Statutory Damage Caps Are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions

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I. INTRODUCTION

Recently, tort law reformers, have exploited the prevalent belief that excessive compensation of nonpecuniary losses is in part responsible for the high cost and decreased availability of liability insurance in order to promote statutory caps on noneconomic damage awards.1 Advocates of unrestricted compensation damages have, in their turn, defended the awards and sought their reinstatement in jurisdictions where legislative reforms have restricted the awards but have failed to address adequately the deficiencies in noneconomic damage compensation that made the awards vulnerable to attack.2 The premise of this article is that the currently unsettled status of noneconomic damage awards offers an opportunity to reexamine the function of such awards, and to move tort law in the direction of more stable and rational remedies, something that could not be achieved either under recently adopted damage cap statutes or through the reinstatement of unrestricted compensation of noneconomic losses.

A proposal originally offered by Professor Jeffrey O'Connell3 as an element of a comprehensive no-fault compensation scheme4 may provide the proper basis for further reform of noneconomic damage awards5 in

1. See infra note 17 and infra text accompanying notes 17-23.
2. See infra text accompanying notes 45-58.
5. The phrase "noneconomic" or "nonpecuniary" damages or losses is to be understood throughout this paper as referring to the entire class of psychic injuries, including such injuries as pain and suffering, mental anguish, emotional distress, and loss of society and companionship, all of which are commonly understood to result in subjective nonmonetary losses which tort law nonetheless compensates by the award of money damages. See, Dobbs, Remedies § 8.1, at 544-45 (1973).
personal injury litigation. Professor O’Connell called for limiting recoveries for noneconomic damages to nominal amounts and awarding prevailing plaintiffs’ fees together with compensation for proven special damages. This proposal, which appeared prior to the recent preoccupation with tort reform, was grounded on the observation that noneconomic damages are haphazardly awarded, are marginally related to their ostensible purpose, and are routinely used as an indirect and covert means of paying plaintiffs’ legal fees and trial expenses.

Although Professor O’Connell described the deficiencies of noneconomic damage compensation and stated a case for adopting a remedy system based on provable economic losses, he did not address how an attorney’s fee award scheme might actually be implemented, nor explore the effect of awarding plaintiffs’ legal fees in a conventional tort setting. His proposal does, however, offer a framework for the reform of personal injury tort remedies. O’Connell’s approach, applied to the present controversy over whether noneconomic damages should be capped at moderately high levels or should remain unrestricted, would call for virtual abolition of the awards and for the substitution of a remedy structure based on compensation of attorneys’ fees and economic losses, a structure more routinely responsive to the actual economic losses that arise from tort injuries.

There are already some small signs of willingness to restructure tort remedies upon foundations that do not include noneconomic damages. For example, although several courts have sustained challenges to statutory damage caps on state constitutional grounds, those same courts

6. O’Connell, supra note 3. See infra text accompanying notes 63-68.
7. See, O’Connell, supra note 3; O’Connell & Simon, supra note 4; Zelermyer, Damages for Pain and Suffering, 6 Syracuse L. Rev. 27 (1954) (reviewing cases illustrative of the haphazard process of tort general damage awards and the erratic character of the awards themselves).
8. See O’Connell, supra note 3.
9. See, e.g., Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986) (declaring unconstitutional the Virginia statute, which imposes a $1,000,000 cap on economic and noneconomic damages combined); White v. State, 661 P.2d 1272 (Mont. 1983) (invalidating on the basis of a strict scrutiny equal protection analysis the restriction of nonpecuniary awards to $250,000 in actions against the state; recognizing the right to tort recovery as a fundamental right protected under the Montana constitution); Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (invalidating across-the-board noneconomic damages cap of $250,000); Arneson v. Olson, 270 N.W.2d 125- (N.D. 1978) (invalidating statutory cap of $300,000 on medical malpractice recovery, the cap including both economic and noneconomic damages); Wright v. Central Du Page Hosp. Ass’n. 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (invalidating statute limiting total recovery in medical malpractice actions to $500,000); Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) (holding a $450,000 cap on noneconomic damages to be an unconstitutional violation of right to trial by jury and right to access to the courts).

The Texas courts are split. Compare Baptist Hosp. of Southeast Texas v. Baber, 672
have suggested that noneconomic damages might be eliminated if
the substantive effectiveness of plaintiffs' remedies could be preserved
by other means. Indeed, the sharpened attack on noneconomic

S.W.2d 296 (Tex. Ct. App. 1984) (invalidating statutory limitation of damages other than
medical expenses to a maximum of $500,000 in medical malpractice actions) with Rose
v. Doctors Hosp. Facilities, 735 S.W.2d 244 (Tex. Ct. App. 1987) (statute constitutional);
Detar Hosp. v. Estrada, 694 S.W.2d 359 (Tex. Ct. App. 1985) (statute unconstitutional);
Malone & Hyde, Inc. v. Hobrecht, 685 S.W.2d 739 (Tex. Ct. App. 1985) (statute un-
constitutional); Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986) (statute un-
constitutional).

The Florida and New Hampshire courts are the only state supreme courts that have
addressed the narrow question of the constitutionality of general restrictions on nonpe-
cuniary awards. See Smith, 507 So. 2d 1080, and Carson, 424 A.2d 825. The court in
Carson found the imposition of a universally applicable $250,000 damage cap on nonpe-
cuniary awards an arbitrary deprivation of the plaintiff's right to reasonable recovery.
424 A.2d at 836-38. The New Hampshire court took the position that although the right
to recover for personal injuries is not a fundamental right which requires strict equal
protection scrutiny, it is nonetheless an important substantive right. In the court's view,
such rights are not to be restricted in the absence of a showing that the restriction is
reasonable, not arbitrary, and rests upon some "ground of difference having a fair and
substantial relation to the object of the legislation." Id. at 831. The court went on to
find that the invidious treatment of nonpecuniary awards by the legislature could not be
justified on the basis of this standard, suggesting however that restriction of non-economic
damages could be acceptable if some quid pro quo remedy were substituted. Id. at 837-
38.

The New Hampshire statute has been amended since Carson. Presently, recovery for
nonpecuniary losses is restricted to a maximum of $875,000. N.H. Rev. Stat. Ann. §
508:4-d (Supp. 1986). It is difficult to see why $875,000 is any less arbitrary than $250,000,
though perhaps the higher maximum reflects a more balanced accommodation of the
competing interests of adequate compensation and control of runaway awards.

The Florida court in Smith held unconstitutional the imposition of a $450,000 damage
cap on the ground that the plaintiffs' rights to access to the courts and to trial by jury
were impermissibly restricted. The court found that neither restriction could be permitted
unless a reasonable alternative remedy were provided or commensurate benefit to the
plaintiff were established, or there were a legislative showing of overpowering public
necessity for abolishment of the right and no alternative method of meeting such public
necessity could be shown. 507 So. 2d at 1088. The Florida holding has stimulated a
citizens' initiative to adopt an amendment to the state constitution permitting caps on
noneconomic damages. The Florida Court has ruled that the proposed amendment would
be lawful if adopted as a result of citizens' vote. In re Advisory Opinion to Atty. Gen.,
520 So. 2d 284, 287 (Fla. 1988).

Decisions in other jurisdictions have overturned legislation restricting tort recoveries
against specific classes of defendants, see, e.g., Baptist Hosp., 672 S.W.2d 296, and
White, 661 P.2d 1272, or legislation restricting recoveries for economic losses as well as
noneconomic losses. See, e.g., Arneson, 270 N.W.2d 125, and Wright, 63 Ill. 2d 313,
347 N.E.2d 736.

10. See, e.g., Wright, 63 Ill. 2d at 327-30, 347 N.E.2d at 742-43; Carson, 424 A.2d
at 837-88 (on noneconomic damages); Cf. Smith, 507 So. 2d at 1088.

Workers' compensation schemes and defined benefit no-fault schemes are typically noted
as examples where common law rights have been abrogated in exchange for offsetting
damages has led some defenders of the awards to reformulate their arguments by stressing less the preservation of noneconomic recoveries as such and emphasizing more the preservation of substantially effective plaintiffs' remedies. Even more telling indications of the need for a fresh approach to noneconomic damage reform can be found in those decisions in which courts have upheld the validity of statutory damage caps and have approved the restrictions that those caps impose on advantages that either enhance the likelihood of compensation or that assure reasonably adequate compensation through alternative means. Wright, 63 Ill. 2d at 327-28, 347 N.E.2d at 742.

The view that such statutory quid pro quo's are required in order for limitations on tort recovery to be acceptable has been urged by Learner, Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties, 18 Harv. J. on Legis. 143 (1981). Learner considers the right to damages for personal injury a right to the preservation of one's personality. This right is viewed as having constitutional dignity triggering a heightened equal protection scrutiny and requiring the provision of directly offsetting benefits should the remedies provided by the common law be restricted.

11. For example, in Florida the overturning of damage caps in Smith has been followed by an attempt to impose damage caps in a constitutionally acceptable manner. In In re Advisory Opinion to Atty. Gen., 520 So. 2d 284 (Fla. 1988), the Florida court issued an advisory opinion that if caps on noneconomic damages were adopted by means of an amendment to the Florida constitution proposed and approved through the mechanism of a citizens' initiative petition, damage caps would be constitutional.


A Washington decision may point in the same direction, though the facts of the case did not squarely raise the issue of the constitutionality of damage caps. Daggs v. City of Seattle, 110 Wash. 2d 49, 750 P.2d 626 (1988) reviewed a municipal ordinance which imposed a sixty-day waiting period on the filing of tort claims against the City of Seattle and incidentally caused the plaintiff's lawsuit to be subject to the newly adopted Tort Reform Act which capped noneconomic damages. The Washington court rejected plaintiff's claim that enforcement of the waiting period unconstitutionally deprived plaintiff of the right to recover unrestricted tort damages which he would have enjoyed under the old law. Dore, J., writing for the court stated in passing that the right to tort recovery was not a constitutional right. Id. at 57, 750 P.2d at 630. The Washington court currently has pending a case that squarely raises the question of the constitutionality of Wash. Rev. Code § 4.56.250 (1988), the state's damage cap statute, under the Washington constitution. Sofie v. Fibreboard Corp., Docket No. 54610-0.

The decision of the Indiana court in Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980), sustaining a $500,000 cap on economic damages in actions against health care providers, is sometimes numbered among those decisions sustaining legislative remedy restrictions. This inclusion is somewhat inappropriate. At issue in Johnson was a statute creating a state compensation fund as a quid pro quo for the imposition of damage caps. In order for health care providers to enjoy the protection of the $500,000 cap, the statute
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plaintiff's remedies. These latter decisions threaten the future of noneconomic damage compensation. Further, the rulings in these decisions, together with the argument of some commentators that the proper response to the legislative restriction of noneconomic damage awards is the reinstatement of uncapped noneconomic damage awards, invite the question of whether the tort compensation system should be revised in such a way that it does not depend on generous compensation of intangible loss.

This article has two parts. In the first part, the ambiguous role of noneconomic damages, that is, their function as makeweight compensation for noncompensable litigation expenses and as compensation for real intangible injuries, is described. This ambiguity has clouded the question of whether noneconomic damage awards can be justified in their own right. The first part further shows how the tort reform movement has deflected discussion of the critical role of noneconomic damages as makeweight compensation and, thereby, has produced a debate that concerns primarily the value of the awards as compensation for their ostensible purpose, that is, as compensation for pain and suffering and for other psychic harms. This focus of debate ignores evidence that noneconomic damage awards have flourished because they are needed to pay attorneys' fees, and obscures the question of whether noneconomic damages should be replaced by a remedy that is more routinely responsive to the tort victim's compensable losses. In the second part of the article, the merits and difficulties of adopting a system of attorney fee awards in lieu of continuing the present system of compensation for noneconomic injuries are considered. This part of the article describes in particular the structuring of a fee awards system appropriate for personal injury litigation and the administrative challenges of making such a system workable. The growing body of com-

requires that they contribute to the compensation fund. This structure, unlike the statutes which simply limit recoveries, involves the provision of a substitute remedy, an approach which has been approved even in jurisdictions which have found damage caps unconstitutional. See, e.g., Carson v. Maurer, 424 A.2d at 837-38; Wright v. Central Du Page Hosp. Ass'n., 347 N.E.2d at 742.


15. The efforts of the defenders of noneconomic damages, who, in general, have conceded little to those who argue that the system of unrestricted noneconomic damages is flawed, id., see also Fein v. Permanente Medical Group, 38 Cal. 3d 137, 168-79, 695 P.2d 665, 687-92, 211 Cal. Rptr. 368, 390-95 (1985) (Bird, C.J., dissenting), depend on the proposition that noneconomic damages can be fully justified as a necessary and desirable remedy for intangible loss, a proposition that seems suspect on closer examination. See infra text accompanying notes 42-44 and 52-58.
mentary that concerns the treatment of attorneys' fees as compensable losses in ordinary civil litigation is also examined.16

II. THE FUNCTION OF NONECONOMIC DAMAGE AWARDS

A. The Restriction of Noneconomic Damage Awards

In response to public clamor, many states have enacted laws restricting plaintiffs' tort remedies in hopes of reducing the cost and improving the availability of tort liability insurance.17 One of the most

16. See infra text accompanying notes 86-91.


Despite the push to restrict plaintiffs' remedies, the reasons for the crisis in liability insurance markets are much in dispute. Efforts to attribute the crisis to excessive litigation and overly generous plaintiffs' remedies have in general given way to explanations that emphasize either the imprudent business practices and collusive activities of insurance companies or the effect on insurance rates of imprecise and malleable standards of liability. Compare, e.g., Belotti, Van de Kamp, Thornburg, Mattox, Brown & LaFollette, An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance (May 1986) (Prepared for the National Association of Attorneys General, this report concludes that the cyclical nature of the insurance industry is largely responsible for the current crisis and that changes in the civil justice system are not likely to solve the current or future problems in availability and affordability of insurance.); Nader, The Corporate Drive to Restrict Their Victim's Rights, 22 Gonz. L. Rev. 15 (1986) (viewing the insurance crisis as a self-inflicted phenomenon created by the underwriting practices of the industry and intended to justify an assault on a remedies structure already inadequate at providing effective compensation to the great majority of claimants) and Waldman, Insurers, Long Free of Antitrust Curbs, Face Rising Challenges, Wall St. J., July 8, 1988, at 1, 6 (describing the growing pressures to abolish the antitrust immunity of the insurance industry because of alleged collusive activity in forcing revision of tort remedies), with Mooney, The Liability Crisis—A Perspective, 32 Vill. L. Rev. 1235 (1987); Priest, supra; and Clarke, Warren-Boulton, Smith & Simon, Sources of the Crisis in Liability Insurance: An Economic Analysis, 5 Yale J. on Reg. 367 (1988) (each concluding that the operation of indeterminate common law liability rules has had a substantial effect on the price and availability of certain classes of liability coverage). Professor Priest in particular has minimized the role played by the size of damage awards in determining the cost and availability of liability insurance. He views as more significant the uncertain application of broadly stated definitions of due care or product defectiveness which make it difficult to predict whether a given level of care will or will not result in liability. This indeterminacy frustrates the creation of discreet insurance risk pools, and so causes all buyers of insurance to be burdened with premium prices which reflect the risk that their utmost precautions will be found inadequate.

The emergence of these explanations has made the hope that insurance might become cheaper and more available as a result of restricting damage recoveries seem a vain hope. See infra note 22.
common limitations on plaintiffs' remedies appearing in the new statutes is the restriction of damage awards for noneconomic losses,\(^{18}\) that class of injuries that includes pain and suffering and other psychic hurts.\(^{19}\) Awards for such losses must be controlled, the reformers argue, because they are unusually susceptible to overstatement and abuse,\(^{20}\) and therefore

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The alternative approach has been to restrict plaintiffs' recoveries only in those actions brought against defendants who are viewed as particularly susceptible to the high cost and restricted availability of liability insurance characteristic of the "insurance crisis." Thus, some of the new statutes restrict plaintiffs' maximum recoveries only in medical malpractice actions while others extend protection to vulnerable groups such as charitable institutions or states and their political subdivisions. See, e.g. statutes in Cal. Civ. Code Ann. § 3333.2 (limiting noneconomic damages in medical malpractice cases to $250,000) (1975 and Supp. 1986). Mich. Comp. Laws Ann. § 600.1483 (Supp. 1987) ($225,000 in medical malpractice cases unless, among other exceptions, tort causes death, injury involves reproductive system, limb or organ wrongfully removed or vital bodily function lost); Mo. Ann. Stat. § 538.210 (Supp. 1987) ($350,000 per defendant in medical malpractice actions); Mont. Code Ann. § 2-9-108 (1987) ($750,000 for each claim, $1.5 million for each occurrence against political subdivisions; statute terminates in 1991); S.C. Code Ann. § 15-78-120 (Supp. 1987) (limits total damages to $250,000 per plaintiff and $500,000 per occurrence against political subdivision).

In general, the statutes adopted before the explosion of new reform legislation in 1986 and early 1987 were directed at control of damages in medical malpractice litigation. See, Smith, Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws, 38 Okla. L. Rev. 195, 200-01 (1985). The statutes of general application reflect the tort reform juggernaut which has undertaken wholesale revisions of existing remedies.

19. See supra note 5.

20. See, e.g., Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 1, 2 (U.S. Dept. of Justice Feb. 1986). However, there is strong countervailing evidence that nonpecuniary damage awards are neither excessive nor wildly unpredictable in the great mass of cases. See Daniels & Martin, Civil Jury Awards Are Not Out of Control, 26 Judges 10 (1987) (setting out the results of a broadly based study of civil jury awards in state trial courts from 1981 through 1985). The authors state that very few awards for noneconomic and special damages combined approach the $250,000 to $500,000 range for noneconomic damage awards typical of many of the recent statutory damage caps. See also Hensler, Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research, 48 Ohio St. L.J. 479 (1987) (noting a general increase during recent years in rates of litigation and in the size of tort damage awards, the author of this Rand Institute...
cause high insurance rates and restricted insurance coverage. Although there are growing doubts about the good faith of those advocating the tort remedy restrictions that some states have recently adopted, and about the effectiveness of those restrictions in controlling the cost and

study is nonetheless unwilling to conclude that the data collected show that damage awards or rates of litigation are disproportional or reflect undesirable patterns).

21. See supra note 20. While studies conducted for the Rand Institute of Civil Justice indicate that damages recovered in medical malpractice actions have in fact decreased in jurisdictions which have limited operation of the collateral source rule and capped recoveries for noneconomic injuries, see, Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 Law & Contemp. Probs. 57 (1986), it seems to be becoming clearer that reductions in damages will not be accompanied by lower rates and improved coverage. See supra note 17 and infra note 22.

For other studies exploring litigation patterns in malpractice actions, see also Danzon, Medical Malpractice: Theory, Evidence and Public Policy (1985); Danzon, The Frequency and Severity of Medical Malpractice Claims, 27 J. L. & Econ. 115 (1984); Danzon and Lillard, Settlement Out of Court: The Disposition of Medical Malpractice Claims, 12 J. Legal Stud. 345 (1983).

22. These doubts about the tort revision movement draw strength from the growing evidence that the legislative changes that have so systematically restricted plaintiffs' remedies will not in fact produce the hoped for improvements in the cost and availability of insurance coverage. See, e.g., U.S. Gen. Accounting Office, Medical Malpractice: 6 State Case Studies Show Claims and Costs Still Rise Despite Reforms 39 (GAO/HRD-87-21, DEC. 1986) [hereinafter "GAO Case Studies"]; Hilder, Insurers' Push to Limit Civil Damage Awards Begins to Slow Down: States Resist Major Changes, And Some Link Ceilings to Insurance-Rate Cuts, Wall St. J., August 1, 1986, at 1, 8; Belotti, supra note 17; Nader, supra note 17; Schroeter & Rutzick, Tort Reform—Being an Insurance Company Means Never Having to Say You're Sorry, 22 Gonz. L. Rev. 31 (1986); Hutner & Angoff, Tort Reform Legislation Ought to Reduce Premiums, Wall St. J. Feb. 11, 1987, at 26; Kirsch, Prop. 51 Shakes (barely) the House of Torts, 6 Cal. Law. at 70-71 (June 1986).

The experience of states where restricted remedies are already in force seems to support these doubts. For example, recent experience in Florida indicates that reduced liability exposure may not be reflected in improvements in the cost and availability of insurance. In Florida, liability insurers have overwhelmingly sought rates higher than those charged in previous years, and two of the country's largest insurers have recently told the Florida Insurance Department that their rates will not be affected by the state's new limitations on compensation. Hutner & Angoff, supra. See also supra GAO case studies.

Recently, concerns about the good faith of insurance companies has resulted in lawsuits by the attorneys general of the states of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin. This action against insurers and reinsurers alleges collusion and conspiracy in setting rates and restricting coverages, thereby creating the insurance crisis. See Waldman, supra note 17; Fact Sheet on the Multi-State Insurance Anittrust Litigation, Office of the Attorney General of the State of Washington (Jun. 14, 1988). These actions have been consolidated for trial in the United States District Court for the Northern District of California. A related complaint was filed in state district court in Austin, Texas by the Attorney General of Texas. See Texas v. Insurance Serv. Office, cause no. 439,089, filed Mar. 22, 1988 in the District Court of Travis County, Texas.
availability of insurance, state legislatures have widely accepted the need for limitations on ‘plaintiffs’ remedies.23

B. The Effect of Noneconomic Damage Caps on Compensation of Legal Fees and Other Losses

The new damage caps reduce a plaintiff’s potential recoverable damages by placing an upper limit on noneconomic recoveries.24 Unchanged, however, is the established expectation of those familiar with American tort litigation that the plaintiff will look to the noneconomic portion of his damages not only to compensate him for those intangible injuries for which the award is ostensibly made, but also to pay his attorneys’ fees.25 This expectation is a joint product of the American practice of not treating attorneys’ fees as a compensable element of damages in common law civil actions26 (the American Rule) and of the American tradition of viewing the noneconomic portion of the plaintiff’s recovery,

23. In addition to the imposition of damage caps, such measures as abolition or modification of the collateral source rule, restricted access to punitive damage awards, limitations on joint and several liability, and the reestablishment of tort immunities have been adopted. Many of the new statutes have introduced procedural reforms such as statutes of repose for products liability and medical malpractice claims, and made provision for periodic payments of judgment.

Description of the large number and wide variety of statutory revisions affecting tort remedies is beyond the scope of this article. The new laws have been monitored and described in a series of continuing publications by the National Conference of State Legislatures. See 1987 Summary: Liability Insurance (National Conference of State Legislatures, July 31, 1987); 1987 Summary: Liability Insurance—February 27, 1987 Update (National Conference of State Legislatures); General Summary—1987 State Legislative Action (National Conference of State Legislatures, January 30, 1987); 1986 Summary: Liability Insurance—(National Conference of State Legislatures, December 15, 1986); Trolin, Civil Justice Reform in the States, 10 State Legis. Report, No. 14 (National Conference of State Legislatures, December 1985).


24. See supra note 18.


26. The practice of denying attorneys’ fees as a recoverable element of damages will be referred to as the “American Rule,” its customary designation. An account of the origins and development of the Rule is given by Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, 47 Law & Contemp. Pros. 9 (1984). Leubsdorf observes that the Rule seems to have arisen from a self-evident expectation that clients would pay their own legal fees. Only later was the Rule justified or challenged because of its effect on the conduct of litigation. Id. at 27-31.
rather than the plaintiff’s recovery for proven economic losses, as the primary source of payment for fee obligations.\(^\text{27}\)

The proposition that the award for noneconomic damages plays a buffering role in the plaintiff’s recovery, that is, provides a means of funding litigation expenses so that the plaintiff’s recovery for economic losses will be preserved intact, involves awkward assumptions. It supposes that a plaintiff’s damage award for intangible injuries in particular, rather than the plaintiff’s total damage award for all losses, bears the burden of the undercompensation inevitably produced by the American Rule. It partially acknowledges that noneconomic damages lack legitimacy and that juries can easily manipulate them to compensate more pressing and demonstrable losses. It is at odds with what might be considered the more natural, intuitive view that the burdens of undercompensation produced by the American Rule weigh equally on all the plaintiffs’ remedies, and that the victorious plaintiff is simply placed in the position of allocating recoverable damages as he sees fit.\(^\text{28}\)

The issue of whether noneconomic damages play this buffering compensation role is further complicated by uncertainty regarding whether juries actually consider the impact of attorneys’ fees on a tort victim’s net recovery. Some commentators have argued that jurors, in making the general damage award, anticipate that the plaintiff will use part of the award to pay the attorney’s fees.\(^\text{29}\) Such arguments are often grounded on the inference that juries are aware of the typical means of paying attorneys’ fees, an inference drawn from studies which reveal that the noneconomic damage award often does not correspond to the gravity of the plaintiff’s injuries, but rather represents an amount adequate to compensate both the plaintiff and his lawyer.\(^\text{30}\) An article by Professor Harry Kalven,\(^\text{31}\) written to summarize findings of The Jury Project at the University of Chicago Law School, offers the contrary opinion that jurors, having once agreed on a proper damage figure, do not decide

27. See supra note 25.
28. The fact that some portion of the victim’s total damage award will in all likelihood be used to pay contingent fees means either that damage awards must be overstated to assure an adequate net recovery of the plaintiff’s economic and nonpecuniary losses after the payment of contingent fees or that an award which is narrowly tailored to a factfinder’s best estimate of the scope of total damages will not be adequate after litigation expenses have been paid. Where a factfinder is properly disciplined, undercompensation should be the result. The inherent difficulty of noneconomic damages is that it is difficult to be sure that such discipline is in fact being imposed because of the malleable and unquantifiable nature of nonpecuniary awards.
30. See J. O’Connell and R.J. Simon, supra note 4, at 6-7 and infra note 43.
to add on an amount in order to enable the plaintiff to pay the fee. Qualifying this conclusion, however, Professor Kalven acknowledged that jurors are frequently knowledgeable about contingent fee arrangements (despite the prohibition on their being so informed at trial) and that because jurors arrive at general damage awards by a largely unreviewable process that reflects a jumbled mixture of compensatory and retributive objectives, the general damage award could well include some provision for fees that would remain undetectable. Thus, jurors might take fee obligations into account in setting a general damage award in the first instance, even though they might be unwilling to make an explicit award for fees as an addendum.

Whether the jury is aware that the plaintiff will allocate part of the damage award to fees may, however, be less important than most commentators have supposed. Because the arguments of counsel provide the primary source of the jury's information on the appropriateness of a given award, the jury is likely to gain its strongest impression of the proper range for a general damage award from those competing arguments. The awareness on the part of the plaintiff's counsel of the need to seek a total recovery adequate both to compensate the plaintiff and to pay fees and the expenses of litigation, will cause counsel to argue for a combination of general and special damages that will be adequate for these purposes. Thus, the connection between the amount of a general damage award may reflect the need to provide for counsel fees, to cover litigation costs and to provide adequate compensation for the plaintiff's economic losses, independently of a jury's actual knowledge that fees and expenses will be paid out of the damage award.

Despite the conceptual difficulties and factual uncertainties of acknowledging that noneconomic damage awards play a makeweight compensation role, recognition of this role has become widespread. As a result, capping of noneconomic damages is viewed not only as diminishing the plaintiff's recovery for the psychic injuries that ostensibly justify such damages, but also as exposing to demands for payment of the expenses of litigation the plaintiff's damage award for economic losses. For example, if a severely injured plaintiff has proved economic damages in the amount of $1,500,000 and noneconomic damages in the

32. Id.
33. One commentator has noted that the later published H. Kalven & H. Zeisel, The American Jury 149-62 (1966) shows that juries in fact do not include an assessment of the lawyer's contingency fee in their award of damages. Jenkins & Schweinfurth, California's Medical Injury Compensation Reform Act: An Equal Protection Challenge, 52 So. Cal. L. Rev. 829, 943 (1979). While the Kalven & Zeisel source does not discuss this particular issue of jury conduct with any specificity, the 1958 Kalven article cited at supra note 31 does.
34. See supra note 25.
amount of $500,000, the effect of a $250,000 cap on noneconomic damages, typical of several of the new statutes,\textsuperscript{35} would be to diminish the plaintiff's recovery from $2,000,000 to $1,750,000. If the plaintiff and his attorney agreed to a contingent fee of thirty percent,\textsuperscript{36} the plaintiff's recovery, after payment of that fee, would be reduced from $1,400,000 to $1,225,000, a reduction that would cause the plaintiff's net damage recovery to fall significantly short of the established economic damages.

The tort cases that involve noneconomic damage awards large enough to be affected in the manner described represent a small proportion of all tort litigation,\textsuperscript{37} but the cases affected will be those where plaintiffs have suffered severe economic losses and where the unrestricted award

\textsuperscript{35} See supra note 18.

\textsuperscript{36} A study by the Rand Institute for Civil Justice indicates that the portion of tort recoveries that goes to plaintiffs' attorney fees and legal expenses ranges from a bit below thirty percent to thirty-nine percent depending on the type of litigation, but that the average amount is thirty to thirty-one percent of total compensation paid to plaintiffs. Kakalik & Pace, Costs and Compensation Paid in Tort Litigation, Rand Institute for Civil Justice (1986). See also Danzon, Contingent Fees for Personal Injury Litigation, Rand Institute for Civil Justice (R-2458-HCFA) (1980); and Aronson, Attorney-Client Fee Arrangements: Regulation and Review, 68 A.B.A. J. 284 (1982) (discussing the range of reasonable contingent fee arrangements).

A number of tort reform statutes attempt to relieve the pressure of contingent fee arrangements on the plaintiff's net recovery by setting limits on contingent fee awards. See infra note 61. To the degree that contingent fee awards are reduced by such vehicles, the effect of damage caps on the plaintiff's net recovery may be lessened. However, this effect may be accomplished at the cost of making plaintiffs' cases less attractive to lawyers who find the reduced fees inadequate, a significant risk in complex litigation demanding extensive pre-trial discovery and the development of evidence dependent on scientific or technical expertise. One empirical study has found that plaintiff lawyer effort in contingent fee litigation increases significantly as the dollar stakes and complexity of the litigation increases. Kritzer, Felstiner, Sarat & Trubek, The Impact of Fee Arrangement on Lawyer Effort, 19 Law & Society Rev. 251, 267-73 (1985). Similarly, a Rand Institute study on the resolution of medical malpractice claims reports that claims are most likely to be dropped in states that impose statutory limits on contingent fees. The study concludes that fee ceilings do more than cut down on "windfall" returns by discouraging spurious litigation—that they also reduce the attorney's efforts and hence the probability of victory for the plaintiff and the likely gross recovery and the net amount realized by the plaintiff. Danzon & Lillard, Settlement Out of Court: The Disposition of Medical Malpractice Claims, 12 J. Leg. Stud. 345, 362-63 (1983). See also Slovenko, Medical Malpractice and the Lawyer's Contingent Fee, J. Psychiatry & L. 587, 595 n.27 (1984).

\textsuperscript{37} For example, in the years preceding California's adoption of its Medical Injury Compensation Reform Act, which contains a provision limiting damages for noneconomic losses to $250,000 in medical malpractice actions, Cal. Civ. Code Ann. § 3333.2 (1975 and Supp. 1988), a report of the state's Auditor General indicated that no more than fourteen individuals in any given year received compensation of over $250,000 in noneconomic and economic damages combined. See, California Auditor general, The Medical Malpractice Insurance Crisis in California at 31 (1975).

For a more recent and broadly based study, see Daniels & Martin, supra note 20.
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of noneconomic damages theoretically would have provided more completely for their economic losses and for the payment of their legal fees and expenses. The more significant point may be, however, that the same skepticism about noneconomic damages that has stimulated recent limitations of remedies may also be reflected in jurors’ views of appropriate noneconomic damage awards. Thus, even where maximum awards of noneconomic damages are not limited by statute, jurors often seem to be unwilling to award very large noneconomic damages, even in cases of quite severe injury. The significance of this resistance is that while statutory damage caps set upper limits of compensation, and in cases of severe injury and high trial expenses assure undercompensation, the same undercompensation may be produced without statutory restrictions simply because jurors are not willing, regularly and predictably, to make large tort awards, even in cases where such awards are called for. The more central problem may therefore be not the effect of statutory damage caps on compensation, but rather the tort system’s continued reliance on a form of compensation that, because it is viewed somewhat skeptically, may or may not be forthcoming.

C. How the Tort Reform Movement Has Limited the Range of Objections to Noneconomic Damage Caps

As suggested above, the statutory restriction of noneconomic damages has generated controversy for two contradictory reasons. First, caps on noneconomic losses, some critics contend, undermine the settled expectation that tort plaintiffs will be able to look to the private damage action for compensation of all proven injuries, including intangible losses. Second, damage caps purportedly jeopardize the plaintiff’s ability to attract legal representation and therefore to seek tort remedies. By reducing the total damages recoverable, such caps diminish the likelihood that the damage award will be adequate to meet the expenses of litigation while providing for the plaintiff’s injuries. The first objection assumes

38. See text accompanying notes 75-76.
39. See ABA Commission Report, supra note 14, at 10-15. The first objection assumes that noneconomic damage awards are justified in their own right, and accords with the view that appropriate money compensation for intangible injuries can be determined, however incalculable the underlying injury. Confidence that awards will be appropriate must depend on a belief that the jury will be able to assign some roughly approximate dollar value to the immeasurable and that the courts will be able to police the process adequately. Underlying this willingness to allow money compensation is the assumption that the law, confronted with an immeasurable loss, compensate, and deter such injuries by awarding a sum of money that seems fair, however roughly determined. See Dobbs, supra note 5, at 545-46; Zelermeyer, supra note 7, at 34-38.
that noneconomic damages are justified in their own right. The second objection assumes that noneconomic damages find their primary justification as a form of makeweight compensation, useful to meet losses that would otherwise go uncompensated.

The incompatibility of these two objections to damage caps arises not from any disagreement about the genuineness of the injuries that justify nonpecuniary damages. The reality of psychic injuries is generally acknowledged. Rather, it is in part the routine application of noneconomic damages to other losses that stimulates the question whether the practice of generously compensating intangible injuries can be accepted on its own terms or compels a more realistic and practical explanation. Furthermore, iconoclastic explanations of noneconomic damages are encouraged by the essential incalculability of intangible harms such as pain and suffering, which makes problematic the relation between given noneconomic awards and the injuries on which the compensation is grounded. The uncertain relation between injury and compensation has caused some commentators who defend noneconomic damages to justify those damages in terms of the broad goals of adequate overall compensation and retribution rather than in terms of any readily demonstrable correlation between compensation sought and injury suffered.

It is a significant consequence of the attack that the tort reform movement has launched against the integrity and size of noneconomic damage awards that, of the two objections to noneconomic damage caps, the objection that emphasizes the value of noneconomic damages as collateral compensation may have become untenable. Defending noneconomic damages for their practical role plays into the hands of those who have attacked the damages on the very ground that they are routinely

41. Morris, supra note 25, at 476-77.
42. There are numerous accounts of the arbitrariness and unverifiability of nonpecuniary damage awards, emphasizing the indeterminable relation between the value of money and pain and suffering injuries. These accounts emphasize that most damage awards could be arbitrarily increased or diminished without compromising their responsiveness to the injuries intended to be compensated. See, e.g., Dobbs, supra note 5; Ingber, supra note 29, at 778-79 (citing in particular P.S. Atiyah, Accidents, Compensation and the Law 213 (3d ed. 1980)); O'Connell, supra note 3, at 341; Peck, supra note 40; Zelermyer, supra note 7, at 34-38.

The incommensurability of intangible injuries is distinct from the problems of accurate calculation of speculative economic losses such as future wages. Loss items such as future earnings may be exceptionally difficult to establish accurately and may depend upon substantial conjecture for their calculation, but ultimately they represent economic loss measurable in dollar terms, however deficient the tools for accurate calculation may be.

43. The defense of the broad compensation function simply states that even if the soundness of noneconomic damage awards cannot be verified, the awards help to provide an aggregate recovery adequate to pay special damages and the costs of litigation. See, e.g., Dobbs, supra note 5, at 550-51; Ingber, supra note 29, at 779.
bloated to serve collateral purposes and cannot be justified in their own right. Thus, one must now defend noneconomic damages on their own terms. Alternatively, if one holds the practical view of noneconomic damages, one must now either openly advocate alternative remedies that will perform the remedial functions that noneconomic damage awards have until now performed covertly, or argue the case for noneconomic damages disingenuously. Unfortunately, most of the defenders of noneconomic damages have so far put forward only disingenuous-seeming or incomplete arguments for preservation of the awards, perhaps sensing that in the present climate the salvage of an endangered remedy is a more likely prospect than the adoption of a novel remedy. An example of an argument in favor of the restoration of noneconomic damages that seems unpersuasive and incomplete is that of the report of the American Bar Association (ABA) Commission to Improve the Tort Liability System.44

1. The ABA Commission Report

Commissioned to make recommendations to the ABA House of Delegates for the improvement of the tort liability system, the ABA Commission to Improve the Tort Liability System has proposed that the statutory caps on nonpecuniary damages be abandoned and that factfinders be permitted to award damages for intangible injury without arbitrary limitations.45 The Commission’s report was particularly harsh in its attack on the arbitrariness of damage caps,46 noting that the caps typical of the new statutes assure that those who have suffered the most devastating psychological injuries receive inadequate compensation.47

The commission’s criticism draws its strength from the fact that the damage cap statutes have left noneconomic damages intact for all but the most severe losses. The new statutes have thus not challenged the principle of compensation for intangible injury as such, but have simply restricted remedies when “they “cost too much.”48 The force of the commission’s criticism of invidious treatment of some noneconomic damages is reduced, however, by the indeterminacy that plagues all awards for intangible injury.49 Because it is impossible, except on arbitrary terms, to define appropriate dollar compensation for intangible injuries or to know how to translate to a scale of dollars intangible injuries that vary in severity, the argument that more severe intangible injuries demand

44. See ABA Commission Report, supra note 14.
45. Id. at 13.
46. Id. at 12.
47. Id.
48. Id.
49. See supra note 42.
more dollars in compensation is not self-evident. The commission recommended that the tort system continue to strive for individualized awards for intangible injury, but failed to consider as an alternative the possibility of abandoning this effort and limiting money remedies to harms that can be quantified. It is doubtful that the best cure for the inequality of treatment of intangible injuries that is reflected in damage cap statutes is the reinstatement of a system that has shown a decided lack of success in providing appropriate levels of compensation. Plaintiffs in small claims litigation often receive three or four times their economic losses in general damage awards, no matter how trivial their intangible injuries may be, simply to facilitate settlement of claims. On the other hand, the award of substantial general damage awards in cases that presumably merit such awards is haphazard and comparatively rare. The commission’s recommendation would reinstate unrestricted noneconomic damages, but offers little assurance that the undercompensation of substantial injuries and the overcompensation of minor injuries characteristic of general damage awards will be corrected.

The commission recognized and to some extent attempted to respond to the inexactness of noneconomic damage calculation. The commission report acknowledged that nonpecuniary awards are both prone to overstatement and are difficult to estimate and, for that reason, proposed the adoption of dollar guidelines for appropriate awards. The commission further suggested that judges could and should control excessive awards by granting motions for remittitur when justice so requires. The difficulty with these suggestions for reform is that they offer no help in determining when an award is excessive, except that of comparing it to other awards for similar injuries. More significantly, the proposals leave untouched the more fundamental weaknesses of an unrestricted award system—that the value of all nonpecuniary awards is indeterminate and that any given award, which may include undetectable padding, may be regarded as “reasonable” simply because it lies within a range of damages that has come to be accepted as reasonable for the type of injury sustained.

Reliance on rough approximations that rest upon experience with other awards might not be so troublesome if the rough estimates reflected no more than someone’s sensible effort to quantify the unquantifiable. However, there is reason to believe that the size of expected noneconomic damage awards in American tort litigation has expanded as attorneys’ fees and the costs of litigation have increased. This evidence indicates

50. See ABA Commission Reports, supra note 14, at 10, 12.
51. See infra notes 72-73 and 82.
53. Id.
54. O’Connell & Simon, supra note 4, at 100-04.
that the growth in size of noneconomic damage awards may have been stimulated in part by pressures to generate a total damage award that is responsive to the plaintiff's need to obtain compensation for injuries and adequate to the costs of litigation, including attorneys' contingent fees. It would be a distortion of the historical development of intangible injuries to suggest that increased litigation costs and the need to provide for legal fees is the single driving force behind expanded compensation of noneconomic losses. Solicitude for psychic injuries and a refined regard for the integrity of the personality, both characteristic features of modern American tort law, have been consistently promoted by the plaintiffs' trial bar. Nonetheless, the peculiarly American willingness to permit unrestricted recovery for nonpecuniary injuries and the American expectation that the plaintiff will use part of the award for such injuries to pay the attorney's contingency fee seem intertwined. Contingency fee arrangements in fact create incentives for the plaintiffs' trial bar to expand recoveries for intangible injuries. Furthermore, a

55. See, e.g., ABA Commission Report, supra note 14, at 10; O'Connell & Simon, supra note 4, at 100-04; O'Connell, supra note 3, at 333-40.

56. The impulse of other common law systems has been to curb compensation of nonpecuniary loss, with courts being drawn to standardized awards. One leading commentator has noted both the strong Western attachment to the compensation of intangible injuries and the need to confine the awards within reasonable bounds:

The resulting trend to more or less standardized awards ("flexible judicial tariffs") is reinforced by the great value our law attaches to predictability, which promotes settlements and satisfies a sense of justice demanding equal treatment for equal cases. Uniformity is maintained by stringent appellate control over awards and, especially in England, by displacing juries entirely from the realm of assessing damages in favor of judges whose professionalism ensures adherence to prevailing, judicially-imposed norms.


The trend towards standardization of awards has in the main also been a trend towards the restriction of awards, though Professor Fleming notes as a contrary example that standardized awards for lost faculties produce higher compensation for insensate victims than would be the case if the victim's subjective awareness of loss formed the basis for the damage award. Id. at 212-13. Nonetheless, and despite the fact that "more than half the total amount paid out under the present tort system is apparently attributable to nonpecuniary loss and to a particularly high proportion of small payments (in settlements), id. at 211, recoveries for noneconomic damages in other common law countries are at once more predictable and less generous than is the case under American tort law.

57. Professor John Leubsdorf, in considering the origins and continued vitality of the American Rule, accounts for the absence of any concerted effort on the part of the trial bar for broader awards of attorneys' fees by noting that so long as lawyers feel able to rely on their clients to provide adequate fees, they will lack any incentive to search for alternative solutions such as fee shifting. He cites as an example the expectation of the tort plaintiffs' lawyer that the plaintiff's general damage recovery can be used as a source of fees. Leubsdorf, supra note 26, at 31.

58. See O'Connell & Simon, supra note 4, at 51-54, 100-09, and O'Connell, supra note 3, at 334-39 for descriptions of such devices as the per diem argument.
litigation environment often dominated by the need for extensive discovery and by the high costs of case development creates pressures to enhance damage recoveries so that they provide for such expenses while substantially preserving the plaintiff's net recovery. For these reasons, even the "reasonable" noneconomic damage award may reflect not an effort simply to quantify the intangible, but rather the effect of economic pressures on the conduct of litigation.

The ABA Report, however, does not dwell on such likelihoods. The report chooses to treat the reform of noneconomic damages as a problem that involves only the curbing of excess damage awards, without considering that the conception of "reasonable award" may already incorporate amounts unrelated to noneconomic damage compensation as such.

It is a bit difficult to believe that the authors of the ABA Report did not consider the collateral remedial functions of noneconomic damage awards and the impact of damage caps on the conduct of plaintiffs' litigation as they compiled their recommendations, yet the report was silent on such matters. The commission cast its recommendations in a form that assumes the basic validity of noneconomic damage awards and addresses only the problem of invidious treatment of one subset of those awards. The new damage cap statutes technically demand no more of a response, for their effect is only to deny compensation for high noneconomic losses and not to eliminate noneconomic damages altogether. Nevertheless, the comments of the ABA Report were too narrowly focused. They also evidenced a disinclination to take up the more difficult remedy issues that would have been raised if the commission had explored all sources of American society's willingness to compensate plaintiffs for noneconomic damages at such generous levels. Such an exploration would compel a discussion of the validity of generous compensation of intangible injuries and an examination of the relationship between legal fees, litigation costs, and intangible damage awards.

2. The Modest Possibilities for Future Tort Reform—A Partial Explanation for the Staunch Defense of Noneconomic Damages

It is somewhat speculative to suggest that the support of the ABA Commission and of several state courts for the preservation of non-


In common with the ABA Report, those court decisions which have declared unconstitutional the restriction of nonpecuniary damage recoveries have not addressed the possible links between generous nonpecuniary awards and the funding of plaintiffs' litigation. Protection of the right to full compensation of nonpecuniary damages is viewed in these cases simply as an element of the plaintiff's right to trial by jury and of full access to the courts for redress of injuries, and it is relatively rare to find discussion of the collateral remedy functions of noneconomic damages. See cases cited at supra note 9.
pecuniary awards was motivated as much by a desire to preserve the present remedy structure as by a principled commitment to nonpecuniary awards as such. Ruling out such a possibility is nonetheless difficult. The tort law revision movement is, after all, not a product of a wish to propel the tort system to more rational plaintiffs' remedies that still retain their basic effectiveness. Rather, the movement has been concerned with cost containment and litigation reduction, and has as part of its underlying strategy making plaintiffs' cases less appealing to plaintiffs' attorneys. Thus, friends of plaintiffs' remedies may have preferred to defend existing remedies instead of attempting to redirect a hostile reform movement. Moreover, many of those engaged in the

60. See Rabin, supra note 17, at 15-23 (describing how the limited objectives of recent tort reform and the narrow cost containment objectives on which the consensus in favor of tort reform was based may circumscribe the types of further reforms that can be hoped for).

61. The relationship between damage caps and the regulation of contingent fee contracts, typical of the new revision statutes, illustrate this point well. Many tort reform statutes include provisions meant to protect plaintiffs from oppressive contingent fee arrangements. These provisions fall into two broad categories. There are those that set maximums on contingent fee recoveries, often establishing schedules of maximum percentages of the plaintiff's gross recovery which can be charged as a contingent fee. This approach may or may not be combined with a second type of provision which subjects contingent fee arrangements to reasonableness inquiry, initiated either by the court or by a party to the litigation. See, e.g., Ariz. Rev. Stat. Ann. § 12-568 (sliding scale); Cal. Bus. & Prof. Code § 6146; Conn. Gen. Stat. Ann. § 52-251c (sliding scale); Del. Code Ann., tit. 18, § 6865 (Supp. 1984); 1987 Ga. Laws 672 (plaintiff's attorney's fees capped at 50% of award); Ill. Rev. Stat., ch. 110; Iowa Code Ann. § 147.138 (Supp. 1987); Wash. Rev. Code Ann. 4.24.005 (1988) (establishing factors to be considered in computing reasonable attorneys' fees).

Although these measures are clearly appropriate, since contingent fee arrangements may be particularly prone to an absence of effective negotiation between lawyer and client, see J. Auerbach, Unequal Justice 44-50 (1976) and Danzon, Contingent Fees for Personal Injury Litigation, Rand Institute Study R-2458-HCFA, 26-29 (June, 1980), and open to abuse by lawyers, these statutes address only the question of how the tort judgment or settlement amount is to be allocated between lawyer and client, leaving untouched the problem whether the total amount recoverable will provide adequately for the plaintiff's losses and for the payment of reasonable expenses associated with the litigation. Where maximum tort recoveries are restricted by damage caps and the abolition or modification of the collateral source rule, the conflict between the provision of adequate net recovery to the plaintiff and the payment of an adequate fee to counsel will be acute. In those settings where presentation of the plaintiff's case will require substantial lawyer effort, but where payment of a fee corresponding to that effort would seriously erode the plaintiff's net recovery, courts will be subject to obvious new pressures to choose between the lawyer's fee claim and the adequacy of the client's net recovery. The lawyer's willingness to take cases where the risk of an inadequate fee award and expense allowance is real will undoubtedly be affected. See supra note 36.

For an account of the process by which lawyers decide to accept litigation, see, e.g., Johnson, Lawyer's Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 Law & Society Rev. 567 (1980).
current debate over tort reform have no interest in making fundamental changes in the existing system, which serves them well even if it does not serve the public well.\textsuperscript{62} The system of general damage awards has served the plaintiffs' bar well, and an effort to salvage that system may seem at once less disruptive and more likely to enjoy success than proposals for fundamental change. Neither the proponents of tort law revision nor the advocates of unrestricted noneconomic damages have taken the current ferment about tort reform as an opportunity to develop a more integrated approach to the remedy issues raised by the ambiguous role that noneconomic damage awards play in modern tort litigation. This failure to discuss more forthrightly the relationship between the generosity of American noneconomic damage awards and the funding of litigation expenses has done a disservice to long-term reform of the tort remedy structure.

III. Attorneys' Fees As a Substitute For Noneconomic Damages

A. The Appropriateness of Economic Damages Together with Attorneys' Fees as a Tort Remedy

Professor Jeffrey O'Connell is the most notable advocate of awarding economic damages and attorneys' fees to prevailing plaintiffs in lieu of economic and noneconomic damages.\textsuperscript{63} In its basic form his proposal would limit noneconomic recoveries to nominal amounts,\textsuperscript{64} far below the levels permitted by the damage caps typical of the recent round of tort reform legislation.\textsuperscript{65} Further, the proposal would permit full recovery of all economic losses, including money damages suffered as an immediate consequence of intangible injuries.\textsuperscript{66} For example, lost earnings

\textsuperscript{62} See, e.g., Pierce, Institutional Aspects of Tort Reform, 73 Calif. L. Rev. 917, 918 (1985) (noting the existence of vested interests opposed to change).
\textsuperscript{63} O'Connell, supra note 3, at 333; See also Peck, supra note 40, at 1373-74.
\textsuperscript{64} O'Connell suggests a maximum amount of $10,000, resisting the temptation to award generous nonpecuniary damages in cases of particularly severe injury on the ground that full compensation of the economic consequences of such psychic injury is responsive to the plaintiff's need and to a sense of fairness, and because drawing a line between claims that do and do not merit compensation for intangible injury will tempt claimants to pad their claims in marginal cases, cultivating psychic injuries. Supra note 3, at 351, 360-64.
\textsuperscript{65} See supra note 9 for typical damage cap amounts.
attributable to an inability to return to work because of psychological
disability would be recoverable, as would counselling expenses associated
with recovery from traumatic events.\textsuperscript{67}

The chief merit of this proposal is that it would establish a system
of tort remedies that openly addresses calculable losses rather than a
system that relies on the inexact and haphazard award of nonpecuniary
damages. Such a revised system would inspire confidence in the integrity
of damage awards and improve the accuracy of the awards themselves.
Under the proposal, money would be used as a means of compensating
plaintiffs for goods and services that have an independent market value
rather than as a solatium for injuries that cannot be redressed by the
payment of money. This section of the paper will describe how the
award of special damages together with attorneys' fees is more responsive
to the goals of victim compensation, deterrence of unjustified risk-
creation, and shifting of losses from victim to wrongdoer than is the
award of noneconomic damages.\textsuperscript{68}

1. \textit{The Unresponsiveness of Noneconomic Damages to Tort
Remedy Objectives}

One of the principal objections raised against the limitation of tort
recoveries to economic losses is that the elimination of noneconomic
damages would insulate defendants from liability for a significant part

\textsuperscript{67} Id. O'Connell's basic proposal is reflected in Ingber, supra note 29, at 782.
Professor Ingber's principal concern is the development of a more rational, less arbitrary
approach to the compensation of intangible injuries. Id. at 811. Examining the prevailing
rationales for the unrestricted award of damages for intangible injuries, Ingber ultimately
finds unpersuasive all explanations for unlimited nonpecuniary awards other than their
function as a source of general damages available for attorneys' fees and makeweight
compensation. He, like O'Connell, would restrict recovery for pain and suffering and
psychic injuries to economic ramifications of the harm done. Id. at 782.
The difficulties of proof of economic consequences of intangible injury should not be
underestimated, however. The causal link between economic loss and the psychic disruption
which is alleged to have produced the loss could be extremely elusive, and the existence
of such a link could prove as speculative as the existence of a link between intangible
injury and the amount of the dollar award intended to compensate the loss. Proof of
causation-in-fact could require intensive use of expert testimony to sort out psychic injuries
caused by the defendant from costs attributable to pre-existing psychological difficulties
to which the plaintiff may have already been subject. In addition to sorting out pre-
existing psychic injuries from injuries triggered by the defendant's conduct, there is the
problem whether later physical injuries which are possibly attributable to psychic harm
caused by the defendant are in fact the responsibility of the defendant or of some
independent cause. See, e.g., Fuller v. Preis, 35 N.Y.2d 425, 430, 434, 322 N.E.2d 263,
266, 268, 363 N.Y.S.2d 568, 573, 576 (1974). Fuller involves the difficult question whether
an accidental tort victim's subsequent suicide is to be attributed to trauma caused by the
tort.

\textsuperscript{68} O'Connell, supra note 3, at 354.
of the harm caused, thereby frustrating the law's objectives of shifting losses to the wrongdoer and of vindicating the plaintiff's right to be free of psychic harm.\textsuperscript{69} In fact, noneconomic damages are less responsive to core tort remedial objectives than is generally supposed. Noneconomic damages are routinely excessive in cases where plaintiffs have suffered relatively minor injuries\textsuperscript{70} and usually inadequate in cases where plaintiffs have suffered truly catastrophic emotional and psychic injuries.\textsuperscript{71} This distortion occurs partly as a result of the strategic dynamics of large claim and small claim tort litigation and partly as a result of jury response to noneconomic damage claims.

In small claims litigation, where the award sought for pecuniary losses is simply too small to support both the expenses of litigation and an adequate net recovery for the plaintiff, the plaintiff's counsel is under pressure to seek a total damage award that is sufficient to meet the plaintiff's proven economic losses and to pay attorneys' fees. Those pressures are particularly evident in the negotiation of settlements of modest claims. In such cases, the defendant will often agree to pay noneconomic damages that are large in relation to the nature of the plaintiff's injury in order to induce the plaintiff to accept the settlement offer.\textsuperscript{72} For their part, the plaintiff's counsel and the plaintiff are willing to accept such an offer because they will thereby be assured a net recovery adequate to cover both the plaintiff's pecuniary losses and the attorney's fees. The defendant is willing to tolerate this overpayment

\textsuperscript{69} For statements of the argument that complete loss-shifting requires the compensation of noneconomic damages, see, e.g., Bell, The Bell Tolls: Toward Full Tort Recovery for Psychic Injury, 36 U. Fla. L. Rev. 333 (1984); Phillips, To Be or Not to Be: Reflections on Changing Our Tort System, 46 Md. L. Rev. 55, 60 (1986). See also Ingber, supra note 29, at 773, 781.

\textsuperscript{70} See, e.g., O'Connell \& Simon, supra note 4, at 6; Ingber, supra note 29, at 804-05.

The phenomenon of systematic overcompensation and undercompensation of tort claims for both economic and noneconomic damages has been a matter of frequent comment. One GAO study showed that in medical malpractice actions, plaintiffs whose economic damages exceeded $100,000 received less than that amount in settlement or damages while those whose economic losses were less than $50,000 often received payments substantially greater than their actual losses. U.S. Gen. Accounting Office, Medical Malpractice: Characteristics of Claims Closed in 1984, at 44-45 (GAO/HRD-87-55, Apr. 1987). Similar observations have been made with respect to automobile accident tort claims. See Franklin, A Symposium in Honor of Charles D. Gregory—Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 Va. L. Rev. 774, 780 (1967).

\textsuperscript{71} Id. "If there is one thing which the surveys have shown conclusively," reported Professor Alfred Conard, "it is that the tort system overpays the small claimants who need it least, and underpays the large claimants who need it most." Conard, Testimony Before the New York Joint Legislative Committee on Insurance Rates and Regulations, U. Mich. L. Quadrangle Notes at 15 (Fall 1970).

\textsuperscript{72} See, e.g., J. Fleming, supra note 56, at 211; O'Connell, supra note 3, at 340, 359 (citing H. Ross, Settled Out of Court 230 (1970)); Ingber, supra note 29, at 304.
because the absolute dollar amounts are small enough to make some overpayment acceptable as a price of prompt settlement. This is especially true where, as is often the case with smaller claims, the defendant's liability insurance policy is adequate to allow settlement of the claim within policy limits.

Conversely, in cases where large noneconomic damages are sought, undercompensation is typical. Part of the reason for this undercompensation is that the high stakes of litigation cause defendants to resist settlement and to protract the conduct of litigation, even when they face plaintiffs with strong cases. A strategy of resistance may exhaust the plaintiff and help to force a more advantageous settlement. Moreover, very few insurance policies will cover the claims involved in such large dollar cases. Unless the defendant is a competent self-insurer, it can be expected to resist a settlement that exceeds its insurance policy limits, thereby compelling the plaintiff who has suffered serious injury to settle for an inadequate amount or to proceed to trial in hopes of obtaining a judgment or coaxing the defendant to extend a revised settlement offer more responsive to its losses.

The ability of noneconomic damage awards to meet the full extent of plaintiffs' needs is further undercut by the simple unwillingness of factfinders to make large awards for intangible injuries. Factfinders, when considering whether to award substantial noneconomic damages, often seem to be constrained by the feeling that the requested award is simply too large, however justified the award may seem under a scheme that calls for progressively larger recoveries for progressively graver injuries. This constraint imposes a very real, but altogether uncertain, practical upper limit on noneconomic damages recoveries. Because there is such an uncertain limit on recovery, noneconomic

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73. O'Connell, supra note 3, at 340.

Those who have suffered injuries in automobiles know that prompt payment of compensation is rare, and that the gap between loss and compensation is vast. . . .

The long delays, characteristic of this system, produce a cruel injustice that strikes harder as injuries are more severe. A hard bargaining insurance company can buy the claim of such a person with a penurious settlement offer that capitalizes on his pressing needs in face of a long wait for trial.

75. See supra note 20 for evidence of jury restraint in making noneconomic damage awards.
damages do function reliably to achieve full compensation or the proper measure of deference. The uncertainty introduced into noneconomic damages awards as a result of this constraint may deter worthwhile litigation and may affect the plaintiffs' counsel's trial strategy. This is so because of the effect of noneconomic damages on the amount of effort that the plaintiff's counsel will be willing to invest in a lawsuit and on the capacity of the total damage award to meet pecuniary losses, attorneys' fees, and other legal expenses.76

2. The Suitability of Attorneys' Fee Awards as a Substitute for Noneconomic Damages

The award of reasonable attorneys' fees would offer a number of advantages over noneconomic damage awards. First, with respect to cases involving small claims, the award of reasonable attorneys' fees, combined with economic damages, would avoid dependency on contrived noneconomic damage claims.77 Further, widespread knowledge that damage awards are not necessarily and systematically bloated to provide additional compensation would contribute to public confidence in the integrity of damage settlements and judgments. Second, with respect to cases involving large claims, awards of attorneys' fees could be more effective than noneconomic damage awards at causing defendants to move promptly towards reasonable settlements. Unreasonable delays could result in increased plaintiff's legal fees, placing a premium on prompt resolution of disputes and attaching a cost to unreasonable delay.78 By contrast, noneconomic damages are not normally increased as a result of delays in settlement or of protracted litigation.79 Another advantage of awarding attorneys' fees rather than noneconomic damages in large claim cases is that such awards could reduce defendants' strategic resistance to settlement proposals. It is far more likely that an early settlement offer consisting of reasonable attorneys' fees and economic damages would lie within the defendant's policy coverage limits than would a settlement proposal that incorporated a large "opening offer" claim for noneconomic damages. The greater likelihood that its insurer could pay the damages in a promptly settled case would promote earlier settlement, especially by solvent defendants, who could thereby avoid

76. See discussion in supra note 36, describing relationship of lawyer effort to the earning potential of the case; see also O'Connell, supra note 3, at 359 (citing H. Ross, Settlements Out of Court 230 (1970)).
77. O'Connell, supra note 3, at 354.
exposing other assets to the costs of protracted litigation. The incentive to resist plaintiffs’ settlement offers that include large “opening offer” noneconomic damage claims would therefore be eliminated.

The award of attorneys’ fees in place of noneconomic damages will not eliminate all downward pressure on plaintiffs’ recoveries. When the claim for proven special damages substantially exceeds the defendant’s policy limits, the defendant will continue to resist any settlement beyond those limits. Furthermore, the pressure to settle promptly, which is created by the defendant’s obligation to pay the plaintiff’s ever-increasing legal fees, may be less effective in a case where the plaintiff’s special damages are large enough to create an independent reason to resist settlement or where the bulk of the plaintiff’s counsel’s work is completed relatively early in the litigation. In these settings, the risk that the defendant might have to pay an additional amount for the plaintiff’s counsel’s courtroom work may seem worth taking if further resistance to settlement is likely to move the plaintiff to settle for a sure, but lesser, amount instead of testing his case at trial. Thus, the award of attorneys’ fees will not overcome strategic resistance to settlements for amounts exceeding insured liability, but will be effective in removing the barriers to settlement that are peculiar to noneconomic damage awards.

In addition to promoting prompt, just settlements of strong plaintiffs’ claims, attorneys’ fee awards are consistent with the deterrence and loss-shifting goals of the tort system. Fees, together with proven economic damages, would constitute a remedy that is fully responsive to the plaintiff’s quantifiable losses. By shifting to the defendant all substantial economic losses caused by its wrong, this remedy would also signal strongly the legal system’s commitment to protecting the plaintiff’s right to be free of the injury suffered. Although the proposed scheme would force plaintiffs to forgo receiving substantial compensation of noneconomic damages, the reasonable fee award would provide more reliable compensation of fixed and ascertained losses than the uncertain

80. Even though defendants would probably still negotiate large plaintiffs’ claims downward, such settlement negotiations would be grounded on claims for reasonable fees and provable special damages. This development would narrow the range of competing settlement proposals and provide a sounder foundation for compromise.

81. One commentator has raised the question whether abandoning noneconomic damage awards might signal indifference by the legal system to psychic injuries. He concludes that the compensation of the economic consequences of an intangible injury would give an adequate signal of the law’s solicitousness and that abandonment of damages for the intangible part of the harm might actually diminish psychic and psychosomatic injuries by discouraging morbid absorption in one’s own aggrievement. Ingber, supra note 29, at 799-808. See also O’Connell, supra note 3, at 337-39, describing how plaintiffs are encouraged by litigation to develop an acute sensitivity to their pain and suffering.
award of noneconomic damages.\(^{82}\) Further, certain recovery for quantifiable losses would provide as much, if not more, compensation and deterrence as that accomplished by the fitful award of noneconomic damages.\(^{83}\)

Despite these advantages of attorneys' fee awards, the use of such awards is not unproblematic. First, there is the troublesome problem of arriving at a structure for attorney fee shifting that will not meet with the reflexive opposition of plaintiffs' or of defendants' groups. Second, a system of attorneys' fee awards faces several administrative problems, for example, the possibility that routine fee awards will prompt nuisance litigation\(^{84}\) and the danger that attorneys will put forward overstated claims, the review of which might impose a significant administrative burden on the tort system.\(^{85}\) In the next section of the article, these problems will be explored in detail.

B. The Features of a Fee Shifting System Appropriate For Common Law Tort Litigation

Two principal commentators have analyzed the compatability of attorney fee awards with the conduct of tort litigation. Philip Mause,\(^{86}\) and, more recently and more comprehensively, Thomas Rowe, Jr.,\(^{87}\) have analyzed the effects of various approaches to fee awards on such

\(^{82}\) See supra note 7 and M. Peterson, Civil Juries in the 1980's: Trend in Jury Trials and Verdicts in California and Cook County, Illinois 21, 32-34 (RAND R-3466-ICJ, 1987). This study describes the "negligence lottery" phenomenon which causes some plaintiffs to recover disproportionately generous awards while others go wholly uncompensated or receive amounts far less than their proven special damages. "Big verdicts" in only sixty-seven cases accounted for eighty-five percent of all plaintiffs' medical malpractice awards in Cook County during the four-year period of the study (1980-84). See also J. O'Connell, The Lawsuit Lottery (1979).

\(^{83}\) Cf. supra note 81.

\(^{84}\) See Rowe, supra note 78, at 150; Wolfram, The Second Set of Players: Lawyers, Fee Shifting and the Limits of Professional Discipline, 47 Law & Contemp. Probs. 293 (1984). The American Rule creates similar incentives for nuisance litigation, though, as Professor Rowe observes, the explicitly encouraging climate of a one-way prevailing plaintiff rule might increase marginally such nuisance litigation. The discouragement of abusive recourse to litigation in a one-way fee-shifting system is discussed in the text accompanying infra notes 124-26, 130-33.


\(^{87}\) Rowe, supra note 78; Rowe, The Legal Theory of Fee Shifting: A Critical Overview, 1982 Duke L.J. 651 [hereinafter Rowe, The Legal Theory].
matters as the encouragement of well-founded litigation, the discouragement of spurious suits, and the promotion of fair settlements. This work was stimulated in part by a wish to test the soundness of persistent suggestions that a prevailing-party system of fee awards be substituted for the American Rule of no fee awards in tort litigation. More recently, exploration of how fee shifting systems might operate in untried areas of litigation has been stimulated by the adoption of many new state and federal fee shifting statutes. The proliferation of these fee shifting statutes has raised new doubts about the appropriateness of the American Rule as the universal approach to payment of fees in litigation, and intensified the search for alternatives to the practice of making each litigant responsible for his own fees. What is most valuable in this

88. While the two-way indemnity rule is perhaps the most familiar alternative to the existing American Rule, and has been continually advocated in some quarters as suitable for general application in American litigation, see, e.g., Greenberger, The Cost of Justice: An American Problem, An English Solution, 9 Vill. L. Rev. 400 (1964); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); Lyman, Our Obsolete System of Taxable Costs, 25 Conn. B. J. 148 (1951); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 Colo. L. Rev. 202 (1966); Talmadge, The Award of Attorneys' Fees in Civil Litigation in Washington, 16 Gonz. L. Rev. 57 (1980-81), two-way indemnity has received little legislative support. See, however, as an example of a two-way fee-shifting statute applicable to tort litigations, Wash. Rev. Code Ann. § 4.84.250 (1988), which provides that in any action where the damages pleaded, exclusive of costs, is $10,000 or less, the prevailing party shall be allowed reasonable attorneys' fees, as determined by the court. The decided inclination, however, is towards prevailing plaintiff rules. Note, State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?, 47 Law & Contemp. Probs. 321 (1984).

Most early fee shifting proposals assumed the necessity or desirability of treating victorious plaintiffs and victorious defendants alike in awarding each its fees. The claimed benefits of this scheme include the discouragement of frivolous lawsuits, the alleviation of court congestion through the creation of powerful incentives to settle rather than to litigate, the just treatment of vindicated plaintiffs and defendants by making them financially whole by paying their legal expenses, and the encouragement of meritorious lawsuits which do not involve money damages adequate to fund attorneys' fees under a contingent fee arrangement. See, e.g., Mause, supra note 86, at 26-27. These benefits are won at the cost of discouraging good faith plaintiffs' suits where chances of victory are uncertain. See discussion accompanying infra notes 94-96.


90. The collection of articles appearing in Volume 49 of Law & Contemporary Problems is indicative of the heightened interest in fee shifting schemes.
work is its insistence on the need for refined analysis of the effect of specific fee award practices on the conduct of litigation. The central observation of the studies is that a given fee award scheme will not be appropriate unless it is consistent with the core objectives of the type of litigation where it is applied.91

For example, an essential characteristic of the American tort litigation system, one that is relevant to the choice of an appropriate fee shifting system for personal injury litigation, is its strong preference in favor of unencumbered access to remedies by good faith plaintiffs.92 The American tort system is designed to compensate injuries and to reduce the risk of injuries caused by legally responsible actors. To accomplish these goals, the system must encourage plaintiffs' actions that may prove to be unsuccessful. Otherwise, the continual testing and evolution of tort duties, which the system values, will be frustrated. These goals—compensation and deterrence—thus operate as a limiting factor, defining the range of acceptable fee shifting systems. Although a satisfactory fee shifting system must include some mechanism for promoting just settlements, deterring frivolous claims, and eliminating abusive trial tactics by plaintiffs and defendants alike, the system should accomplish these goals in a way that allows the plaintiff to undertake good faith litigation of uncertain outcome.93 The identification of this core concern permits a fairer appraisal of the responsiveness of various fee shifting systems to the objectives of tort litigation.

1. The Unsuitability of Two-Way Indemnity Fee Shifting

The nature of the core objectives of the torts system means that a true, two-way indemnity fee awards system cannot be tolerated. It is incompatible with the policy of affording good faith plaintiffs unencumbered access to the civil remedy system.94 In the absence of institutional arrangements allowing plaintiffs of lesser means to avoid fee

91. Rowe, supra note 78, at 144.
92. This preference for the encouragement of plaintiffs' actions is the principal reason why a common argument in favor of two-way fee shifting—that it is fair that the party whose legal action or defense has prevailed should not suffer the financial burdens of its successful action or defense—is not a winning argument. The claim for equality of treatment of plaintiffs and defendants must be reconciled with the objective of not deterring access by good faith plaintiffs to the remedy system. See Rowe, The Legal Theory, supra note 87, at 654.
93. Id.
94. The United States Supreme Court has commented favorably on the American policy of encouraging or accommodating litigation and the vindication of rights through the contingent fee system. This policy was construed with that promoted by the English Rule, which, by imposing what may prove crushing costs of litigation on the losing party, discourages access to the courts. See Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 237, 85 S. Ct. 411, 417 (1964) (Goldberg, J., concurring).
indemnity obligations in unsuccessful litigation, two-way fee shifting could deter such plaintiffs from bringing meritorious claims of uncertain outcome by exposing them to the risk of having to pay the defendant’s legal fees. Even commentators who have favored substitution of a two-way rule for the present American Rule have acknowledged that adequate access to the tort system would be frustrated by a pure two-way rule, and have suggested that the courts be given discretion to forgive the fee obligations of losing plaintiffs in appropriate cases.

The incompatibility of two-way fee shifting with the objects of tort litigation is also shown by that scheme’s effects on the settlement of cases. The obligation of the losing party to pay the winning party’s expenses is said to discourage unreasonable suits, unreasonable refusals to settle, and unreasonable delays in settlement by plaintiffs and defendants alike. The result is purportedly produced by compelling the losing party to pay the expenses suffered by the prevailing party as a result of the loser’s unreasonable tactics. The weakness in this argument is that by granting indemnity to the party who succeeds on the merits, losers are penalized simply for having lost, no matter how sound their decision to litigate or to resist settlement may have been.

There will be cases involving novel theories of liability where the measure of appropriate compensation is untested, and plaintiffs should not invariably be deterred from testing the adequacy of settlement offers. Nor should the plaintiff’s failure to obtain a damage award at trial that is as large as a proffered settlement amount establish, without more, the defendant’s right to fee indemnification.

95. See e.g., Mause, supra note 86, at 36; Rowe, supra note 78, at 153-54.
96. See, e.g., Corboy, Contingency Fees: The Individual’s Key to the Courthouse Door, 2 Litig. 27 (Summer 1976).
97. See, e.g., Mause, supra note 86, at 46-50; Talmadge, supra note 88, at 71-72.
98. Id. One difficulty with these proposals for mitigation is that they either depend on the application of awkward tests requiring that the plaintiff show that its losing case has advanced some significant public interest, or seem to abandon two-way fee shifting altogether in favor of a de facto rule in which winning plaintiffs are awarded their fees routinely and losing plaintiffs are rarely assessed the fees of prevailing defendants. A further difficulty of any but the most clearly stated of mitigation rules is that plaintiffs would have to await the result of the litigation and a judicial ruling on fee awards before knowing whether their unsuccessful litigation would create fee obligations. The uncertainty created by any such discretionary rule could itself discourage good faith litigation. Moreover, the “public interest” ground for mitigation would not, unless permissively interpreted, protect the undertaking of good faith garden variety lawsuits where no public interest existed. New and significant risks would affect the decision to undertake ordinary claims where the chance for success was good but not certain.
99. Rowe, supra note 78, at 154-61.
100. For identical reasons, offer of judgment rules, assessing the settlement offeror’s costs and fees to an offeree who declines the offered amount and who subsequently fails to obtain a judgment as large as the offered amount, are intended to promote settlements,
Moreover, the need for fee indemnity as an incentive to curb plaintiffs' tactical behavior has been exaggerated. Even when a losing plaintiff is not threatened with the prospect of paying the fees of a prevailing defendant, there remains the risk that loss on the merits will cost the client his remedy and the lawyer his fee. These risks provide powerful incentives for plaintiffs and their counsel to accept fair settlements. Similarly, the initial decision to litigate is not without risk for the plaintiff and counsel, even under the American Rule. If the additional sanction of fee indemnity is needed to deal with cases of frivolous litigation and oppressive conduct by plaintiffs' counsel, the sanction should, at a minimum, be narrowly focused on such abusive cases alone. Blanket application of a fee indemnity rule will thus create inappropriate pressures to settle rather than litigate even sound plaintiffs' cases, even where a defense settlement offer seems inadequate and should be tested at trial. The risks of litigating rather than settling even a strong case are comparatively great, and the additional threat of paying prevailing party fees in all cases of loss, or of failure to obtain at trial an award as great as an earlier settlement offer, would unduly burden plaintiffs' trial decisions.

True two-way indemnity weighs as heavily on good faith refusals to settle as it does on unreasonable refusals to settle. A fee shifting system must be more discriminating than that scheme in its effects on different classes of unsuccessful plaintiffs. So long as the tort system employs the private legal action as an important tool for remedying injury and for creating legal duties that serve the public interest, that but may place undesirable pressures on the parties. Rule 68 of the Federal Rules of Civil Procedure is the best known offer-of-judgment rule and there exist similar state rules. See, e.g., Wash. Rev. Code Ann. §§ 4.84.250-300 (1988) (offer of judgment device applicable in cases involving damages of $10,000 or less). The risk to plaintiffs is that defendants will use the device to make an unacceptably low settlement offer, expecting that the plaintiff will refuse, and hoping to defeat the plaintiff on the merits or to exhaust him in litigation. See Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L.J. 889. If offer of judgment devices become typical features of American tort litigation, they should be structured in a manner that distinguishes abusive refusals to settle from good faith testing of the adequacy of settlement offers. See, e.g., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 362-63 (1983), which would have granted discretion to courts to deny costs, expenses and interests to an offeror whose offer the court determined to have been made in bad faith. This provision was not reflected in the 1987 amendments to Rule 68, which are technical and effect no substantive changes. 7 Moore's Federal Practice ¶ 68.01 (1988).

101. The expense associated with discovery and trial preparation is a significant impediment to foundationless claims. It has frequently been noted that the self-interest of plaintiffs' counsel is an effective screen for claims with a low likelihood of success.

102. Although the need to provide adequate compensation through the tort system has been diminished somewhat by the increasing availability of disability benefits to compensate for injuries, Sugarman, Doing Away With Tort Law, 73 Calif. L. Rev. 555 (1985), such benefits are not sufficiently universal to permit an atrophying of effective tort remedies.
system must subordinate the defendant's right to fee indemnification to the need to maintain the plaintiff's free access to the tort system.

The conflict between one-way and two-way fee shifting as competing legitimate models appropriate to tort litigation is thus a false conflict.\textsuperscript{103} The notion that the clash of the defendant's interest in equal treatment and the plaintiff's interest in unencumbered access creates a genuine impasse depends upon the false view that the policy arguments for vindicating each of the two interests are of equal stature. This impasse can be overcome by focusing on the central objectives of tort litigation.\textsuperscript{104}

2. \textit{Prevailing Plaintiff Fee Awards as an Alternative to the American Rule}

A prevailing plaintiff fee shifting system, more so than either a two-way indemnity fee shifting system or the American Rule, would reconcile the dual objectives of promoting plaintiffs' access to the tort system and protecting defendants from unjustified claims. Plaintiffs suing under a one-way system would be able, as under the American Rule, to pursue reasonable theories of recovery, free of the threat that fee indemnification obligations would arise from the mere failure of a lawsuit.\textsuperscript{105} However, the inclusion of a definite attorneys' fee award as an integral part of the tort remedy would encourage the bringing of strong claims, large and small, to a greater extent than would the American Rule, and therefore would eliminate reliance on contrived noneconomic damage claims to make suits worthwhile. For defendants, especially in routine uncontested liability cases, the payment of reasonable attorneys' fees could often cost less than the payment of the inflated noneconomic damages that are now exacted as a cost of settlement of such claims. Such uncontested liability claims could be especially amenable to the development of relatively firm judicial guidelines fixing modest but adequate fees.

There might well be an increase in the number of cases brought, since the general availability of fees would encourage certain classes of litigation that are discouraged under the American Rule. Strong plaintiffs' cases that require extensive trial preparation but that involve modest

\textsuperscript{103} See Rowe, The Legal Theory, supra note 87, at 666.
\textsuperscript{104} Id.
\textsuperscript{105} One-way fee awards in favor of prevailing defendants is another conceivable form of fee shifting. To justify pro-defendant fee shifting, there must exist either (i) a sufficient bias against all plaintiffs' litigation that one wishes not only to encourage successful defense efforts but to provide no encouragement to successful plaintiffs who establish violations of tort duties; or (ii) a belief that the relative economic positions of defendants and plaintiffs is so disparate and that defendants are so disadvantaged that they should be protected from the obligation to pay the fees of winning plaintiffs, and should be entitled to their own fees when they win. The bias of such a system seems wholly at odds with the present dynamics of personal injury litigation. See Rowe, supra note 78, at 141.
dollar claims are presently discouraged under the American Rule. The expected recovery will simply not support the costs of litigation of such cases. The award of attorneys' fees not only would encourage the filing of such actions, but also would foster their prompt settlement. Reasonable legal fees for preparation of such a case for trial could well be substantially greater than the damages at issue; thus, settlement would be the better course for the defendant who thinks he is likely to be held liable.

An increase in the attractiveness of certain plaintiffs' actions will plainly not advance defendants' interests, but is consistent with the goal of accommodating the legitimate interests of plaintiffs and defendants. The defendant's right is defined not as the right to be free from suit, for in a system where liability rules are not fixed, testing of liability rules through plaintiffs' suits involves no legal wrong and provides the mechanism for establishing general tort duties. The defendant's right in this setting is instead the right to be free of plaintiffs' abusive litigation. The plaintiff's corresponding right is the right of full good faith access to the remedy system in order to test proposed theories of recovery. The prevailing plaintiff rule, grounded on a rationale of full recourse to compensation for legal injury, permits plaintiffs the free access to remedies that the tort system has valued, but contains its own limiting principle, namely, the protection of defendants against abusive litigation.

Because the protection of defendants from intolerable liability has dominated recent tort reform efforts, a prevailing party fee shifting scheme, modified to accommodate some losing plaintiffs' actions, might be more intuitively appealing to many legislators than would a prevailing plaintiff system. This is so because a prevailing plaintiff system, even if accompanied by the elimination of noneconomic damage awards and by the implementation of sanctions to deter frivolous and abusive plaintiffs' suits, would seem in the eyes of many to treat defendants unfairly, to accord plaintiffs a favored status, and to institutionalize the role of plaintiffs' counsel in obtaining tort remedies. Although a two-way

106. Id.
107. Id.
108. The risk of abusive recourse to litigation has been identified as a particular disadvantage of prevailing plaintiff fee shifting. Accordingly, the need for effective sanctions to discourage spurious litigation stimulated by the prospect of a fee award is viewed as an essential component of an effective prevailing plaintiff fee shifting system. See Rowe, supra note 78, at 147.
109. Rowe, The Legal Theory, supra note 87, at 657-59. Professor Dan Dobbs has taken exception to the "prejudicial" treatment of defendants flowing from one-way prevailing plaintiff fee shifting. See Dobbs, supra note 85, at 445.
110. Interestingly, opposition to the possible institutionalization of plaintiffs' counsel's role as gatekeeper to the remedy system by awarding fees to successful litigants could
fee shifting system could be modified to excuse good faith losing plaintiffs from fee indemnity obligations, a prevailing plaintiff rule fits more naturally with the objectives of American tort law and, unlike two-way indemnity fee shifting, requires no distortion of its fundamental assumptions to permit fee awards to all prevailing plaintiffs but not all prevailing defendants. Two-way indemnity systems rest upon the assumption that prevailing plaintiffs and prevailing defendants have an equal entitlement, as winners, to compensation for the expenses of successful litigation. The injury-compensation orientation of modern American tort law, however, is at odds with this assumption and supplies a rationale for distinguishing between winning plaintiffs' fee claims and winning defendants' fee claims.

Prevailing plaintiff fee shifting is common, though, where there is a strongly perceived interest in promoting plaintiffs' good faith litigation, as is the case with litigation brought under consumer protection or civil rights statutes. The public interest in promoting products liability and common law negligence litigation is strong, because such litigation has led to safer products and conduct and because compensation for accident injuries in our society continues to depend on giving plaintiffs ready access to tort remedies. Although the present willingness of legislatures to adopt a prevailing plaintiff system must seem doubtful, the limited focus of recent tort law revisions and their preference for restricting remedies should not be allowed to define the course of future reforms.

come from elements of the plaintiffs' bar as well as from the defense bar. Routine fee awards, subject to judicial review and removed from the realm of private ordering, would make the compensation of plaintiffs' attorneys a more integral part of the administration of tort claims and might cause a significant alteration in the plaintiffs' attorneys' self-conception as an independent actor. See infra text at notes 124-26, 131-33.

To the extent that the plaintiffs' bar believes itself to have been well-served by a system where fee awards have come from the plaintiff's damages, the relative loss of independence resulting from intense judicial scrutiny of fee claims may seem an undesirable sacrifice. See Rowe, The Legal Theory, supra note 87, at 657-58; Mause, supra note 86, at 30.

111. See Rowe, The Legal Theory, supra note 87, at 657-58; Mause, supra note 86, at 30.

112. Three-fourths of the fee shifting statutes specifically applicable to consumer litigation are prevailing plaintiff statutes as are seventy-nine percent of the antitrust fee shifting statutes. Note, supra note 88, at 329-31.

A recent nationwide survey of state attorney fee shifting statutes has discovered that fifty-four percent of the 1,974 statutes identified as mandatory fee shifting statutes among the 4,000-5,000 statutes surveyed, designated the prevailing plaintiff as the beneficiary of the statute, while nineteen percent of the statutes designated the prevailing party as the beneficiary and only 8.4 percent identified the prevailing defendant as the beneficiary. Id. at 330-31. The author views these findings as particularly significant because they indicate that the states, in developing alternatives to the American Rule, have not embraced the English rule of general indemnity, but have instead sought to encourage litigation by individuals and consumers. Id.
3. Administration of a Fee Shifting System

In developing an attorney fee award system, legislatures may draw upon the accumulated experience of awarding attorneys' fees under Title VII of the Civil Rights Act\textsuperscript{113} and other state and federal statutes authorizing such awards.\textsuperscript{114} Existing fee shifting systems have struggled both with the problem of setting appropriate fee awards and with regulating the conduct of lawyers tempted to abuse the fee award process. The chief difficulties have occurred in establishing and applying criteria for the reasonableness of fee awards, in verifying specific fee claims, and in addressing conflicts of interest that arise between lawyer and client in dividing settlement amounts between damages and fees.

Regarding the setting of reasonable fee awards, the effort by the Supreme Court to prescribe, and of the lower federal courts to apply, methods for calculating legal fees for purposes of Title VII litigation indicates that fee awards may be difficult to set and may themselves become the subject of continuing litigation. Using the basic calculation developed by the Supreme Court in \textit{Hensley v. Eckerhart},\textsuperscript{115} the trial court arrives at a reasonable fee, referred to as a "lodestar" fee award, by multiplying reasonable hours by a reasonable rate. The court may then make discretionary adjustments to this basic calculation to reflect the relative success or failure of the litigation in realizing the plaintiff's

\textsuperscript{113} The relevant portion of The Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988 (1976) states:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The legislative objectives of section 1988 support and subsequent court interpretation of the section has confirmed, the appropriateness of treating prevailing plaintiffs far more favorably than prevailing defendants in the exercise of judicial discretion to make fee awards. Prevailing plaintiffs promote statutory objectives by bringing civil rights actions, while the award of fees against them would chill their willingness to bring such actions. Accordingly, defendants rarely are awarded attorneys' fees in civil rights suits, while awards to prevailing plaintiffs are commonly made, unless a court finds that "special circumstances" would make the award unjust. For a discussion of the development in the case law of standards to be applied in making fee award decisions under section 1988, see Comment, Attorneys' Fees in Civil Rights Cases: Contingent Fee Awards Under Section 1988, 17 Pac. L.J. 1275, 1281-83 (1986), and, generally, on interpretive issues under section 1988, Note, Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act of 1976, 59 Notre Dame L. Rev. 1293 (1984).

\textsuperscript{114} See Fein, supra note 89; Percival & Miller, The Role of Attorney Fee Shifting in Public Interest Litigation, 47 Law & Contemp. Probs. 233 (1984); Zemans, supra note 89; and Note, supra note 88, for descriptions of the proliferation and the objects of fee shifting statutes.

\textsuperscript{115} 461 U.S. 424, 103 S. Ct. 1933 (1983).
objectives. In making these discretionary adjustments, the Hensley Court suggested, courts should continue to look to the factors enumerated by the Fifth Circuit in Johnson v. Georgia Highway Express, factors that the sponsors of Title VII suggested should be used in setting fee awards. The Johnson factors, which closely correspond to the factors enumerated in codes of professional conduct, include the following: time and labor expended by counsel, the novelty and difficulty of the case, the particular skill of the attorney, any preclusive effect the case might have had on counsel’s ability to take other cases, the attorney’s customary fee, the contingent nature of the fee award, any unusual time limitation imposed by the litigant, the amount of money involved and the nature of the relief sought in the case, the experience and reputation of counsel, any undesirability in being associated with the case, the length of the relationship between attorney and client, and the fees paid in similar cases.

Hensley's invitation to trial courts to make discretionary adjustments of the basic "lodestar" calculation has produced the greatest uncertainty in setting fee awards. In Blum v. Stetson the Court attempted to return the calculation of reasonable fees to a more objective basis, emphasizing that fee enhancements over and above lodestar amounts should normally not be expected. Nonetheless, because the Court in Blum indicated that computation of the basic lodestar amount, based on a reasonable hourly rate and a reasonable number of hours worked, should take into account any special value of the services provided, the courts have simply shifted the consideration of subjective factors to computation of the basic lodestar fee.

Despite the difficulties of calculating reasonable fees, most legislation providing for counsel fee awards is similar to Title VII and therefore leaves with the courts the burden of case-by-case determination of fee

116. 488 F.2d 714, 717-19 (5th Cir. 1974).
118. See Model Code of Professional Responsibility DR 2-106 (B) (1979) and ABA Model Rules of Professional Conduct Rule 1.5(a) (1983).
119. Two elements of the Johnson factors, the undesirability of the case and the amount of fees awarded in similar cases, are not listed among the criteria for reasonable fee awards set out in the Model Rules. See ABA Model Rules of Professional Conduct Rule 1.5(a) (1983).
121. Id. at 896-97, 104 S. Ct. at 1548.
122. Id. at 898, 104 S. Ct. at 1548-1549.
123. See, e.g., Jordan v. Multnomah Co., 815 F.2d 1258, 1262 (9th Cir. 1987); Greater L.A. Council on Deafness v. Community Television of S. California, 813 F.2d 217, 221 (9th Cir. 1987); Nisby v. Commissioners Court of Jefferson Co., 798 F.2d 134, 137 (5th Cir. 1986).
The prevalence of this statutory approach suggests that case-by-case fee setting does not present unsolvable administrative problems, as indeed it does not. Even some recent tort reform statutes incorporate provisions for the review of contingent fee arrangements, and these provisions will begin to involve the courts in reasonableness and fairness inquiries akin to those that a fee shifting scheme would require. In short, the establishment of appropriate fee awards under a fee shifting system will not require skills that the courts do not already possess and apply. Furthermore, it is not unreasonable to suppose that as the courts develop greater experience in applying existing fee award statutes, they will develop a surer hand in promptly and fairly adjudicating fee claims, and will be able to apply this same skill to fee claim disputes in routine tort litigation. It must be recalled, too, that while the substitution of attorney fee awards for nonpecuniary damages seemingly exposes defendants to a class of damages that are no less subject to potential abuse than are noneconomic damage awards at present, the trial judge or the parties, rather than the jury, customarily set attorneys' fees. Consequently, fee awards are far more amenable to full appellate review than are general damage awards. While appeals courts often review fee awards de novo, they typically overturn general damage awards only if those awards are "manifestly unreasonable."

Fee shifting systems have been plagued not only by the complications of calculating appropriate fee levels, but also by several distinct classes of unethical conduct by lawyers. One obvious problem with such systems is that they encourage claims for unperformed work and foster unnecessary work, protracted litigation, and padded fee claims. The short answer to this problem is that fraudulent or padded fee claims should fail to the extent that they are not reasonable. They are amenable to challenge by opposing parties and to review by the courts. One should not make light of the administrative costs associated with litigating questionable fee claims or minimize the risks of unethical conduct that the promise of fee awards creates. However, these costs and risks are inherent in any process by which fees are paid, whether that process is

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124. A recent comprehensive search of the statutes of the fifty states and the District of Columbia enacted as of 1983, striving to identify all statutes which provided for mandatory fee shifting in favor of one or another litigant, has located 1,974 fee shifting statutes of which 1,602, or eighty-one percent of the total, require the court to award "reasonable" fees to the favored party. Only thirty-six of the statutes included in the final sample, provided fixed upper dollar ceilings, and only eighteen provided fixed dollar amounts. See Note, supra note 88, at 323, 333-34.

125. Id.

126. See supra note 61.

127. See, Wolfram, supra note 84, for exposition of the risks of unethical conduct associated with large formal fee awards.
ATTORNEY FEE SHIFTING

based on formal fee awards paid by opposing litigants or on the extraction of the lawyer's fee from the client's general damage award. Indeed, opportunities for abuse are as great under the present American Rule as they would be under a fee shifting regime. It is not uncommon, as tort litigation is now conducted, for a lawyer to press the client to accept a smaller settlement than the strength of the claim would warrant simply in order to be quickly done with the case. Lawyers also exact contingency fees that are not justified by the work done. Thus, the problem of controlling undesirable lawyer conduct is not unique to fee shifting systems. The adoption of fee shifting in place of the American Rule would, however, transform the problem of overstated fee claims from one that involves a breach of trust by the lawyer in representing his client into one that involves the defrauding of the losing defendant. As a result of the involvement of this powerful interested party, the courts may more routinely be asked to intervene in what has long been a matter for resolution between lawyer and client.

Because fee awards would be paid by losing defendants, special patterns of abuse may emerge. Defense counsel would seek to minimize the total liability of its client for the aggregate amount of tort damages and reasonable plaintiff's fees. "Sweetheart arrangements" between the plaintiff's and the defendant's counsel, where the latter agrees to approve claimed legal fees in exchange for reduction of the total damage award for fees plus damages, would benefit the defendant and both lawyers at the plaintiff's expense.128 The negotiation by counsel for the plaintiff and counsel for the defendant of an aggregate award for damages and fees gives rise to obvious conflicts of interest for the plaintiff's counsel. Professor Charles Wolfram, noting the ineffectiveness of bar disciplinary mechanisms in controlling such conduct and the need to control the opportunities for such conduct, has suggested that all settlements of fee claims and plaintiffs' damages receive court approval.129 This approval would be conditioned on receipt from the plaintiff's counsel of affidavits certifying that the attorneys, in negotiating the damage settlement, were not influenced by concerns about attorneys' fees, that is, that the amounts fixed for the plaintiff's damages and counsel's fees were determined independently.130 Such an affidavit might not eliminate all fraud, but the requirement of an affirmative statement that fees and awards were independently arrived at would greatly reduce the likelihood of misconduct by all but the most cynical and incorrigible.

128. Id.
129. Wolfram, supra note 84, at 312.
130. Id.
A more elusive objection to fee shifting than potential administrative
difficulties is that the award of reasonable attorneys’ fees in tort litigation
would reduce the independence of plaintiffs’ counsel because the setting
of such fees and the resolution of fee claim disputes would require
routine and intensive court involvement. It must be conceded, however,
that the representation of clients under the many state and federal fee
shifting statutes now in effect apparently does not suffer from any lack
of inventiveness, energy, or independence among lawyers practicing under
those statutes. Further, many tort revision acts have already reduced
some degree of lawyer autonomy in negotiating fee arrangements with
clients by according clients the right to challenge such arrangements in
the courts.\footnote{\textsuperscript{131}} It is nonetheless conceivable that more routine involvement
by the courts in reviewing fee arrangements would subtly change the
plaintiff’s lawyer’s self-conception, emphasizing the lawyer’s role as docket
manager and gatekeeper of the remedy system and his dependency on
the process of judicial administration for his fees. The plaintiffs’ bar
has become accustomed to its making fee arrangements with some in-
dependence.\footnote{\textsuperscript{132}} A closely monitored fee award system, costing a measure
of this independence, may seem less attractive to plaintiffs’ attorneys
than continued reliance on general damage awards, at least so long as
the plaintiffs’ bar believes that it is well-served by general damage
awards. However, there can be no convincing objection to more routine
and effective oversight of the fairness of fee arrangements, given the
absence of true negotiation between plaintiffs and their attorneys that
has plagued contingent fee arrangements.\footnote{\textsuperscript{133}}

IV. CONCLUSION

The widespread adoption of statutes limiting nonpecuniary damages
requires a fresh appraisal of the remedy functions performed by these
awards and a renewed consideration of whether alternative provisions
should be made for accomplishing these remedy objectives. One function
performed by nonpecuniary damage awards is the payment of the plaintiff’s attorneys’ fee obligations, a form of damages that are not directly
unrecoverable under the American Rule. The recent restriction of tort
remedies has jeopardized this practical remedy function.

This article suggests that an appropriate response to these remedy
restrictions would be the award of attorneys’ fees to prevailing plaintiffs
rather than the reinstatement of noneconomic damages awards. The
special appeal of restricting noneconomic damages to nominal amounts
and reorienting compensation towards quantifiable injuries is that damage

\footnote{131. Id.}
\footnote{132. Leubsdorf, supra note 26, at 31.}
\footnote{133. Wolfram, supra note 84, at 297.}
awards could be more openly identified with the injuries to which they actually correspond and therefore could be calculated more accurately. One valuable by-product of this increased accuracy and candor might be a reduction of the skepticism about plaintiffs' awards that has undermined public confidence in the legitimacy of tort remedies.

The current round of tort reform has focused primarily on the confinement of plaintiffs' remedies. Future rounds should focus on the development of approaches to remedies that promote adequate and rational compensation both for quantifiable tort injuries and for the expenses of vindicating tort claims. Noneconomic damage awards, despite their imperfections, have survived the recent round of tort reform and remain a substantial component of tort remedies. Granting fee awards to prevailing plaintiffs in lieu of continuing reliance on general damage awards should be the next reform of the remedy system.