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# Proposed Remedy for Mississippi's Medical Malpractice Miseries, A

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# A PROPOSED REMEDY FOR MISSISSIPPI'S MEDICAL MALPRACTICE MISERIES

*Jeffrey O'Connell**

## I. INTRODUCTION**

Analysts and reporters across the globe have deemed Mississippi a "legal hell-hole."[1] While plaintiffs' attorneys remain steadfast in their belief that tort reform is not the answer in Mississippi's medical malpractice misery,[2] doctors across the state claim that they have no choice but to leave the state because they can no longer afford malpractice insurance premiums.[3] The Mississippi Insurance Commissioner has stated that more than seventy insurance companies have stopped issuing policies in Mississippi.[4] Plaintiffs' attorneys assert that greed motivates the insurance companies and note that only two percent of all cases filed in Circuit Court last year were medical malpractice cases.[5]

Nonetheless the U.S. Chamber of Commerce launched a full-scale campaign for tort reform in Mississippi in May 2002.[6] The Chamber stated that they would "do everything they can to change the state's deeply flawed legal system."[7] The Chamber, the world's largest business federation,[8] relies on a Harris Interactive poll of more than 800 attorneys who rated Mississippi as the lowest ranking state in judicial fairness.[9] Whereas the Chamber views tort reform as the only solution to save Mississippi's "flawed legal system," data on median compensatory awards from across the nation purport to show that Mississippi is in fact below the national median and nineteen of the forty-four states that reported have a higher median.[10]

Mississippi's legislators entered a special session on September 5, 2002, to address the issue of high medical malpractice premiums and tort reform. Thirty-two days later, on October 7, 2002, the legislature finally agreed on House Bill 2, which was passed and signed by Governor Ronnie Musgrove. House Bill 2 among other things set forth the following "cures" for the crisis.[11]

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** This introduction was co-authored by Kassie Coleman, Mississippi College School of Law, Class of 2003.

1. Betty Liu, *The Poor Little County That's Big on Lawsuits,* FINANCIAL TIMES OF LONDON, August 20, 2001.

2. Jimmie E. Gates, *Lawyers Willing to Talk about Tort Compromise*, THE CLARION LEDGER, June 26, 2002, at A1.

3. Pamela Berry, *Doctors Turning to Last Resort*, THE CLARION LEDGER, July 21, 2002, at A1.

4. George F. Will, *Tort Reform Now*, THE WASHINGTON POST, September 29, 2002. *See also* Reed Branson, *Malpractice Suits on the Rise*, THE COMMERCIAL APPEAL, August 25, 2002 (An analysis by THE COMMERCIAL APPEAL of six years of data on all civil lawsuits filed in Mississippi found that medical malpractice makes up less that 8 percent of all personal injury cases filed and less than 2 percent of all lawsuits filed in circuit courts.).

5. Press Release, U.S. Chamber of Commerce, *Chamber Urges Mississippians To Reform Flawed Legal System,* (May 8, 2002).

6. *Id.*

7. *Id.*

8. *Id.*

9. Henry Taylor, *U.S. Chamber of Commerce State Liability Systems Ranking Study*, HARRIS INTERACTIVE, Final Report, Jan. 11, 2002 (empirical research conducted for United States Chamber of Commerce).

10. CATHERINE THOMAS & KATIE ANDREWS, CURRENT AWARD TRENDS IN PERSONAL INJURY 30-31 (LRP Publications 2002).

11. H.B. 2, 3d Ex. Sess. (Miss. 2002) (Partially amended as to venue by H.B. 19, 3d Ex. Sess. (Miss. 2002)).

- Non-economic damages in medical malpractice cases filed on or after January 1, 2003, will be capped at $500,000. This amount will increase to $750,000 in 2011 and to one million dollars in 2017. Punitive and actual damages were not capped.
- Venue for medical malpractice cases will be in the county where the alleged cause of action occurred.
- Statute of limitations for cases against nursing homes was decreased from three years to two years.
- Joint and several liability issues were tackled by holding defendants responsible for their percentage of fault in pain-and-suffering awards.
- In cases involving medication-related errors, doctors who prescribe and pharmacists who dispense U.S. Food and Drug Administration approved drugs will be immune from lawsuits filed against drug manufacturers.[12]

All of these provisions either make it harder for injured patients to be paid or pay them less when they are paid. This is hardly even-handed reform of a legal system. Rather, it is a system that is hard on both patients and health care providers. And ironies of ironies, according to Neil Vidmar's careful piece on this issue, such reforms will not accomplish much in the way of reduced costs.[13]

## II. THE PROBLEM[14]

The current medical malpractice tort regime not only fails in promoting the goal of safety, but also often fails to live up to the tort system's own prime goal -- justly compensating victims of medical error.[15] According to a Harvard study, only one in eight negligently injured plaintiffs files a tort claim, and only one in sixteen negligently injured plaintiffs is eventually compensated.[16] Even if a victim is successful in accessing the tort system, the average tort lawsuit reaches trial years after it is filed.[17] An injured plaintiff's financial needs are probably most dire during this delay, as lost wages, medical bills, and low morale begin to take their toll. Even if the case never reaches trial, studies show that delays are long and the system's transaction costs consume half or more of all the dollars that defendants pay in tort settlements and verdicts.[18] Indeed, up to forty percent of any award is immediately diverted to a plaintiff's own attorney fees.[19]

As Harvard Law School Professor Paul Weiler notes, when it comes to just compensation the current malpractice regime "has major flaws."[20] As tort benefits are "doled out in a rather arbitrary manner to some--but not most--deserving

12. *Id.*

13. Neil Vidmar, *Tort Reform and the Medical Liability Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. (forthcoming Fall 2002).

14. The remaining portions of this article are excerpted and adapted from Jeffrey O'Connell and Patrick J. Bryan, *More Hippocrates, Less Hypocrisy*, 15 CLEVE. J.L. & HEALTH 23 (2000-01).

15. *See* PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMNAS OF TORT LAW 51 (1997).

16. Jeffrey O'Connell & James F. Neale, *HMOs, Cost Containment, and Early Offers: New Malpractice Threats and a Proposed Reform*, 14 J. CONTEMP. HEALTH L. & POL'Y 287, 294 (1998).

17. BELL, *supra* note 15, at 59.

18. BELL, *supra* note 15, at 67.

19. O'Connell, *supra* note 16, at 295.

20. Paul C. Weiler, *The Case for No-Fault Medical Liability,* 52 MD. L. REV. 908, 915 (1993).

victims, and also to those who are not even 'deserving' within tort law's fault-based frame of reference."[21] According to one source, fifty percent of plaintiffs' attorneys see little or no evidence of malpractice in more than half of the cases they themselves file.[22] As a result, the current system often undercompensates deserving claimants (especially the more seriously injured), while it grossly over-compensates other claimants (often the less seriously injured).

Most serious disputes about damages in tort law focus not so much on payments for actual economic damages, such as lost wages and medical expenses, but on the validity of payments for non-economic or intangible harms.[23] Traditionally tort law purported to award plaintiffs money for the "pain and suffering" that accompanied their physical injuries. Today, damages for pain and suffering may also include compensation for the despair, humiliation, and "loss of life's pleasures" or so-called "hedonic damages" that result from a bodily injury.[24] Although the law recognizes that no precise dollar value can automatically be placed on physical and psychological hurt, non-economic damages generally rise with economic damages.[25] This potential for high awards can often result in needlessly or even fraudulently padded claims. To increase a jury's estimation of pain and suffering damages, claims may include unneeded medical expenses, and unnecessary wage losses. According to the Rand Institute for Civil Justice, pain and suffering awards based on the amount of economic loss incurred for health care, which is often covered by private or public insurance, result in huge and unnecessary health care expenditures.[26]

Granted, for those truly injured victims who are able to survive the lengthy process, a large monetary award, substantially enhanced with pain and suffering damages, may offer some relief. But in the end, even high awards will often not alleviate the emotional and economic hardship that plaintiffs may feel, not only during their long battle for compensation, but for the remainder of their lives. The data compiled by tort scholars and the stories of successful but disillusioned plaintiffs demonstrate that the current tort scheme does not adequately address malpractice claims.

## III. A CURE?

Among the possible alternatives to the current tort regime, two are often mentioned: enterprise liability and no-fault insurance.[27] However, there are flaws with both of these reforms that render them less effective than some would have it. A most serious objection to much tort reform, including enterprise liability, is that it is still based on fault and still allows for pain and suffering damages.

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21. Weiler, *supra* note 20, at 915.

22. Michael B. Van Scoy-Mosher, *An Rx for the Malpractice Explosion*, L.A. TIMES, June 28, 1983, at 4 (reviewing D. FLASTER, MALPRACTICE: A GUIDE TO THE LEGAL RIGHTS OF PATIENTS AND DOCTORS (1983)).

23. BELL, *supra* note 15, at 42.

24. BELL, *supra* note 15, at 43.

25. BELL, *supra* note 15, at 64.

26. BELL, *supra* note 15, at 163.

27. COMMITTEE ON QUALITY OF HEALTH CARE IN AMERICA, INSTITUTE OF MEDICINE, TO ERR IS HUMAN 1 (Linda T. Kohn, Janet Corrigan et al. eds., 1999).

These two variables are the principal problems of the current system. As long as these variables are retained, reform efforts will remain unnecessarily futile.

As to a no-fault system, a neo-no-fault "Early Offers" plan, first proposed by the author of this article, is similar to a no-fault scheme in that compensation is paid periodically as economic losses accrue, and non-economic losses such as pain and suffering are excluded. Compensation is also delivered more swiftly with less hassle than under the current tort system. This Early Offer plan differs considerably from traditional no-fault regimes such as workers' compensation and no-fault auto insurance statutes. Early Offers avoids the impractical task of pre-accident definitions of when no-fault payments kick in for adverse results from medical care.[28] It does this by simply creating a device whereby any defendant of a medical malpractice claim is given the option within 120 days after the adverse result or after a claim is filed to make no-fault-like periodic payments of a claimant's net economic loss. One hundred twenty days is a relatively prompt time frame compared with the current tort system.[29]

The early payment offer must cover such costs as medical and rehabilitation expenses as well as wage losses (beyond any collateral sources such as health or disability insurance already payable to the claimant), and reasonable hourly fees for the claimant's lawyer. Given the quick resolution of cases disposed of by Early Offers, the attorney's fees would be much less than the normal thirty to forty percent. However, no compensation would be paid for non-economic losses such as pain and suffering. A crucial feature of the plan is that a defendant who promptly offers to pay a claimant's net economic losses forecloses further pursuit of a normal tort claim for non-economic losses. In this way, the parties forgo the insurmountable problems mentioned above of separating ex ante the adverse effects caused by health care from the patient's presenting complaint. On the other side of the coin, victims can turn down offers, but only if the defendant's injurious acts are proven beyond a reasonable doubt, or at least by clear and convincing evidence, to have been intentional or wanton. Thus, a crucial element of the tort system's deterrence mechanism is retained. That is, needy plaintiffs can still win suitably large monetary awards under the Early Offers model through the recovery of both economic and non-economic damages in egregious cases of medical misconduct.

To qualify as an "early offer" under the plan, the offer must be made in accordance with a formula for calculating damages for economic losses similar to those paid under no-fault schemes that would be set forth in an Early Offers statute passed either at the state or federal level. In fact, the Early Offers plan has already been incorporated in a piece of federal legislation proposed by Republican Senator Mitch McConnell of Kentucky.[30] Because the early offer compensates only for actual economic damages, some injured claimants such as

28. *See* O'Connell *supra* note 16, at 307-18 (describing the impractical task of pre-accident definitions).

29. BELL, *supra* note 15, at 213 (The plan can be drafted to apply to other claims than medical malpractice as well, such as product liability.).

30. *See* S. 1861, 104th Cong. (1996); COMMITTEE FOR ECONOMIC DEV., BREAKING THE LITIGATION HABIT: ECONOMIC INCENTIVES FOR LEGAL REFORM (2000), *available at* http:// www.ced.org/projects/legal.htm, at 18 (hereinafter CED).

the elderly, homemakers, or the unemployed, might not stand to receive substantial payment under the system. Hence, compensation for economic damages alone could not sufficiently deter defendants in the event one of these individuals were injured. However, a simple solution to this problem would be to stipulate an alternative of a substantial minimum amount for all early offers covering serious injuries of these individuals, which should be rigorously defined in the statute.[31]

Because health care providers would not be required to define the conditions under which they would make an early offer before the adverse event occurred, the question arises: When would a defendant be inclined to make such an offer? One obvious example of when *not* to make an offer would be when a defendant determines that the claimant was never even treated by the practitioner or medical center in question. Apart from such stark cases, the health care provider might not believe the accident was its fault, and thus would be prompted to calculate what it would likely cost to pay the claimant periodically for the net medical expenses and lost wages brought about by the injury. If that sum turns out to be less than what the defendant would pay to defense lawyers, plus its likely tort exposure--with the whole panoply of possible repayment of collateral sources and non-economic damages figuring into the equation--the defendant might well decide that it is worthwhile to make the early offer. Given the huge costs of defending tort cases and the gamble of having to pay large sums already paid by collateral sources, as well as for intangible losses, many defendants would be prompted to pay for net economic losses, not just in cases they are sure to lose, but even in many cases in which the issue is legitimately in doubt. One leading defense lawyer has hypothesized that of the 250 medical malpractice cases his large office was then defending, all in various stages of litigation, he would advise making an early offer in 200 (or eighty percent) of those cases if such a law were in effect.[32]

Indeed, implementation of the Early Offers system would bring with it many benefits. Perhaps most importantly, it ensures that victims can receive rapid and essential compensation when they need it most, since the plan requires defendants to make any offer early in the dispute process. Thereby, both parties avoid protracted litigation. In addition, the Early Offers plan crucially reduces the possibility that injured parties and their counsel will interpret a settlement offer as merely an opening bid in negotiations and as a signal that they could eventually recover much more. Such a possibility would simply spur further litigation, with all its attendant waste and frustrations.

A prompt offer under the plan can also reduce the transaction costs for defendants (and their insurers) by paying their own lawyers for far fewer hours of work. Indeed, early offers could be expected to be generated in-house by insurers. The Insurance Services Office has estimated that insurers' legal defense costs account for fourteen percent of total operating costs of malpractice litigation.[33] However, it is not so much the insurance companies that feel the sting of

31. O'Connell, *supra* note 16, at 312.
32. BELL, *supra* note 15, at 214.
33. BELL, *supra* note 15, at 218.

these high costs for legal defense in tort suits--it is the American public that must absorb the resultant high liability premiums. Thus, the Early Offers program should actually work to lower the cost of insurance that health care providers need to purchase since the legal exposure of health care providers under Early Offers would be dramatically reduced by the reductions in (1) attorneys' fees on both sides, (2) payment for amounts already paid by collateral sources, and (3) pain and suffering awards.

Furthermore, it can be argued that Early Offers will enhance public safety. The need to make quick offers under the plan will encourage rapid reporting of adverse events within an organization, since the opportunity to make a qualifying offer can be lost if not made promptly after the adverse result or claim.[34] In today's medical malpractice lawsuits, the vast majority of medical injuries are neither the result of "wanton," nor "intentional," acts but are only some variant of "negligence." The Early Offers system provides incentives for both the claimant and defendant to agree to a binding early settlement. In turn, the system also provides a key incentive for the health care provider to reveal and report any medical mistakes that might have occurred in the course of a claimant's treatment. Indeed, an Early Offers statute could require that, after an early offer is accepted, a health care provider offer to meet with patients and/or their families to explain as fully as feasible, the circumstances surrounding the adverse result. Moreover, to the extent that health care providers might fear that making an early offer under the plan would be included in the National Practitioner Data Bank, which lists medical malpractice payments and settlements by individual practitioners,[35] the Early Offers statute could specify that payments made through the Early Offers system be noted in the Practitioner Data Bank as subject to special exonerating consideration.

Thus, implementation of the Early Offers system would help to lessen the often myopic and counterproductive blame culture that permeates current tort law. Early Offers would work to calm the animosities of the parties in an accident claim rather than inflaming them, as the current litigation culture now does. It accomplishes this by giving defendants a healthy incentive to promptly acknowledge any problems and even to discuss what happened. Under the current adversarial tort regime, claimants rarely receive an apology, admission of fault, or even an explanation of the adverse event.[36] Many times a simple apology or explanation by the defendant can assuage the emotions of an injured party more effectively than a mammoth, long-delayed monetary award for pain and suffering damages. Such open and candid discussions could provide the accident victim with another form of valuable compensation often overlooked by the judicial system--peace of mind. In fact, researchers report that feelings of forgiveness and compassion have been proclaimed as therapeutic for accident victims because they reduce the anxiety and stress associated with continuing anger and

34. CED, *supra* note 31, at 18.

35. *See* O'Connell, *supra* note 14, at 2.

36. CED, *supra* note 31, at 19; *see also* BARRY WERTH, DAMAGES: OWE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE (1999).

resentment.[37] The Early Offers plan induces the parties to discuss what happened rather than forcing them to engage in the combat of the current "blame game" of tort litigation. In so doing, Early Offers thus promotes understanding, cooperation and swift compensation rather than contentious, hostile, and dilatory legal proceedings.

In summary, Early Offers seems to be a well-suited reform in the context of medical malpractice law. The Early Offers plan helps to create a different legal culture in which the reporting of errors is fostered while promoting prompt and fair compensation for injured patients. Reviewing again the mechanics of the system, claimants have the right to deny an early offer if they think it can be proved that the health care provider engaged in wanton or intentional misconduct. Although the burden of proof is higher in such cases, if a health care provider's level of care is so bad as to legitimately raise the question of whether maltreatment was egregious, there would presumably exist a case where simply paying for economic loss is not enough. Similarly, prolonged and extensive litigation in such cases would seem to be worth it. Furthermore, just as health care providers have the option to refuse to make an early offer if they do not believe a claim is justified, patients have the option to pursue a tort claim under normal standards of proof, care, and damages when no early offer is tendered. Finally, if so many cases result in claims being pursued for wanton misconduct that the Early Offers plan seems counterproductive, early offers will simply cease to be tendered, and the system will die a natural death. However, this scenario seems unlikely given the experience under workers' compensation laws, where few employees are successful in suing employers for gross negligence.[38]

If an Early Offers system is enacted, it might be argued that insurance rates will rise for health care providers because many more injured patients will seek quick settlements. Any added cost of medical malpractice insurance would then be passed to patients. Thus, the Early Offers system, so the objection goes, would end up costing the average American citizen more than the current tort system.

In reply, highly questionable or smaller claims are unlikely to receive an early offer in the first place. Remember, the offer decision rests with defendants.[39] Medical providers (and their insurers) will not make an offer unless they believe doing so is more advantageous than paying for defense costs under the tort system, thereby taking the risk of losing the case and ultimately repaying for damages covered by collateral sources and for large non-economic damages.[40] Even in the unlikely event of higher premiums as injured patients file more claims and more settlements are provided under the Early Offers system, this arguably

37. Neal R. Feigenson, *Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law*, 27 FORDHAM URB. L.J. 1633, 1647 (2000).

38. *See* Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1411-12 (1987); Jeffrey O'Connell, *Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability*, 27 WAKE FOREST L. REV. 871, 880 (1992).

39. *See* Jeffrey O'Connell, *Offers That Can't Be Refused*, 77 NW. U. L. REV. 589, 604-06 (1982) (No money would be saved by encouraging claims by those not bringing them previously because the plan confines initiating early offers to defendants.).

40. CED, *supra* note 31, at 20.

would still be a vast improvement over the current legal system. Under the current system, patients are often wrongly compensated (if at all) either too much or too little, and always too late. Given the high rate of iatrogenic injuries,[41] if injured people who are clearly wronged are compensated expeditiously for their genuine economic losses, and much less money is expended for transaction costs of litigation and payment of less essential non-economic damages, the result can be viewed as a real gain for society.[42]

41. O'Connell, *supra* note 16, at 23-24.

42. *Id; see also generally* O'Connell, *supra* note 14. (The Early Offers solution would arguably apply much better to HMOs than either the status quo of trying to insulate them from medical malpractice claims or, on the other hand, expanding the presently unworkable malpractice regime to apply to HMOs.).