Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims

Patrick T. Morgan
Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims

Lingel v. Olbin

I. INTRODUCTION

The common law conceives property rights as a bundle—for instance, the right to possession, income, or capital. We unbundle these rights in order to transact with others; thus, we have rental arrangements, the right to mine for minerals, or harvest land for timber. These rights also can be used as assets or assigned to creditors, such as a landlord-tenant lease agreement.

Property rights, however, differ from tort rights. As an injury to one's personal, proprietary, or relational interests, a tort is different. Tort rights are personal and cannot be separated from the person. This is unlike the proprietary right between an owner and his res: tort rights are interpersonal, existing between the tort victim and the tortfeasor.

If tort rights were treated more like property rights, plaintiffs would be less barred by the prohibitively high cost of litigation in America. Contingent fee services may reduce the expense of litigation, but some claimants are likely still deterred from pressing a legitimate claim because of the cost, especially if there is no recovery. A modern understanding of rights to one's person—for example, allowing one explicitly to contract for who could sue for damages resulting from a tort—would remove that deterrence and allow greater legal access to those who

2. See A.M. Honore, Ownership, in OXFORD ESSAYS IN JURISPRUDENCE 107, 113-18 (A.G. Guest ed., 1961). This is the liberal theory of property; for more in-depth, philosophical treatments of property, see generally STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990).
3. This is a general definition of a tort for the purposes of this Note; a general definition is necessary because there is still some disagreement over how precisely to define a tort. See W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 1 (5th ed. 1980).
4. Cecil A. Wright, Introduction to the Law of Torts, 8 CAMBRIDGE L.J. 238, 238 (1944) ("The purpose of the law of torts is to adjust [losses from modern living], and to afford compensation for injuries sustained by one person as the result of the conduct of another.").
5. Litigation is expensive; the average tort claim (whether products liability or negligence) costs $12,000 in legal fees alone. Stuart M. Speiser, Taxing Civil Court Awards, 14 NAT'L L.J. 13 (1992).
need it most. Yet such agreements are prohibited by the hoary doctrines of maintenance and champerty.  

This Note explores the origins of the prohibition on champerty and maintenance in tort litigation. It suggests that a modern understanding appropriate to our mature legal system should allow a tort victim to assign his right to sue and collect damages for a wrongful injury or death. This ability to unbundle this right would lead to an efficient restructuring of incentives in tort liability and open courtroom doors to those currently excluded.

II. FACTS AND HOLDING

In May 1997, twenty-four-year-old Erik Olbin was killed in a traffic accident.  

Erik was the son of divorced parents, Rick Lingel and Patricia Olbin, both of whom had remarried.  

After the divorce, Mr. Lingel had relinquished his parental rights over Erik, and Mrs. Olbin’s new husband, Michael Olbin, adopted Erik.

After Erik’s death, the Olbins and the Lingels contracted orally to divide equally between them “Erik’s estate, any insurance benefits ‘relating to Erik’s death,’ and proceeds from any wrongful death action.”  

At Mr. Lingel’s request, Mr. Olbin later confirmed the agreement in a writing.  

Mr. Lingel subsequently

6. Maintenance is “[a]ssistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case.” BLACK’S LAW DICTIONARY 965 (7th ed. 1999). Blackstone pejoratively defined maintenance as “an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise.” IV WILLIAM BLACKSTONE, COMMENTARIES *135; see also infra note 73 as to his further treatment of maintenance. Champerty is “an agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant’s claim as consideration for receiving part of any judgement proceeds.” BLACK’S LAW DICTIONARY, supra, at 224.


8. Id.

9. Id.

10. Id. at 1165. When the parties made this agreement, an attorney friend of the Lingels was present. Id. The Olbins later filed a third-party complaint against the attorney for breach of fiduciary duty in convincing the Olbins that he would “protect their interests,” for providing them with inaccurate information regarding the need for a personal representative for Erik’s estate, and for misinforming the Olbins regarding the Lingels’ standing to sue on a wrongful death action and ability to participate in the distribution of Erik’s estate. See id.

11. Id.
initiated a suit against the driver who had collided with Erik; as Erik’s “surviving
father,” Mr. Lingel sought damages for loss of consortium, costs associated with
Erik’s burial, and other expenses.12

The Olbins’ attorney informed the Lingels that they did not have a right to
seek damages for Erik’s death, nor did they have a claim upon Erik’s estate or any
recovery from a wrongful death suit.13 Subsequently, the Olbins’ attorney settled
with the driver and his insurance company.14

The Lingels brought an action against the Olbins for breach of contract and
breach of the covenant of good faith and fair dealing.15 The Olbins
counterclaimed for a return of money they previously had paid the Lingels and
“certain items in Erik’s estate.”16 They also moved for partial summary judgment,
asserting that an assignment of a wrongful death action and any recovery that may
result is unenforceable.17 The Lingels argued that the prohibition on assignment
of personal injury does not extend to the assignment of wrongful death claims.18

The trial court agreed with the Olbins and granted their motion for partial
summary judgment.19 According to the trial court, the common law prohibition of
assignment of one’s personal injury claim and proceeds also extended to the
assignment of rights to a wrongful death action.20 The Lingels appealed the trial
court’s judgment.21 The court of appeals affirmed the lower court’s ruling.22

12. Id. The record does not reveal the result of Mr. Lingel’s wrongful death action.
See id. at 1165 n.1.
13. Id. at 1165.
14. Id. The Olbins also settled with Pima County in a collateral action for
negligence in road design. Id. at 1165 n.2.
15. Id.
16. Id.
17. Id. The Olbins also claimed that the agreement between the parties was
unenforceable because it violated the statute of frauds and that Mr. Lingel, in his capacity
as personal representative of Erik’s estate, breached his fiduciary duty to the Olbins. See
id.
18. Id. The Lingels also responded to the Olbins’ other claims by asserting that the
statute of frauds did not apply, and that whether Mr. Lingel breached a fiduciary duty
remained a question of fact. Id. In their cross-motion for partial summary judgment, the
Lingels denied that there was a triable issue regarding whether an assignment of the
insurance proceeds was void. Id.
19. Id.
20. Id. The court further concluded that an issue of fact remained as to whether the
complete agreement between the parties was unenforceable, whether any previously
exchanged insurance proceeds must be returned, and whether the Lingels had to return
to the Olbins items from Erik’s estate. Id.
21. Id.
22. Id. at 1171.
Specifically, the appellate court held that, because (1) the attempted assignment amounted to champerty, (2) legal precedent in Arizona allowed no such assignment, and (3) the nature of a wrongful death claim itself, the cause of action arising from Erik's wrongful death was not freely assignable.  

III. LEGAL BACKGROUND

The Arizona trial court's decision was an application of legal orthodoxy. Rights arising out of a personal injury or the wrongful death of another are typically considered unassignable. There is a long history behind this prohibition. Modern courts tend to base the prohibition on one of two grounds: (1) the dangers associated with champerty and maintenance, or (2) the nature of the right being assigned.

A. The Nature of Tort Rights

Our inveterate notion of tort rights as inseparably personal traces most proximately to English law. However, to understand the instrumental nature of tort rights, it is necessary to explore the two primary influences on that English foundation: Roman and Germanic law.

For the Romans, a cause of action stemming from a tort (or contract)—an obligatio—was inextricably personal and, thus, incapable of transfer to others;

23. Id. at 1168.
27. See W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 402 (1921); see also 2 HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES 45 (1902) ("An obligation is not susceptible, as a thing is, of bodily transference from the possession of one to the possession of another."). The obligatio's nature as a bond was highlighted by the discharge of that debt—a solutio—that literally acted as releasing of that bond. H. F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 161 (3d ed. 1972).
it could not exist outside of the two parties between whom it arose. To suggest assignment, then, was antithetical to the nature of the right.

Beginning with the fifth century B.C., however, English law was also shaped by Anglo-Saxon institutions that replaced the supremacy of the Roman law in England. The tribes that invaded England brought Germanic influences that fostered the development of English law. Under early Germanic law, torts were first obligations that resulted from wrongs that individuals committed against one another. These were highly personal offenses and were dealt with primarily by

28. See Buckland, supra note 27, at 404. This Roman limitation is ironic given its Greek ancestry. As one of the Seven Sages, Solon of Athens instituted in the sixth century B.C. constitutional reforms designed to cultivate fraternal sensibilities among the Athenians and secure the rights of newly-enfranchised citizens. See FREDD. MILLER, JR., NATURE, JUSTICE & RIGHTS IN ARISTOTLE'S POLITICS 4-5 (1995); 2 ROBERT J. BONNER & GERTRUDE SMITH, THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE 39 (1938). One of these reforms allowed any citizen to prosecute a wrong that had been committed against another. See 2 BONNER & SMITH, supra, at 39. According to Plutarch, "for the greater security of the weak commons, [Solon] gave general liberty of indicting for an act of injury; if any one was beaten, maimed or suffered any violence, any man that would and was able might prosecute the wrongdoer." PLUTARCH, THE LIVES OF THE NOBLE GRECANS AND ROMANS 118 (Arthur Hugh Clough, trans., MODERN LIBRARY 1992). As to Solon's reforms, see generally ARISTOTLE, THE ATHENIAN CONSTITUTION 33 (T.E. PAGE ET AL. EDs., LOEB CLASSICAL LIBRARY 1935).

29. See 7 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 520 (2d ed. 1973). Although the Roman law did not allow an assignment of the obligatio, the asset of the solutio could be assigned. JOLOWICZ & NICHOLAS, supra note 27, at 413-14; 2 ROBY, supra note 27, at 45. Thus, using procedure to distinguish a bond between creditor and debtor from the creditor's right to sue on that bond, the Romans allowed a cessio actionis, or the assignment of a chose in action. JOLOWICZ & NICHOLAS, supra note 27, at 413-14; 2 ROBY, supra note 27, at 45 n.2. For a discussion of the chose in action, see infra notes 35-39 and accompanying text. The jurist Gaius instructed:

[F]or by none of those modes whereby corporeals are transferred can I bring it about that what a man owes me, he shall in future, if I wish it, owe to you. What must be done is this: you must yourself, on my instruction, take from him a stipulatory engagement [for the same debt]; thereby he is discharged so far as I am concerned, but begins to be bound to you. This is called novation of an obligation. Without such novation you cannot proceed against him in your own name, but must sue in mine as my cognitor or procurator.

G. INST. 2.39 (J. Muirhead trans.); see also JOLOWICZ & NICHOLAS, supra note 27, at 412-14 (tracing the increasing abstraction of the Roman classical law).


31. Id.

32. RUDOLF HOEBNER, A HISTORY OF GERMANIC PRIVATE LAW 459-60 (1918). In early barter systems, credit was an unknown concept. Id. at 459. Contractual obligations
“self-help”—victim-inflicted revenge. When these tribal customs later provided the basis for the Anglo-Saxon Codes, one of the first sources of English law, this strain was continued. For instance, liability for injuries to a person under Anglo-Saxon law was determined not by the offender’s act but by the victim’s (or his kin’s) feelings.

Early English law was predicated upon both Anglo-Saxon and Roman legal institutions. This mixture was evident in the English common law notion of a personal claim in the form of the chose in action. A chose in action was a right to proceed in court against another person for damages. Under English law, it eventually included property and tort claims.

Because of the inherently personal nature of the chose in action, the legal scholars of medieval England considered it to be only a right to action. It could not be transferred from one to another because it was not a possessory right, presumably because possessory rights moved with the res.

The distinction between assignability of rights to an action arising from an injury to one’s property rights versus assignability for an injury to one’s person occurred later in the development of English law. Around the beginning of the eighteenth century, judges began to modify the unassignability of a chose in action regarding proprietary rights. These cases tended to involve an owner out of possession who sold the chattel to a third party. If the party in possession of the chattel did not produce the property to the new owner, the latter had a right of action. Given the natural coupling of possession with property, this transition only later developed with a burgeoning trade and a government capable of enforcing property rights. Id. at 459-60.

33. Id. If the criminal law was invoked, the offender had to pay the fine, or a bêt. Id. at 577. Because payment could not be compelled, an offender was alternatively punished by being cast from the community and labeled an outlaw. See id. at 460.

34. Id. at 50-51. This is because the compensation required to absolve the offender (and prevent a blood feud) was a function of the victim’s status. Id.

35. RADCLIFFE & CROSS, supra note 30, at 1.

36. Professor Holdsworth attributed the chose in action solely to Roman law. 7 HOLDSWORTH, supra note 29, at 520.

37. 7 HOLDSWORTH, supra note 29, at 516.

38. See 7 HOLDSWORTH, supra note 29, at 516. These included the rights to possession or title of property. See 7 HOLDSWORTH, supra note 29, at 516.

39. 7 HOLDSWORTH, supra note 29, at 516.

40. 7 HOLDSWORTH, supra note 29, at 518.

41. 7 HOLDSWORTH, supra note 29, at 518.

42. 7 HOLDSWORTH, supra note 29, at 533.

43. 7 HOLDSWORTH, supra note 29, at 533.

44. 7 HOLDSWORTH, supra note 29, at 533.
seemed to be an organic one, consistent with the earlier idea that lack of possession foreclosed transferability.45

Interestingly, the courts even decided that this assignability extended to—but immovably halted at—the damages from a personal tort claim.46 Because the damages were future property, the rights to that future property could be assigned presently.47

However, rights from a personal injury were unquestionably not assignable.48 Heretofore, this rule hardly had been necessary to state because all choses in action were unassignable.49 Indeed, the evolution of proprietary rights brought into relief the fixed unassignability of a chose in action resulting from a personal wrong.50

American courts perpetuated their English predecessors’ understanding of a tort injury as strictly personal and, thus, unassignable.51 The United States Supreme Court spoke to this idea as early as 1828 when, in Comegys v. Vasse,52 the Court noted in dictum: "[I]n general, . . . mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of assignment."53 Subsequent courts followed the Supreme Court’s lead, but they, nonetheless, have questioned the coupling of survivability with assignability.54

45. Professor Holdsworth noted that it was the “dread of maintenance” that prevented this transition earlier—courts simply blocked the assignability of anything that savored of such a practice. 7 HOLDSWORTH, supra note 29, at 525.
46. 7 HOLDSWORTH, supra note 29, at 534.
47. 7 HOLDSWORTH, supra note 29, at 534.
48. 7 HOLDSWORTH, supra note 29, at 538.
49. 7 HOLDSWORTH, supra note 29, at 538.
50. 7 HOLDSWORTH, supra note 29, at 538.
52. 26 U.S. 193 (1828).
53. Id. at 213. In so noting, the Court went on to affirm the assignability of claims arising from injuries to property. Id.
54. See, e.g., S. Farm Bureau Cas. Ins. Co. v. Wright Oil Co., 454 S.W.2d 69, 70 (Ark. 1970) (“Common law judges often mentioned assignability and survivability in the same breath, even though the policies underlying the two interdictions were far from being identical. . . . Thus what began as an association of ideas is being stated in terms of cause and effect.”); Geertz v. State Farm Fire & Cas., 451 P.2d 860, 861-62 (Or. 1969) (“Generally it is said that a claim which will not survive the plaintiff’s death is not assignable. The reason for this equation between survivorship and assignability is seldom explained.”).
On the other hand, statutes sometimes override the common law and allow for the survivability of tort claims.\textsuperscript{55} When a statute makes such a claim survivable, the issue of assignability is not always resolved. Some statutes do not mention the assignability of the claim,\textsuperscript{56} whereas others stipulate that such a claim is not assignable.\textsuperscript{57} Where a statute does not refer to assignability for an action on wrongful death,\textsuperscript{58} the courts have relied upon the common law default position of unassignability of tort claims.\textsuperscript{59}

Discussions of the nature of a tort right are diminishing in the case law. Increasingly, courts have been relying upon other grounds to prevent the assignment of tort claims.

\section*{B. The Public Policy Argument: Champerty and Maintenance}

More recently, assignment of personal torts\textsuperscript{60} has been prohibited because courts considered such agreements to be examples of champerty or maintenance. By statute or common law, champerty and maintenance are void as against public policy.\textsuperscript{61} In some states, champerty and maintenance have been criminalized.\textsuperscript{62}

\begin{enumerate}
\item \textsuperscript{56} See, e.g., ARK. CODE ANN. § 16-62-102 (Michie 1987 & Supp. 1999); WIS. STAT. ANN. § 895.01 (West 1997 & Supp. 2000).
\item \textsuperscript{57} See, e.g., W. VA. CODE ANN. § 55-7-8a (Michie 2000).
\item \textsuperscript{58} See MO. REV. STAT. § 537.080 (2000).
\item \textsuperscript{60} A personal tort is a right arising from an injury to one's person, reputation, or feelings. Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 422 (Mo. Ct. App. 1965). Comparatively, a property tort is a right to damages from an injury to one's personal property. \textit{Id.} The latter historically has been assignable. Remmers v. Remmers, 117 S.W. 1117, 1122 (Mo. 1909). For a history of the chose in action and its relation to champerty and maintenance, see generally William S. Holdsworth, \textit{The History of the Treatment of Choses in Action by the Common Law}, 33 HARV. L. REV. 997 (1920). As has been shown, it is the nature of the personal tort claim that prevented its assignment. See supra notes 27-50 and accompanying text.
\end{enumerate}
As will be shown, these prohibitions against maintenance and champerty are legal holdovers to what early English courts and legislatures thought was a necessary response to the particular problems of their time. To understand the development of champerty and maintenance, it is necessary to consider the instrumental origins of those rules.

1. Origin and Evolution of Champerty and Maintenance

During the later medieval period, English courts were unable to police themselves sufficiently. The common law and forms of procedure had grown increasingly complex, requiring expensive technicians (lawyers and barristers) to navigate the judicial process. Bribery rampantly corrupted both judges and juries.

An example of this corruption was the landed gentry's misuse of the courts as a surrogate battlefield. Aristocratic families and individuals used medieval courts to perpetuate their feuds, primarily through suits over land or assisting their opponents' legal antagonists.

Litigants, for instance, would attempt to consolidate larger estates by assisting others in a suit for recovery of land. These agreements amounted to defraying the cost of the trial in exchange for an interest in the land. Because the litigation costs were usually less than the value of the property interest, the entire deal smacked of usury—a despised practice in such times.

Thus, at that time, champerty, or tenant by champart, referred to a party who held an interest in land. Specifically, he had a claim on any rent and profits coming from the land. After this type of interest became less common, the name attached itself to those who took property as a share in the proceeds of a suit.

63. See 7 Holdsworth, supra note 29, at 524.
64. See 7 Holdsworth, supra note 29, at 524; see also Radin, supra note 25, at 59.
65. See 7 Holdsworth, supra note 29, at 524; see also Radin, supra note 25, at 59.
66. See 3 Holdsworth, supra note 25, at 395; see also Radin, supra note 25, at 64.
67. See Radin, supra note 25, at 60.
68. See Radin, supra note 25, at 60-61.
69. See Radin, supra note 25, at 61.
70. See Radin, supra note 25, at 61. Blackstone explained the French legal conception of champart: "a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom." IV William Blackstone, Commentaries *135.
71. See Radin, supra note 25, at 63. This practice apparently anticipated today's contingent fee. See infra note 189 and accompanying text.
Secondly, feudal lords often assisted their attendants in suits that clogged the courts and acted as vicarious feuding with opponents. This practice of supporting or upholding suits was termed maintenance and was yet another means of "pervert[ing] the machinery of justice."

Changing mores also added to the early doctrines of champerty and maintenance. As Christianity ascended during the late Roman Empire and spread during the medieval period, people came to see litigation as antithetical to the virtue of forgiveness. A Christian spirit may permit the litigant's temperate use of a court to protect his rights, but he scarcely would intervene on another's behalf. Anything beyond legal self-protection amounted to meddling and was "based on the worst possible motives." Litigation, itself, then, became a vice and evolved into something to be avoided.

Thus, the early English perception of litigiousness in the later medieval period was decidedly negative. The judicial system was overused by those who would abuse its process and, in so doing, victimized individuals who, because of their station or education, could not fend for themselves. The English laws regarding champerty and maintenance were an instrumental response to this abuse. In an effort to prevent these practices, English lawmakers prohibited transactions that fomented litigation. Necessarily, the common law English courts began to differentiate what rights could and could not be assigned. Simultaneously,

72. See Radin, supra note 25, at 64.
74. See Radin, supra note 25, at 58. The Bible generally counsels against litigiousness. "What your eyes have seen do not hastily bring into court; for what will you do in the end, when your neighbor puts you to shame? Argue your case with your neighbor himself." Proverbs 25:7-9. Jesus, himself, admonished his followers: "Make friends quickly with your accuser, while you are going with him to court, lest your accuser hand you over to the judge . . . [and] [d]o not resist one who is evil . . . [I]f any one would sue you and take your coat, let him have your cloak as well." Matthew 5:39-40. From Ephesus, Paul chastised the Corinthians: "When one of you has a grievance against a brother, does he dare go to law before the unrighteous instead of the saints? Do you not know that the saints will judge the world? . . . To have lawsuits at all with one another is defeat for you." 1 Corinthians 6:1-2, 7.
75. See Radin, supra note 25, at 58.
76. See Radin, supra note 25, at 58.
77. See Radin, supra note 25, at 56.
78. See 7 Holdsworth, supra note 29, at 524.
79. See 7 Holdsworth, supra note 29, at 524. The statutes dealing with these
legislators reinforced these decisions with statutes that were enacted to prevent further abuses.80

The guiding force behind these distinctions was the "dread of maintenance."81 Whereas release on an obligor's debt was allowed because it avoided litigation, those actions personal in nature became unassignable because they tended to encourage litigation, and, thus, maintenance and champerty.82 Given the disarray of the English courts, policing their own system and each transaction would have been too costly administratively. Hence, a flat prohibition of these transactions helped rid the courts of corruption, protected the underclass, and protected feudalistic institutions.83

Once the United States became a separate political entity, it adopted much of the English common law and statutes as a body of law.84 But, whereas English prohibitions against maintenance and champerty were first used to resist burgeoning capitalism around the twelfth century and then to prevent land monopolies during the later feudal period, in America they gained quite a different use.85

The American prohibitions on maintenance and champerty furthered the subsidy granted to infant industries in the nineteenth century.86 To prohibit the practices tended to consolidate champerty and maintenance, which is why today one scarcely can discuss one without the other. See 7 HOLDSWORTH, supra note 29, at 524.

80. See 7 HOLDSWORTH, supra note 29, at 524. The offenses included "forgery, perjury, conspiracy, deceit, champerty, maintenance and embracery." See 7 HOLDSWORTH, supra note 29, at 524.

81. See 7 HOLDSWORTH, supra note 29, at 525.

82. See 7 HOLDSWORTH, supra note 29, at 525. For the earlier English attitude toward personal claims, see supra notes 35-50 and accompanying text.

83. See Radin, supra note 25, at 65-66.

84. See E. ALLAN FARNsworth, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 6-10 (3d ed. 1996).

85. See Radin, supra note 25, at 65-66.

86. See generally MORTON J. HORVITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 98-99 (1977). See also Charles O. Gregory, Trespass to Negligence to Absolute Liability, 37 YALE L.J. 359, 368 (1951) (supposing that subsidies "to youthful enterprise removed pressure from the pocket-books of investors and gave incipient industry a chance to experiment on low-cost operations without the risk of losing its reserve in actions by injured employees"). This subsidy hypothesis has been accepted outside academic circles. See Li v. Yellow Cab Co., 532 P.2d 1226, 1231 (Cal. 1975) (quoting at length William Prosser, Comparative Negligence, 41 CAL. L. REV. 1, 3-4 (1953)). Yet, not everyone agrees with this hypothesis. See Richard A. Posner, A Theory of Negligence, 1 J. LEGAL STUD. 29, 30 (1972) (rejecting the subsidy theory of negligence as "ambiguous"); Gary T. Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 YALE L.J. 1717, 1717-18 (1981) (testing the "subsidy interpretation" of tort law by studying nineteenth century tort cases bifurcated between
assignment of or assistance in prosecuting claims arising from industrial accidents because such practices engendered litigiousness was another form of legal subsidization. In effect, the rule immunized important sources of economic growth, such as railroads and factories, from those who were unable to prosecute their claim without a partial or complete sale of that claim.

2. Today’s Use of Champerty and Maintenance

Modern usage, however, tends to be somewhat confused. Sometimes, the prohibition is based on the nonsurvivability of the tort right; other times, the prohibition is removed from some of its theoretical underpinnings. Nonetheless, today’s basic arguments against these types of assignments are still grounded in the English common law against champerty and maintenance.

When today’s courts face a purported assignment of a tort claim, the dangers of champerty and maintenance tend to lead the justifications against such an assignment. That is, today, the prohibition is justified by the expected antisocial consequences that supposedly would flow from assignability of a personal injury or wrongful death action. Opponents of assignability argue that sound public policy prohibits champertous agreements and its accompanying high administrative costs. More narrowly, the prohibition is considered humane: individuals who are—by reason of their personal tragedy or loss—able to assign a tort claim are spared the intrusion of those seeking to purchase that claim.

New Hampshire and California). Chief Judge Posner later modified his position, allowing for a possible judicial subsidy, but one that was justified by the economic benefits to the landowners whose property was crossed by the railroad. See Richard A. Posner, Economic Analysis of Law 277-78 (5th ed. 1998).

87. Compare Karp v. Speizer 647 P.2d 1197, 1198 (Ariz. Ct. App. 1982) (“The reason for this rule was often expressed in terms of survivability, i.e., in the absence of statutes to the contrary, tort actions for personal injuries did not survive the death of the injured person and, therefore, were not assignable.”), with Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208, 217 (Mo. Ct. App. 1967) (“We reject the rule . . . that whether a cause of action for personal injury is assignable depends solely upon whether it survives and adopt the rule that such causes of action may not be assigned . . . for reasons of public policy.”).

88. As noted, the other basis for the prohibition is the nature of a tort right. See supra notes 27-59 and accompanying text.

89. These consequences were expected as early as the 1700s. Blackstone disdained those who practice champerty as “pests of civil society [who] perpetually endeavour[] to disturb the repose of their neighbours, and officiously interfer[e] in other men’s quarrels.” IV William Blackstone, Commentaries *135.

90. See Brown v. Bigne, 28 P. 11, 13 (Or. 1891).
According to conventional reasoning, if these agreements were permitted, the court system soon would be overcome with "baseless litigation." Also, courts should not permit an assignment of wrongful injury or death lest lawyers engage in speculation and gambling in lawsuits. The contemplated scenario here is that a party will agree to take on the costs of even a flimsy claim in exchange for a share in the award—that the party essentially will become an investor in the plaintiff’s suit. In a situation involving the assignment of a wrongful injury or death claim, the attorney presumably will treat the lawsuit as an investment, defraying the costs of the claim in the hopes that the tort damages will provide a profit over the initial investment. In short, it is unseemly for "unscrupulous people [to] purchase causes of action and thereby traffic in law suits for pain and suffering."54

Closely related to this is the fear of nuisance suits—allowing an assignment would encourage the type of champertous litigation that is initiated primarily to harass defendants. The judicial process only should be used for the pursuit of just resolutions, and not, by way of aiding or buying claims, for "injuring and oppressing others . . . in unrighteous suits."55

As with anything, however, there is an exception. A minority of jurisdictions do allow assignments of a tort claim. For instance, though New York has a statute preventing the assignment of a personal injury claim,57 courts have read the statute strictly to allow an assignment of the award from successfully litigating that claim.58

92. Huber v. Johnson, 70 N.W. 806, 807-08 (Minn. 1897).
94. Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208, 217 (Mo. Ct. App. 1967); see also North Chicago St. Ry. Co. v. Ackley, 49 N.E. 222, 225 (Ill. 1897) ("The law will not consider the injuries of a citizen, whereby he is injured in his person, to be, as a cause of action, a commodity of sale.").
98. See Williams v. Ingersoll, 89 N.Y. 508 (1882); Statzos v. Murphy, 276 N.Y.S.2d 727, 733 (N.Y. App. Div. 1966). In effect, this is the same as the Roman cession of action. For an explanation of the chose in action, see supra text accompanying note 37.
This argument has not fared well outside of those jurisdictions, however. In *Karp v. Speizer*, the Karps, the plaintiffs, received a judgment of $6,248.85 against the Speizers, the defendants. In satisfaction of that judgment, Mr. Speizer assigned to the Karps that amount out of the proceeds from an earlier accident in which the defendant was the claimant. When the car accident proceeds were distributed wholly to the Speizers, the Karps filed suit for breach of the assignment agreement. The lower court granted the Speizers’ motion to dismiss. In affirming the lower court’s dismissal of the claim, the Arizona appeals court noted the common law rule that, in the absence of a statute, a tort claim is not assignable. The court disagreed with the Karps’ suggested distinction between the assignment of the claim and the assignment of the damages prior to judgment.

In some jurisdictions, an assignment of proceeds from a tort claim is permissible once the case has been decided. Despite acknowledging that a minority of jurisdictions may make such a division, the appellate court concluded the majority perpetuated the “better reasoned rule” in that a tort claim should not, for purposes of assignment, be divided and sold.

Thus, from the English common law roots to the American adoption and modification of champerty and maintenance, assignability of tort and wrongful death claims remain disfavored in our legal system. Against this backdrop, the Lingels hoped to enforce their agreement with the Olbins.

IV. INSTANT DECISION

A. Majority

In *Lingel*, the trial court held that the Olbins’ cause of action could not be assigned; thus, the attempted agreement between the Olbins and Lingels was void. Upon appeal, the Lingels asserted that the trial court erred in refusing to

---

100. Id. at 1198. The court in *Karp* did not specify the theory upon which the Karps proceeded against the Speizers in the initial action.
101. Id.
102. Id.
103. Id. at 1198.
104. Id.
105. Id. at 1199.
enforce their agreement with the Olbins because of Arizona’s prohibition on the
assignment of causes of actions for personal injuries.109

After dispensing with the standard of review, Chief Judge Espinosa, writing
for the court, stated that an assignment of a claim from personal injury is
unenforceable.110 The appellate court noted that Arizona shares the common law
prohibitions of other jurisdictions against an assignment of personal injury
claims.111 However, the Lingels attempted to distinguish their agreement with the
Olbins (in which the latter purportedly agreed to share the proceeds of the claim)
from a void assignment of a claim.112

The appellate court grounded its dismissal of the Lingels’ arguments on
statute and precedent.113 First, the court noted that the Olbins had proceeded on
a claim of loss of consortium.114 This action was provided for by an Arizona
statute115 that prevented the survival of a loss of consortium claim.116 Because it
did not survive the person in whom it vested, any claim proceeding under that
statute could not be assigned.117

Next, the court examined the statutory nature of a wrongful death claim
under Arizona law.118 The statute provided that only those listed could proceed
on such a claim.119 Because the Lingels were not statutorily categorized among
those able to proceed on such a claim, they were unable to assert any rights arising
out of Arizona’s wrongful death statute.120

109. Id. at 1166.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id. at 1166-67.
115. The statute reads:
Every cause of action except a cause of action for damages for breach of
promise to marry, seduction, libel, slander, separate maintenance, alimony,
loss of consortium or invasion of the right of privacy, shall survive the death
of the person entitled thereto or liable therefor, and may be asserted by or
against the personal representative of such person, provided that upon the
death of the person injured, damages for pain and suffering of such injured
person shall not be allowed.
116. Lingel, 8 P.3d at 1167.
117. Id.
118. Id.
119. Id. Under the statute, only the decedent’s personal representative could
120. Lingel, 8 P.3d at 1167.
The court next concluded that an assignment of a wrongful death claim would generate the type of problems associated with champerty and maintenance in other areas of the law. The court reasoned from precedent and held that the “fortuitous” distinction between a wrongful death and a personal injury was not a legitimate basis for an assignment of the one but not the other. The court also supported its conclusion by reference to other jurisdictions’ similar holdings.

After laying a basis for the prohibition on assignment of tort claims, the court rejected the Lingels’ attempt to distinguish an assignment of a cause of action from an agreement to share in the proceeds of such an action. The court held that Arizona precedent perceived “no meaningful distinction” between such claims whether characterized as the creation of a right in the proceeds or maintaining the original plaintiff’s “control of the wrongful death action.” If Arizona were to countenance such an argument, parties could elude the prohibition by simply renaming their assignment of a personal injury or wrongful death claim.

The Lingels also attempted to use the lack of control by an assignee to the proceeds as a fulcrum to convince the court that an assignment of the damages did not trigger the same policy associated with champerty and maintenance. The Lingels referred to Achrem v. Expressway Plaza Ltd. in which the Nevada Supreme Court held that plaintiffs’ assignment of part of their settlement proceeds in a personal injury case did not violate the public policy against absolute assignments of tort claims because the assignors retained control of the lawsuit.

The Lingel court first noted that Nevada statutory law differed from Arizona in that it allowed for assignment of the proceeds. Secondly, the Lingels’ argument was foreclosed because the court in Karp v. Speiser already had rejected such reasoning. Moreover, the facts, the court concluded, directly contradicted the Lingels’ contentions. While both parties were mourning the

121. Id.
122. Id. at 1167-68.
123. Id.; see also Liberty Mut. Ins. Co. v. Lookwood Greene Eng’rs, Inc., 140 So. 2d 821 (Ala. 1962); Totten v. Parker, 428 S.W.2d 231 (Ky. 1967).
124. Lingel, 8 P.3d at 1168.
125. Id. The appellate court cited Karp v. Speiser, 647 P.2d 1197 (Ariz. Ct. App. 1982), for the proposition that assignments of a claim and of proceeds from that claim are indistinguishable and, thus, void. Id.
126. Id.
127. Id. at 1169.
129. Lingel, 8 P.3d at 1169.
131. Lingel, 8 P.3d at 1170.
132. See supra notes 99-107 and accompanying text.
133. Lingel, 8 P.3d at 1170.
loss of Erik, the Lingels' attorney friend assisted the parties in coming to an agreement regarding the proceeds.\textsuperscript{134} Yet, Mr. Lingel, not Mr. Olbin (who had the right to proceed), filed the wrongful death claim in his own name—this despite Mr. Lingel's legal status as a stranger to both Erik and the claim.\textsuperscript{135} Regardless of Mr. Lingel's intentions, the rules against assignment contemplate the transaction itself, not the inducements.\textsuperscript{136} Hence, the trial court found that the wrongful death proceeds were unassignable.\textsuperscript{137}

The Lingels also contested the trial court's ruling that the underinsured motorist proceeds arising from the insurance policy were unassignable, as well.\textsuperscript{138} According to the court, insurance proceeds should be freely assignable as a contractual right.\textsuperscript{139} However, the court found that the Lingels overlooked that these proceeds were payment for Erik's wrongful death.\textsuperscript{140} The Lingels' argument, if accepted, would create an exception that would swallow the general rule of unassignability of personal injury or wrongful death claims.\textsuperscript{141}

The appellate court conceded, in the end, that the Lingels advanced sound reasons for allowing an assignment of a personal injury or wrongful death claim or the proceeds flowing therefrom.\textsuperscript{142} Nonetheless, the court was bound by precedent and public policy, which prohibited such assignments.\textsuperscript{143} The court concluded that changes in the law would have to come from legislation.\textsuperscript{144} Therefore, the trial court's decision for the Olbins was affirmed.\textsuperscript{145}

\textbf{B. Concurrence}

Judge Brammer wrote a concurrence to the majority's opinion to express his disagreement with the principle that assignment of proceeds of a personal injury or wrongful death action should be assignable.\textsuperscript{146} Referring to the survivability of personal injury claims under an Arizona law promulgated in 1955,\textsuperscript{147} Judge

\begin{itemize}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.} at 1171.
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Id.} The current law is quoted at note 115, \textit{supra.}
\end{itemize}
Brammer wrote that the rule in Arizona prohibiting assignment of a personal injury claim arose from dictum in *Harleysville Mutual Insurance Co. v. Lea.* In that case, the appellate court assessed the state of the law after the promulgation of the statute, and it relied upon sources derived after the statute had been enacted.

In deciding that a personal injury or wrongful death claim is unassignable despite survivability, Judge Brammer opined that, in an attempt to protect insureds, the *Harleysville* court overreached. Specifically, because the issue for the *Harleysville* court was only whether the survivability statute allowed “an injured party to assign a portion of his recovery for personal injury to reimburse his insurance carrier for payments made to him under the provisions of the medical-pay portion of his insurance policy,” there was no reason to decide the issue of assignability of tort claim proceeds.

Judge Brammer noted that the *Harleysville* court based its reasoning on two 1965 cases, one from Missouri and another from Washington. After affirming that a tort claimant’s rights were unassignable, the *Harleysville* court went on to write: “nothing herein should be construed to prevent an assignment of all or part of a claim for personal injuries which has been reduced to judgment or otherwise liquidated.” Yet, once judgment or settlement has been reached, there is no more claim and all that can be assigned are the proceeds. Thus, Judge Brammer noted that *Harleysville* began a line of cases that have contributed to the inconsistency and confusion between the jurisdictions on the issue of assignment of personal injury claims.

Though he ultimately would uphold the assignment of claims, Judge Brammer stated that he would allow agreements to share the unliquidated

149. *Lingel*, 8 P.3d at 1171.
151. *Id.* (quoting *Harleysville*, 410 P.2d at 496).
152. *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418 (Mo. Ct. App. 1965). In *Chumbley*, a Missouri appellate court denied an insurer’s contention that the insurer’s settlement with the tortfeasor effectively assigned part of the proceeds to the insurer. *Id.* at 423. Instead, such settlement had not affected the subrogation rights of the insurer. *Id.* at 424. Reliance on *Chumbley* was misplaced, according to Judge Brammer, because that case did not address the survivability of a cause of action. *Lingel*, 8 P.3d at 1171-72.
proceeds of such actions. After reviewing the definitions of champerty, maintenance, and barratry, Judge Brammer concluded that prohibitions against such practices still have a place in the judicial system today.

Nonetheless, Judge Brammer underscored a contradiction in the notion that grieving parties are considered competent to handle daily affairs and transactions, but they are paternalistically deemed unable to make rational decisions regarding inchoate assets from a tort claim. Allowing for an assignment of proceeds would not, according to Judge Brammer, entail the same dangers associated with an absolute assignment of claims. To the extent sharing proceeds would court such problems, the courts would be able to monitor any legal impropriety.

Because Judge Brammer "felt compelled to follow" the current rule prohibiting such an assignment of proceeds until it is changed, he agreed with the conclusions of the majority.

V. COMMENT

The Lingel court missed an important opportunity to expand the notion of what rights are associated with a tort claim. What is being proposed in this Note is the treatment of a tort right as a property right—one that can be alienated for due compensation. Specifically, if claimants were allowed to unbundle certain rights within their tort claim (for instance, the right to part of the unliquidated proceeds, or the entire bundle itself, that is, the claim), then the claimant and the public would reap significant benefits.

If a tort victim could sell his claim, the tort victim would be like any other seller in a competitive market with buyers bidding to purchase the claim. With

158. Id. at 1173-74.
159. See supra note 6.
160. See supra note 6.
161. "Barratry is adjudicative cheerleading—urging others, frequently, to quarrels and suits." Lingel, 8 P.3d at 1173 (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13, at 490 (1986)); see also IV WILLIAM BLACKSTONE, COMMENTARIES *134 ("[B]arratry [sic] is the offence of frequently exciting and stirring up suits and quarrels between his majesties subjects.... The punishment for this offence... is by fine and imprisonment.").
162. Lingel, 8 P.3d at 1173.
163. Id. at 1174.
164. Id.
165. Id.
166. Id.
167. For the potential benefits—both private and public—associated with a tort market, see infra notes 168-93 and accompanying text.
168. Conversely, a bidder only would be willing to pay an amount that would yield
the ability to alienate one's right to proceed, either in part or whole, against the tortfeasor, the tort victim only would be induced to sell his claim for an amount at least equal to the amount that he would receive in a judgment. 169

Alternatively, a partial sale of a claim could help a financially desperate tort victim proceed against the tortfeasor. A tort victim may not want to divest himself completely of the claim but may be unable to afford the cost of litigation; without alternatives such as assignability, the litigation most likely will not go forward. Many statutes only allow a wrongful death claim to be pursued by the party named in the statute, yet the party named may be unable to proceed because of pecuniary reasons. 170 A rule that would enforce agreements to share in the proceeds would encourage others who had such an interest (i.e., family members, legally unrecognized intimates, etc.) to assist the named claimant financially. Today, such relations and friends may be disinclined to do so for fear that the "loan" would never be repaid. 171 Admittedly, the enforcement of assignability would neither change the claimant's chances of success in litigation nor increase others' willingness to take a chance on the victim's claim. But it adds to the security the claimant can offer to others who may hesitate, perhaps for their own financial

---

169. However, the negotiated amount that a rational tort purchaser would pay would be less than what the victim ultimately would receive from a judgment. This follows from the economics of present value, i.e., a tort victim would demand no less than a figure that, when invested, would yield the same amount that he would receive when awarded a judgment. See generally ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW STUDENTS 25-41 (2d ed. 1998) (discussing the concept of present value and annuities). Thus by receiving the discounted value of his expected judgment sooner, a tort victim could begin his compensation quicker than he would with a lawsuit. Given the length of some suits, this also would be important for investment purposes. See generally Maurice Rosenberg & Michael I. Sovem, Delay and the Dynamics of Personal Injury Litigation, 59 COLUM. L. REV. 1115 (1959) (examining the relationship between the delay of trials and the amount recovered). Nor must the negotiated payment be only cash; some purchasers in a competitive market could offer upfront incentives, such as defraying hospital and funeral costs for the tort victim. See generally POSNER, supra note 86, at 209-14 (examining damages due to lost earning capacity).


171. Some may object to the use of an economically-minded family member to support this point, or argue that familial sympathy or goodwill between friends should be sufficient if the need is desperate enough. The proper response is merely to refer to the case of the Lingels and the Olbins.
reasons. The knowledge that enforcement is available may be all the added inducement necessary.

With this relationship established, some of the private benefits behind a tort claims market, which the Lingel court and others ignored, become clear. First, a tort victim could avoid the multi-faceted costs associated with litigation (financial and emotional) if he were spared the necessity of trial in order to be compensated.\footnote{172}

A tort market would create greater access to compensation for tort victims. With poorer tort victims not pursuing their claims because of an inability to finance the costs and risks of a trial, the sale of the tort claim would shift those burdens from the seller to the purchaser.\footnote{173}

Another private benefit would be the greater range of information and choices for a tort claim seller. The average tort victim probably is not aware of his legal rights.\footnote{174} Those wishing to purchase the claim from the victim would have an incentive to inform the victim of his rights so that those rights could be enforced.

Moreover, a tort victim facing a free market would not be limited to choosing between what the tortfeasor offered in settlement and what a jury awarded in trial. The tort purchaser would act as a competitor of the tortfeasor; the purchaser would offer an alternative price for the plaintiff’s claim or to share proceeds in exchange for assisting with the claim. Currently, the tortfeasor must offer a competitive price in settlement or be willing to go forward with the litigation. The net result would be an increase in a tort victim’s access to legal services at a lower cost.

The public would benefit from such a market, as well. America’s system of tort liability rules is predicated upon the notion that tortfeasors will be forced to internalize the costs they impose upon others.\footnote{175} With increased access to legal services comes increased willingness and ability to pursue claims.\footnote{176} Hence, 

\footnote{172. Of course, he still would be involved to some degree—if only to provide evidence or testify—so that the purchaser effectively could pursue the claim. It has been suggested that with compensation, however, would come a decreased willingness for a tort victim to assist a purchaser in the pursuit of the claim. \textit{See} Marc J. Shukaitis, \textit{A Market in Personal Injury Tort Claims}, 16 J. LEGAL STUD. 329, 340 (1987). This legitimate concern would be lessened by devices designed to motivate the tort victim to participate, such as cooperation clauses in the purchase contract, payment on an installment basis conditioned on the tort victim’s assistance or purchase of only part of the expected judgment with the balance to come from the actual judgment. \textit{Id.}}

\footnote{173. \textit{Id.} at 337.}

\footnote{174. \textit{Id.}}

\footnote{175. \textit{Id.} at 341.}

\footnote{176. This is markedly so in the case of a business that specializes in buying and pursuing such claims. \textit{See generally} Dobner, \textit{supra} note 93, at 1529 (hypothesizing such a firm). The courtroom, itself, however, may deter some litigants. \textit{See supra notes 172-}
potential tortfeasors would be less likely to engage in risky behavior that may give rise to rights to damages in others.\textsuperscript{177} This deterrence from inefficient risk would create a positive externality of greater safety.\textsuperscript{178}

A tort victim's ability to alienate her claim also could provide other benefits. The ability to sell her claim to a party with a stronger bargaining position would increase the number of pretrial settlements and reduce stress on the court system.\textsuperscript{179} A claimant who has the ability to litigate a claim fully is in a better settlement position than one who does not have such resources. In situations where litigation is not in the tortfeasor's best interest, the well-heeled claimant is better able to extract a more appropriate settlement price than the claimant who is unable to afford the costs and risks associated with a trial. Thus, an assignee of a tort claim, who has the superior bargaining position,\textsuperscript{180} could demand a more efficient settlement price than an impecunious plaintiff who may be forced to settle for less than his claim was worth.\textsuperscript{181} Shifting the claim to the party with the superior ability to settle at a more efficient price would reduce the number of trials.\textsuperscript{182} This expected increase in settlements weakens one of the typical public policy arguments against a market for tort claims.

\textsuperscript{73} and accompanying text.

\textsuperscript{177} See POSNER, supra note 86, at 626. Given the current tort system, the average tortfeasor only would take as much risk as is efficient, i.e., as is the case where the benefits from the safety outweigh the costs discounted by the probability of an accident happening. See generally John Prather Brown, Toward an Economic Theory of Liability, 2 J. LEGAL STU. 323 (1973).

\textsuperscript{178} See Shukaitis, supra note 172, at 341.

\textsuperscript{179} Note that this is in direct opposition to the fear of over-litigiousness. Indeed, it is not empirically certain whether a market in tort claims actually would increase litigation. POSNER, supra note 86, at 625. Although this may be true in the short term, eventually it may reduce the number of claims. Shukaitis, supra note 172, at 343. That it may cause increases in the short term is a result of economic forces. With the creation of a market, the volume of suits would increase as purchasers flooded the new market. Shukaitis, supra note 172, at 343. However, such a market eventually would reduce claims. See infra notes 179-82 and accompanying text.

\textsuperscript{180} That the assignee would have the superior bargaining position is an economic observation. An assignee would not purchase a claim from a tort victim if the former could not "get a better return" on the claim. In other words, no one knowingly bets on a losing team.

\textsuperscript{181} It would be efficient because the tortfeasor would not pay a settlement price greater than what he would pay were he to be found liable by a jury. Providing the impecunious plaintiff with less than his claim is worth is inefficient because it forces the victim to bear the burden of the tortfeasor's negligence. Allowing parties with a stronger bargaining position to purchase claims, then, raises the costs of negligence for settlement, as well—contributing to the overall public benefit of such a market.

\textsuperscript{182} See Dobner, supra note 93, at 1536-38.
Similarly, arguments against a tort market are weakened by modern procedural devices. Rule 11 of the Federal Rules of Civil Procedure provides protections against the filing and pursuit of baseless claims; it also establishes sanctions for violations.\textsuperscript{183} State courts have similar rules.\textsuperscript{184} Today's courts are not the courts of the medieval period, which were fragmented and out of control. The judiciary has the ability to protect itself from apparent nuisance suits or claims that amount to baseless speculation. These safeguards against the costs of a tort market make room for availing society of the benefits of such a market.

Also, those who fear the victimization of tort sellers overlook that the legal system already has a considerable body of law designed to protect against such fraud or overreaching.\textsuperscript{185} The same contractual safeguards that protect against other forms of unfair dealing could be employed against tort purchasers who seek to exploit claimants.\textsuperscript{186} Presumably, tort sellers who are unfairly solicited into parting with their claim would have contractual remedies, such as rescission or damages.

In addition, an economic analysis reveals that the concern about pursuit of baseless claims is overstated. Viewing an alienable tort claim as an investment, potential buyers would not bid on a flimsy claim; it simply would be a bad investment.\textsuperscript{187} The market, itself, would provide mechanisms to reduce frivolous litigation.\textsuperscript{188}

The dynamics of a tort claims market also would lower the cost of legal access. In a contingent-fee situation, the lawyer takes anywhere from a quarter to a third of the damages awarded.\textsuperscript{189} Both forms of litigation financing—the sale of a tort claim and a contingent-fee arrangement—are means for plaintiffs with

\textsuperscript{183} \textit{FED. R. CIV. P. 11.}

\textsuperscript{184} \textit{See, e.g., MO. SUP. CT. R. 55.03(b)(1) ("By presenting or maintaining a claim . . . an attorney . . . is certifying that . . . the claim . . . is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.").}

\textsuperscript{185} \textit{See \textit{generally} E. ALLAN FARNSWORTH, \textit{CONTRACTS} §§ 4.1-4.19 (3d ed. 1999).}

\textsuperscript{186} Or, it is the same body of law a purchaser could turn to if the seller attempted to back out of the bargain, such as what occurred in \textit{Lingel}.

\textsuperscript{187} Of course, there would be those who would value such claims inordinately—just as there are those who overvalue stocks in the securities market. Arguably, however, their ability to clog the judicial system would be limited by their marginality and the aforementioned procedural devices.

\textsuperscript{188} Some may object that the market strips the tort victim of a legal remedy. However, there is always conventional legal access, i.e., contingent fee lawyers and the like.

\textsuperscript{189} Thus, the modern contingent-fee practice is heir to the practice of taking part of the property awarded to claimant. \textit{See supra} notes 69-71 and accompanying text.
limited funds or high risk-aversion levels to access legal services. But the ability to sell the claim on the front end (whether completely or in part) would be more appealing to some potential litigants. This form of competition would give contingent-fee lawyers an incentive to remain competitive. To do so, they would have to give plaintiffs a reason to select a contingent-fee arrangement, perhaps by reducing their share in the damages awards to a level comparable with what tort claim purchasers would offer. From this, it follows that contingent fee lawyers would have an even greater incentive to pursue higher damage awards generally from juries in order to compensate for the reduction in their fees. A competitive market would create pressure for all plaintiffs’ lawyers to deliver to their clients higher quality legal service at more affordable rates.

The distributional policies of unassignability are also outdated. Preventing the marketing of claims was a response to the abuses of the aristocracy in feudal England. It was extended by the need to adjust to the growing pains of industrial America. Today, industry does not require such indulgences. Given the costs of today’s legal system, the rule against tort assignability blocks poorer, risk-averse claimants from legal remedies. Those who need what the law can provide should be able to transfer their claims to those who value them more. In allowing for the sale of personal injury or wrongful death claims, we have the opportunity to do a rare thing in law: bring efficiency and justice together.

190. See Posner, supra note 86, at 625.

191. See Simon, supra note 93, at 11 (“Nonlawyer syndicators might accept a lower portion of a claim in exchange for providing the funds necessary to hire a lawyer on an hourly rate.”).

192. Or become competitive, as the case may be. See Simon, supra note 93, at 11.

193. Note, however, that this necessarily does not mean a higher quality of justice for all. With higher damage awards come higher insurance costs. These costs are passed on to the consumer. However, this is no more an argument against the tort claims market than it is against contingent-fee services. At best, it only would contribute to the negative attitude towards plaintiffs’ lawyers.

194. See supra notes 66-68 and accompanying text.

195. See supra note 86 and accompanying text.

196. See Gregory, supra note 86, at 396 (suggesting that, due to our society’s “radical changes,” the time has come to reevaluate the liability theory set forth in Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850)).
VI. CONCLUSION

As Holmes noted, law adapts to the society in which it exists. Our rights and duties, in large measure, have been influenced by historical forces and instrumental decisions directed towards the good of society. However, one generation’s solution eventually becomes another generation’s problem. Consequently, new answers are needed, as well as new rights and duties. It is through this process that our rights are nuanced and textured to adapt to the changing relations within society.

Missouri stands ready to mark such a turning point. With the opinion of Travelers, Missouri made a well-cited contribution to the public policy arguments against assignment of tort claims. Missouri is in a position to make a turning point in tort rights. Subsequent abrogation of that rule would weaken the resistance to what is a natural evolution of our understanding of personal rights. Many possibilities flow from a rule allowing a tort claims market. At the beginning of this century, the judicial system should discard the tired, paternalistic prohibition and allow plaintiffs to employ their tort rights as they see fit.

PATRICK T. MORGAN
