

OHIO STATE LAW JOURNAL

Volume 48, Number 2, 1987

Balanced Proposals for Product Liability Reform*

JEFFREY O'CONNELL**

I. INTRODUCTION

Injuries resulting from faulty products or conduct not only lead to much personal trauma, but also occasion wild fluctuations in insurance premiums, huge legal costs, and long delays before settlements or verdicts are reached. These costs and the uncertainties of the legal system are in turn blamed for skyrocketing tort liability insurance rates. The result is widespread alarm and cries for tort reform throughout the United States.

Perception of the legal system as a game of chance rather than a sound mechanism for catching unreasonable behavior undercuts the system's ability to raise standards of products and conduct and to deter injuries. Providers of goods and services believe that, in seeking to establish reasonable standards of care, the legal system itself lacks the capacity to be reasonable and, instead, often penalizes only the spurious appearance of fault.

Even more importantly, the system's haphazardness also diminishes its value as a protection for the injured. One seriously injured victim may recover nothing at all or far less than fair compensation, while another, similarly injured, receives far more than actual losses. The inconsistency is exaggerated by allowing juries to award damages for such noneconomic losses as pain and suffering or grief. Because placing a monetary value on such nonmonetary losses is inherently irrational, plaintiffs are encouraged to play upon the jury's sympathy, further distorting the issue of who or what was really at fault.

Although only a small fraction of claims go to trial, the prospect of litigation is still weighed by both defendants and plaintiffs in assessing their settlement prospects. As a result, high costs and long delays are incurred in evaluating claims, whether or not they reach court. Ideally, a system of insurance should call for settlement of typical claims by prompt, periodic payment of the injured party's actual economic loss, but the unpredictable and intensely adversarial nature of liability insurance claims makes such settlements rare indeed.¹

* This Article is based on the author's Arent Lecture at The Ohio State University College of Law, April 6, 1987. Portions of the lecture were, in turn, adapted from previous writings of the author, including J. O'CONNELL & C.B. KELLY, *THE BLAME GAME: INJURIES, INSURANCE, & INJUSTICE* (1987); Moore & O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267 (1984). I am grateful to James Guinivan, University of Virginia Law School Class of 1988, for his (as usual) expert research assistance.

** John Allan Love Professor of Law, University of Virginia. B.A., 1951, Dartmouth College; J.D., 1954, Harvard University.

1. For criticisms of the uncertainties and vicissitudes of personal injury law from varying points of view, see, e.g., TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES EXTENT AND POLICY IMPLICATIONS OF THE

II. INADEQUATE REFORMS

What is the solution to this mess? The insurance industry and its institutional insureds urge *tort reform*, which, for them, means new laws that curtail what they perceive as the excesses of the tort system. Specifically, they propose “reforms” that either (1) pay injured parties less, or (2) make it harder for them to be paid, if at all.²

In the first category are laws that:

- Limit pain and suffering awards to, say, \$100,000 or \$250,000 or \$500,000.
- Eliminate or severely curb the amount of or the occasions for punitive damages.
- Deduct from the plaintiff’s tort award the other insurance monies already payable to the plaintiff from collateral sources, such as from health or disability insurance.

In the second category are laws that:

- Raise the standard of liability—for example, requiring plaintiffs to prove defendant’s fault by a more demanding level of proof.
- Limit plaintiffs’ lawyers’ contingency fees—for example, by setting a ceiling of forty percent of the first \$50,000 awarded to the plaintiff, with the share dwindling gradually to only ten percent of recoveries over \$200,000.
- Abolish or alter the doctrine of “joint and several liability,” under which if two or more defendants are both found to be liable to the plaintiff for an injury, a defendant only marginally responsible can be held liable for all the plaintiff’s damages (especially likely if the primarily responsible party is either insolvent or grossly underinsured). Under this reform, a defendant’s share of any liability would be limited to its share of responsibility. Thus, a defendant found twenty-five percent responsible would be liable, at most, for twenty-five percent of any damage award.
- Reduce the time allowed for suit under the statute of limitations.
- Penalize those bringing marginal claims.

One or more of these reforms have been or are under consideration in all states, including Ohio, and many have been enacted.³ But a “solution” that merely further

CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) (Federal Inter-Agency Study sponsored by the Attorney General); U. S. ATTY’S GEN. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS (1987); Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985); Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. (forthcoming 1987).

2. An Ohio tort reform bill passed by the Ohio General Assembly was vetoed by Governor Richard Celeste after protests by consumer advocates, such as Ralph Nader, claimed that it unfairly discriminated against consumers in favor of industry. S.B. 330 (1986). For a report on the bill, the veto, and the failure of an attempt to override the veto, see NATIONAL UNDERWRITER (Prop. & Cas. ed.) Jan. 12, 1987, at 28, cols. 1–5. Further reform bills have been reintroduced in the current session of the Ohio General Assembly. *E.g.*, H.B. 1 (1987).

3. More than a third of the states enacted statutes limiting liability in all, or in a wide range of, cases. Often enacted were these kinds of reforms:

(1) *Limits on joint and several liability*. ALASKA STAT. § 09.17.080 (Supp. 1986); COLO. REV. STAT. § 13-21-111.5 (Supp. 1986); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1987); FLA. STAT. ANN. § 768.81 (West Supp. 1987); ILL. ANN. STAT. ch. 110, para. 2-1117 (Smith-Hurd 1987); MICH. COMP. LAW ANN. § 27A.6304 (West 1987); N.Y. CIV. PRAC. L. & R. 1601 (McKinney 1987); WASH. REV. CODE ANN. § 4.22.070 (Supp. 1987); WYO. STAT. § 1-1-109(d) (Supp. 1986). These statutes are not all alike, however. Some apply only in particular circumstances, as where the plaintiff himself is negligent.

(2) *Caps on damages*. Some states enacted flat caps; others include escape clauses; one provides for variations in the

limits the amount or availability of compensation to injured persons is a questionable solution indeed. The *least* appealing way to reform the tort system is to make it even harder for injured parties to be paid.

That is not to deny the evils of the present system. Even if liability insurance cases were not rising, and even if sellers of products or services were finding it easy to buy liability insurance, the tort system would still need fundamental change—especially from the point of view of those who are injured. But change is needed not only from the victims' perspective, it is also urgently needed to correct the profligate diversion into litigation of dollars that *all* consumers of products and services are paying, even if the price of insurance made such coverage readily affordable.

That is why it is so sad to see so many consumer groups allying themselves with the trial bar in defense of the present tort liability system.⁴ Consumer advocates are right in opposing changes that simply make it more difficult for the injured to get compensation, but they are wrong in wanting to maintain a system that already makes it *much too* difficult to be paid insurance dollars. Trial lawyers, of course, have to concede how difficult it is to get payment from the tort-liability system: else how could they justify charging a third or more to help get it?

Trial lawyers argue that the tort system makes sense in requiring a provider of defective products or services to pay the injured buyer or other victim. But the problem is that product injuries, for example, often happen under very complex circumstances.⁵ As a result, unraveling the cause-and-effect relationship between a malfunctioning product and the individual hurt by it usually is difficult, calling for expensive expert engineering testimony and exhaustive discovery techniques. Even in much simpler cases such as those involving automobile accidents, it is often too difficult for the law to determine who is "at fault." Finding fault then is often an extremely expensive business in both simple and complex product liability cases.

To compound the problem, the second variable mentioned above makes it even more of a nightmare of complexity in product liability suits: injured parties can recover not only their medical expenses and wage loss but also the monetary value of their nonmonetary loss, especially pain and suffering. But what is the monetary value of physical pain? What is an aching back worth? There is no rational answer to that—no market value to consult for the selling price of aching backs.

cap depending on the age of the claimant and the state's current average wage. See ALASKA STAT. § 09.17.010 (Supp. 1986) (\$500,000 cap except when involving serious disfigurement); FLA. STAT. ANN. § 768.80 (West Supp. 1987) (\$450,000); MD. CTS. & JUD. PROC. CODE ANN. § 11-108(b) (Supp. 1986) (\$350,000); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1986) (\$875,000); WASH. REV. CODE ANN. § 4.56.250 (Supp. 1987) (cap varies with age of plaintiff and state's economy). MD. CTS. & JUD. PROC. CODE ANN. § 11-108(b) (Supp. 1986) (\$350,000); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1986) (\$875,000); WASH. REV. CODE ANN. § 4.56.250 (Supp. 1987) (cap varies with age of plaintiff and state's economy).

(3) *Limits on punitive damages recoveries.* Some statutes put limits on punitive damages—imposing a higher standard of proof to recover such damages; putting a cap on such damages; or allocating part of the recovery to a state fund. E.g., N.H. REV. STAT. ANN. § 507:16 (Supp. 1986); FLA. STAT. ANN. § 768.73(2) (West Supp. 1987) (only 40% of punitive damages payable to claimant); IOWA CODE § 668A.1 (only part of punitive damages payable to plaintiff unless tort aimed specifically at plaintiff); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (clear and convincing evidence required to overcome limit equal to actual damages).

4. E.g., *supra* note 2.

5. The discussion in this Article will focus on product injuries but can be applied equally to all personal injury actions, including those from services such as medical treatment.

Seeing how wildly complex the tort-liability insurance system is in being required to determine not only who or what was at fault, but also the monetary value of nonmonetary losses, we can more appreciate why that system is so unmanageable and why compared with life, health, or fire insurance, it is so uniquely plagued by delay, uncertainty, and costly lawsuits. Although high costs and unavailability of insurance currently highlight the need for change, the system's demand for fundamental change exists quite apart from whether, say, product liability insurance happens to be readily available at a reasonable price at any given time.

III. NO-FAULT REFORMS

Two generations ago the answer to this mess, at least for workplace accidents, was workers' compensation. This was a form of no-fault insurance enacted in Germany in the 1880s, in Great Britain in the 1890s and in the United States roughly between 1910 and 1920. Workers' compensation decrees that workers injured on the job need not go to court to assert their employers' fault and their own freedom from fault, with all the entailing litigation. Rather, injured workers are automatically paid for all their medical costs and for a substantial part of their wage loss with nothing paid for pain and suffering. Thus, the two litigious issues that dominate tort liability—fault and the value of pain and suffering—are eliminated.⁶ The result, in turn, is a viable insurance system.

Of course there are problems with our workers' compensation system. It does not always work as well as the reformers said it would—hardly any reform ever does—but it has worked magnificently compared to the tort system. No one (except maybe some trial lawyers) suggests that we go back to litigating over fault and the value of pain and suffering after every workplace mishap.

The next great wave of accidents to engulf modern society came from traffic collisions. And no-fault again has presented itself as the answer to the shortcomings of tort law.⁷ One can best illustrate the stunning contrast between the relatively low cost of high payments under no-fault auto insurance and the relatively high cost of low payments under traditional liability coverage by looking at the cost of auto insurance in New York State. There, no-fault benefits pay for medical expenses and wage loss up to a combined total of \$50,000—at an average annual premium of \$46 in 1983. Lawsuits based on fault, meanwhile, are allowed when the victim is disabled for at least ninety days or when the victim dies or suffers other serious injury. To cover their liability losses in such lawsuits, New York motorists are also required to buy tort-liability insurance providing coverage of at least \$10,000 per person and \$20,000 per accident. In 1983, the average premium for liability coverage was \$118.⁸ In other words, no-fault insurance with high limits and automatic payment costs about

6. For a summary of workers' compensation statutes, see O'Connell & Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L.J. 931-33 (1987).

7. See *id.* at 930; U.S. DEP'T OF TRANSP., COMPENSATION AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCES EXPERIENCES (1983); for a summary of the Department of Transportation Report, see O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61-72 (1986).

8. U.S. DEPT. OF TRANSP. REPORT, *supra* note 7, at 37.

half what tort-liability insurance, often with low limits and disputed payment, costs. Similar scenarios exist in other no-fault states.⁹

Can we construct a no-fault insurance plan for accidents caused by manufactured products? In a limited sense, we already have. Product sellers are now held to “strict products liability,” which means that anyone injured by a defective product is entitled to be reimbursed for his loss by the product seller, whether or not the seller was in any way negligent in letting the product on the market.

But even strict products liability does not really begin to eliminate the basic problems connected with the tort liability system. It may not be necessary to litigate over whether the manufacturer was negligent, but deciding whether a product was “defective” is still necessary—and about as difficult. And once it has been determined that a product was defective, there is the same opportunity for costly wrangling over the monetary value of nonmonetary loss—pain and suffering, loss of consortium, and so forth—that must be reimbursed.

There is a real problem, though, in extending no-fault principles to provide reimbursement of all medical expenses and wage loss (but not noneconomic loss) caused by injury from a product, whether or not the product is “defective.” In the field of products liability, the question of who or what should be viewed as “causing” an injury can be just as complicated as the question of “negligence” or “due care” in other settings. If one is in reasonably good physical condition before an auto accident and comes out of the collision with a gash on the cheek or even a severed arm, it is not hard to determine that it was the automobile accident that caused the gash or the amputation. But what if one slips on a throw rug at a neighbor’s house and smashes one’s head on the marble table top? On a no-fault basis, who should pay for the medical expenses and wage loss? Should the neighbor pay as a homeowner? The marble quarry? The manufacturer of the table? Or the manufacturer of the throw rug (remembering that, under no-fault, it doesn’t matter whether or not the manufacturer put a rubber backing on the rug to prevent slips)? Thus, determining liability could often be just as vexing on a no-fault as on a negligence basis.

IV. THE FAIR-TRADE ANSWER

On the other hand, this does not mean that society has to make do with product liability insurance, either as it exists or as insurance companies and those they insure would like to reform it. The key to both workers’ compensation and auto no-fault reforms, unlike those being proposed by insurers and product sellers, is balance: it is easier for the injured party to be paid but he or she is paid less. That is a fair exchange on both sides. If a complete no-fault system for non-workplace and non-auto accidents is not feasible, at least some of the same trade-offs can be obtained.

We should start with the following two benchmarks for reform:

9. *Id.* at 25–40.

● *Make it easier for injured parties to be paid promptly for economic losses without litigating the fault of either products or persons (including the injured themselves) and without significantly increasing current liability costs.*

● *To hold the line—and perhaps even reduce—the costs for any increase in new claims by lowering the costs of litigation and lowering payments for noneconomic loss.*

Proposals being made by the insurance industry and by product sellers do not meet these criteria. By limiting pain and suffering awards, contingent fees, joint and several liability, and other remedies, they would make it no easier—and often indeed harder—for injured parties to be paid promptly for their economic loss. Similarly, proposals that obligate payment of any and all injury claims—or at least an indeterminate number of new ones—offer no guarantee that insurance costs will not rise exponentially.¹⁰

V. NEO-NO-FAULT

With these benchmarks in mind, I have proposed a law under which any product seller¹¹ facing a products liability claim would have the option of offering a claimant within, say, a maximum of 180 days, periodic payment of the claimant's net economic loss. That would be prompt payment compared to what the tort system offers. Such payment would cover any further medical expenses, including rehabilitation, and wage loss, not already covered by any other health or disability insurance payable to the claimant. It would also call for a reasonable hourly fee for the claimant's lawyer.

These benefits are lavish compared to those under most health insurance policies in this country; few such policies, for example, cover costs of rehabilitation. Under the proposed law, if a product seller promptly offers to pay these benefits to the injured customer, further pursuit of a product liability claim in tort would be foreclosed. The claimant, in other words, would be forced to accept such an offer. Indeed, I have elsewhere termed the proposal "Offers That Can't Be Refused."¹² (I would allow the claimant to refuse the offer, under certain restricted circumstances: if the defendant had caused the injury intentionally—a rare occurrence, surely—or if the victim's economic losses were minimal, as with the death of a nonearner. More on this last point later.¹³) Under this proposal, no defendant would be forced to offer such a settlement. Thus, potential defendants would not be saddled with unmanageable new burdens.

10. *E.g., Product Liability Amendments: Hearings Before the Subcommittee on the Consumer of the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 1st Sess. (1985); J. O'CONNELL & C.B. KELLY, *THE BLAME GAME: INJURIES, INSURANCE, & INJUSTICE* 128-29 (1987); see text following *supra* note 9.

11. Which term includes anyone in the chain of transmission—manufacturer, wholesaler, or retailer. See notes 16-17 *infra* and accompanying text.

12. O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 *Nw. U.L. Rev.* 589 (1982).

13. See *infra* note 24 and accompanying text.

But wouldn't such a law give defendants an unfair advantage by allowing them to settle for less than they would be forced to pay in a tort suit but never forcing them to settle for *more* than they would pay in such a suit? I foresee little risk of such one-sided advantage. Rather, the huge costs of defending tort cases and the massive exposure to payment for noneconomic losses in such cases would encourage defendants to save themselves such costs and avoid such exposure by offering to pay claimant's noneconomic losses, not only in cases they are sure to lose, but even in many—perhaps most—cases in which their liability is in doubt. One leading malpractice lawyer has said that if a similar neo-no-fault plan were in effect in the realm of medical malpractice, he would advise making an offer to pay claimants' net economic losses in 200 of the 250 cases his office was then defending.¹⁴

What about injured products users? Would they be unhappy with this new law? The answer is that most claimants are not happy with the slugfest tort lawyers have created. Few who have been seriously injured have any taste for (1) a lottery to determine whether they will be paid for their medical expenses and wage loss, and (2) a bitter fight that constantly reminds them of the accident, even to the point of being challenged by the other side's lawyer, often snidely, that a jury might consider them liars or cheats. Such battles may be acceptable to lawyers, who do it for a living, but their injured clients hate the process. Indeed, they emerge twice injured: by the accident itself and then by the bruising legal battle that follows. Given a choice between prompt payment of real losses on the one hand, and a warring gamble for long-delayed possible payment of more on the other, the certainty of prompt payment usually will seem more attractive. Most seriously injured buyers will prefer a legal system that encourages prompt payment rather than one that encourages product providers to dig in their heels and incur potentially huge litigation expenses, either out of fear that an award of intangible damages will be yet more costly or out of hope that delay and expense will force the claimant to reduce or drop his demands. The premise of the proposal is that it is foolish and wasteful to spend vast sums on guesswork over whether a product was faulty, then paying some victims much more than their loss and others much less, instead of simply encouraging injured victims to be compensated promptly for their out-of-pocket losses.

Trial lawyers and others claiming to speak in consumers' interests may criticize the proposal on the ground that findings that a product is defective and damage awards for pain and suffering, which the proposal would remove, work to deter businesses from selling unsafe products. But, we have already noted how arbitrary and capricious the tort system often is in imposing damage payments; such caprice tends to undermine whatever deterrent effects the present system may otherwise have. As criminologists have long preached, if sanctions are to be effective as a deterrent they must be both *swift* and *certain*. But swift and certain are two things that tort law surely is not. In addition, whatever deterrence is imposed by tort law is heavily diluted by product liability insurance, which shifts the cost of injury not to the maker

14. Personal communication to author.

or other seller of the supposedly defective product, but to all who are paying (directly or indirectly) for similar insurance coverage.

Also, under this neo-no-fault proposal, a defendant could only foreclose a tort claim by offering to pay the victim's economic losses in perpetuity—a not insufficient commitment in itself. By no means would defendants escape scot-free under this plan. We would not be abandoning the tort liability system. Rather, in a sort of jujitsu maneuver, we would use tort law's bulk and weight as leverage to spin it around and thereby protect ourselves from losses while avoiding the system's own crushing effects.

VI. SOME FURTHER DETAIL

Once a product seller has made a commitment to pay the victim's economic loss, it is required within thirty days to make payments for any losses already incurred and to continue to make them as further losses are incurred. The plan thus contemplates that payments be made as loss accrues. It provides, however, that, if the parties agree, a court-approved lump sum payment may be made to the victim. (The proposed legislation also authorizes the court to make provisions to prevent dissipation of the fund in appropriate circumstances.)

The bill also permits the seller and accident victim to agree that the seller may discharge its liability by a tender of less than full economic loss. It is unwise, and probably impossible, to prevent people from making their own arrangements. However, to avoid the risk that an unscrupulous seller or its insurance company might take undue advantage of an injured victim, any settlement for payment of less than full economic loss (if the economic loss exceeds \$5000) would have to be approved by the court to be effective. If such a lesser settlement were required to be submitted to a court, but was not submitted, the settlement would not be effective, and the victim would have the same rights as any victim of a product defect to whom a tender is not made.

The injured victim is assured by the seller's offer that he will be made financially whole for the injury without having to bring suit and suffer the uncertainty and delay of litigation. In exchange for this certainty, and the inducements to the seller to make the offer, the victim gives up an opportunity to participate in the litigation lottery, which admittedly for some victims results in recovery for noneconomic damages.

Under the present tort system, attorneys' fees owed by a successful plaintiff are often paid out of the noneconomic damages; such extra payment thus funds the payment of contingent fees.¹⁵ Because these elements of damages would be eliminated, the bill provides that in addition to paying the victim's net economic loss, the tendering seller would pay reasonable expenses, including attorneys' fees, incurred by the victim in obtaining legal advice about the offer and collecting benefits.

The bill also provides that any product seller—a manufacturer, wholesaler, or retailer—which believes it is at risk of liability for an injury (or illness) may make

15. O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 351.

the offer to the victim. The provider of goods making such an offer may also designate any third person who may be liable as a participant in the offer. The issue of whether or in what amount a third person must contribute to the amount to be tendered would be determined in a separate arbitration.¹⁶ A third party so designated would receive the same protection against personal injury suits as a tendering provider. Although a third party thus can be forced to participate in the tendering process against its will, it will not, as a practical matter, be disadvantaged by being a participant in an offer. It thereby avoids exposure to liability for noneconomic tort damages (including pain and suffering), and can still deny and dispute any liability on its part under the offer. Thus, if a retailer makes an offer, it may designate a manufacturer as a contender. A manufacturer may similarly designate the retailer. Either offeror may also designate a wholesaler or component parts manufacturer or other person who may be liable.

When an offer is made and more than one person is designated as a participant, the participants may agree upon their relative contribution to the compensation to be paid to the victim. It can be expected that this agreement will be made informally and expeditiously among sellers in the chain of distribution and their insurers who know they will be dealing commercially with each other on an ongoing basis, and, consequently, that they will make common-sense settlements. If they fail to do so, however, this question will be submitted to arbitration to be decided on the basis of relative fault among the participants in the offer.¹⁷

The plan would not permit a product seller to preclude a tort action where a seller's wrongful conduct was intentional.¹⁸ If the victim elected to rely on the exception for intentional conduct, he would notify the party making an offer that he was rejecting that offer. Thus, the victim could not receive payment for economic loss and then sue the tendering party alleging that the exception applied.

Under the above version of the early offers approach, the product seller *may* make an offer. The claimant has no choice; if an offer is made to a claimant, the claimant cannot sue for any pain and suffering. The two greatest problem areas under the proposal are the fact that the claimant has no choice, and further that since pain and suffering damages are totally abolished, a claimant with small economic, but large noneconomic, loss would recover little.

I have in the past said that a first fallback would be a cap: the claimant could be given a choice of whether or not to accept an offer of net economic loss; if she

16. See *infra* note 18 and accompanying text.

17. At common law, a defendant can implead a third person in a tort action; as a result, involving such third persons in the offer can be viewed as just another form of impleading.

18. The definition of *intentional* should read in the following terms or their equivalent:

A person intentionally causes or attempts to cause a personal injury when acting or failing to act for the purpose of causing injury or with knowledge that injury is substantially certain to follow; but a person does not intentionally cause or attempt to cause injury merely because the act or failure to act is intentional or is done with the realization only that it creates a grave risk of causing injury without the purpose of causing injury or if the act or omission is for averting bodily harm to oneself or another person.

For the rationalization for rigidly defining intentional conduct in this way, as opposed to including, say, gross negligence, see J. O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* 154-55 (1975); P. KEETON, D. DOBBS, R. KEETON, D. OWEN, *PROSSER AND KEETON ON TORTS* § 34 (5th ed. 1984).

rejected the offer, she could sue—but a cap would be placed on the amount of pain and suffering she could recover in any such suit.¹⁹ This would be better than the traditional cap discussed above²⁰ because it would give the claimant something in exchange: the claimant would be subject to the cap only if she had been offered payment of her economic loss without having to go to court. (The usual proposals for a cap, as discussed earlier,²¹ would require the plaintiff to go to court and then impose a cap on her when she was successful.)

However, even though the fallback is fairer to the plaintiff than the traditional cap, it will be tarred with the same brush. It is clear that even such a cap may be the lightning rod for opposition to the proposal.

And yet the focus of the early offers approach on reducing litigation is entirely valid. Avoiding litigation is obviously the area where the largest savings can be obtained and where the treatment of victims of malfunctioning products can be most easily improved.

Accordingly, we should consider ways of maintaining the basic structure of the early offers approach but avoiding a unilaterally imposed cap. The bill could provide that the claimant has a choice of whether or not to accept an offer, but that if the claimant rejects an offer, he may go to court subject to certain restrictions, such as:

1. The standard of proof is more stringent than the usual civil standard of preponderance of the evidence. (It is questionable whether a verbal standard makes much difference to a jury,²² but it does give the trial court and the appellate court a better handle to control a result if they so desire.)

2. The defendant is specifically authorized to offer to finance a second opinion from another lawyer (who cannot be the plaintiff's trial counsel and who cannot have any financial interest in the plaintiff's case) as to whether it is in the plaintiff's interest to reject the defendant's early offer.²³

3. The plaintiff can recover noneconomic losses, only if he establishes a "substantial" amount of such damages. This would limit rejections of the tender to those cases which underlay the justification for giving the plaintiff a choice—those in which noneconomic loss (including any punitive damages awarded) is much greater than the plaintiff's economic loss. A formula would be used to define "substantial." For instance, a plaintiff could collect noneconomic damages only if they were at least four times greater than his economic loss.²⁴ (The risk of this approach, of course, is

19. J. O'CONNELL & C.B. KELLY, *supra* note 10, at 135.

20. *Supra* note 3.

21. *Id.*

22. O'Connell, *Jury Trials in Civil Cases?*, 58 ILL. B.J. 796, 807-08 (1970).

23. In a more stringent provision, the bill might provide that an action could not be brought unless the plaintiff had obtained a second opinion from another lawyer (who, as in the above provision, could not be the plaintiff's trial counsel nor have any financial interest in the plaintiff's case) as to whether it is in the plaintiff's interest to reject the defendant's early offer. See O'Connell, A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers, 73 CALIF. L. REV. 898, 909-10 (1985).

24. For the genesis of this provision, see O'Connell, *supra* note 12, at 601-02. Note that under such a provision the plaintiff would be constrained from exaggerating how small his economic losses were in order to prove them less than 20% of his total damages in that he would be limited in what he would be paid for his economic losses, which would be all he would be entitled to if he could not get over the threshold for recovery of noneconomic damages. As a corollary, defendants would be constrained from exaggerating how large the economic losses were in order to prove them more than

that it might be an incentive for juries to increase the standard of proof of the amount of noneconomic loss in order to have their award be effective.)

4. If the plaintiff does not prevail in the subsequent litigation, the plaintiff must pay the defendant's costs, including legal fees, incurred after rejection of the tender. The plaintiff's counsel who brought the action would be jointly and severally liable for this obligation.

The main criticism of the early offers approach is arguably still applicable, namely that it is one-sided, in that the putative tortfeasor may initiate, with sanctions for rejecting, settlement of the case for periodic payment of net economic loss, but the claimant may not. To deflect this, a present version of the bill gives the claimant the opportunity to request speedy arbitration on the issue of fault.²⁵ If she is successful in same, she can collect net economic loss, plus attorney's fees.

There will be pressure to further revise the early offers approaches to provide that the claimant can offer to settle for net economic loss. If the provider rejects the offer, it becomes subject to sanctions such as those discussed above (particularly payment of attorneys' fees if it loses). This should be resisted. It would give the claimant further leverage to extract settlements and encourage strike suits. The positions of the claimant and defendant in making a settlement offer to cover economic loss are arguably asymmetrical. The bill imposes limitations on the claimant's suit only after he has been offered and rejected prompt payment for his net economic loss. But if the claimant offers to settle for net economic loss, society's interests are arguably not served by tilting the scales against a product seller in subsequent litigation if it rejects the offer. The risk of encouraging too many new claims (some of them of the nuisance variety)—and therefore of rising costs—argue against this approach.²⁶

Unlike most proposals for tort reform, these versions of the early offers plan would *not* impose the restrictions across the board. They would demand that a defendant give something in return for its stronger shield against liability. Thus, the proposal would leave intact the tort rights of those victims to whom an offer of settlement had not been made and who therefore had to resort to a lawsuit.²⁷ Restrictions would only apply when victims reject an opportunity to avoid litigation by accepting what society and insurance theory²⁸ deem a fair settlement in the typical case.

20% of total damages. Such mutually reinforcing (and therefore healthy) incentives would seem to lead to more settlements in those (relatively few) cases where tort actions seem feasible. Cf. Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 63 VA. L. REV. 771 (1982).

25. Moore & O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267, 1284 n.51 (1984).

26. O'Connell, *supra* note 12, at 605-06. As a further incentive, however, for defendants in product liability cases to proffer claimants' net economic loss, the bill could provide that failure to do so eliminates any defense of claimant fault in a subsequent civil claim, short of intentional self-infliction of injury. *Id.* at 606; O'Connell, *A Proposal to Abolish Contributory and Comparative Fault with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L. REV. 591-600; for the restricted definition of "intentional" conduct (applicable to either the defendant or plaintiff), see *supra* note 18.

27. Moreover, the proposal may offer the additional advantage of barring the defendant from any potential defense based upon claimant's fault. See *supra* note 26.

28. As to the flagrant violations of insurance theory involved in tort liability for personal injury, see O'Connell, *supra* note 15, at 344-48.

VII. CONCLUSION

In sum, society ought to avoid, whenever possible, "shin-kicking litigation"²⁹ as a means of deciding whether injured people receive insurance benefits. After all, it was shortly after 1900 that our grandparents—with comparatively little information, actuarial or otherwise, to go on—abandoned tort liability as a means of paying for workplace injuries. As to other types of injuries—including those from manufactured products—as we approach the next turn of the century, surely we can follow their example and avoid the costs, delays, and uncertainties of lawsuits. Indeed, such a neo-no-fault approach need not be limited to product liability. It could and should apply just as successfully to any or all personal injury claims.³⁰

29. As one plaintiff's lawyer put it, after six years of legal battle before settlement of a complex products liability case, "this type of litigation is war—shin-kicking litigation. It often lasts for a long time." N.Y. Times, Aug. 31, 1982, at 10, cols. 1-6.

30. See, e.g., Moore & O'Connell, *supra* note 25. Note that conflicts of laws problems loom especially large in products cases with their manifestly more likely interstate elements. See Professor Kozyris' contribution to this symposium.