

# **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.<sup>1</sup> 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 . . . ."<sup>2</sup> 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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1. I AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY xvii, xi, 3 (1991) [hereinafter VOLUME I].

2. Jeffrey O'Connell & Chad M. Oldfather, *A Lost Opportunity: A Review of the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 307, 310 (1993).

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.<sup>3</sup> Noting the "huge gap between the promise and the performance of tort law,"<sup>4</sup> the first chapter also considers various alternatives to the tort regime.<sup>5</sup>

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;"<sup>6</sup> 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.<sup>7</sup> 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."<sup>8</sup> 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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3. VOLUME I, *supra* note 1, at 11-23.

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.<sup>9</sup> 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.<sup>10</sup> 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."<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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,<sup>14</sup> as well as their limited potential for the future.<sup>15</sup> 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.<sup>16</sup>

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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."<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> "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."<sup>20</sup> 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,"<sup>21</sup> 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,<sup>22</sup> but with all the information collected by the ALI, the

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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].

22. As to timidity, see O'Connell & Oldfather, *supra* note 2; Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163 (1992). As to radicalism, see Marshall S. Shapo, *An ALI Report Markets a Defective Product: Errors at Retail and Wholesale*, 30 SAN DIEGO L. REV. 221 (1993); Jerry J. Phillips, *Comments on the Reporter's Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV.

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.<sup>23</sup> 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."<sup>24</sup> Finally, this section provides a short "Synopsis of Proposals" which briefly discusses each of the proposed changes suggested by the authors.<sup>25</sup> 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"<sup>26</sup>) and overhauling the exculpatory nature of product warnings,<sup>27</sup> all under the umbrella of strict liability from the *Restatement (Second) of Torts* section 402A.<sup>28</sup> In Chapter 3, the Report indicates that there should be a recognition of a regulatory compliance defense in tort litigation.<sup>29</sup> Organizational ("enterprise") liability is discussed in reference to medical malpractice in Chapter 4.<sup>30</sup> 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.<sup>31</sup>

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241 (1993).

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.

28. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

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,"<sup>32</sup> even for third-party claims under workers' compensation.<sup>33</sup> 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.<sup>34</sup> A standard of clear and convincing evidence of reckless behavior is suggested for punitive damages.<sup>35</sup> Further, the criteria by which a jury should determine punitive damages should be more narrowly construed to exclude information about the defendant's wealth;<sup>36</sup> closer judicial monitoring is also suggested.<sup>37</sup> 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.<sup>38</sup>

### *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."<sup>39</sup> 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.<sup>40</sup>

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

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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.<sup>41</sup> 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."<sup>42</sup> 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."<sup>43</sup>

### *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.<sup>44</sup> Another recommendation is the "reconsideration" of contractual alternatives to tort, although the reporters shy away from any bold assertions in this area.<sup>45</sup> 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.<sup>46</sup> Finally, the Report explores filling gaps in compensation with social insurance.<sup>47</sup>

### 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.

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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.

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ALI REPORTER'S STUDY  
ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY

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