obtained from an injured person in exchange for a "reasonable" consideration and finding that the challenged assignment was reasonable where assignee could recover no more than was paid to the injured).

33 Roman law allowed the sale of tort claims until 506 A.D. when the buying of claims was effectively stopped by taking away a purchaser's profit incentive: the constitution of the Emperor Anastasius allowed a purchaser to recover only the amount paid for the claim with interest. The constitutional ban developed because tort victims were being induced to sell their claims for far below their value. See Radin, supra note 12, at 55.

II. The Potential Effects of a Market

A. Compensation to Tort Victims

The most significant effect of a market in personal injury tort claims would be that tort victims who sold their claims would receive immediate and certain compensation at a "market" price.[34] Our present system, in which tort claims may not be bought or sold, tends to reduce the value of compensation available to a tort victim. A tort victim now is able to receive immediate compensation from only one person, the tortfeasor. The tortfeasor, however, often enjoys a bargaining advantage over the victim because of his ability to threaten the victim with the delay and uncertainty of court proceedings. In addition, a tort claims market could increase access to compensation for those who now do not pursue their claims because they are unaware of their legal rights or are unwilling to pay the high costs of litigation.

1. Increased Value of Compensation

A tort victim seeking compensation from the tortfeasor is frequently in a very poor bargaining position. The tort victim may need money immediately to pay medical bills, to replace lost

---

[34] I intitially assume that a market in tort claims would be "efficient," i.e. information relevant to the value of tort claims would be easily and inexpensively available to prospective purchasers and sellers of tort claims. The question to what extent the market would be efficient is discussed infra.

wages, and to cover living expenses.[35] If he seeks compensation through the court system, however, he may wait as much as several years before trial.[36] The tort victim who is unwilling or unable to wait for a court judgment must attempt to settle with the tortfeasor.[37] The tortfeasor, though, may simply be unwilling to settle.[38] In this case, the tort victim, no matter how pressing his immediate need, will receive no compensation except through the legal process.

Unlike the tort victim, the tortfeasor typically has little incentive to settle quickly. Indeed, the tortfeasor prefers delay because a payment in the future costs him less than an

---

[35] If the tort victim has insurance, the need for immediate compensation may be alleviated. Insurance coverage limits, however, may be lower than the actual expenses incurred by the victim. More importantly, many people do not have insurance and it is those who most need immediate compensation (the poor) who are the least likely to have insurance. Even a victim fully compensated for his economic losses by insurance may have a significant interest in pursuing the tortfeasor for pain and suffering damages (for which he would not have been compensated by insurance).

[36] See Rosenberg & Sovern, Delay and the Dynamics of Personal Injury Litigation, 59 **Colum. L. Rev.** 1115 (1959).

[37] From the tort victim's point of view, settling with the tortfeasor is essentially equivalent to selling the cause of action to the tortfeasor in what amounts to a one buyer market, i.e. a monopsony. A monopsony provides the buyer with significant bargaining power. See **R. Lipsey, P. Steiner, & D. Purvis, Economics** 358 (7th ed. 1984). A major difference between settlement and selling in a market is that a market would present many potential buyers to a tort victims.

[38] A tortfeasor may, for example, contest his liability or believe that refusing to settle will discourage future claims.

immediate payment.[39] Delay also operates to the advantage of the tortfeasor when the tortfeasor is better able to bear the ongoing expenses of litigation.[40] The tort victim's need for immediate compensation coupled with the tortfeasor's incentive to delay thus tend to make any settlement less than what the tort victim would expect to receive if he waited for a court judgment.

The parties' differing attitudes towards the uncertainty of the amount of a court judgment also reduce the amount at which the two parties settle. If both the victim and the tortfeasor had the same attitude towards risk, i.e. if both were "risk neutral" or equally "risk averse," neither party would have a bargaining advantage based on his ability to subject the other party to risk.

A "risk neutral" party would be indifferent between pursuing litigation and settling for the discounted[41] "expected value" of

---

[39] The tortfeasor can invest the money in the interim. At a 10% interest rate, a tortfeasor saves himself $8333 per month of delay on a $1,000,000 future judgment. For a discussion of the present and future values of money see **R. Brealey & S. Myers, Principles of Corporate Finance** (2d ed. 1984) at 10-21. Where present, prejudgment interest statutes reduce the incentive of the tortfeasor to delay. See Note, The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases, 16 **U.S.F.L. Rev.** 325 (1982).

[40] Contingency fee representation by attorneys reduces the burden of litigation expenses for tort victims. Contingency fee representation is compared with a tort market infra at text accompanying notes 61--74.

[41] "Discounted" implies that money to be received in the future is worth less than money received today. Thus at a 10% interest or "discount" rate, $100 to be received 1 year from now is worth approximately $90.91 today. A tort victim who needed money immediately to pay bills and living expenses would have a very high discount rate, i.e. would value money in the present

the court judgment.[42] The expected value of a court judgment is equal to the sum of the probability of each possible outcome times the dollar value of that outcome. For example, the expected value of a cause of action where there was a 50% chance of a $100,000 recovery and a 50% chance of no recovery would be $50,000.[43] In this example, one would expect that if both the tort victim and the tortfeasor were risk neutral, the two parties would settle for $50,000.

The tort victim, however, is probably "risk averse" rather than risk neutral.[44] A risk averse person prefers a sum which is less than the expected value of an event, but certain, rather than the risk of an uncertain outcome. In particular, one would expect a poor tort victim who needs to pay expenses to be risk

---

much more highly than money in the future. This assumes that the tort victim is unable to borrow money inexpensively from a bank or other source, which is probably a realistic assumption for a tort victim who has few assets other than his tort claim. Banks are not well-equipped to evaluate tort claims as collateral for loans and in any case the maximum amount a lending institution would be willing to loan on the security of a tort claim would be the discounted expected value of the claim (i.e. the price a victim could sell his claim for in the market).

[42] This assumes that the litigation is costless. A party would value settlement more highly to the extent of costs (attorneys fees, court fees, time expended, etc.) which are associated with the litigation process. For more complex economic modeling of the settlement incentives, see J. Gould, The Economics of Legal Conflicts, 2 **J. Legal Stud.** 279 (1973); S. Shavell, Suit, Settlement, and Trial, 11 **J. Legal Stud.** 55 (1982).

[43] (.50 x $100,000) + (.50 x $0) = $50,000.

[44] Most individuals are risk averse rather than risk neutral or risk seeking. **H. Raiffa, Decision Analysis** (1968) at 52. That most people are risk averse is evidenced by the widespread purchase of insurance.

averse. Given a choice between a sure $20,000 settlement and a 50/50 risk of a court awarding $100,000 or nothing, a person who is sufficiently risk averse would prefer the certain $20,000.[45]

The tortfeasor, on the other hand, is probably much less risk averse. Since most personal injury defendants are insured, one would expect a tortfeasor to be risk neutral. A bargaining situation in which the tort victim is risk averse and the tortfeasor is risk neutral favors the tortfeasor because the tortfeasor can threaten the victim with the uncertainty of litigation. And indeed the amount of compensation a court will eventually award to an tort victim is highly uncertain[46] and has been compared to a lottery[47]. In the above example, the tortfeasor is unlikely to offer a settlement of $50,000 (the expected value it would have to pay were a court to issue a judgment) where the tort victim prefers a certain $20,000 to taking a chance on a court judgment.

---

[45] It makes sense that the first $20,000 of compensation might be worth enough to a tort victim that he would not be willing to gamble losing this amount on the chance of an additional $80,000: he may, for instance, need the $20,000 to pay the out-of-pocket expenses he has incurred. Also, to the extent the tort victim is poor one expects a high degree of risk aversion because the initial amount of money represents "a lot" of money to a poor person. See Raiffa, supra note 44, at 91-92.

[46] Conard, The Economic Treatment of Auto Injuries, 63 **Mich. L. Rev.** 279 (1964) (citing studies showing that half of all tort victims receive less than their monetary loss while others are awarded five times their loss).

[47] **O'Connell, The Lawsuit Lottery** (1979); Sugarman, Doing Away with Tort Law, 73 Calif L. Rev. 555, 594 (1985).

By improving the bargaining position of risk averse tort victims, a market in tort claims would raise the amount of compensation to a tort victim closer to the expected court judgment. A market would provide many potential buyers for tort claims and thus would eliminate the monopsony advantage which a tortfeasor now enjoys.[48] Thus, a tortfeasor would no longer be able to threaten a tort victim with no settlement or the choice between accepting a low settlement and waiting years for a court judgment. Rather than bargaining with one intransigent tortfeasor, a tort victim could simply sell his claim to one of many potential buyers in the market.[49]

A tort claim market would similarly reduce the amount of compensation which the tort victim now forgoes because of his immediate need for money.[50] The tort victim could sell to a third party who would value a future court judgment more highly than does the tort victim[51] and who thus would be more willing to withstand delay.

The tort victim would likewise be able to recover in a tort

---

48 See note 37, supra.

49 Assuming a well functioning market, a tort victim would be unable to sell his claim only if the discounted expected recovery were less than the expected expenses of pursuing the claim.

50 There may also be significant non-economic advantages to providing immediate compensation to tort victims. See Conard, supra note 46, at 314-315 ("The speeding up of settlements ... would do more to relieve the distress of injury victims than any other conceivable change in tort law administration.")

51 i.e. the purchaser would have a lower discount rate than the tort victim.

claim market much of the compensation which he now loses because of his risk aversion. In the above example, the risk averse tort victim might settle for a certain $20,000 offered by the tortfeasor. If a market existed, risk neutral buyers would be willing to pay the injured person up to $50,00052 for the right to pursue the claim.

A tort claim could also be worth more to a market purchaser than to the victim because a purchaser could hold a diversified portfolio of claims.[53] A diversified portfolio of tort claims would be worth more than the sum of the expected monetary values of the individual claims because diversification would reduce some of the risk associated with the claims.[54] A purchaser of a diversified portfolio would eliminate the "unsystematic" risk associated with claims and would thus discount his purchase price of a claim only for "systematic" risk.[55] The diversified port-

---

52 less the expected legal and other expenses of settling or litigating the claim.

53 A diversified porfolio would include many (perhaps a dozen or more) claims from different victims, involving different accidents, different types of injuries, and which would be presented in different courts using different legal theories. Collecting a diversified portfolio would be to some extent inconsistent with increasing value through expertise. See text infra at note 56.

54 For a discussion of diversification and how it reduces the riskiness of a stock portfolio, see **R. Brealey & S. Myers,** supra note 39, at 123-126.

55 "Unsystematic" or "unique" risk is risk peculiar to the individual claim (e.g. the risk of a key witness failing to testify). "Systematic" or "market" risk is economy-wide risk which affects all claims (e.g. the risk of inflation or a shift in public sentiment towards the appropriate level of compensation to personal injury victims). See id at 125.

folio holder could thus pay the tort victim more than the victim's valuation of the claim which would be reduced for both systematic and unsystematic risk.

Finally, a tort victim may be able to receive greater compensation from a market purchaser than from the tortfeasor if the market purchaser is an expert in the sort of claim which the victim has.[56] The claim will be worth more to the expert (who will thus be willing to pay more for the claim) because his knowledge or experience allows him to value the claim more precisely and to recover a larger judgment in court. A purchaser might also have his own legal staff which could reduce the costs to him of litigating a claim. The net effect of a well-functioning market would be to raise the compensation received by a tort victim towards the expected value of the claim discounted at a market interest rate appropriate for the riskiness of a diversified portfolio of personal injury tort claims.

2. Increased Access to Compensation

Many tort victims now receive no compensation from tortfeasors because they do not pursue their claims.[57] Those tort victims who are both aware of their legal rights and have the resources to pursue their rights may choose not to do so for a variety of reasons. Some may decide that the discounted ex-

---

[56] For example, a purchaser might specialize in automobile accident claims or in airplane crash claims in much the same way some law firms specialize in particular types of claims.

[57] See Franklin, Chanin & Mark, Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation, 61 **Colum. L. Rev.** 1, 34 (1961).

pected value of the claim is less than the expected costs of pursuing the claim.[58] Others may feel that the tortfeasor should not have to pay for their injuries. Still other tort victims, however, do not pursue valid claims because of ignorance of their legal rights or because of a lack of resources to pursue their claims.

Presumably many tort victims fail to pursue valid claims simply because they are unaware that they have legal rights to compensation. Tort claim purchasers in the market could inform these potential claimants about their legal rights when soliciting to buy their claims. Some tort victims who otherwise would not have pursued their claims would thus be encouraged to sell their claims and receive compensation. Solicitation of tort victims, of course, raises the danger of abuse by purchasers[59].

Other tort victims presumably remain uncompensated for their injuries because they lack the money needed to pursue their rights. Given their expected risk averseness, poorer tort victims may be especially dissuaded from pursuing valid claims because of the costs involved. In the United States, personal injury tort victims have access to legal counsel through contingency fee representation. While a contingency fee arrangement shields the tort victim from paying attorney's fees if he does

---

[58] Some of these potential claimants would find it worthwhile to pursue their claims (i.e. sell their claims) if there were a market for the reasons discussed supra that a market would increase compensation to tort victims who pursue their claims.

[59] See text infra at notes 107--108.

not prevail in the suit, the tort victim at least in theory remains liable, win or lose, for other expenses of litigation such as court costs, witness fees, etc.[60] A contingency fee lawyer who is himself somewhat risk averse may also be unwilling to accept a case which has a low probability of success; the tort victim may be unable to pursue the claim without a contingency fee arrangement. Because purchasers in a tort market would not be constrained by a lack of resources, a market could provide compensation to some of these tort victims who now fail to pursue their claims.

3. Tort Market Compared to Contingency and Hourly Fee Representation

Almost all personal injury tort victims who hire legal representation do so on a contingency fee basis.[61] Under this system, a client does not pay his attorney if he cannot recover from the tortfeasor. If the victim recovers anything,[62] the attorney receives a stated percentage of the recovery, often one-third. While personal injury claims are almost exclusively handled on a contingency fee basis, a tort victim may have the

---

60 See generally, Annotation, Validity and Propriety of Arrangement by Which Attorney Pays or Advances Expenses of Client, 8 ALR 3d 1155. But see note 67, infra.

61 See Clermont & Currivan, Improving on the Contingent Fee, 63 **Cornell L. Rev.** 529, 531 (1978).

62 Experts estimate that at least 90% of personal injury claimants obtain some recovery. See Schwartz & Mitchell, An Economic Analysis of the Contingent Fee in Personal Injury Litigation, 22 **Stan. L. Rev.** 1125, 1155 n.45 (1970); Clermont & Currivan, supra note 61, at 562, n.76.

alternative of compensating his attorney on an hourly fee basis. From the point of view of the tort victim, however, contingency fee and hourly compensation schemes frequently suffer two serious deficiencies. Ideally, a risk averse tort victim desires representation which 1) enables him to control the settlement and litigation efforts of his attorney so as to maximize the victim's recovery; and 2) enables him to shift the risk of recovery onto a risk neutral party.

A typical tort victim is probably unable to ensure that his attorney's efforts are congruent with the victim's interests other than through the structure of the compensation arrangement.[63] Neither contingency nor hourly fees, however, motivate an attorney to act in his client's economic interest.[64] An attorney on an hourly fee makes more money the longer he works, whether or not his client benefits from the additional efforts--an attorney paid by the hour thus has an incentive to

---

63 A typical tort victim presumably doesn't have the knowledge to make independent informed decisions. For instance, a client offered a settlement will depend heavily on his attorney's advice on whether to accept or to continue litigation efforts. That a client must rely on the fee structure to motivate an attorney to act in the client's best interests assumes that an attorney makes decisions based on the attorney's economic interests. Obviously an attorney's decisions are also influenced by reputational considerations (including the desire to attract future business) as well as professional and personal ethics.

64 See G. Miller, Agency Problems in Settlement (forthcoming) (analyzing conflicts of interest between attorney and client under various fee arrangements); Clermont & Currivan, supra note 61; Schwartz & Mitchell, supra note 62.

work more hours than in the client's best interest.[65] An attorney on a contingency fee, meanwhile, stands to gain only a percentage of the recoveries from additional effort, but "pays" for the entire amount of additional time he devotes to a case; a contingency fee attorney therefore has an incentive to work fewer hours than his client would desire.[66]

In addition to desiring a fee structure which motivates the attorney to act in the client's best interests, a client who is risk averse would like a fee structure which enables him to shift some of the risk of recovery onto a relatively risk neutral party. Both contingency and hourly fee arrangements, however, leave substantial amounts of recovery risk with the risk averse tort victim. An hourly fee obviously shifts no risk at all--the client receives the full amount of any recovery and can suffer a

---

65 Again assuming that the client is unable to direct knowledgeably his attorney's efforts, one might expect an attorney on an hourly fee to work beyond the point where the expected additional benefits of spending more time on a case exceed the additional cost of the attorney's time. Thus the last hour an attorney charging $50 an hour works on a case might result in only $40 of increased expected recovery, leaving the client an expected $10 poorer for the attorney's additional work.

66 See Clermont & Currivan, supra note 61, at 546. For example, assume an attorney has a settlement offer of $15,000, but thinks he could increase the expected recovery to $16,000 by working an additional 10 hours; also assume the lawyer values his time at $50 per hour. The tort victim client clearly would want his attorney to work the additional 10 hours because the client would receive an additional $667 (two thirds of the additional $1000). And indeed the additional $1000 received from the defendant considerably exceeds the $500 (10 hours times $50 per hour) value of the attorney's time necessary to obtain the additional recovery. The attorney, however, has an economic disincentive to pursue the case for the additional ten hours: for the $500 expenditure of his time he will receive only an additional $333 (one third of the $1000).

loss on his claim if the litigation costs exceed the amount of recovery. While a contingency fee eliminates the risk to a client of suffering a negative recovery on his claim[67], it leaves a client with substantially all the risk of the amount of any positive recovery.[68]

Contrasted with contingency and hourly fee representation, a market in tort claims would give the tort victim an alternative under which risk would be efficiently shifted and there would be no divergence between attorney and client economic interests in the level of the attorney's efforts. A tort victim who sells his claim for a definite amount has shifted all of the recovery risk onto the claim purchaser. Assuming that the claim purchaser is risk neutral, this is the most efficient shifting of risk possible if the tort victim is at all risk averse. Once the claim buyer has purchased the recovery rights of the tort victim, there can be no misalignment of economic incentives between the

---

[67] In theory, a client represented on a contingency fee basis remains liable for litigation expenses other than attorney costs (e.g. court filing fees, expert witness fees, etc.) even if these costs exceed the amount of recovery. **Model Code of Professional Responsibility** DR 5-103(b) (1981). In practice, however, personal injury attorneys typically do not seek to recoup these expenses from their clients when the expenses exceed the settlement or judgment recovered. A zero recovery is thus the worst result a client represented on a contingency fee can ordinarily expect.

[68] A client paying, for example, a one-third contingency fee will receive two-thirds of the recovery. This does not reduce the risk of the amount of a positive recovery in any meaningful sense: while the range of expected recoveries for the client is narrowed, this is accomplished only by proportionately reducing each possible recovery without increasing the certainty of any recovery to the client.

tort victim and the purchaser.[69] The claim purchaser might then hire an attorney to pursue the claim, but, unlike the typical tort victim, he would have the knowledge to direct efficiently the efforts of an attorney compensated on an hourly basis. Compared to the contingency fee representation which a tort victim would otherwise use, selling a claim would thus improve a tort victim's welfare by eliminating the risk of recovery and the gap between the victim's interests and the attorney's interests which causes the attorney to expend less effort than the client would desire.[70]

The amount of recovery in a personal injury suit, however, may depend not only on the efforts of the attorney, but also on the efforts of the tort victim. After a tort victim sold his interest in a claim, he would have little incentive to appear sympathetic and deserving before a jury. To the extent this lack

---

[69] A claim purchase is thus analogous to a hypothetical 100% contingency fee where the attorney pays his client a sum certain in exchange for increasing the percentage of the recovery which the attorney receives. Attornies now are prohibited from so purchasing an interest in a lawsuit. **Model Rules of Professional Conduct** Rule 1.8(j) (1983).

[70] Eliminating the divergence of interest between attorney and client would tend to increase the recovery received by the client because the total value of the claim would increase. A contingency fee attorney valuing his time at $50 an hour who lacks an economic incentive to work a marginal hour which would increase the expected settlement by $90 will destroy $40 in total claim value. Under a purchase arrangement which corrected the divergence of interest the total value of the claim would be $40 larger. Shifting risk from the risk averse tort victim to the risk neutral purchaser similarly increases the value of the total claim by eliminating the implied cost of the risk to the tort victim. One would expect the attorney and the tort victim to divide the increases in value between themselves during purchase negotiations.

of incentive for the tort victim reduced the expected recovery in a claim, the development of a market could be inhibited. A purchaser would either have to reduce the amount he was willing to pay for a claim or find a way to motivate the tort victim. There are several ways in which the tort claim purchaser could structure the purchase transaction so as to minimize this incentive problem. Purchasers presumably would require tort victims to covenant cooperation as a condition of purchase. Purchasers might also pay the purchase price in installments, with payments contingent upon cooperation. Finally, purchasers might condition part of the purchase price on the amount of recovery. A purchaser thus might purchase only 90% of the claim, leaving the tort victim with 10% as an incentive to cooperate in pursuing the claim. Such an arrangement would balance the undesirability of leaving some risk with the tort victim and the undesirability of diluting the economic incentives of the claim purchaser with the need for cooperation from the tort victim to maximize the value of the claim.[71]

From a societal point of view, purchase of tort claims would have the desirable effect of shifting more of the recovery risk

---

[71] In subrogation, the one area today in which there are transfers of personal injury claim rights, the insurer typically does not have this problem of motivating the tort victim: since any amount recovered from the tortfeasor in excess of what the insurer paid the tort victim (i.e. recovery for pain and suffering) belongs to the tort victim, the victim has an incentive to cooperate in recovery efforts.

from risk averse tort victims to risk neutral claim buyers.[72] While eliminating the incongruence between a tort victim's economic interests and his attorney's interests would be beneficial to the tort victim, it might also result in an increased amount of time spent by attorneys (and thus also defendants) pursuing personal injury claims.[73]

B. Increased Deterrence of Harm-Causing Activities

The tort system has the economic goals of compensating tort victims for their losses and deterring harm-causing activity.[74] As already discussed, a market in personal injury tort claims would enable more tort victims to receive compensation and increase the value of that compensation.[75] A market would also increase deterrence against harm-causing activities.

Ideally, the tort system deters harm causing activity to the socially optimal level by requiring parties who are able to prevent the harm to pay for the costs of the harm. Whether the

---

72 Eliminating the risk borne by tort victims, however, might decrease incentives to settle and thus increase litigation. See text supra at notes 89-91.

73 As discussed above, the present system where almost all personal injury claims are pursued on a contingency fee basis tends to result in attorneys spending less time on each case than in the clients' economic interests. A claim purchaser with the ability to monitor an attorney's efforts would direct the attorney to spend additional time pursuing each claim.

74 **G. Calabresi, The Costs of Accidents** (1970) at 24-27.

75 The tort liability system, of course, is not the only possible way to compensate tort victims. Private and social insurance are alternative compensatory mechanisms.

costs are imposed by negligence or strict liability rules, the level of injuries in society will be reduced to a socially optimal point when the private costs of "causing" harm equal the social costs.[76]

By increasing compensation of tort victims to an amount closer to what a court would award, a market would impose greater costs on tortfeasors. This is probably socially desirable. Since courts attempt to award compensation for incurred losses, tortfeasors are paying less than they "should" (from a socially optimal deterrence point of view) when they take advantage of the weak bargaining position of tort victims in settlement negotiations. One might feel, however, that from a deterrence point of view tortfeasors already have sufficient incentive to avoid causing harm because court judgments today (and thus settlement amounts) result more from jurors' sympathy than from a desire to set socially optimal deterrence levels based on actual losses.

---

76 See generally, J. Brown, Toward an Economic Theory of Liability, 2 **J. Legal Stud.** 323 (1973) (analyzing various liability rules).

III. Arguments Bearing on Allowing a Market

That courts today continue to bar tort victims from transferring their personal injury tort claims probably represents a number of concerns beyond the legacy of fear of maintenance and the survivability/assignability equivalence: first, that third parties would purchase spurious claims with which to harass defendants; second, that the volume of litigation would tend to increase; third, that transferring personal injury claims is inherently offensive; and fourth, that unsophisticated tort victims might be taken advantage of if they were allowed to sell their claims.

A. Nuisance Suits

One potential danger of a market in tort claims would be that unscrupulous people could purchase groundless claims and pursue them for their nuisance value. Several courts have cited this as a reason for prohibiting the assignment of personal torts,[77] with the Supreme Court of Rhode Island commenting that "to hold otherwise would permit the pernicious and somewhat profitable practice of allowing a person to purchase these claims

---

77 See, e.g., Town and Country Bank of Springfield v. Country Mutual Insurance Co., 121 Ill. App.3d 216, 459 N.E.2d 639, 640 (Ill. App. Ct. 1984) ("A litigious person could harass and annoy others if allowed to purchase claims for pain and suffering and pursue the claims in court as assignees"); Ackley, 49 N.E. at 226.

with the consequent harassment and annoyance of others."[78] In an ideal, costless judicial system, a defendant would never be willing to settle when threatened with a groundless suit. The considerable time, expense, and possible publicity engendered by real-world litigation, however, offer powerful incentives for defendants to pay settlements even for groundless suits.[79]

That an uncontrolled market could result in unscrupulous individuals abusing the judicial process is evidenced by the Texas courts' experience with Frank McCloskey. After Texas passed a survival statute in 1895, Texas courts allowed causes of action to be "bartered, sold and contracted for like personal property."[80] State barratry statutes prohibited only attorneys from soliciting claims.[81] McCloskey, who was not an attorney, set up a business in San Antonio in which he and his employees solicited accident victims for their claims against tortfeasors.

---

78 Hospital, 227 A.2d at 109.

79 The concept that the costs of litigation affect whether "justice" results from a dispute is difficult for some courts to accept. Faced with a series of baseless claims, the defendant in McCloskey v. San Antonio Traction Co., 192 S.W. 1116, argued that the expense it incurred in defending the baseless claims was reason to restrain the plaintiff from further threatened suits. The court rejected this argument, stating:

> We cannot for a moment indulge the presumption that a trial of the cause will result in an unfair loss to appellee. On the contrary, it must and will be presumed that a trial will result in exact justice being meted out to all parties to the suit. A threat to sue is not coercion...but an offer of a fair and equitable settlement." at 1120.

80 McCloskey v. San Antonio Traction Co., 192 S.W. at 1120.

81 Id. at 1119.

McCloskey's business prospered: a San Antonio railroad testified that 60 per cent of the claims against it were presented by McCloskey[82]; the San Antonio Public Service Company testified that 38 of the 67 suits filed against it in 1931 were presented by McCloskey.[83]

McCloskey's representation of tort victims went well beyond acceptable bounds, however. Courts found that McCloskey "counseled malingering to enhance damages"[84] and insisted upon the injured parties "using crutches when not necessary."[85] Efforts to curtail his practice were frustrated. The Texas legislature tried unsuccessfully to shut McCloskey's business down in 1917 by amending the state barratry statute to prohibit solicitation of claims by non-lawyers as well as lawyers.[86] McCloskey's business must have been a profitable one; despite a U.S. Supreme Court decision[87] against him in 1920, he continued soliciting claims in

---

82 Id. at 1117.

83 McCloskey v. San Antonio Public Service Co., 51 S.W.2d 1088, 1089 (Tex. Ct. App. 1932).

84 Id. at 1089.

85 McCloskey v. San Antonio Traction Co., 192 S.W. at 1117.

86 Ex Parte McCloskey, 199 S.W. 1101, 1103 (Tex. Crim. App. 1918).

87 McCloskey v. Tobin, 252 U.S. 107 (1920). After McCloskey was arrested for soliciting employment to collect two claims, he filed a writ of habeas corpus with the United States Supreme Court. McCloskey contended that since tort claims were assignable in Texas they were an article of commerce and that the Texas legislature violated his constitutional rights by prohibiting the business of soliciting claims. Writing for a unanimous court, Justice Brandeis dismissed McCloskey's argument, noting that "[t]o prohibit solicitation is to regulate the business, not to

Texas at least until 1935.[88]

B. Increased Volume of Litigation

Another reason to prevent the development of a market in tort claims would be a desire not to increase the total volume of litigation in society. Although the number of torts and thus the number of potential tort claims would be unchanged by the existence of a market, the number of claims pursued would rise if tort victims who would not otherwise have done so sell their claims. Faced with the cost and uncertainty of litigation, many unsophisticated, poor, and risk averse tort victims now choose not to pursue valid claims. A market would provide purchasers who place a greater value on these claims than do the victims. As one court noted, "[a] man having a doubtful claim...who would hesitate to incur the expense of testing its validity will readily agree that one who will bear the burden of the contest may institute a suit in his own name."[89]

From society's point of view, it is unclear whether an increase in litigation would be desirable. The tort victim with a valid claim who receives compensation he otherwise would not have received obviously finds the increased litigation desir-

---

prohibit it." Id. at 108. The Court also remarked that regulation seeking to bring a business into "harmony with the ethical practice of the legal profession...is obviously reasonable." Id.

88 See Yellow Cab v. McCloskey, 82 S.W.2d 1042 (Tex. Ct. App. 1935).

89 Dahms, 11 P. at 898.

able. From a societal point of view, whether additional litigation is desirable depends not only whether there are tort victims who are not being compensated for their injuries, but also whether the existing incentives to bring suit are socially appropriate.[90]

Related to the fear of increasing the overall volume of litigation is the fear that a market in tort claims would reduce the incentives of litigants to settle. The low value a tort victim puts on his claim because of his risk aversion and desire for immediate compensation now acts as an incentive for the parties to settle.[91] Purchasers of tort claims would have less incentive to settle than would the tort victim sellers because the purchasers would be risk neutral and able to withstand delay. This reduced incentive to settle could increase the amount of litigation, thus consuming judicial and legal resources as well as increasing the backlog of cases many courts now face.

C. Inalienability

A further objection to a market in tort claims is the fundamental notion that personal injury tort claims are so inherently "personal" that society should not allow them to be bought or

---

90 For a model of the private and social incentives to bring suit, see Shavell, The Social Versus the Private Incentive to Bring Suit in a Costly Legal System, 11 **J. Legal Stud.** 333 (1982).

91 That the risk aversion of the plaintiff encourages settlement is noted in Shavell, Suit, Settlement, and Trial, 11 **J. Legal Stud.** 55, 68.

sold. One of the rationales for the early common law prohibition against assignment of choses in action was that a chose in action is essentially a personal matter which should involve only the injured and the tortfeasor.[92] In observing that the rule against assignment of choses in action predates the doctrine of maintenance in England, Ames made the surprising statement that the rule "is believed to be a principle of universal law".[93] Ames explained that a chose in action always involves a "personal relation between two individuals" and that a personal relation "in the very nature of things cannot be assigned."[94]

While Ames' attempt to argue the logical necessity of inalienability seems unconvincing at best,[95] the recognition that there is something distasteful about buying or selling personal injury tort claims cannot be so easily dismissed. Several courts have noted the "personal" nature of tort claims as a reason to restrict alienability. The Kentucky Court of Appeals, for instance, has stated that "a claim for personal injuries is peculiarly a personal right that the injured party may or may not assert as he pleases...."[96,97]

---

92 See Ames, The Disseisin of Chattels, 3 **Harv. L. Rev.** 337, 339 (1890); Holdsworth, supra note 6, at 1003.

93 Ames, supra note 92, at 339.

94 Id.

95 See W. Cook, The Alienability of Choses in Action, 29 **Harv. L. Rev.** 816 (1916).

96 Wittenauer v. Kaelin, 228 Ky. 679, 15 S.W.2d 461, 462 (Ky. 1929). See also Berlinski, 325 A.2d at 242.

From the perspective of economic welfare, restrictions on alienability of tort claims seem allocatively inefficient at first glance[98]: a person selling a cause of action believes the sale improves his welfare or he wouldn't sell; a person buying a cause of action similarly believes the sale improves his welfare or he wouldn't buy.[99] This simple analysis ignores two reasons why an inalienability rule might still be desirable: people other than the buyer and seller may be affected by the transaction and victims may be incapable of making wise decisions whether to sell.[100]

One might feel that the operation of a market in tort claims

---

[97] While the common law's prohibition against the alienability of all "choses in action" has been whittled down to where only personal torts may not be assigned or sold, our legal system today declares other things to be inalienable as well. Despite a shortage of babies for adoption, one may not sell newborn babies. See E. Landes & R. Posner, The Economics of the Baby Shortage, 7 **J. Legal Stud.** 323 (1978); J. Prichard, A Market for Babies?, 34 **Univ. of Toronto L. J.** 341 (1984). Despite people dying for lack of dialysis machines, one may not sell a kidney. 24 **U.S.C.A.** 274e (West Supp. 1985). Babies and body organs seem very different from tort claims, however, in that tort claims represent merely claims to monetary judgments.

[98] One would also worry whether allowing alienability of tort claims would lead to undesired results of wealth distribution. Assuming one thought a market in tort claims was allocatively efficient, however, one would probably find the market to be distributionally desirable as well because the poor are most likely to have the largest discrepancy between their subjective valuation of tort claims and market value.

[99] The reasons why buyers might value claims more highly than sellers, thus allowing both parties to be made better off by a sale are discussed supra in Part II.

[100] For a discussion of inalienability rules, see generally, G. Calabresi and A. Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 **Harv. L. Rev.** 1089 (1972).

would offend the "sensibilities" of enough people so as to outweigh any advantages of the market.[101] Several courts have suggested that buying or selling personal injury tort claims is inherently offensive to society. The Supreme Court of Arkansas, for instance, decried the possibility of a claims market, declaring: "If causes of action for personal injuries could be assigned, then speculators could buy up such claims, perhaps at necessitous discounts, and conduct a profitable traffic in human pain and suffering."[102] A federal district court has refused to allow a personal injury claim to be assigned in a bankruptcy proceeding, saying that to do so would be "encouraging a market in the pain and suffering of unfortunate persons and the law neither does, nor should it, encourage so callous and barbaric a practice."[103]

Allowing a market in tort claims could change the way tort victims think about their claims and their decision whether to pursue them. One might not want tort victims to act as though they were the owners of a commodity, presented with an economic decision to make.[104]

---

101 Another possible externality is an undesirable increase in litigation. See discussion in text supra at notes 89-91.

102 Southern Farm Bureau, 454 S.W.2d at 70; See also Wittenauer, 15 S.W.2d at 462 ("to permit one's pain and suffering to become a matter of speculation is not looked upon with favor by the law").

103 In Re Schmelzer, 350 F.Supp. 429, 437 (S.D. Ohio 1972).

104 See Ackley, 49 N.E. at 225 ("the law will not consider [personal injuries] to be a commodity of sale."); See also Kelman, Consumption Theory, Production Theory, and Ideology in

Refusal to sanction a market might also be justified if one paternalistically felt that tort victims were incapable of making wise decisions whether to sell their claims. To the extent that a tort victim may be ignorant about his legal rights, one might worry that unscrupulous tort claim buyers would coerce victims into selling their claims too cheaply.[105] Also, the offer of a substantial sum of cash to a poor tort victim might be thought inherently coercive and unconscionable.

E. A Market Might Not Actually Increase Compensation of Tort Victims.

Even recognizing that a tort market has the potential to increase the compensation received by tort victims, such an effect might not take place if purchasers were able to take advantage of unsophisticated victims or if court judgments decreased without the presence of a sympathetic plaintiff.

To the extent that many tort victims are unsophisticated and relatively ignorant about their legal rights, one may worry that quick-talking purchasers would be able to purchase many claims for a fraction of what they are "worth."[106] A tort victim

---

the Coase Theorem, **52 So. Cal. L. Rev.** 669, 688 (1978) (commodification applied to baby-selling; "certain social practices may simply serve to redefine 'static states' from which departures are unwelcome").

105 See text infra at notes 106-107.

106 Because of this fear, Roman law prohibited a purchaser of a tort claim from recovering more than he had paid for the claim. See supra note 33.

unfamiliar with the legal system might have little basis on which to value his claim and a prospective purchaser might have little incentive to inform the injured person accurately. Likewise, one can imagine purchasers applying high pressure tactics to close a sale before the tort victim has the opportunity to negotiate with other potential purchasers: for a competitive market price to develop, competing potential buyers must be informed and have an opportunity to purchase.[107]

One might also argue that tort victims would be paid less than their claims are "worth" because a market purchaser would not receive the "sympathy" of a court or jury.[108] Although it is true that purchase of a claim could diminish its value due to a loss of sympathy by juries and courts,[109] this is not a strong

---

107 Essentially the worry here is that the market would not be "efficient" because of the lack of information of buyers and the small scale and localized nature of many claims. Regulation of the market could improve the market's efficiency in these senses. See text infra at note 113. Contingency fee representation by attorneys has been analogously criticized for the possibility of over-reaching agreements. See Contingency Fees: Bane or Boom?, 25 **Ins. Counsel J.** 453 (1958); Thomas, Contingency Fees: A Case Study for Malaysia, 10 **Anglo-Am. L. Rev.** 37, 42 (1981).

108 Southern Farm Bureau, 454 S.W.2d at 70 ("the considerations urged to a jury in a personal injury case are of such a personal nature that an assignee cannot urge them with equal force"); Bethelehem Fabricators v. H.D. Watts Co., 190 N.E. 828, 834 (Mass. 1934) (quoting Rice, 83 Mass. 566); Berlinski, 325 A.2d at 242.

109 Value could be diminished through a loss of sympathy whether or not the jury was aware the claim had been purchased. Evidence that the claim had been purchased might be excluded under the collateral-source rule which prohibits the introduction of evidence that the tort victim has received compensation from an outside source. 22 **Am.Jur.2d** Damages sec. 206 (1965). If purchase of claims became widespread, juries might assume the in-

argument against allowing a market. Tort claim purchasers presumably would require the seller to covenant cooperation in pursuing the claim; purchasers might also purchase only a percentage of the claim so as to leave the tort victim an incentive to cooperate.[110] In any event, a purchase would take place in the market only if the value of the claim to the purchaser, after any reduction in value for lost sympathy, were greater than the value of the claim to the seller. Thus a market would exist only if claims in fact were not so reduced in value as to offset the increase in value of a tort claim from purchase by a market participant.

---

jured party had sold his claim even if the defendant were not able to introduce evidence of the sale directly. Judges and juries today are commonly thought to assume defendants are insured. See **R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim** (1965) at 23. Even if the jury were unaware and did not assume the claim had been purchased, however, a plaintiff who had sold his claim might have little interest in the outcome of the suit and thus tend to evoke less sympathy.

[110] See text supra at note 71.

IV. Conclusion

Legislators should carefully consider encouraging the development of a market in personal injury tort claims.[111] Although there are significant objections to allowing tort claims to be bought and sold, a well-regulated market would provide tremendous benefits which should outweigh these objections.

The potential benefits of a market in personal injury tort claims are great. The delay and uncertainty of the court system today place a tort victim who can settle only with the tortfeasor in an uncomfortable plight. No matter how valid his claim, a risk averse tort victim who needs immediate compensation now has little choice but to accept a settlement offer which may be considerably less than the amount a court would award.

A significant advantage of a market in tort claims would be

---

[111] Development of a market would probably require legislative as opposed to judicial action. State laws prohibiting maintenance, champerty, and assignment of tort claims, together with courts' perceptions of "public policy," create enough uncertainty about the law that direct legislative action would be necessary to encourgage businessmen to enter a market. Legislative action would also allow the state to directly regulate the market as desired.

There would probably be strong political opposition to legislative creation of a market. Insurance companies would probably oppose the market because, as discussed above, more claims would be made and settlement amounts would rise. Personal injury lawyers would also probably oppose the creation of a market because if non-lawyers were allowed to solicit, purchase, and settle claims, the volume of business for personal injury lawyers might decline--contingency fee lawyers would have to compete with purchasers for clients. To the extent that the market reduced the proportion of claims settled, however, personal injury lawyers would have more litigation work.

to increase the horizontal equity of the tort compensation system. By neutralizing the bargaining advantages a tortfeasor now enjoys over some victims, a market would provide tort victims with compensation at a level closer to that which would be offered by a court judgment. Because victims with the fewest resources most need immediate compensation and are the most risk averse, poor tort victims tend to value their claims least in settlement proceedings with the tortfeasor: they would tend to be the greatest beneficiaries of a market in tort claims.

By furnishing information to tort victims who are now unaware of their legal rights and do not pursue their claims, a market would also compensate deserving but presently uncompensated victims. Because tortfeasors would have to pay more to sophisticated, risk neutral purchasers than they now pay to tort victims, increased deterrence of harm causing activities would also be encouraged by the market.

The primary objections to a market in tort claims fall into four categories: (1) mechanistic legal arguments; (2) a disagreement that the "benefits" of a market are indeed benefits; (3) a worry that tort victims would be taken advantage of by claim purchasers; and (4) a feeling that personal injury tort claims by their very nature should be inalienable.

Most of the mechanistic arguments voiced by courts to prohibit the sale of personal injury tort claims can and should be dismissed rather quickly. There is little rational support for the often cited equivalence between survivability and assign-

ability of tort claims. One might logically argue that a personal injury tort claim which has not been assigned should not survive the victim's death because only the victim deserves to be compensated for the injuries. Even so, the notion of survivability should have no relevance to the question of whether a tort victim should be allowed to choose compensation for his injuries by an inter vivos sale of his claim.

The common law rules outlawing maintenance, champerty, and barratry similarly are not persuasive arguments against a market in tort claims. These common law rules developed in response to social and judicial conditions in England four hundred years ago; improved conditions today make the rules largely anachronisms.

A more substantial objection to a tort claim market is the argument that the claimed "benefits" of a market are not socially desirable and would impose substantial costs on society in the form of increased litigation. A basic premise of the argument in favor of a market is that increasing compensation to tort victims to an amount closer to what they would be awarded by a court is a desirable goal. One might disagree with this premise if one felt that court judgments today are "too high" and that conditions which encourage tort victims to settle for less than what their claims are worth in court are desirable. While this argument is logical, it countenances economic discrimination by the judicial system: the tort victims who are the most likely to receive the higher court award are those who are least risk averse and who least need immediate compensation.

The benefits of a market would also be accompanied by an increased volume of tort suits and a decreased incentive to settle. One may well feel that the level of litigation today already exceeds the socially optimal level. While this is a legitimate concern, the wisdom of a rule which reduces litigation by discouraging poor and unsophisticated tort victims from pursuing valid claims is dubious. To the extent that one's worry is not with the increased level of litigation, but with the possibility that spurious claims will be bought and pursued for their nuisance value, there are judicial remedies of malicious prosecution available. Courts also have the power to award attorneys' fees to defendants pursued with groundless claims.

The concern that a market would reduce the incentive to settle and thus increase the costs and congestion of the court system could be significantly alleviated by regulation of the market. Legislators could give the tortfeasor an absolute option to settle with the claim purchaser within two weeks after purchase for a premium, say 10%, above what the claim purchaser paid the tort victim. A purchaser's incentive to buy a claim for far less than what it is objectively worth would thus be much reduced. Settlement would be encouraged because the tortfeasor would always be offered the opportunity to settle at a "market" price. And the market purchaser would be compensated for his

efforts by the premium.[112]

Another concern about a market is that the benefits would not reach tort victims. Certainly abuses would occur--there would be instances of unscrupulous buyers making unconscionable purchases from unsophisticated victims. Even in the absence of regulation, however, buyer behavior would be constrained by purchase price competition of other potential buyers. And even where no other buyer is interested in the claim, a buyer would always have to offer the tort victim more than the tortfeasor (or the tortfeasor's insurer) is offering to settle. Careful court scrutiny of purchase arrangements would also restrain buyer behavior. A court would always have the power to void an unconscionable assignment and award part of the judgment to the tort victim.[113]

Regulation of the market would also reduce the danger from unscrupulous buyers. Ethical standards similar to those for the

---

[112] One potentially serious problem with allowing the tortfeasor to settle claims at a stated premium over the purchase price is that the tortfeasor may have significantly superior information about the value of the claim. If a personal injury tortfeasor typically has valuable knowledge about the tort claim which the purchaser can't easily discover before purchase, the tortfeasor would "know" whether to settle at the premium or to litigate/settle in the usual manner. This process could reduce the incentives to purchase claims since there would be little upside potential for a purchaser coupled with no downside protection. Thus if one thought that personal injury tortfeasors do in fact typically have such information, one might not want to institute the settlement option.

[113] Since most purchased claims presumably would be settled rather than litigated, one might want to require a purchaser to file with the court a statement of the settlement amount and the amount paid for the claim.

legal profession[114] could be enforced. The fear of quick talking purchasers buying a tort victim's claim before the victim has had a chance to receive advice or competing offers could be lessened by giving tort victims an absolute option to void their sale contracts within a stated period, perhaps one week, after sale. One might also require central registration of purchased tort claims and perhaps publication of purchase.

Because human injury and pain are the basis of personal injury claims, it is difficult to dispel a feeling that there is something "objectionable" about buying and selling personal injury claims. What are being sold, however, are not human injuries and pain, but rights to compensation for injuries which have already been suffered. There is, after all, little difference between a tort victim selling his claim to a claim purchaser and a tort victim settling his claim with a tortfeasor. Certainly the desire to compensate tort victims and to set optimal deterrence levels should outweigh any value placed on preserving

---

[114] Existing bar rules would prohibit an attorney from purchasing claims in a market. See **Model Rules of Professional Conduct** Rule 1.8(j) ("A lawyer shall not acquire a proprietary interest in the cause of action [except for a reasonable contingent fee contract]." Bar rules aside, lawyers might make ideal purchasers in a claims market: they are well-informed about the value of claims, they presumably understand the ethical considerations which would be involved in purchasing and pursuing claims, and they are already subject to state and self-regulation. The primary objection (sometimes voiced with respect to contingency fees) to lawyers purchasing claims in a market is that purchases might be inconsistent with an attorney's duties as an officer of the court. A lawyer acting as a principal in a case would have greater economic incentive to violate ethical canons in order to secure a recovery. See Dahms, 11 P. at 896 ("To allow an attorney of the court, however, to purchase a chose in action ... would shock the moral sense of all right-minded people.")

the "sensibilities" of people who would be offended by the thought of people profiting on the purchase of personal injury tort claims. A market in tort claims may seem unnatural to many people simply because a market doesn't exist now--tort liability insurance is widely accepted today but was strongly attacked at its inception as an immoral sale of the right to injure.[115] Part of any feeling that personal injury tort claims belong to a class of inherently inalienable rights may also spring from a paternalistic attitude that tort victims are unable to value their claims and therefore shouldn't be allowed to sell them for less than what a court would award. But tort victims now already settle their claims with the tortfeasor for less than what a rational tort claim buyer would offer. And the risk averseness and need for immediate compensation which would make tort victims prefer to sell their claims for less than what a court would award are realities: courts and legislators which ignore these realities ignore the real interests of tort victims.

The potential dangers of a market in personal injury tort claims need to be addressed through careful regulation and court scrutiny of the market. The significant benefits which could be realized, however, make a market in personal injury tort claims highly desirable.

---

115 See R. Keeton & J. O'Connell, supra note 109 at 252.