

Enterprise Responsibility for Personal Injury: Further Reflections

KENNETH S. ABRAHAM*

ROBERT L. RABIN**

PAUL C. WEILER***

I. INTRODUCTION

The American Law Institute (ALI) commissioned its study of *Enterprise Responsibility for Personal Injury*¹ (the *Study*) in the mid-1980s in the midst of widespread concern about spiralling insurance premiums charged to people and businesses lucky enough to find *any* tort liability coverage. When our *Study* finally appeared in the early 1990s, litigation and premium rates had plateaued and in some sectors were even dropping. If anything, however, debates about the tort crisis had by that time become even more strident in tone. Thus, after listening to intense exchanges between members of the plaintiff and defense bars at its annual meeting in 1991, the American Law Institute's Council decided to duck the fundamental policy questions we had raised about reforming tort litigation and to confine further Institute deliberations to restating tort doctrine.

No doubt, the ALI leadership felt confirmed in its judgment that discretion was the better part of valor when, shortly thereafter, the

* Class of 1962 Professor, University of Virginia Law School, Associate Reporter, American Law Institute Project on *Enterprise Responsibility for Personal Injury* (ALI Project).

** A. Calder Mackay Professor, Stanford Law School, Associate Reporter, ALI Project.

*** Henry J. Friendly Professor of Law, Harvard Law School, Chief Reporter, ALI Project.

1. AMERICAN LAW INST. REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ALI STUDY]. This study was initially known as Compensation and Liability for Product and Process Injuries.

tort system became a prominent topic on the national political agenda. A crucial moment was Vice President Dan Quayle's controversial address in August 1991 to the American Bar Association. In his address, the Vice President decried the "fact" that the United States had seventy percent of the world's lawyers who were generating a \$300 billion annual tort bill.² Lawyers in tasselled loafers — as President George Bush derisively labelled them — had become one of the last groups whom it was still politically correct to insult during the 1992 election campaign.

With the new Clinton Administration in place (and with lawyers more than well represented), we fondly hope that our *Study* will contribute to a more reasoned debate about the role tort liability should play in our law and lives. The *Study's* overview of the legal, social, and economic issues, together with a full list of our recommendations for reform, are reproduced at the beginning of this Symposium issue of the San Diego Law Review. In this article we shall offer some further reflections about specific areas and proposals in the *Study* that have evoked important questions and comments.

II. TOO MANY LAWYERS AND LAWSUITS?

As a prelude to any such discussion, getting the facts straight is crucial. The United States does not have seventy percent of the world's lawyers, nor does it spend \$300 billion on the tort system. The number of lawyers per capita has doubled over the last four decades in this country, as in many others. Depending on whom one counts as a provider of legal services, however, we actually only have somewhere between ten and thirty percent of the world total — a share that is perfectly understandable given our proportion of the world's economic activity.³

In any event, most of this country's lawyers are not engaged in litigation. The bulk of lawyers perform nonadversarial tasks such as drafting wills and contracts, conveying real estate, and incorporating and advising businesses. Even considering lawyers' adversarial work, a high proportion involves helping people who have problems with the government — whether in their taxes, their social security or

2. The Vice President was putting out for popular consumption the REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS (a Council chaired by Quayle), AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (Aug., 1991) [hereinafter AGENDA].

3. See Marc Galanter, *The Debased Debate on Civil Justice*, WIS. INST. OF LEGAL STUD. (1992) (25 to 30 percent), and Ray August, *The Mythical Kingdom of Lawyers*, 78 A.B.A. J. (Sept. 1992) (as of 1987, 9.4%), for different estimates of the United States' share of the world's lawyers. See Marc Galanter, *Law Abounding: Legalisation [sic] Around the North Atlantic*, 55 MOD. L. REV. 1 (1992), and Dean Robert Clark, *Why So Many Lawyers? Are They Good or Bad?* 61 FORDHAM L. REV. 275 (1992), for thoughtful explorations of the causes and effects of the world-wide upsurge in the numbers and uses of lawyers.

welfare benefits, or, most commonly, when facing criminal charges. The real target of popular lawyer-bashing is the civil litigator. What makes litigation distasteful to so many people is that while lawyers in this setting are trying to do something helpful for their clients, they are also doing something harmful — financially, reputationally, and emotionally — to the targets of lawsuits. Furthermore, because approximately twenty million suits are filed every year in federal and state courts, this seems to bear out the widespread concern about American litigiousness and the felt need for tort reform.

When one looks closely at the composition of this civil suit caseload, though, it turns out that only a small fraction — about five percent of the total — are tort suits.⁴ The vast bulk of lawsuits involve family, property, and contract disputes. Businesses and governments are far more likely to sue individuals for repayment of debts than they are to be sued themselves for infliction of tortious injuries. Even within the tort caseload, most claims filed and monies expended arise out of motor vehicle accidents in which many of the smaller claims are filed by victims themselves, without the help of lawyers. A generous estimate of the total insurance costs of tort liability is \$130 billion,⁵ of which roughly \$90 billion goes for motor vehicle coverage.⁶ Only a minor share of the money is expended for the product and medical litigation that attracts most of the popular and political attention. Medical malpractice insurance and litigation expenses, for example, cost \$9 billion a year, or only about one percent of the nation's \$840 billion health care bill.⁷

4. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?*, 140 U. PA. L. REV. 1147 (1992), for an in-depth treatment of the scope and trends in tort (and other) litigation.

5. Recently estimated in TILLINGHAST, *TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE* 3 (1992), and including both premiums paid and self insurance costs.

6. We arrive at this estimate by extrapolating from A.M. BEST CO., *BEST AGGREGATES & AVERAGES — PROPERTY/CASUALTY* 148-50 (1992), which calculated that of a total of \$83.3 billion for liability insurance premiums in 1991, \$61.8 billion was spent on auto liability premiums.

7. Of course, the direct costs of malpractice litigation and insurance do not include the medical costs of "defensive" medicine induced by the prospect of litigation. Roger A. Reynolds et al., *The Cost of Medical Professional Liability*, 257 J.A.M.A. 2776 (1987), estimate that these indirect costs of additional medical treatment are approximately three times the cost of malpractice premiums. This is the figure, when applied to the earlier \$80 billion estimate of tort insurance costs, that led Dan Quayle (relying on a suggestion by Peter Huber) to put the total tort bill at \$300 billion. See *AGENDA*, *supra* note 2. This amount could be as high as \$400 billion now, given the recent Tillinghast estimate of \$130 billion in direct costs.

Such an extrapolation from the malpractice context is fallacious for several reasons. First, nearly three-fourths of direct tort costs come from motor vehicle litigation, which

One reason medical and product litigation tend to be the focus of legislatures is that successful suits in these settings tend to win far higher damage awards than in the motor vehicle field. Equally important is the fact that the subjects of products and malpractice liability are well-organized constituencies of doctors and businesses that are ready and able to take on the trial lawyers in the legislative arena. Furthermore, the parties seeking cutbacks in tort litigation do not highlight the scholarly evidence that, relative to the number of potential "high stakes" tort claims, only a minority of suits are actually filed.⁸

Appreciating the true state of affairs — that in some respects we have a gap, rather than a surplus, of tort suits — does not imply complacent endorsement of the status quo of the tort system. These facts testify, in part, to a serious shortcoming in the present system: tort law is mainly accessible to victims of motor vehicle injuries in which the negligence of another insured party is reasonably easy to document. On the other hand, if there were more malpractice or products liability suits, for example, we would not necessarily be better off. That judgment requires a further policy inquiry about whether litigation does more good than harm when the suit is actually initiated. That question cannot be answered generally. In the *Study* we answered the question in various ways, field-by-field. For a sophisticated and fair-minded appraisal of competing positions in the tort debate, though, one must necessarily keep in mind the harms inflicted on people who suffer personal injury as a result of tortious behavior, in addition to the harms inflicted on enterprises that suffer

produces little if any indirect financial expenditures. Second, malpractice litigation takes place within a health care system in which doctors make the vast bulk of treatment decisions on behalf of patients whose extensive health care insurance leaves little need for consumer resistance to unnecessary but expensive tests and procedures ordered by their doctors. Manufacturers faced with product litigation do not have this market luxury when they consider adopting defensive designs or production procedures. Finally, as the authors of the JAMA study cited above recognize, defensive medicine (and by analogy, defensive manufacture and defensive driving as well) can all *save* money to the extent this involves useful precautions that avoid accidents. Reynolds et al., *supra* at 2778, 2781.

8. A recent RAND Study, DEBORAH R. HENSLER ET AL., RAND, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 127, table 5.6 (1991), found that out of 100 people who reported a *serious* injury for use of a *consumer* product, only 20 victims even thought of suing and just five consulted a lawyer; of those who saw a lawyer, only three found one prepared to take their case. Two of the three filed suit and one collected payment. Of course, most consumer product injuries are not tortious because of the limited scope of liability for "defective" products. The Harvard Medical Practice Study in New York, however, found that 1 in 25 hospitalized patients suffered an injury from medical treatment, 1 in 4 of these due to provider negligence; but of the 1 in 100 patients who were the victims of an actual tort, only 1 of 7.5 filed a malpractice claim, and only 1 in 15 collected any money. PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE 137-40 (1993).

financial injury as a result of tort litigation.⁹

III. TOO HIGH PREMIUMS AND AWARDS?

The fact that the tort coin has two sides is little consolation to the obstetricians, day care operators, and small plane manufacturers, for example, who are all preoccupied with their experience of huge premium increases that have occurred at various times in the past. An additional concern of theirs is that this phenomenon will recur in the future. Even though claims and litigation rates are not statistically excessive, defendants and their lawyers assume that juries are prone to dip into the "deep pockets" of the enterprise in order to award outlandish sums of money to badly-injured plaintiffs.

Supporters of the tort system — a curious alliance of personal injury lawyers and consumer activists — counter that the tort system is an indispensable weapon against the "outrageous misconduct"¹⁰ of corporate enterprises that are only too ready to place private profit over public safety. Among the parade of horrors advanced in support of this cause are asbestos, DES, the Ford Pinto, the Dalkon Shield, and — the most recent contender — silicone breast implants. Tort advocates insist that juries of ordinary people should be able to register society's moral condemnation of such corporate behavior by rendering awards in amounts that send a message to not only this defendant, but to other companies as well not to tread that same path again.

At the same time, though, many argue that the true source of sharp premium increases — or worse, denial of any insurance coverage at all — is not to be found in the outcomes of tort litigation. Instead, the source is found in excess profit-making by a noncompetitive insurance industry using the excuse of popular unrest about lawyers and civil juries as a cover for hiking premiums far above liability costs. Ironically, the remedy prescribed (and undertaken)

9. For example, the Harvard Medical Practice Study found that the cost to New York State's health care system of just the additional medical treatment required for patients who were injured as a result of their initial hospitalization was larger than the total malpractice premiums paid. Note that New York is a state that has malpractice litigation levels as high as anywhere in the country. See WEILER ET AL., *supra* note 8, at 95-97.

10. This is the title of a journalistic account of the asbestos tragedy, PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* (1985). For a recent retelling of the same story in the same vein by a plaintiff's lawyer arguing against an administrative replacement for asbestos litigation, see Ronald L. Motley & Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 CARDOZO L. REV. 1919 (1992).

for this supposed market failure in insurance is yet more litigation — this time an antitrust suit that, if successful, will produce *treble* damage awards.¹¹

Our own view about the insurance side of the tort system is that much of what happens to premiums and coverage in the short run cannot be directly explained by trends in litigation. In the longer run, though, insurance prices do reflect those legal trends.¹² A distinctively cyclical flavor marks the flow of capital in and out of the insurance industry which, in turn, accounts for the steep increases in premiums in different lines of liability coverage at different points in time during the last three decades. One may safely assume that the same cyclical pattern will recur in the 1990s, generating yet another crisis atmosphere in the debate about tort law.

On the other hand, in general, liability insurance is one of the more competitive industries in our economy. The purchasers of coverage are either reasonably sophisticated business consumers or doctors who often have coverage provided by their own “bedpan mutuals.” Thus, doctors, for example, have recently seen their liability insurance premiums go down as well as up, a luxury not yet experienced by patients in their health insurance premiums. Interestingly, retrospective investigations over a longer time span have shown that trends in rising tort claims, especially those claims that grant average-sized awards, do account for the magnitude of premium increases over the entire insurance cycle.¹³

Some features operating within the tort system, however, appear to aggravate the problem of unaffordable (or unavailable) insurance coverage. In particular, contemporary tort law has generated considerably greater unpredictability about the nature and extent of liability visited on enterprises. Hence, uncertainty is created about the premium amounts an insurer must charge now for claims that may not be payable for a long time in the future.

A key source of such uncertainty in high-stakes litigation is the amount of liability that will flow from open-ended jury determination of damage awards, especially under such inherently subjective categories as pain and suffering and (typically noninsurable) punitive damages. Medical malpractice, for example, has experienced only modest tinkering with the initial liability requirement that a doctor

11. See *In re Insurance Antitrust Litigation*, 723 F. Supp. 464 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991). For a critique of the argument of the plaintiffs in this case, see Paul L. Joskow & Linda McLaughlin, *McCarran-Ferguson Act Reform: More Competition or More Regulation?*, 4 J. RISK & UNCERTAINTY 373 (1991).

12. See generally, Kenneth S. Abraham, *The Once and Future Crisis*, 4 J. RISK & UNCERTAINTY 353 (1991).

13. See, e.g., David J. Nye et al., *The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances*, 76 GEO. L.J. 1495 (1988).

fall below the medical profession's own standard of care. Nonetheless, we now regularly see multi-million dollar awards once physician fault has been found by the jury. While judges do wield some after-the-fact authority to prod the parties to reduce such initial awards, this process takes place only within parameters set by an original jury verdict, which may be far out of line. More systematic scholarly examination¹⁴ has demonstrated huge variations in average awards across different counties governed by the same state law. The amounts that are awarded against one type of defendant, rather than another, also show great variation. For example, malpractice awards are three times the size of motor vehicle awards *after* controlling for the age of the victim and the severity of injury. *Ex ante*, the prospect of a runaway tort award — even worse, of a multiplicity of such awards stemming from a single decision about a product design or plant location — can generate a level of risk aversion among potential defendants and their insurers that is far more costly and economically disruptive than the same tort expenditures made in a more rational and predictable fashion.

Equally important in evaluating both the size of individual awards and trends in average awards is a skeptical consideration of what is known as the “morality play” — depicted in both courts and legislative chambers — of a contest between an innocent victim and an unscrupulous defendant. Even when the source of the immediate product disaster was deliberate profiteering, rather than unfortunate (albeit negligent) human error, the executives actually guilty of such misdeeds do not personally pay the awards. Moreover, the culpable executives have often left the business long before the consequences of their misdeeds come to light. The reality of all high-stakes litigation — even medical malpractice, in which the nominal defendant is usually an individual doctor — is that some corporate enterprise or other entity will actually pay the award with money that is then deducted from taxable income. The ultimate burden of both jury awards and legal costs, then, is shifted to the shareholders, employees, and customers of the company or the industry, even though none

14. See, e.g., Stephen Daniels & Joanne Martin, *Jury Verdicts and the “Crisis” in Civil Justice*, 11 JUST. SYS. J. 32 (1986); Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U. L. REV. 908 (1989) [hereinafter *Valuing Life and Limb in Tort*]; Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5 (1991); Brian Ostrom et al., *What are Tort Awards Really Like? The Untold Story from the State Courts*, 14 LAW & POL’Y 77 (1992).

of these groups had any personal culpability for the victim's injury.¹⁵ The specific distribution of the tort burden among these several constituencies of the enterprise or the broader community depends on a complex interplay of consumer, labor, capital, and tax markets in that sector of the economy.

IV. RESHAPING TORT DAMAGES

This pragmatic conception of tort liability as a vehicle for injury prevention and compensation, rather than moralistic condemnation, has equally important implications for reform of tort damages — of the standards determining what kinds of harms will be compensated and by how much.

At a minimum, we need to introduce a meaningful degree of *law* into this area to provide lay juries with greater judicial guidance and supervision as they make judgments about appropriate monetary figures in individual cases. This does not imply that occasionally outlandish jury awards have caused too much money to be spent on tort damages overall. Indeed, scholarly research documents that more seriously injured victims tend to recover only a part of their total financial losses, notwithstanding the supposed legal entitlement to full compensation for both economic and noneconomic losses.¹⁶ That is why we strongly oppose the politically popular tool of caps on damages, regardless of whether the cap is on the total award or just pain and suffering. Such a legal measure is highly regressive because capping awards imposes the burden of containing liability costs and premiums upon the most severely disabled, the people who are most likely to be undercompensated even without a damage cap. Instead, our objective is to ensure that the necessary amounts of tort damages are more carefully channeled to those victims most deserving of compensation in light of rational insurance principles. Under those principles, the prime focus of tort damages should be the actual financial losses suffered by personal injury victims, in amounts that are more predictable and insurable by enterprises.

A. Collateral Sources

From that premise flowed several major prescriptions for tort reform. The first is that collateral source payments should be offset

15. The article written for this Symposium by Professor 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), is an especially valuable elaboration of this often forgotten truth about the ultimate incidence of tort liability.

16. See HENSLER ET AL., *supra* note 8; ELIZABETH M. KING & JAMES P. SMITH, *ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS* (1988); and Frank A. Sloan & Stephen S. van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 LAW & CONTEMP. PROBS. 131 (1991).

against the tort award, instead of being ignored in damage calculations, as now. In other words, liability insurance should be a second payor to loss insurance (medical or disability), which is much cheaper and faster to deliver. Tort liability should then be a second payor to systems of no-fault liability, such as workers' compensation.

Implementation of this new collateral source rule requires that the lien or subrogation rights of loss insurers be repealed at the same time.¹⁷ A further practical problem is how to handle collateral benefits that may be paid to the plaintiff after the award is fixed. The amount of collateral benefits paid in the past is identifiable through ordinary methods of proof. In the case of long-term losses, however, the amount of collateral benefits payable in the future is likely to be speculative. For example, the capacity of the plaintiff to secure private health insurance in the future is uncertain, and the scope of any new or improved social insurance programs that could add to the plaintiff's benefits is unknown.

One possible solution to this dilemma would be to offset against the plaintiff's award only those future benefits of which the plaintiff is legally assured at the time of trial — i.e., benefits payable in the future under existing insurance contracts and social insurance programs.¹⁸ An alternative would be to employ a test that is vaguer in form, but in most cases would be similar in result: offsetting not only benefits of which the plaintiff is legally assured, but all future benefits that the defendant proves, by a preponderance of the evidence, will be payable in the future. Admittedly, in certain instances this kind of inquiry would be speculative. The key is to fashion a method

17. Which in turn may well require federal legislation to remove the preemptive effect of Medicare and Medicaid (*see* *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984) and *Rubin v. Sullivan*, 720 F. Supp. 840 (D. Haw. 1989)), and ERISA (*see* *FMC Corp. v. Holiday*, 490 U.S. 52 (1990)) on such state efforts to rationalize tort damages.

18. For example, under New York law, evidence regarding proposed offsets to the plaintiff's damage award is admissible to show that any past or future expenditures by the plaintiff were or will "with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source" (with certain exceptions). N.Y. CIV. PRAC. L. & R. § 4545(a) (McKinney 1992 & Supp. 1993). The requirement for reasonable certainty regarding future expenses can be met only if the plaintiff is legally entitled to receive the collateral benefits as a result of an enforceable agreement or contract. *Id.* Michigan law requires a finding that the benefit derives from a collateral source obligated either by contract or statute to pay. MICH. COMP. LAWS ANN. § 600.6303(5) (West 1987 & Supp. 1992). In Ohio, offsets are limited to collateral benefits the plaintiff has received or may receive within five years from the date of judgment. OHIO REV. CODE ANN. § 2317.45 (Anderson 1991). And the collateral source rule in Florida has been construed to bar offsets for future collateral source payments dependent on future employment. *Measom v. Rainbow Connection Preschool, Inc.* 568 So. 2d 123 (5th Cir. 1990) (construing FLA. STA. ANN. § 768.76 (West Supp. 1993)).

that provides a reasonable blend of precision and ease of application in offsetting future collateral benefits against tort recoveries, so that tort damages only compensate actual financial losses and are not used to provide duplicate recovery.

B. Future Losses and Periodic Payments

The need to refine the treatment of future collateral source payments has made us consider the even more speculative endeavor of estimating the future losses against which such collateral payments would be offset. Juries are now asked to make a once-and-for-all calculation of the plaintiff's total economic losses, including those to be suffered twenty or thirty years in the future. One slice of this problem emerged on the tort reform agenda in the mid-1970s. The result is that legislation has been produced in a number of states authorizing or mandating periodic payment of tort awards or settlements over the life of the victim.¹⁹ In our *Study*, we endorsed this periodic payment idea, but only if it were made reciprocal. In other words, contrary to the standard "reform" model (exhibited in California malpractice law), if a periodic award for the victim's losses will cease when the victim dies earlier than anticipated, then the award must be extended when the victim lives longer than expected.

Even that more equitable version of periodic (or structured) payments addresses only a single future contingency — a deviation of the victim's actual from his actuarial life. Juries still must decide what kind of health care costs, for example, will be required to care for the plaintiff a decade or two later. Juries, though, do a poor job in making this estimate and often underestimate compensation. One likely reason for systematic undercompensation of the most severely injured plaintiffs is a psychological tendency of jurors to underestimate the total dollar cost of a loss factor — again, health care costs — whose actual burden will rise exponentially with soaring inflation.²⁰ We are inclined to favor the view, then, that any comprehensive reform of tort damages that takes seriously the desire to compensate actual financial losses of victims should at least experiment with a procedure whereby the jury determines the victim's losses (net of collateral sources) and damage amounts for the current year(s) and then specifies what trajectory these losses are likely to take in selected future years. The court, with advice from the parties, would then establish the formula that ensures compensation of such future losses at appropriate rates of inflation, whether paid

19. The best treatment of this topic is Roger C. Henderson, *Designing a Responsible Periodic Payment System for Tort Awards: Arizona Enacts a Prototype*, 32 ARIZ. L. REV. 21 (1990).

20. See Saks, *supra* note 4, at 1216-21, 1268-69.

through a lump sum award or paid on a periodic basis.

C. Pain and Suffering

The legal treatment of pain and suffering accounts for nearly half the damages paid in high-stakes product or medical litigation. Rather than ad hoc, open-ended jury determination under the common law, or crude nominal dollar caps imposed by numerous state legislatures, we propose an inflation-adjusted monetary scale for such awards — under which the largest sums of money will go to younger victims who suffer severe injuries, and who then will have funds to purchase substitute forms of enjoyment of life while afflicted with their disability.

The major practical challenge to implementation of this proposal is the task of preparing the recovery scale. Part of this task is empirical. Decision-makers can be greatly assisted by knowledge of the actual awards that juries within the jurisdiction have made for different classes of injury. Because in many jurisdictions the number of recent awards in different categories may be too small to be statistically reliable, a national study would be useful as a reference point.²¹

Another feature of the task is normative, not empirical. Decision-makers will have to determine the appropriate methods of categorizing injuries, and then set the presumptive upper and lower bounds on awards in each category.²² Because both these features of the normative task require policy judgments, legislatures could set the scales themselves. We believe, though, that a more fruitful approach would be legislative establishment of a special commission to recommend recovery scales to the supreme court of each state. The courts would be given the authority to adopt the scales, with or without modification. These special commissions could be composed of practicing lawyers, health care professionals including rehabilitation therapists, and citizen members. In this way, the technical, judicial, and political features of the task of constructing recovery scales for

21. The team of Bovbjerg, Sloan, and Blumstein has already done pioneering work in this regard. See Bovbjerg et al., *Valuing Life and Limb in Tort*, *supra* note 14, and James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171 (1991).

22. In their analyses, Bovbjerg, Sloan, & Blumstein suggest use of a matrix that would award damages based on factors including the victim's injury severity and age. See Blumstein et al., *supra* note 21, at 190-94; see also Bovbjerg et al., *Valuing Life and Limb in Tort*, *supra* note 14, at 938-53. Alternatively, a limited number of typical injury "scenarios" and their accompanying dollar values could be presented to the jury as guides for their damage determinations. See *id.* at 953-56.

noneconomic loss would be allowed to operate, subject to mutual influence and constraint. This process would preserve legislative oversight, but — because there would be no direct legislative involvement in fixing recovery scales — the possibility of deadlock and pure political compromise would be minimized.

D. Attorney Fees

A crucial corollary to this new approach to damage awards²³ is its treatment of the plaintiff's attorney fees. Actual participants in the tort litigation/liability insurance system have long understood the de facto role played by both the traditional collateral source rule, which duplicated recovery for certain financial losses, and the arguably excessive amounts awarded for pain and suffering. The combination of the two served to provide successful plaintiffs with the wherewithal to pay for the time and expense of their attorneys. That phenomenon is what makes so inequitable the standard approach of tort reformers who simply cut back on these alleged excess damage categories. The actual consequence of such "reforms" is to leave many plaintiffs who have meritorious claims and severe injuries with a net deficit in compensation for their financial losses, after the plaintiff's attorney has deducted a contingent fee that usually runs from thirty to forty percent of the award against the defendant.

Our solution to that problem²⁴ is not to maintain the erratic and unpredictable status quo, but rather to create a new category of

23. We should note that punitive damages present an analogous problem to pain and suffering damages in terms of the inherent subjectivity of such jury verdicts. Indeed, punitive awards are not only unpredictable in amount, but often random in occurrence. For that reason we devoted chapter 9 of our *Study*, "Punitive Damages," to developing a set of principled criteria for whether and how much punitive damages should be assessed in tort cases. Victor Schwartz and Mark A. Behrens sketch the nature of and rationale for our proposals, which they largely endorse. Victor Schwartz & Mark Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263 (1993).

We add this parenthetical comment about the debate. Rather than deal with punitive damages concerns on their intrinsic merits, representatives of the plaintiffs' bar have sought to dismiss this problem as quantitatively unimportant. They rely on recent empirical research (synopsized at 2 ALI STUDY, *supra* note 1, at 233-35). This research indicates that punitive awards are an exceptional rather than a typical event in personal injury suits against product manufacturers and health care providers. Other researchers have reached similar conclusions. See Michael Rustad, *Demystifying Punitive Damages in Product Liability Cases*, 78 IOWA L. REV. (forthcoming 1993). While in aggregate terms punitive awards are a much less substantial problem than pain and suffering awards, this is hardly an argument against otherwise justifiable reforms of this component of the tort system. If in fact defects exist in the design of this litigation product, this is a good reason for carefully rethinking the standards we are now using, rather than dismissing the problem on the grounds that only a few randomly selected defendants are unlucky enough to suffer severe legal injuries from the current design.

24. Developed in chapter 10, "Attorney Fees," 2 ALI STUDY, *supra* note 1, at 267-317.

compensable tort damages — the successful plaintiff's attorney fee. Our basic rationale is quite simple. When someone is hurt as the result of a defective product or negligent doctor, the victim must pay for *medical* treatment of the resulting injuries — a mode of professional assistance that tort law fully compensates now. The victim, however, must also pay for *legal* treatment of her injuries with the help of another professional, a lawyer — to be able to collect tort damages that help pay for the needed medical care. Our position is that tort damage awards should be expanded to compensate successful plaintiffs for this tangible financial cost of the defendant's original tortious behavior.

Implementation of this proposal raises some problems of design; in particular, determining what is the appropriate level of compensable attorney fees. Clearly, the judgment about what fees the defendants must compensate will have to be made by and for the tort system, rather than simply left to private contract between plaintiffs and their attorneys. In our view, the best approach is to use the contingent percentage formula that is now the norm in personal injury litigation. This model avoids the additional controversy that has been experienced in civil rights litigation about the appropriate number of hours of legal time spent on a particular case, and the proper hourly fee for that time. The model also maintains the current incentives faced by plaintiffs' attorneys to refuse or drop cases that appear nonmeritorious.²⁵

The crucial judgment about the correct percentage remains. Probably the figure should vary depending on the nature of the injury setting (e.g., aviation versus environmental) and the time of case disposition (e.g., before discovery or during trial). We found in debates about our *Study* that nothing raised the hackles of plaintiffs' lawyers more than the thought that legislatures or courts would have to scrutinize the reasonableness of their existing fee percentages. We did not propose that the tort damages formula would dictate the terms of the actual fee arrangement between plaintiff and client (i.e., the client could contract to pay more or less than the standard percentage included in the award). This typical lawyer reaction to our proposal, however, suggests that external legal guideposts for the contingent fee system might well be a good idea in its own right.

The reaction from the other side — defendants and their attorneys

25. For a theoretical defense of the contingent fee on this score, see James D. Dana & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation* (1992) (unpublished).

— is that the proposal constitutes inequitable one-way fee-shifting. In other words, if a patient sues her doctor and wins recovery, the patient's attorney fees are to be paid by the doctor: is it not fair, then, that if the doctor wins, the patient should pay her legal bills? Indeed, former Vice President Quayle and the President's Council on Competitiveness²⁶ made "loser pays" the centerpiece of the Republican program of tort reform to reduce "excessive" litigation in this country.

As between the typical personal injury victim and tort defendant, however, only an illusory equality to two-way fee-shifting exists. The true reason the doctor should pay the successful plaintiff's legal expenses is that the doctor has been found guilty of medical malpractice that inflicted serious physical injury on the patient. In contrast, the mere fact that a patient has sued a doctor and lost does not imply that the patient (or his lawyer) was guilty of legal negligence (any more than the fact that a doctor loses a patient on the operating table implies that the doctor was guilty of negligence). Additionally, the doctor's liability insurer, and not the individual doctor, would pay the plaintiff's legal costs (along with the rest of the tort award). By contrast, few, if any, patients would be insured against the sizable cost of losing a lawsuit. Two-way "loser pays" is a recipe, then, for sharply reducing the incidence of tort claims in the medical, product, and environmental areas where, as noted earlier, empirical investigation has documented that only a portion of potentially meritorious claims are now being brought.

Thus, from the point of view of tort and personal injury policy, two-way fee-shifting is an unwarranted step. From the point of view of improving the administration of civil litigation, a possible case for this idea exists, at least if varied to make a plaintiff's *lawyer* pay defendant's legal fees when a suit is lost. Personal injury lawyers would be able to insure against this legal risk and incorporate the premiums (or self-funded reserves) for such coverage into their cost structure and fee formulas (as doctors now do for medical malpractice insurance). The resulting formula would, in turn, determine the size of the fee award won by successful plaintiffs and paid to their attorneys. The typical losing defendant would, therefore, end up paying the legal costs of the typical successful plaintiff, and the losing defendant, in turn, would pass this cost on to the blend of shareholders, employees, customers, and taxpayers mentioned earlier. Assuming standardized fee formulas and experience-rated (or self) insurance for plaintiffs' lawyers, this new litigation liability system

26. AGENDA, *supra* note 2, at 8-9, 19 & 24-25.

might enhance the current incentives faced by personal injury lawyers to weed out good cases from bad, and drop or settle the latter.²⁷ For the moment, though, we agree with the views of those²⁸ who suggest that experimentation with this version of no-fault liability for legal injury should begin with contract litigation between businesses that operate on a comparatively equal legal and economic plane.

V. REFINING PRODUCTS LIABILITY

We turn now to the legal standards used to determine when personal injury victims are entitled to any tort damages. A full chapter²⁹ has been devoted in our *Study* to a number of doctrinal issues that have preoccupied judges and scholars in the products liability field over the last two decades. Our principal conclusions were that the standard for defective design and warning should be fault-based in light of the state of the art at the time of production and marketing. Judgments about whether a design was defective should not turn on consumer expectations as such, but on a balancing of risks and benefits from alternative designs that would satisfy the consumer's expected use of the product. With respect to warnings, it is crucial to avoid the too-ready finding that a particular warning might have been helpful after the fact without regard to the danger of information overload before the fact (i.e., manufacturers trying to incorporate every conceivable warning that might be the subject of litigation if something goes wrong).

The positions we took were largely in accord with those advanced in mainstream tort scholarship.³⁰ We were under no illusion that these doctrinal refinements, however justified in their own right, would make anywhere near the difference in actual product litigation as do practical factors such as attorney fee arrangements, trial by jury, and damage principles.³¹ Thus, we are bemused by the fact

27. For a mixed, though preliminary, verdict on this score, see Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J. L., ECON. & ORGANIZATION 345 (1990).

28. See, e.g., Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness' Agenda for Legal Reform*, 75 JUDICATURE 244, 250 (Feb.-Mar. 1992).

29. 2 ALI STUDY, *supra* note 1, at 33-82 (chapter 2, "Product Defects and Warnings").

30. For example, Professors James Henderson, Jr. and Aaron Twerski, the new Reporters for the ALI's project for a Restatement (Third) of Products Liability, advocated essentially the same positions in their subsequent article, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

31. The reasons why have been detailed by one of our ALI colleagues. See Gary

that so much emphasis is placed on products liability law in this Symposium — with much of Jerry Phillips' and all of Marshall Shapo's contributions chastising us for presuming to tamper with what they consider to be the fully-enlightened judicial product in this area.³² Because Professor Shapo, in particular, takes issue with the historical underpinnings of the *Study*, it may be useful to begin with a brief treatment of the development of modern products liability law — in order to indicate somewhat more precisely how that process of development has influenced our approach to the subject.

Consider the California experience as reflected in the landmark opinions from the formative era in products liability law. The modern view is generally traced to Justice Traynor's famous concurrence in *Escola v. Coca-Cola Bottling Co. of Fresno*,³³ an opinion that reflects the mixed heritage of the products area. In a single highly suggestive passage, Traynor offers a consumer expectations rationale for strict liability which sounds in warranty; an enterprise liability justification, grounded in both risk-spreading and accident prevention considerations, sounding in tort; and a pragmatic basis for liability, drawing upon the kindred spirit of *res ipsa* negligence law. Traynor discusses none of the refinements among manufacturing defects, design failures, and inadequate product warnings that would become a staple feature of later product liability analysis. Nor does one find any of the reservations about the "strictness" of strict liability that creep into later explications of products liability law, such as ours — refinements and reservations that trigger the criticism of Professors Phillips and Shapo, among others.

The question, though, is can, and should, such reservations and refinements be avoided? At first the influential California Supreme Court seemed to think so. The landmark case of *Greenman v. Yuba Products, Inc.*,³⁴ in which strict liability for defective products was finally adopted, did consider and reject contract warranty as the legal base for personal injury claims. In his *Greenman* opinion, however, Justice Traynor drew no distinction between tort treatment of manufacturing and design defects, and he made no reference to warnings. Moreover, a few years later in *Cronin v. J.B.E. Olson*

Schwartz, *Products Liability and Medical Malpractice in Comparative Context*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 28-80 (Peter W. Huber & Robert E. Litan eds., 1991).

32. Jerry J. Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 *SAN DIEGO L. REV.* 241 (1993); Marshall S. Shapo, *An A.L.I. Report Markets a Defective Product: Errors at Retail and Wholesale*, 30 *SAN DIEGO L. REV.* 221 (1993).

33. 24 Cal. 2d 453, 150 P.2d 436 (1944). The majority decided the case on the traditional negligence footing, using *res ipsa loquitur* to sustain the plaintiff's claim.

34. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

Corp.,³⁵ the court went out of its way to criticize and reject the position of section 402A of the *Restatement (Second) of Torts* that a product is defective only if the product is "unreasonably dangerous." Strict liability was treated, instead, as self-defining: liability automatically ensued when the risks in the product came to fruition.

The court, though, soon found it necessary to move beyond the simple and straightforward approach taken in these early cases. The key opinion is *Barker v. Lull Engineering Co., Inc.*,³⁶ in which a worker was injured by the capsizing of the high-lift loader he was manipulating on hilly terrain. *Barker* can be viewed as a classic "misuse" situation, exposing some of the inadequacies of the California court's earlier approach to the products area. In a *Barker*-type case three alternative scenarios are possible: 1) the manufacturer can be viewed as properly responsible for marketing a product with a "defective" (excessively dangerous) design; 2) the employer can be viewed as properly responsible for requiring the driver to use the product in an excessively dangerous way; or 3) the employee can be viewed as personally responsible for using the product in an excessively dangerous fashion. Whatever the case, the court could not simply apply the *Greenman-Cronin* approach to the situation and mechanically equate harm with manufacturer responsibility for a "defect."

The court, in fact, established a two-pronged test. The consumer expectations rationale was not rejected — indeed, it was the first prong — but its limitations were exposed to view: could the court possibly treat as dispositive the worker's "expectations" when he was instructed to operate the loader on sharply sloping terrain? Clearly, what constituted a "defective" design was not self-defining, nor necessarily a function of the driver's state of mind. A second prong — risk/utility analysis, reflecting considerations not unlike the "unreasonably dangerous" standard in section 402A of the *Restatement (Second) of Torts* — was enunciated for cases where consumer expectations provided no guidance. The early attempt to move effortlessly from negligence to strict liability had clearly faltered, and the ensuing decade, the 1980s, did little to effectuate a new synthesis in California, or elsewhere.

What has emerged, in our view, from these early efforts to forge

35. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). Here, a device meant to hold bread trays in place at the rear of a delivery truck failed to do so, injuring the plaintiff. *Id.*

36. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

an all-encompassing products liability standard is a recognition that any useful framework for dealing with the product-related injury cases must be sensitive to the variety of defective product claims. In manufacturing defect cases where the claim is essentially that one unit of the product has generated a risk not ordinarily associated with the product line — the classic exploding soda bottle case — establishing that the harm occurred from such a malfunction is sufficient. In this sense, liability for manufacturing defects is “true” strict liability: no additional showing of unreasonableness is necessary to establish liability. While Professor Phillips is technically correct in observing that the category of manufacturing defects is not air-tight — in some sense, a production process which allows for one exploding soda bottle in every one million soda bottles produced could be regarded as a failure in design — courts and commentators have had no substantial difficulty identifying a particular product as flawed when something went wrong in its operation as compared to the performance of typical products in that line. Strict liability in these cases, which we endorse, is a relatively straightforward rule to administer and it comports with both the enterprise liability foundations of tort, mentioned earlier, and the consumer expectations underpinnings of warranty.

By contrast to the conceptual ease of manufacturing defect cases, design defect claims require some limiting principle. As our brief discussion of *Barker* indicated, product-related injury, in itself, is an inadequate marker for assigning responsibility. Shortly after adoption of the crashworthiness doctrine, motor vehicle cases brought the point home clearly. Was an automobile manufacturer to be strictly liable for burns resulting from ruptured gas tanks even though any conceivable alternative placement of the gas tank would have led to greater dangers of the same sort?³⁷ Was the manufacturer of a recreational vehicle with the engine in the rear to be liable for all front-end collision injuries, despite distinctive consumer utility associated with the design?³⁸ These and other cases led to a search, one that continues, for a satisfying limiting principle.

In our view, risk/utility analysis, coupled with a requirement that a reasonably feasible, safer alternative design is available, is an appropriate test for design defect. Theoretically, risk/utility creates the appropriate incentives for safe design. Conceptually, risk/utility meshes well with the defenses of consumer fault, product misuse, and alteration. Pragmatically, the requirement that a reasonably feasible alternative must exist focuses the risk/utility inquiry, making it

37. See *Self v. General Motors*, 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974); see generally *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3rd Cir. 1980).

38. See *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974).

concrete to the jury, and avoids global speculation about whether a product — for example, all-terrain vehicles or above-ground swimming pools — is “essential” or “inessential” in cases where a generic product line is under attack.³⁹

Our critics protest the elimination of consumer expectations as an alternative basis for liability. In response, we would suggest that our approach eliminates a test that suffers from a number of flaws. In patent defect cases, a consumer expectations test may be used as a broad defense against liability for harm caused by “open and obvious risks” — a bar that many courts have considered excessively generous to the makers of dangerous products. By contrast, in latent defect cases the test may be easily used in a conclusory sense to avoid inquiry into the optimal level of design safety to be expected from product manufacturers. More specifically, the consumer’s expectation in any particular case is, quite simply, that the product will not cause harm. Moreover, when consumer expectations do arguably deserve some independent weight — consider, in this regard, Professor Shapo’s product promotion rationale for manufacturer liability⁴⁰ — no reason exists why consumer expectations cannot be factored into the “risk” term in a risk/utility test. For example, the actual risk of a product is actually increased when product promotion creates justifiable expectations by consumers that the product is safe for use without consumers having to take special precautions.

Like design defect cases, product warning claims raise singular issues that require distinctive consideration. Legitimate concerns can be raised about both under and overdisclosure. Less than optimal disclosure is inconsistent with the notion of promoting consumer choice, which we take to be a fundamental principle. A requirement of greater than optimal disclosure is also potentially inconsistent with the idea of consumer sovereignty, because excessive warnings may actually undercut the cautionary and informational functions that warnings are meant to promote. Additionally, requiring greater than optimal warnings is inconsistent with the goal of creating proper safety incentives.

What, then, is the optimal level of warning? Most courts have come to adopt a standard of reasonableness measured from the time the product is marketed.⁴¹ This is the approach that we have adopted

39. See *O'Brien v. Muskin*, 463 A.2d 298 (N.J. 1983), which set off a firestorm of scholarly criticism for encouraging such jury speculation.

40. See Shapo, *supra* note 32, at 227-29.

41. See, e.g., *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal.

because it best approximates the informational and deterrence functions just mentioned. While "true" strict liability — a time of trial approach to information about risk, as espoused by Professor Phillips, among others — would further promote the compensation function of tort law, the furtherance would be at the expense of the other goals just mentioned and, we would argue, at the expense of a basic notion of fairness. This notion of fairness holds that one should only be responsible for information about risk that one knew or should have known about at the time the product was actually marketed.

We would further buttress the reasonableness standard in warning cases by adding two other provisions. To begin with, if a safer way of making the product exists at a reasonable cost under ordinary circumstances, a warning would not suffice. For example, an otherwise adequate warning would fail in the case of a lawn mower with a dangerous opening over the rotary blade that could inexpensively be eliminated. The same would hold true for products posing dangers to children that could be reduced or eliminated through childproof caps. Secondly, in order to avoid haggling and unproductive speculation in cases of a sub-standard warning, the legal assumption should be that the injured party would have heeded a proper warning — avoiding a counterfactual inquiry into cause-in-fact.⁴²

This provides only the briefest outline of the contours of our approach to the products area and our points of disagreement with our critics. In assessing these suggestions, it is critical to keep in mind what we said earlier, that the doctrinal side of products liability law is *not* the most salient dimension of our proposals. For all of the discussion and criticism that our products liability proposals have generated, they do little more than draw on what we regard as the best current thinking of courts and commentators addressing the substantive issues of products liability law — an attempt, on our part, to put the various pieces of the puzzle together in a coherent fashion.

These proposals, however, would be seriously lacking in force without our more innovative and far-reaching remedial strategies regarding damages, for example. Here is where we part company from Professor O'Connell, who faults us for not thinking in sufficiently bold terms. We do not deny that our pragmatic inclinations made us look for workable, feasible reform initiatives. But we regard the doctrinal synthesis just sketched out, taken in tandem with our package of damage reforms, as a rather substantial departure from present tort law — and one that promises to reduce the unpredictability of

Rptr. 412 (1988); *Feldman v. Lederle Lab.*, 479 A.2d 374 (N.J. 1984).

42. This is one point at which we disagree with Professors Henderson and Twerski. See Henderson & Twerski, *supra* note 30, at 1522.

liability and the unevenness of compensation now endemic to the system.

VI. PROPORTIONAL LIABILITY FOR ENVIRONMENTAL TORTS

Early in this article we observed that, contrary to popular and political opinion, comparatively few tort claims are actually pursued, based on the total number of tortious injuries. Absent better mechanisms for identifying, compensating, and preventing avoidable injuries, such evidence of a litigation gap argues for reform measures that would make it easier to sue and win legitimate claims. This is especially true in the environmental arena. Nowhere else are the legal and practical hurdles to recovery so high as in the cases of victims of long latency diseases caused by diffuse environmental hazards.⁴³ While recognizing the legitimate concerns posed by mass tort litigation,⁴⁴ we proposed a major innovation in the legal nature and proof of disease causation in these cases.⁴⁵

Current law requires proof that it is more probable than not that a particular toxic hazard caused a claimant's disease. If, and only if, the answer is affirmative, the law awards full compensation for all the consequences of the disease. We recommended, instead, that environmental causes of action be based on epidemiological findings of the proportion of overall level of a disease attributable to such exposure, as long as the proportion was at least twenty percent. Under our proposal, victims who have been exposed to an environmental hazard would not have to prove that it was at least fifty-one percent likely that, for example, their cancers resulted from the exposure. Rather, if the likelihood were thirty percent (or sixty percent) they would collect damages for only thirty percent (or sixty percent) of their losses.

43. The evidence is summarized in chapter 11, "Environmental Injuries," 1 ALI STUDY, *supra* note 1, at 301-34, and more recently by two of our ALI colleagues, Troyen Brennan in his *Environmental Torts*, 46 VAND. L. REV. 1 (1993), and Donald N. Dewees, *The Role of Tort Law in Controlling Environmental Pollution*, 18 CAN. PUB. POL. 425 (1992). The one conspicuous exception to this observation about environmental liability is asbestos — a discrete substance to which millions of workers were exposed in generally confined quarters, and which generated 100,000 tort claims once scientific investigation had established a very high correlation between asbestos exposure and certain kinds of diseases.

44. See 2 ALI STUDY, *supra* note 1, at 441-83 (chapter 14, "Administrative Compensation Schemes"); Peter S. Menell, *The Limitations of Legal Institutions For Addressing Environmental Risks*, 5 J. ECON. PERSP. 93 (1991).

45. See 2 ALI STUDY, *supra* note 1, at 319-82 (chapter 11, "Scientific and Legal Causation," and chapter 12, "Standards of Environmental Liability").

This new doctrine of proportional liability could substantially expand the liability of certain enterprises, most notably chemical manufacturers. Indeed, our environmental liability proposal generated strong opposition from a number of members of the defense bar, equal in intensity to the distaste of the plaintiffs' bar for our damages proposals described above. The pincer movement of these two significant components of the American Law Institute's membership led the ALI Council to decide to terminate the project with our *Study*, rather than put our recommendations out for debate and vote by the Institute's membership.

As a matter of abstract principle, the defense bar's objection to our proposal is weak, because under ideal conditions proportional liability would charge enterprises for precisely the amount of injury they actually cause — no more, no less. This sum would simply be divided proportionally among all who might have been injured by such companies, rather than be paid in larger amounts to those plaintiffs who could surmount the fifty-one percent hurdle. We acknowledge, however, that numerous defendants would shoulder more liability than they do at present: those whose activities actually cause considerable levels of environmental injury, but injuries sufficiently diffuse in impact that few victims can prove by a preponderance of the evidence that their diseases were actually caused by any particular defendant and its hazardous sources. Expansion of liability in such situations is precisely the point of our proposed reform.

Admittedly, practical problems exist in administering proportional liability fairly. These problems have been the principal target of critics of the idea. One problem is how to assure the reliability of evidence regarding the probability that the defendant's actions caused a plaintiff harm. The *Study* recommended procedures by which courts could draw on nonpartisan scientific expertise. The important issue here, however, is not only which experts should make the probability determination, but what standard should be used to make this determination. In our view, the typical preponderance-of-the-evidence standard is not a sufficiently exacting basis for making proportional liability awards. Rather, in order to be sufficient, such evidence (ordinarily based on epidemiological studies) ought to have widespread support in the scientific community. With this standard in mind, the *Study* recommended formation of "blue ribbon" science panels to provide courts with assistance in making judgments regarding scientific issues. Crucial to this alternative is that courts have a sufficient basis for concluding that the epidemiological or statistical evidence of causal probability presented to them is respectable and reliable.

The second obstacle to fair administration of proportional liability arises in a case in which the plaintiff established that the defendant's actions more probably than not were the cause of his injuries. Under

traditional rules, the plaintiff would be entitled to an award of full damages in such a case. In contrast, our *Study* recommended that in *all* cases in which proportional liability is appropriate, plaintiffs should receive only a proportion of damages, even if the evidence shows that the defendant's actions were more probably than not the cause of the plaintiff's injury. The *Study* recommended that proportional liability begin at the point when evidence shows at least a twenty percent probability of causation, and that damages be proportional to causation up to the point when the probability is at least an eighty percent probability that the defendant's action caused the injury in question.⁴⁶

The critical issue, then, is how to determine which of the claims that would traditionally warrant full recovery would, nonetheless, be subject to proportional liability and would, therefore, entitle the plaintiff to only a limited, proportional recovery. On this point the *Study* was unambiguous, but evidently more elliptical than would have been necessary to reassure its critics. Clarifying our position may be useful: *in any case* relying on epidemiological proof of causation, proportional liability recovery rules, not traditional all-or-nothing liability rules, would apply. Some defendants, then, would pay damages in cases in which they would have entirely escaped liability under traditional rules, and other defendants would pay only partial damages in certain cases in which they would have been held liable for full damages under traditional rules.

VII. ORGANIZATIONAL RESPONSIBILITY FOR MEDICAL MALPRACTICE

A major premise of our proposed recasting of tort damages was clear-eyed recognition of the fact that the tort bill is *not* ultimately paid by the guilty actor, but instead is distributed among the several constituencies of the enterprises that are sued. An additional implication of that point of view was our proposal for a new model of "organizational" liability for medical injuries in place of the apparently-personalized liability presently imposed on the individual doctor judged negligent.⁴⁷ Under our proposal, individual hospitals (or

46. In that respect our proposal differed from that of the REPORT TO THE CONGRESS FROM THE PRESIDENTIAL COMMISSION ON CATASTROPHIC NUCLEAR ACCIDENTS 114-20 (1990) (the study recommended proportioning recovery only for cases in which the probability of causation lay between 20 and 50%, and paying full damages in all cases that satisfied the "preponderance" (more than 50%) criterion).

47. For initial development of this idea, see chapter 4, "Medical Malpractice," 2

other health care organizations, such as HMOs) would bear exclusive liability for any malpractice-related injuries inflicted on the hospital's patients by doctors (or other health care providers), whether or not the doctors were employees of the organization. The only exception would be for injuries resulting from intentional (as distinguished from merely negligent) misconduct. As a consequence, individual physicians would, for all practical purposes, be completely relieved of legal liability for patients admitted to a hospital. Indeed, we envisage that hospitals and doctors would likely find it sensible to have the former's liability insurance cover all patients treated by its affiliated physicians, irrespective of whether the patient ever used the hospital.⁴⁸

We believe that this new liability regime would provide several positive advantages within our pragmatic conception of the role of tort law. More stable insurance would be available to both medical providers and injured patients because hospital-based coverage would be large enough to handle individual catastrophic cases, but less susceptible to the dislocating swings of the insurance premium cycle. Our litigation system would also operate more economically, because of reduction in the number of, and legal jockeying among, potential defendants (e.g., family physician, surgeon, anesthetist, and hospital). Most importantly, tort law would exert a more effective preventive influence against future medical injuries because the focus of liability would be at the level of the institution whose memory, planning, and decision-making is most susceptible to legal/financial incentives.

Several practical obstacles would have to be overcome, however, before organizational liability for medical malpractice could be effectively implemented. Two such obstacles deserve special attention: the method by which the regime would be brought into being, and the insurance adjustments that would have to be made during the transition.

ALI STUDY, *supra* note 1, at 111-26; PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 122-32 (1991). At the present time, two of us are embarked on a project to work out the details and address the pitfalls of enterprise responsibility for medical injury. See Kenneth S. Abraham and Paul C. Weiler, Organizational Liability for Medical Malpractice: An Alternative to Individual Health Care Liability for Hospital-Related Malpractice (1993) (unpublished).

48. Doctors with admitting privileges at several hospitals would simply designate a primary hospital affiliation for this specific insurance purpose.

A. Elective or Mandatory Participation

Organizational liability might take one of two different forms — elective or mandatory. The elective version could be implemented either through purely voluntary contracts between hospitals and doctors or other health care providers, or under the authority of an enabling statute. Under the pure contractual approach, hospitals and doctors could voluntarily agree that hospitals would indemnify doctors against liability for medical malpractice. In contrast, an enabling statute could authorize, but not require, hospitals to undertake organizational liability. Such an undertaking would automatically relieve affiliated physicians of liability for medical malpractice ensuing from doctors injuring hospital patients.

Under either elective approach, doctors would receive an immediate windfall and hospitals would suffer an almost immediate loss. Until health insurance reimbursement rates (and malpractice insurance premiums) adjusted to the new liabilities, therefore, payments would be required from doctors to hospitals to reflect these windfalls and losses. Eventually, as we suggest below, health insurance adjustments should make such payments unnecessary.

A second approach would be mandatory organizational liability, under which all hospitals would automatically bear liability for medical malpractice claims against their affiliated physicians, who would correspondingly be made immune from suit. With little direct experience in organizational liability, however, moving hastily to a mandatory system would likely be a mistake. Much is to be learned and many wrinkles ironed out before a single model is required of everyone. Consequently, we recommend a series of demonstration projects using the elective approach — preferably involving several hospitals in a single geographic region — as a prelude to legislative adoption of across-the-board organizational liability.

6

B. Complementary Insurance Adjustments

Perhaps the greatest obstacle to implementation of organizational liability is the need for considerable adjustment in background insurance arrangements. First, malpractice liability insurance premiums charged to hospitals and doctors would have to be altered.⁴⁹ Second,

49. If full organizational liability were adopted for both hospital-patient and non-hospital-patient events, then physicians would no longer have to purchase malpractice insurance at all, because they would be totally immune from suit. In turn, the malpractice premiums or payments to self-insured reserves of hospitals would have to increase,

adjustments in allocation of the costs of care by doctors and hospitals, and in reimbursement schedules of private and public health care insurers, would be required because the fees that doctors and hospitals charge their patients are based, in part, on their respective costs of malpractice insurance.

It is vital to assure that both kinds of adjustments are made. The financial health of both hospitals and doctors depends too heavily on reimbursement schedules to permit a purely wait-and-see approach to the adjustment of these schedules. Detailed and coordinated planning by malpractice and health insurers is necessary so that the transition to organizational liability can be made smoothly, equitably, and without severe economic dislocation. A useful mechanism for dealing with this transitional problem, especially if organizational liability were elective, would be payment of surcharges by doctors to the hospitals in which they enjoyed admitting privileges. The payments would be roughly equal in amount to what the doctors were saving in malpractice insurance as a result of this protection from suit. As noted earlier, two of us are now engaged in a study that will outline precisely how these adjustments should be made.

Such a shift in the focus of medical liability from the individuals providing medical care to the institutions under whose auspices the care is provided reflects our broader rejection of the moralistic conception of tort law — as an instrument for imposing on the people at fault the burden of the harms they inflict on innocent victims. What malpractice law really does is serve as a point of entry to a judicially-mandated system of disability insurance under which liability insurers pay successful tort claimants with funds ultimately accumulated from premiums paid by potential patients for health insurance. Channelling the relative burden of such liability in a way that accentuates the injury prevention incentives felt by parties in a position to avoid tortious harms is crucial. For this reason, we advocate imposing medical liability on health care organizations, rather than on individual providers.

because hospitals would bear liability for all malpractice claims made on account of care provided by affiliated health care providers. On the other hand, if as a first step hospitals were to bear liability only for injuries suffered by their own patients, then health care providers would continue to purchase malpractice insurance, but such insurance would need to cover only liability for non-hospital-patient care. Even in this case substantial downward adjustment of individual premiums would be required, with a concomitant upward adjustment of premiums (or payments to self-insured reserves) by hospitals.

VIII. BEYOND TORT LAW

A. *Good Fences Make Good Neighbors*

The foregoing gives some of the flavor of our approach to reform of the tort system. A number of serious scholarly critics of tort litigation are impatient with what they characterize as our tinkering with an irreparably flawed regime.⁵⁰ Certain of these critics believe we would be better off with no tort law at all. In their view, the positive functions of injury compensation and prevention now performed by cumbersome and expensive litigation would best be parcelled out among such alternative institutions as private competitive markets (for consumer products), first party loss insurance (for medical treatment and lost earnings), and administrative regulation of health and safety risks (from food and drugs or the workplace).⁵¹

From the outset of our *Study*, we sought, as they have, to avoid a narrow tortcentric cast to our analysis. We undertook a comparative evaluation of the contributions that could be made by all of tort's institutional neighbors in the broader personal injury universe. That effort brought clearly home to us that civil litigation was by no means the only policy instrument through which our society fixes responsibility for personal injury. Even granting the sizable gap, noted earlier, between the number of injuries that occur and the number of tort payments that are made, most personal injuries do secure some redress from a variety of other community sources.⁵²

At the same time, notwithstanding our natural lawyers' preoccupation with the operations and failings of the tort system that we know best, we must not lose sight of the characteristic flaws of these other programs. Scholars who study Social Security Disability Insurance, for example, or the Occupational Health and Safety Act, or

50. That is particularly true of our colleague Jeffrey O'Connell, as exhibited by the title and tenor of his article that he coauthored with Chad M. Oldfather for this Symposium: *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).

51. For example, while largely endorsing our proposals for reforming the existing tort system, Stephen D. Sugarman believes that we would be better off replacing tort litigation with these alternatives: see his review of our *Study*, *A Restatement of Torts*, 44 STAN. L. REV. 1163 (1992).

52. For a comprehensive review of the scope of public and private insurance, see Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75 (1993). This article estimates that in 1990, when tort payments totalled roughly \$50 billion, health insurance coverage expended \$385 billion (\$200 billion public and \$185 billion private) and long term disability insurance \$41 billion (just \$6 billion private, the rest under Social Security).

the private market for medical services, are fully conversant with the characteristic flaws of these institutions.⁵³ Only a minority of long-term lost earnings are insured against. The command and control regulation of workplace hazards imposes substantial costs upon employers with only a modest reduction of injury to workers. Additionally, for good reasons, we think, the American polity is not prepared to leave to purely private contract the questions of how medical treatment is to be provided to patients and who will be the provider.

Even with that more realistic appraisal of the limits, as well as the scope, of nontort institutions, we are aware of intriguing speculations about whether the nation would be better off dispensing with tort litigation entirely, leaving the injury field to these alternative regimes. Perhaps because of our more pragmatic bent — taking the world as it is, not as some of us might dream it should be — we did not propose such a political nonstarter. Our *Study* accepts the continuing reality and value of tort law — a system of civil liability, primarily shaped by judges and juries, enforced by victims themselves against enterprises responsible for their injury — as an instrument that should, and will, remain available for other kinds of injury problems not adequately dealt with in either the private marketplace or the political and regulatory arenas.

We recognize that in many specific settings tort law is *not* needed, and that superimposing a lawsuit on top of another public or private remedy may do far more harm to defendants than good to plaintiffs. For that reason, we proposed a variety of reform measures designed to erect better demarcation lines — better fences — between tort and its neighbors.

1. *Collateral Source Offset.*

Earlier we developed the case for this reform of tort damages. Although our social insurance safety net still has far too many holes in it, that system is available to many personal injury victims at much lower costs in terms of money and time.⁵⁴ Tort liability insurance should be a second payor, then, to public or private loss insurance.

2. *Regulatory Compliance Defense.*

The reach and effectiveness of legal regulation of unsafe workplaces, motor vehicles, consumer products, and even food and drugs is inherently limited. These administrative programs, however, do address a number of the most important injury risks regarding safety

53. See, for example, Clayton P. E. Gillette & James Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990), for a comprehensive review of the inadequacies of institutional alternatives to tort litigation in dealing with toxic risk.

54. See Abraham & Liebman, *supra* note 52.

standards devised by specialized agencies. Many people are troubled that current law allows a jury to ignore such experienced administrative judgment and substitute lay views about the appropriate steps for a firm to take in reducing the inevitable risks generated by its enterprise (e.g., selling medical appliances). Thus, we fashioned a carefully-limited regulatory compliance defense⁵⁵ that could be made available to private actors who have informed the responsible agency of what they knew or should have known about a hazard and have relied on the standard of conduct propounded by the agency for them.

3. *Product Warnings.*

Inevitable imperfections exist in the degrees of information, appraisal, and choice available to individuals presented with the array of goods and services in the marketplace. Hence, we think that allowing product manufacturers or health care providers, for example, to insist on full waiver of liability for anyone wanting to avail themselves of what is being offered would be a mistake. We, therefore, developed a number of measures⁵⁶ that would better enlist the services of tort law — in particular, product warnings law — in elevating the level of consumer awareness of risks and the ways to avoid them.

B. *Elective No-Fault Medical Liability*

Closer to tort's home is the alternative legal model of administrative no-fault liability. This regime is designed to provide more accessible and more economical compensation to all the injured victims of a particular activity, irrespective of whether the injury happened to be due to someone else's identifiable fault. At the same time, no-fault liability fixes financial responsibility on the enterprise whose activities gave rise to the injury. The principal exemplar of this liability model is workers' compensation. Though workers' compensation has recently been afflicted with many of the same ailments as

55. See 2 ALI STUDY, *supra* note 1, at 83-110 (chapter 3, "Regulatory Compliance") for both the scope and, equally important, the limits we propose for such a tort defense. At a minimum, when a regulatory compliance meets these criteria, then the award of punitive damages should be precluded and a rebuttable presumption should be created showing that the defendant has satisfied the tort standard of liability.

56. See 2 ALI STUDY, *supra* note 1, at 33-82 (chapter 2, "Product Defects and Warnings").

tort law — rising levels of litigation and premiums⁵⁷ — one point that both business and labor agree upon is that they do not want to repeal the workers' compensation system and revert to tort liability. Workers' compensation spends a far higher proportion of its compensation dollars on victims than on lawyers, and the system has proven considerably more influential in reducing occupational injuries than has administrative regulation.⁵⁸

For these reasons, we believe in trying the no-fault model elsewhere — in particular, in health care.⁵⁹ Hospitals or health care organizations should eventually be made responsible for the patient's otherwise uncompensated financial losses from all seriously disabling medical injuries, irrespective of the presence or absence of provider fault.⁶⁰ We are fully aware of the doubts concerning both the costs of such an expansion of liability and of the difficulties in making judgments about whether a current patient disability is really due to medical treatment, rather than from the original illness requiring the treatment.⁶¹ That is why we recommend a pilot plan of *elective* no-fault liability for medical injury. Such a plan would permit observation of the pros and cons of this liability approach in actual operation (and can be compared to malpractice litigation). This pilot phase should consist of the following components:

1. Express legislative authorization would be given to hospitals and other health care organizations to offer their patients the option of an administrative system of no-fault compensation for all medical injury occurring within the hospital, in return for waiver of the right to sue the hospital and any other health care providers for malpractice associated with the injury in question.

2. After being informed in an understandable manner of the tort rights to be surrendered and the no-fault rights to be provided, patients would choose between treatment in a no-fault hospital and a tort-fault hospital.

57. Total workers' compensation premiums soared from \$25 billion in 1984 to over \$60 billion in 1991. See John F. Burton, Jr., *Workers' Compensation Costs in 1991*, 5 WORKERS' COMPENSATION MONITOR 1 (May-June, 1992).

58. See MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY (1990) (Viscusi was one of our colleagues on the ALI Project).

59. We also carefully reviewed the virtues and limits of the no-fault alternative for mass toxic harms. See 2 ALI STUDY, *supra* note 1, at 441-83 (chapter 14, "Administrative Compensation Schemes"), that is elaborated upon in Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. (forthcoming 1993).

60. See 2 ALI STUDY, *supra* note 1, at 487-516 (chapter 15, "Elective No-Fault Medical Liability"); WEILER, MEDICAL MALPRACTICE ON TRIAL, *supra* note 47, at 132-158; Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. (forthcoming 1993).

61. The Harvard Medical Practice Study did provide considerable information on both these scores: see WEILER ET AL., *supra* note 8.

3. Compensation would be sufficiently generous to replace the vast majority of the economic losses of patients who are disabled for a minimum period — e.g., at least two months. Such compensation would include full medical and rehabilitation expenses not covered by other sources of insurance, a fairly high percentage of wage loss (e.g., eighty percent) up to a multiple of the state's average wage (e.g., up to twice that level), again offset by payments from other sources such as disability insurance, and specified payments for lost household production and long-term loss of enjoyment of life.

4. The program would include a claims administration procedure that would be neutral, fair, and easily accessible to patients. A board of independent arbiters would resolve disputes over coverage and amount, and devise "designated compensable event" formulas to reduce the incidence and difficulties of such disputes.⁶²

5. Hospitals would be authorized to impose a surcharge on physicians and other health care providers with admitting privileges in exchange for relief from the threat of tort liability. These reductions and surcharges would have to be supported by actuarial data approved by the state Insurance Commissioner or other designated official who reviews ordinary malpractice premium levels.

6. The hospital or health care facility offering no-fault benefits would have in place an effective quality assurance program and would receive state-provided authority to surcharge or suspend the admitting privileges of accident-prone physicians, together with protection from antitrust liability for doing so.

Pilot no-fault programs with these components would provide the basis for determining whether full scale mandatory systems should be adopted. Additionally, data gathered as part of any pilot project could help liability insurers adjust their malpractice premiums and enable health insurers to adjust their reimbursement rates in the event that full-scale no-fault programs were adopted. Today's comparatively uncontroversial malpractice climate provides the right conditions for pilot studies to be completed before the next malpractice "crisis"⁶³ makes dispassionate, long-term investigation of this reform option much more difficult.

62. See Lawrence R. Tancredi & Randall R. Bovbjerg, *Rethinking Responsibility for Patient Injury: Accelerated Compensation Events, A Malpractice and Quality Reform Ripe for a Test*, 54 LAW & PROBS. 147 (Spring 1991).

63. See Walter Wadlington, *A Medical Malpractice Crisis in 1995?: Some Conceivable Scenarios*, 36 ST. LOUIS U. L.J. 897 (1992).

CONCLUSION

The responses to our *Study* reflect the range of interests at stake in the ongoing debate about personal injury law and compensation in this country. No proposal for substantial reform can be made without receiving criticism from those with a substantial interest in maintaining the *status quo* or from academic critics who find life without a tort system they are familiar with difficult to imagine. Yet, no sooner is a proposal made for altering a doctrinal component of tort law while retaining certain of its other features, than the proposal is criticized as insufficiently bold "tinkering" with tort law.

Because our *Study* contained proposals of both kinds, it is not surprising that it received both kinds of criticism. We recommended some substantial tort reforms and did not hesitate to consider far-reaching substitutions of non-tort approaches to compensation and safety regulation in place of the current system of tort law. Because we saw major flaws in the tort system from the standpoint of both victims and injurers, we were bold in considering reform. But, recommending major changes simply for the sake of being bold is pointless. When the defects of a radical approach to reform seemed to us to be greater than the benefits derived from such an approach, or when adoption of a recommendation (e.g., universal disability insurance) seemed utterly unrealistic, we declined to endorse that particular approach and instead proposed sensible and feasible changes. Nonetheless, some of the reforms we recommended were sufficiently controversial that the leadership of the American Law Institute could not bring itself fully to confront them. If an organization like the Institute could be paralyzed by internal divisions about such issues, one cannot help wondering whether even more substantial reforms — whether they would expand or contract tort liability — have any chance of adoption in the current climate.

This kind of institutional gridlock may well be broken in the foreseeable future. In the interim, though, our *Study* might well serve as a model and as a resource for those who believe that improvement of our liability and compensation systems depends on dispassionate and rigorous analysis of the strengths and weaknesses of all possible methods of dealing with personal injury prevention and compensation. This Symposium itself has made a genuine contribution to that process of improvement.