

Rejoinder: Advances in the Analysis

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As I note in my Article in this Symposium, the *Reporters' Study* on personal injury law is grand in its ambition.

In the service of that enterprise, the contribution to the Symposium by Professors Abraham, Rabin, and Weiler furthers our understanding of a group of knotty problems in the realm of injury law. Not the least of their contributions is their assault on the medical malpractice problem,¹ which in conjunction with other scholarship led by Professor Weiler² appears to be a genuine advance in the discussion of legal policy.

This brief rejoinder addresses two levels of issues—broad questions involved in the effort to establish a critical overview of injury law and questions more precisely bound up with products liability law. One lesson of this essay is something that a distinguished social scientist taught me at the outset of my career: in the social sciences, we learn basic truths over and over again.

I. GLOBAL ANALYSES

In the last decade, there have been two global analyses of society's responses to the injury problem. These are my initial effort in 1984, as Reporter for the Special Committee on the Tort Liability System of the American Bar Association (A.B.A.),³ and the *American Law*

1. Kenneth S. Abraham et al., *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 SAN DIEGO L. REV. 333, 355-58 (1993).

2. See PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991); PATIENTS, DOCTORS, AND LAWYERS: *MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENTS' COMPENSATION IN NEW YORK* (Report of the Harvard Medical Practice Study to the State of New York 1990).

3. AMERICAN BAR ASS'N SPECIAL COMM'N ON THE TORT LIABILITY SYSTEM, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* (1984) [hereinafter A.B.A. REPORT].

Institute Enterprise Liability Report in 1991.⁴ It may be that their congruences are more noteworthy than their differences in points of view.

Perhaps the most significant parallel between the two Reports is their scope of inquiry. The *A.B.A. Report*, entitled *Towards a Jurisprudence of Injury*, seeks to "define tort law as a major feature of a developing jurisprudence of injury in our country."⁵ The study devotes a chapter of nearly two hundred pages to neighboring systems of law through which society seeks to avoid, or to resolve, conflicts about injury.⁶ This approach built on my recognition in 1970 of "the public complications of private lawsuits and judicial decisionmaking"⁷ and on my 1976 casebook, entitled *Tort and Compensation Law*.⁸ The *ALI Study* essays a "serious scholarly analysis and reflection about the tort system and related institutions for dealing with disabling injuries."⁹

Both works stress that whatever needs exist for repair in the tort system go far beyond doctrine. The *A.B.A. Report*, though analyzing many of the discrete controversies about doctrine and damages rules that have engaged scholars for years, focuses many of its key recommendations on improvement of the process of data gathering and dispute resolution.¹⁰ The *ALI Study* occupies itself in significant part with institutional analysis,¹¹ and with "develop[ing] a number of *approaches* to legal and institutional reform."¹²

Both this author and the writers of the *ALI Study* appear to agree on the misleading features of the public relations barrage that has been launched against the civil justice system as it applies to personal injuries.¹³ Some disagreement exists about quasi-substantive rules of law crucial to the amount of money that changes hands in tort suits, but there appears to be a congruence of thought on the scholarly background of that disagreement.

The *A.B.A. Report* analyzed, in some detail, the criticisms of tort damages on the grounds that they lack "'coherent principle,'"¹⁴ and

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

5. A.B.A. REPORT, *supra* note 3, at 1-1.

6. *Id.* at 10-1 to 10-192.

7. Marshall S. Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 STAN. L. REV. 330, 338 (1970).

8. MARSHALL S. SHAPO, TORT AND COMPENSATION: CASES AND MATERIALS ON TORT AND COMPENSATION LAW (1976).

9. 1 ALI STUDY, *supra* note 4, at 5.

10. See A.B.A. REPORT, *supra* note 3, at ch. 13.

11. The titles of its two volumes are *The Institutional Framework* and *Approaches to Legal and Institutional Change*.

12. 2 ALI STUDY, *supra* note 4, at 580.

13. See Abraham et al., *supra* note 1, at 334; Marshall S. Shapo, *Bashing the Law*, 65 N.Y. ST. B. J. No. 3, at 46 (March-April 1993).

14. See A.B.A. REPORT, *supra* note 3, at 5-164 (quoting Beverley M. McLachlin,

spoke of "the difficulties of fixing a philosophical base for tort damages, particularly for personal injuries."¹⁵

The *ALI Study* focuses on discrete issues of damages. Concerning one of the most discussed of those issues, it agrees with the *A.B.A. Report* on the desirability of retaining pain and suffering as an item of tort awards.¹⁶ It also presents interesting ruminations on ways to establish limits to that item, which strains the rational structure of damages arithmetic.¹⁷

In both the *ALI Study* and their article,¹⁸ the authors reflect the tensions concerning the collateral sources rule that manifested themselves in the discussions of the A.B.A. Committee. I can testify that this was one of the two or three subjects that produced the most contentiousness in that committee. I personally continue to find the question a very difficult one. I do note, in particular, that no one has satisfactorily explained why life insurance is not a "collateral source" for purposes of the argument against retention of collateral sources.

Perhaps the major difference between the *ALI Study* and my views of the subject is that the *Study* insufficiently deals with the "Problem of the Missing Tsar": the persistent (and fortunate) resistance of the American polity to the idea that we should endow one institution with comprehensive power to "assign" injury law tasks to various decisionmaking systems.¹⁹

II. PRODUCTS LIABILITY

I turn now to the particular subject of products liability.

I seem to detect a certain puckishness in the ALI authors' lament that there was "so much emphasis . . . 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."²⁰

What Price Disability? A Perspective on the Law of Damages for Personal Injury, 59 CAN. B. REV. 1, 1 (1981)).

15. See *id.* at 5-165.

16. See *id.* at 5-176 to 5-183; 2 ALI STUDY, *supra* note 4, at 229.

17. See 2 ALI STUDY, *supra* note 4, at 217-29.

18. Compare 2 ALI STUDY, *supra* note 4, at 161-82 with Abraham et al., *supra* note 1, at 340-42.

19. See Marshall S. Shapo, *Tort Reform: The Problem of the Missing Tsar*, 19 HOFSTRA L. REV. 185 (1990).

20. Abraham et al., *supra* note 1, at 348.

I have explained in my Article why I, at least, chose to focus on that subject. I was writing an article responding to a book, rather than writing another book. Products liability is a subject I know in detail, and it is one, that as the ALI authors themselves point out in their present essay, to which they chose to “devote[] a full chapter.”²¹ Moreover, in a report so powerful and filled with good ideas, the products chapter seemed curiously unpersuasive.

I venture a few comments, staccato:

- Our competing recitations and criticisms of the *ALI Study's* short history of products liability stand on their own, and the reader must choose what seems the fuller and more satisfactory treatment.²²

- The ALI authors' sally about “presuming to tamper with . . . the fully enlightened judicial product”²³ is surely wry. My products liability treatise, now more than two volumes,²⁴ as well as two coursebooks,²⁵ reflect one observer's attempt at detailed criticism of doctrine, as well as an attempt to explore its underlying roots. A monograph recently published²⁶ extends that effort. Thus, I assume that with their reference to my presumed support for “the fully enlightened judicial product,” the authors indulge a light-hearted penchant for the lugubrious. This is doubtless also the case with their reference to my presumed opposition to “refinements and reservations” in products liability law.²⁷

Indeed, in some cases where the ALI authors seem to insist that there is disagreement, there appears to be a basic agreement on refinements and distinctions. Scholars generally, as well as courts generally, have recognized the “variety of defective product claims” and the fact that as a practical matter, there is often a working distinction between “manufacturing defects” and “design defects.”²⁸

Yet, as Professor Phillips points out,²⁹ and as I have independently

21. *Id.* at 347.

22. Compare Marshall S. Shapo, *An ALI Report Markets a Defective Product: Errors at Retail and Wholesale*, 30 SAN DIEGO L. REV. 221 (1993), with Abraham et al., *supra* note 1, at 333.

23. Abraham et al., *supra* note 1, at 348.

24. MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* (2d ed. 1990 & Supps. 1991, 1992, 1993).

25. W. PAGE KEETON & MARSHALL S. SHAPO, *PRODUCTS AND THE CONSUMER: DEFECTIVE & DANGEROUS PRODUCTS* (1970) (with an opening section of 422 pages on public regulation reflecting an early concern with comparative institutional analysis); MARSHALL S. SHAPO, *PRODUCTS LIABILITY: CASES AND MATERIALS* (1980). See also MARSHALL S. SHAPO, *PUBLIC REGULATION OF DANGEROUS PRODUCTS* (1980).

26. MARSHALL S. SHAPO, *PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE* (1993).

27. Abraham et al., *supra* note 1, at 348.

28. See *id.* at 348-49.

29. Jerry J. Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 241, 244 (1993).

noted, "there is a substantial area of overlap between the concepts."³⁰ Indeed, in *Barker v. Lull Engineering Corp.*,³¹ on which the ALI authors place a certain emphasis,³² the court stresses that in *Cronin v. J.B.E. Olson Corp.*,³³ it had "refute[d] any such distinction."³⁴

Another area of agreement on important issues in products liability involves the crashworthiness conundrum. I have invited my students to wrestle with this problem for almost a quarter century,³⁵ and indeed my second casebook plays off the two cases on which the ALI authors focus.³⁶

The authors' description of the *Barker* case "as a classic 'misuse' situation"³⁷ illustrates how the criticism of doctrine, and the effort to probe beneath seemingly solvent language, can improve analysis. I explain in some detail in my treatise that it would, on the whole, improve the law if the courts stopped using a separate "misuse" defense.³⁸

The question of whether "consumer expectations" should be a separate element of the defect test is an important one. The notion admittedly has some artificiality. I only express the concern that an effort to bundle "expectations" into the construct of "risk/utility" may produce a double layering of artificiality that usually will not yield analytical gains.

It is important to note an area of overlap, if not total agreement, on a basic idea. The ALI authors observe that "the doctrinal side of products liability law is *not* the most salient dimension of our proposals."³⁹ Nor is the doctrinal side of products liability law what most

30. SHAPO, *supra* note 24, ¶ 8.01, at 8-3.

31. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

32. See Abraham et al., *supra* note 1, at 349-50.

33. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), to which the authors refer in Abraham et al., *supra* note 1, at 348-49.

34. *Barker*, 20 Cal. 3d at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228. See also *Coy v. Simpson Marine Safety Equip., Inc.*, 787 F.2d 19 (1st Cir. 1986), summarized in SHAPO, 1 THE LAW OF PRODUCTS LIABILITY, *supra* note 24, ¶ 8.01, at 8-4 n.6.

35. KEETON & SHAPO, *supra* note 25, at 824-58; SHAPO, PRODUCTS LIABILITY: CASES AND MATERIALS, *supra* note 25, at 149-61 (excerpting *Self v. General Motors Corp.*, 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974), and *Dreisonstok v. Volkswagenwerk A.G.*, 489 F.2d 1066 (4th Cir. 1974)).

36. See SHAPO, PRODUCTS LIABILITY: CASES AND MATERIALS, *supra* note 25, at 149-61 (excerpting *Self v. General Motors*, 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974), and *Dreisonstok v. Volkswagenwerk A.G.*, 489 F.2d 1066 (4th Cir. 1974)).

37. Abraham et al., *supra* note 1, at 349.

38. See, e.g., SHAPO, 2 THE LAW OF PRODUCTS LIABILITY, *supra* note 24, § 21.08[6].

39. Abraham et al., *supra* note 1, at 352.

needs fixing about the process of products litigation, or tort litigation generally.

III. FRAMING AN ACHIEVEMENT

The stakes are high in the sprawling territory of the law of injuries. Yet, as the ALI authors specifically suggest about medical malpractice, the stakes are incomparably higher in the larger areas of policy that surround the law. Robert Reischauer, the director of the Congressional budget office, recently provided a poignant example in the medical area. He asserted that efforts to control health care costs would probably "requir[e] consumers to accept some real limits on the quality or quantity of medical care." Of special relevance to our present inquiry was his statement that changes in malpractice laws, as well as managed care and elimination of red tape, would produce "only modest savings."⁴⁰

It is fitting to conclude with a reference to the ALI authors' complaint that the Institute gave insufficient consideration to their proposals.⁴¹ This observer would interpret the fate of the *Study* differently. Its drafts were, in fact, the subject of spirited if brief discussion from the inception of the project. The final product was the topic of particularly intense debate.

The politics of national lawyers' organizations is a fascinating study in itself. This writer could provide relevant anecdotal experiences concerning the history of his own tort study within the American Bar Association, and the minutes of the A.L.I. would yield an instructive chronicle of the competition of ideas in the context of organizational culture.

But those histories await analysis. For the moment, the Reporters not only should be proud of their intellectual achievement, but pleased with what it has accomplished: It has become an important part of a national debate about legal policy. What more could a schoolteacher ask?

40. *Less Health Care Seen as Possible*, N.Y. TIMES, Mar. 3, 1993, at A10 (quoting and paraphrasing Robert D. Reischauer).

41. Abraham et al., *supra* note 1, at 333.