

## THE SYNERGY OF EARLY OFFERS AND MEDICAL EXPLANATIONS/APOLOGIES

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### INTRODUCTION

Medical malpractice law has been subjected to strong criticism by both medical and legal commentators.<sup>1</sup> It has been challenged as inefficient,<sup>2</sup> inaccurate,<sup>3</sup> and even counterproductive.<sup>4</sup> Although many reforms have been proposed, most tend to benefit one group—either physicians or patients—to the exclusion of the other. Professor Jeffrey O’Connell’s “early offers” proposal provides a reform of the system that is beneficial to plaintiffs, defendants, and society as a whole.<sup>5</sup> Although some attention has been paid to

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<sup>1</sup> See, e.g., COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 5 (Linda T. Kohn et al. eds., 2000) (advocating a shift in emphasis away from blaming individual actors to improving the overall health care system); Paul C. Weiler, J.P. Newhouse & H.H. Hiatt, *Proposal for Medical Liability Reform*, 267 JAMA 2355 (1992) (advocating a no-fault approach to medical liability).

<sup>2</sup> See, e.g., David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2031 (2006) (observing that plaintiffs recovered only 46 cents of each dollar spent on their cases) (link).

<sup>3</sup> See, e.g., Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1464 (2007) (noting that a review of all seven studies that have compared verdicts rendered in individual malpractice cases with independent evaluations of each claim by medical or legal experts determined that plaintiffs win between 10% and 20% of cases they should likely lose, but lose 50% of cases they should likely win) (link).

<sup>4</sup> See, e.g., COMM. ON QUALITY OF HEALTH CARE IN AM., *supra* note 1, at 43 (asserting that the blame culture deters physicians from disclosing errors).

<sup>5</sup> O’Connell and I published a book about early offers last year. JEFFREY O’CONNELL & CHRISTOPHER J. ROBINETTE, A RECIPE FOR *BALANCED* TORT REFORM: EARLY OFFERS WITH SWIFT SETTLEMENTS (2008). In the book’s *Foreword*, we acknowledged that early offers may be better suited to some areas of tort law than others. *Id.* at xi. I endorse the application of early offers to medical malpractice suits, and much of the associated apology research focuses thereon. See, e.g., Mark A. Hall, *Can You Trust a Doctor You Can’t Sue?*, 54 DEPAUL L. REV. 303, 309 n.33 (2005) (arguing that “scholarship on the need for law generally to facilitate apology often discusses medical malpractice cases as leading examples”). The integration of explanations and apologies into an early offers proposal is possible, however, in other contexts, such as products liability.

combining early offers with explanations of the incident<sup>6</sup> or with apologies,<sup>7</sup> the idea has never received a focused analysis. Recent scholarship on explanations and apologies allows greater insight into the role they play in conflict resolution, and their importance to an early offers proposal in the field of medical malpractice. This Essay considers such scholarship and explores the advantages of combining early offers with explanations of the incident and/or apologies.

### I. EARLY OFFERS

The early offers proposal functions quite simply. Under it, a medical malpractice defendant has the option to offer an injured claimant within a defined statutory period (for example, within 180 days of a claim) a settlement of periodic payments. In total, these payments would cover the claimant's net wage loss and medical expenses (including rehabilitation), plus a reasonable attorney's fee—presumptively 10% of the recovery, an amount that reflects the reduced legal load created by the shortened process.<sup>8</sup> Pain and suffering is not included.

The early offer option is totally voluntary—defendants are never forced to make an early offer, and, if no offer is made, traditional common-law principles apply to both liability and damages. If, however, the defendant does make an early offer, that offer triggers strong incentives for the claimant: a claimant who declines an early offer will be subject to a higher burden of proof (either “clear and convincing” or even “beyond a reasonable doubt”), and the defendant will be held to a higher standard of misconduct (“gross negligence”), at trial.

Despite its advantages, the early offers approach is not overly favorable to healthcare providers. First, only defendants willing to forgo obstructive defenses will be advantaged by the proposal. In that vein, a defendant cannot game the system by making a lesser offer and then gain the advantages of the early offer system. Furthermore, once an early offer is tendered, that can be seen as disciplining offerors by the transformation of the claim into a first-party one. Unlike adversarial, third-party claims, the offeror is subjected to more regulatory supervision by state insurance departments as well as claims based on bad faith for refusal to pay benefits. Second, defendants making early offers must still pay for victims' (often substantial) net economic losses, thereby internalizing the cost of such accidents. The proposal could also include a minimum offer of \$250,000 for serious injuries, a distinction carefully defined by statute, when actual net

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<sup>6</sup> O'CONNELL & ROBINETTE, *supra* note 5, at 133; Jeffrey O'Connell & Patrick B. Bryan, *More Hippocrates, Less Hypocrisy: "Early Offers" as a Means of Implementing the Institute of Medicine's Recommendations on Malpractice Law*, 15 J. L. & HEALTH 23, 47–48 (2001).

<sup>7</sup> Jeffrey O'Connell, Jeremy Kidd, & Evan Stephenson, *An Economic Model Costing "Early Offers" Medical Malpractice Reform: Trading Noneconomic Damages for Prompt Payment of Economic Damages*, 35 N.M. L. REV. 259, 269 n.24 (2005).

<sup>8</sup> For a more detailed description, see O'CONNELL & ROBINETTE, *supra* note 5, at 123–134.

economic losses suffered are relatively small (for example, those by children, homemakers, or retirees). Third, if no early offer is made, or if, despite receiving an offer, the claimant goes to trial and prevails, the claimant can recover for pain and suffering or even punitive damages. This means that awards for noneconomic damages would be reserved for cases where the malpractice is egregious or where a recalcitrant defendant unwisely declines to make an early offer.

Effectively, then, the early offer provides the claimant with the equivalent of a major medical/disability policy that covers the claimant's reasonable net economic losses. Injury victims tendered early offers would lose their recourse to full-scale, medical malpractice litigation, but they would also receive payment without the uncertainty, delay, and transaction costs they now face. Moreover, the recourse to full-scale litigation is lost *only* if the defendant guarantees prompt payment compensating the malpractice litigant for his economic losses plus attorney's fees. The defendant-physician, on the other hand, protects herself from the vicissitudes of noneconomic damages in return for promptly offering to pay the claimant's net economic damages.

O'Connell, along with Professors Kip Viscusi and Joni Hersch, performed a study of closed claim medical malpractice cases in Texas and Florida. The authors analyzed how the system would have performed if an early offers law had been in effect.<sup>9</sup> The savings, in both time and money, would be dramatic. On average, the length of medical malpractice suits would be reduced by over two years per claim,<sup>10</sup> and litigation costs alone reduced by between \$100,000 and \$200,000 per claim.<sup>11</sup>

Thus, under the early offer proposal, claimants are compensated for their economic losses, including rehabilitation, much more promptly, without the frustration of a long trial process and with considerably lower transaction costs. Moreover, physicians are able to avoid arbitrary noneconomic damages and to spend less time preparing for litigation and more on patient care. Finally, society benefits from the lower transaction costs. Medical care should become more affordable, and courts should have more time available to hear other cases.

## II. EXPLANATIONS AND APOLOGIES

Scholarship in the last decade has begun to focus on whether there are nonmonetary incentives that motivate claimants to file and settle cases. Claimants, particularly in medical malpractice cases, say they file suit for three reasons: (1) "to get information about and understand their injury and

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<sup>9</sup> Joni Hersch, Jeffrey O'Connell & W. Kip Viscusi, *An Empirical Assessment of Early Offer Reform for Medical Malpractice*, 36 J. LEGAL STUD. S231 (2007) (link).

<sup>10</sup> The average time between injury and resolution in medical malpractice cases is approximately five years. Studdert et al., *supra* note 2, at 2031.

<sup>11</sup> O'CONNELL & ROBINETTE, *supra* note 5, at 151 tbl. III.

the circumstances surrounding it,” (2) “to prevent future injuries,” and (3) “to determine accountability.”<sup>12</sup> Professor Jonathan Todres elaborates:

The cynical observer may think that an apology has limited value and that patients sue only for money. However, empirical research suggests otherwise. A study published in the *Lancet*, the leading British medical journal, found that as many as 37% of medical malpractice plaintiffs reported that they would not have filed their lawsuits if their doctors had sincerely apologized instead of stone-walling . . . . An apology facilitates patients’ emotional healing. Access to information helps patients regain a sense of control and empowerment, as well as a voice in the process.<sup>13</sup>

Thus, following an adverse medical event, patients want to communicate with their physician and other healthcare providers. Furthermore, physicians report a desire to interact with patients and even to apologize.<sup>14</sup> They are concerned, however, that such conduct will increase the possibility of legal liability<sup>15</sup>—generally, fault-admitting apologies are admissible to establish liability at trial.<sup>16</sup> As Professor Jonathan Cohen states, “Although a physician may wish to tell a patient when he has made a mistake, lawyers often order doctors to say nothing.”<sup>17</sup>

Both sides appear to desire the same thing, but the incentives provided by litigation tear them in opposite directions. In his co-authored book, *Sorry Works!*, Doug Wojcieszak writes a powerful, first-person account of the ordeal his family faced after his brother died:

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<sup>12</sup> Jennifer K. Robbennolt, *What We Know and Don’t Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1016 (2005). Cf. Hall, *supra* note 5, at 309 (“Research reveals that, often, what injured patients most desire are candid acknowledgements of medical errors, a sincere apology that conveys genuine remorse, and constructive steps toward corrective actions.”); Michael B. Rainey, Kit Chan & Judith Begin, *Characterized by Conciliation: Here’s How Business Can Use Apology to Diffuse Litigation*, 26 ALTERNATIVES TO HIGH COST LITIG. 131, 132 (2008) (“Literature suggests the top three reasons for patients or their family members filing suit are (1) a lack of explanation of what happened, (2) the perception that no one takes responsibility for their actions, and (3) the demand that someone take measures to mitigate the offensive situation.”) (link).

<sup>13</sup> Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 686 (2006).

<sup>14</sup> Robbennolt, *supra* note 12, at 1018 (citing Thomas H. Gallagher et al., *Patients’ and Physicians’ Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1003, 1004 & tbl. 2).

<sup>15</sup> *Id.* See also Todres, *supra* note 13, at 686 (“The litigation-based system . . . discourages apologies, thus hindering patients’ (and physicians’) healing.”).

<sup>16</sup> See, e.g., FED. R. EVID. 801(d)(2) (defining admissions by a party opponent as outside the hearsay exclusion) (link).

<sup>17</sup> Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1011 (1999).

After the funeral and all the relatives and friends went home, my parents went back to the hospital seeking answers, especially my father, the Ph.D. engineer. “*What happened? Why did it happen? Can the process be improved so it never happens again?*” These were all questions my parents—especially my dad—had. But the door was unceremoniously slammed in their face. Meetings were promised, but did not transpire. Even the surgeon who was so honest the night Jim died told my parents: “*Look, our legal counsel has instructed me not to speak with you any further. You will have to leave.*”<sup>18</sup>

Given the tension between the parties’ “true” desires and the burdens and incentives associated with litigation, it is perhaps unsurprising that much of the relevant literature attempts to address this problem. Professors Jonathan Cohen and Aviva Orenstein, independently and simultaneously, proposed one solution that has had significant impact: that apologies be excepted from the admissions doctrine.<sup>19</sup> They both hypothesize that physicians will be more willing to provide apologies if they are deemed inadmissible as evidence of liability, and that the free flow of communication between physicians and patients will thereby be encouraged. For years, Massachusetts was the only state that provided immunity to certain types of apologies in this manner.<sup>20</sup> Almost immediately after the articles by Cohen and Orenstein were published, however, apologies became a public policy issue in many jurisdictions. In the decade following the work of Cohen and Orenstein, thirty-four additional states passed some form of apology immunity.<sup>21</sup>

The academic proposals and state laws created in their wake have launched several contentious debates.<sup>22</sup> First, there is the debate over

<sup>18</sup> DOUG WOJCIESZAK, JAMES W. SAXTON & MAGGIE M. FINKELSTEIN, *SORRY WORKS!: DISCLOSURE, APOLOGY, AND RELATIONSHIPS PREVENT MEDICAL MALPRACTICE CLAIMS* 5 (2007).

<sup>19</sup> See Cohen, *supra* note 17, at 1061–64; Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 223–24 (1999).

<sup>20</sup> MASS. ANN. LAWS ch. 233, § 23D (LexisNexis 2000) (“Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.”) (link). This statute, passed in 1986, has a touching history. See Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1151 (2000) (explaining that the nation’s first apology-immunity law arose out of the death of a legislator’s daughter).

<sup>21</sup> See Sorry Works! Coalition Website, <http://www.sorryworks.net/lawdoc.phtml> (last visited Apr. 22, 2009) (link); see also WOJCIESZAK ET AL., *supra* note 18, app. A, at 111–12 (listing state apology immunity statutes).

<sup>22</sup> One response to these and related debates is the search for empirical data, primarily by Professor Jennifer Robbennolt. See, e.g., Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical*

whether to protect “full” apologies or merely “expressions of sympathy and benevolence.”<sup>23</sup> Full apologies acknowledge responsibility, whereas expressions of benevolence merely express sympathy. The vast majority of apology-immunity statutes only protect expressions of benevolence, allowing admission of fault-acknowledging apologies to prove liability. Limiting immunity to expressions of benevolence creates a line-drawing problem: At what point has the speaker crossed the line from expressing sympathy to admitting fault?<sup>24</sup>

Second, scholars have debated the consequences of apology immunity. An apology may dissuade claimants from suing in the first place, and academics question whether that end is a good thing.<sup>25</sup> On the one hand, a claimant voluntarily forbearing a suit prevents inefficient, time-consuming, and often painful litigation. On the other hand, if someone has been injured as a result of negligence, an apology may be inadequate consideration—in other words, they think that if someone is truly sorry, she should pay for the harm she has caused.

And third, there exists a related debate over whether immunizing apologies creates incentives for purely strategic behavior and deprives apologies of their moral significance.<sup>26</sup> Arguably, immunized apologies will entice defendants to apologize, regardless of their sincerity, because there is no cost to doing so. If, as often occurs, the claimant feels more favorably toward the defendant, the claimant may forgo litigation. If, on the other hand, the apology does not change the claimant’s attitude, it is inadmissible. Furthermore, an apology, absent the willingness to make further reparations, can be seen as hollow.<sup>27</sup>

Fortunately, the context of early offers provides a way to sidestep these debates, and to take full advantage of the benefits of explanations and apologies.

### III. SYNERGY

The apology research demonstrates the wisdom of requiring malpractice defendants to include an offer to meet with the claimant as part of the early offer. The offer to meet would be included with the compensatory

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*Examination*, 102 MICH. L. REV. 460, 492–99 (2003) (distinguishing effects of apologies based on factors such as severity of injury, strength of liability evidence, and thoroughness of apology); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349 (2008) (distinguishing effect of apologies on attorneys and clients) (link); Robbennolt, *supra* note 12.

<sup>23</sup> Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 871 (2002). See, e.g., *id.* at 847 (“If the injurer is truly sorry, shouldn’t he pay for what he has done? . . . . What these laws do is promote insincere apologies between people. They cheapen the meaning of an apology.”). For a thorough summary of the pros and cons of both approaches, see *id.* at 871–72.

<sup>24</sup> See *id.* at 837–38.

<sup>25</sup> *Id.* at 845–47.

<sup>26</sup> See Taft, *supra* note 20, at 1138.

<sup>27</sup> *Id.*; Lee Taft, *On Bended Knee (With Fingers Crossed)*, 55 DEPAUL L. REV. 601 (2006).

part of the comprehensive settlement proposal. Accordingly, the physician would not be required to attend such a meeting unless the claimant has decided to accept the compensatory offer. At the meeting, the physician would be required to explain why (in his or her opinion) the claimant's injury occurred. The physician would also have to explain what additional steps, if any, are necessary to prevent similar injuries from occurring in the future. Finally, the physician should have the opportunity to apologize. Because of free-speech protections, court-ordered apologies are not legal in the United States.<sup>28</sup> Furthermore, a coerced apology would carry very little weight with the claimant. Because evidence suggests that in many cases physicians would *like* to apologize to claimants,<sup>29</sup> however, it is reasonable to assume that many of them would take this opportunity to do so.

As far as it can be mandated, therefore, the meeting offer will provide claimants with the three things that apology research has determined they desire.<sup>30</sup> First, the required explanation will help claimants understand their injury and the circumstances surrounding it. Physicians are already required to provide this information during the adjudication process, but the atmosphere in litigation is rarely one of candor. Attorneys frequently advise their clients that while they should answer deposition and trial questions, they should never volunteer information. Under the proposal, more information is likely to be provided sooner and in a less hostile manner. Second, physicians will have to inform the claimant what steps are being taken to prevent future injuries. The process of explaining the injury and describing whatever preventive steps are being taken are beneficial to the claimant. Moreover, these steps should, in themselves, assist in deterring medical errors. Litigation has a chilling effect on the access to information about medical errors.<sup>31</sup> Yet experts in patient safety identify disclosure of such information as crucial to improving the quality of health care.<sup>32</sup> When physicians focus on explaining what happened, as opposed to defending their conduct from liability, they are likely to provide the information needed to correct and prevent errors. Thus the explicit requirement to discuss corrective steps, as opposed to deny and defend, reinforces the preventive effort. Finally, the information provided will help the claimant determine accountability—particularly if the physician is given the opportunity to apologize. Given the general desire among physicians to apologize for any medical errors, many of those physicians believing themselves

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<sup>28</sup> Cohen, *supra* note 17, at 1018 (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (holding that the freedom of speech protects against compulsory speech) (link).

<sup>29</sup> See *supra* text accompanying note 14.

<sup>30</sup> See *supra* text accompanying note 12.

<sup>31</sup> See COMM. ON QUALITY HEALTH CARE IN AM., INST. OF MED., *CROSSING THE QUALITY CHASM: A NEW HEALTH SYSTEM FOR THE 21ST CENTURY* 218–19 (2001) (link).

<sup>32</sup> *Id.* at 122.

to be responsible for a claimant's injuries should take this opportunity to do so. These apologies will assist in claimants' "emotional healing."<sup>33</sup>

The early offers meeting requirement also bypasses the three contentious issues in the apology literature. First, there is no need to determine whether it is preferable to immunize statements of benevolence or full apologies, or how to draw the line between the two. Because the opportunity to apologize is part of a comprehensive settlement, there is no need to offer immunity. The claim is being resolved, and there will be no litigation. Second, there is no concern that an apology will influence a claimant to relinquish a claim for compensation. If a physician makes an apology, it will be after compensation for the claimant's economic losses has been offered and accepted. For the same reason, there is no concern that physicians will apologize strategically. Although the explanation portion of my meeting proposal is mandatory, it can be seen as part of the consideration for settlement. The apology, which is left to the physician's discretion, cannot. There is therefore no reason to think physicians' post-resolution apologies will be insincere.

#### CONCLUSION

Early offers provide a balanced reform of the maligned medical malpractice system. Recent research into alternative methods of dispute resolution demonstrates how important explanations and apologies are to injured claimants. In particular, many claimants desire to understand their injury and how it occurred, to determine accountability, and to prevent future similar injuries. Early offers, when combined with an in-person meeting requirement, can help patients achieve these goals. Requiring physicians to offer to meet with claimants to explain the injury, describe preventive steps being taken, and perhaps apologize, would help claimants with the healing process. It would also allow physicians the opportunity to apologize, which many of them desire, and it should assist in reducing the rate of medical errors.

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<sup>33</sup> Todres, *supra* note 13, at 686.