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Alternatives to the Tort System for Personal Injury†

JEFFREY O'CONNELL*

The tort liability system for claims for personal injury is both cumbersome and fortuitous. As at least a partial solution Professor O'Connell suggests a statute under which a potential defendant would be given the option of offering within a short time to pay periodically the claimant's net economic loss. Payment would also include claimant's reasonable attorney's fees. Claimants would be obligated to accept such payment in discharge of their personal injury claims, except for cases of death or intentional injuries.

But given the difficulties of passing a statute, Professor O'Connell also proposes that sellers of products or services put in effect an insurance policy or product warranty binding the seller to tender within a short period the victim's net economic loss regardless of the existence of tort liability in any particular case. The victim would then be given a further short period to accept such tender or to claim in tort.

INTRODUCTION

Since the 1930's legal academics have been attacking the tort system and trying to replace it with alternate means. Although intuitively the tort system makes sense in that a wrongdoer should pay an innocent victim for his wrongdoing, the problem has been, as epide-

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miologists well know, that accidents happen under very complex circum-
cumstances. They happen in the split second of the agony of an auto-
mobile collision; they happen during the organized chaos of surgery; 
they happen when a toaster explodes or when an industrial machine  
malfunctions. The interconnection between the machine which mal-
functions and the individual who is hurt is one that is very hard to  
disaggregate, to use the jargon of social scientists. Even in an auto-
mobile accident it is often very difficult to disentangle who or what  
was at fault. A more complicated product injury, an exploding  
toaster for example, requires engineering testimony of the most ar-
cane kind to unravel whether the machine was misused by the  
owner, or whether it had a design defect in the myriad of electronic  
or other complicated parts in even a relatively simple consumer ma-
chine. Moreover, there must be one expert for the plaintiff and one  
for the defendant. The meter goes on ticking while lawyers and en-
gineers try desperately to understand each other.

A very real problem exists here. Engineers do not understand  
much law. Indeed, from my experience, engineers do not understand  
much English. I do not mean to be overly harsh, but anybody who  
thinks in terms of ergs is in serious trouble. At a minimum, an engi-
neer often has trouble convincing laymen of what he or she is talking  
about, and an articulate engineer is very difficult to obtain. Having  
spent hours readying engineers to testify before jurors, I know that  
trying to get them to say what they mean in terms understandable to  
laymen is very expensive work; while I am talking with them, an-
other meter is ticking—my meter. When one moves to medical mal-
pactice, the complexity of the event becomes truly awesome. While  
machines are complicated, these "machines" that humans walk  
around in defy description in their complexity. There are sixteen bil-
lion neurons in the cortex of the human brain. If you sat down to  
design a machine of that complexity you would need a structure the  
size of the Empire State Building, and Niagara Falls flowing over it  
to handle all the friction. Yet humans move around in these ma-
chines of between 100 and 250 pounds for eighty years or so with  
relatively little friction and not much breakdown. (It is almost  
enough to make one religious.)

The point is that when something does go wrong in health care,  
the tasks of trying to find out whether the doctor was at fault, or  
whether the procedure was an appropriate procedure, or whether the  
presenting complaint of the patient made the result inevitable no  
matter how skillful the health care provider, provide awesomely

1. See generally J. O'Connell, Ending Insult to Injury: No-Fault Insur-
ance for Products and Services 9-28 (1975).
complicated questions.\textsuperscript{2} If engineers do not understand much English, the same is true of doctors. They go to medical school and many of them never speak English again. They learn a bastardized form of Greek which they are very proud of and which they tend to use exclusively. It is only under the most intense pressure that they will return to the language of their childhood. Facilitating this return is the job of a lawyer when bringing doctors before a jury.

As a result, finding fault is often an extremely expensive business in both simple and complex cases. In a tort suit, an additional variable exists that makes it even more of a nightmare of complexity. The premise that a tortfeasor was a wrongdoer—an evil person—used to be correct. Prior to the industrial age, most tortfeasors were evil people. Before machines it was very hard to injure another without intent. With machines, however, inadvertent injuries became the norm. Since one began with the premise that a wrongdoer had wronged an innocent party, the innocent party was allowed to recover not only for medical expense and wage loss but for the monetary value of pain. Note, however, that it is one thing to ascertain with relative rationality the lost wages of a person and his present and future medical expenses. Yet it is quite another thing to place a monetary value on physical agony. What is an aching arm worth? There is no answer to that; there is no market for aching arms. We cannot find a market functioning anywhere that tells us what migraine headaches are worth; what the loss of a leg is worth in indignity and loss of pleasure. So what do we do? We try these issues in front of juries with lawyers for plaintiffs using harps and violins and other “scientific” instruments to convey the value of this loss, with juries given almost unlicensed discretion to squander or stint according to how sympathetic they feel toward the individual, such that females get more for pain and suffering than males for the same injury, and older people get more than younger people. There is no reason behind this because nothing has evidenced that females suffer more than males.\textsuperscript{3} Once again, trying to rationalize all this in economic principles is extremely difficult.\textsuperscript{4}

In any serious case, then, two variables of confounding complexity arise in which vast differences of opinion cause endless litigation and

\textsuperscript{2} See generally id. at 29-47.

\textsuperscript{3} Perhaps this is changing; our society has had a protective attitude toward females generally, and this is one of the few areas where females have benefited from discrimination.

negotiation: (1) "What" or "who" was at fault, and (2) What is the pecuniary value of non-pecuniary loss.

There is also a third variable that tort lawyers have instituted and kept in the system: the "collateral source rule" which also grew out of a view of the tortfeasor as an evil person, a wrongdoer. When individual A injures individual B, and B is already covered by health insurance to a very substantial degree (or disability insurance, or life insurance), A is not allowed to take account (nor is the judge or jury) of the fact that B has already been paid for a good deal of her economic loss. On the contrary, A must pay all over again. So A either pays B twice, or there is a very complicated subrogation proceeding whereby one insurer, the health insurer, who has already borne the loss, gets involved in a complicated claim to reclaim the amount already covered by an efficient insurance mechanism. Thus, the tort liability system is unleashed to bear a cost that society has already borne, either through private or social insurance, on the ground that it would be unthinkable to allow the wrongdoer to benefit by the insurance already covering the loss.\(^5\)

The resulting system, despite its intuitive appeal, is a nightmare. It is a system where many people are not compensated because they cannot prove, although in fact it may be the case, that someone or something was at fault. Many others are paid a small fraction of their loss because they cannot afford years of delay until the matter is settled. These are people who are injured; they have mounting wage loss. So they settle with a tremendous discount to avoid the delay which a jury trial would entail. Even then, they are usually paid only years after the event. For example, the average delay in the case of someone recovering in a product liability claim is about two years from the event.\(^6\) Two years! How long does it take to get a health insurance claim paid in our country? One month, on the average.\(^7\) And yet for tort claims, seriously injured people must wait two years in angst and uncertainty as to what they will be paid, when they will be paid, and if they will be paid. In turn, when they are paid, because this is a very complicated matter calling for very skillful expertise on the part of counsel, they will be forced to turn over a third, or a half, or sixty percent, not uncommonly, of what they are paid in litigation expenses and attorney's fees.

I undertook a study a few years ago, generally confirmed by sub-


sequent studies, in which it was determined that for medical malpractice claims, twenty-eight cents out of the medical malpractice insurance dollar actually went to the victims of malpractice. The rest of it went to insurance overhead and legal fees. Twenty-eight cents out of every dollar! For products liability, the estimate is about thirty-seven cents. That is "huge loading"—huge transaction costs to use the jargon of the economist.

**Alternatives**

**Workers' Compensation**

There is a solution to this. It is surprisingly simple and was discovered about 100 years ago by, of all people, Bismarck. Though Bismarck was not exactly the most enlightened figure in the history of western civilization in the past 100 years, he did figure out a more humane solution than tort liability. In order to defuse the progressive movement of the reformists in Germany, Bismarck instituted social reforms of all kinds, including social insurance reforms. The most famous reform was workers' compensation, a quite simple solution to the problem of industrial accidents which was raging in Germany, England, and the United States. The first two great waves of accidents to engulf modern society were railroad accidents and industrial accidents. Workers' compensation, passed in Germany in the 1880's, in Britain in the 1890's and in the United States between about 1910 and 1920, decreed that when an employee was injured in the course of employment he need not sue the employer. He need not allege that the employer was at fault and that he, the employee, was free from fault. Rather, if the injury occurred in the course of employment, the employee would be paid automatically for all medical expenses and for some wage loss. Typically a workers' compensation wage loss maximum benefit today is in the vicinity of $200 or $300 per week—a social insurance level. That amount is assured to the victim, regardless of how the accident happened, regardless if he was at fault, regardless of whether or not he was wearing goggles, re-

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10. Id. at 511.
gardless of whether or not he had used the guard on the machine properly, regardless of whether or not the employer had maintained the machine properly for its use. Because the accident occurred in the course of employment, the loss is payable as an actuarially predictable and inevitable result of the industrial activity. Nothing is paid for pain and suffering. Since there is no litigation over fault, the result is that two litigious issues are eliminated and a healthy, functioning insurance mechanism remains.

Admittedly, there are problems with the workers' compensation system. It does not work as well as the reformers had expected. It has, however, worked magnificently compared to the tort system; almost anything would. No pressure exists anywhere in the world to replace workers' compensation with the tort system it replaced. It is not surprising that reform of workers' compensation is never suggested by anyone in his right mind—except perhaps for a few zany academics from some place like the University of Chicago. With such no-fault insurance covering this form of pervasive industrial risk, no one would think of abandoning the system of workers' compensation.

No-Fault Insurance

The third great wave of modern accidents arose, of course, from automobiles. Within the last fifteen years, the no-fault insurance idea has been applied in some fifteen states to automobile accidents. No-fault insurance works as follows: $A$ and $B$ are in an automobile accident. Under the common law system, $A$ claims against $B$ based on the fault of $B$, and $B$ claims against $A$ based on the fault of $A$. The prevailing party is compensated, not only for medical expense and wage loss, but for pain and suffering. No-fault insurance comes along and says, "Look, $A$ has insurance covering $B$ and $B$ has insurance covering $A$, under very cumbersome criteria. Why don't we have a system in which $A$ insures himself for his economic loss—his medical expense and his wage loss, up to, say, $300 per week. $B$ insures herself on the same basis. Because each of them is covered

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12. According to the National Commission on State Workmen's Compensation Laws:
   We have discussed the implications of abolishing workmen's compensation and reverting to ... negligence suits, a remedy abandoned some 50 years ago. This option is still inferior to workmen's compensation ... [Tort liability suits are] a drawn-out, costly, and uncertain process that was dismissed long ago as a means of dealing with occupational injuries and diseases. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS REPORT 25 (1972).

13. U.S. DEP'T OF TRANSP., COMPENSATING ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCE (1985). This study indicates that 16 states have no-fault systems and eight more have add-on no-fault programs. But see infra note 32 and accompanying text.
for essential losses, they will be forced to waive their claims based on fault against each other. Once again, at a stroke, the issues of fault and of pain and suffering valuation, the two issues litigated so endlessly and offensively, are eliminated. Perhaps no-fault insurance has not worked as well as reformers had expected, but it has worked very well.\textsuperscript{14}

Some Michigan figures indicate the amount of waste in the tort system that can be eliminated or better used with no-fault insurance dollars. In Michigan, prior to no-fault, \(A\) was forced to carry $20,000 of tort liability insurance on \(B\) and \(B\) carried the same on \(A\). Under no-fault, \(A\) insures himself with his own company for unlimited medical expense, including rehabilitation (which very few disability insurance policies or health insurance policies cover). Thus, \(A\) has bought unlimited medical benefits in case of terribly serious trauma due to an automobile accident, and possibly millions of compensation dollars before the claim is completed. In addition, no-fault covers wage loss of $2000 per month for three years, tied to inflation. Further, one can still sue the other driver under Michigan's no-fault law if one suffers death or substantial bodily impairment. Michigan motorists are still required to carry $20,000 of tort liability coverage under their no-fault law. The no-fault package (unlimited medical expenses, wage loss of $72,000 dollars payable automatically as long as the injured party has suffered to that extent, and $20,000 of tort coverage) costs, the actuaries tell us, about ten percent less than tort coverage alone would cost. The result is startling: $20,000 of liability insurance versus no-fault insurance covering unlimited medical and $72,000 of wage loss. That kind of savings is achievable only when the lawyers are removed from the system and non-economic loss is no longer compensated.\textsuperscript{15}

There are, of course, moral, ethical, and economic questions involved in moving to such a system. A connection exists between the epidemiological approach to preventing injury, and the insurance mechanism under no-fault of paying for injury, when, despite the best efforts of society, an injury occurs.\textsuperscript{16} In both cases the worthy and the unworthy are lumped together. In both cases those who have a proclivity to accidents are protected, whether their injuries arose...
through moral failings or not. We neither care nor argue about such failings. We put seatbelts or airbags in the car which will protect the drunk and the sober. They will protect the prudent and the imprudent. They will protect the skillful and the unskillful. They will protect those who practice safety and those who do not. They are indiscriminate. They are a safety net, unconcerned about the merits of those whom they protect.

Note, then, that no-fault insurance does just the same. It says, “We are going to protect those injured in accidents by insurance payments regardless of the moral quality of their act.” True, we will not pay those who intentionally injure themselves. That exception need not detain us, however, because the number of people who subjectively go out of their way to injure themselves is very small. Note, though, that under no-fault we protect the drinking driver just as workers' compensation usually protects the drinking worker. We also protect the speeding driver; we protect the hot-rodder; we protect all of those crazy kids (young, or old) who use those crazy machines in crazy ways, just as the epidemiological approach would try to prevent injury to them regardless of their indiscreet behavior.

This is a moral question worthy of discussion; one cannot dismiss it. The question I am constantly asked when I testify before state legislatures is, “Professor, [with a marvelous whining accusation accompanying the word] Professor, you gonna pay the drunk driver?” Yes, I reply, I am going to pay the drunk. I am going to pay him because he is at risk. I also am going to pay him because trying to distinguish between the drunk and the non-drunk is very difficult. The more that is at stake, the more evidence can be produced that he was not drunk; the more likely that he will claim that he just had the proverbial two beers; that the reason his eyes were bloodshot and glazed was that he had just been in a collision, not an implausible claim; that the liquor on his breath is explained by the fact that he had those two beers. (It is surprising that the brewery business in the United States survives in light of the fact that no one ever has more than two beers.) Then, of course, the breathalyzer results will be attacked very skillfully by a lawyer who will show that the policeman who administered the test does not have a degree from MIT, tending to disqualify automatically anybody from testifying on any scientific matter in any court in the United States.

17. Could any insurance mechanism afford to compensate intentional injuries? Possibly, but it is hard ethically and it does create actuarial problems to pay people who by design provoke the insured event.


19. For a description of the fortuities involved in proving drunken driving, see J. O'CONNELL, supra note 4, at 77-82.
An issue is whether we will spend our resources litigating whether people were drunk instead of paying people for injuries. Litigating does not strike me as a terribly profitable way to use the resources of society. One can argue that it is, and I do not dismiss that argument as irrelevant. We can carve out exceptions, for example, that we will not compensate drunk drivers. Once we have done that, however, why exclude the speeding hot-rodder? Why pay anybody who has behaved in a suboptimal way? Evidently, making exceptions is hard. We can carve out the person who intentionally injures himself. Most of us would view that exception as a stark bright-line test that makes sense. Yet once we start decreeing, “let us not pay people who are very, very careless but do pay people who are very careless,” lawyers will have a rich time—and stay prosperous as hell—litigating the difference between “very, very” and “very.”

I have spent the last seventeen years of my life trying to extend this idea of no-fault insurance to all kinds of accidents. I have been trying to extend this idea to products liability and medical malpractice where the problems exceed those of auto accidents. Because the insured event is much more complicated it takes longer to prepare and to try these cases. Justice Jim Dooley of the Illinois Supreme Court used to say that he could take a reasonably articulate Irish bartender and teach him to try an intersection auto accident case in about a day and a half. That statement is probably correct. The brightest lawyer in the world, however, cannot be taught quickly how to try a medical malpractice case. It is going to be a long, bruising process; he will have to know enough medicine to cross-examine a doctor and make him look wrong. It takes a lot of time, effort, and

20. Such a provision could be drafted as follows:
[Benefits are not payable for injury to any person] intentionally causing or attempting to cause injury to himself or to another person for injury arising from his acts. A person intentionally causes or attempts to cause injury if he acts or fails to act for the purpose of causing injury or with knowledge that injury is substantially likely to follow. A person does not intentionally cause or attempt to cause injury (1) merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of causing injury, or (2) if the act or admission causing the injury is for the purpose of averting bodily harm to himself or to another person.

O'Connell, A Proposal to Abolish Contributory and Comparative Fault with Compensatory Savings by Also Abolishing the Collateral Source Rule, 1979 U. ILL. L.F. 591, 598.

For the necessity of a rigid definition of intentional conduct as opposed to including conduct such as gross negligence, see J. O'Connell, supra note 1, at 154-55.

skill. Thus medical malpractice cases, like products cases, are extremely nasty in terms of the time and effort that goes into them. It is also much harder to apply the no-fault solution to these cases.

Obviously, if $A$ suffers an auto accident, previous to which he was in reasonably good shape, and comes out with a terrible gash on his forehead, or even a leg that has been severed, it is not very hard to determine that the automobile accident caused his injuries. Now, however, consider the health care scenario. Assume $A$ goes to a health care provider and asks the health care provider to treat him. We cannot decree that the health care provider must automatically pay for any adverse condition which results after the treatment. Obviously, adverse conditions may be due to the presenting complaint of $A$. It may be that no matter what the health care provider did, $A$ was going to get worse. After all, $A$ was sick when he went to the health care provider, wasn't he? The result is that distinguishing the adverse conditions due to the treatment of the health care provider and/or to the presenting complaint of $A$, is a most vexing question, even on a no-fault basis.22

Merely providing, therefore, that every health care provider will be liable for all adverse results occurring from medical service is an unmanageable no-fault criterion. The same is true with product injuries. Should we decree that anybody who produced or sold or possessed a product will pay for any injuries resulting from that product? I go to your house; I slip and fall and I smash my head on your marble table. Who pays on a no-fault basis for my brain damage, for my paralyzed condition? Do you pay as a homeowner? Does the quarry pay for it? Does the person who designed the table pay for it? Does the retailer pay for it? If so, in what proportions do each of these pay once you have moved away from a fault criteria? It is hard enough to identify the person who was at fault and make him pay. If there was a design defect in the table, then the person who designed it can be asked to pay. That is relatively easy. But who is going to pay now under no-fault? Assume I trip over a book and I break my leg. Does the publisher pay me? He was involved; he was a causal factor wasn't he? Once fault is not a factor, then why not? Thus, the whole problem of moving away from the moorings of fault and deciding who pays gets very difficult.23

H.R. 3084

There are ways to skirt these problems. I have drafted a statute which is now before Congress, entitled H.R. 3084,24 which attempts

22. Id. at 596-97.
23. Id.
to address these problems in an uncomplicated way. This proposition is debatable, as I will be the first to concede; it is being debated rather ferociously. H.R. 3084 applies only to health care providers, but it could apply across the board to any tort claim for personal injury. The bill attempts to avoid the problems of: (1) litigating over fault, (2) litigating and paying for the value of pain and suffering, (3) paying even though losses have already been covered, and (4) being uneasy about who ought to pay on a no-fault basis once you move beyond workplace accidents or simple automobile accidents.

The bill provides that any defendant of a personal injury claim is given the option of tendering to a claimant, within approximately 180 days (relatively prompt compared to the tort system), an offer to pay periodically the net economic loss\(^2\) of the claimant beyond any health or disability insurance already applicable to the injured. Note that these benefits are lavish compared to most health insurance policies in effect in this country.\(^2\) If a defendant in a tort suit will promptly tender those amounts to the claimant, that tender forecloses the tort claim. The claimant is forced to accept that amount, and the "negotiation" is over.\(^2\)

Could I have done better than that? After all, today either party can settle—or offer to settle—for net economic loss, with no payment for pain and suffering and no duplication of collateral sources and no further argument over fault. If parties can agree today to do that, why does the bill force the plaintiff to accept the same offer by the defendant?

Note that the device cannot be reversed. The problem today is that each side in a personal injury action is often adamant against such a settlement. Each side has so many variables in its favor that each believes it can afford to be adamant. The claimant thinks that he may get much more than his net economic loss—or his lawyer does. The defendant, on the other hand, thinks that if it can wait long enough and beat the claimant down it may pay much less than net economic loss. Perhaps, indeed, it will not have to pay anything. How can we get around this intransigence on both sides, encouraged by the very vague and amorphous criteria of liability of which I have spoken? One cannot eliminate the intransigence on both sides by

\(^2\) Net economic loss means any medical expense, including rehabilitation, or wage loss.
\(^2\) As stated earlier, very few health insurance policies cover rehabilitation.
passing a no-fault statute requiring both sides to accept disposal of the cases by the payment of economic loss, for the reason I have indicated. Nor can one define the insured event very well in advance for many medical or product injuries. On the other hand, one also cannot force a defendant to pay any claim made to him by claimant because if that were the case, any claimant could make a claim against almost anyone and exact payment. If I were to get hit by a hit and run driver I could just call up the Registry of Motor Vehicles, get some license plate numbers, and make a claim against the owners of those numbers, requiring them to pay my economic loss. Obviously an unworkable scheme would ensue. It is not as problematic, however, to provide that once a defendant has examined a claim, he will be allowed to force the claimant to accept payment of net economic losses in total satisfaction of the claim.

A defendant will be inclined to make such payment under certain circumstances. If, for example, the defendant, after examining the claim, decides that the claimant never was in the hospital nor was given the treatment he alleges, then the defendant will not tender net economic loss because defending and defeating the claim will be easy. The defendant will defend the claim for moral reasons in an attempt to evade a reputation of being an easy target for spurious or marginal claims. On the other hand, assume a claim which, although the defendant's hospital thinks it might be able to defeat it, is made by a patient and the adverse result was clearly due to services rendered during his stay. Although the hospital does not believe it was at fault, since it believes the staff performed impeccably, what will it cost to pay periodical medical expense and wage loss to this patient from a corpus that is set aside? Let us assume it turns out to be $150,000. Now ask what is it going to cost to defend the case? That may very well turn out to be in the vicinity of $40,000. Next, ask what will it cost to duplicate the collateral sources of the patient, if the hospital loses? Assume, as a seriously injured person, he or she has already received $30,000 from Blue Cross, which in a tort case the hospital would have to pay all over again either by subrogation or in duplication of the payment to the patient. Thirdly, what will it cost the hospital to pay for pain and suffering, if the hospital loses? Assume that loss would amount to $250,000. Further assume that the hospital has a fifty percent chance of winning. An exposure of $140,000 results. Now add to the second two items the defense costs (which one must pay, win or lose). It is apparent one has achieved a good trade—$180,000 versus $150,000. Indeed, in some cases what is spent litigating is more than the plaintiff's net eco-

28. See O'Connell, supra note 21, at 604-06.
29. Thirty thousand dollars plus $250,000 divided by two yields $140,000.
economic loss.

A virtue of this plan is that it allows the health care provider to take care of the real needs of the patient without sending a signal to the other side that its case is weak. Under modern tort law, if a defendant promptly offers to pay all the net economic loss of a patient within 180 days, the plaintiff's lawyer will not be inclined to accept. Rather, he would assume that the defendant thinks that its case is very weak and that the plaintiff can get many times the initial offer. But under H.R. 3084, once a defendant comes forward with such an offer, it need not fear that it will be used as leverage to exact even more.

What about the claimant? He will be advantaged by this new law. Most claimants are not happy with the slug-fest lawyers have invented. Anybody who has been seriously injured has no taste for either a lottery to determine whether his medical expenses and wage loss will be paid, or for a bitter fight which serves as a constant reminder of the accident, and which may escalate to the point of the other side implying, rather snidely, that one should be viewed by a jury as a liar or a cheat. This amounts to a very unpleasant experience. It may be fun for lawyers, who engage in the practice frequently, but the people that the lawyers represent—on both sides—hate it. The seriously injured person is, above all, risk averse. Given the choice between prompt payment of real losses versus the gamble of long-delayed possible payment of more, the certainty of payment is most attractive. Under the premise of the bill, then, spending vast sums to guess at responsibility for the accident, and to reward some victims much more than their loss and many others much less, seems not nearly as wise as seeing to it that patients in general are promptly made whole. It is better to use dollars to pay for injury victims' losses than to pay lawyers to battle over whether to pay injury victims' losses. This seems a much better use of precious insurance funds than funding the litigators.

What are the prospects of the bill? Will it go anywhere? Obviously trial lawyers are very powerful lobbyists. The personal injury bar is the most lucrative in the United States. There are many lawyers making one million dollars a year and better out of personal injury litigation. Why? Because unlike most lawyers—who are ad-

mittedly well paid—personal injury lawyers are not tied to their time sheets. There is, after all, a limit to how much an attorney can charge anybody per hour. But if a lawyer gets one-third of a three million dollar claim, and has several substantial personal injury cases in his pipeline, he has “a piece of the action” in a way that other lawyers do not. This explains why the personal injury bar is so wealthy, and why it has so much invested in the present system, and why it fights so ferociously to retain the system. That in turn is why it is so difficult to pass a statute which will change that system. There has been no new no-fault law passed in the United States, except in the District of Columbia, since 1975. This is not because no-fault insurance does not work well; the Michigan figures speak for themselves. But the merits of any case are only part of the case made in a legislature. Trial lawyers are, almost by definition, political. They understand the political process. They make handsome contributions to legislators at both the state and federal level, and, the argument they make is not, on its face, nonsense. The way the tort system works, is in fact nonsense—but its underlying theory is not. Lawyers can argue, for example, that it is immoral to treat the drunk the same as the sober, or to treat the careful and the careless equally. (That all payments are made out of large and impersonal pools of insurance dollars, and that other forms of insurance—whether life, health, or accident—do treat the drunk, the sober, the careful, and the careless the same would seem to undercut this argument.) The political power of lawyers and the complexity of the arguments for reform, coupled with the difficulty of getting any statute passed in this country—especially a controversial one—makes legislative reform uncertain at best. Perhaps in time it will be achieved, but anyone undertaking the quest must be ready for frustration.

For example, any legislator who is interested in good causes can be assured that there will be 500 other similarly good causes after him to devote his time and energy to their particular issue—whether it is child abuse, or the impoverished state of the arts. Even if one can get the attention of an enlightened legislator, one cannot be at all sure that what the legislature will pass will make any sense. What may emerge, after all the pulling and hauling of various interests, may look like the proverbial camel designed by a committee with humps and dips one never predicted. If you want to have your heart in your mouth, go and watch a bill you are interested in being debated in legislature. Watch the horse-trading that goes on; a

clause—which is absolutely essential to the bill—may be cut, with
the bill then sailing through in a form that is inimical to the purpose
in trying to get it passed in the first place. And, once a bill has been
passed, getting it amended is all that much more difficult. You have
had your turn; now the legislature will turn to the cause of another.

Alternatives in Contract

All this has led me to resort to alternatives to legislation. Not that
legislation should not be pressed for—but one should have alternate
means of addressing the problem. As a result, I have drafted a con-
tract for the National Federation of State High School Associations.
The Federation came to me after a case in the state of Washington,
in early 1980, when a young student athlete won a $6.3 million ver-
dict against the Seattle School District. The student had been ren-
dered a quadraplegic in a 1975 football game. In 1982—some seven
years later (with the law working with its customary “all deliberate
lassitude”)—the student finally got in front of a jury and won that
massive verdict.\footnote{O'Connell, A “Neo No-Fault” Contract in Lieu of Tort: Preaccident Guar-
antees of Postaccident Settlement Offers, 73 CALIF. L. REV. 898 (1985); Seattle Times,
July 22, 1983, at D1, cols. 1-5.}
In the game, he had apparently used his helmet as
a spear and the resulting trauma had crippled him. His allegation
was that the coaches had not sufficiently instructed him to not lower
his head when he was about to make bodily contact. You can imag-
ine the quagmire of litigation, with the coaches trying to reconstruct
their 1975 training routine in 1982, and with endless dispute as to
what had happened years before.\footnote{For a graphic description of the frustrations of such litigation, see O'Connell,
\textit{supra} note 34, at 904, quoting from the Wash. Post, Apr. 23, 1983 at A1, col. 1, A8, col.
3.}
The student did seem to
win—although perhaps not. Seven years is not enough time for the
law. The case, of course, was appealed.\footnote{This raises a discussion of the function of a defense lawyer in such a case. He
has two jobs. The first is to win the case; the second is to make sure that even if he loses
the case, there is error in the record, so that the loss will be appealable.}
As a result, after another
year and a half the case was finally settled for some $3.7 million. All
the while, of course, a meter was ticking on both sides for lawyer
fees and other expenses. This youngster—a quadraplegic—waited
the better part of ten years for the glorious common law lottery to
come up with a prize.

At any rate, the case created a furor. Schools began to panic. How
could they insure against such fortuity? So desperate were they that
they even turned to me in light of the writing I have been doing through the years about changes in the tort system. As a result I drafted a contract\textsuperscript{37} with the following provisions: an insurer guarantees to a school district that when an athlete is catastrophically injured—defined as injury leading to more than $10,000 of loss—the insurer will tender within ninety days to the student and his family an offer to pay for all the net economic loss of the student, for medical expenses, rehabilitation, and even $300 a week for wage loss, paid periodically as loss accrues, without regard to whether tort liability existed on the part of the school in the accident. Nothing is payable for pain and suffering, nor does payment duplicate amounts already paid to the student from a collateral source such as health insurance. The student and his family are then given a further ninety days to accept these benefits and waive their right to sue in tort—or alternatively, to sue. As a result, the student has the alternative of prompt payment of real losses rather than years of uncertainty. Importantly, the rights of no one have been taken away. Nor has anybody been forced to sign away rights when registering to play athletics. The student is a third-party beneficiary to the insurance contract. In fact, he does not have to know anything about it, unless and until he gets hurt.

When insurers first looked at my contract, they were worried that athletes with good claims would proceed in tort and those with bad tort claims would accept the no-fault benefits, with the result being what insurers call adverse selection, and costs going through the ceiling. My premise, however, is that seriously injured people are risk averse\textsuperscript{38} such that if an insurer came to such victims promptly after the accident and made such an offer—in a manner which is not a signal of weakness as to its case—it would be accepted. This latter action is a very important point. Note that under this contract, plaintiffs and their lawyers cannot perceive the tender of net economic loss as a signal of weakness. The insurer makes the tender, not because the lawyer for plaintiff has such a great reputation and not because it fears liability. Rather, it makes the tender because it contracted to do so before it could know anything about the accident. Thus, no suggestion of liability exists from the offer itself and the threat to take the offer off the table in ninety days is a very critical one. Indeed, the lawyer who advises that the tender be rejected may be looking at a malpractice suit himself. At a minimum, he had better get “informed consent” from his client to reject the tender.

\textsuperscript{37} For further description of the contract, see O'Connell, supra note 34, at 906-15.

\textsuperscript{38} See supra text accompanying note 30.
So far, the plan is in effect in forty-eight states and in the twenty or so cases where it has been applied, all the accident victims have agreed to accept the tender of benefits and waive their rights to sue in tort.\(^9\)

Could this plan be adapted to fit medical malpractice? It would be more difficult in this area because, as we have seen, adverse results can stem from health care or from the complaint which sent the patient to a health care provider. The problem of distinguishing between the two is obviously difficult. This is not to say, however, that there are no adverse results from health care that cannot be identified and be incorporated into a similar contract.\(^0\)

I mention all of this because the tort system is such a nightmare for so many people, despite its logical and intuitively sensible premises, that we should find ways around it. I would like to do so by legislative rules. That would be simpler. This approach, however, is so uncertain that we must also proceed by contract. Paul Samuelson, the economist, once said that "some things society does so badly, everybody benefits by change." That sentiment is true of the tort system. Everybody will benefit by change—except the personal injury bar. As a matter of fact, we do not have to worry about the lawyers. They will continue to do very well in our society, no matter what type of tort system we have. In a highly contentious, sophisticated, arrogant society like ours, lawyers will be the last people on the breadlines. But they will be disadvantaged by the kinds of changes suggested and they will fight them. In this regard, however, the real beauty of the contract approach appears. One does not have to go to Richmond or Olympia or Sacramento to get legislative approval for contractual reform. Lawyers cannot block such change unless they claim the contract is illegal, and they cannot accomplish this because the contract has not removed anyone's rights; it has merely offered an alternative to the cumbersome procedure of the common law.

**DETERRENCE?**

Does no-fault deter accidents? It is very difficult to determine the degree to which it acts as a deterrent. Workers’ compensation did away with tort law. Nonetheless, it internalizes the costs of accidents by forcing the employer to automatically pay for medical expense
and some wage loss in every case. It internalizes about as much as the tort system did, albeit in different ways, with less transaction costs, less money for pain and suffering, but with more being paid for medical expense and wage loss.

A study done by economist Elisabeth Landes purports to prove that no-fault auto insurance causes an increase in the death rate. The study encounters a real problem, because no-fault in every instance preserves the tort action in death cases. The author maintains that motorists learn, or at least act as though they have learned, the difference between a threshold which allows you to sue in tort if more than $500 in medical expenses is incurred versus a threshold of more than $750, or one of more than $1000. She purports to find that the higher the threshold of the state law which immunizes the tortfeasor from suit in tort, the more death cases arise in that state. In other words, the more a state abolishes tort suits, the more accidents there are. The flaw in the study is that she assumes superrational people who understand the distinction between a threshold of $500 and a threshold of $750 or $1000, and then act on that knowledge. At the same time, these superrational people get fooled into causing deaths for which they are still liable. Now, she cannot have it both ways. She cannot assume superrational people who understand these fine shadings of distinction in liability and cause more accidents if you immunize them at $750 versus $500, and then assume that those same people somehow get confused about cases involving death and go out and cause deaths. If they are superrational, they are superrational. There has to be some other explanation than their understanding of the tort system that explains her figures. Indeed, another study challenges her finding that there are such variations in death rates.

Even so, the question of the deterrent effect of tort law is certainly worth asking. When you immunize people from tort liability, or when you pay them regardless of their fault, will you increase their proclivity to get into accidents? My instinct is that this question is not something we need worry about, especially if you still internalize accident costs significantly as the American law of workers' compen-

sation and no-fault auto insurance does. The presence of deterrence remains, and those who insist that deterrence will lessen without tort liability must be challenged to prove their case.

New Zealand has gone much further than anything just proposed, and New Zealand is, after all, a common law country. That country has abolished all tort law for personal injury; no one ever gets sued in New Zealand today for personal injury unless he or she intentionally injures someone. How is one paid? By being provided with workers' compensation-like benefits from a government insurance office, regardless of how the injury occurred. There is, thus, no internalization of costs in New Zealand against product manufacturers or medical health care providers and yet, New Zealanders do not seem to find any change in their accident rates. Admittedly, the issue has not been studied very extensively; they tend to dismiss all of this talk of economic internalization by tort litigation as a lot of American nonsense. The deterrence point, however, is worth thinking about.

The workers' compensation experience, the no-fault auto experience, and generally the availability of tort liability insurance has been such that it is hard to ascertain if paying insurance dollars for serious personal injury encourages an increase in the accident frequency. It is hard to prove that a no-fault proposal is not worth the advantages it achieves in lowering transaction costs, by not paying lawyers, and in redistributing income. This is my policy hunch. We do not really know, however, because the data is not available. It is worth discussing, but I would close the way I opened. Almost anything is likely to be better than the common-law tort system that lawyers have devised.
