

A Restatement of Torts

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I. INTRODUCTION AND THE WIDER CONTEXT

In 1986 the American Law Institute (ALI), which is most well known for its "Restatement of the Law" efforts, launched an ambitious project to evaluate contemporary personal injury law. Five years later, the ALI published and put before the membership of the Institute the results of that project in a massive two volume Reporters' Study.¹

In May 1991, at the Institute's meetings devoted to discussion of the Study, which I attended, several members complained that this project was, unfortunately, unlike the ALI's previous endeavors. They argued that the study was inappropriately political or policy-oriented, in contrast to what a Restatement (Third) of Torts might have been.

These complaints are ironic. First, most of the important recommendations of the Study can readily be described as modifications of the ALI's Restatement (Second) of Torts. At the same time, it is naive to suggest that key changes made in the first Restatement of Torts by the second were not also driven by policy or politics. The most obvious and important example is section 402A concerning manufacturers' strict liability for product defects.² Section 402A did not "restate" the dominant common law rule in America circa 1964; rather it reflected the judgment of the ALI as to what the law should be.³ With the ALI's imprimatur, the new doctrine soon swept the nation.

If important policy-driven changes in tort law were comfortably ushered in by the Second Restatement, why did this ALI report generate so much criticism? Why was Dean William Prosser, the ALI's Chief Reporter for the Second Restatement able to obtain consensus in the 1960s, but in 1991 no

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1. Thousands of additional pages of output from the project are available, or soon will be, in the form of preliminary reports to the ALI and separately published articles and books by the key participants in the effort. For my review of an important book by the chief reporter of the ALI Report, see Stephen D. Sugarman, *Doctor No*, 58 U. CHI. L. REV. 1499 (1991) (reviewing PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991)).

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

3. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

real consensus could be reached within the ALI with respect to any of the important recommendations made by the Study?⁴

Tort law is much more politicized today than it was in the early 1960s, when personal injury attorneys mainly handled auto accidents. Today a sophisticated and specialized bar exists in the fields of products liability, medical malpractice, and environmental torts. Similarly, tort law then was neither a major concern of, nor a threat to, most large enterprises. All this, of course, has changed.⁵

One symptom of this change is that, while the project was underway, several subgroups within the ALI were fiercely battling each other over tort reform in numerous legislative and other arenas. Predictably, these factions were unwilling, even in a more august forum, to cast aside positions they have long and vigorously argued, turn their backs on the interests of their clients and constituents, and compromise.⁶ The reform proposal that the Study offers is itself a compromise. Whether it is the right compromise is another matter, one to be addressed in due course. But discussion at the ALI meetings might have been more fruitful and less harsh, cynical, and adversarial had the members on both sides of the battle line regarded the recommendations as a package rather than as a series of individual ideas to attack.

Another thing that contributed to the Study being attacked is the fundamental change in the academic study of tort law that has occurred since the last ALI report was undertaken. When Prosser was the reporter for the Restatement (Second) of Torts, he was already the author of his famed hornbook.⁷ As such, he was immersed in "doctrine"; his approach was shaped by his own distillation of countless decisions by countless courts over countless years. He, and the other leaders of the time, like Yale's Fleming James, were interested in "policy" and the social functions of tort law. However, he promoted change in traditionally familiar language suited to common law evolution.

Today, the study of tort doctrine is not so fashionable. Case law analysis has been supplanted in academia by an onslaught of theoretical and empiri-

4. Indeed, it ought to have been clear in 1986, when the Reporters' Study was launched, that it was exceedingly unlikely that a consensus could be reached by the ALI (or the project's advisers, the project's consultative group, or the ALI's Inner Council) about any important recommendations that such a report might make. Just what the ALI originally thought it was getting into with this project is not clear; however, because in 1986 the country was in the middle of what was widely being called a torts "crisis," it would not be surprising if the ALI, as did other groups, simply concluded that it ought to examine the "crisis" and attempt to solve it. Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329 (1987). In his Forward to the Study, the ALI's director, Geoffrey Hazard, explains that the ALI Inner Council, divided on the Study's recommendations, authorized its publication as a report "to" the Institute, rather than a report "of" the Institute. Vol. I, p. xi.

5. The Study states that the direct liability insurance (and self insurance) costs of the tort system are roughly \$100 billion a year, about half of which are for auto accidents. Vol. I, pp. 57-58.

6. They certainly did not at other "high level" conferences I have attended, such as the American Bar Association's conference in Kentucky in 1985 or the American Assembly on Tort Law in New York in 1990.

7. WILLIAM L. PROSSER, *PROSSER ON TORTS* (2d ed. 1955).

cal analyses from various schools of thought, including "law and economics," "moral philosophy," "critical legal studies," and "law and society." Moreover, arguments for detailed changes in tort law are as likely to be directed at the legislative as the judicial process.

In fact, the tide was already turning at the time of the ALI's endorsement of Section 402A. Alfred Conard and his colleagues were just reporting on their monumental study of the auto accident compensation system;⁸ Jeffrey O'Connell and (now) Judge Robert Keeton's blueprint for auto no-fault was in the making;⁹ and Dean Guido Calabresi's path breaking work that led to the publication in 1970 of his *The Costs of Accidents*¹⁰ was underway.

To be sure, doctrinal development did not die with the adoption of Section 402A. To the contrary, when I began teaching torts in 1972, an enormous number of the rules I had learned during my first year at Northwestern Law School in 1964-65 had already been overturned. By the time I published my first substantial article in the field in 1985,¹¹ the subject had been transformed. Nevertheless, it is my strong belief that as my generation of torts professors have more new "law" to keep up with, we also write less about "law" in Prosser's way. Indeed, judging by the Study, one of the last places to find lucid thinking about the desirable direction of tort law is in the published opinions of state and federal judges.

Evidencing this shift away from doctrinal concerns was the appointment by Professor Geoffrey Hazard, the ALI director, of Richard Stewart as the original Chief Reporter for the new ALI torts study in 1986. Stewart is a brilliant scholar, best known for his work in administrative law and environmental law, but he is not generally considered a "torts man." Similarly, when Stewart left the project part way through to go to the Department of Justice, his replacement, Paul Weiler, was known primarily for his splendid work in the labor field, not tort law. Indeed, several of the very talented Associate Reporters and lead Contributors for the project are more noted for their work in other, albeit sometimes adjacent, fields. For example, while Robert Rabin is plainly one of the torts "stars," Kenneth Abraham and Alan Schwartz are more closely associated with insurance and contract law, respectively.

Selecting a team of reporters not primarily steeped in tort doctrine would have seemed odd in 1960, but given the changes in the field, it was an astute choice in the late 1980s. Hazard and Stewart are to be commended for their insight. Yet the predictable upshot of these changes in context between the Restatement (Second) of Torts and this study, indicative of the times and the

8. ALFRED F. CONARD, JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES E. VOLTZ & ROBERT E. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964); Alfred F. Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279 (1964).

9. ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965).

10. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

11. Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558 (1985).

talent, was that the Study reads very differently from the reports that Prosser and his colleagues produced.

Not surprisingly, then, the loudest cries of protest against the unabashedly policy-driven report came from judges and lawyers whose first allegiance is to the more doctrinal approach of Prosser. Another consideration seems to have been that some ALI members still see the function of the Institute as one of sorting through and making sense of the case law, and then taking a leadership role in the guiding of future common law decision-making. But this is a process that is very difficult to undertake for tort law today when, for several years now, so much of the action has been in the legislative arena.

I do not mean to suggest that no law professors launched attacks on the report. Some did, and, in a few cases, they attacked passionately. These critics generally shared the view that the common law of torts is both good and important because it compensates individual victims who have been wronged and that, on balance, the Study is pro-defendant and therefore needs to be discredited. Ironically, compared to legislative reforms in some jurisdictions, adopting the recommendations of the Study in full arguably would produce substantial gains for plaintiffs.

Some professors complained that the study disregarded important intellectual perspectives on tort law. This is a delicate problem. A report that takes a reasonably coherent stance on the future direction of tort law could not possibly embrace the enormous diversity of opinion currently present in academia.¹² The Reporters had little choice but to emphasize their preferred perspective—which is best described as Calabresian.

12. Given my radical position that would combine “doing away” with personal injury law and strong public law substitutes, I sometimes think of myself as being at one end of the range of academic opinion. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989). But, because such diverse work is now being done in the field, it is by no means clear whether I am better seen as at the end of a line or, say, at one outer point of a star; nor do my critics seem to agree whether, on the political spectrum, I should be put at the far left or the far right.

A few years ago two Berkeley colleagues, Robert Cooter and Daniel Rubinfeld, and I taught a 2-year seminar on “tort theory and policy.” We tried to put academic opinion into different “schools.” Among these were the law and economics school, starting with Calabresi and Judge Richard Posner and later followed by “real” economists and other fellow travelers; the moral philosophy school, as exemplified by Jules Coleman, Richard Epstein, and Ernest Weinrib; the no-fault compensation school, epitomized by O’Connell; and the critical legal studies school, with a small list of contributions, mostly by Richard Abel and Allen Hutchinson. This methodology, however, was not altogether satisfactory. Members of the various schools often did not even share common starting points, and there was enormous disagreement within the schools. Also, this type of categorizing left out many important contributors to contemporary torts scholarship, including John Fleming and Gary Schwartz. In many respects, the “schools” that Cooter, Rubinfeld, and I identified all have something fundamentally critical to say about existing tort law—how it is conceived, how it functions, and so on. Other scholars, however, largely delight in the way tort law has been (or had been) developing, especially its incorporation of more grounds on which more victims could recover. Marshall Shapo falls into this category. Shapo was the Reporter for an earlier American Bar Association study of tort law, which found everything pretty much hunky-dory. *REPORT TO THE AMERICAN BAR ASSOCIATION, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* (1984). The work of still others is more descriptive and analytical than normative, and therefore has never been included as a “school.” Peter Schuck’s fascinating account of the Agent Orange saga fits in this category. PETER

In *The Costs of Accidents*, Calabresi argued that society's policy towards accidents should be to minimize the sum of primary, secondary, and tertiary accident costs. Reducing primary costs concerns promoting safety (while not discouraging, if possible, socially desirable innovation). Reducing secondary costs concerns spreading the costs of compensation paid to accident victims. Tertiary costs are the transactions costs; these costs include the costs of lawyers' fees, insurance administration, the parties' time, and court costs.

While the Study pays lip service to other aims of tort law, in the end it evaluates the existing regime and its potential alternatives primarily in terms of their role in primary and secondary cost reduction: (1) how well they channel human behavior in socially desirable ways, and (2) how well they provide accident victims appropriate compensation.

To its credit, the Study employs the Calabresian framework in an expansive way. Whereas Calabresi has given some attention to auto no-fault as an institutional alternative to tort law, he has not focused a great deal of attention on other institutional alternatives.¹³ By contrast, the Study does so. Launching a serious inquiry into a wide range of institutional alternatives is

SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (enlarged ed. 1987). Our response in the seminar was to include the work of many of these authors on an ad hoc basis.

The ALI project might have set its task as one of organizing torts scholarship. Perhaps it could have produced a well worked out map of the different intellectual approaches of contemporary tort law scholars. Recent intellectual history, however well rendered, hardly translates directly into an understanding of the torts crisis or a program for whatever reform, if any, is needed. And, reform—especially practical and politically plausible reform—is what the project's chief reporters and their colleagues seem to have had their eyes on from the start. See vol. I, p. 10.

13. Guido Calabresi, *The New York Plan: A Free Choice Modification*, 71 COLUM. L. REV. 267 (1971). In my judgment, in terms of practical application, Calabresi's writings about accident costs primarily provide insights into how the tort law might decide whether to impose liability on persons or institutions, thereby internalizing the accident's costs. For Calabresi, the answer lay in the elusive "cheapest cost avoider," the party who could best appraise how to reduce the sum of accident costs and act on that appraisal. How are we to decide who that party is? In my opinion, the main problem is that Calabresi never provided convincing criteria for deciding at which level of generality to answer the question. For example, are we supposed to ask who is the cheapest cost avoider while thinking about the provision and use of a power lawn mower without certain guards but containing certain warnings; about the sale and use of power mowers generally; about the sale and use of lawn mowers of all sorts; about the decision to have lawns and arrangements for their upkeep generally? As the target of the inquiry changes, the ultimate cheapest cost avoiders change.

In what appears to be an attempt to tame the uncertainty in Calabresi's analysis, Howard Latin has proposed that the Calabresi-type inquiry be turned into a scrutiny of whether either of the parties involved in the class of accidents at issue is a "problem solver." See Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985). If so, there may be good reason to impose accident costs on him, her, or it. Problem solvers are those actors who rationally respond to legal threats to impose accident costs. Of course, Latin's structure, too, is fraught with uncertainty in defining the relevant class of accidents. Should it be car accidents involving drinking, in which case the alcoholic beverage makers are a potential candidate for liability? Or is it auto accidents generally, as Latin seems to prefer, in order to impose liability on the auto makers to stimulate them to make safer cars? Or is it all roadway accidents, in which case highway designers become an equally promising target under Latin's criteria? At least Latin's framework recognizes that while tort law might be appropriate for some settings, focused compensation schemes and social insurance plans might be more appropriate for others.

Stewart's most important contribution.¹⁴

Although I believe that there is widespread support within the academy for Calabresi's framework, there plainly are other points of view. Not everyone sees tort law and its alternatives in such an instrumental way. For example, many commentators, including the academics who complained at the ALI meeting, emphasize individual justice. These commentators believe that people who are wronged deserve to have a mechanism through which they can right those wrongs, and it is an obligation of our democratic society to provide such a mechanism no matter the cost.

In my writing I have largely devalued this corrective justice goal because I am convinced both that we have no coherent and agreed theory of corrective justice and that, in practice, tort law ill serves any defensible theory of justice.¹⁵ The Study likewise dismisses the idea of a quest for justice.¹⁶ Following Calabresi, it adopts the position that the principles of justice essentially serve as a constraint on the way that accident cost minimization is implemented.

Having studied the alternatives, the Study concludes that there still is an important role for personal injury law, albeit a reformed law. The reporters believe that enterprise liability for personal injury has important, socially desirable behavioral consequences for primary cost reduction that should not be abandoned. Furthermore, they believe these results cannot be achieved as well through other institutional arrangements. Also, the Study finds that at least some needy people are well compensated by tort law, and is skeptical about the political viability, or (in some cases) the desirability, of alternatives. Notwithstanding these strengths, the Study recognizes that the current tort system is expensive to administer and proposes some cost reduction techniques.

Were I to flatter myself, I would say that the Study is a long response to my odyssey through Calabresi's framework, one which led me¹⁷ to quite a different conclusion. I too canvassed the institutional alternatives, but found them far more promising, at least in principle. In addition, I found the primary cost reduction effects of tort law unpersuasive compared with available alternatives. Ironically, I stand together with the advocates of tort law as a provider of individual justice on this: We are skeptical that so much of the Study's defense of tort law can be sustained on appeals to its positive behavioral consequences. As a result, I find the tertiary costs of operating the current system more damning than does the Study.

Although we part company on the broader analysis, when it comes to the details of how tort law should be reformed now, the Study and I are close on many important items, especially those in which the Study turns away from

14. For his own first cut, see Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184 (1987).

15. S. SUGARMAN, *supra* note 12, at 55-63.

16. Vol. I, pp. 24-25.

17. S. SUGARMAN, *supra* note 12.

the imperatives of behavioral channeling and to the requirements of sensible compensation.

II. THE INSTITUTIONAL ALTERNATIVES

Before turning in detail to the Study's recommendations, contained in volume II, I will describe and discuss volume I, "The Institutional Framework." Although it bears the hallmarks of separate authorship, volume I is a skillfully knit and bountiful primer on a wide array of important topics. What's more, in certain places it is quite insightful. Volume I is especially helpful background reading both for torts people who are unaware of the wide range of institutional alternatives discussed in recent scholarship and for the ALI's general membership, whose main work lies outside tort law. I too found many chapters quite informative.

Volume I tells the same story four times. First comes Weiler's overview of the Volume. The following seven chapters discuss the various institutional settings considered by the Study. These include the tort law/liability insurance (chapter 2) and its many complementary and/or competing schemes, such as first-party insurance, regulation, markets, and focused compensation plans (chapters 3-8). Chapters 9 through 12 examine similar issues organized in terms of the injury setting. In particular, the Study examines workplace, product, medical, and environmental injuries. Chapter 13 offers a second overview, comparing the competing arrangements' ability to modify behavior, provide compensation, and other desirable social functions as revealed by empirical data. In my view, to be told something four times by different, thoughtful people with different points of view is not a bad thing.

A. *Five Models*

Tort law and its alternatives may be categorized in many ways. In this section, I offer five competing institutional arrangements for handling accidents. My models are not water-tight, but I offer them for heuristic purposes; moreover, I have given them labels drawn from political philosophy, broadly, right to left, that are meant to be suggestive, more than definitive.

1. *The Libertarian model.*

The first model is the Libertarian alternative. Under this approach, members of society rely primarily upon the market to determine standards of conduct and provide compensation for accidental injuries. Government protects property from theft and intentional destruction, enforces contracts and, I suppose, punishes fraud. Voluntary market transactions, however, determine the degree of risk people will accept in the goods and services they consume. The market also provides insurance of all kinds. The dominant value is liberty; the social picture is a result of millions of decentralized decisions about risk.

2. *The Conservative model.*

The historic tort law/liability insurance option I call the Conservative model, both because it reflects the status quo for many types of accidents and because many of the values it embodies are conservative. In this model, government establishes legal rights and wrongs with respect to risk-taking beyond those created by contract. But those rights are enforced only when they are asserted by individuals. Fault is the fundamental criterion by which both wrongdoing and the right to compensation are identified. Behavior is meant to be controlled through private threats to assert these rights via lawsuits claiming money damages. (Hence, the judiciary, not the executive, is the public agency of social control.) Compensation, when provided, is intended to be full, with two further conservative consequences. First, by providing more compensation to the disabled high earner than to the disabled laborer, the law reinforces pre-existing inequalities in income and wealth that were upset by the injury-triggering event; second, by compensating for intangible loss ("pain and suffering"), the law caters to individual feelings of indignity and outrage.¹⁸

3. *The Liberal model.*

Focused compensation plans, of which workers' compensation is the most prominent example, characterize what I call the Liberal model. This alternative is more interventionist than traditional tort law in several ways. Like other liberal ideas, little weight is put on individual fault. Instead, larger institutional forces are thought to be responsible for causing the majority of injuries, and institutions are obligated to compensate their victims. Compensation, although comprehensively wide (perhaps excluding intentional self-injurers), is not meant to be full. The aim is to assure that the basic material needs of the ordinary citizen are met. The focused compensa-

18. Admittedly, some self-styled "liberals" are strong supporters of the tort/insurance model and might resent my "conservative" label. Indeed, they might well believe that American tort law better serves their values than would the other models. They revel in examples of the "little guy" and his or her lawyer taking on and defeating powerful enterprises by convincing that very democratic institution, the jury, of corporate wrongdoing. Because they tend to associate the label "conservative" with the power of business, a model that facilitates David taking on Goliath hardly seems conservative to them. Furthermore, lawyers and academics, with the cooperation and urging of judges and the support of juries, have helped make American tort law far more pro-plaintiff than it was before the 1960s. Tort liberals, in this sense of the word, do not want to give up these gains, nor, in many cases, do they wish to trade them for the compensation and behavior control mechanisms of the more centralized models. They are skeptical that other mechanisms for controlling corporations will work as well as the present system, and fear that the compensation delivered by other models will be less than promised. In other words, as a pragmatic matter, these liberals are fearful of the fate of the Liberal model when their opponents exercise their political clout in the legislature.

As Mies Van Der Rohe said, "God is in the details." And friends of the tort law/insurance model in the abstract—including both plaintiff and defense attorneys, many "conservative" economists, liability insurers, and certain consumer activists like Ralph Nader—fiercely disagree as to its details. As substantial tort reform has been undertaken in recent years in legislatures throughout the country, these strange bedfellows, rather than fending off devotees of other models, have been at each other's throats. For my purposes, however, so long as tort law at its core stands for a private law remedy through which individuals seek redress from their injurers, it is "conservative" in the ways I have already explained.

tion plan, like the traditional tort system, can be seen as a single societal instrument used both to control conduct and provide compensation. Because the funding mechanisms of these plans internalize the costs of accidents to specifically responsible institutions, they are meant to discourage dangerous activities and promote their safe performance.

4. *The Collective model.*

What I call the Collective model is more interventionist than the Liberal model in two critical ways. First, accident victims are not singled out based upon the specific type of accident they suffer, e.g., auto, medical, or product. In fact, accident victims are not treated separately or differently from the disabled generally; accident victims, like those suffering from disease, birth defects, and so on need medical care and income protection. Indeed, accident victims may be treated as part of a much broader class of citizens, including the unemployed and the retired, for whom collective protection against loss is assured. Social insurance is the mechanism used to compensate the protected class and, as with focused compensation plans, its goal is to meet the basic material needs of its beneficiaries. Social insurance funding may be unrelated to behavior-channeling goals, relying instead on effective revenue-generating devices such as payroll and income taxes. This gives rise to the second contrast with focused compensation schemes. Under the Collective model, behavior control must be accomplished independent of compensation, through government regulation.

5. *The Socialist model.*

Finally, there is what I call the Socialist alternative.¹⁹ Its compensation side is not sharply differentiated from the Collective option. However, this alternative precludes the range of wealth and income inequalities permitted or encouraged by the other alternatives. It protects accident victims and others by nationalizing health care and providing a minimum guaranteed income for all. Under the Socialist model, behavior control is accomplished by a collective commitment to risk-sharing that is far greater than under other models. There is less freedom for individual risk-taking and risk-creating, and hence less diversity in the risk levels to which people are exposed. This greater equality with respect to the exposure to risk comes about not only through reductions in the levels of risk created in the society but also through collective ownership of, and worker control, over large enterprises that create risk.

Our actual experience in the United States, of course, neither runs the gamut of these five models, nor always fits neatly into just one of the boxes. But the models represent ideologically distinctive approaches to the control of risk and the personal injury consequences of risk. As we move through the models, managing risk and providing compensation shift from individual

19. For this model I draw on the writings of Richard Abel. See generally Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990).

matters to matters of increasingly wider social responsibility. Thus, the focus of compensation shifts away from the individual and the particular to the group and the general, and the process for determining which risks are socially acceptable shifts from the decentralized to the increasingly centralized.

Obviously, as tort law shifts towards mass victim claims proceedings, ignores defendant fault, reduces its insistence on clear defendant-plaintiff causal connections, and pays out damage amounts that are much less finely tuned to individual circumstances, it ceases to be traditional tort law. It thereby loses many of its conservative characteristics and begins to take on those of the focused compensation plan of the Liberal Model, albeit a compensation plan organized and operated under the supervision of the judiciary.

Combined models, which reject ideological purity in favor of pragmatic considerations, offer additional possibilities. Viewing the models as complementary rather than mutually exclusive, society could employ both cascading compensation arrangements (tort plus compensation plans and/or social insurance) and cascading control mechanisms (tort plus focused plan funding plus government regulation). Society, too, at least in certain respects, can decide to apply one model to some accidents and another model to others.

Before 1900, the United States largely combined reliance on the Conservative and Libertarian models. Today, no modern industrialized society relies exclusively, or even predominantly, on the Libertarian model. At present our nation's policy towards those suffering personal injuries and the prevention of accidents is decidedly mixed, combining elements of the Conservative, Liberal, and Collective models. This is contrasted, for example, with New Zealand where the Collective model predominates.

B. *Markets, First Party Insurance, and The Libertarian Model*

The Study gives little support to the Libertarian model even though it is keen on the idea that social welfare is maximized when individual consumers decide how much risk they are willing to assume and how much they will pay for safety.²⁰ The Study nonetheless recognizes that unregulated markets are unlikely to achieve the socially optimal level of risk.

One shortcoming of the Libertarian model, although the Study gives it precious little attention, is that many accidents involve parties with no market relationship to each other. Environmental spills, ultrahazardous activities such as dynamite blasting or other conduct covered by section 520 of the Restatement (Second), and fires that spread from one land owner to another are likely to involve injury to parties previously unknown to each other. Extreme libertarians might imagine these problems being solved through private land use schemes—voluntary covenants, entered into in advance, that

20. Vol. I, pp. 203-07.

would control conduct and provide remedies if breached. But this solution would entail enormous transaction costs to make the necessary arrangements. Therefore, most people find this solution implausible, believing that collective standard setting, through either tort law or government intervention, is required to regulate these externalities.

Even in circumstances where the parties are in a market relationship, there are market failure problems. One of the central problems the Study identifies is that the market alone may not provide sufficient information for consumers to make reasoned choices about risk, and that, even if well informed, consumers may mistakenly make choices that are not in their best interest.²¹ Government intervention beyond that contemplated by the Libertarian model is then necessary to deal with these market failures.

The authors emphasize that much could be gained if social intervention assured that people were adequately warned.²² Without doubting that in the slightest, adequate warning alone fails to contend with other problems already identified, namely, unforeseen third parties, harm to others, and people's failure to act in their own best interest. Moreover, it is, of course, one thing to favor effective warnings and another to believe that tort law actually promotes them (a matter to be taken up below).

One empirical finding on risk perception that the authors stress is that although people devalue risks of which they are unaware, they tend to over-react to small risks of which they are somewhat aware: They might, for example, refuse to purchase a product when it would really be in their best interest to do so.²³ This shows that social intervention to make people realistic about risk in both directions has its place. On the other hand, being told once about a small risk by no means assures that when later confronted by it a person is still meaningfully informed; those settings may prompt under-reaction, rather than over-reaction.²⁴ The authors acknowledge this point by emphasizing the concept of the salience of a risk.²⁵

This would have been a splendid occasion to provide a synthetic analysis of a range of problems concerning the inadequate awareness of, and inappropriate response to, risk. Examples include the issue of informed consent to medical treatment, the sorts of warnings landowners are required to give different classes of occupiers, and the related question of when warnings are inadequate, requiring instead that the danger be removed, as well as the role of warnings in product liability cases. The current tort law responses to these issues are strewn throughout the Restatement. Unfortunately, the Study misses this opportunity and focuses only on product dangers.

Private disability and life insurance, which in the Libertarian model provide financial protection for losses arising from accidental injury or death, are discussed in chapter 5. The Study explains that private disability insur-

21. Vol. I, pp. 207-08.

22. Vol. I, p. 232.

23. Vol. I, pp. 223-26.

24. Professor Howard Latin has pointed this out to me in private conversation.

25. Vol. I, p. 226.

ance today plainly fails to cover all those disabled by accidents. For example, it notes that "loss insurance does not come close to paying the full economic losses of those who bring tort actions" and emphasizes that the gaps are "most severe for the seriously injured victim."²⁶ From the Libertarian perspective this might simply mean that many individuals have elected not to insure against the risk of their own disability. But, as the Study points out, incomplete coverage of disability insurance is an inevitable result of the first party insurance market.²⁷

Like insurers generally, those selling individual disability insurance policies must worry about adverse selection and moral hazard. Adverse selection concerns the problem of purchasers who are at greater risk than the insurer realizes. This is a particularly acute problem for disability insurers because buyers may be aware of their own physical and mental condition in ways unfathomable to the insurer. Moral hazard concerns the problem that the existence of the insurance itself has a tendency to increase what otherwise would be the incidence of disability. The insured may act in ways which increase his chances of becoming disabled, or he might feign disability. Insurers respond to adverse selection through underwriting practices. They scrutinize potential buyers and set premiums in accordance with risk classifications. They try to combat moral hazard, among other things, by providing only partial replacement of the loss of current income and by requiring participation in rehabilitation.

In practice, this means that useful disability insurance is not widely marketed to individual blue collar workers or to those more concerned about protecting their anticipated future earnings than their current income, such as children, students, temporary homemakers and the unemployed. Even among white collar workers and professionals, those who are evidently most at risk may well be uninsurable. Furthermore, many of those who might purchase disability insurance fail to appreciate the nature of the risk they face and gamble against becoming disabled contrary to their own best interest. Others make this gamble because they overestimate how well they are protected by other forms of disability insurance such as job-based group disability insurance and social security. Group disability insurance that is provided to an enterprise's entire workforce eliminates some of the coverage problems; but it, of course, is only available where employers choose to provide it (even if they make the employees pay for it)—and today many don't.

The Study gives brief attention to the idea of mandatory disability insurance.²⁸ This, of course, would not be a solution for the Libertarian model, nor the Conservative or Liberal models. Mandatory disability insurance, rather, is one way to implement the Collective model. Therefore, it may be misleading to say it would be dramatic overkill (and very expensive) to deal with the compensation goals of tort law through mandatory disability insur-

26. Vol. I, pp. 165-66.

27. Vol. I, pp. 168-75.

28. Vol. I, pp. 178-80.

ance, as the authors do.²⁹ After all, on this basis the existing, and effectively mandatory, life and disability insurance provisions of the social security system are already overly broad when it comes to compensating accident victims, let alone victims of another's fault, because social security also protects victims of disease and of congenital disabilities, as well as those who carelessly injure themselves. But it hardly seems sensible to criticize this overbreadth. It simply reflects the fact that the Collective model identifies those to be compensated differently than do other models.

From the viewpoint of the Collective model, the real question is whether social security's existing disability insurance scheme should be expanded. It might, for example, provide more generous benefit levels, cover some partial disabilities, and apply to people who do not have substantial recent attachment to the labor force. In the alternative, similar results could be sought through insurance schemes organized at the state level or through required employment-based disability insurance.

Chapter 5 seeks to distance tort reform from reform that guarantees disability protection, suggesting only that the latter "does warrant careful evaluation on its own terms."³⁰ This is somewhat unsatisfying, both because the Study does not go on to make that evaluation and because, were disability (and health) insurance to be provided to everyone, the compensatory role for tort law would be dramatically decreased and possibly eliminated.

C. *Workers' Compensation and the Liberal Model*

The Study, in chapter 3, paints a reasonably positive picture of the workers' compensation system. Adopted in America in the 1910s and sharply strengthened since 1970, workers' compensation exemplifies the Liberal alternative to tort law. It provides reasonable medical, income replacement, and rehabilitation benefits to workers injured on the job, promptly and without much attention to fault. Because the job setting is broadly under the control of employers, they are required to pay regardless of whether there is anything they might have done to avoid the accident.

The Study identifies several problems with this system, particularly regarding victim compensation.³¹ First, the system's coverage of occupational disease is poor. Second, periodic payments to those suffering long term disabilities have not been subject to regular cost of living adjustments. Because these benefits may seriously erode in value, they fail to provide the compensation intended by the Liberal model. Third, because the future work prospects of those suffering from partial permanent disabilities are so unpredictable, compensation is problematic. The traditional system, which awards a worker a specific sum on the ground that she has been X percent disabled or has suffered type Y impairment, over compensates some and under compensates others. Finally, administrative costs for seriously injured

29. Vol. I, p. 178.

30. Vol. I, p. 180.

31. Vol. I, pp. 113-21.

workers are high, especially when compared to social security. Nevertheless, workers' compensation remains an administrative bargain compared to tort law.

As a technical matter, the inflation problem can readily be solved; it is a matter of political will. As for the prediction problem confronting those with partial permanent disabilities, the Study points out that important strides already appear to have been made in some jurisdictions. Benefits in these jurisdictions more carefully track actual individual wage loss over time and separately award compensation for the impairment itself.

The occupational disease problem, however, is more difficult. Employees change jobs. Many of these diseases are the result of cumulative exposure, including non-job exposure. Causal links between individual workers and job exposure are often hard to prove. Hence, solving this problem may require moving away from the Liberal model to the Collective model, in which connecting the disease to a specific institutional source is not relevant. As the Study suggests in chapter 3, this shift should also reduce administrative costs. To the extent the Collective model is already in place in America through the social security system, we are again faced with the policy issue described in the previous section. Social security already covers occupational diseases with serious consequences. Thus, the question is whether social security should be improved generally, which in turn would benefit those disabled from occupational diseases.

On the other hand, it is clear that the Study authors worry that abandoning the focused funding obligation of workers' compensation could lead to an increase in the injury rate. On the behavioral impact side, the Study reports that the more generous the workers' compensation benefits are, the higher the level of claims filed. This is especially true for "softer, less visible muscle or back injuries."³² At the same time, recent work has found that because the funding obligation of worker's compensation is focused on employers and, for medium and large employers, varies with their claims experience, it has had a powerful impact on reducing the injury rate. Presumably, employers have increased their efforts to provide a safe workplace in order to save compensation costs.³³

I am skeptical that the workers' compensation system is truly as powerful in promoting safety as the Study suggests. Apart from workers' compensation premiums, government regulation, and tort suits, employers already have strong incentives to make the workplace safe. On-the-job injuries cause disruption, loss of morale, and productivity losses. A replacement must be hired and trained. Without the workers' compensation obligation, the employer might well be concerned about the medical costs the worker would impose on the employer's health plan.

More generally, the Study's examination of focused compensation plans

32. Vol. I, p. 124.

33. Vol. I, p. 125. The study describes and analyzes other evidence about workplace injuries and the workers' compensation system at vol. I, pp. 335-47, 427-41.

is both somewhat narrow and fragmented. For example, it fails to deal with the overlap in coverage between workers' compensation and the typical employer's health insurance plan. It never discusses focused compensation plans, existing and proposed, as a package. Chapter 13 of volume I discusses some of these ideas briefly.³⁴ Further discussions of compensation plans are also contained in chapters 14 and 15 of volume II.³⁵

D. *Health Insurance, Social Insurance, Regulation, and the Collective Model*

I was delighted to see the Study devote chapters to institutional arrangements that are essential to evaluating the alternative I have called the Collective model. Tort law professors and practitioners are often accused of knowing little about health insurance and social insurance. Chapters 4 and 6 of the Study provide some good basic information.³⁶

Chapter 4 traces the history of health insurance in the United States to its current, unsatisfactory, hodge podge of arrangements.³⁷ Group plans sponsored by employers form the core of our system. Medicare and Medicaid provide important governmental support for the elderly, the disabled, and the poor. Unfortunately, our nation's health care costs are out of control, there are many holes in the system, and those without regular health insurance arrangements receive fewer and lower quality health services than do other Americans.

As the Study notes, "It would be rash, therefore, to dismiss out of hand the role that tort damage awards play in providing a form of health insurance for the victims of enterprise injuries."³⁸ But this conclusion is less a form of praise for the Conservative model than a commentary on our failure to embrace the Collective health care model. The Conservative model, after all, provides health care only to certain accident victims, and at enormous cost. Many other industrialized societies have long had health care systems that are reasonably comprehensive. Were we to adopt, say, the Canadian system that has been much discussed of late—or even some sort of mandatory employer-provided health insurance combined with broadened coverage by Medicare and Medicaid—the role for tort law could be sharply curtailed. Whether broad health care reform of that sort is soon forthcoming is difficult to predict, even though nearly all those who have studied our health care system agree that it demands prompt attention.

The Study could have said more about the extent to which seriously injured tort victims eventually gain access to Medicare and Medicaid. Also, a discussion of the ways in which tort law's definition of medical damages

34. Vol. I, pp. 391-97 (medical injuries), 411-12 (product injuries).

35. See vol. I, pp. 441-516.

36. See vol. I, pp. 129-56, 181-202.

37. Vol. I, pp. 129-54.

38. Vol. I, p. 156.

relates to typical health insurance coverage would be useful. But, apparently, little hard data is currently available on these questions.

The Study's remarks in chapter 6 on social insurance also reveal that the United States has not embraced the Collective model with regard to income replacement the way competitor nations have.³⁹ Our social security system does provide moderate, wage-related benefits to totally disabled people, their young children, and dependent spouses when the disabled person has had substantial recent attachment to the labor force. Also when former workers die (including death from accidents that might be covered by tort law or workers' compensation), social security provides moderate wage-related pensions to surviving children and to the decedent's elderly dependent spouse or parents. But there is no national scheme for the partially permanently disabled or the temporarily disabled.

State workers' compensation plans fill part of the income replacement gap but also overlap partially with social security. For nonoccupational disabilities, however, there is no comprehensive state-level scheme. A few states provide temporary disability insurance programs for workers. Otherwise, most people must rely upon their own savings and whatever sick leave and temporary disability insurance their employers might provide.

Once more, tort law can fill some gaps in the compensation system. It remains, however, an expensive and incomplete system for filling those gaps. Our nation could more fully implement the Collective model with respect to income replacement; many creative options exist. For example, even without action by the federal government, states could require workers' compensation benefits to cover employees and their dependents around the clock. Alternatively, they could focus the workers' compensation income replacement function on serious injuries, make reasonable sick leave plans mandatory, and adopt employee-paid, temporary income replacement plans covering disabilities of all sorts.

On the compensation side, a true Socialist model would imply even more dramatic changes both in the health care system⁴⁰ and in the income transfer system. But the Study does not really begin to address this alternative.

The Study examines regulation in chapter 8.⁴¹ Recognizing the need for effective behavior control mechanisms and acknowledging the shortcomings of the market, the Study characterizes the policy choice in terms of the Collective model (government regulation) and the Conservative model (tort law). The Socialist approach to risk control is ignored, and, more surprisingly, no comparison is made to the Liberal model's focused obligations to fund compensation plans, despite the Study's support for workers' compensation.

The Study also confines itself to federal regulation. While national regu-

39. Vol. I, pp. 181-202.

40. This would probably call for some variation on the traditional British health service in which health care professionals are employees of the state.

41. Vol. I, pp. 233-51.

lation is uniform, more well known, and has been the subject of careful empirical studies, ignoring state and local regulation is a significant omission. In any event, the Study offers fair criticisms of existing regulatory schemes, noting for example, their inadequate enforcement and their incomplete coverage of risks.⁴² It recognizes, however, both that these problems might be alleviated and that tort law, as a system of behavior control, has serious shortcomings.⁴³

E. *Tort Law, Liability Insurance, and the Conservative Model*

In the introductory chapter to volume I, the Study states, "Anyone conducting a fair-minded review of trends and analyses over the last several decades would have to concede the flaws in tort law's performance."⁴⁴ But the Study's general chapter on tort law and liability insurance does not address those "flaws" as the reader might expect. Rather, after providing basic information on the tort system's financial scale, its increasing cost over time, and the growing number of large verdicts,⁴⁵ the Study in chapter 2 turns its attention to the liability insurance crisis of the mid-1980s.

The Study attempts to make sense of the many competing explanations for the skyrocketing liability insurance rates (especially for product liability, medical malpractice, and municipal liability insurance) and the occasional complete unavailability of insurance associated with the tort crisis.⁴⁶ It asserts that "the evolution of the underwriting cycle, the growth of tort law, the tendency of this body of law in some instances to promote adverse selection, market conditions, and increased uncertainty regarding the scope and magnitude of modern tort law" all played a part.⁴⁷ As for the relative importance of these factors, the Study concludes "we are persuaded that a significant share of the responsibility for what occurred in the liability insurance markets during the decade of the 1980's was caused by developments within the civil liability system."⁴⁸ At the same time, the Study is skeptical that the reforms so far enacted in response to the crisis have had, or are likely to have, much of an impact on tort costs and insurability. The main exception noted is the imposition of a tight cap on recoveries for pain and suffering; that solution, however, is one which the Study opposes for reasons explained in volume II. Further discussion of the Conservative model is provided in the context of specific accident settings referred to by the Study as the "upper tiers of high-stakes and very-high-stakes litigation."⁴⁹

The Study's chapter on product injuries draws two significant conclu-

42. Vol. I, pp. 249-51.

43. Vol. I, pp. 249-51.

44. Vol. I, pp. 33-34.

45. Vol. I, pp. 56-66.

46. Vol. I, pp. 66-97.

47. Vol. I, p. 97.

48. Vol. I, p. 102.

49. Vol. I, p. 10.

sions. Regarding compensation, the Study says: "It is generally more efficient to insure once and for all against the entire set of risks a person faces rather than purchase insurance on a product by product basis, as occurs, in effect, through product liability."⁵⁰ This conclusion takes no stance on the comparative desirability of either the Libertarian solution, in which individuals elect whether to purchase insurance, or the Collective solution, in which insurance is assured. With respect to safety promotion, the Study concludes: "[A] general endorsement of the efficiency of the tort system is unwarranted. . . . [T]he amounts of compensation provided are generally insufficient to promote efficient levels of deterrence."⁵¹

It has been strongly asserted that tort law discourages desirable product innovation.⁵² On that issue, the Study concludes that the evidence to date is mixed.⁵³ On the other hand, it expresses concern about negative impacts on product development from another direction. In contrast to the tenor of its chapter on regulation generally, government control of product safety, the Study asserts in chapter 9, is often too stringent, rather than incomplete or unenforced.⁵⁴ By demanding more safety than is socially desirable, government regulation keeps some products from the public and makes others more expensive than they need be.⁵⁵

The Study finds fault with tort law's response to medical malpractice as well. Tort law, the study concludes, vastly under compensates most malpractice victims, if it compensates them at all.⁵⁶ The tort system also falls short as a deterrent. The Study notes, for example, that "it is questionable whether [more] suits would reduce the amount of malpractice."⁵⁷ The "apparently . . . limited effect" tort law has in producing safer medical care is attributed to the fact that it is directed towards individual physicians, most of whose errors "consist in inadvertent mistakes and slipups caused by momentary inattention—the kind of behavior that the tort system is least likely to influence effectively."⁵⁸ The Study also attributes medical malpractice insurance's fiscal crisis, marked by unpredictable rate increases and fabulously high premiums in some specialties, to the fact that this insurance is directed at, and generally paid for by, individual physicians.⁵⁹

The Study is also not much impressed with the record to date of the

50. Vol. I, p. 262.

51. Vol. I, p. 264. For an appraisal of the largely indeterminate empirical evidence on the impact of tort liability in the product area, see vol. I, pp. 398-402.

52. See generally PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

53. Vol. I, p. 277. For some more recent evidence, see *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (Peter W. Huber & Robert E. Litan eds., 1991).

54. Vol. I, pp. 279-83.

55. Vol. I, pp. 279-83. The Study's review of governmental safety regulation in the product area finds a mixed outcome, suggesting that agencies might do best by making more use of required warning labels and safe use information. See vol. I, pp. 404-11.

56. This is further confirmed in chapter 13. See vol. I, pp. 381-85.

57. Vol. I, p. 297.

58. Vol. I, p. 298. The more thorough presentation of the empirical evidence in chapter 13 finds the impact "inconclusive." Vol. I, p. 379.

59. See vol. I, pp. 285-92.

Collective model's regulatory approach to physician control.⁶⁰ However, the Study does suggest that recently required hospital risk-management programs might have some positive effect.⁶¹

F. *Conclusion: Volume I*

Perhaps the dominant theme of volume I of the Study is best captured in the phrase "nothing is perfect." For example, many accidents that would be prevented under other systems would occur under the Libertarian model. Moreover, many accident victims would not be compensated under the Libertarian model, including both those whose best interests should have, but didn't, cause them to be insured, and those whom the rest of us want to be insured regardless of their own preferences. Yet the social intervention models attempting to correct the shortcomings of the Libertarian model are also flawed. The Conservative model, for example, is an ineffective behavioral channeling mechanism, compensates a limited share of victims (even of tort victims), provides uneven and unpredictable compensation, and costs a great deal to administer. Unable to rely on the moral power that attaches to injurer fault, the Liberal model runs into political objections by those forced to pay the bill. As a result, there is a risk that plan benefits will be inadequate, forcing victims to look as well to Conservative and Libertarian model remedies (lawsuits and their own insurance) for sufficient compensation. This undermines some of the efficiency gains that, in principle, attach to the Liberal model. It is also by no means clear that we can sensibly design focused compensation plans for the wide range of accidents covered by the Conservative model. Product injury compensation plans? Transportation injury compensation plans? Premises injury compensation plans? Medical injury compensation plans? Some of these might work, others not. Finally, despite some encouraging evidence, it remains unclear how effective the Liberal model can be in shaping behavior through the use of financial incentives created by plan funding arrangements.

The Collective model can effectively assure victim compensation at low administrative costs. But its embrace requires a feeling of collective and mutual responsibility that may be absent in a nation such as ours with a strong ideological commitment to individual responsibility and individual desert. Moreover, the compensation paid would likely be of a common denominator sort, less carefully tailored to individual circumstances than in other models. This reflects the model's common citizen orientation. Having separated behavior control from the compensation mechanism, the Collective model must resort to government regulation. Yet, American experience with current governmental efforts to promote safety is mixed at best.

The Study failed to address the Socialist model. Had it done so, it surely would have predicted inefficiency of government ownership of basic industries, including the health care system. Also, it would have doubted the fea-

60. Vol. I, p. 294.

61. Vol. I, pp. 385-91.

sibility and desirability of equalizing exposure to risk. This, the Study would have reasoned, would sharply reduce individual welfare by preventing people from voluntarily accepting risk in exchange for other benefits they want. Undoubtedly, the authors would also have concluded that a policy of assuring greater equality of income in America is politically implausible in the near future, quite apart from concerns about potentially undesirable social consequences resulting from dampened individual initiative.

If there is no ideal solution, then one must judge which is the most promising despite its flaws. At the least, one can select the elements of each model that appear most able to deal with various personal injuries. This is the subject of volume II.

III. APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE

Volume II of the Study contains the project's recommendations. Consistent with its broad appraisal of the institutional alternatives in volume I, the Study insists that "it is essential to avoid a 'tort-centric' approach to personal injury policy."⁶² Yet, it concedes that its policy proposals "are largely devoted to tort law alone."⁶³ It offers two justifications for that focus: first, it concludes that "tort plays a valuable role in the broader personal injury picture"; and second, it asserts that "as a group of tort scholars, that is where our comparative advantage lies."⁶⁴

To illustrate the latter point, the Study says, "the more we learned about the problems as well as the virtues of disability insurance, for example, the more we realized how presumptuous it would be for us to judge whether social security disability insurance might be expanded to cover partial as well as total disability."⁶⁵ I find this expression of modesty rather disingenuous. The project leaders planned the expansive nature of their inquiry, so why did they not shape its personnel to be competent to make broad judgments beyond tort law? In addition, at least two of the core participants in the project, Kenneth Abraham and Lance Liebman, do know a great deal about disability insurance and social security, and wrote about those topics for volume I. If more diverse expertise was needed, other prominent legal scholars specializing in social security's disability insurance role could have been added. Jerry Mashaw is one name that comes to mind. Besides, the project did include social and private insurance experts who were not law professors, such as Kip Viscusi, a very talented economist, who made important contributions to the products liability, markets, and regulation chapters. Other nonlawyers could have been added to the team as well.

In any event, the heart of volume II addresses recommendations for reforming the Conservative model. Volume II does not completely ignore other institutional arrangements; the Libertarian, Liberal, and Collective

62. Vol. II, p. 6.

63. Vol. II, p. 7.

64. Vol. II, p. 7.

65. Vol. II, p. 7.

models are briefly revisited near the end of the volume. Nevertheless, those who would prefer a wholesale replacement of personal injury lawsuits with, for example, a comprehensive accident compensation scheme similar to New Zealand, will find the Study regrettably timid.

The Study has not shied away from proposing "serious tort law reform."⁶⁶ Still, most of Volume II, however thoughtfully argued, re-plows very familiar ground and offers few surprises. Indeed, most of the tort reform recommendations could have been cast as proposed revisions of existing sections of the Restatement (Second) of Torts.

A. *Tort Damages*

In chapters 5-10 of volume II, the Study proposes substantial changes in the rules for determining the amount of damages payable to tort victims.⁶⁷ Chapter 47 of the Restatement (Second) of Torts is devoted to principles of damages, and several its sections would have to be altered to accommodate the Study's recommendations.

1. *Collateral sources.*

Section 920A(2) of the Restatement (Second) states the common law collateral source rule. Simply put, tort law ignores the fact that the victim is eligible for compensation for his medical expenses, wage losses, and other accident related costs from sources such as health insurance, disability insurance, sick leave, and social security.⁶⁸ Payment from these sources either results in double recovery to the victim, or is returned to the payors via their contractual or equitable subrogation rights. This rule reflects the Conservative model value that tortfeasors should internalize the full costs they impose.

In chapter 6, the Study authors "recommend virtually complete reversal of the collateral source rule."⁶⁹ Damage awards would be reduced by sums received from collateral sources, and those payors would lose reimbursement rights against the plaintiff's award. (The Study authors also emphasize elsewhere that the same principle would apply in cases where employees receiving workers' compensation sued third parties.)⁷⁰

This is hardly the first time that reversing the collateral source rule has been advocated. In recent years, the U.S. Attorney General's Task Force appointed by the Reagan Administration urged reversal,⁷¹ as did my own

66. A great number of the positions it takes parallel those I made in an article with that very title. Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987). My proposals draw on earlier ideas of Professor O'Connell's.

67. Although the Study's focus, as noted, is on certain types of high stakes cases, there is no reason to suppose that the authors wish their rules regarding damages reform to be limited to such cases.

68. See RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).

69. Vol. II, p. 182.

70. Vol. II, p. 197.

71. U.S. ATTORNEY GENERAL TORT POLICY WORKING GROUP, REPORT ON THE CAUSES,

proposal for "serious tort law reform."⁷² Moreover, several jurisdictions have already adopted various formulations of the collateral source rule similar to the one recommended by the Study. Indeed, section 920A of the Restatement (Second) of Torts already acknowledges the possibility of statutory change in the rule.⁷³ An important effect of combining the collateral source rule reversal with the adoption of compensation schemes of the Liberal and Collective models is that tort law's compensation role is eroded from within; the more those plans pay, the less tort law does.

2. *Pain and suffering.*

Section 924(a) of the Restatement (Second), which in turn refers to section 912 (concerning certainty), and section 905 (generally discussing compensatory damages for nonpecuniary harm), sets out the common law right of personal injury victims to an open-ended monetary award, determined by the trier of fact, to compensate for past and prospective pain and suffering.⁷⁴

The Study proposes restricting pain and suffering awards in various ways. First, no damages for pain and suffering would be awarded unless the victim has suffered "significant injuries."⁷⁵ The Study cites the verbal threshold in Michigan's motor vehicle accident law as an example. That statute requires "proof of serious impairment of bodily function or permanent and serious disfigurement as a precondition to recovery of damages for pain and suffering."⁷⁶ The Study authors, however, favor a slightly more generous rule that would award pain and suffering damages to "more serious, albeit temporary, injuries inflicted by tortious behavior,"⁷⁷ at least absent a new scheme that assures pecuniary compensation to such temporarily disabled victims.

A second reform recommended by the Study is an inflation-adjusted ceiling on allowable pain and suffering damages in serious injury cases. As the Study goes to great lengths to explain, this ceiling is not simply a cap on general damages applied by the judge to truncate the jury's open-ended award. Rather, the ceiling is the top of a scale (or set of guidelines) that would be developed for serious injuries generally, with injuries of differing degrees of seriousness located along the scale. The jury's job is to place the injury in question at a suitable point along the scale and award the designated sum. The Study does not establish a specific dollar value for the ceiling although it does insist that "substantial monetary awards [be] paid to the permanently disabled who can use the additional funds to adjust to and better enjoy life in their future disabled state."⁷⁸ The authors defer to the polit-

EXTENT, AND IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1989) [hereinafter WORKING GROUP].

72. Sugarman, *supra* note 66, at 819-23.

73. RESTATEMENT (SECOND) OF TORTS § 920A cmt. d (1979).

74. *Id.* § 924(a) cmt. b (1965).

75. Vol. II, p. 230.

76. Vol. II, p. 220 n.23; *see also* MICH. COMP. LAWS ANN. § 500.3125(1) (West 1990).

77. Vol. II, p. 221 n.3.

78. Vol. II, p. 230.

ical process to establish the precise number.⁷⁹

As with the collateral source rule, other commentators have also recommended both thresholds for awarding pain and suffering damages, and ceilings on those awards. My own proposal is along the same lines, though without the Study's more sophisticated "scale." Instead I proposed allowing the common law to develop reasonable awards in reference to the ceiling as it has done in England.⁸⁰ Indeed, the Australians have also recently put such a scheme in place through statutory reform.⁸¹ On the principle that compensation for the seriously injured should be fair but not excessive, I proposed a ceiling that would generate income in the admittedly arbitrary amount of about \$1,000 a month in the late 1980s, to be increased with inflation. Hence my proposed ceiling would be close to \$200,000 today. The Australian ceiling is \$180,000 Australian.

The Reagan Administration advocated a simple cap, first in the amount of \$100,000⁸², later \$200,000.⁸³ Several American jurisdictions have capped pain and suffering awards, although the amount of the cap has varied considerably. However, many of these caps have been invalidated on state constitutional grounds.⁸⁴

3. *Punitive damages.*

Sections 908 and 909 of the Restatement (Second) cover punitive damages. Section 908(2) requires a finding of the "defendant's evil motive or his reckless indifference to the rights of another" and permits taking "the wealth of the defendant" into account in awarding punitive damages.⁸⁵ In effect, this requires finding serious fault at the managerial level of the corporation before the enterprise can be held liable for punitive damages based upon its employee's conduct.⁸⁶ Again, the Restatement (Second) already recognizes that many states have adopted statutes governing liability for punitive damages.⁸⁷

The Study calls for raising the Restatement (Second)'s standard by adding "clear and convincing evidence" to the required showing of "reckless disregard for the safety of others in the decision made by management officials or other senior personnel" before punitive damages can be awarded. In contrast to the Restatement, it urges that evidence of the defendant's wealth be excluded, although it would allow evidence of the "profits earned from

79. Vol. II, p. 229.

80. Sugarman, *supra* note 66, at 823-30.

81. For a recent discussion of the application of the New South Wales statute, see Southgate v. Waterford, 21 N.S.W.L.R. 427 (c.a. 1990).

82. WORKING GROUP, *supra* note 71, at 66-69.

83. U.S. ATTORNEY GENERAL TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS, 78-81 (1987) [hereinafter UPDATE].

84. Vol. II, p. 203.

85. RESTATEMENT (SECOND) OF TORTS § 908(2) (1965).

86. *Id.* § 908 cmt. b.

87. *Id.* § 908 cmt. f.

the specific tortious activity."⁸⁸

In calculating the amount to award, the Study favors a scheme in which punitive damages are calculated as a ratio of compensatory damages. The Study fails to endorse any specific ratio (e.g., 1/1 or 3/1). Alternatively, the Study urges that judges should be able to bifurcate trials, trying the punitive damages part of the claim separately to the same jury. If the amount of the award is not set by the ratio formula, it urges "serious consideration" of having judges fix the amount after juries decide punitive damages are warranted. Finally, it proposes in mass tort cases, that the punitive damage issue be tried in a single, national mandatory class action, to avoid cascading awards in individual litigation over the same course of conduct.⁸⁹

My proposal regarding punitive damages calls for judges to decide whether and how much to award.⁹⁰ The Reagan Administration first proposed applying the \$100,000 pain and suffering cap to punitive damages as well, but later separated the two and called for a variety of restrictions on the punitive damages award.⁹¹ In recent years, states have adopted a wide range punitive damage reforms and some have even eliminated them altogether.⁹²

4. *Joint and several liability.*

Chapter 44 of the Restatement (Second) covers contributing tortfeasors, recognizing that much of the law in this area is governed by statute. Section 875 states the general joint and several liability principle: if two or more tortfeasors are liable for a single harm, each is liable for the full damage claim.⁹³ The plaintiff can obtain a full judgment against any or all of them, although she can only collect her full judgment once.⁹⁴

Restatement (Second) section 886A sets out the general rule that defendants who are jointly and severally liable have contribution rights against each other.⁹⁵ The Restatement (Second) recognizes that the traditional rule of pro-rata contribution, whereby three solvent defendants are each liable for a third of the judgment, has been giving way to a rule of contribution based upon the relative fault among the defendants.⁹⁶

Two situations that frequently give rise to practical difficulties are those in which one of the jointly and severally liable defendants is insolvent (or absent), or has settled with the plaintiff for less than what otherwise would be his share under the contribution rules. In the former case, the Restatement (Second)'s rules place the risk of insolvency on the defendant from

88. Vol. II, p. 264.

89. Vol. II, p. 265.

90. Sugarman, *supra* note 66, at 830-34.

91. WORKING GROUP, *supra* note 71, at 66-68; UPDATE, *supra* note 83, at 78-83.

92. Vol. II, pp. 243-52; *see, e.g.*, CAL. CIV. CODE § 3294 (West Supp. 1987); COLO. REV. STAT. § 13-31-102(4) (Supp. 1986); IOWA CODE ANN. § 668A.1 (West Supp. 1987); N.H. Prod. Liab. Rep. (CCH) ¶ 93.025.

93. RESTATEMENT (SECOND) OF TORTS § 775 (1965).

94. *Id.* § 885(3).

95. *Id.* § 886A.

96. *Id.* § 886A cmt. h.

which the plaintiff has collected;⁹⁷ his right to contribution is worthless.

Section 467 of the Restatement contains the common law rule that the plaintiff's contributory negligence is a complete bar to recovery, while the special note to section 467 recognizes that several states have adopted a comparative negligence regime in which an at-fault plaintiff's recovery may be reduced in proportion to her fault. Since this section was issued, comparative negligence has swept the country. This, in turn, has highlighted the need to decide whether an at-fault plaintiff should share, proportionately along with solvent defendant(s), in the insolvency of other defendant(s). For example, in a 2-auto collision in which the victim driver is 20 percent at fault, the injurer driver is 40 percent at fault (but is insolvent), and the local municipality is 40 percent at fault for failing to maintain the highway properly, should the plaintiff share the burden of the other driver's insolvency with the municipality? This is the solution recommended by the Uniform Law Commissioners in the Uniform Comparative Fault Act of 1977, although states are divided on the issue.⁹⁸

On the risk of under-settling, the Restatement (Second) makes no endorsement, but acknowledges three alternative outcomes.⁹⁹ First, the settling defendant is still liable in contribution to the non-settling defendant(s). This, however, tends to discourage settlement. Second, the settling defendant is released from further liability and the shortfall is borne by the other defendant(s). This encourages low settlements with D1 where D1 agrees to be a witness against D2. That, in turn, prompts legal requirements that the settlement with D1 be in "good faith" and requires that the standards be policed. Lastly, the risk of under-settling is borne by the plaintiff. The settling party's liability is discharged in full, thereby reducing the liability of the other defendant(s), even though that share was not fully paid. This solution discourages settlements with defendants of limited solvency, such as drivers with limited auto insurance coverage, provided that the insolvent-defendant rule is more favorable to the plaintiff. This point suggests yet another alternative, which is that the risk of under-settling is borne by the parties, including the plaintiff, on the basis of fault. As the Restatement (Second) points out, the Uniform Comparative Fault Act of 1977 opts for the third solution.¹⁰⁰

The Reagan Administration urged the elimination of joint and several liability altogether. Instead, multiple tortfeasors would each be liable only in proportion to their fault.¹⁰¹ This solution was considered especially fair in cases in which a "deep pocket" defendant is minimally at fault, perhaps even less so than the plaintiff, but nonetheless would be liable for a large percentage of the damages under the rule of joint and several liability when the other defendant doesn't pay the appropriate share. It has never been clear to

97. *Id.* § 886A cmt. f.

98. Vol. II, p. 156.

99. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1965).

100. *Id.*

101. WORKING GROUP, *supra* note 71, at 64-65.

me whether advocates of abolishing joint and several liability truly favor this solution in cases when, for example, a landlord whose negligent failure to provide adequate security leads to the rape of a tenant. Is the landlord really only to be liable for a small share of the victim's damages (on the assumption that the rapist, who is typically either judgment proof or simply not apprehended, was primarily at fault)? That certainly seems to be the consequence of holding a defendant liable only for her share of the fault in causing an injury. In any event, in recent years, several states have modified their rules on joint and several liability in a variety of ways, including a few that have abolished the rule.¹⁰²

Chapter 5 of the Study rejects abolishing joint and several liability. When the defendants have contracted among themselves, such as the parties in the chain of distribution of a product, or doctors and hospitals, the Study favors retaining joint and several liability. The risk of insolvency is borne by the defendants, to be allocated by them contractually in advance. When the defendants are not in a position to contract in advance, the Study adopts the Uniform Law Commissioners' approach, in which the risk of insolvency is shared by plaintiffs and defendants in proportion to their share of the fault. Like the Uniform Comparative Fault Act, the Study also favors the position that the risk of under-settling should fall on the plaintiff.¹⁰³

Altering the rule of joint and several liability was not part of my proposal, so to that extent I join the Study in opposition to the Reagan Administration proposal. However, in contrast to the Study, under my plan in multiple defendant cases the risks of insolvency and under-settling would fall fully on the defendant(s). This flows from another part of my proposal that is considerably more dramatic: The plaintiff's fault would not reduce her recovery at all.¹⁰⁴ Not content to stop at comparative fault, I would move all the way to the principle articulated in compensation plans under the Liberal and Collective models, in which the victim's negligence is simply disregarded. This has long been the case in workers' compensation, for example. Exceptions would arise in cases of intentional self-injury, and perhaps when the plaintiff is more than 50 percent at fault. The Study does not address this proposal.

5. Attorneys' fees.

Under the common law, as reflected in section 914 of the Restatement (Second), a tort victim's damages do not ordinarily include attorneys' fees or other expenses of litigation such as expert witnesses and deposition fees.¹⁰⁵ The Study, in chapter 10, proposes the opposite solution. Reasonable attorneys' fees and other litigation costs should be part of the plaintiff's damage.¹⁰⁶ This portion of the Study's package of recommendations is critical.

102. Vol. II, pp. 136-40.

103. Vol. II, pp. 156-57.

104. Sugarman, *supra* note 66, at 838-40.

105. RESTATEMENT (SECOND) OF TORTS § 914 (1965).

106. Vol. II, p. 315.

The collateral source rule and the unconstrained award of pain and suffering damages are both now often justified, albeit awkwardly because of the poor match, as serving the practical function of providing money to pay for the victim's legal expenses. The Study favors changing both of those rules contingent upon allowing attorneys' fees and costs to be awarded as damages.

The Study's proposal is not the same as the so-called English rule in which the loser is generally liable for the legal expenses of the winner. Rather, when combined with the American practice of contingent fees, if the plaintiff wins or settles, the defendant pays the legal expenses of both sides. If the plaintiff loses, the defendant would still pay its own expenses and the plaintiff's lawyer would go unpaid. This is also what I proposed.¹⁰⁷

The Study does not make a firm proposal for the method of calculating the fee, but suggests that defendants pay approximately what the "market" has traditionally generated.¹⁰⁸ Thus, liability for attorneys' fees would probably be in the range of an additional one-third of the plaintiff's recovery for compensatory damages. This would likely be reduced somewhat for settled cases and increased somewhat for appealed cases. The Study rejects both basing the award on hours worked) and scaling the percentage awarded to the amount of the recovery.

My proposal and that of the Study diverge on the latter score. I proposed, for most cases, that a decreasing proportion of the award be added for lawyers' fees as the award increases. The sliding scale contingent fee rule applicable to medical malpractice cases in California, although it governs how much of the plaintiff's award his own attorney can take as a fee, serves as an example.¹⁰⁹

The Reagan Administration, by contrast, did not advocate making the plaintiff's legal expenses part of their tort damage award. Rather, it proposed simply restricting the amount that the plaintiff's lawyer could charge, as in the California rule for medical malpractice cases just noted. Some states have adopted this kind of solution.¹¹⁰

6. Conclusion: Tort damages.

Taken as a whole, the changes recommended by the Study would make

107. Sugarman, *supra* note 66, at 834-38. The Study goes on to propose some sophisticated "offer of settlement" rules. Simply put, if the plaintiff rejects an offer and in the subsequent trial fares worse, his right to attorney fees is reduced. See vol. II, pp. 283-90. The Study also addresses prejudgment interest, groundless litigation, and other matters beyond the scope of this discussion.

108. Vol. II, pp. 297-395.

109. CAL. BUS. & PROF. CODE § 6146 (West 1990); see Sugarman, *supra* note 66, at 835. The Study and I also disagree about whether the plaintiff should be allowed to contract with his lawyer for an additional fee beyond that to be paid by the defendant. The Study would permit such agreements. Vol. II, p. 305. On both counts our disagreement stems from the Study authors' confidence in the market for lawyers and from my belief that the market for lawyers is quite imperfect. Most tort victims do not "shop" and, in any case, lawyers rarely compete on price. My view is based on my belief that victims are very risk averse in selecting lawyers, and cannot accurately judge how good a lawyer someone is. In this context, an attorney who offers to work for less risks signaling low quality that will frighten the plaintiff off.

110. WORKING GROUP, *supra* note 71, at 72-74.

tort compensation more closely reflect the principles of the Liberal model—a move that I favor. The Liberal model values meeting actual need over punishing wrongdoing. Awards are less individualized in the interest of greater uniformity and more simplified administration. If lawyers continue to be necessary to help people press their claims, the cost of litigation is not taken out of awards that are intended for other purposes.

As I have shown, this does not mean that victims' awards are simply to be reduced. On the contrary, as a result of the proposal concerning attorneys' fees, a balance of interests is struck between plaintiffs and defendants that is fair even when compared to the common law rules. Moreover, as compared with the law in states that have already adopted one or more of the Reagan Administration proposals, the Study's recommendations are less threatening to, and even supportive of, plaintiff interests. For example, in California medical malpractice cases, attorneys' fees are already restricted, pain and suffering damages are capped at \$250,000, the collateral source rule is essentially reversed, tighter controls have been imposed on punitive damages, and relatively few people sue who haven't suffered serious injuries.¹¹¹ There, the most important consequence of the Study's proposals on damages would probably be the shifting of the burden of paying the plaintiff's legal expenses to the defendant. This would be a substantial pro-plaintiff change.

My own proposal differs from the Study's recommendations on several important points. First, depending upon local politics, the awards for pain and suffering favored by the Study might be more generous than I have recommended. On the other hand, a substantial proportion of claimants would benefit more under my proposal because victim fault would be largely ignored in awarding damages. In addition, as I will explain in more detail below, my proposal for reforming tort damages rules would also assure first-party compensation for tort victims outside the tort system.

B. *Tort Substance and Procedure*

Chapters 2, 3, 4, and 12 of the Study examine substantive standards for tort liability in product injury cases, the effect regulatory compliance should have in tort cases, the substantive liability for medical malpractice, and the substantive law governing environmental injury. The next section discusses these issues.

1. *Product defects and warnings.*

Section 402A of the Restatement (Second) appears to have played an important role in generating widespread support among courts and commentators for its core principle, namely that manufacturers are liable for injuries caused by manufacturing defects in their products without proof of

111. CAL. BUS. & PROF. CODE § 6146 (West 1990) (restricting attorney fees); CAL. CIV. CODE § 3333.2 (West 1990) (capping damages); CAL. CIV. CODE § 3333.1 (West 1990) (collateral source rule).

negligence in the manufacturing process.¹¹² Section 402A effectively supersedes section 395 which states the rule of *MacPherson v. Buick Motor Co.*,¹¹³ holding manufacturers liable for injuries caused by products that become dangerous because they are negligently manufactured.¹¹⁴ Illustrations of manufacturing defects plainly covered by section 402A include the exploding soft drink bottle, the automobile whose steering mechanism goes awry, and the loaf of bread with a pin in it. The manufacturer will concede that this particular product did not conform to ordinary manufacturing standards and hence is "defective."¹¹⁵

For manufacturing defects, the courts have had to decide additional issues such as whether, for example, the manufacturer is strictly liable to a pedestrian run over by a car with a defective tire; whether retailers should be held strictly liable; whether component part manufacturers should also be strictly liable when the defect is in the part they provided. Although the ALI left these three issues unresolved in 1964 when it adopted section 402A, the law governing them has since matured and a revised Restatement would take these developments into account. So, too, a revised section 402A would address the liability of others who, though not manufacturers, may nonetheless be strictly liable. The courts have addressed this issue in cases involving lessors, financiers, franchisors, rebuilders, repairers, and sellers of used goods. Unfortunately, the Study does not address these matters.

Instead, the Study focuses its attention on warning and design defects. Prior to the adoption of section 402A, the Restatement (Second) provided for liability in cases both of negligent product design and negligent failure to warn.¹¹⁶ After the adoption of section 402A, however, plaintiffs sought to convince courts that strict liability should attach for both defective design and failure to warn. The main issue here concerns knowledge and technology that change over time. A product that appeared reasonably safe and was reasonably designed according to the state of the art available at the time of manufacture may appear defective if judged as of the time of trial. When that happens, should an innocent manufacturer nonetheless be liable for a product that it would be negligent to sell in the same condition today? The Restatement (Second) takes no clear position on the question; courts, legislatures and commentators have split.¹¹⁷ Although the Study does not seriously engage this issue, the authors apparently favor judging the product as of the time of sale.¹¹⁸

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

113. 217 N.Y. 382, 111 N.E. 1050 (1916).

114. RESTATEMENT (SECOND) OF TORTS § 395 (1965).

115. The Reagan Administration expressed concern about the whole concept of strict liability. WORKING GROUP, *supra* note 71, at 61-63. In recent years, several states have adopted a wide variety of statutory changes that modify the way their courts have treated product liability issues. See vol. II, pp. 35-40.

116. RESTATEMENT (SECOND) OF TORTS §§ 388, 398 (1965).

117. See, e.g., Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979).

118. I say this because the Study calls for abolishing the so-called consumer expectations test, which some courts have used to hold defendants strictly liable when a product has surprised both the

Another thorny issue is whether a product may be deemed defective in design simply because it contains an unavoidable risk of injury that is well understood by both the manufacturer and user. A good example is a valuable medicine that nonetheless contains the risk of harmful side effects; another is good whiskey. The Restatement (Second) rejects strict liability for "unavoidably unsafe products."¹¹⁹ Again, courts and commentators are split on this issue. Some believe that manufacturers should be forced to bear the costs imposed by products, which in turn encourages efforts to eliminate hazardous products. Others, on the other hand, fear that imposing strict liability would cause manufacturers to remove desirable products from the marketplace. The Study rejects imposing tort liability on such products and, more generally, rejects the "insurance" or "compensation" argument for imposing strict products liability.¹²⁰

A different issue is whether a jury ought to be able to condemn what the Study calls a "generic category of product," (such as lawn darts, all-terrain vehicles (ATVs), cigarettes, soft-top convertible cars, or above-ground swimming pools) on the ground that the product's dangers so outweigh its benefits that it is "defective" to market it at all (or, I would say, negligent to market it at all). This issue is different from the question of "unavoidably unsafe products" because there the question is whether the danger alone might be the basis for strict liability. Here the dangers are weighed against the benefits. Thus, while no one would argue that a life-saving drug should not be marketed at all, risky side effects notwithstanding, some might argue that the risks associated with lawn darts, or ATVs, for example, outweigh their benefits. Although there are exceptions, courts have not been inclined to permit generic categories of products to be deemed defective on the basis of a jury's cost/benefit (or risk/utility) analysis, and the Study strongly agrees. The authors argue that, so long as the consumer is reasonably well informed of the risks, the market, not the jury, should determine whether the benefits are worth the risks.¹²¹ It is noteworthy that the concern raised in volume I, that informed people might nonetheless foolishly make decisions not in their own best interests, has seemingly been forgotten in volume II.

A closely related issue concerns products for which an alternate safer design is available, but the manufacturer nonetheless markets a more dangerous version, together with a warning about the danger. Although some have argued that in this case, the market should determine which risks are socially acceptable, the Study rejects this result on the ground that, in practice, because of imperfections in the market for information, consumers may

manufacturer and the victim by its dangerousness. See vol. II, pp. 44-47. Some courts have, mistakenly in my view, thought that comment k to section 402A of the Restatement (Second) sheds light on the solution to the problem of changing knowledge over time. See, e.g., *Brown v. Superior Ct.*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

119. RESTATEMENT (SECOND) OF TORTS § 402A, cmts. h, k (1965).

120. Vol. II, pp. 47-51.

121. Vol. II, pp. 54-57.

not actually make informed choices. Notwithstanding its somewhat self-contradictory presentation, the bottom line for the Study is that the jury ought to be able to find a product “defective” where a feasible alternative design exists that would have avoided the harm, and where implementing the alternative is cost-justified in terms of the injuries avoided.¹²²

While I don’t disagree with its proposals on these last two issues, it is important to appreciate that the boundary between the two categories that the Study creates is ambiguous. Is the generic product category ATVs or all “Jeep-like” vehicles? Is the generic product category limited to lawn darts with sharp metal points, or does it include lawn darts using foam and velcro, or even all lawn target games? Is the generic product category above-ground swimming pools, or all swimming pools? The more broadly one describes the generic product category, the more likely it is that feasible alternative designs exist with which the jury would be permitted to make cost/benefit comparisons; the narrower, the less likely. Unfortunately, the Study doesn’t really give us criteria for defining the generic product category.

Another important issue addressed by the Study is how to decide whether a warning is adequate. The fact that the Study has rejected the view that lawsuits should always be disallowed against products where the complaint is made against a patent danger, including a danger made patent through warning, does not mean that warning defects no longer merit discussion. Dangerous products without feasible, cost-justified alternative designs, and generic categories of dangerous products must carry adequate warnings. One might rely upon the market to provide proper warnings, as in the Libertarian model, but the Study again expresses its distrust for the market. Instead, it concludes that tort law must police the market: Manufacturers are to escape liability only where a legally adequate warning has been given.¹²³ To determine what should constitute an adequate warning, the Study (harkening back to some the points made in Volume I) wisely calls for the following improvements: wider use of experts in evaluating warnings; the development of what it calls a “uniform national vocabulary” to be used to communicate risk levels; and, where appropriate, deference by the tort system to warning requirements established by governmental agencies.¹²⁴

Finally, candidly displaying its “law and economics” outlook,¹²⁵ the Study urges that where an adequate warning has not been given, the courts should presume that the consumer would have read the warning and heeded it.¹²⁶ This eliminates the traditional requirement that the plaintiff prove that if the defendant had acted differently, it would have made a difference in this case. Were the Study’s position on causation adopted, it would require a

122. Vol. II, p. 57. The issues discussed in these last two paragraphs plainly could be seen as inquiries into the legal meaning of design negligence under RESTATEMENT (SECOND) OF TORTS § 398 (1965).

123. Vol. II, pp. 70-72.

124. Vol. II, pp. 72-75.

125. This is to be contrasted with the “corrective justice” outlook in which proof of causation is generally thought essential.

126. Vol. II, pp. 77-80.

further change in sections 402A and 388 of the Restatement (Second).¹²⁷ I do not claim that this provocative position is not persuasively argued, but it is unfortunate that the Study does not address its more sweeping implications. For example, would the authors of the Study also eliminate the requirement that patients who assert that their doctor failed to obtain "informed consent" before administering treatment prove that they (or a reasonable patient in their position) would have refused the treatment had they been fully informed?

It is also disappointing that the Study did not address the question of whether there are analogies to manufacturing defects in mass-production enterprises other than manufacturing. For example, when an airplane crashes, why does the crash not constitute a defective service so far as the passengers on board are concerned? Or, if the roof falls in or a shelf falls over in a Wal-Mart store, would it not be as appropriate to invoke a concept of "defective premises" in this context as it is to invoke strict liability against General Motors for one of its defective Buicks? I don't mean to argue that the analogies are necessarily apt, rather I present these questions merely to illustrate my view that the authors of this sweeping review of "enterprise liability for personal injury" focused their attention too narrowly.

2. *Regulatory compliance.*

Section 288C of the Restatement (Second) provides that while compliance with an administrative regulation is evidence of due care, the legal standard of care is set by the trier of fact in the torts case.¹²⁸ The Restatement (Second) is concerned about regulations that may establish only minimum standards when the "reasonable man" would have taken more precautions. Its position also reflects a fear of agency capture by industry.

The Study's primary concern regarding regulatory standards is that imposing liability on enterprises even though they have complied with relevant regulatory requirements may deter socially desirable conduct by those enterprises. It is also concerned about the competence of juries to second guess the regulators. As a result, chapter 3 of the Study proposes a stronger role for what it calls a "regulatory compliance defense."¹²⁹ As noted by the authors, several states have already attempted to fashion regulatory compliance defenses.¹³⁰ Under the Study's proposal, if a specialized agency has focused on the risk at issue and adopted standards specifying the level of permissible risk, and if the defendant has fully complied with the agency's requirements, then it should be presumed to have exercised due care, provided that one further test is met: The defendant must have disclosed to the

127. Perhaps changes would also be needed in section 430 and other sections of the Restatement (Second) dealing with "causation" generally.

128. RESTATEMENT (SECOND) OF TORTS § 288C (1965).

129. Vol. II, p. 95. This is a broader version of chapter 2's position, noted above, that regulatory standards should play a stronger role in determining what is an adequate warning.

130. Vol. II, pp. 90-94.

agency all material information it possesses about the risks it has taken.¹³¹ The Study recognizes that “such a defense would probably not have a very extensive application.”¹³²

Adopting a regulatory compliance defense might have two desirable side effects. First, realizing their regulations set a presumptive liability threshold, agencies might strengthen their requirements. Second, hoping to take advantage of the rule, enterprises might disclose known risks that they now keep secret. This last point suggests a potentially productive interaction between strategies of the Conservative and Collective models. Currently, many agencies, such as the Consumer Products Safety Commission (CPSC), already have rules that require enterprises to come forward with information about risks. This command so far has not worked well, as all too many of the hazardous products the CPSC has learned about came through disclosure other than by the manufacturer.¹³³ The Study’s tactic is to provide an incentive in the tort system to improve compliance.

Elsewhere, I have suggested that bounties be paid to private citizens who point out hazardous products to the CPSC before the manufacturer discloses them. The bounties would be financed with fines imposed on such nondisclosing manufacturers.¹³⁴ My idea is meant both to direct the energy of the public, consumer groups, and plaintiff tort lawyers to the discovery of dangerous products and to stimulate greater self-disclosure of dangers by manufacturers.

3. *Medical malpractice.*

One of the project’s most innovative and stimulating proposals concerns liability for medical malpractice. The Study pays scant attention to the criteria for imposing tort liability for medical injuries. Rather it argues for “organizational liability,” a very sharp change in the current regime.

Under the common law, as reflected in section 409 of the Restatement (Second), employers of independent contractors are not ordinarily vicariously liable for the torts of those contractors.¹³⁵ Today, the large majority of physicians who commit malpractice in hospital settings are not employees of the hospital; they are independent contractors with “privileges” to treat their patients in the hospital. Hence, absent negligence of the hospital itself, the patient plaintiff must sue the doctor and not the hospital. (In exceptional cases, hospitals have been found negligent for granting continued privileges to physicians they know to be incompetent. These decisions follow Restatement (Second) sections 410-415 which state when those who employ independent contractors may themselves be found negligent with respect to

131. Vol. II, pp. 95-97.

132. Vol. II, p. 101.

133. Robert S. Adler, *New CPSC Act: A Disappointment*, TRIAL, Nov. 1991, at 19; Robert S. Adler, *Manufacturers Blind CPSC to Product Hazards*, TRIAL, Oct. 1990, at 20.

134. S. SUGARMAN, *supra* note 12, at 156-60.

135. RESTATEMENT (SECOND) OF TORTS § 409 (1965).

that employment.¹³⁶)

The Study's proposed reform in this area has a wider sweep. Its first, and most important, feature is that hospitals would be liable for the malpractice of a physician that occurs in the hospital even if the doctor is an independent contractor and even if the hospital itself was not negligent. Sections 416-429 of the Restatement already constitute a kind of grab-bag list of exceptions to the general rule of Section 409—situations in which the employer of an independent contractor is vicariously liable for the torts of that contractor even though the employer itself is not negligent. The Study's proposal would, in effect, add a new situation to the existing list of common law exceptions. In addition, under the proposal, the doctor could not be sued individually. This would be quite a radical change, although it is not clear how important it would be in practice.

The Study's goals here are two-fold, based upon findings reported in volume I discussed above. The first aim is to eliminate the current practice in which malpractice insurance for torts committed by doctors in hospitals is financed and carried by individual doctors. In the current system, doctors have difficulty incorporating unpredictable increases in medical malpractice insurance rates into their fees. The authors of the Study believe that this problem would be sharply reduced if the insurance were carried by hospitals instead of doctors. Second, believing that medical malpractice law now fails to promote safer medical practice in the way the Conservative model envisions (and has negative social consequences too), the authors conclude that the prospects for improved medical care would be enhanced by imposing the financial burden on the relevant larger enterprise, namely, the hospital.

Although the Study articulates this proposal effectively, and defends it against likely objections from within the tort system,¹³⁷ the authors realize, and I agree that it is not clear the strategy of organizational liability is best pursued through the Conservative model. Rather, organizational liability is an attractive possibility for a medical accident compensation scheme adopted pursuant to the Liberal model.

4. *Environmental injuries.*

The Study reports, in chapter 12, that "there has been comparatively little litigation alleging environmental hazardous substance-produced personal injury" even though there are at least "10,000 environmentally related cancer deaths per year."¹³⁸ The Study authors believe that this gap between the high number of injuries related to environmental hazards and the low

136. *Id.* §§ 410-415.

137. Perhaps relieving the doctor from personal liability is required to assure the financial shift and to create the desired incentive structure, but this is not obvious. After all, it has not been necessary to relieve airline pilots of personal liability to have the litigation concerning commercial air crashes directed at the airline itself. Hence, it may suffice for the Study's goals simply to create vicarious liability for hospitals. For further discussion of the proposal, see Sugarman, *supra* note 1, at 1514-15.

138. Vol. II, p. 355.

number of lawsuits in this area is primarily the result of the difficulty of proving causation. At the same time, the authors believe that many of those who do win these sorts of cases do so on scientifically dubious evidence. This, in turn, has caused some judges to demand an even higher evidentiary standard for causation before allowing cases to proceed.

To improve the tort system's treatment of such cases, the Study recommends changes in the use of class actions and science panels, advocates early monetary awards to pay for medical monitoring of future harm, and seeks liberalization of the statute of limitations.¹³⁹ Some of these points tie into the Study's discussion in a separate chapter which proposes, in more detail, the creation of a Federal Science Board to assist the judiciary in the handling of tort litigation about hazardous substances. The Board's role would include identifying experts, convening "science panels" in certain cases, and generally assisting courts to cope with the uncertainty that often plagues hazardous substances litigation.¹⁴⁰ These are plausible improvements in the system, upon which I will not elaborate here. Two other issues that bear further consideration, however, are the standard of liability and the award of proportionate compensation.

Under the common law, persons engaged in "abnormally dangerous activities" may be held strictly liable for the consequences of their actions, and the Restatement (Second) lists six factors for determining if an activity is ultrahazardous¹⁴¹. Essentially, the Restatement (Second) allows strict liability to be imposed on activities that create a substantial risk of harm and are uncommon for the place in which they are carried out, even though the activities are not nuisances and are not conducted negligently.¹⁴²

Chapter 12 asserts that environmental risk cases should be judged, generally speaking, by the law of "abnormally dangerous activities." But this is neither persuasive nor sufficiently analytical. First of all, if the victims of environmental risk can demonstrate liability on the basis of negligence or nuisance principles, they should prevail on those grounds. The strict liability principles applicable to abnormally dangerous activities should be better

139. Vol. II, pp. 358-64, 375-81.

140. Vol. II, ch. 11.

141. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1965).

142. Comparing dynamite blasting, the paradigmatic abnormally dangerous activity, with driving an automobile illustrates this point. Blasting can cause substantial injury even when carried out with extreme care in a suitable location. The same can be said of driving. The difference between these two activities is that blasting is uncommon, while driving is an ordinary occurrence.

Unfortunately, the Restatement's explanation of ultrahazardous activities does not include a definition of "uncommon." If "uncommon" implies an activity that takes place infrequently, attaching strict liability can be justified on the ground that potential victims are unlikely to create similar risks, nor are they likely to be attuned to, and prepared for, the risks entailed. If, on the other hand, uncommon implies that few people engage in the activity, strict liability can be seen as the price exacted by society for allowing persons to exploit their particular expertise. Apparently, the Restatement (Second) favors the former meaning because it has specially set out section 520A which calls for strict liability for ground damage from aircraft. It appeared necessary to set out a special section because, although only a few carry out the activity, it is common. *But cf.* *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 567 P.2d 218 (1977) (imposing strict liability on crop dusting, which the court found to be frequent but carried out by relatively few persons).

understood as potentially available for those cases where wrongdoing through the creation of environmental risks cannot be demonstrated by the victim. Second, the Study concedes that not all the externalities of enterprise activity that could be labelled "pollution" should qualify for strict liability. I agree that "ordinary manufacturing activities involving the emission of smoke or fumes,"¹⁴³ provided that they are not carried out negligently or in an inappropriate place, presumably would be seen as common activities and hence not abnormally dangerous. The key issue then becomes which non-negligent environmental risks are sufficiently uncommon to be appropriate targets for strict liability. Unfortunately, the Study does not discuss this question.

Instead, the Study addresses an issue raised above in the discussion of product injuries: Is it relevant that, at the time the pollution was created, the defendant either could not reasonably know of the risk or had no feasible way to prevent it without ceasing the activity altogether? Acknowledging that it may be taking a different approach from that proposed for product injuries, the Study argues that while unknowable risks should be exculpating, unavailable means of prevention should not. This inconsistency should not be the cause of great alarm, however, because the proposal for environmental risk fits the basic structure of strict liability for abnormally dangerous activity. If the enterprise could not have known at the time that its conduct was dangerous, it can hardly be said to have chosen to engage in a dangerous activity, and understandably escapes strict liability. By contrast, if the conduct is known to be dangerous and uncommon, the whole point of the abnormally dangerous activity doctrine is to impose strict liability even though no reasonable precautions could have been taken to avoid the harm. (Products differ, according to the Restatement (Second) approach, because, when buyers are made aware of the unavoidable danger, they accept the risk, thereby making the product not defective.)

Finally, the Study endorses a limited use of what has become known as probabilistic causation to award proportionate damages. Where toxic substances are emitted into the environment, the typical facts are that a class has been exposed to a risk, sometime in the future plaintiffs complain of physical injury (such as cancer), but there is a good chance, perhaps a better than 50 percent chance, that the harm was actually caused by something other than the risk created by the defendant. Traditional tort law would require proof of "more likely than not" causation in each case. This is often enough to defeat the claims of all the victims in the exposed class, even though we might be confident that, for example, 40 percent of those in the class were actually harmed by the defendant's risk. On the other hand, when there is a 66 percent chance that any one in the class was in fact injured by the defendant's risk, tort law's all-or-nothing approach might allow everyone in the class to recover in full. In place of tort law's sharp cutoff rule, the Study proposes a proportionate compensation substitute. When the

143. Vol. II, p. 367.

chances are between 20 percent and 80 percent that the defendant's risk caused the victim's harm, recovery would be proportionate to the chance. Those with less than a 20 percent chance would get nothing. Those with an 80 percent or more chance would be compensated 100 percent.

The adoption of this proposal would seemingly require modification of Restatement (Second) section 433B which states the traditional tort causation standard of preponderance of the evidence.¹⁴⁴

While there is a certain attractiveness to the Study's proposal for proportionate compensation, especially from the viewpoint of those who can show that the chances that the defendant's activity injured them was between 20 percent and 50 percent, it also has drawbacks. The Study admits that much of the behavior control function for these risks must be taken up through mechanisms other than tort law. The long latency quality of these problems makes it especially unlikely that individuals within an enterprise will alter their present conduct because they may expose the firm to liability long in the future. Proportionate liability is also an unsatisfactory compensation mechanism because victims only partially compensated through tort law will have to turn to other broader sources anyway; and if those other sources were themselves adequate, then proportionate liability would be unnecessary. Indeed, under the Study's proposal on the collateral source rule, the availability of the other sources would actually relieve the environmental risk-creating defendant from having to pay. Hence the Study's recommendation, in the end, seems most appealing as a symbolic commitment to group justice or what some have called "good social cost accounting."

5. *Conclusion: Torts substance and procedure.*

As was true of the Study's recommendations concerning the reform of tort damages law, its proposals pertaining to substantive and procedural changes are balanced. Changes advanced for environmental torts are certainly intended to open up the courts to more plaintiffs. While the adoption of organizational liability for medical injuries may not formally benefit claimants much, in practice plaintiffs might find significant advantages in proceeding against an enterprise instead of an individual doctor. The Study also seeks to help defendants by creating the regulatory compliance defense and by narrowing some of the grounds for holding manufacturers liable for product injuries.¹⁴⁵

Thematically, the recommendations canvassed by the Study authors seek generally to improve tort law's ability to signal potential defendants as to what conduct is acceptable so that they will know what actions to take to avoid liability. A lesser, and somewhat contradictory theme of the authors is

144. RESTATEMENT (SECOND) OF TORTS § 433B (1965).

145. Especially because defendants have already won beneficial changes in many state legislatures, the Study's recommended product liability regime would, on balance, benefit plaintiffs, at least in some jurisdictions.

to concentrate liability on certain defendants in order to encourage them to intensify their own search for injury reduction efforts.

Like the reversal of the collateral sources rule, the Study's recommendations for tort reform acknowledge and interface with features of the institutional alternatives. Unfortunately, the Study does not really compare the package of proposed reforms with potential improvements in the institutional alternatives, such as government regulation. In other words, although the project addresses possible synergies between tort law and the CPSC or the FDA, it does not even follow up on its own observations in volume I about improving government regulation to determine whether those sorts of changes might make tort law's behavior modification role largely redundant. Consider two examples: First, applying its talent to enhancing regulation, the Study team might well have devised new ways of prompting hospitals to be more effective in policing their practicing doctors without imposing organizational tort liability on them; second, if regulatory agencies are to create a new national vocabulary for warnings as recommended, the authors might well have identified ways of assuring the widespread use of this new vocabulary without involving tort law. My modest efforts in this direction, for example, centered on increasing citizen participation in the regulatory process, hoping in part to harness and redirect some of the energy that now goes into bringing tort suits.¹⁴⁶

More effective regulation alone, of course, does not take care of a person's need for compensation when accidents do happen, which brings me to the final set of chapters in the Study.

C. *Beyond Tort*

1. *Contract alternatives: Revisiting the Libertarian model.*

Should potential personal injury victims be permitted to waive their tort rights in advance, and thus on a one-by-one basis, revert from the Conservative model to the Libertarian model? The Restatement (Second) supports only a limited right to assume the risk of harm (i.e. to waive liability) by express agreement.¹⁴⁷ The Restatement recognizes that such agreements are often invalid because they are against public policy.

The Study rejects the idea of generally allowing outright disclaimers of liability. On the other hand, the Study authors support the proposal that people should be able to purchase products and services that include no-fault insurance coverage in lieu of the right to sue the manufacturer. The Study also gives some consideration (not especially favorably) to a proposal permitting those who already have adequate first party protection to accept contract disclaimers of tort liability.¹⁴⁸ By contrast, the Study authors are intrigued with the idea of allowing sellers to set two prices for their goods

146. S. SUGARMAN, *supra* note 12, at 156-60.

147. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

148. Robert Cooter and I imagined that the quid pro quo for the disclaimer would usually be better employee benefits and that the transaction would be handled for people by their employers.

and services—one with tort rights and the other without. Yet the authors reject this option for the time being, fearing that existing market failures would make it unworkable in practice.¹⁴⁹

Allowing individuals to use contract to arrive at solutions they judge better for themselves reflects the core principle of the Libertarian model. The Study favors allowing parties to contract around tort liability only where other compensation arrangements would be available. The proposals the Study considers differ formally on the basis of whether people accepting disclaimers are to rely primarily on private individual protection, no-fault protection provided by the injurer, or broad-based collective protection provided by employers and/or society at large for compensation in the event of injury.

But there is a broader issue here as well. If disclaimers are to be permitted only when the victim is otherwise protected, is the role of contract law here really to promote variety and individual choice as in the Libertarian model? Or, alternatively, should contract law be viewed as a device aimed at facilitating the eventual adoption of compensation plans under either the Liberal or Collective models? This point is made even more vividly in the next discussion.

2. *Revisiting the Liberal model I: Medical no-fault plans.*

The Study, in chapter 15, proposes taking even further the “organizational liability” notion advanced with respect to medical malpractice liability: Hospitals would become liable on a no-fault basis for all medical accidents that occur on their premises, provided that the accident resulted in serious injury.¹⁵⁰ This scheme would replace medical malpractice tort suits. Benefits would cover expenses and lost income (up to moderate limits) not covered by other sources, plus modest, scheduled payments to compensate for the impairments themselves.

In the past, many commentators have assumed that a broad no-fault medical accident scheme would be prohibitively expensive, especially considering that there are perhaps four times as many victims of medical accidents as there are medical malpractice suits, and only one in thirty victims now recovers in tort.¹⁵¹ Nevertheless, the Study authors assert that their proposal would cost no more than the current regime because recovery would be restricted to the most seriously injured victims, payments would not be duplicated by collateral sources, and administrative costs would be far less than they are under the existing system.

Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, in *NEW DIRECTIONS IN LIABILITY LAW* 174 (Walter Olson ed., 1988).

149. Vol. II, pp. 521-36. These ideas are to be distinguished from a quite different contractual alternative to tort that the Study cautiously supports: With some consumer protection provisions in place, the Study favors the right of tort victims to sell their claims to others who would pursue them against the injurer. See vol. II, pp. 517-21.

150. Vol. II, pp. 487-512. For example, a disability of more than six months could become the standard.

151. *E.g.*, Sugarman, *supra* note 1, at 1500-02.

Scholars have also previously assumed that determining what constitutes a "medical accident" would be terribly difficult and expensive, thus undercutting the theoretical advantages of a no-fault plan.¹⁵² The Study downplays that concern, however, based upon a recent Harvard Medical Practice Study, which found that in most instances, this determination is not difficult to make.¹⁵³ Moreover, as noted earlier, the Study argues that no-fault hospital liability would promote safer medical practice than does the current malpractice regime.¹⁵⁴

The Study authors do, however, acknowledge some potential problems with the proposal, such as the handling of medical injuries occurring outside of hospitals and the real-world administration of the eligibility requirements, especially were lawyers to become heavily involved.¹⁵⁵ Consequently, they advocate implementing it on an elective basis, along lines previously proposed by Professor O'Connell.¹⁵⁶

I will not say much more about this rather exciting proposal here because I have written more extensively about it elsewhere.¹⁵⁷ I do, however, want to register my concern about treating differently, as this proposal would, those who are injured in medical accidents while in the hospital and those who are injured in other ways. Why have a special plan for those who lose the use of a leg due to a surgical accident, but not for those who are born with only one functioning leg, who contract a disease that disables the use of one leg, or who lose the use of one leg in an industrial or recreational accident? This, of course, is a general argument favoring the wider compensation scheme of the Collective model over the focused compensation plan of the Liberal model.

3. *Revisiting the Liberal model II: An administrative compensation scheme for toxic harm.*

Early in chapter 14 the Study states, "there is no substantial reason for looking beyond the toxic harm area in assessing the case for mass injury no-fault putting aside consideration of a universal, New Zealand-type compensation plan."¹⁵⁸ I find this unpersuasive.

For example, the Study concludes that current tort law responds to non-toxic mass tort cases, such as those arising from commercial airline crashes sufficiently well, so that changing over to the focused compensation scheme

152. E.g., Clark C. Havighurst & Laurence R. Tancredi, "Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance, 51 MILBANK MEM. FUND Q. 125 (1973).

153. HARVARD MEDICAL PRACTICE STUDY GROUP, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK (1990).

154. See text accompanying notes 136-137 *supra*.

155. Vol. II, pp. 512-15.

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

157. Sugarman, *supra* note 1.

158. Vol. II, p. 445.

envisioned by the Liberal model is not needed. But I have not been convinced by either the Study's conclusions or those of the RAND report on aviation accidents¹⁵⁹ on which the Study relies.¹⁶⁰ The Study concedes that, on top of the benefits paid to claimants, an additional 33 percent, or more, is expended in claims administration. Furthermore, the Study acknowledges that those with minor losses are over compensated while those with major losses are under compensated. It is also true that the payment of claims from commercial airline crashes is sometimes long delayed.¹⁶¹

Compare this state of affairs with two hypothetical alternatives.¹⁶² Under the first, all airline tickets would come with an insurance policy with predetermined death (say, \$250,000) and disability benefits, and tort liability would be eliminated. In the event of an accident, claims would be promptly paid with minimum administrative cost. Most passengers would be well aware of their entitlement, and could make an informed decisions about whether or not to carry additional insurance. In addition, this scheme would be more equitable since the claimants, unlike plaintiffs in wrongful death actions today, would not receive radically differing awards despite paying the same amount for their tickets.

Under the second hypothetical plan, commercial air crashes would automatically lead to the payment of no-fault benefits to the passengers' heirs based upon the projections of what would have been the future earnings of the deceased, as well as the payment of medical expenses and lost wages for those who survived but suffered injuries. This sum would be reduced by any social security payments or workers' compensation payments to which the heirs are entitled. If politically desirable, it could also be augmented by a legislatively determined lump sum designed to compensate for the death itself (as a substitute for tort damages now allowed under some state's wrongful death statutes for what is, in effect, loss of consortium). Again, I believe that this solution would pay faster and more fairly, and would incur considerably lower administrative costs than the tort system.

Unfortunately, the Study neglects to engage the question of the comparative advantages or disadvantages of these sorts of Liberal model alternatives to the current system, not only in air crash cases, but also in other mass harm situations where they might plausibly apply, such as commercial building collapses from forces like fire and earthquakes.

Although the Study ignores focused compensation plans of the sort just

159. INSTITUTE FOR CIVIL JUSTICE, EXECUTIVE SUMMARIES OF THE AVIATION ACCIDENT STUDY (1988).

160. Vol. II, pp. 444-45.

161. ELIZABETH M. KING & JAMES P. SMITH, INSTITUTE FOR CIVIL JUSTICE, DISPUTE RESOLUTION FOLLOWING AIRPLANE CRASHES 16-18 (1988).

162. These are discussed in greater detail in Stephen D. Sugarman, *Right and Wrong Ways of Doing Away With Commercial Air Crash Litigation: Professor Chalk's "Market Insurance Plan" and Other No-Fault Follies*, 52 J. AIR L. & COM. 681 (1987). After imagining and exploring various air crash no-fault plans, I express my preference for broad social insurance mechanisms that would treat air crash victims as part of a broader category of persons whose injuries and deaths are to be compensated as part of a collective plan. *See id.* at 703-07.

mentioned, at least chapter 14 seriously addresses the issue of whether there should be an administrative compensation scheme for victims of toxic harm broadly defined.¹⁶³ The Study authors consider this solution after concluding that the tort system has not handled well cases involving claims of widespread injury following mass exposure to toxic substances. The Agent Orange, asbestos, DES, and Dalkon Shield litigations are all examples of this kind of claim. Earlier, the Study proposes procedural reforms to improve the ability of tort law to deal with such problems, including mandatory class actions in federal courts, the mandatory creation of a fund for future victims of past exposure and the payment of scheduled, as opposed to, individualized damages.¹⁶⁴ But in chapter 14, the authors admit that they are doubtful those changes will truly suffice and proceed to explore an explicit administrative compensation scheme.¹⁶⁵

If there is to be a no-fault compensation system for toxic harm, there must be some way to identify the "designated compensable event."¹⁶⁶ Of course, private parties could be given the right to petition the administering agency to create a list of toxic substances and their known hazards in advance, adding to the list as scientific knowledge expands. Injuries from substances on the list would come within the compensation plan. But past experience with asbestos and the Dalkon Shield, for example, teaches that people may not be aware of the dangers associated with a particular substance until after they have been exposed to the harm or actually injured. To deal with the problem, chapter 14 considers what it calls a "switching mechanism" by which these cases are somehow diverted from the tort scheme to the compensation scheme once they become known and before enormous litigation expenses are incurred. The authors admit, however, that there are likely to be many bugs in this switching mechanism which they have not yet worked out (including just what proof would be necessary to trigger it).¹⁶⁷

Turning to the level of benefits such a scheme might provide, the Study argues for payments equivalent to those of a generous workers' compensation plan.¹⁶⁸ Again, the Study is confronted with the uncertain-causation/probabilistic-compensation issue discussed in Section III.B.4. above in relation to environmental injuries.¹⁶⁹ Here the Study argues that for an administrative compensation scheme, partial compensation on probabilistic grounds is inapt. Rather, full benefits are to be paid, but, to control costs, higher proof thresholds are to be required if it appears that "too many" claimants will otherwise recover. This too has its shortcomings; we will be reasonably confident that the injurer's toxic chemical injured or killed some people, but the claimants will go without compensation from the administra-

163. Vol. II, pp. 441-83.

164. Vol. II, pp. 412-29. Notice that these procedural mechanisms, if taken to their extreme, effectively create an administrative compensation scheme run by the judiciary.

165. Vol. II, p. 476.

166. Vol. II, pp. 457-66.

167. Vol. II, pp. 463-65.

168. Vol. II, pp. 466-70.

169. See text accompanying notes 138-143 *supra*.

tive compensation scheme for toxic injuries, and instead will have to pursue other compensation sources.

Another question raised by the Study is whether tort law should be retained as a supplemental or alternative remedy to the toxic harm administrative compensation scheme. It concludes that tort should certainly not provide a supplementary remedy.¹⁷⁰ On the other hand, as a way of both trying to assure that the compensation scheme functions well and saves administrative costs, the Study suggests that claimants might be required to make an early binding election to pursue one remedy or the other.

Finally, on the matter of funding the scheme, the Study suggests several alternatives, including a flat tax on the gross revenue of the listed substances, more precisely calibrated charges on the listed substances as payout experience is gained, and subrogation rights against enterprises that generate obligations of the fund. It recognizes, however, that the last alternative could be costly to operate, but that without it serious fairness claims would arise, especially when a substance is "switched" onto the list only after it has caused harm, but before its manufacturers have contributed anything to the fund to provide for those injuries.¹⁷¹

Taking all the pluses and minuses into account, chapter 14 first concludes that "if there were a clear prospect of a significant number of discrete mass tort cases occurring in the future on the scale of asbestos or the Dalkon Shield . . . the case for resorting to a broad-based no-fault scheme would be very strong."¹⁷² But in view of the uncertainty of such mass injury events occurring, and in light of the potential for great problems with the compensation plan it has outlined, the Study ultimately suggests that perhaps the better approach is "a wait-and-see attitude for now."¹⁷³

Many of the problems of an administrative compensation scheme for toxic substances that the Study identifies simply disappear under the Collective model. Therefore, I found extremely disappointing the Study's initial dismissal of Collective model alternatives in a footnote in chapter 14: "comprehensive no-fault along the lines of New Zealand is almost certainly not politically feasible in the United States at this time . . ." ¹⁷⁴ Although this short run political appraisal is probably true, it is an insufficient reason to avoid evaluating the longer-run, social desirability of Collective model alternatives, especially in light of the Study's self-appointed task to avoid being "tort-centric."

At the end of chapter 14, the Study returns to the Collective model, concluding, as I would, that "it may well be that a really satisfying [solution to the toxic substances problem] . . . may be found only in the continuing development of the social insurance mechanisms and regulatory approaches dis-

170. Vol. II, pp. 470-73.

171. Vol. II, pp. 473-75.

172. Vol. II, p. 480.

173. Vol. II, p. 482.

174. Vol. II, p. 445.

cussed in other sections of this Report.”¹⁷⁵

4. *Expanding social insurance: Revisiting the Collective model.*

One thousand pages after it began, the Study reaches its final chapter, entitled “Filling Compensation Gaps with Social Insurance.”¹⁷⁶ Stating that the ALI “did not charge this Project with the task of recommending a new and coherent social welfare system,” chapter 18 nonetheless goes on to “outline the implications for this Project’s recommendations of changes in the American social welfare system that have received serious scholarly if not political consideration.”¹⁷⁷ After all, were such social welfare changes forthcoming, they might alter the role of tort law.¹⁷⁸

For example, if there were a comprehensive health care and income loss protection system for those suffering from illness or injury, there would arguably be little need for tort law to compensate accident victims.¹⁷⁹ Recognizing this, in order to impose financial pressures on those who cause accidents, the Study authors suddenly seem to back-pedal a bit on their proposed reversal of the collateral source rule.¹⁸⁰ In addition, they seem to favor keeping tort law alive so that richer people, whose earnings are not likely to be fully covered by the comprehensive compensation plan, can be more completely compensated.¹⁸¹ I find both of these perspectives highly unattractive. In the latter instance, wealthier people are subsidized by consumers as a group, who must pay a premium on goods and services to insure producers against tort suits brought by the well-to-do. Since they are concerned about behavioral incentives, the Study would have been far more helpful here if the authors instead explored the possibility of funding comprehensive health care and income loss protection schemes, at least in part, through charges targeted to those who cause harm.

Various proposals have been made for improving the income replacement for those who are temporarily out of work. Some of these proposals focus on those temporarily disabled in an accident while others include those not working for any of many socially acceptable reasons.¹⁸² The Study authors express mixed feelings about these proposals. The authors are again concerned that a needed deterrent would be lost if tort is replaced, however they also recognize that benefits would accrue by removing from the tort system what would otherwise be lots of little injury claims.¹⁸³ Unfortu-

175. Vol. II, pp. 482-83.

176. Vol. II, p. 555.

177. Vol. II, p. 559.

178. Vol. II, p. 559.

179. The authors express their doubts about whether these changes are politically likely. *See* vol. II, pp. 559-61.

180. Vol. II, p. 561.

181. Vol. II, p. 561.

182. For example, I propose the adoption of a substantially expanded version of California’s temporary disability income plan, together with the mandatory imposition on employers of a paid sick leave plan. *See* Sugarman, *supra* note 66, at 808-15.

183. Vol. II, pp. 561-65.

nately, the discussion of these proposals is too thin to come to grips with their competing behavioral channeling incentives. For example, the authors mention my proposal for Short Term Paid Leave in which employees would earn one day of paid leave for a certain number of days worked.¹⁸⁴ These earned days off would substitute for unemployment compensation, temporary disability insurance, paid public holidays, paid vacations, paid sick leave, and the income replacement part of workers' compensation for temporary disabilities, and would relieve tort law from covering the first six months of lost earnings. Although this plan would remove certain existing financial pressures on employers to avoid injury and unemployment, it would create new ones that might be more effective. For example, employees would have more of an incentive not to call in sick when they are well, not to become disabled, to return to work more quickly after a temporary disability, and to accept more promptly a new job after a layoff.

Suppose social security's disability insurance system were substantially expanded (or some equivalent state-level scheme were adopted)? The Study considers the possibility and expresses concern yet again about the loss of financial incentives given its earlier proposal concerning the collateral sources rule.¹⁸⁵ It suggests keeping tort and/or no-fault schemes in place, largely at the interinsurance company level, for the purpose of reallocating costs to the sources of injury.¹⁸⁶ My impression is that this closely resembles the schemes in places like Germany which have generous and well developed social insurance networks. Regrettably, the Study fails to engage the alternative solutions of improved regulation and/or direct funding of the social insurance mechanism by the sources of injury. Based on the New Zealand experience, the Study authors might have been convinced that the administrative costs of targeting costs are not worth the positive behavioral consequences to be attained.

Finally, the Study thoughtfully highlights several acute problems facing broad compensation plans, including the workers' compensation system, aimed at those with partial permanent disabilities.¹⁸⁷ I concede that the problems of prediction and proof can be extremely difficult in these cases. Ultimately, however, there is no reason to believe that the tort system is any good at dealing with partial permanent disabilities either; the same problems are simply buried through the use of general jury verdicts and settlement agreements. Worse, the outcomes turn more, I fear, on the quality of one's lawyer and not one's real loss.

5. *Conclusion: Beyond tort.*

In sum, apart from continually harping on the potential work-disincen-

184. Vol. II, p. 562 n.16 (citing Sugarman, *supra* note 66). This proposal is set out in far more detail in Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CAL. L. REV. 465 (1987).

185. Vol. II, pp. 565-68.

186. Vol. II, p. 568.

187. Vol. II, pp. 568-72.

tive effects of income support plans to an extent that would probably make former President Reagan and other welfare-bashers proud, the Study concerns itself more with the implications for tort law than with the desirability of a serious institutional change, such as to a fuller American embrace of the Collective model. Maybe such an evaluation should not have been expected from those who tell us they know mainly about tort law. A retreat to this limited point of view, however, misses a potentially important opportunity.

At the beginning of volume I, the Study refers to the approximate \$100 billion direct annual cost of the tort law.¹⁸⁸ Enterprises and individuals might well be convinced to support any number of expansions in our social welfare system if, as part of the package, they could be relieved of most or all of the cost of personal injury law.¹⁸⁹ The potential for such a change is perhaps not well appreciated by nontort scholars. While those who wrote the Study did not give as much explicit attention to this proposal as I would have liked, those who read it ought to be well positioned to begin to make such an appraisal for themselves.

IV. POSTSCRIPT

The Study ends with a postscript and so will I. The ALI study is an important contribution to torts scholarship. An unbelievably dazzling range of issues is surveyed and intelligently commented upon in a well organized way. Although most of the project's main recommendations can be considered as revisions to the rules currently stated in various sections of the Restatement (Second) of Torts, I believe it was ultimately proper that the Study did not explicitly cast its proposals in that way. Tort law reform is now the property of a far wider audience than the ALI membership and other leading players in common law development, including attorneys, judges, and torts professors. The ALI in a certain sense is wedded to what I have called the Conservative model because that is what a traditional restatement of torts necessarily implies. But by casting the Study in this wider form, rooted as it is in the approaches and techniques of contemporary legal scholarship, and presented in ways that appeal to a broader audience as well, the authors at least open up the possibility of envisioning a restatement of torts in which social insurance plans and regulatory devices of the Collective model play the featured roles.

188. Vol. I, p. 57.

189. For example, I have recently proposed replacing tort liability for auto accidents with what I call the Auto Accident Compensation Corporation (AACC), which would pay generous no-fault benefits to all those injured in motor vehicle accidents. The AACC would be funded by new gasoline taxes, charges on drivers (based on their driving record and years of experience), and charges on vehicles (based on their safety features and record). In return for paying these new costs, motorists generally would be relieved of even larger auto insurance premiums. See Stephen D. Sugarman, *Nader's Failures?*, 80 CAL. L. REV. 289 (1992); Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683, 711-14 (1990); Stephen D. Sugarman, *Foreword: Choosing Among Systems of Auto Insurance for Personal Injury*, 26 SAN DIEGO L. REV. 977, 988-92 (1989).