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VICARIOUS LIABILITY OF HEALTH PLANS FOR MEDICAL INJURIES

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Thank you Guido for that kind introduction, which shows that you have not forgotten my Yale credentials. But there is room, I think, for at least, this bit of correction of my personal historical record. The most powerful influences on me first came with my Oxford education. It may have been happenstance that I began my study of law with Roman Law, whose influence I have never escaped. Once I completed my English education, with its heavy emphasis on the common law of contract, property and torts, it inoculated me against some of the public law excesses of American legal education in general, and the Yale Law School in particular. Although I am often identified today with some segment of the Chicago School of Law and Economics, that understanding is somewhat incomplete. There is a sense in which the institution that gets you first keeps you for the longest. And for law at least, I remain part English in outlook, if not in accent, at least English law as it was understood in the mid-1960s when I studied there.

This English influence will prove itself again in this brief article on the role of vicarious liability and managed care organizations (MCOs) which has been in the news so much today. As usual, I think that the best way to cut into this problem is by indirection. The novelty of liability for MCOs is best placed in perspective by comparing the claims for liability here with those which could be made, both in England and the United States, by employees against their employers for work-related accidents.

We are fortunate today for the major reduction in the level of workplace injuries, a shift that is attributable not only to our legal rules, but also to the vast technological and industrial changes that have reduced our dependence on the dangerous trades, such as mining and railroading that loomed so large in the last half of the nineteenth century. Yet our current lack of concern about the accident problem should not be allowed to conceal the historical fact that liability for industrial accidents—those which arose out of and in the course of employment—

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gave rise to a political debate in the late nineteenth and early twentieth century that in its own way was as intense, if not more so, as the debate over employment discrimination and sexual harassment has been in the last part of the twentieth century. It seems fair to say that this issue above all was the one that separated the defenders of laissez-faire from their most insistent critics. It did so at a time when no progressive reformer would even have mentioned the right to health care on a list that included the traditional trinity of "food, clothing, and shelter," which most people hoped they could afford from the take-home wages for a grueling day's work.

That said, the response to industrial accidents forced our nineteenth century forbearers into thinking about matters of *institutional* responsibility, even though the vast bulk of earlier tort law had been directed to questions of individual responsibility. Practically, the familiar debates in the classical tort law had to do with the boundaries between trespass and case as they applied to intersection collisions between two horse-drawn carriages. Theoretically, they revolved around the place of blameworthiness in a general theory of tortious responsibility. Representative of the older locus of concerns was, ironically, Oliver Wendell Holmes, in his classic *The Common Law*, published in 1881.[1] To be sure, as a famous realist he began with the stirring and sonorous declaration: "The life of the law has not been logic: it has been experience."[2] He immediately follows with his famous observation about "the felt necessities of the time."[3] But it was all show: within a page he was deep into the early forms of liability, on such topics as the role of vengeance and the control of mayhem. Yet, nowhere in his entire extended treatment of contract and tort does Holmes so much as mention, let alone undertake, any assessment of the legal transformations brought on by the rapid industrialization of the nineteenth century. Industrial accidents, assumption of risk, the fellow servant doctrine and vicarious liability make no appearance on his pages.

Notwithstanding the backward, historical bias of writers such as Holmes, the rise of large industrial corporations brought front-and-

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[1] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Boston, Little Brown & Co. 1881).

[2] *Id.* at 1.

[3] "The felt necessities of the time, the prevalent moral and political thories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men are governed." *Id.*

center the question whether liability extended to the individual workman who committed the wrong, or moved beyond him to reach the firm that employed him. That question forced the courts to deal with the tension between principles of vicarious liability and those of freedom of contract in the workplace. The doctrine of vicarious liability in some inchoate form was always a part of the common law, but it was typically confined to actions of the servants that the master authorized. As Blackstone put the matter, "As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium facit per se*" (he who acts through someone else acts for himself).[4]

Yet, this formulation did not reach the key cases of accidental harms that mark the rise of large, impersonal organizations. Explicit or implied commands kept faith with the principle of personal blameworthiness, but with industrialization, there were few explicit commands to commit accidental wrongs, and only an artful interpretation of individual facts could generate the implied command necessary to create liability. To fill that gap, the principle of vicarious liability expanded so that it reached all actions "arising out of and in the course of employment."[5]

In truth, there was a fair bit of intellectual resistance to the idea of holding the firm responsible for the transgressions of its workers. Holmes himself pronounced the rule anomalous precisely because it clashed with the bedrock principle of blameworthiness that limited each person's responsibility to his or her own individual actions.[6] It was easy to tie this principle of individual responsibility to traditional human virtues of self-reliance and self-sufficiency. But it was, and is, somewhat more difficult to see why one person, or why one group of shareholders, should be held vicariously responsible for the actions of individual workers.

These nagging academic and philosophical doubts, however, did not prevent the legal system from responding powerfully to the changes in

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[4] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 429 (1765). For a case taking this position, see Hern v. Nichols, 91 Eng. Rep. 256 (Ex. 1708).

[5] *See, e.g.*, Limpus v. London General Omnibus Co., 158 Eng. Rep. 993 (Ex. 1862); River Wear Commissioners v. Adamson, 2 A.C. 743 (H.L. (Eng.) 1876).

[6] Oliver Wendell Holmes, *Agency*, 4 HARV. L. REV. 345 (1891) ("I assume that common-sense is opposed to making one man pay for another man's wrong unless he has actually brought the wrong to pass.... I therefore assume that common-sense is opposed to the fundamental theory of agency...."). *See also* THOMAS BATY, VICARIOUS LIABILITY (1916).

the form of industrial organization. With a little invention courts were prepared to apply the doctrine of vicarious liability to hold the firm responsible to strangers and passengers who were injured by its employees acting within the scope of their employment. The rationales for this outcome were, and remain, frankly instrumental.[7] It was thought inappropriate that innocent individuals should go without compensation from the firms that stood to profit from the actions of its workers. It was thought to be an invitation to bad conduct to allow the large industrial complex to hide behind the insolvency of its workers who had inflicted serious injuries on persons who were not part of the firm. It was thought that liability on the firm would induce it to select careful workers, to supply them with the right equipment, to assign them to the proper tasks, and to monitor their behavior. It was thought that vicarious liability would ease the need to police the merits of each of these firm decisions, and thus help curb any temptation of the firm to delegate dangerous tasks to untrained workers, by counting on their putative insolvency to insulate the firm from tort liability.[8]

The truth be told, we have not retreated one iota from these general rationalizations for vicarious liability in the twentieth century because these rationales seem to be, if anything, more robust today than they were one hundred years ago.[9] The upshot of this position was that the railroad was answerable to the passenger, the pedestrian and the neighbor. They were not required to bring suit against the engineer or conductor (assuming they could determine which of them had failed in the mishap), but could hold the firm responsible without having to first penetrate the layer of individual responsibility. The firm, of course, for its part could turn around to sue the individual worker, assuming he was solvent, for his own personal derelictions. But actions of this sort were few and far between, although it seems likely that discipline or dismissal did follow from individual misdeeds. The remarkable expansion of vicarious liability in these cases belies any effort to insist

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[7] For an early account, see Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923).

[8] Note that this tendency always is present, but is counteracted by other tendencies as well. After all, the untrained or incompetent worker is just as likely to damage firm equipment or hurt other employees, both of which consequences will redound to the disadvantage of the firm. But in some contexts, the potential liabilities averted could justify the incremental risks of exposure, so the point continues to be of concern even today, especially in the delegation of certain dangerous tasks to other firms with more limited resources.

[9] *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

that the judges, as members of the dominant social class, manipulated legal rules to protect their industrial patrons.

By the same token, the law could not ignore the competing principle of freedom of contract. That principle of course had no sway whatsoever in those cases where railroads burned crops near the tracks, or injured innocent bystanders. But freedom of contract could have been invoked to limit the liability of the railroads to their passenger; indeed, after a fashion it did, since the rules of common carrier liability would exempt the railroad from harms attributable to Acts of God or violent acts of third persons. But even here, there is normally little that any passenger can do to learn of latent defects in the operation of railroads or take steps to counter the dangers that he observes. The nineteenth century cases thus took the position that the railroad was, in general, obliged to observe "utmost care" in the preparation of its roadbeds, cars and machinery; however, it was not held to the same high standard with respect, for example, to the shoveling of snow along the stairs leading to the train station, where the individual passenger has the means for self-protection.[10] In effect, there was probably little pressure for deviation from the legal default rules in these cases. Contracting costs are high with passengers that rapidly come and go on the lines; and public disclaimers of liability were not the best way to attract business.

The situation with employees raised rather more substantial contractual problems. In dealing with these workers, the firm recognizes that the workers have large amounts of control over the equipment and premises that they use, and thus can do much to cause or prevent accidents in the workplace. In this setting, the principle of vicarious liability cannot be justified as a means to protect strangers, even if it could be invoked in order to expose the firm to liability for the wrongs that one workman does to another.

At the same time, there were serious counterweights. Under the so-called "fellow servant" or "common employment" doctrines, the common law courts erected a strong default presumption that the

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[10] *See* Kelley v. Metropolitan R.R., 20 N.E. 383, 385 (N.Y. 1889) (per Peckham, J.). Ironically, some modern cases appear to *cut back* on the liability of railroad company for latent dangerous conditions by substituting the standard of ordinary care for that of utmost care. *See* Bethel v. New York City Transit Auth., 703 N.E.2d 1214 (N.Y. 1998). Yet other cases keep the standard of "utmost care" in cases where passengers have better control over the dangerous instrumentality, as in removing packages from overhead bins. *See* Andrews v. United Airlines, 24 F.3d 39 (9th Cir. 1994) (denying summary judgment to airline under California utmost care standard).

worker was "deemed" to assume as against the firm the risk of injuries arising out of the course of employment.[11]

Even if we reject this artificial deener, there is another way to think about this issue that will lead to the same conclusion in many cases. Here the initial move is to note that the employer and his workers all stand in direct relations with each other. The doctrine of freedom of contract says that the employer could contract with all its employees to either eliminate or cap that loss. In this setting, we do not have the specter of imposing liability on strangers, for there seems good reason to believe that no employee would give up the right to recover for accidents in the event of injury unless he received, either in wages or collateral benefits, something in exchange. Similarly, in this setting, we do not have the situation where the firm might wish to contract out liability because the worker, or his own gang or team, can do more to prevent accidents than the firm itself. There is, moreover, likely to be some variation in the ideal regime given the different patterns of firm organization. We should not therefore treat it as a sign of industrial recalcitrance that some employers eliminate the prospect of suit while other employers continue to honor their common law liabilities.

The question here is whether the firm and worker can find some system that works to minimize the expected losses for accidents. On that issue we can take a leaf from our learned moderator, Guido Calabresi, to ask whether the common law regime of negligence cum contributory negligence minimized the sum of accident costs, the cost of their prevention and the cost of administering the system. The movement toward contracting out that was widely, but not universally, observed in the mines and the rails suggest that the common law rules were inefficient in at least some settings. For a risk averse worker, the uncertainty in recovery was doubtless a serious disadvantage; both sides would be unhappy about the high costs of litigation; and both parties would ask whether negligence and contributory negligence subjected both sides to the right incentives to take care.

Therefore, when we look to established practices in these firms, we often find that they contracted out of tort liability. But it hardly followed that there was any universal movement to adopt a defense of assumption of risk by contract that afforded no compensation at all in

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[11] *See* Priestly v. Flower, 150 Eng. Rep. 1030 (Ex. 1837). This carried over into American law in *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49 (1842).

the event of injury. Rather, in many instances, we know as early as the 1860s and 1870s that workers and firms often contracted into a system that on virtually all essential features adumbrated the workers' compensation systems that were later introduced by statute, first in England and then in the United States.[12] That result comports perfectly well with a model that holds that one function of the law (whether we call it torts or contracts does not matter too much for these purposes) is to set default terms which the parties can contract around if they so choose. It does not, however, comport well with the notion that waivers of liability were always forms of exploitation that left workers worse off than they would have been if they had never undertaken employment in the first place. That view might well jibe with certain progressive instincts on the subject, but it does explain the *substitution* of one liability regime for another, especially one that offers, as the traditional workmen's compensation bargain did, the quid pro quo of *greater coverage* in exchange for smaller guaranteed payments. I conclude therefore that in dealing with workplace injuries, the principle of vicarious liability only sets up the prima facie case that holds the worker responsible for the actions of another coworker. Yet, that is subject to a defense based on assumption of risk or freedom of contract, where the burden then shifts back to the worker to explain why the consent was unfairly obtained. Where there was union intervention (as was frequently the case) or familiar terms that were widely accepted within the industry, it is very difficult to overcome the presumption of contractual regularity unless we choose to treat the worker as the ward of the state.

Health Care.

The great question that faces us at the end of the twentieth century does not concern industrial accidents, but medical accidents that arise out of the provision of health care services. During the nineteenth century there was little if any serious liability for medical malpractice. It was yet another one of those subjects that nowhere appears in Holmes' *The Common Law*. The explanation for the relative dearth of malpractice cases probably lies in the prosaic truth that the level of medical error was so high that it was almost pointless to distinguish between cases of negligent and non-negligent error.[13] It is only when the level of medical

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[12] Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation*, 16 GA. L. REV. 775 (1982).

[13] *See* Mark Grady, *Why Are People Negligent?: Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988).

care becomes sufficiently sophisticated that we can afford the luxury of distinguishing between cases of medical negligence and those of simple error, as the law routinely does today.[14]

However, we have to face exactly the same question today that was faced with industrial accidents over a century ago: Do we have a rule that allows the physician and patient to contract out of the negligence system, with *or* without the creation of any substitute system of contractual liability? When that question was fought out in the context of the liability of hospitals and individual physicians for tort liability, the freedom of contract position lost[15] for reasons that are not persuasive.[16]

The dislocations of the tort system in the area of ordinary malpractice actions are familiar enough. The costs of litigation are sky-high since each disputed case calls forth legions of experts on both sides of the line. The uncertainty in payouts place additional burdens on individual patients and even on large institutions that struggle to balance their insurance portfolios. The error rates in adjudication tend to dull the desirable incentive effects of the tort rules. And, the feedback mechanism is most imprecise since the lag in litigation means that individual defendants are held liable for technologies that have already been displaced in the ordinary course of medical progress. Too often the purpose of the system often seems to be to maximize (the sum of) accident, prevention and administrative costs.

The problem of medical malpractice liability is less severe today than it was 25 years ago. Here it is not so much the ad hoc reform legislation that varies extensively state by state. Rather, much of the relief from pressure comes from improved technology that reduces the rate of failure in routine procedures (even if it may induce the undertaking of newer procedures with higher error rates that become the topics of litigation).

However, today, a new villain has appeared on the scene: the MCO. The rise of the MCO is a long and complex story and this Article shall

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[14] *See* Hirahara v. Tanaka, 959 P.2d 830 (Haw. 1998).

[15] *See* Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963).

[16] *See* Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. B. FOUND. RES. J. 87 (1976) [hereinafter Epstein, *Medical Malpractice*]. For similar views, see Glen O. Robinson, *Rethinking the Allocation of Medical Malpractice Risks between Patients and Providers*, 49 LAW & CONTEMP. PROBS. 172 (1986). For the opposite position, see Patrick Atiyah, *Medical Malpractice and the Contract/Tort Boundary*, 49 LAW & CONTEMP. PROBS. 287 (1986); PAUL WEILER, MEDICAL MALPRACTICE ON TRIAL 113 (1991).

give only the barest outlines of it.[17] Health care (of which medical care is the largest element) has two components. The first is routine care which can be budgeted like rent, food or perhaps education. Current revenues are sufficient to cover current costs, so that insurance is not worth the administrative burden that it imposes. But health care also has a strong probabilistic element. There is a small probability that even healthy persons will suffer enormous losses with which neither accumulated savings nor current earnings can cope. To fill that void, individuals often seek to purchase health care insurance. But that strategy solves one problem only to create a second. Physician and patient work together to get the finest possible care at the expense of other individuals. Ex ante, all members desire sensible coverage at affordable prices. Ex post, the sky is the limit for a family member in dire straights. So long as the expected benefit of treatment is perceived as positive, the suffering patient does not care that its value is far below its expected cost to others.

To offset the problem of excessive consumption of medical services, we often ask our health care providers to ration services in order to restore some balance between the financial and the human sides of the program. The health plans have the unenviable task of acting as gatekeepers. For a fee they are asked to say "no" to you in individual cases, not because they hate you, though it seems as if they may, but rather because everyone knows that unless they say no to you in the individual case, the entire plan will unravel, first with one exception, then with a second, and finally with a third. If anyone were to look at the popular literature, MCOs have replaced insurance companies, banks, and railroads, as the devils of the twentieth century. Mainly they assume this role because they are the people who remind us that resource scarcity pinches even in an age of apparent abundance, and they do it in the worst of all possible situations—with expenditures that are worth making in some sense, but not perhaps quite worth the costs that they impose.

Now, it turns out through a whole variety of historical twists that the HMOs and the MCOs have been insulated from tort liability. Part of this odd development lays at the doorstep of ERISA,[18] whose preemption provision has been widely interpreted to afford health plans total

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[17] For one account, see Richard A. Epstein, *Managed Care Under Siege*, 24 J. MED. & PHIL. 434 (1999).

[18] Employment Retirement & Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994).

immunity against tort action for the negligent management of the health plan's obligations toward its patients.[19] But can the barricades remain stout when it is all too easy to turn against our gatekeepers and argue that the treatments they deny, and the preconditions that they impose, demean the patient in his or her greatest moment of need? Worse still, the heavy hand of the health plan offers the individual physician or hospital a ready excuse against any charge of medical negligence: we would have done more if only that health plan had authorized treatment.

At this point, frustrated patients have joined forces with frustrated physicians to vent their collective spleen on MCOs. But in many cases they appear to be thwarted by the preemption provisions. As a matter of first principle, I can see no justification for the creation of a government immunity from liability in a tort system. But as a practical matter, the entire issue of ERISA preemption raises a rich irony, so long as it is understood as a *default* contractual provision which could be waived by the health plan if it so chose. Under that reading, ERISA may well introduce, by weird coincidence, the efficient contractual solution to the overall liability problem. The waivers are not forthcoming because it is more efficient to channel tort liability (if that is what it is) through direct actions against the physician or hospital than to bring in third parties that are one degree removed from the actual treatment arena. It need not be the case that this judgment proves right in all cases. It is sufficient if it proves right in most cases when it is impossible to isolate out those cases of serious abuse for which direct health plan liability might be appropriate.

Yet, this solution has been under savage attack in litigation and in the legislative arena. More concretely, the strong anti-market rhetoric that characterized the attack on freedom of contract for workplace injuries reasserts itself in identical form in the modern context.[20] The situation is regarded as exploitive and worse. Patients are thought to have insufficient information to make intelligent choices as to treatment. Their employers are said to care only about the cost of health care, and not about the benefits that it provides workers. The call for a Patients' Bill of Rights is heard around the realm. It matters not that the real Bill of Rights imposed limitations on government powers while the

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[19] *See* Corcoran v. United Health Care, Inc., 965 F.2d 1321 (5th Cir. 1992).

[20] *See* Herdich v. Pegram, 154 F.3d 362, 374-75 (7th Cir. 1998), *rev'd*, 120 S. Ct. 2143 (2000) ("[Market forces alone] are insufficient to cure the deleterious [e]ffects of managed care on the health care industry.").

proposed legislation under that name seeks to *increase* the scope of government power.

At present, it seems impossible to stop the steamroller and to maintain the contractual system which, however flawed, may be better than the alternatives that are proposed. Nonetheless, there are rejoinders on the substantive challenges just raised. Employers have to recruit workers, and good health plan coverage is a prerequisite that they can offer. It is highly fanciful to think that employers are indifferent to the health care offered to their employees. The absence of choice may be imposed once the health care plan is selected, but it need hardly be the case that employees have no voice in the selection of the health plan (or plans) or in the modification, amendment or rejection.

Nor is it clear that the substantive provisions that are commonly included in these Patients' Bill of Rights make sense. Broader coverage for mental health or alcoholism could easily be of benefit to a tiny fraction of workers but a net drain on the welfare of others. If so, then imposing comprehensive coverage does more than supply coverage that benefits workers and hurts firms (even if we put aside the wage and premium adjustments that this entails): It could easily work a wealth redistribution among workers that favors the less productive at the expense of the more productive.

To mention just one other common proposal, it may well prove unclear whether any additional levels of external review for the plans' denial of treatment will improve the accuracy of the underlying determinations. They might create a higher error rate at some additional cost, or they could easily give rise to a serious adverse selection problem in which a small set of desperate or troubled patients consume huge amounts of resources that might be better used in treatment rather than litigation.

In the alternative it could be said that an opportunity to be heard by an outsider will help induce a higher level of care at the treatment level, and increase the level of participant satisfaction in a program by affording legitimate processes that help legitimate otherwise controversial decisions. As a matter of first principle it would be very odd to see any health plan (any more than any public welfare agency) devote all of its resources to treatment and none of them to the delicate art of customer relations and grievance procedures. But if those benefits are true, then we should expect to see MCOs move to those needed protocols voluntarily precisely because they will be able to internalize

the gains from these actions. Many MCOs have decided to make further efforts in this direction for just these reasons, at which point legislation could hamper the overall effort to improve relations in the plan/physician/patient triad by imposing requirements that do not meet the needs of any particular program.

That said, we now have a concerted effort by lawyers to bring direct actions (in tort of course) against health plan providers. In one recent case, *Petrovich v. Share Health Plan of Illinois, Inc.*,[21] a determined court held that the handbooks and brochures of the health plan carried with them the implied representation that physicians were in fact subject to the control of the health plans so that the imposition of vicarious liability was appropriate under the doctrines of apparent or implied authority. The net effect was that the joint contractual understanding between physicians and health plans that the latter were independent contractors (to whom the doctrines of vicarious liability did not apply) were of no effect, so that the older tort model of vicarious liability exposed the health plan to, it appears, liability not only for its own errors and omissions, but for any independent physician negligence.

Once again it is hard to predict the consequences of this new avenue of liability. One possibility is that it will simply redirect toward MCOs actions that would normally be brought against treating physicians and their own hospitals and practice groups. But alternatively, it could create a whole new dynamic in which patients and physicians settle their grievances in ways that allow the physician to join forces with the patient in attacking the health plan for its distant and hostile attitude to the welfare of plan participants. "Send them a message" has long been the stock war cry of able plaintiffs' lawyers, and it sounds better when brought against a distant corporation than against the local physician or hospital. Therefore, the change in the locus of litigation could do much to expand the total bill for tort liability.

Unfortunately, if that is the case, then what goes around will come around. We already know that many MCOs are on the financial ropes. For each one that falters or fails, the slack will have to be picked up elsewhere. Yet if all plans are hit by systematic pressures, then they could easily fold or limit or reduce services if employers and their workers find it unattractive to pay the outsized premiums needed to fund this litigation in the first place. If that is the case we may not have

[21] 719 N.E.2d 756 (Ill. 1999).

the same "happy landing" that we had in the workers' compensation arena, when the state system proved relatively stable (at least until the onset of occupational diseases such as asbestosis) precisely because it borrowed so heavily from the private systems of workers' compensation that were already in place. But whatever the final resting place for the current legislative struggles, the conceptual issues have both similarities and differences to the battle over industrial accidents that was waged over one hundred years ago.

One final point is that it is doubtful that any system of medical no-fault could work a tenth as well as the general workers' compensation formula. The idea of tying liability to accidents that arise out of and in the course of medical treatment is so broad and complex that the whole system is likely to flounder on the inability to give any workable account of what counts as a compensable event.[22] So in the absence of that fix, it seems clear that the most that we can do is impose ordinary standards of reasonable care on the health plan, with all the ambiguity that this entails.[23]

Therefore, in the end, it is more important to dwell on the structural similarities between the older workers' compensation dispute and the modern struggles over the liability of health plans for medical injuries. So long as health plans, physicians, patients and employers have contractual arrangements with each other, it is best to let these run their course than to replace them with complicated legislative initiatives that may have complex unintended consequences which only some new scheme of legislation can correct.

The optimal contractual solution will look far different from the proposed legislative initiative. The traditional immunities that the MCO enjoys would (if allowed) probably remain in place, such that the individual patient's only action would lie against the physicians and the physician groups under traditional medical malpractice liability, unless contractual relief were afforded there, as I , for example, urged nearly 25 years ago.[24] But there is little possibility that the pendulum will swing to

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[22] *See* Robert Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590 (1973). For an effort to resurrect the no-fault ideal, see Paul Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908 (1993).

[23] *See, e.g.*, Managed Health Care Insurance Accountability Act of 1999, codified at CAL. CIV. CODE § 3428(a) (West, WESTLAW through 1999 portion of 1999-2000 Reg. Sess. and 1st Ex. Sess.).

[24] *See* Epstein, *Medical Malpractice*, *supra* note 16.

any contract solution in the short run. Therefore, it is feared that the liability issue will careen out of control, which will in turn create greater pressures for government operation of the entire system, at which point the pendulum will switch once the government takes over power; it will find all sorts of reasons why public funds should not be used to satisfy the whims of runaway juries for jackpot justice. In short, the movement toward legislative control over the liability system is only one part of a long-term tendency, perhaps even a long-term plan, toward the government takeover of the entire health care system—a subject large and complex enough to enjoy a lecture of its own.