

5-1-1993

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Recommended Citation

Virginia E. Nolan & Edmund Ursin, *Foreword, Symposium on the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 213 (1993).

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Foreword, Symposium on the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury

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The topic of this Symposium is the American Law Institute's *Reporters' Study on Enterprise Responsibility for Personal Injury*.¹ Published in April, 1991, the *Reporters' Study* assesses the American tort system a quarter-century after the appearance of the ALI's *Restatement (Second) of Torts*. During that interval, there has been a revolution in American personal injury law. The two most striking developments have been the adoption of strict products liability by courts and the enactment of no-fault automobile compensation plans by legislatures. William Prosser wrote in 1971 that the judicial creation of strict products liability represented "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."² Courts have dramatically expanded the availability of compensation not only in products cases but throughout the tort system.³ On the legislative front, a development of equal dimension was the enactment, beginning in 1970, of no-fault automobile compensation plans in many states.⁴ No-fault advocates such

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1. AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ALI STUDY].

2. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 654 (4th ed. 1971).

3. *E.g.*, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (abolishing traditional landowner rules); *see also* Becker v. IRM Corp., 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985) (adopting strict landlord tort liability).

4. *See Tort Law No-Fault Insurance Symposium*, 26 SAN DIEGO L. REV. 977

as Jeffrey O'Connell have urged since the 1970s that the successes of automobile no-fault indicated that it was time to turn "to more ambitious legislation"⁵ to extend its benefits beyond the auto accident.

Academic studies played an important role in the movement toward auto no-fault plans and strict products liability. The auto no-fault movement can be traced to the landmark 1932 *Columbia Report*,⁶ the product of a three-year study of the problem posed by automobile accidents, conducted largely by Columbia and Yale University scholars. That report rejected the dominant view of the time that fault was a satisfactory criterion for compensation. Rather, the *Columbia Report* viewed automobile accidents as "inevitable" and proposed a "plan of compensation, analogous to workmen's compensation [which] would eliminate the principle of fault and through a requirement of insurance and the use of a statutory scale of benefits would make it reasonably certain that all persons with appreciable injuries would receive some compensation."⁷ The authors supported their legal and policy analysis with data developed in empirical studies on the automobile accident problem.⁸ In 1959, Fleming James wrote that the *Columbia Report* was "the most significant contribution to the study of torts to appear so far in the twentieth century."⁹

Despite the approval of scholars such as James, the idea of a compensation plan for automobile accidents languished until a new wave of academic studies coincided with the consumer movement led by Ralph Nader to draw attention to the automobile accident problem.¹⁰ In 1964, Alfred Conard and his colleagues unveiled an exhaustive analysis of the economic treatment of automobile injuries.¹¹ The following year, Robert Keeton and Jeffrey O'Connell published *Basic Protection for the Traffic Victim*.¹² The Keeton-O'Connell plan became the model for reform, as some form of no-fault auto insurance gained legislative acceptance in twenty-four states between 1970 and 1975.¹³

(1989).

5. Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 771 (1973).

6. COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932).

7. *Id.* at 134, 132.

8. *See id.* at 3.

9. Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 408 (1959).

10. *See* Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 21 (1988).

11. ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION (1964).

12. ROBERT KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

13. Jeffrey O'Connell, *Alternatives to the Tort System for Personal Injury*, 23

An academic study also played a central, though different, role in the judicial acceptance of strict products liability. That study, conducted in the late 1950s and early 1960s under the auspices of the American Law Institute, produced the *Restatement (Second) of Torts*, whose Reporter was William Prosser. Early advocacy of strict products liability came, however, from more traditional legal scholarship — most notably Karl Llewellyn's 1930 casebook on sales¹⁴ and Justice Roger Traynor's 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*¹⁵ Like the auto compensation plan idea, the proposal for strict products liability languished for decades. In the early 1960s, however, it was given new life by landmark holdings of the New Jersey and California Supreme Courts in *Henningsen v. Bloomfield Motors, Inc.*¹⁶ and *Greenman v. Yuba Power Products, Inc.*¹⁷ While these decisions sparked the strict products liability revolution, its success was arguably assured by the ALI's approval of section 402A of the *Restatement (Second)* in 1965.¹⁸ With the prestige of the ALI behind it, the doctrine of strict products liability swiftly swept the country, with many courts simply "adopting" section 402A, as if it were a statute.¹⁹

We recall the pivotal role played by these academic studies to suggest that, if the past is a guide, the 1991 *ALI Reporters' Study* is likely to be a focal point for scholars and reformers and may well serve as a guide for judges and legislators. Professor Stephen Sugarman already has commended the *Study* as "an important contribution to torts scholarship," with "an unbelievably dazzling range

SAN DIEGO L. REV. 17, 22 n.13 (1986) (citing U.S. DEP'T. OF TRANSP., COMPENSATING ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCE (1985)).

14. KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 340-41 (1930).

15. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461-67, 150 P.2d 436, 440-43 (1944). In a forthcoming book, tentatively entitled *Understanding Enterprise Liability*, we demonstrate that strict products liability shares a common heritage with no-fault compensation plans. Our account, which also demonstrates that damages reform is an integral part of that heritage, thus questions Professor Priest's widely accepted account of the history of enterprise liability. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). See also Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229 (1981).

16. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

17. *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

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

19. See W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS 180 (1989).

of issues . . . surveyed and intelligently commented upon in a well-organized way."²⁰ And Judge Jack Weinstein has said the *Study* is "destined to be the baseline for judicial and legislative activity for years to come."²¹

Conceived in 1986 in response to a widely-held perception of a tort and insurance crisis, the *Study* is the product of a five-year collaboration by fourteen scholars.²² Unlike the ALI's *Restatement of Torts*, the *Study* does not seek to be a "restatement" of the common law of torts. Instead, the *Study* analyzes and evaluates key issues of tort law within the context of "the broader array of social institutions that seek to prevent and to compensate personal injuries: no-fault liability systems such as workers' compensation, private and public loss insurance for medical expenses or lost earnings, competitive markets, and the various forms of administrative regulation of health and safety."²³ It confines itself to personal injuries that "arise out of product use, medical treatment, the workplace, and toxic exposures in the environment,"²⁴ the sources of "high-stakes" litigation that many claimed led to a tort crisis in the mid-1980s.²⁵

The *Study's* recommendations are both provocative and diverse. With respect to the judicially created doctrine of strict products liability, for example, the *Study* repudiates the policies of victim compensation and loss spreading²⁶ that have dominated judicial lawmaking.²⁷ While the *Study* would retain strict liability for manufacturing defects, it calls for a more restrictive approach in design defect cases.²⁸ It concludes that there "should be no separate 'consumer expectations' test for design defects, nor any reference in this inquiry to the superior capacity of manufacturers to serve as insurers for product injuries."²⁹ It also urges a risk-utility test of defectiveness more restrictive than that developed by some courts.³⁰ The *Study* proposes that "a product design should be held defective only if there was a feasible alternative design which would have avoided the injury in question without materially altering the consumer's expected use and enjoyment of the product, and then only if the costs

20. Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1208 (1992).

21. ALI Releases *Study on Products, Mass Torts; Controversy Brews over Process, Substance*, Prod. Safety & Liab. Rep. (BNA) No. 19, at 477 (Apr. 26, 1991).

22. See 1 ALI STUDY, *supra* note 1, at xvii-xix.

23. *Id.* at xviii.

24. *Id.* at 7.

25. *Id.* at 9. Thus, the *Study* does not focus on automobile accidents, although it recognizes that these "comprise the bulk of present-day tort litigation." *Id.* at 8.

26. 2 *id.* at 81.

27. See Ursin, *supra* note 15, at 302 n.470.

28. 2 ALI STUDY, *supra* note 1, at 81.

29. *Id.* at 16.

30. *Id.*

of incorporating this new precaution in the design do not outweigh the human and financial harms from the injuries thereby preventable."³¹ These recommendations can be seen as following the ALI tradition of "restating" the law, since the *Study* argues that "courts should explicitly recognize that they are employing a de facto negligence standard in this area"³² Like Prosser's "restatement" of products liability in section 402A of the *Restatement (Second)*, the *Study*, in effect, urges courts to join what it sees as a trend.³³ Unlike Prosser's trend, however, the contemporary trend is seen as cutting back on the scope of products liability as a vehicle for victim compensation. Thus the *Study's* "restatement" might be dubbed the *Retrenchment (First) of Products Liability*.³⁴

The diversity of the *Study's* recommendations is apparent when one turns from its treatment of products liability to that of medical accidents. Far from disparaging the goal of victim compensation, the *Study* here attempts to breathe new life into the idea of no-fault patient compensation for medical accidents.³⁵ Premised on a goal of victim compensation independent of the carelessness of doctors or nurses,³⁶ proposals for medical no-fault surfaced in the early 1970s in the midst of the surge of enactments of no-fault auto plans.³⁷ The *Study* notes, however, that "the no-fault idea was a non-starter in the medical area," with the "first major objection [being] that it would be too expensive"³⁸ To meet this objection, the *Study* develops a medical no-fault plan with a cost that would not exceed

31. *Id.* The *Study* also proposes alterations in the approach to warning issues which could "reduce the role of courts and juries in making case by case adjudications of warning adequacy" and would "increase the role of the federal government in creating a viable hazard warning system." *Id.* at 57.

32. *Id.* at 16.

33. 1 *id.* at 5; 2 *id.* at 16.

34. For more expansive judicial approaches see *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (two-prong test for design defect); *Beshada v. Johns-Manville Prod. Corp.*, 447 A.2d 539 (N.J. 1982) (rejecting state of the art defense). The California and New Jersey Supreme Courts may have joined in the retrenchment. See *Anderson v. Owens-Corning Fiberglass Corp.*, 33 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991) (risk must be known or knowable in a warning case); *Feldman v. Lederle Laboratories*, 479 A.2d 374 (N.J. 1984) (restricting *Beshada* "to the circumstances giving rise to its holding").

35. 2 ALI STUDY, *supra* note 1, at 487-516 (elective no-fault medical liability). In addition to its no-fault proposal, the *Study* proposes that tort liability should be shifted from physicians to hospitals or other health care institutions in order to relieve doctors of the direct financial burden of malpractice insurance. *Id.* at 488.

36. See *id.* at 492.

37. See *id.* at 488-89.

38. *Id.* at 489, 492.

that of the current malpractice system. Its emphasis would be on compensation of "the catastrophic losses of the few people who [are] most seriously injured rather than . . . the losses of the much larger number of people who are only moderately harmed."³⁹ Recognizing that policy makers will likely be "reluctant to shift suddenly to this new form of liability," the *Study* endorses "at least as an intermediate step . . . Jeffrey O'Connell's idea of elective no-fault as a possible way to bring this new liability approach on stream."⁴⁰ Under this approach, legislation would authorize hospitals and other health care organizations to opt for no-fault in return for an exemption from common law tort liability. Thus, in the area of medical accidents, the *Reporters' Study* can be analogized to the 1932 *Columbia Report* and its recommendation that tort be displaced in auto accidents by a compensation plan. Coming in the midst of widespread concern about health care in general and medical malpractice in particular, the *Study* could spark a new debate over no-fault alternatives to tort, comparable to the debate inspired by the Keeton-O'Connell plan in the 1960s.

The *Study* also contains important, and likely to be controversial, recommendations for the reform of damages law.⁴¹ The *Study* states that "the law relating to tort damages has generated greater legitimate concerns than have the underlying standards of substantive liability."⁴² In particular, the "current open-ended process of jury damage determination produces awards that are customarily unpredictable, occasionally far too large (and sometimes too small), and that channel disproportionate sums into payment for nonpecuniary injuries such as pain and suffering, as well as into punitive damages."⁴³ While the *Study's* damages reform recommendations operate within the existing regime of liability rules and would not entail the sweeping change of the medical no-fault proposal, they nevertheless call for fundamental change.⁴⁴ The *Study* recommends restrictions on pain and suffering and punitive damages, alteration (but not elimination) of joint and several liability, and an almost complete reversal of the collateral source rule. To balance these proposals, which would significantly cut back on the right to victim compensation afforded under existing law, the *Study* proposes that successful plaintiffs (but not defendants) be awarded reasonable attorney fees, subject to restrictions involving the refusal of settlement offers.

39. *Id.* at 494.

40. *Id.* at 513 (footnote omitted).

41. *Id.* at 159-316 (tort damages).

42. *Id.* at 10.

43. *Id.*

44. *Id.* at 19-24.

While the products liability, medical no-fault, and damages proposals represent only a fraction of the many diverse reforms suggested by the *Study*,⁴⁶ they illustrate the range and importance of its recommendations. They also are the principal focus of the distinguished scholars who contribute their commentaries on the *Reporters' Study* to this Symposium. Following this Foreword Professor Marshall S. Shapo, the Reporter for a major 1984 American Bar Association study of the tort system,⁴⁶ opens the Symposium with an article focusing on the treatment of product defects and warnings by the *Reporters' Study*.⁴⁷ At the close of the Symposium Professor Shapo also contributes a rejoinder which addresses more general themes.⁴⁸ Professor Jerry J. Phillips, author of numerous works on products liability and tort law,⁴⁹ examines the *Study's* approach to products liability and assesses its damages reform proposals.⁵⁰ In contrast to Professors Shapo and Phillips, who are critical of aspects of the *Study* that tend to restrict victims' rights to compensation, Victor E. Schwartz, who chaired the federal government's 1976 Interagency Task Force on Product Liability⁵¹ and authored the model Uniform Product Liability Act,⁵² joins co-author Mark A. Behrens to generally commend the *Study's* proposed restrictions on punitive damages.⁵³ Professor Alfred F. Conard, author of the previously mentioned 1964 study of the automobile accident problem,⁵⁴ assesses the implications of the fact that innocent consumers, workers, the

45. The *Study*, for example, also offers suggestions on how the legal system might better handle the complex scientific-legal problems arising in the context of toxic environmental exposures and other mass tort litigation, and it suggests a no-fault approach not only for future mass exposure disasters of the dimensions of the asbestos episode, but also for injuries caused by prescription drugs. *Id.* at 319.

46. AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM: TOWARDS A JURISPRUDENCE OF INJURY (1984).

47. Marshall S. Shapo, *An ALI Report Markets a Defective Product: Errors at Retail and Wholesale*, 30 SAN DIEGO L. REV. 221 (1993).

48. Marshall S. Shapo, *Rejoinder: Advances in the Analysis*, 30 SAN DIEGO L. REV. 365 (1993).

49. See, e.g., JERRY J. PHILLIPS ET AL., TORT LAW (1991); JERRY J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL (3d ed. 1993); DIX W. NOEL & JERRY J. PHILLIPS, PRODUCTS LIABILITY CASES AND MATERIALS (1976).

50. Jerry J. Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 241 (1993).

51. FINAL REPORT, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY (National Technical Information Service - Report No. 273-220).

52. 44 Fed. Reg. 62714-50 (1979).

53. Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Liability for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263 (1993).

54. See *supra* note 11 and accompanying text.

public in general, and investors (or investors' constituents) actually bear a large share of damages awards.⁵⁵ Finally, Professor Jeffrey O'Connell, whose pioneering work spurred the modern no-fault movement,⁵⁶ and co-author Chad M. Oldfather sharply criticize the *Study* for not going further to promote an aggressive agenda of no-fault alternatives to tort.⁵⁷ Following these commentaries, three of the ALI Reporters — Kenneth S. Abraham, Robert L. Rabin and Chief Reporter Paul C. Weiler — offer their reflections on the *Study* and the commentaries.⁵⁸ Following Professor Shapo's rejoinder, the *San Diego Law Review* presents an overview of the analysis and recommendations of the *Study*, drawn from the *Reporters' Study* itself.⁵⁹

55. Alfred F. Conard, *Who Pays in the End for Injury Compensation? Reflections on Wealth Transfers from the Innocent*, 30 SAN DIEGO L. REV. 283 (1993).

56. See *supra* notes 4, 5, 13 and accompanying text.

57. 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 (1993).

58. Kenneth S. Abraham et al., *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 SAN DIEGO L. REV. 333 (1993).

59. *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 371 (1993).