

# Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury

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*This Article critiques the substantive law and damage proposals of the Reporters' Study on Enterprise Liability, which was published in 1991 by the American Law Institute. Contrary to the Reporters' recommendations, the author proposes retaining the consumer expectations test and strict liability for product suppliers. He argues that it is not practical to shift medical malpractice liability, as proposed by the Reporters, from doctors to hospitals. In the area of damages, the author proposes retaining the rules of recovery for pain and suffering, punitive damages, and the collateral source rules essentially as they are now, instead of adopting the changes recommended by the Reporters. The author believes that the tort system and trial by jury as they are presently constituted work well, and are not in need of the sort of drastic overhaul recommended by the Reporters.*

## I. INTRODUCTION

A two-volume study of tort law (the *Study*) was issued under the auspices of the American Law Institute (ALI) on April 15, 1991.<sup>1</sup> The *Study* was the culmination of approximately five years of work by its reporters and advisers. It never received the imprimatur of the ALI, and the project was subsequently abandoned by the ALI Council.

The analysis and proposals in the *Study* are of special interest, however, since they canvass most of the tort law "reforms" of the

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

mid-1980s. No general proposal in the *Study* advocates the abandonment of tort law in favor of administrative compensation for injuries and governmental regulation of safety. Therefore, the *Study* should be evaluated in the context of whether it constitutes a proposed improvement on the existing tort system, rather than whether it provides a suitable alternative to that system.

The main thrust of the *Study* breaks down into two parts. One branch (volume 2, section B) considers proposed changes in liability standards, and the other (volume 2, section C) considers proposed changes in rules governing the award of tort damages. This article evaluates the merits of these proposed changes.<sup>2</sup>

## II. LIABILITY STANDARDS

### A. Product Defects

The Reporters for the *Study* propose that “[c]urrent law establishing strict liability for manufacturing defects should be retained,” but that “the consumer expectations test for defining a product [design] defect should be discarded” in favor of a risk-utility test which holds “a design to be defective only if there was a feasible alternative design,” the costs of which do not outweigh the preventable harm.<sup>3</sup> The Reporters reject a design cost-benefit analysis that would permit the jury to find product defectiveness based on a “balance” of the “benefits against the hazards” of a product without considering whether there is a safer alternative design available.<sup>4</sup>

The consumer expectations test, which forms the standard of liability under section 402A of the *Restatement (Second) of Torts*, has been criticized as a basis for determining design defectiveness on two primary grounds. First, the standard would preclude liability where the danger is obvious, and second, the consumer has no expectations as to how a complex design can be made safer.<sup>5</sup>

The obvious-danger criticism proceeds on the assumption that a

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2. The first volume of the *Study* contains a wealth of background material used by the Reporters in developing their recommendations in the second volume. Volume 2 contains additional recommendations (§ B.3 concerning regulatory compliance, § D dealing with environmental and other mass torts, and § E exploring tort alternatives such as elective no-fault medical liability, contractual alternatives to tort, and methods of improving liability and social insurance) that are not dealt with in any detail in the present comments. For an overview of the *Study*, including these additional recommendations, see Steven D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163 (1992). See also Jerry J. Phillips, *Comments on the American Law Institute Study of Enterprise Liability for Personal Injury* (1991), on file with the University of Tennessee Law School Library and as an exhibit to the 1991 annual proceedings of the American Law Institute.

3. 2 ALI STUDY, *supra* note 1, at 81.

4. *Id.* at 54.

5. See W. PAGE KEETON, ET AL., *PRODUCTS LIABILITY AND SAFETY* 230, 379 (2d ed. 1989).

consumer cannot expect safety from a product that she knows is dangerous. But this assumption is unwarranted. A person may be unwillingly exposed to a product danger although she would prefer a safer product. The trend toward not barring recovery as a matter of law based on obviousness of danger<sup>6</sup> reflects a judicial understanding that consumers are not in the best position to eliminate such dangers, and that the average person would prefer not to be exposed to those dangers.

The alternative argument, that consumers have no expectations regarding the practically achievable safety level of a product design, ignores the way in which jurors—as representatives of the ordinary consumer—make their factual determinations. In some instances their decisions are based on common knowledge, but in many more their judgment must be informed by expert testimony.<sup>7</sup> The ultimate jury decision, however, is no less a lay or ordinary consumer determination when based on expert testimony than when based on common knowledge.

The Reporters' rejection of the unreasonably-dangerous-per-se method for determining design defectiveness supports their rejection of the consumer expectations test. Under a per se approach, a jury decides that a product's utility is outweighed by its danger without regard to whether a safer product can be made.<sup>8</sup> The jurors decide, in other words, that the product should not be marketed, or that a substitute product should be marketed. Such a determination reflects community or ordinary consumer values and is surely justified in cases of negligence or intentional misconduct on the part of the defendant. It may well be justified also in strict liability, where the focus is on the product<sup>9</sup> and the defendant's misrepresentation.<sup>10</sup>

Products liability, particularly strict torts liability, originated in implied warranty.<sup>11</sup> The warranty of merchantability, with its key requirement that goods be fit for the ordinary purposes for which

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6. See, e.g., *Holm v. Sponco Mfg.*, 324 N.W.2d 207 (Minn. 1982).

7. See *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100-01 (10th Cir. 1991).

8. See JERRY J. PHILLIPS, *PRODUCTS LIABILITY IN A NUTSHELL* 18-19 (3d ed. 1988). The Louisiana per se rule was repealed by "tort reform" legislation. Products Liability Act, 1988 La. Acts, No. 64, § 1 (current version at LA. REV. STAT. ANN. § 9:2800.56 (West 1991)).

9. See *Roach v. Kononen*, 525 P.2d 125 (Or. 1974).

10. On the importance of express and implied representations of the product supplier as a basis for determining strict liability, see Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

11. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965).

they are used,<sup>12</sup> reflects the consumer expectations test. A number of states, by common law or statute, follow the consumer expectations test for determining design defectiveness.<sup>13</sup> It would be precipitous to depart from this substantial line of precedent.

The Reporters state that “[c]urrent law establishing strict liability for manufacturing defects should be retained,” but that in the case of design defects current law should be “substantially altered” by discarding the consumer expectations test.<sup>14</sup> Apparently the Reporters intend that the consumer expectations test be retained for determining manufacturing defects, and they concede that this test is one of strict liability.

It is unclear why the Reporters think a bright line can be drawn between manufacturing and design defects. Both types of defects may be unintended, and both may be random in causing injury but generic to a line of production. Conversely, both types of defects can result from conscious design decisions—as to the type of material used, the frequency of sample testing for product defect, and the like.

More importantly, why do the Reporters think a bright line should be drawn? Perhaps they think consumer expectations are more crystallized in the case of production defects than design. But when a gun barrel explodes in a user-consumer’s face, her expectations are not determined by whether the explosion resulted from a production or a design defect. Expert testimony will normally be required in any event—to establish what went wrong, and to trace the defect to the defendant. In some design defect cases, as well as manufacturing or production defect cases, the fact of the accident may be sufficient to establish defectiveness.

For design defects, the Reporters say,

the risk-utility test should hold a design to be defective only if there was a feasible alternative design which would have avoided the injury in question without materially altering the consumer’s expected use and enjoyment of the product, and then only if the costs of incorporating the new precaution in the design do not outweigh the human and financial harms arising from the injuries preventable by doing so. It would be helpful if courts explicitly recognized that this approach to design defects (as well as the approaches now followed in practice) is really a form of negligence rather than the strict liability used for manufacturing defects.<sup>15</sup>

The Reporters apparently think the risk-utility test sounds in negligence, á la the Learned Hand formula in *The T. J. Hooper*.<sup>16</sup> The parallel is not precise, however, and by no means required under a

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12. U.C.C. § 2-314(2)(c) (1978).

13. See M. STUART MADDEN, 1 PRODUCTS LIABILITY § 6.7 (2d ed. 1988).

14. 2 ALI STUDY, *supra* note 1, at 81.

15. *Id.*

16. 60 F.2d 737 (2d Cir. 1932).

strict liability analysis. Many courts instruct the jury to consider the adequacy of the *product*, rather than the defendant's *conduct*, in a strict liability case. Unless the Reporters are willing to disregard the efficacy of jury instructions, such a jury charge can make a substantial difference between negligence and strict liability.

A critical distinction for purposes of strict liability in design is when the availability of an alternative design is to be determined—the date of manufacture, or the date of trial. Strict liability points to the date of trial. The issue in strict liability is whether a product can be more safely designed, and not whether it should have been. If it can be, as established by date-of-trial evidence of feasibility, then a design defect is established for purposes of strict liability.<sup>17</sup>

Federal Rule of Evidence 407, and its counterpart in many states, look to post-manufacture design improvements to determine the feasibility of a safer design.<sup>18</sup> Moreover, reference to date of manufacture knowledge and feasibility can be confusing on the issue of strict liability, and adumbrates many complicated negligence issues as to why the defendant did not design a safer product at the date of manufacture.<sup>19</sup>

The consumer expectations test looks to the date of trial. So does the test of unreasonably dangerous per se. Breach of express warranty and tortious misrepresentation imply liability without regard to whether a safer design is feasible, either at trial date or the date of manufacture.<sup>20</sup> As the landmark strict liability case of *Greenman v. Yuba Power Products, Inc.*<sup>21</sup> indicated, a product carries an implied representation of safety by its presence on the market. Holding the supplier to that implied representation as of the date of trial is what strict products liability is designed to achieve.

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17. See *Dart v. Wiebe Mfg.*, 709 P.2d 876 (Ariz. 1985).

18. See *In re Hawaii Federal Asbestos Cases*, 665 F. Supp. 1454, 1457 (D. Haw. 1986), *aff'd* 960 F.2d 806 (9th Cir. 1992), stating that a "product's design is considered at the time of trial not at the time of manufacture" in part because "Hawaii Rule of Evidence 407 allows the jury to consider subsequent remedial measures as proof of a dangerous defect." See also Roger C. Henderson, *Admissibility of Remedial Measures*, 64 NEB. L. REV. 1 (1985).

19. These points are well made in *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982), and in Milton Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587 (1969).

20. *Crocker v. Winthrop Lab.*, 514 S.W.2d 429 (Tex. 1974).

21. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

## B. Inadequate Warnings

One of the most intractable areas of products law involves liability for failure to warn and for inadequate warnings. A warning or failure to warn is not susceptible to bright line rules of adequacy or inadequacy, although the Reporters attempt to formulate such rules. The determination of the need for and the adequacy of warnings is peculiarly a matter of ordinary consumer expectations.

The Reporters appear to accept the idea, which is recognized by a few courts,<sup>22</sup> that a warning should be "fully exculpatory only for products whose manufacture or design cannot be improved."<sup>23</sup> This position accords with the widely recognized principle that obviousness of danger does not bar recovery as a matter of law, but rather goes to the issue of consumer misconduct.<sup>24</sup> A warning at best serves only to make a danger obvious.

This forthright position of the Reporters is rendered ambiguous by their subsequent statement that "[c]onsideration should be given to requiring risk level warnings even for potentially defective products."<sup>25</sup> Such a warning would only serve as an added protection for the prudent user. But why should the supplier be required to warn, rather than redesign, a defective product?

The other warning recommendations point toward an exclusion or restriction of the jury's role in warning cases. The Reporters propose that compliance with "specific government regulations respecting the form and content of product warnings should be sufficient to establish the adequacy of the warning for purposes of tort law."<sup>26</sup> They propose that "use of expert testimony concerning warning adequacy should be much encouraged, if not required."<sup>27</sup> And they state that "[c]onsideration should be given to the creation of a uniform vocabulary for expressing risk level warnings."<sup>28</sup>

The regulatory preemption proposal reflects a recent trend toward finding implied statutory or regulatory preemption of common law tort actions.<sup>29</sup> The trend is against the weight of established law<sup>30</sup> and disregards the political-compromise nature of most government safety regulation. It represents a conservative swing of the judiciary

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22. *E.g.*, *Uloth v. City Tank Corp.*, 384 N.E.2d 1188 (Mass. 1978); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979).

23. 2 ALI STUDY, *supra* note 1, at 81.

24. *See supra* note 6 and accompanying text.

25. 2 ALI STUDY, *supra* note 1, at 82.

26. *Id.* at 81.

27. *Id.*

28. *Id.* at 82.

29. *See* JERRY J. PHILLIPS & D. SULLIVAN, PRODUCTS LIABILITY § 7.09A (Supp. 1992).

30. FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 17.6 at n.71 (2d ed. 1986 & Supp. 1991).

that seems to reflect political rather than judicious analysis.<sup>31</sup>

The "creation of a uniform vocabulary for expressing risk level warnings" also points toward governmental or judicial preemption of the jury's role in determining warning adequacy. The purpose of creating a "uniform vocabulary," or of complying therewith, is to establish a legal norm.

The Reporters' recommendation that the "use of expert testimony concerning warning adequacy should be much encouraged, if not required," is ironic in view of their own recognition of the pitfalls of expert testimony<sup>32</sup> and the general attack today on its widespread use in tort law.<sup>33</sup> Moreover, the need for warnings, and their adequacy or inadequacy, are matters generally within the common knowledge of lay jurors. To require expert testimony in such cases would only add to the expense of such litigation and to the possible confusion of outcome.

Many courts today describe the duty to warn—like the duty to design safely—as a duty based on standards of due care, rather than strict liability.<sup>34</sup> The Reporters' stance on this issue is not clear. Their statement, however, that "courts should give more deference to warnings whose content reflects *current* expert opinion about risk communication"<sup>35</sup> suggests that they incline toward strict liability in the context of warnings. "Current" opinion reflects date of trial knowledge and thus is not controlled by what the supplier knew or should have known at the date of sale.

The tendency today of courts and commentators to shift warning and design cases away from strict liability and toward a negligence standard<sup>36</sup> has many unfortunate consequences. The interrelation of warning and design with misrepresentation and production defect

31. The Reporters devote a separate chapter, vol. 2, ch. 3, to the effect of regulatory compliance in general and conclude, at page 110, that such compliance either should be an absolute defense, or that it should create "a rebuttable presumption or strong and substantial evidence that the defendant's actions or products were not at fault" and should "preclude the award of any punitive damages." This sanguine view of regulatory compliance jars with their conclusion in vol. 1, at page 248, that to date "shortcomings in the performance of regulatory agencies have been substantial."

32. See 2 ALI STUDY, *supra* note 1, at 332-51.

33. As exemplified by the populist writing of PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991).

34. See MADDEN, *supra* note 13, at § 10.1.

35. 2 ALI STUDY, *supra* note 1, at 81 (emphasis added).

36. See James A. Henderson & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1513 (1992); William Powers Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639.

cases, which are typically tried on a strict liability basis, is ignored. The fact that non-manufacturing suppliers, such as wholesalers and retailers, will usually not be found responsible except in strict liability is overlooked. The negligence standard that it points toward may revert to all the strictures of 19th-century tort liability. The modern law of products liability, which had its origin in warranty, is invited to shift from a tort perspective back to one of warranty.

A great deal of criticism has been directed at the alleged disincentive to product innovation and development brought about by a strict products liability regimen.<sup>37</sup> This criticism is not supported empirically, and runs counter to common sense in most respects. A product manufacturer cannot afford to ignore safety improvements in his product, because he does so at the risk of being found negligent or even reckless. Whether he will undertake to develop new products probably depends more on profit considerations than on concern for possible tort liability. If a manufacturer decides not to develop a new product, or to abandon the manufacture of an old one, because of the safety risks involved and the likelihood of tort liability if the product is marketed, the decision may well be in the best interests of the public and the type of decision that tort law is designed to encourage.

### C. *Medical Malpractice*

The medical malpractice proposal of the Reporters has been considered to be among their more innovative proposals.<sup>38</sup> They propose that doctors be relieved of “the direct financial burden of malpractice insurance by shifting the locus of legal liability from the physician to the hospital or other health care institution connected with the incident.”<sup>39</sup> The “broadest version of this proposal would make the hospital liable for all the malpractice committed by an affiliated physician, whether or not the relevant treatment took place in the hospital.”<sup>40</sup> Recognizing the “objections of both principle and practicality” that this proposal would evoke, “including disagreements over which hospital would be made liable for physician negligence in the office when the doctor happens to be affiliated with two or more hospitals,” the Reporters conclude that a “more sensible initial approach would be to hold a hospital liable only for physician malpractice that injures patients who are treated within that hospital.”<sup>41</sup> Such a rule “would cover roughly ninety percent of the incidents

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37. See *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

38. See Sugarman, *supra* note 2, at 1195.

39. 2 ALI STUDY, *supra* note 1, at 113.

40. *Id.* at 114.

41. *Id.*



now giving rise to malpractice claims and payments."<sup>42</sup>

The reasons for this proposal are essentially twofold. One is to "distribute the cost of malpractice insurance" more efficiently "without having to funnel the premiums through the practice costs of individual doctors."<sup>43</sup> The other is to place the safety incentive where it may be most effectively administered. "Most malpractice suits are lodged in connection with momentary inadvertent slips or mistakes that are hardly influenced by the threat that an adverse tort verdict may materialize years later."<sup>44</sup> Even in the case of "conscious medical choices about what type or level of precaution to employ," the doctor "rarely has a financial incentive to skimp on safety" because "additional tests or more complicated procedures usually entail more work and income for the doctor."<sup>45</sup>

By placing liability on the hospital, the "memory of the institution can serve to record and piece together patterns in a host of apparently idiosyncratic incidents."<sup>46</sup> The hospital can "devise feasible procedures and technologies for guarding against the ever-present risk of occasional human failure . . . for example, by developing arrangements or technology to monitor a patient under anesthesia in order to detect and avoid sudden oxygen deprivation."<sup>47</sup> The hospital additionally can use "appropriate personnel management techniques—in selection, training, supervision, discipline and termination—to secure increased levels of care from its employees."<sup>48</sup>

The insurance aspect of this proposal is problematic. Considering the financial instability of many hospitals, large and small, it is doubtful they would relish picking up the doctors' medical malpractice insurance tab. There is no indication that the overall costs of insurance would be reduced, and those costs would be passed on to the consumer whether they are initially borne by the doctor or by the hospital. The risks, however, would be pooled under a hospital insurance policy, so that patients would likely bear more or less equally the insurance costs of high-risk as well as low-risk medical treatment.

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42. *Id.* This alternative proposal would not relieve doctors of the necessity of carrying liability insurance, since they would still be exposed to claims arising outside of the hospital context.

43. *Id.* at 117.

44. *Id.* at 122.

45. *Id.*

46. *Id.* at 123.

47. *Id.*

48. *Id.* at 124.

The safety incentive aspects of the proposal are even more problematic. If “inadvertent slips or mistakes” are unlikely to be influenced by the threat of tort liability, nothing will be gained by way of safety incentive through shifting that liability to the hospital. Concluding that the doctor will never consciously “skimp on safety” seems unrealistic, because in many situations the patient may not be able or his insurer may not be willing to pay for expensive tests and “complicated procedures.” Moreover, if there are “feasible procedures and technologies for guarding against the ever-present risk of occasional human failure,” doctors may be as well suited as hospitals to devise such procedures and technologies.

Considering the reluctance of hospitals today to monitor the safety practices of their doctors, it seems cavalier to suggest they will effectively increase that monitoring process if the costs of malpractice insurance, which can be passed through to patients, are placed on the hospitals.

The Reporters recognize that their proposal “may raise the hackles of physicians and their associations” who view themselves as “independent professionals who must be free to exercise their own medical judgment.”<sup>49</sup> The Reporters dismiss this objection on the grounds “that it nostalgically evokes a health care world that has long since passed.”<sup>50</sup> If they are right in this analysis, it is a cause for dismay rather than pride.

#### D. Joint and Several Liability

Joint liability has been a potentially charged issue since the “tort reform” movement of the mid-1980s. A number of states have enacted legislation trenching on the doctrine of joint liability.<sup>51</sup> The Reporters recognize that “reforms that have entirely shifted the cost of a defendant’s unavailability and the risk of insolvency to plaintiffs may have been overreactions to the occasional problem that results when disproportionate liability is imposed on a single large enterprise whose actions contributed in a minor way to a plaintiff’s loss.”<sup>52</sup>

The Reporters recommend leaving “traditional joint and several liability and traditional apportionment rights in place” where “potential co-defendants can contract in advance regarding their apportionment obligations among themselves,” because this approach “might create optimal incentives and be consistent with equitable

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49. *Id.* at 125.

50. *Id.*

51. See Richard W. Wright, *Allocating Liability Among Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1164-68 (1988).

52. 2 ALI STUDY, *supra* note 1, at 156.

concerns.”<sup>53</sup> They identify three situations where the parties can typically contract in advance: (1) product suppliers in the chain of distribution, (2) hospitals and health care providers practicing in the hospitals, and (3) generators, transporters, owners and operators of “waste disposal sites licensed under the Resource Conservation and Recovery Act of 1976 or an equivalent licensing authority.”<sup>54</sup> In all other cases, the share of losses “for which unavailable or insolvent defendants would be responsible” would be reallocated “among available solvent defendants as well as the plaintiff in proportion to each party’s negligence or equitable contribution to the plaintiff’s loss.”<sup>55</sup>

The Reporters do not clearly explain their policy reason for retaining joint liability where the parties can contract among themselves. The best explanation offered is their statement that joint liability in these situations “would create incentives for the execution of contracts that would allocate the burden of liability among potential co-defendants, alert the defendants to the risk of insolvency among their number, and preserve the compensatory benefits to tort victims of the traditional rule.”<sup>56</sup> The reason the Reporters think it desirable to “create incentives” for the execution of contracts allocating the risk of liability among potential co-defendants is unclear. Presumably such co-defendants are aware of the risk of insolvency among their number, and need no “incentives” to “alert” them to this risk. The desirability of preserving “the compensatory benefits to tort victims” that derive from joint liability exists whether or not the potential defendants have contracted for allocation of the risk among themselves.

Where the defendants are “strangers” to one another, the Reporters would allocate the “losses for which unavailable or insolvent defendants would be responsible . . . among available solvent defendants as well as the plaintiff in proportion to each party’s negligence or equitable contribution to the plaintiff’s loss.”<sup>57</sup> Joint liability would presumably be retained in the case of the plaintiff who was

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53. *Id.*

54. *Id.* at 157. The proposal for joint liability of doctors and hospitals conflicts with the Reporters’ earlier proposal in chapter 4, volume 2, that liability for medical malpractice be shifted from doctors to hospitals. *See supra* note 41 and accompanying text.

55. *Id.*

56. *Id.* at 146.

57. *Id.* at 157.

free of fault,<sup>58</sup> or whose fault was considered *de minimus*.<sup>59</sup>

What the Reporters mean by an 'unavailable' defendant is unclear. They may even intend to include immune tortfeasors within this term. Arguably an immune party should not be considered a tortfeasor because he has legally been declared not to be a tortfeasor.

In situations of master-servant and respondeat superior, the question of whether joint liability would be retained arises. Often the parties would be able to allocate responsibility among themselves by agreement, although these situations are not necessarily included within the three categories the Reporters identify as candidates for such agreements and for the retention of joint liability. Any agreements in the categories listed by the Reporters, as well as in the employer-employee context, may be subject to problems of inequality of bargaining position.

Joint liability has been widely retained in the context of respondeat superior. If it were not, tort law would be essentially gutted because most tort litigation is against corporations that are held vicariously liable on the basis of respondeat superior. Presumably it would also be retained in indemnity situations, which typically involve vicarious liability of the indemnitee.

Concert of activity among tortfeasors is a classic case for imposing joint liability.<sup>60</sup> *Qui facit per alium facit per se*.<sup>61</sup> In the case of intentional tortfeasors, many courts do not apply comparative fault to reduce the plaintiff's recovery.<sup>62</sup> If the plaintiff is treated as if he is free of fault for comparative purposes then joint liability should arguably also be retained.<sup>63</sup>

The Reporters favor a proportionate reallocation of an unavailable and insolvent defendant's responsibility between an at-fault plaintiff and the available, solvent defendant, based on their relative degrees

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58. While some states have abolished joint liability entirely, a number retain it where the plaintiff is found to be free of fault. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 315 (1990). Joint liability would clearly be retained under the Reporters' proposal where the plaintiff was free of fault and there were two co-tortfeasors, one of whom was unavailable or insolvent, because in that situation the fault of the unavailable or insolvent tortfeasor would be reallocated only to the solvent co-tortfeasor. See *supra* note 57 and accompanying text.

59. Courts commonly do not take into account a plaintiff's negligence when it is describable as mere inadvertence or inattention. PHILLIPS, *supra* note 8, at 272. Equating inadvertence with no fault, joint liability would be retained under the plaintiff no-fault rule discussed *supra* note 58.

60. HARPER, ET AL., *supra* note 30, § 10.1.

61. "He who acts through another acts himself [*i.e.*, the acts of an agent are the acts of the principal]." BLACK'S LAW DICTIONARY 1249 (6th ed. 1990).

62. Mutter, *supra* note 58, at 277.

63. See *supra* note 58 and accompanying text.

of negligence or equitable contribution to the plaintiff's loss. The Reporters contend that their proposed method of reallocation follows the procedure "set out in the Uniform Comparative Fault Act § 2(d) (1977)."<sup>64</sup> An important difference exists between their proposal and the Uniform Act, however. The Act initially imposes joint liability on the defendant, with the burden on him to come back into court "not later than [one year] after judgment is entered." The defendant must show that contribution from a co-tortfeasor is uncollectible and that the co-tortfeasor's liability should therefore be reallocated among the other at-fault parties.<sup>65</sup> The Reporters would apportion liability in the initial litigation with the burden on the plaintiff to return to court and seek reallocation if a co-tortfeasor proves unavailable or insolvent.<sup>66</sup>

A number of pitfalls are associated with imposing the burden on the plaintiff to seek recovery from a potential co-tortfeasor if that tortfeasor is not a party to the initial litigation. The statute of limitations may run before a second suit can be brought. Indeed, the second suit may be barred as a matter of procedure,<sup>67</sup> and even if it is not, the plaintiff may be bound by the findings in the first suit under principles of nonmutual defensive collateral estoppel.<sup>68</sup>

### III. DAMAGES

#### A. Collateral Sources

Collateral sources are those payments receivable by the plaintiff, as the result of an accident, from sources other than the tortfeasor who caused the accident.<sup>69</sup> Under the traditional rule, these sources are not credited against the liability of the tortfeasor.<sup>70</sup> The reformers would require such a credit.

The Reporters estimate that plaintiffs as a class receive collateral

64. 2 ALI STUDY, *supra* note 1, at 155.

65. UNIF. COMP. FAULT ACT § 2(c)-(d), 12 U.L.A. 49 (Supp. 1992).

66. 2 ALI STUDY, *supra* note 1, at 154-55.

67. See David Polin, Annotation, *Comparative Negligence: Judgment Allocating Fault in Action Against Less Than All Potential Defendants as Precluding Subsequent Action Against Parties Not Sued in Original Action*, 4 A.L.R. 5th 753 (1992).

68. See E.H. Schopler, Annotation, *Comment Note—Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R. 3d 1044 (1970).

69. See Sugarman, *supra* note 2, at 1183-84; JEFFREY O'CONNELL, *ENDING INSULT TO INJURY* 50 (1975).

70. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979). Payments by co-tortfeasors or by those who believe they are co-tortfeasors are not collateral sources. *Id.* § 920A(1).

source benefits equal to approximately fifteen percent of their total claims.<sup>71</sup> “The only category of claimants who could be seriously harmed by a new collateral source offset rule,” the Reporters say, “would be that small minority who had suffered extremely large economic losses.”<sup>72</sup> They recommend that “[a] plaintiff’s tort recovery should be reduced by the amount of present and estimated future payments from all sources of collateral benefits except life insurance.”<sup>73</sup>

The lines of debate are clearly drawn on the collateral source rule. The reformers contend that the plaintiff should not receive double recovery and that economic efficiency requires that a credit be given. The traditionalists contend that the collateral source is usually a result of the plaintiff’s own prudential efforts, or of persons willing to help the plaintiff, and that the wrongdoer is not equitably entitled to the benefit of such sources.<sup>74</sup>

A distinction has sometimes been drawn between benefits personally paid for by the plaintiff, and benefits from other sources such as the government, employers and the like.<sup>75</sup> The argument is that the plaintiff should receive the benefit of collateral sources he has paid for personally, but that the tortfeasor should receive a credit for collateral benefits from others payable to the plaintiff. The distinction is difficult to maintain because the plaintiff usually contributes in part to group health insurance, unemployment insurance, taxes, and the like.

Third-party sources often have a subrogation claim against the tortfeasor to recover any collateral benefits paid to the plaintiff as the result of an accident. The Reporters would abrogate these subrogation claims. Such a result cannot turn on the prevention of double recovery, and it undermines basic ideas of contractual entitlement.

Some collateral sources are paid out of charity or goodwill, and not as a result of contractual obligation. The Reporters make no distinction between these and other collateral sources. As the Australian High Court said in this context:

It would be contrary to the ordinary man’s sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he could gain nothing from the benevolence of his friends or relations or the public at large, and that the only gainer would be the wrongdoer.<sup>76</sup>

The Reporters say that the only category of claimants who would

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71. 2 ALI STUDY, *supra* note 1, at 168.

72. *Id.* at 174.

73. *Id.* at 182.

74. See *Helfend v. Southern Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970).

75. *Id.*

76. *Griffiths v. Kerkemeyer*, 139 C.L.R. 161 (Austl. 1977).

be "seriously harmed" by their proposed offset rule would be "that small minority who had suffered extremely large economic losses."<sup>77</sup> The rule discriminates against this small minority of claimants who, studies show, is significantly undercompensated by tort law.<sup>78</sup>

The Achilles heel of the Reporters' collateral source-offset proposal is that the plaintiff's recovery be reduced by the amount of all collateral benefits "except life insurance." The Reporters explain: "Life insurance benefits would be excluded from the new approach, mainly because such benefits typically do not provide direct compensation for out-of-pocket loss. . . . Moreover, 'whole life' and 'universal life' insurance contain investment components that should be returned to beneficiaries without offset."<sup>79</sup> The phrase "direct compensation for out-of-pocket loss" is meaningless in this context. The "investment component" of collateral sources supplies the rationale against offsetting collateral sources in general.<sup>80</sup>

### B. *Workers' Compensation and Products Liability*

Arthur Larson called the controversy surrounding indemnity and contribution against employers in third-party actions "[p]erhaps the most evenly balanced controversy in all of compensation law. . . ."<sup>81</sup> The problem arises when a plaintiff employee is injured by workplace machinery and sues the machine manufacturer, who then seeks contribution or indemnity against the employer, who is often guilty of negligence in failing to train or supervise the employee. Such cases arise frequently in products litigation.<sup>82</sup>

The employee typically cannot sue her employer in tort for workplace injuries, but is statutorily restricted to the exclusive remedy of workers' compensation. The manufacturer's indemnity-contribution claim is usually also deemed barred by the exclusive-remedy provision of workers' compensation law. Moreover, the employer has a subrogation claim against the manufacturer for workers' compensation benefits paid to the employee, usually without regard to consideration of any fault of the employer in causing the employee's

77. *Supra* note 72 and accompanying text.

78. 2 ALI STUDY, *supra* note 1, at 174.

79. *Id.* at 177. The Reporters also say that "certain other forms of coverage, such as accidental dismemberment policies," could reasonably be exempted from the collateral offset rule because they "bear a close resemblance to life insurance." *Id.*

80. Moreover, term-life insurance has no "investment component" in the sense of cash surrender value.

81. 2B ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 76.11 (1989).

82. 2 ALI STUDY, *supra* note 1, at 186.

injuries.

The Reporters recommend two solutions to the workers' compensation problem. One is to credit any workers' compensation benefits received by the employee against any tort recovery from the manufacturer and to eliminate the employer's subrogation claim; the other is to eliminate the employee's third-party claim entirely, but preserve "the employer's right to sue the product manufacturer to recover [workers' compensation] benefits paid for injuries resulting from the wrongful conduct of a third-party manufacturer."<sup>83</sup> The Reporters express no preference between these alternative proposals.

The first proposal reflects the approach taken in some jurisdictions where there are co-tortfeasors, one of whom settles: the settlor, relieved from liability, is not subject to any claim for contribution, and the non-settling tortfeasor receives a credit against her liability in the amount of the settlement.<sup>84</sup> The analogy is imprecise, however, since the employer is not a co-tortfeasor here and the employer workers' compensation payment is required by law and is not the product of a voluntary agreement.

The second proposal is interesting in what it reveals about the role of fault in the employment context, and the Reporters' reaction to that role. If the employer should retain a tort remedy against the manufacturer, the manufacturer should also retain a tort remedy against the employer where the latter is at fault. Indeed, the employee should retain a tort remedy against her employer where the latter is at fault. The deterrence and corrective-justice purposes of tort law apply in all of these situations, as well as in the more common situation where the employee sues the third-party manufacturer in tort.

### C. Pain and Suffering

The centerpiece of the Reporters' damage proposals concerns recovery for pain and suffering. The Reporters conclude that "[p]ain and suffering should be retained as a basis of tort damages," but:

[S]uch compensatory damages should be paid only to victims who suffer significant injuries, with substantial monetary awards paid to the permanently disabled who can use the additional funds to adjust to and better enjoy life in their future disabled state . . . . Meaningful guidelines should be developed to assist juries in assessing such damages. The guidelines should be based on a scale of inflation-adjusted damage amounts attached to a number of disability profiles that range in severity from the relatively moderate to the gravest injuries.<sup>85</sup>

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83. *Id.* at 197-98.

84. See UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4, 12 U.L.A. 98 (1975). About twenty states have adopted this act, *Svetz for Svetz v. Land Tool Co.*, 513 A.2d 403 (Pa. 1986).

85. 2 ALI STUDY, *supra* note 1, at 230.



Putting aside the difficulty of determining when a person has suffered "significant injuries" so as to justify any award of damages for pain and suffering, the proposal curiously restricts "substantial monetary awards" for such injuries to those who are "permanently disabled."<sup>86</sup> Thus, no substantial award would be made to one who is disabled only for a limited time, or to one who suffers no permanent disability (in the presumed sense of being unable to work), regardless in either case of how severe the pain and suffering might be.

Such substantial damages would be awarded only to the permanently disabled who can use the funds "to adjust to and better enjoy life in their future disabled state."<sup>87</sup> Insofar as this proposal contemplates damages only for expenses of rehabilitation, such expenses should be recoverable separate and apart from damages for pain and suffering. If the damages are not viewed as an award for expenses of rehabilitation, then how is a jury to determine whether the funds "can" be used to "adjust to and better enjoy life"?

Probably the key aspect of the proposal is the call for "[m]eaningful guidelines" to "assist juries in assessing such damages." The *Study* is ambiguous as to who would draw up these guidelines, and what binding effect if any they would have on the jury in their deliberations.

The proposal for pain and suffering guidelines is an attempt to impose controls on the jury other than simply by a judicial review for excessiveness. The proposal reflects an antijury bias, and a search for certainty where there is none. Moreover, although juries have a good deal of discretion in the award of damages for pain and suffering, the evidence does not support the conclusion that such awards are generally arbitrary or excessive in amount.<sup>88</sup>

#### D. Punitive Damages

A great deal of the brouhaha associated with tort reform has been directed at the award of punitive damages. Yet serious scholarly studies indicate that such awards are infrequent and not out of line in amount.<sup>89</sup> The United States Supreme Court upheld the award of punitive damages against due process constitutional attack in *Pacific*

86. *Id.*

87. *Id.* at 229-30.

88. See 2 ALI STUDY, *supra* note 1, 201 n.7.

89. See Steven Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990); Michael Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes With Empirical Data*, 78 IOWA L. REV. 1 (1992).

*Mut. Life Ins. Co. v. Haslip*.<sup>90</sup>

The Reporters have several proposals concerning punitive damages. They recommend that these damages be awarded only where there is clear and convincing evidence of reckless disregard for the safety of others by "management officials or other senior personnel." The relevant criteria for assessing punitive damages should be clearly specified, and should "exclude from consideration . . . the defendant's overall wealth (while permitting reference to the profits earned from the specific tortious activity)." "[C]loser judicial scrutiny" of these awards should be mandated, with power in the judge to bifurcate the trial so as to try the punitive issue separately. "[S]erious consideration should be given to having the trial judge fix the actual amount of the punitive award once the jury has found that such an award is warranted. . . . Alternatively, and preferably, a ratio should be established" between the compensatory and punitive award, "with an alternative monetary ceiling available to permit higher damages for cases in which especially egregious wrongdoing happens to inflict only modest harm on a particular plaintiff." In the case of mass tort claims, a "national mandatory class action procedure should be developed to determine and distribute an appropriate amount of punitive damages to be awarded for all tort claims arising out of the defendant's single course of conduct."<sup>91</sup>

The call for a clear and convincing standard of proof is unexceptionable, and the adoption of this standard in lieu of a simple preponderance of evidence probably represents the trend. Likewise, the recommendation of clearly specified criteria, close judicial scrutiny, and bifurcation are reasonable requirements.

The remaining recommendations are dubious. Restriction of liability to acts of "management officials or other senior personnel" does not reflect the realities of corporate misconduct, because the ordinary employee on the firing line is often the person responsible for the corporate misconduct.<sup>92</sup> The overall wealth of the defendant is widely considered to be relevant in determining the amount of damages necessary to punish the defendant. Allowing the trial judge to fix the amount of punitive damages raises constitutional questions regarding the right to trial by jury. Any attempted compensatory-punitive ratio or ceiling on the amount of awardable punitive damages suffers from the same problems of arbitrariness and distrust of juries reflected in the proposals for pain and suffering damages.

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90. 111 S. Ct. 1032 (1991). See also *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993).

91. 2 ALI STUDY, *supra* note 1, at 270.

92. See, e.g., *Edwards v. Travelers Ins. Co.*, 563 F.2d 105 (6th Cir. 1977) (insurance agent); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) (research-division employees).

The proposal for a "national mandatory class action" in the case of mass tort claims represents an attempt to meet the serious problem of multiple punitive awards for a "single course of conduct." The problem typically arises in the context of products liability litigation. The proposal creates more problems than it solves, however. In addition to the difficulty of defining a "mass tort," there are due process problems in requiring a single proceeding, and states' rights issues in attempting to preempt state claims in the area. There are also major choice-of-law problems in administering a national suit.

The approach of the courts to date in meeting the problem of multiple punitive awards has been to allow the defendant to advise the judge or jury of any prior punitive awards made in connection with the same conduct.<sup>93</sup> The offer of this evidence is a two-edged sword, at least when presented to the jury, because it may be used against the defendant as evidence of guilt. Its best use may be as evidence presented to the judge for purposes of "[close] judicial scrutiny of the size of the verdict."

### *E. Attorney Fees*

A linchpin of the damages aspect of the *Study* is the Reporters' proposal for the award of plaintiffs' attorneys fees in successful plaintiff litigation. This proposal is seen by the Reporters as a trade-off for the proposed elimination of the collateral source rule and the restriction of recoverable damages for pain and suffering. The Reporters suggest that juries award attorney fees today under the guise of damages for pain and suffering.<sup>94</sup> The Reporters also propose that "[p]rejudgment interest at market rates should be included in damage awards."<sup>95</sup> The rationale for these proposals is that "the major role of tort damages is to reimburse victims for the pecuniary losses they suffer which are not covered by other forms of loss insurance."<sup>96</sup>

The offer-of-settlement feature of the proposal would create a host of problems. Under that procedure, "once the defendant made a formal offer for settlement, if the rejecting plaintiff did not fare better (or at least come within a certain range) in the eventual recovery," then he would forfeit his right to recover "any legal fees incurred

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93. See, e.g., *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

94. 2 ALI STUDY, *supra* note 1, at 270.

95. *Id.* at 316.

96. *Id.* at 315.

after a reasonably short period to consider the offer.”<sup>97</sup> This settlement feature would work to the disadvantage of risk-averse claimants, and could create significant conflict of interest problems for the plaintiff’s attorney vis-à-vis his client. The attorney, for example, may be pressured to settle against her better judgment in order to preserve her client’s entitlement to attorney fees. Even more seriously, the defense may use the attorney-fee item as a bargaining tool in settlement to attempt to drive a wedge between the interests of the attorney and her client.

Insofar as the Reporters are concerned that the jury may return attorney fees in the guise of pain and suffering damages, this risk could be cured by instructing the jury that the plaintiff is entitled to recover damages both for attorney fees and for pain and suffering. The failure of the Reporters to propose this solution may suggest a bias against recovery of damages for pain and suffering.

#### IV. CONCLUSION

The Reporters’ proposal to abandon the consumer expectations test and adopt a negligence-like risk-utility standard as the basis for determining product design defectiveness significantly undervalues the importance of the consumer expectations test in products liability. Their willingness to abandon strict liability for defects of design, but not of manufacturing, demonstrates a lack of appreciation for the close relation between these types of product defectiveness. The Reporters overlook or disregard the ways in which strict liability markedly differs from negligence for purposes of determining design defectiveness.

Their proposals regarding product warnings reflect an antijury bias that is pervasive throughout the *Study*. A required use of expert testimony and a proposed national vocabulary for warnings constitute a repudiation of the ordinary consumer expectations standard that underlies products liability warning litigation. One of the Reporters’ more regressive proposals is their recommendation that compliance with governmental warning standards preempt any claim for warning inadequacy.

The medical malpractice proposal seems impractical, and unlikely to be acceptable either to doctors or to hospitals. It is not apparent that shifting malpractice liability from doctors to hospitals would result in any net cost savings to patients. Nor is it at all apparent that the shift would result in any greater safety incentives for doctors. Indeed, considering the general reluctance of hospitals to pursue disciplinary procedures against doctors, removal of tort liability from

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97. *Id.* at 315-16.

doctors might well bring about a decrease in medical safety measures.

The Reporters' proposals on joint liability raise a number of unresolved issues. Why restrict situations for *ex ante* agreements to the three categories listed, and what should be done in the likely event of bargaining inequality? Beyond the *ex ante* situation, where else will joint liability be retained? For the innocent plaintiff? For the vicariously liable defendant? For defendants acting in concert, or intentionally? If the Reporters' primary concern regarding joint liability is the "occasional problem that results when disproportionate liability is imposed on a single large enterprise whose actions have contributed in a minor way to a plaintiff's loss," then why not propose restrictions on joint liability limited to those "occasional" situations?

The Reporters do not make a convincing case for abolishing the collateral source rule because they concede the rule should be retained where the "investment components" of life insurance and "accidental dismemberment policies" are involved. Nor are they persuasive in advocating abolition of the employee's third-party tort claim while suggesting that the employer's subrogation right should be retained, or in failing to consider the pros and cons of employee and third-party tort claims against the at-fault employer. The attorney-fee proposal does not consider the conflict-of-interest problems involved, or why attorney fees could not be awarded as a separate item of recovery without regard to limitations on damages for collateral sources and for pain and suffering.

The recommendations regarding punitive damages are regressive. For example, the "managerial-senior personnel" restriction for vicarious liability awards, the compensatory-punitive ratio, and punitive-cap proposals are unrealistic. The constitutional and practical problems associated with judges fixing the amount of punitive damages, and with the mandatory national class action to determine punitive damages for "mass tort claims," are manifold.

Finally, the Reporters' recommendation that "[m]eaningful guidelines. . . be developed to assist juries" in assessing damages for pain and suffering" reflects a theme of jury distrust that runs throughout the study. It also indicates a predilection for certainty and efficiency that is an ever-present threat to tort law's reasonable person standard for determining corrective justice.

