An Index and Table of Contents to the ALI Reporters' Study on Enterprise Responsibility for Personal Injury

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In 1986, the American Law Institute (ALI) conceived of a report to analyze and appraise the present state of the tort system and formulate recommendations as to its reform. Remarkably comprehensive in its scope, the Report amasses an overwhelming body of facts and figures which will, for some time, be "unparalleled as a general source of information and analysis of the tort system and its institutional complements . . . ." As calls persist for policy changes in areas from the environment to health care, the ALI Report takes on an enhanced role both as an important resource of vast amounts of information and, more controversially, as a proposal for change.

When a work of such magnitude is published, its utility is greatly undermined if it cannot be easily accessed. Unfortunately, the ALI's study lacks those crucial aids which could make its more than 1000 pages much more usable: Crucially, it is devoid of any index and even the table of contents contains only its thirty-six main headings, ignoring the many hundreds of significant subheadings. The authors, therefore, have herein created an index, as well as a comprehensive table of contents, in order to make the Report more "user friendly."

What follows is a brief description of the ALI's Reporters' Study,

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* The Samuel H. McCoy II Professor of Law, University of Virginia; A.B. Dartmouth College, 1951; J.D. Harvard University, 1954.
followed, in turn, by an expanded table of contents and a combined index for Volumes I and II.

**VOLUME I**

*Section A: Perspectives on the Tort System and the Liability Crisis*

Whether the Report is considered as endorsing either radical or overly cautious reforms, its value as a research tool is clear. Volume I's introductory section, "Perspectives on the Tort System and the Liability Crisis," discusses the vast problems of the existing tort system and suggests that, in part, changing social dynamics are at the root of many of today's problems. Noting the "huge gap between the promise and the performance of tort law," the first chapter also considers various alternatives to the tort regime.

Most notable in the Introduction is part VI, "Themes of the ALI Report." The reporters here endorse the continued use of tort law as "an important umbrella institution for the victims of personal injuries;" however, this section does not purport to advocate the continuance of the status quo. While recognizing the importance of tort law, the Report makes clear the need for "profound revisions" in what it sees as a flawed system. The closing sentences of the Introduction evidence this balanced approach: "We must seize this opportunity to reflect carefully on the strengths and weaknesses of the present regime, and to give a fair hearing to changes that will capitalize on the strengths and ameliorate the weaknesses. That, at least, is the spirit in which we produced this Report." Regardless of whether the ALI's recommendations are viewed as too restrained or too radical, it is undeniable that the Report provides a strong basis for discussion and debate.

*Section B: The Range of Institutional Systems*

Section B discusses, in sequence, tort law and liability insurance, workers' compensation, health insurance, private disability insurance, social insurance alternatives, and the role of markets and regulation.

In Chapter Two, the functioning of the present liability insurance regime is examined in light of the tort system, with the inter-relation

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4. *Id.* at 33.
5. *Id.* at 33-50.
6. *Id.* at 51.
7. *Id.* at 51-52.
8. *Id.* at 52.
of the two discussed. In large part, the reporters find that the uncertainties and vagaries of tort law itself hamper and burden tort liability insurance providers. As a corollary, the reporters indicate that the general inadequacies of the insurance markets themselves, while problematic, are not fundamentally responsible for shortfalls in the liability insurance industry. The ultimate conclusion is that "changes in the tort system that expand or contract liability and legal uncertainty . . . are likely to have the greatest impact on the ability of the insurance markets to provide the insurance protection that American enterprises require." This leads the Report to focus on the role of various other loss-shifting institutions and the possibility of "re-allocating responsibility among them and the tort system" to better stabilize the present regime.

Chapters Three through Eight contemplate the alternate loss-shifting institutions. The discussion of no-fault workers' compensation provides a telling contrast to the contemporary tort system and acts as a provocative case study in alternative modes of allocating liability and responsibility. In Chapter Four, the needs and deficiencies of the health insurance industry are spotlighted. The examination of the system's coverage, leading to a discussion of the relation between health insurance and tort liability, is quite timely and worthy of consideration in light of proposed changes to this nation's health care regimes. The present role of tort liability as a supplement to health insurance is shown to be significant and worthy of note. Chapter Five's discussion of private insurance in the form of both disability and life insurance shows the relatively modest role such insurance schemes play today, as well as their limited potential for the future. Chapter Six examines the viability of social welfare alternatives. Chapters Seven and Eight examine the respective functions of markets and regulation. The performance of both in creating incentives and deterrence is discussed at length, and the strengths and weaknesses of each are noted.

9. Id. at 86-94, 102.
10. Id. at 102.
11. Id. at 103. See also Id. at 97-102.
12. Id. at 103.
13. Id. at 154-56.
14. Id. at 175.
15. Id. at 175-80.
16. Id. at 203-31, 249-51.
Section C: The Variety of Personal Injury Settings

While Section B provides an exhaustive discussion of the foundation of various types of tort-based claims, Section C takes each major category of tort and tracks its evolution and position in the present tort regime chapter-by-chapter: product, medical, environmental, and workplace injuries are all discussed in turn. Each Chapter provides a suitable backdrop to the application of the various institutional approaches mentioned in Section B.

Section D: Comparative Evaluation

Throughout Section D, the reporters recognize controversy in establishing an evaluative framework for determining the "efficacy of the present tort system." By examining the three major goals of the tort system — deterrence, corrective justice, and distributive justice — from the standpoint of inputs and outputs of the system, the reporters endeavor to provide a complete study of the tort regime's capabilities.

Section D looks at automobile accidents, medical malpractice, products liability, environmental injuries, and workplace injuries. The conclusions center around deterrence, compensation, and regulatory and compensatory alternatives to the tort system. "In the final analysis, [the reporters'] . . . review of the empirical evidence leads [them] . . . to a relatively skeptical view of tort litigation as an injury prevention mechanism, and an even bleaker evaluation of the tort system as a compensatory mechanism." This conclusion is not all that surprising in light of the vast amount of data in the Report upon which this conclusion rests.

Volume II

Volume II, "Approaches to Legal and Institutional Change," contains the reporters' recommendations for change both in and outside the tort system. Granted that both conservatives and liberals have taken aim at the ALI's proposals as being either too radical or too timid, but with all the information collected by the ALI, the

17. Id. at 351.
18. Id. at 353-57.
19. Id. at 357-438.
20. Id. at 448.
21. II AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter VOLUME II].
reporters have, at the very least, cited the facts and sources of today's predicament.

Section A: Overview

The introductory overview to Volume II gives a brief synopsis to those "major lessons" learned in Volume I. Part I of Section A, "Principles for Reform," then outlines what it considers the overarching objective — "to ensure [the reporters'] . . . diagnoses and prescriptions are principled and non-partisan." Finally, this section provides a short "Synopsis of Proposals" which briefly discusses each of the proposed changes suggested by the authors. Each is then discussed in far greater detail in the following sections.

Section B: Liability Standards

In its discussion of liability standards, Section B examines product defects and warnings, regulatory compliance, medical malpractice, and joint and several liability. In the area of product defects and warnings, this section advocates changing the standards for the determination of design defects, imposing a risk-utility test ("really a form of negligence") and overhauling the exculpatory nature of product warnings, all under the umbrella of strict liability from the Restatement (Second) of Torts section 402A. In Chapter 3, the Report indicates that there should be a recognition of a regulatory compliance defense in tort litigation. Organizational ("enterprise") liability is discussed in reference to medical malpractice in Chapter 4. In the realm of joint and several liability, the reporters note the lack of a truly superior alternative, and instead propose a hybrid of the doctrine employing the equitable principles of an allocative approach for sharing the burden of an insolvent or judgment-proof defendant.

23. VOLUME II, supra note 21, at 3-7.
24. Id. at 8.
25. Id. at 15-29.
26. Id. at 81.
27. Id. at 33-82.
29. See VOLUME II, supra note 21, at 95-110.
30. Id. at 113-26.
31. Id. at 156-57.
Section C: Tort Damages

Proposals under the heading of “Tort Damages” are, for the most part, similar in tenor to those mentioned above. The Report calls for a “complete reversal of the collateral source rule,”32 even for third-party claims under workers’ compensation.33 The reporters propose retention of pain and suffering as a measure of compensatory damages; such a remedy, however, should only be available to those with “significant injuries,” and special guidelines should be developed to assist juries in the determination of such awards.34 A standard of clear and convincing evidence of reckless behavior is suggested for punitive damages.35 Further, the criteria by which a jury should determine punitive damages should be more narrowly construed to exclude information about the defendant’s wealth;36 closer judicial monitoring is also suggested.37 As for attorney fees, prevailing plaintiffs (but not defendants) should be able to recover such fees in addition to traditional compensable damages, limited by an offer-of-settlement provision.38

Section D: Environmental and Other Mass Torts

In their discussion of environmental and other mass torts, the reporters outline the problems posed by scientific uncertainty, and recommend a Federal Science Board, whose purpose would be to “educate the judiciary, develop general policy statements, monitor ongoing hazardous substance litigation, maintain a list of experts that courts could appoint, and convene science panels in a small number of cases.”39 In the case of general environmental liability, the “use of the CERCLA [Superfund Act] definition of the ‘discovery rule’ for tolling statutes of limitations,” the employment of “refined strict liability standards,” a regime of proportionate liability, and the utilization of medical monitoring for potentially long-latency diseases are all recommended.40

After discussion of the costs of the present legal processes and the

32. Id. at 182, 175-82.
33. Id. at 192-98. Calling for “a full offset of collateral source benefits against the employee’s tort recovery in tandem with elimination of any subrogation rights of the employer.” Id. at 197.
34. Id. at 229-30. Of particular note in this chapter is the thoughtful discussion about the whole concept of pain and suffering. Id. at 199-213.
35. Id. at 248-49.
36. Id. at 255.
37. Id. at 264. Also, national mandatory class actions for multiple punitive damages arising out of large-scale mass torts are proposed, as well as the use of ratios between compensatory and punitive damages. Id. at 263-65.
38. Id. at 315-16.
39. Id. at 350-51.
40. Id. at 381, 381-82.
existing collective processes for mass torts, the Report proposes two models for expanding collective procedures. Model 1 enlarges the existing federal multidistrict consolidation powers. Model 2 authorizes the resolution of "causal indeterminacy on a common question basis" and provides methods for coping with the "long-delayed risks of future disease or traumatic injury." Finally, the reporters debate the value of a no-fault compensation scheme; however, in light of the often blurred lines of causation, "a really satisfying resolution of the compensation-deterrence dilemma may be found only in the continuing development of the social insurance mechanisms and regulatory approaches discussed in . . . this Report."  

Section E: Beyond Tort  

Volume II offers several ideas for consideration which lie "beyond tort." One such semi-proposal is elective no-fault medical liability for the victims of medical accidents. Another recommendation is the "reconsideration" of contractual alternatives to tort, although the reporters shy away from any bold assertions in this area. In a more certain tone, the Report goes on to suggest taking steps to improve liability insurance through excess liability funds, regulatory reforms, and group risk retention. Finally, the Report explores filling gaps in compensation with social insurance.  

CONCLUSION  

In the ALI's Reporters' Study on Enterprise Liability for Personal Injury, the reporters faced a formidable task as they attempted to find the most practical and feasible solutions to significant problems in the tort system. Although, as indicated, some may take aim at its recommendations, there is little doubt of its value as a source of data and research. In an effort to enhance the Report's utility, we hereby endeavor to make the Report more accessible by providing a greatly expanded table of contents, a comprehensive index, in addition to the above thumbnail sketch of the Reporters' Study.

41. Id. at 412-19.  
42. Id. at 439, 419-39.  
43. Id. at 482-83.  
44. Id. at 487-516.  
45. Id. at 536.  
46. Id. at 537-53.  
47. Id. at 555-76.
# Table of Contents - Volume I

Forward .......................................................... xi
Preface .................................................................... xvii

## A. Introduction
1. Perspectives on the Tort System and Liability Crisis .......................................................... 3
   I. Introduction .................................................. 3
   II. The Focus of the ALI Study ......................... 7
   III. Sources of the Tort Crisis ........................... 11
      A. The Insurance Regime .............................. 11
      B. The Legal Regime .................................. 14
      C. Tort Law in a Broader Perspective ............. 19
4. The Aims and Limits of Tort Law ...................... 23
   A. Corrective Justice .................................... 24
   B. Social Grievance Redress ............................ 26
   C. Compensation/Risk Distribution ................. 28
      1. Fault limited ........................................ 29
      2. Overgenerous ...................................... 29
      3. Regressive ......................................... 30
      4. Expensive .......................................... 30
   D. Incentives for Prevention ............................ 30

## V. A Pluralistic Personal Injury Universe ......... 33
   A. No-Fault Liability ..................................... 35
   B. Private Contracts ..................................... 37
      1. Information ........................................ 40
      2. Intermediaries ..................................... 40
      3. Exit Costs .......................................... 40
      4. Social Altruism .................................... 41
   C. Loss Insurance ....................................... 42
   D. Safety and Health Regulation ...................... 45

## VI. Themes of the ALI Report ............................ 50

## B. The Range of Institutional Systems
2. Tort Law and Liability Insurance ...................... 55
   I. The Tort System ........................................ 56
      A. The Direct Cost of the Tort System .......... 57
      B. Tort and Other Sources of Compensation .... 58
      C. Increases in Tort Costs Over Time .......... 59
      D. Increases in Very Large Awards ............. 64
   II. The Liability Insurance System ................. 66
      A. The Functions of Liability Insurance ....... 66
      B. The Nature of the Liability Insurance Market ............................................. 68
         1. Forms of Coverage ............................ 68
2. The Structure of the Liability Insurance Markets .................................. 70

III. Short-Term Effects: Periodic Insurance “Crises” and the Underwriting Cycle .... 72

IV. The Long-Term Relation Between the Tort System and Liability Insurance .......... 76
   A. Market Conditions .................................................. 76
   B. Legal Developments ............................................... 79
      1. The Tort Cost “Push” ............................................. 80
      2. Adverse Selection Generated by Modern Tort Law ................. 83
      3. Increased Legal Uncertainty .................................... 86
         a. New Causes of Action in Tort ................................ 88
         b. Increased Numbers of Large Verdicts ...................... 90
         c. Expansive Judicial Interpretation of Liability Insurance Policies .......... 92
         d. Influence of CERCLA Liability on the Tort System .......... 94

V. The Impact of the Tort Reforms of the 1980's on Liability Insurance ............... 97

VI. Conclusion .......................................................... 102

3. No-Fault Workers’ Compensation .............................................. 105
   I. Introduction .......................................................... 105
   II. The Basis of Entitlement Under WC .................................. 108
   III. The Structure and Level of WC Benefits ........................... 113
   IV. Administering WC ................................................... 118
   V. Insurance and Prevention ........................................... 121
   VI. Conclusion .......................................................... 126

4. Health Insurance .................................................................... 129
   I. The Development of Health Care Insurance ............................ 130
   II. The Health Insurance Gap ............................................ 137
   III. The Impact of Health Care Cost Controls .......................... 146
   IV. The Health of the Uninsured ......................................... 152
   V. Relation Between Health Insurance and Tort Liability .............. 154
   VI. Conclusion .......................................................... 156

5. Private Disability and Life Insurance ....................................... 157
   I. Disability Insurance ................................................... 157
   II. Life Insurance .......................................................... 158
III. Coordination of Different Sources of Loss Insurance .................................................. 159
IV. Gaps in Disability and Life Insurance Coverage ............................................................. 162
V. Disability Insurance and Tort Reform ................................................................. 166
   A. History ........................................... 167
   B. Market Conditions and Psychological Barriers ......................................................... 168
       1. Adverse Selection .................. 169
       2. Moral Hazard ....................... 171
       3. Misperception of Risk ........... 173
   C. Implications ..................................... 175
       1. Cost .................................. 176
       2. Rationales for a Mandatory System ................................................................. 178
           a. Disability Insurance as an Alternative to Tort ........................................ 178
           b. Comprehensive Disability Insurance as a Social Reform .......................... 179
6. Social Insurance Alternatives .............................................................. 181
I. The Current System ........................................... 182
   A. Income Support for Those Excused from Work ...................................................... 182
       1. The Young .......................... 182
       2. The Old ............................ 184
       3. Working Age But Sick or Injured .............................................................. 186
   B. Income Support for Those Capable of Work ......................................................... 193
       1. The Unemployed ...................... 193
       2. The Poor ............................ 194
II. Discussion and Assessment ..................................................... 196
   A. Children and the Elderly .................. 196
   B. The Working Age Population .................. 197
       1. Medical Disability ..................... 197
       2. The Unemployed But Able .............. 200
III. Conclusion ........................................... 202
7. Markets .................................................. 203
I. Markets in General ........................................... 208
II. The Judicial Role When Consumers Are Informed ................................................... 212
III. The Courts' Role When Information Is Imperfect .................................................. 219
IV. Evidence About Risk Perceptions .......................................................... 223
V. Conclusion ........................................... 230
8. Regulation ........................................... 233
I. Introduction .................................. 233
II. Market Failure and Beyond .................... 234
III. Regulation as a Policy Instrument .......... 238
IV. Evolution and Performance of Administrative Regulation ......................... 242
V. Choosing Between Regulation and Tort Liability .................................. 249

C. THE VARIETY OF PERSONAL INJURY SETTINGS
9. Product Injuries .............................. 255
I. Introduction .................................. 255
II. Role of Markets ............................. 258
   A. Safety .................................... 258
   B. Compensation .............................. 261
   C. Imperfect Information .................... 262
III. Tort Liability ............................... 263
   A. The Objectives of Product Liability Law ................................... 263
      1. Deterrence Effects ........................ 263
      2. Insurance, Compensation, and Distribution ......................... 264
   B. The Burdens of Product Liability .................... 265
      1. Trends in the Caseload .................................. 266
      2. Trends in Awards .................................. 270
      3. Trends in Insurance Premiums and Availability ..................... 271
      4. The Changing Role of Product Liability ............................. 275
      5. Product Liability and Economic Performance ......................... 276
IV. Consumer Product Safety Regulation ......... 279
   A. The Focus of Safety Regulation ..................... 279
   B. The Impact of Federal Regulation ................. 280
V. Workers’ Compensation ....................... 283
10. Medical Injuries .............................. 285
I. Sources and Dimensions of the Current Problem .................................. 285
II. Malpractice and the Insurance System ........ 289
III. Malpractice and the Legal System .......... 293
IV. Malpractice and the Health Care System ... 295
V. Conclusion .................................... 299
11. Environmental Injuries ........................ 301
## I. The Nature of Environmental Injuries ....... 302

## II. Tort and Environmental Law ............ 309

## III. Environmental Toxic Tort Litigation ..... 317
   A. Groundwater Contamination ............... 321
   B. Nuclear Fallout ................................ 323
   C. Recent Developments .......................... 325

## IV. The Evolving Synthesis of Environmental Regulation and Tort Law ................ 328

## V. Conclusion ................................ 332

## 12. Workplace Injuries ........................ 335
   I. Introduction ................................ 335
   II. The Labor Market ............................ 336
   III. OSHA Regulation ............................ 341
   IV. The Return of Tort Litigation ............ 345

## D. COMPARATIVE EVALUATION

## 13. Tort and Its Alternatives ...................... 351
   I. The Evaluative Framework ...................... 351
      A. Deterrence ................................ 354
         1. Input Evaluation ........................ 354
         2. Output Evaluation ....................... 354
      B. Corrective Justice ........................ 355
         1. Input Evaluation ........................ 355
         2. Output Evaluation ....................... 355
      C. Distributive Justice ........................ 355
         1. Input Evaluation ........................ 355
         2. Output Evaluation ....................... 356
   II. Automobile Accidents ........................ 357
      A. Deterrence ................................ 357
      B. Compensation .............................. 361
      C. Regulatory Alternatives to the Tort System .................. 369
         D. Compensatory Alternatives to the Tort System .................. 374
   III. Medical Malpractice ........................ 376
      A. Deterrence ................................ 376
      B. Compensation .............................. 381
      C. Regulatory Alternatives to the Tort System .................. 385
         D. Compensatory Alternatives to the Tort System .................. 391
   IV. Products Liability ........................... 398
      A. Deterrence ................................ 398
      B. Compensation .............................. 402
      C. Regulatory Alternatives to the Tort System .................. 404
D. Compensatory Alternatives to the Tort System .................. 411

V. Environmental Injuries ............................. 412
   A. Deterrence .................................. 413
   B. Compensation ............................... 418
   C. Regulatory Alternatives to the Tort System .................. 420
   D. Compensatory Alternatives to the Tort System ............... 427

VI. Workplace Injuries .................................. 427
   A. Deterrence .................................. 428
   B. Compensation ............................... 431
   C. Regulatory Alternatives to Tort Law ....................... 433
   D. Compensatory Alternatives to the Tort System ............... 438

VII. Conclusions ........................................ 441
# Table of Contents - Volume II

**Forward** .................................................................................. xi
**Preface** ................................................................................... xvii

## A. Overview

1. Reforming the Tort System ..................................................... 3
   I. The Comparative Institutional Perspective ...................... 3
   II. Principles for Reform ..................................................... 7
   III. Synopsis of Proposals ................................................... 15

### Liability Standards

A. Product Defects and Warnings .............................................. 15
B. Regulatory Compliance ..................................................... 17
C. Medical Malpractice ........................................................ 18
D. Joint and Several Liability ............................................... 19

### Tort Damages

A. Collateral Sources .......................................................... 20
B. Workers’ Compensation and Product Liability .................... 20
C. Pain and Suffering .......................................................... 21
D. Punitive Damages ........................................................... 22
E. Attorney Fees ................................................................. 23

### Environmental Liability and Science Disputes

A. Science Experts and Panels .............................................. 24
B. Environmental Liability ................................................... 25
C. Mass Torts .......................................................................... 26
D. Administrative Compensation Schemes ............................. 28

## B. Liability Standards

2. Product Defects and Warnings ............................................. 33
   I. The Development of Strict Liability .................................. 33
      A. Emergence of Liability for Design Defects .................... 35
      B. The Duty to Warn ..................................................... 36
      C. Summary ...................................................................... 39
   II. Defining Design Defects .................................................. 40
      A. Alternatives to “Design Defect” Liability ....................... 41
         1. Absolute Liability Subject to a Contributory Negligence Defense .............................................. 41
         2. An Exculpatory Duty to Warn of Latent Defects ................................................................. 42
         3. Comprehensive Cost-Benefit Analysis ................................................................. 43
      B. Existing Approaches to Design Defect Liability ................ 44
1. The Consumer Expectations Test ............................................. 44
2. The Risk-Utility Test ......................................................... 47
C. Limiting the Scope of Cost-Benefit Analysis .......................... 52

III. Warning Issues ................................................................. 57
A. General Considerations ...................................................... 57
   1. The Problem of Effective Communication .......................... 59
   2. Paternalism Versus Consumer Sovereignty .......................... 62
B. Criteria for Hazard Warnings ................................................. 63
   1. Prior Risk Knowledge .................................................. 64
   2. Information Processing Issues .................................. 64
   3. Context ........................................................................ 65
   4. The Information Structure ........................................... 65
   5. The Behavior-Affecting Goal ....................................... 66
   6. The Cost-Benefit Goal ............................................... 66
C. Overview of Current Institutional Roles ................................. 66
   1. The Market ............................................................... 67
   2. The Federal Role ....................................................... 67
   3. The State Role .......................................................... 68
   4. The Courts ............................................................... 68
D. Policy Proposals .................................................................. 69

IV. Conclusion ............................................................................ 80

3. Regulatory Compliance ............................................................ 83
I. Interplay Between Regulation and Liability ............................. 85
II. Efforts to Fashion a Regulatory Compliance Defense ................ 90
III. Directions For Reform ............................................................ 95
   A. Regulatory Compliance as a General Defense to Liability ....... 95
   B. Limited Regulatory Compliance Defense .......................... 101
   C. Regulatory Preemption ............................................... 105
   D. Additional Considerations .......................................... 107

IV. Conclusion ............................................................................ 110

4. Medical Malpractice ............................................................... 111
I. Introduction ............................................................................. 111
II. Organizational Liability .......................................................... 113
III. Concerns About Organizational Liability ............................... 119

5. Joint and Several Liability .......................................................... 127
I. The Nature and Scope of the Traditional Approach .............................................. 129
   A. Liability Rules ................................................. 130
   B. Apportionment Rules ........................................... 134

II. Recent Reform Legislation .......................................................... 136
   A. Preserve the Status Quo ........................................... 138
   B. Partial Repeal ..................................................... 138
   C. The Comparative Approach ........................................ 139
   D. The Allocative Approach ......................................... 139
   E. Full Repeal ....................................................... 140

III. Analysis and Recommendations ............................................. 140
   A. Practical Implications and Contractual Possibilities ................. 141
      1. Product Liability ............................................ 142
      2. Medical Malpractice ........................................ 143
      3. Environmental Liability .................................... 143
      4. Municipal Liability ........................................ 143
   B. Fairness and Compensation under Recent Reforms ....................... 146
   C. The Relevance of Comparative Negligence ............................ 149
   D. Implementation .................................................. 152
      1. Procedure .................................................... 153
         a. The Burden of Proving Allocation .......................... 153
         b. The Problem of Reallocation ............................... 154
      2. The Effect of Settlement .................................... 155

IV. Conclusion ............................................................. 156

C. Tort Damages

6. Collateral Sources ........................................................................ 161
   I. The Traditional Approach ........................................ 162
   II. Recent Reform Legislation ........................................... 165
   III. Analysis ........................................................................ 167
      A. The Impact of the Traditional Rule ............................... 167
      B. The Impact of Reversing the Rule ............................... 172
   IV. Recommendations .......................................................... 175
      A. Reverse the Collateral Source Rule ............................... 176
      B. Rehabilitate the Collateral Source Rule ......................... 177
      C. Re-establish the Traditional Rule ................................ 179
      D. Evaluation of the Three Approaches ............................ 179
   V. Conclusion ............................................................. 182

7. Workers’ Compensation and Product Liability ................................ 183
   I. Introduction .................................................................... 183
   II. The Third-Party Focus ................................................. 184

680
III. The Policy Options .................................. 187
   A. The Dominance of WC Policy .............. 187
   B. The Dominance of Tort Policy .......... 188
   C. Substantive Blend of Tort and WC
      Policy ........................................... 189
   D. Administrative Accommodation of WC
      and Tort ........................................ 191
   E. Eliminating the Third-Party Product
      Liability Suit? ................................. 192

IV. Summary ............................................. 197

VIII. Pain and Suffering .............................. 199
   I. Introduction ................................... 199
   II. Should Pain and Suffering Be Compensated
       at All? ......................................... 204
   III. The Uneasy Case for Pain and Suffering .. 208
       A. Compensation ............................... 209
       B. Prevention .................................. 211
       C. Administration ............................. 213
   IV. How Should Pain and Suffering Damages
       Be Calculated? .................................. 217
       A. Cap ........................................... 218
       B. Scale ......................................... 221
       C. Schedule .................................... 223
   V. How Much in Damages for Pain and
       Suffering? ..................................... 227
   VI. Summary ......................................... 229

IX. Punitive Damages .................................. 231
   I. Introduction ................................... 231
   II. The Uneasy Case for Punitive Damages .. 236
   III. Legal Conditions for Punitive Liability .. 243
       A. Proscribed Conduct ....................... 243
       B. Burden of Proof ............................ 248
       C. Vicarious Liability and Insurability .. 249
   IV. Quantum of Punitive Awards ................. 252
       A. The Defendant's Wealth ................... 253
       B. Ratio of Punitive to Compensatory
          Damages ..................................... 256
       C. Multiple Punitive Awards ................ 260
   V. Summary ......................................... 264

X. Attorney Fees ..................................... 267
   I. Introduction and Summary .................. 267
A. Statutes of Limitations .................. 362
B. Liability Standards .................. 365

IV. Proportionate Compensation .......... 369

VI. Medical Monitoring .................. 375

VII. Conclusion .......................... 381


I. Introduction .......................... 383

II. New Procedures for Mass Torts .......... 389

III. The Costs of the Standard Legal Process ........ 393

A. Inconsistent Judgments ................ 394
B. Individuation of Damages .............. 395
C. Accrual of Manifest Injury .............. 396
D. Redundancy .......................... 397
   1. Effect on Access and Viability of Claims ................. 397
   2. Effect on Defendant Interests .......... 399
E. Biases in the Standard Process ........ 399
   1. Defendants' Strategic Advantages .......... 399
   2. The "Public Good" of Prevention .......... 401

IV. Existing Collective Process ............ 402

A. Voluntary Collective Process .......... 402
   1. Settlement ........................ 402
   2. Voluntary Joinder .................. 404
   3. Networks .......................... 405
   4. Test Case, Pattern Settlement ........ 405
B. Involuntary Collective Process .......... 407
   1. Claim and Issue Preclusion ........... 407
   2. Federal Multidistrict Consolidation .... 408
   3. Class Action ........................ 409
   4. Bankruptcy ........................ 410

V. Proposals for an Expanded Collective Process ............. 412

A. Model 1: Expanded Federal Consolidation ................. 412
B. Model 2: Augmented Collective Procedures For Mass Exposure Cases .......... 419
   1. Risk as Accrued Injury and Insurance Fund Judgments .......... 421
   2. Damage Scheduling .................. 426
C. Objections to Collective Process .......... 429
   1. Individualized Justice ................ 430
<table>
<thead>
<tr>
<th></th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>Excessive Costs of Collective Process</td>
<td>433</td>
</tr>
<tr>
<td>3.</td>
<td>Maturity Requirement</td>
<td>433</td>
</tr>
<tr>
<td>4.</td>
<td>Opting Out</td>
<td>434</td>
</tr>
<tr>
<td>VI.</td>
<td>Conclusion</td>
<td>438</td>
</tr>
<tr>
<td>14.</td>
<td>Administrative Compensation Schemes</td>
<td>441</td>
</tr>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>441</td>
</tr>
<tr>
<td>II.</td>
<td>Toxics Compensation Schemes: Exploratory Models</td>
<td>446</td>
</tr>
<tr>
<td>A.</td>
<td>Tort/No-Fault Hybrid: The Price-Anderson Act</td>
<td>446</td>
</tr>
<tr>
<td>B.</td>
<td>Narrowly-Focused No-Fault: The National Childhood Vaccine Injury Act of 1986</td>
<td>450</td>
</tr>
<tr>
<td>C.</td>
<td>Expansive No-Fault for Toxic Harms: Superfund 301(e) Study Group Report and Environmental Law Institute Model Statute</td>
<td>452</td>
</tr>
<tr>
<td>D.</td>
<td>Emerging Themes</td>
<td>455</td>
</tr>
<tr>
<td>III.</td>
<td>Challenges for Mass Toxics Administrative Compensation</td>
<td>457</td>
</tr>
<tr>
<td>A.</td>
<td>Designating a Compensable Event</td>
<td>457</td>
</tr>
<tr>
<td>B.</td>
<td>Setting Limits on Compensation</td>
<td>466</td>
</tr>
<tr>
<td>C.</td>
<td>Deciding Whether to Retain the Tort System</td>
<td>470</td>
</tr>
<tr>
<td>D.</td>
<td>Financing the System</td>
<td>473</td>
</tr>
<tr>
<td>IV.</td>
<td>The Uneasy Case for a Compensation Scheme</td>
<td>476</td>
</tr>
<tr>
<td>E.</td>
<td>BEYOND TORT</td>
<td></td>
</tr>
<tr>
<td>15.</td>
<td>Elective No-Fault Medical Liability</td>
<td>487</td>
</tr>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>487</td>
</tr>
<tr>
<td>II.</td>
<td>Compensation</td>
<td>491</td>
</tr>
<tr>
<td>III.</td>
<td>Administration</td>
<td>497</td>
</tr>
<tr>
<td>IV.</td>
<td>Prevention</td>
<td>502</td>
</tr>
<tr>
<td>V.</td>
<td>Elective No-Fault</td>
<td>512</td>
</tr>
<tr>
<td>VI.</td>
<td>Summary</td>
<td>515</td>
</tr>
<tr>
<td>16.</td>
<td>Encouraging Contractual Alternatives to Tort</td>
<td>517</td>
</tr>
<tr>
<td>I.</td>
<td>Post-Injury Contracts</td>
<td>517</td>
</tr>
<tr>
<td>II.</td>
<td>Pre-Injury Contracts</td>
<td>521</td>
</tr>
<tr>
<td>III.</td>
<td>Pre-Injury Voluntary Contracts: The No-Fault Alternative</td>
<td>526</td>
</tr>
<tr>
<td>A.</td>
<td>Would Firms Offer No-Fault Contracts?</td>
<td>529</td>
</tr>
<tr>
<td>B.</td>
<td>Would Contract No-Fault Be Socially Desirable?</td>
<td>533</td>
</tr>
</tbody>
</table>
IV. Conclusion .................................................. 536
17. Improving Liability Insurance ........................... 537
   I. Excess Liability Funds ................................. 538
   II. Regulatory Reforms ..................................... 544
      A. Repeal or Amendment of the
         McCarran-Ferguson Act and State
         Antitrust Exemptions ........................... 544
      B. More Effective Rate Regulation ................... 549
      C. Alternatives to Market Insurance ............... 551
   III. Conclusion ............................................ 553
18. Filling Compensation Gaps With Social Insurance .... 555
   I. Medical Insurance ..................................... 559
   II. Temporary Total Unemployment ....................... 561
   III. Permanent Total Disability ......................... 565
   IV. Partial Disability .................................... 568
   V. AFDC and the Social Minimum ....................... 572
   VI. Conclusion: On Comprehensiveness .................. 574

F. CONCLUSION
19. Postscript ................................................ 579
ALI REPORTER'S STUDY
ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY

Page numbers for Volume I are in plain type, Volume II are in italics. All bold entries indicate that the term is a section title or chapter heading in the text, and as such, these entries may not be all-inclusive of the subject matter which might be considered applicable. Further, not all sub-entries under those bold headings are necessarily to be found in that particular section or chapter.

A
A.H. Robins 345 - 46
ABA (see American Bar Association)
ABA Commission on Mass Torts (ABA-CMT) 412 - 15
Abinger, Lord 383, 384
Action in concert 129, 138, 147
Administrative Compensation Schemes (see also No-fault compensation)
Administrative no-fault model 28 - 29, 35, 105 - 27, 300, 512, 542
ALI Proposal 28 - 29
Attorney fees 306 - 307, 463 - 64
Background 441 - 46
Case for, 476 - 83
Compensable event 457 - 66
   Toxic harm
      definition 459 - 62
Compensation limits 466 - 70
   Insurance underpinning 469
   Probabilistic recovery 467 - 69
Environmental liability 372
Fear of injury 469
Financing 473 - 75
   Flat tax 475
Hazardous waste 460 - 61
Pecuniary loss 481
Switching mechanism 463 - 64
Threshold questions 479 - 81
Tort system 470 - 73
   Serious injury 471
Toxics compensation schemes
   Emerging themes 455 - 57
No-fault
   National Childhood Vaccine Injury Act of 1986, 450 - 52
No-fault, expansive
   Environmental Law Institute (ELI) Model Statute 452 - 55,
456 - 57
Superfund Section 301(e) Study Group Report 452 - 55, 456 - 57
Price-Anderson Act 446 - 49
Tort/No-fault Hybrid 446 - 49
Administrative no-fault model (see Administrative compensation schemes; Workers' compensation)
Administrative regulation (see also Strict liability) 203, 219, 221, 233 - 51, 256 - 58, 281
Advisory Committee on Civil Rules 283
AFDC (see Aid to Families with Dependent Children)
Agency for Toxic Substances and Disease Registry (ATSDR) 331 - 32, 333, 335, 341
Agent Orange 13, 27, 28, 183, 260, 320, 320, 331, 385 - 86, 420, 442 - 43, 453, 461, 476
In re "Agent Orange" Product Liability Litigation 93 -94, 183, 320, 347
Aid to Families with Dependent Children (AFDC) 135 - 36, 191, 194 - 95, 572 - 74
Table 195
AIDS 280, 356
Air pollution 303 - 05, 313, 315, 421, 426
Airline accident claims 267
ALI-CLP (see American Law Institute - Complex Litigation Project)
ALI Corporate Governance Project 299
Allen v. United States 324, 325 - 26, 448 - 49
AMA (see American Medical Association)
AMA/Specialty Society proposal
Medical malpractice 392 - 93
American Bar Association 244, 258, 262, 263
American Bar Association Commission on Mass Torts 26, 412 - 15
American College of Trial Lawyers 244, 258, 263
American Hospital Association 131, 132
American Law Institute - Complex Litigation Project (ALI - CLP) 26, 412 - 15, 416 - 19
American Medical Association (AMA) 224, 225, 392, 488
American National Standards Institute 67, 75
American Public Health Association 139
Antitrust immunity 78
Aplastic anemia 331, 343
Applicant screening 169
Apportionment contracts 142 - 46
Asbestosis 111
Assumption of risk (see also Markets; Risk) 16, 83, 210 - 32, 428, 430
Risk perceptions 210, 216, 223 - 29, 264
ATSDR (see Agency for Toxic Substances and Disease Registry)
Attorney Fees 23 - 24, 267 - 316
  Administrability 277, 281
  Administrative compensation schemes 463
  ALI proposal 23 - 24, 297 - 98
  ALI proposal, generally 315 - 16
  American rule 269 - 70
    Rationale 273 - 76
  Close-case 279
  Collateral sources as fund 163 - 65, 179, 181
  Continental rule 277 - 78
  Contingent fees (see Contingent fees)
  English rule 179, 277 - 78
  Fee setting 273, 297 - 305
    ALI recommendation 297
    Court-awarded fees 305
    Jury's role 303 - 04
    Lodestar method 299 - 300
    Percentage approach 300 - 03
Groundless litigation
  Compensating defendants 290 - 96
    Federal judicial system 291 - 95
  Lodestar method 299 - 300
  Loser indemnity (Loser-pays) 276 - 83
  Offer-to-settlement proposal 286 - 88
    Cushion 287 - 88
    Inappropriate contexts
      All-or-nothing issues 289
      Class actions 289 - 90
  Offer-of-settlement provisions 283 - 90
    Objections 284 - 85
  One-way rule 277, 290
  Opt-out claimant 437
Pain and suffering (see also Pain and Suffering) 215 - 16, 220, 267, 268, 270, 302, 312
Percentage approach 300 - 03
Prejudgment interest 308 - 15
Brief history 309 - 10
Settlement, The effect of 313 - 15
Prevention value 401 - 402
Pro-plaintiff prevailing rule 277
Punitive damages 270, 303, 304
RAND Institute for Civil Justice
Aviation study 444 - 45
Reasonable-loser 279
Risk
Fee shifting 275, 279 - 80
Special contexts
Hybrid of lodestar and percentage 307
Workers' compensation model 306 - 07
Attributable fraction 345, 347 - 48, 368, 370 - 71, 373 - 74 424
Individual attribution uncertainty 326 - 27
Automatic weapons 237
Automobile accidents 283, 357 - 75, 376, 380, 386, 407, 441, 446
Compensation 361 - 69, 384
Table
Percentage of Victims Compensated by Months (Quebec) 368
Compensatory Alternatives to the Tort System 374 - 75
Design improvements 373
Deterrence 357 - 60
Drunk driving 358, 371, 372
Guest passenger rule 362
Liability insurance 8, 57 - 58
No-fault compensation 374 - 75
Regulatory Alternatives to the Tort System 369 - 74
Safety incentives 357 - 60
Seatbelt legislation 247 - 48, 283, 371
Speed limits 371
Ayers v. Township of Jackson 378
B
Baylor Hospital 131
Bendectin 61, 276, 461, 482
Bentham 206
Benzene 332, 344
Birth Related Neurological Injury (BRNI) 394
Blue Cross 131, 132
Blue Ribbon Science Panels 335 - 39
Blue Shield 117
BOD 422
Borel v. Fibreboard Paper Products Corporation 318
Botulinum 401
Boyle v. United Technologies 106
Bravemen, et al. 154
British Medical Association 490
BRNI (see Birth Related Neurological Injury)
Burden of proof
  Administrative compensation schemes 448
  Allocation of liability 153 - 55
  Environmental liability 371
  Punitive damages 235, 248 - 49
  Uniform Products Liability Act 90
Byssinosis 111

C
Cadmium 329
California 186, 219, 235, 411, 492
  Department of Health and Human Services 68
  Proposition 65, 68, 477
  Safe Drinking Water and Toxic Enforcement Act of 1986, 477
  San Francisco County 234
Canada 229, 490
  Quebec 505 - 06
Cancer 10, 17, 36, 37, 76, 111, 112, 125, 224, 268, 303, 304, 306,
  307, 313, 323, 324 - 25, 329, 329, 335, 348, 355, 362, 370, 379,
  448, 459, 499, 501
  Blood cancer 339
  Breast cancer 513
  Hepatic cancer 321, 370, 371
  Leukemia 324, 332, 361, 363
  Liver cancer 370, 467
  Lung cancer 325 - 27, 337, 349
  Thyroid cancer 359
“Cancerphobia” 380
Carcinogens 230, 282, 302, 304, 313
Cardozo, Judge 354
Carson, Rachel 311
CERCLA (see Comprehensive Environmental Response, Compensation, and Liability Act)
CHAMPUS 138
Chelius 429
Christiansburg Garment Co. v. EEOC 292 - 95
   Christiansburg approach 300
Civil liability system 357, 377, 378, 382, 385, 390, 441
   Legal developments 79 - 97
Claim preclusion 407 - 408
Claims-made coverage 69 - 70
Class actions (see also Mass Torts; Collective judicial procedures)
   Bankruptcy 410 - 11
   Mandatory class actions 408 - 09, 411, 414 - 19, 420, 436
   Multi-state class actions 417 - 18
   National class actions 417 - 19
   Punitive damages 262 - 65
Clean Air Act 242, 314, 330
   Section 109(a)(1), 312
   Section 112, 313 - 14
Clean Water Act 315, 330 - 31
CME (see Continuing Medical Education)
Cohen, Wilbur 134
Collateral estoppel 407 - 08
Collateral sources 14, 20, 100, 113, 161 - 82, 192, 197, 216, 229, 268, 270, 379, 473, 487, 529, 530, 538, 560 - 61, 568
   Analysis 167 - 75
   Impact 167 - 72
   Recommendations 20, 175 - 82, 558
      Evaluations 179 - 82
      Payments 19, 98, 164 - 66, 293, 299, 357, 366, 383, 393, 396, 397, 399, 403
      Rehabilitate the rule 177 - 78
      Reverse the rule 176 - 77, 267
      Traditional rule, Re-establishment of 179
   Reform legislation 165 - 67
   Reversing the rule 176 - 77, 267, 481
   Impact 172 - 75
27, 28, 264, 306, 383 - 439
Expanded collective process
   Proposals 412 - 37
      Damage Scheduling 426 - 29
      Model 1 - Expanded federal consolidation 412 - 19
      Model 2 - Augmented collective procedures for mass exposure cases 419 - 29
Risk
   Accrued injury 421 - 26
   Insurance fund judgments 421 - 26
Existing collective process 402 - 11
Involuntary collective process
   Bankruptcy 410 - 11
   Claim and issue preclusion 407 - 08
   Class action 409 - 10
   Consolidation, Federal multidistrict 408 - 09
Objections 429 - 37
   Costs of collective process 433
   Individualized justice 430 - 32
   Maturity requirement 433 - 34
   Opting out 434 - 37
   Preconditions 437
Voluntary collective process
   Networks 405
   Settlement 402 - 04
   Test case, Pattern Settlement 405 - 07
   Voluntary joinder 404 - 05
Colorado 90, 258
Command-and-control regulation 42
Commercial general liability insurance 55, 68, 71, 85
   Large verdicts, increase in 91 - 92
   Degree of competition 71 - 72
Commercial multi-peril coverage 68 - 69
Comparative institutional perspective 3 - 7, 479
Comparative negligence 135, 138, 139, 141, 149 - 52, 186
Competitive markets (see generally Markets) 38 - 42, 52, 203 - 32
Comprehensive Environmental Response, Compensation, and Liability Act — CERCLA (see also Superfund Act) 25, 91, 94 - 96, 316 - 17, 331, 364, 381, 414 - 15, 418, 474
   Influence on tort system 94 - 97
Comprehensive general liability (see also Commercial general liability) 68
Conclusions
   Review of empirical evidence 441 - 48
Consolidation 307, 408 - 09, 412, 420, 430 - 31, 443, 479

692
Expanded federal consolidation, Model 1, 412 - 19
Federal multidistrict consolidation 408 - 09, 437
Mass torts 26 - 27
Consumer awareness (see also Markets, risk perception) 210, 216, 223 - 29
Consumer expectations test 16, 44 - 47
Consumer Federation of America 82
Consumer Product Safety Act 281
Consumer product safety regulation 45
Focus 279 - 80
Impact of federal regulation 280 - 83
Consumer sovereignty 205, 207 - 208
Continuing Medical Education (CME) 389 - 90

**Contractual Alternatives to Tort**
- Post-injury contracts 517 - 21
  - Contingency contracts 521
  - Imperfect information 519
  - Prohibition against sales to third party 19, 518 - 19
- Pre-injury contracts 521 - 26
  - Imperfect information 521
  - Two-price schemes 522 - 26
- Pre-injury voluntary contracts
  - No-fault 526 - 36
    - Desirability 533-36
    - Viability 529 - 33
- Contribution (see also Comparative negligence) 127 - 28, 129, 130 131, 134 - 35, 136, 139 - 40, 146, 149 - 50, 152, 155, 157, 186 - 87, 188, 190, 192, 197
  - Equitable contribution 139, 150 - 54, 155 - 56, 157
- Contributory negligence 16, 83, 135, 138, 149, 428, 430
  - Design defects 41 - 42
- Cooter 245 - 46
- Copper-7 intrauterine device 277
- Corporate enterprises 26, 32, 50
- Corporate hospital responsibility 15
- Corrective justice 24 - 25, 355, 362, 374, 375, 402 - 03, 404, 419, 431 - 32, 441 - 42

693
Cost-benefit analysis

Design defects 43

Limiting the scope of 52 - 57

Warning issues 66

Cost (direct) of tort system 57 - 58

Cost push 80 - 83

Court-appointed expert (see also Experts) 332 - 35, 339, 341 - 42, 351, 360 - 61, 369 - 74, 380, 381

CPSC (see Consumer Product Safety Commission)

Crack cocaine 237

Critical Legal Studies 352

D

Dalkon Shield 10, 13, 27, 61, 262, 331, 345 - 47, 349, 385 - 86, 420, 460 - 62, 478, 480, 481

Damages (see Tort damages)

Damages, scheduling 426-29, 430

Danzon study of malpractice reform 100, 167, 174, 384

DCE (see Designated Compensable Event)

Default rules 219, 232

Risk allocation 205

Delaney Clause 282

Delgado 371

Democratic party

Advocacy of national health insurance 144

Denmark 411

Department of Justice Study, 1987, 81 - 83

Department of Justice Study, 1986, 61, 81 - 83

Department of Transportation 369

Depression, The Great 167

DES (see Diethylstilbestrol)

Designated Compensable Event (DCE) 393 - 94, 396 - 97

Design defects 40 - 57, 246, 345, 527, 532 - 33

Alternatives to "design defect" liability

Absolute liability subject to a contributory negligence defense 41 - 42

Comprehensive cost-benefit analysis 43

Exculpatory duty to warn of latent defects 42 - 43

Cost-Benefit analysis

Limiting the scope of 52 - 57

Existing approaches

Consumer expectations test 44 - 47

Risk-Utility test 47 - 52


694
Automobile accidents 357 - 60
Environmental injuries 413 - 18
Medical malpractice 376 - 81
Product liability 398 - 402
Workplace injuries 428 - 31
Devlin 360
Diabetes 153
Diethylstilbestrol (DES) 27, 27, 319, 353, 385 - 86, 420, 439, 460 - 62, 476
Disability insurance 29, 30, 41, 59, 130, 134, 157 - 58, 217, 269, 444
Gaps 162 - 66
Permanent Partial Disability Insurance 45
Premiums 161, 169 - 70
Private disability and life insurance (see also Life insurance) 157 - 80
History of, 167 - 68
Mandatory scheme 175 - 80
Cost 176 - 78
Rationales
  Alternative to tort 178 - 79
  Social Reform 179 - 80
Market conditions and psychological barriers 168 - 75
  Adverse selection 169 - 71
  Misperception of risk 173 - 75
  Moral hazard 171 - 73
Tort reform and disability insurance 166 - 80
AIDS 280, 356
Asbestosis 111
Aplastic anemia 331, 343
Byssinnosis 111
Cancer (see Cancer)
Environmental carcinogenesis 375
Environmental disease (see also Environmental injury) 9, 25 - 26, 353, 355 - 56, 357, 360, 362 - 63, 369 - 71, 373 - 74, 481
Hepatic angiosarcomas 321
Leukemia (see Cancer)
Long-latency disease 16, 25 - 26, 51, 92, 125, 235, 328, 341, 345, 409, 419, 421 - 24
Occupational disease 110 - 17, 120 - 21, 125 - 26, 335, 338 - 39, 341, 345, 428, 429, 434, 436, 438 - 40
Pelvic inflammatory disease (PID) 345 - 46
Pica 303
Pneumoconiosis 111
Respiratory disease 303, 313
Signature disease 322, 462
Dobbs, Professor Dan 270
Doll and Peto article 304 - 307
Donora 421
Dow Chemical Company 260 - 61
Drunk driving 358, 371, 372
Dupont Plaza Hotel fire 385 - 86
Dual system: liability and regulation 85 - 89
Duty to warn (see also Warning issues)
  Exculpatory duty to warn of latent defects 42 - 43

E
Economic loss 35, 59, 94 - 95, 163, 164, 165, 218, 264, 365 - 66, 367, 384, 392 - 93, 397, 403, 414, 496
  Victim's burden 59, 264
Elective no-fault compensation (see Medical liability; No-fault compensation)
Elam v. Alcolac, Inc. 326
Empirical evidence, review 441 - 48
Employment Retirement Income Security Act (ERISA) 185, 197, 572
Energy assistance payments 196
Enforcement deficit
  Punitive damages 257 - 59
Environmental concerns 12 - 13
Environmental Law Institute (ELI)
  Model Statute 452 - 55
  No-fault model 471
  Proposal 461 - 62, 474 - 75
Environmental liability, Standards of (see also CERCLA) 3, 24 - 29, 62 - 64, 85, 87, 89, 94 - 97, 115, 142, 143 - 44, 145, 152, 161, 237, 353 - 82
  ALI proposal 25 - 26, 381 - 82
  Background 353 - 58
  Class actions 358 - 60
  Litigation, Infrequency of 355 - 56
  Medical monitoring 375 - 81
ALI view 378 - 81
   Ayers v. Township of Jackson 378
   Latency problems 375 - 81
   Monitoring damages 376 - 77
   Statutes of limitations 376
Proportionate compensation
   ALI recommendations 369 - 75
   Attributable fractions 370 - 71, 372 - 73, 374 - 75
   Class certification 374
   Probabilistic causation 372 - 73
Science disputes
   Administrative compensation schemes 28 - 29
   Environmental liability 25 - 26
   Mass torts 26 - 27
   Science Experts and Panels 24 - 25
Science panels 360 - 61
   Standards, background 353 - 58
   Standards of liability
      Mix of strict liability and negligence 365 - 68
   Statutes of limitations 362 - 64
   Statutes of repose 363 - 64
Environmental cleanups 95
Environmental impairment liability insurance 85
Environmental injuries (see also Environmental torts; Tier III torts)
   3, 7, 9, 11, 22, 301 - 34, 412 - 27, 441 - 48
   Compensation 418 - 20
   Compensatory alternatives 427
   Deterrence 413 - 18
   Disease 9, 25 - 26, 303, 353, 355 - 56, 357, 360, 362 - 63, 369 -
      71, 373 - 74, 481
   Environmental law 309 - 17
   Expense 30
   Groundwater contamination 321 - 23
   Litigation 32
   Nuclear fallout 323 - 25
   Punitive damages 18
   Recent developments 325 - 28
   Regulation and tort law, Synthesis between 328
   Regulatory alternatives 238, 420 - 27
   Table
      Air Pollution Emissions Trends 423
Tort and environmental law 33, 309 - 17
Environmental law 238, 309 - 17, 330
Environmental Protection Agency (EPA) 68, 91, 99, 239, 242, 246, 248, 279, 305, 307, 315, 321, 341, 420
National Contingency Plan 316
National Priority List of hazardous waste sites 316, 331 - 32
Pesticides Office 68
Environmental torts (see also Tier III torts) 317 - 483
No-fault program (see also Administrative compensation schemes) 476
Environmental toxic tort litigation 317 - 28
Environmental toxins 304 - 05
EPA (see Environmental Protection Agency)
Epidemiology 324, 328, 337, 340, 341, 345, 358 - 59
Equal Access to Justice Act 277
ERISA (see Employment Retirement Income Security Act)
Exclusion waiver 143 - 44
Court-appointed expert 332 - 35, 339, 341 - 42, 351, 360 - 61, 369 - 74, 380, 381
Science experts and panels 24 - 25

F
Fair Labor Standards Act (FLSA) 258
"False positives" 171 - 73
Family Security Act of 1988, 194, 195
FDA (see Food and Drug Administration)
Federal Employers’ Liability Act (FELA) 362, 430
Federal Judicial Center 340
Federal Rules of Civil Procedure
Rule 11, 292 - 94, 300
Rule 16(f), 292
Rule 20, 404
Rule 23, 409 - 10
Rule 23(a), 262
Rule 26(g), 292
Rule 68, 283
Federal Rules of Evidence
Rule 706, 332 - 33, 335, 341
Federal Science Board 339 - 51
Application to Agent Orange litigation 347 - 48
Application to Dalkon Shield litigation 345 - 47
Procedure 343 - 45
Federal Superfund Act (see also CERCLA; Superfund Act) 94

698
Federal Tort Claims Act 93, 323 - 34, 448
Federal Toxic Substances Board 25
Federal Water Pollution Control Act 314
Federation of State Medical Boards 387
FELA (see Federal Employers’ Liability Act)
Ferebee v. Chevron Chemical Company 320
Finland 490
First-party loss insurance 42
Fishback 429 - 30
Florida 203, 258, 490, 497, 502, 527
Focus of ALI study 7 - 11
Food and Drug Administration (FDA) 68, 73, 90 - 92, 229, 242 - 43, 245 - 46, 248, 279, 280, 282, 341, 405, 411, 474
   Public Board of Inquiry 335
Food, Drug and Cosmetic Act 97, 452
Food Stamps 196
Ford Motor Company 232
France 411
Fraud 46 - 47, 70, 171 - 73, 178, 180, 521
Frye v. United States 334

G
Gaps
   Attorney fees, American rule 276, 280
   Christiansburg rule 293
   Consumer information 222, 227
   Disability insurance 162 - 66
   Fault and no-fault compensation for loss 496
   Health insurance 43 - 44, 137 - 45
      Advocation of national health insurance 144
         Underinsurance 142, 143
   Life insurance 162 - 66
   Malpractice insurance 126
   Malpractice litigation
      Understanding effects of 299 - 300
   Product liability 188
   Risks, perception of 227
Social insurance, Filling Gaps with 43 - 44, 555 - 76
   Aid to Families with Dependent Children 573 - 74
   Lack of a national disability program 192
   Medical insurance 559 - 61
Partial disability 568 - 72
Permanent total disability 565 - 68
Social minimum 572 - 74
Temporary total unemployment 561 - 65
Tort claims, potential and actual 356
Workers' compensation 188
Gaudry 360
Gaumer 388, 389 - 90
General Accounting Office (GAO)
1987 Study 64
1988 Study 61
General Aviation Accident Liability Standards
(H.R. 2238/S-473) 90
General Electric 217
General Motors 217
Georgia 261
Germany 411, 555
Gilmore, Grant 517
Grady 246
Grimshaw v. Ford Motor Co.
Pinto case 232
Groundwater contamination 303, 321 - 23, 416, 418, 421
Guinivan, Professor 556
H
Halley's comet 245
Hand, Learned 357
“Hard Paternalism” 207
Harvard Medical Practice Study 154, 491, 495 - 97, 501, 504 - 05
Harvard Medical Practice Study Group 380 - 81
Harvard Medical Practice Study of New York Hospitals 298, 385 - 86
Harvard School of Public Health 321
Hazard fee 453, 474
Hazardous waste 63, 86, 94 - 95, 143, 154, 305, 316, 332, 353, 354,
363, 388, 415, 416, 417, 418, 442, 453, 454, 459 - 61, 474, 481
Health and safety regulation 45 - 50
Health Care Quality Improvement Act of 1986, 391
Health expenditures, national 146
Health insurance 59, 129 - 56
“Certificate of need” rules 147
Cost-control 146 - 51
Two-pronged approach 147
Cross-subsidies 150 - 51
Development of 130 - 37
First-party health insurance 361
Gap in, 43 - 44, 137 - 45
Advocacy of national health insurance 144
Underinsurance 142 - 43
Health Maintenance Organizations (HMO) 148
National health insurance 144
Proposals and models 144 - 45
Expenditures 146
Pepper Commission Report 145
Preferred Provider Organizations (PPO) 148
Private commercial insurers 132
Private insurance 163, 164, 166, 175, 178, 367
Rate regulation 147
Risk pools 150 - 51
Tort liability, relation to 154 - 56
Uninsured 152 - 54
Universal coverage 151
Health, Education and Welfare, U.S. Department of
1971 Report 387
Health Maintenance Organization (HMO) 118, 120 - 21, 124, 148
Henningsen v. Bloomfield Motors 275
Hepatic cancer 321, 369 - 71
HMO (see Health Maintenance Organization)
Holmes, Justice 392, 426, 438
Hooker Chemical 319
Hospital accreditation 390 - 91
Huber 400 - 01

I
Iatrogenic injury 295, 299, 383, 385, 386, 394, 493, 495, 499, 500, 502, 510, 513, 514, 528
Idaho 138 - 39
Illinois 203
Cook County 234
In re Agent Orange Product Liability Litigation (see also Agent Orange) 93 - 94, 320
In re Insurance Antitrust Litigation 77 - 78
Indivisible injury 129 - 30, 131, 147
Industrial (occupational) disease 110 - 17, 120 - 21, 125 - 26, 335, 338 - 39, 341, 345, 428, 429, 434, 436, 438 - 40
Industrial Disease Standards Panel (IDS Panel) 335, 336-39, 344, 350
Informed consent 15, 19, 293, 378
Institutional systems, The range of 55-251
(see Health insurance)
(see Disability insurance: Private disability and life insurance)
(see Markets)
(see Regulation)
(see Social insurance alternatives)
(see Tort law and liability insurance)
(see Workers' compensation, No-fault)
Insurance Services Office (ISO) 12, 77, 78-79, 102, 165, 167-68, 173-74, 545-49
Intrauterine Device (IUD) 277, 319, 345-46
Issue preclusion 407-408, 414, 415

J
Japan 411, 477-78
Jenkins, Judge 324-25
Joint and several liability 12, 19, 81, 98, 127-57, 264, 393
Action in concert 129
ALI Proposal 19
Allocation, Burden of proof 153-54
Reallocation 154-55
Settlement, The effect of 155-56
Analysis and recommendations 140-56
Apportionment rules 134-36
Comparative negligence 149-52
Contractual possibilities
Apportionment contracts 142-46
Contexts
Environmental liability 143
Medical malpractice 143
Municipal liability 143-46
Product liability 142
Feasibility 145
Contribution 134-36
Effects of reform 100
Fair compensation and recent reform 146-48
Implementation of proposal 152-56
Indivisible injury 129-30
Mass torts 388
Practically indivisible injury 130
Reform legislation 136-40
Allocative approach 139-40
Comparative approach 139
Fair compensation 146 - 48
Full repeal 140
Partial repeal 138 - 39
Preserve the Status Quo 138
Superfund Act 96, 100, 414, 418
Traditional Approach 129 - 36
In practice 133 - 34
Liability rules 130 - 34
Judicial Council of Massachusetts 272
Judicial moral hazard 290
Judicial Panel on Multidistrict Litigation 408
Judicial procedures, collective (see Collective Judicial Procedures)

K
Kansas 90
Kant, Immanuel 206, 207 - 08, 352

L
Large verdicts 64 - 66, 90 - 92
Laurenti v. Tiffenbauch 136
Lave and Lave 389
Legal uncertainty, increase in 86 - 97
Leges Barbarorum 426
Leubsdorf 269, 303
Leukemia (see Cancer)
Liability insurance 66 - 72, 255, 261, 272, 291, 293, 297, 362, 376, 381
Collateral sources 168, 174, 175
Comparison to workers' compensation 107 - 08, 108 - 112
Expansive judicial interpretation 92 - 94
Forms of 68 - 70
Functions of liability insurance 66 - 68
Improving liability insurance 537 - 53
Excess liability funds (ELF) 538 - 44
Patient compensation fund (PCF) 539
Product liability insurance (see also Product liability) 50 - 51, 192
Regulatory reforms 203, 207
Market insurance, Alternatives to 551 - 53
Group risk retention 551

703
Self-insurance 551
McCarran-Ferguson Act 544 - 49
Rate regulation 549 - 51
Rate service organizations 545 - 47
State anti-trust exceptions 544 - 49
Joint and several liability 141 - 42
Market conditions (see also Markets: Liability insurance) 76 - 79
Cooperative features 77
Nature of liability insurance market 68 - 72
Obstacles to functioning 67 - 68
Pain and suffering 208
Risk allocation 67
Source of tort crisis 11 - 14
Spreading/pooling risk 66
Structure of markets 70 - 72
Third party liability insurance 358 - 60, 364, 368
Tort law and liability insurance 55 - 103
Tort law as liability insurance 29 - 30
Tort reforms of the 1980's, Impact of 97 - 102
Tort system, long-term relation to 76 - 97
Transfer of risk 66
Liability Risk Retention Act of 1986, 551 - 52

Liability standards
(see Joint and several liability)
(see Medical malpractice)
(see Product defects; Product liability; Warnings)
(see Regulation)

Life insurance, Private disability and (see also
Disability insurance: Private disability insurance) 129, 157 - 80, 444
Gaps 162 - 66
Litigation/insurance cycle 6, 13
Locality rule 15
Long-latency diseases (see also Diseases) 16, 25 - 26, 51, 92, 125,
235, 328, 341, 345, 409, 419, 421 - 24
Long-tail liability 69, 72
Loss insurance (see also Disability insurance: Private disability and
life insurance) 31, 42 - 45, 157 - 80, 218, 262
Coordination of different sources, 159 - 62
Subrogation 160

Loss ratios
General liability insurance 273 - 74
Love Canal 302, 315, 319, 418, 459
Lurie 153
M

Malpractice (see Medical Malpractice)
Mandatory class actions 408 - 09, 411, 413 - 19, 420, 436
Marek v. Chesny 288
   Conclusions 230 - 32
   Disability insurance 168 - 69
   Failure of markets 38 - 40, 234 - 36, 361
   Government intervention 219
   Health care 147 - 48, 151
Incentives
   Safety 245, 251, 258 - 61, 263
      Financial 246
   Inefficiencies 221 - 22
Labor market (see Workers’ compensation)
Liability insurance market, generally 55 - 103
   Adverse selection 83 - 86
   Legal uncertainty 86 - 97
   Market conditions, generally 76 - 79
   Tort cost push 82
Practical problems with
   Exit costs 40 - 41
   Information 40
   Intermediaries 40
      Social altruism 41 - 42
Product injuries
   Assumptions for analysis 209
   Compensation 261 - 62
   Imperfect information 262 - 63
   Safety 258 - 61
Risk perceptions 210, 216, 223 - 29, 264
   Assumption of risk 16, 83, 210 - 33, 430
      Judicial role 212 - 23
   Discrimination of products 227
   Evidence 223 - 29
      Salience of the risk 226
      “Zero risk” 225 - 26
   Imperfect information 219 - 32, 382
   Information costs 219 - 32
      Specialized settings (medicine) 229
Strict liability 213
Warranties 213 - 19, 220 - 21
Adverse selection 215
Consequential damages 216 - 18
Limited warranties 216
Workers compensation 107, 122
Marshall Islanders Compensation Program 427
Mass latent injury claims 61, 385, 444
Mass torts, Environmental and other 12, 23, 26 - 27, 143, 262, 306, 319 - 483 (see also Tier III torts)
Administrative compensation schemes (See also Administrative compensation schemes) 441 - 83
ALI proposal 26 - 27
Background 383 - 89
Collective judicial procedures, Mass torts and (See also Collective judicial procedures) 383 - 439
Costs of the standard legal process 393 - 402
Accrual of manifest injury 396 - 97
Biases in the process
Defendants' strategic advantages 399 - 401
Prevention as a public good 401 - 02
Inconsistent judgments 394 - 95
Individuation of damages 395 - 96
Redundancy
Effect on access and viability of claims 397 - 99
Effect on defendant interests 399
Defining characteristics 390 - 91
Mass tort/non-mass tort distinction 330
New procedures 389 - 93
No-fault program (See also Administrative compensation schemes) 476
Punitive damages 260 - 64, 265
Scientific and legal causation 319 - 51
Massachusetts Department of Public Health 321
Massachusetts, Judicial Council of (See Judicial Council of Massachusetts)
McCarran-Ferguson Act 12, 13, 77, 78, 537, 544 - 49, 553
McEwen 360
Medi-Cal 153
Medicaid 59, 135 - 37, 146, 155, 160, 161, 164, 166, 176, 196, 391, 557
Reagan administration cutbacks 137
Medical liability (see also Medical malpractice) 18 - 19, 152
Elective no-fault medical liability (see also No-fault liability) 487 - 516
Medical injuries (see also Medical malpractice) 376, 381, 383

706
Compensatory alternatives 391 - 98
Harvard study 22
Sources and Dimensions of the problem 285 - 89
Medical Licensing Board 386
Medical malpractice 111 - 26, 143, 144, 145, 157, 166, 167, 168,
174, 203, 206, 234, 242, 285 - 300, 362, 441, 539, 581
ALI proposal 18 - 19
Caps 99
Claims statistics 62 - 63, 286
Compensation 381 - 85
Percentages 383
Compensatory alternatives 391 - 98
AMA/Specialty Society proposal
Medical malpractice 392 - 93
Designated Compensable Event (DCE) 393 - 94, 396 - 97
Foreign no-fault plans 393 - 96
O’Connell, Jeffrey
Neo-no-fault scheme for medical injuries 391 - 92
Danzon (see Danzon Study of malpractice reform)
Designated Compensable Event (DCE) 393-94, 396-97
Deterrence 32, 376 - 81
Discipline 386 - 90
Discontinuance in high-risk areas 378
Fee schedules 116 - 17
Health care system 295 - 99
Insurance system 286, 289 - 92
“Bedpan Mutuals” 292
Large verdicts, increase in 65, 91
Health care system 295 - 99
Legal rules, impact of 19 - 20
Legal system 293 - 95
Licensure 388 - 90
Litigation, Growth in 60, 62, 64
Organizational liability 113 - 19
Concerns 119 - 26
Punitive damages 99
Reform
Danzon study 100
Regulatory alternatives 385 - 91
Medical monitoring 348, 358, 373, 375 - 81, 382, 397, 469 - 70
ALI view 378 - 81
Ayers v. Township of Jackson 378
Latency problems 375 - 81
Monitoring damages 376 - 77
Statutes of limitations 376
Medicare 117, 146, 149 - 50, 155, 160, 161, 164, 166, 176, 196, 197, 391, 557
The initiative 134
Medicine bottle safety caps 247 - 48
MER/29, 295, 482
Merrill Dow Pharmaceuticals 276
MGM Grand Hotel fire 385
Miami 116
Michigan 497
Mikva, Judge 320
Mills, Congressman Wilbur 134
Missouri 261
Moore and Viscusi 437
Moral hazard 67, 171 - 73, 175, 178, 211, 215 - 16, 258, 361 - 62, 447, 521, 530, 532, 559, 573
In medical care 146
Morbidity data 170
Morrall 410
Morris, Professor Clarence 270
Motor vehicle accidents (see Automobile accidents)
Motor vehicle recalls 282
Multi-state class actions 417

N
National Academy of Science 340
National Center for Health Services Research
Yet unpublished paper 139
National class actions 417 - 19
National Electronic Surveillance System 406
National health expenditures 146
National health insurance 144
Proposals and models 144 - 45
National Highway Traffic Safety Administration (NHTSA) 98, 239
- 43, 279, 282, 407, 411
National Institute for Occupational Safety and Health 341
National Medical Expenditure Survey, 1987 (NMES) 139 - 40
Neo-no-fault regime 391 - 92
New Jersey 90, 91, 378

708
New York 235, 492, 494 - 95, 497, 501, 505, 545, 550
New York City 116
New Zealand 445, 458, 489, 501, 502, 503, 555
NHTSA (see National Highway Traffic Safety Administration)
NMES (see National Medical Expenditure Survey)
No-fault compensation (see Administrative compensation schemes;
No-fault contracts; No-fault liability; Workers' compensation)

No-fault contracts
Pre-injury voluntary contracts
  Desirability 533 - 36
  Viability 529 - 33
Pre-injury voluntary contracts 526 - 36
No-fault compensation 35 - 37, 81, 359 - 60, 364 - 69, 374 - 75, 391
  - 98, 412, 427 - 28
Automobile accidents 374 - 75
Elective no-fault medical liability 487 - 516
  Administration 497 - 501
    Causal questions 501 - 02
    Costs/Savings 498 - 500
  Background 487 - 91
  Coverage gap 496 - 97
  Coverage guidelines 494 - 95
    Elective no-fault 512 - 15
    Advantages 515
    O'Connell, Jeffrey 513
Objections
  Expense 492 - 94
Pain and suffering 494
Pecuniary needs 493 - 94
Prevention
  Background 502 - 04
  Non-pecuniary concerns 509 - 10
  Safety incentives 504 - 12
    Quebec study 505 - 06
    Viscusi and Moore study 506 - 07
Excess liability funds (ELF) 542
Failings of 36
Neo-no-fault regime 391 - 92
No-fault workers' compensation (see also Administrative compensa-
tion schemes; Workers' compensation) 105 - 27, 336, 345 - 47
No-liability 37 - 38, 209, 222

709
Norplant 400
North Dakota 90
NRC (see Nuclear Regulatory Commission)
Nuclear fallout 323 - 25
Nuclear Regulatory Commission (NRC) 239
Nuisance 309 - 11

O
O'Connell, Jeffrey 513, 556
  Neo-no-fault scheme for medical injuries 391 - 92
OASDHI 182, 184
Occidental Petroleum 319
Occupational (industrial) disease 110 - 17, 120 - 21, 125 - 26, 335,
  338 - 39, 341, 345, 428, 429, 434, 436, 438 - 40
Occupational Health and Safety Administration (OSHA) 48, 73,
  195, 240 - 42, 242 - 43, 245 - 47, 281 - 82, 283, 341 - 45, 410 -
  11, 433 - 37
Occurrence policies 69, 70
Ohio 91, 203
Oklahoma 258
Ontario 224
  Industrial Disease Standards Panel (IDS Panel) 335, 336 - 39,
    344, 350
Oregon 91
Organizational liability
  Medical malpractice 113 - 26
OSHA (see Occupational Health and Safety Administration)
Ozone layer 237

P
Pain and suffering 4, 8 - 10, 17, 21 - 22, 35 - 36, 100, 113, 161, 163,
  179, 180, 199 - 230, 218, 231, 237, 256, 257, 264, 267, 268, 270,
  293, 295, 299, 302, 312, 380, 383, 403, 439, 469, 473, 528, 531,
  568, 580, 582
  ALI proposal 21 - 22
  ALI recommendations 229 - 30
  Attorney fees 215 - 16, 217, 220, 267, 268, 270, 302, 312
  Calculating 217 - 27, 451
  Cap 81, 99, 218 - 22
    Deficiencies 219 - 21
  Case for pain and suffering 208 - 16
    Administration 213 - 16
    Compensation 209 - 11
    Prevention 211 - 13
  Compensation, Question of 204 - 07
Floors 220 - 21
Medical malpractice 113, 203, 487, 494, 497, 508
National Childhood Vaccine Injury Act of 1986, 451
Partial disability 569
Pre-injury contracts 522 - 23, 530
Quantification 227 - 29
Scale 221 - 23
Scheduling 223 - 27
  Objections 225
  Types of nonpecuniary loss 199 - 200
Unpredictability 201 - 02
Workers’ compensation 114
Patient Compensation Funds (see also No-fault compensation: medical liability) 119, 539 - 41, 543, 553
Pauly and Redisch 146
PCB contamination 337, 355
Pecuniary loss principle 10, 28, 315
Pelvic inflammatory disease (PID) 345 - 46
Pennzoil 232
Pepper Commission Report 145
Periodic Insurance Crises, short term effects of 72 - 76
Permanent partial disability (PPD) 114 - 17, 118 - 20
Permanent total disability (PTD) 115 - 16
Personal injury bar 23, 296
Personal injury settings, The variety of
  (see Environmental injuries)
  (see Medical injuries)
  (see Product injuries)
  (see Workplace injuries)
Pharmaceutical injuries 29, 103, 106, 139, 387, 442, 461, 480, 482, 534
Physician’s Desk Reference 229
Pluralistic Personal Injury Universe 33 - 50
Pneumoconiosis 111
Point probabilities 59
Pollution emissions 424 - 25
Population survey, March 1988, 139 - 40
Populist goal 26 - 27
“Practically” indivisible injury 130, 131, 147
Preferred Provider Organizations (PPO) 148
Premiums 3, 11 - 14, 19, 21, 55, 58, 72 - 76, 78, 79, 83 - 84, 86, 87,
Awards 270 - 71
Caseload 266 - 70
Insurance premiums and availability 271 - 75
Compensation 402 - 04
Compensatory alternatives 411 - 12
Design 16, 40 - 52
Deterrence 398 - 402
Developments 61 - 62
Economic concerns 230
Competitiveness 278
Environmental liability 353 - 54, 367 - 68
Insurance 50 - 51
Joint and several liability 142, 144
Legal rules, impact of 20 - 21, 227
Litigation 246
Manufacturing defects (see also Product defects) 15, 36 - 40, 57, 70, 81 - 82
Markets 16 - 17
Objectives
Deterrence effects 263 - 64
Insurance, compensation, and distribution 264 - 65
Pain and suffering 207
Punitive damages 233 - 35, 242, 261
Regulatory alternatives 404 - 11
Table
The Cost of Various Risk-Reducing Regulations Per Life Saved 408 - 09
“Strict” product liability 108 - 09
Workers’ compensation, interplay with 183 - 98 (see also Workers’ compensation)
Eliminating third-party product liability suit 192 - 97
Policy options
Administrative accommodations 191 - 92
Blend of Tort and Workers’ compensation policy 189 - 91
Dominance of tort policy 188 - 89
Dominance of workers’ compensation 187 - 88
Third-party focus 184 - 87
Contribution 186 - 87
Proposition 65 (California) 68, 329 - 330, 477
Prosser and Keeton 377
Public finance 28
Public Health Act 452
Punitive damages 17, 18, 22 - 23, 26, 81, 98, 99, 199, 231 - 65, 264,
267, 268, 310, 476, 530, 533, 580
ABA report 244, 256, 258, 262, 263
ALI Proposal 22 - 23
ALI recommendations, generally 264 - 65
Attorney fees 270, 303, 304
Case for punitive damages 236 - 43
Corrective justice 237 - 38
Economic deterrence 242
Retributive justice 238 - 40
Conditions for punitive liability
Burden of proof 248 - 49
Insurability 251 - 52
Proscribed conduct
Mens rea 245
Subjective test 246
Proscribed conduct 243 - 48
Vicarious liability 249 - 51
Enforcement deficit 257 - 59
Environmental injury 18
Growth of punitive damages 234
Medical malpractice 99
Pre-judgment interest 310 - 11
Quantum of award 252 - 64, 265
Defendant’s wealth 253 - 55
Irrelevancy of 254 - 55
Multiple punitive awards 260 - 64
Ratio to compensatory damages 256 - 59
Regulatory compliance and punitive damages 17, 84, 101, 107,
110
Warning issues 239, 248, 260

Q
Quebec 505 - 06

R
RAND Health Insurance Experiment 153, 155
RAND Institute for Civil Justice 22, 58 - 59, 60 - 61, 65 - 66, 164,
269, 288, 302, 384, 444, 445, 446, 460
Aviation study 444 - 45
Cook County, Illinois Study 65 - 66
San Francisco, California Study 65 - 66
Rate service organizations 545 - 47
Rayco of Trenton, Inc. 137

714
RCRA (see Resource Conservation and Recovery Act)
Reagan administration 149, 293
Tort Policy Working Group 218
Two pronged cost-control strategy 147
Recession of 1974-76, 168
Reform
1988 welfare reform 196 - 97
Collateral sources 165 - 67
Impact of 1980’s tort reforms on liability insurance 97 - 102
Joint and several liability 136 - 40
Liability insurance 544 - 53
Medical malpractice law 293
Pain and suffering 217 - 29
Principles 7 - 15
Regulatory compliance 95 - 109
Synopsis of proposals 15 - 29
Tort system 216
Comparative Institutional Perspective 3 - 7
Regulation 45 - 50, 159 - 160, 233 - 51, 291
Actual impact 47 - 50
Administrative 219, 239, 256 - 58
Automobile accidents 369 - 74
Consumer product safety 279 - 83
Enforcement sanctions 246
Environmental injuries 328 - 34, 420 - 27
Table
Air Pollution Emissions Trends 423
Evolution and performance 242 - 49
Health care 147, 199
Market failure and beyond 203 - 04, 234 - 36
Justifications beyond market failure 236 - 38
Medical malpractice 385 - 91
OSHA 341 - 45
Policy instrument 238 - 42
Pollution 314 - 15
Products liability 404 - 11
Safety regulation 279 - 83
Shortcomings 244 - 49
Tables
Cost of Regulations per Life Saved 241
Institutions to Control Risk and Their Performance 257
Summary of Effects of Regulation 243 - 44
Tort liability, a complementary role 244 - 46
Tort liability and regulation, Choosing between 249 - 51
Workplace injuries 339, 433 - 38

Regulatory agencies 203, 332

**Regulatory compliance** 95 - 101
- Administrative agencies 83, 88, 95, 110
- ALI proposal 17 - 18
- Compliance defense 90 - 94
- Defense to liability 95 - 101, 242
- Liability and regulation, interplay between (Dual system) 85 - 90
  - Overdeterrence 87 - 88, 89
- Limited defense to liability 101 - 05
- Market concerns 109
- “Minimum Standards” concern 108
- Preemption 105 - 07
- “Regulatory compliance” defense 242

Regulatory policy
- Safety caps for medicine bottles 247 - 48
- Seat belts 247 - 48
- Res ipsa loquitur 15, 293
- Res judicata 407

Resource Conservation and Recovery Act (RCRA) 157, 316, 474

Restatement (Second) of Torts 11
- Section 402, comment k, 451
- Section 402A, 15, 275
- Section 433(B)(2), Comment (d), 153
- Section 519, 25, 381
- Section 520, 25, 365 - 68, 381
- Section 908(b), 244, 253

Retroactive strict-liability 88 - 90, 317, 414

*Rheingold v. E. R. Squibb and Sons* 377

Risk
- Accrued injury 421 - 26
- Administrative compensation schemes 453, 460, 462, 463 - 64, 466, 467, 468, 473 - 74, 475
- Allocation 67 - 68, 204
  - Default rules 205
- Attorney fees
  - Fee shifting 275, 279 - 80
- Classification 67, 169, 399
- Compensation theorists 370
- Contractual alternatives (see 517 - 36)
Disease (see also Disease; Risk: environmental liability) 325 - 27, 345 - 47, 358
Distribution 28 - 30, 404
Environmental liability 365 - 68, 370, 372, 373 - 74, 377, 380
Insurance fund judgments 421 - 26
Joint and several liability
  Risk of insolvency 128 - 29, 133, 140, 144, 146 - 47, 149, 151, 154 - 56
Liability insurance 537 - 53
Malpractice insurance 113 - 19
Mass torts 384, 387, 391, 396 - 97, 401, 410, 420, 421
Pain and suffering 203, 205 - 06, 212
Pools 66, 85, 87, 150 - 51, 382
Unraveling 83
Punitive damages, Risk of 235, 239, 240 - 41, 243, 245, 246 - 48, 249, 251, 252, 254
Risk level warnings (see Product defects)
Risk premiums 336 - 41
Risk-Utility test 47 - 52
  Insurance problems 51
  Moral hazard concerns 50
  Risk diversification concerns 50
Robins, A.H. (see A.H. Robins)
Robinson 372
Rosenberg 344, 371
Rules Enabling Act 284

S
Safe Drinking Water Toxic Enforcement Act of 1986
(California) 329, 477
Safety and health regulation 45 - 50
Safety
  Automobiles, safety incentives 357 - 60
  Markets 258 - 61
  Product safety 404 - 11
  Regulation 279 - 83
SARA (see Superfund Amendments and Reauthorization Act of 1986)
Scheduling damages 426 - 29, 430
Science experts and panels
  ALI proposal 24 - 25
Scientific and legal causation (see also Scientific evidence; Scientific uncertainty) 319 - 51

Scientific evidence

Alternatives
- Blue Ribbon Science Panels 335 - 39
- Court appointed experts 332 - 35
- Federal Science Board 339 - 51
  - Application to Agent Orange litigation 347 - 48
  - Application to Dalkon Shield litigation 345 - 47
  - Procedure 343 - 45

Scientific uncertainty

Forms
- Confidence interval uncertainty 325 - 26
- Individual attribution uncertainty 326 - 27
- Matrix for hazardous substance cases 330
- Multiple causation uncertainty 327 - 28
- Trans-scientific uncertainty 324 - 25

Forms of Evidence
- Cluster analysis 321 - 22
- Epidemiological cohort studies 324
- Short-term molecular assays 323

Searle 277

Seat belt regulation 247 - 48, 283, 371

Section 402A of the Restatement (Second) of Torts 15, 275

Self-insurance 551

Shavell 372

Sherman Act 77, 258

Signature diseases 322, 462

Silent Spring 311

Sills v. City of Los Angeles 137

Smith, Adam 258

Social Grievance Redress 26 - 27

Social influences 23


Collateral sources 161, 170, 171, 178

Compensation gaps, Filling the 555 - 76
  - Aid to Families with Dependent Children (AFDC) 573 - 74
  - Medical insurance 559 - 61
  - Partial disability 568 - 72
  - Permanent total disability 565 - 68
  - Social minimum 572 - 74
  - Temporary total unemployment 561 - 65

Current system 182 - 96
  - Income support for those capable of work
The unemployed 193 - 94
Income support from those excused from work
The old 184 - 86
The young 182 - 83
Working age, but sick or injured 186 - 92
Tables
Aid to Families with Dependent Children (1986) 194 - 95
Disability Benefits 191
Institutions to Control Risk and Their Performance 257
Other Income Support 196
Retirement Benefits 186
Survivor Benefits under OASDHI (1986) 183
Temporary Disability (1986) 193
Unemployment Insurance (1986) 194
Workers’ Compensation 187
Discussion and assessment
Children 196 - 97
Elderly 196 - 97
Working age population
Medical Disability 197 - 201
Unemployed but able 200 - 01
Social Security 134, 171, 182, 185, 190, 191, 197, 556
Misperceived coverage 173 - 75
Old age benefits 185, 197
Social Security Amendments of 1983 Title VI, 149
Social Security Disability (SSD) 187 - 92, 562, 565 - 66, 569 - 72, 572, 574
Social Security Disability Administration 427
Social Security Disability Insurance (SSDI) 1, 30, 44, 120, 155, 160, 161, 162, 164, 168, 172, 175, 176, 177, 495
Social Security Insurance (SSI) 160
Social welfare system 28, 193, 195, 199, 200 - 02, 354
Sox 389
SSDI (see Social Security Disability Insurance)
Starr 132
Statutes of limitations 311, 417, 419
Environmental liability 358, 362 - 64, 376, 381
Strict liability (see also Product defects, Product liability) 11, 15, 25, 70, 81, 86, 133 - 34, 139, 150, 152, 153, 211 - 12, 216, 219, 221, 223, 245, 278, 309, 353, 424, 428, 432, 521, 522 - 23, 525
Development of, 33 - 40
Texas 203, 258
Themes of the ALI Report 50 - 52
Tiers of tort litigation 8 - 10
Tier III torts (generally) 319 - 483
  Administrative compensation schemes (See Administrative compensation schemes) 441 - 83
  Environmental liability, Standards of (See Environmental liability, Standards of) 353 - 82
Mass tort and collective judicial procedures (See Collective judicial procedures; Mass torts) 383 - 439
Mass tort/non-mass tort distinction 330
Matrix for hazardous substance cases 328 - 32
  Alternatives to traditional litigation 329 - 32
Scientific and legal causation (see Scientific evidence; Scientific uncertainty)
Times Beach 459
Title VI of the Social Security Amendments of 1983, 149
Tort cost push 80 - 83
Tort damages 19 - 24
  (see Attorney fees)
  (see Collateral sources)
  (see Pain and suffering)
  (see Punitive damages)
  (see Product liability: workers’ compensation)
Tort law
  Aims and limits 23 - 33, 263, 298
 Alternatives, Tort law and its 351 - 448
   Contractual alternatives to tort (see Contractual alternatives to tort) 37, 517 - 36
   Loss insurance (see also Disability insurance; Loss insurance) 42 - 45
   No-fault liability (see also No-fault liability) 35 - 37
   Safety and health regulation 45 - 50
Environmental injuries (see also Environmental liability; Environmental injuries) 309 - 17
Environmental regulation, synthesis with tort law 328 - 32
Expanding role 22
Liability insurance, Tort law and 55 - 103
Tort liability (see Tort law; Tort system)
Tort litigation (see Tort system)
Tort Policy Working Group
Reagan Administration 218

Tort system
Adverse selection generated by 83 - 86

Alternatives, Tort and its 351 - 448

Automobile accidents
Compensation 361 - 69

Table
Percentage of Victims Compensated by Months
(Quebec) 368

Compensatory alternatives to the tort system 374 - 75
Deterrence 357 - 60
Regulatory Alternatives to the tort system 369 - 74
Contractual alternatives (see Contractual alternatives)
Disability insurance (see also Disability insurance) 178 - 79
Environmental Injuries (see also Environmental Injuries) 412 - 27

Evaluative framework
Corrective justice 355
Deterrence 354 - 55
Distributive justice 355 - 57
Medical malpractice (see also Medical malpractice) 376 - 98
Product liability (see Product liability)
Workplace injuries (see also Workplace injuries) 427 - 41

Causes of action, new 88 - 90
Compensation sources 58 - 59
Complement to market and regulation 204, 233 - 34, 242, 244 - 46, 249 - 51

Costs, increase over time 59 - 66
Direct cost 57 - 58

Expansion 238
Health insurance, relation to 154 - 56
Large awards, increases in 64 - 66, 90 - 92
Liability insurance, impact of 1980's reform on 97 - 102
Liability insurance, long-term relationship with 76 - 97
Litigation, high-stakes 26, 32, 60

Perspectives on the tort system and liability crisis 3 - 52
Product injuries 255 - 56, 261, 263 - 78

Table
Institutions to Control Risk and Their Performance 257
Product liability law (see also Product liability) 263 - 78

Reforming the tort system 3 - 29
Disability insurance and 166 - 80
Impact of 1980's tort reform on liability insurance 97 - 102

Regulation and the tort system 249 - 51
Toxic compensation schemes (see Administrative compensation

722
schemes)
Emerging themes 455 - 57
No-fault
 National Childhood Vaccine Injury Act of 1986, 450 - 52
No-fault, expansive
 Environmental Law Institute (ELI) Model Statute 452 - 55, 456 - 57
 Superfund Section 301(e) Study Group Report 452 - 55, 456 - 57
 Price-Anderson Act 446 - 49
 Tort/No-fault Hybrid 446 - 49
Toxic exposure 25 - 26, 194
Toxic harm 28, 452 - 55, 456, 463, 467, 471, 474, 478 - 82
 Definition 444, 459 - 62
Toxic Substance Document 28, 453 - 55, 481
Toxic Substances Control Act (TSCA) 99
Toxic torts 61
 Environmental litigation 317 - 28
 Lead paint exposure 308
Litigation
 Groundwater contamination 321 - 23
 Nuclear fallout 323 - 25
 Recent developments 325 - 28
TOXLINE 341
Traynor, Judge 354
Triggers, for insurance coverage 69
Truth in Lending Act 65, 75

U
U.S. Conference Board
  1988 Survey of Products Liability 401
Uncertainties 33
 Effects on insurance companies 86 - 97
 Empirical evidence 351
 Expansive judicial interpretation 92 - 94
 Increased numbers of large verdicts 90 - 92
 Influence of CERCLA Liability on tort system 94 - 97
 Of liability
  Dramatic increase during mid-80’s, 85 - 86
 Of tort law 86 - 97
 Retroactive strict-liability 88 - 90
Underinsurance 142 - 43
Underwriting cycle 72 - 76, 83, 97 - 98, 102
  Causes 74 - 76
Unemployment insurance 193 - 194, 200, 383, 561 - 65, 572 - 74
  Table 194
Uniform Commercial Code
  Section 2-314, 219
  Warranty disclaimers 65
Uniform Comparative Fault Act (1977)
  Section 2(d) 155
  Section 6, 156
Uniform Products Liability Act 191
  Section 108(a) 90
Uniform Product Safety Act (H.R. 1115) 90
Uninsured 171, 175, 364 - 65
  Costs of health care 146 - 51
  Health insurance gap 137 - 45
  Health of the uninsured 152 - 54
Unions
  Advocacy of national health insurance 144
United Kingdom 296, 411, 412
Utah 90
Utilitarianism 205 - 06, 207 - 08

V
Vaccine Injury Table 451
Vann v. City of Woodhaven 331
Veterans' benefits 105
Vicarious hospital responsibility 15
Victim responsibility 16 - 17
Villari v. Terminix International, Inc. 378
Vinyl chloride 321
Virginia 490 - 91, 502, 504, 527
Viscusi and Moore 124, 400, 437, 506
Viscusi, W. K. 405
Volvo 227

W
Waivers 15, 337
  Exclusion waiver 143
Wall Street Journal 260
Warner amendment 323 - 24
Warning issues 15 - 17, 57 - 80, 345, 451, 465 - 66, 477
  Administrative agencies, Federal 67 - 68
  Contractual alternatives 527, 532 - 33
724
Criteria for hazard warnings 63 - 66  
Behavior-Affecting Goal 66  
Context 65  
Cost-Benefit goal 66  
Information processing issues 64 - 65  
Information structure 65  
Prior Risk Knowledge 64  

Current institutional roles  
Courts 68 - 69  
Federal role 67 - 68  
Market 67  
State role 68  

Duty to warn 36 - 38  

General considerations 57 - 59  
Communication, The problem of effective 59 - 62  
Paternalism versus consumer sovereignty 62 - 63  

Policy proposals 69 - 80  
Proposal No. 1, 70 - 72  
Proposal No. 2, 72 - 74  
Proposal No. 3, 74  
Proposal No. 4, 74 - 76  
Proposal No. 5, 77 - 80  
Punitive damages 239, 248, 260  
Risk level warnings (see Product defects)  

Warranties 213 - 19, 220 - 21  
Consequential damages 216 - 18  
Limited warranties 216  

Weiler 384  
Weinstein, Judge 320, 344  

Winterbottom v. Wright 383 - 84  

Witness fees 454  

Administration 118 - 21  
ALI proposal 20 - 21  
Attorney fees 306  

Basis of entitlements 108 - 112
Comparison to tort liability scheme 107 - 08, 108 - 12
Compensation gap for industrial disease 111 - 12
Coordination of sources of loss insurance 160, 162
Employer expenditures 106 - 07
Fault 108 - 09
Generosity of, 114
Labor market 336 - 41
Large verdicts, increase in 91 - 92
Inadequate as a social insurance system 110
Increasing employer expenditures 106 - 07
Insurance 121 - 26 (see also Liability insurance)
Misperceived coverage 173
Model 176
Moral hazards 172
Occupational disease 110 - 17, 120, 125, 126
Ontario 224, 336 - 39, 350
Pain and suffering 114, 224
Periodic payments 118
Permanent partial disabilities (PPD) 114, 116 - 17
  PPD claims 120
  PPD reform 117
Permanent total disabilities (PTD) 115 - 16
Personal injuries 283 - 84
Premiums 107, 119, 122, 125, 236, 259, 284
Prevention 121 - 26
Product liability and Workers’ compensation 183 - 98
  Eliminating third-party product liability suit 192 - 97
  Policy options
    Administrative accommodation 191 - 92
    Blend of tort and workers’ compensation policy 189 - 91
    Dominance of tort policy 188 - 89
    Dominance of workers’ compensation 187 - 88
Third-party focus 184 - 87
  Contribution 186 - 87
Structure and level of benefits 113 - 17
Table 187
Types of claims 114 - 17
Workplace injuries (see also Workers’ compensation) 335 - 47, 427 - 41
  Compensation 431 - 33
  Compensatory Alternatives 438 - 41
  Deterrence 428 - 31
  Labor market 336 - 41
  OSHA regulation 341 - 45
  Regulatory Alternatives 433 - 38

726
Return to tort litigation 345 - 47
World War I 167
World War II 268, 345, 417