

# CONCLUDING THE RESTATEMENT (THIRD) OF TORTS: AN INTRODUCTION

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The American Law Institute (ALI), a group of prominent judges, attorneys, and law professors, was founded in 1923 “to promote the clarification and simplification of the law.”<sup>1</sup> The primary method for this work is the publication of Restatements of the Law, “a synthesis of the law as stated in judicial opinions and an attempt to declare the correct rule of law and to recommend for the future doctrinal statements that will advance both the law’s coherence and its consistency with good public policy.”<sup>2</sup> The Restatement of Torts was one of the four original Restatements published by the ALI,<sup>3</sup> and has been the most influential.<sup>4</sup> The three tort Restatements have been cited approximately 90,000 times since the publication of the first one in 1934.<sup>5</sup>

The work on the Restatement (Third) of Torts began in the early 1990s. That effort, down to a handful of projects, is within several years of completion. During the ALI’s centennial year, Southwestern Law School assembled leading scholars, judges, and practitioners, many of them Reporters or Advisers for the final portions of the Restatement, to discuss

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1. *The Story of ALI*, AM. L. INST., <https://www.ali.org/about-ali/story-line/> [<https://perma.cc/QV47-JENG>].

2. Michael D. Green & Olivier Moreteau, *Restating Tort Law: The American and European Styles*, 3 J. EUR. TORT L. 281, 282 (2012) (quoting Lance Liebman, *The American Law Institute: A Model for the New Europe?*, in MAKING EUROPEAN PRIVATE LAW: GOVERNANCE DESIGN 209 (Fabrizio Cafaggi & Horatia Muir-Watt eds., 2010)).

3. *The Story of ALI*, *supra* note 1. The other three were Agency, Conflict of Laws, and Contracts.

4. Green & Moreteau, *supra* note 2, at 285.

5. Michael D. Green & Christopher J. Robinette, *American Law Institute*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 111, 112 (J. Smits et al. eds., 2023).

significant remaining issues. The ALI sent a representative, Justice Goodwin Liu of the California Supreme Court, and a member of the ALI Council, to welcome participants and guests. In his remarks, Justice Liu concluded, “So much of the work that the ALI does and that all of you do as part of the legal profession is designed to fortify and ensure our society’s unwavering dedication to the rule of law. That is the big picture of what we are doing here today.”<sup>6</sup> Professors Nora Freeman Engstrom and Michael Green, Reporters for two of the final four Restatement projects, provided background information about the Restatement process and issues of particular importance.<sup>7</sup>

Panels were arranged in a traditional method for Southwestern Law School torts symposia, merging theory into practice. The initial panel addressed the proper role of theory in the formulation of Restatements. In his article,<sup>8</sup> Professor Keith Hylton concludes that modern positive tort theory, which is utilitarian, “explains the broad contours of tort doctrine as well as specific doctrinal rules.”<sup>9</sup> As such, he argues that the Restatement would benefit from its inclusion, because “it is desirable that the justificatory grounds for tort doctrine be discussed and disseminated beyond academic circles.”<sup>10</sup>

Professor Greg Keating, in his article,<sup>11</sup> asks a fundamental question about the Restatement process: “How do you extract *the* law from the decisions of courts when those courts are deeply divided over the matters you are restating?”<sup>12</sup> Specifically, he examines the decision in Restatement (Third) of Torts: Products Liability to define design defects in terms of negligence.<sup>13</sup> Keating concludes that shutting down debate over this highly contested issue was a mistake and proposes an alternative: “Rather than asserting that the law speaks with a single voice when it does not, might

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6. Hon. Goodwin H. Liu, *A Brief Introduction to the American Law Institute and the Restatements of Torts*, 52 SW. L. REV. 358, 362–63 (2024).

7. See generally Michael D. Green, *The American Law Institute and the Restatement (Third) of Torts: Presentation of Michael Green*, 52 SW. L. REV. 364 (2024). Professor Green was also a Reporter for two other Restatement (Third) of Torts projects: RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. L. INST. 2010 & 2012) and RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (AM. L. INST. 2000).

8. See generally Keith N. Hylton, *Tort Theory and the Restatement, in Retrospect*, 52 SW. L. REV. 369 (2024).

9. *Id.* at 372.

10. *Id.* at 398.

11. See generally Gregory C. Keating, *Is the Third Restatement of Design Defect a Defective Product?*, 52 SW. L. REV. 399 (2024).

12. *Id.* at 401–02.

13. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. L. INST. 1998).

Restatements offer the contending voices of the law to us in their best and most coherent incarnations?”<sup>14</sup>

In his article,<sup>15</sup> Professor Ken Simons, himself a Reporter,<sup>16</sup> denies the usefulness of “grand” or unified theories that explain all of tort law. However, he defines theory as “those normative principles that might justify the results in legal cases and, at a slightly higher level of abstraction, might justify the content and scope of legal doctrines.”<sup>17</sup> As such, Simons argues that theory is necessary in the Restatement process to make sense of the law, but accurate theory is pluralistic, not unified.

Finally, Professor Cathy Sharkey, in her remarks,<sup>18</sup> argues that “intuitive theory” manifests itself in tort law. Specifically, Sharkey points to prevention of harm and insurance as “driv[ing] the evolution of tort doctrine and practice.”<sup>19</sup> For Sharkey, like Hylton, such theory is economic, and she argues that it can be seen in prominent recent decisions from the United States and California Supreme Courts.

The second panel discussed the Restatement of Medical Malpractice. In his article, Professor Mark Hall, a Reporter for the Restatement of Medical Malpractice, focuses on the important but contested issue of informed consent.<sup>20</sup> Hall states that “appropriate liability for breach of informed consent strikes a balance between the doctrine’s highest ideals and the pragmatics of administrable legal principles.”<sup>21</sup> Although Hall acknowledges that the essay spends a lot of time on pragmatic considerations, it does so in the service of patient autonomy. In particular, Hall draws attention to a key safeguard for patients; regardless of whether the jurisdiction uses a patient-centered or a provider-centered standard, the Restatement requires that patients receive information “that the provider is aware the patient reasonably wants to know.”<sup>22</sup>

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14. Keating, *supra* note 11, at 427.

15. Kenneth W. Simons, *The Role of Tort Theory in the Third Restatement of Torts: An Explanation and Defense*, 52 SW. L. REV. 428 (2024).

16. Ken Simons is the Reporter and Associate Reporter for the RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, a project that is part of ALI’s ongoing revision with the latest tentative draft approved in 2021. See *Restatement Third of Torts: Intentional Torts to Persons is Approved*, AM. L. INST. (May 18, 2021), <https://www.ali.org/news/articles/restatement-third-torts-intentional-torts-persons-approved/> [<https://perma.cc/D2XC-E5N3>].

17. Simons, *supra* note 15, at 430.

18. Catherine M. Sharkey, *Tort Theory and the Restatements: Presentation of Catherine Sharkey*, 52 SW. L. REV. 444 (2024).

19. *Id.* at 445.

20. See generally Mark A. Hall, *Informed Consent in the Restatement of Medical Malpractice*, 52 SW. L. REV. 450 (2024).

21. *Id.* at 463.

22. *Id.*

In his article,<sup>23</sup> Professor Philip Peters argues that custom, the traditional standard of care in medical malpractice cases, is problematic. For example, physicians may be reluctant to adopt newer, better methods because the custom standard will not protect them.<sup>24</sup> Peters strongly endorses the Restatement's subtle change to the standard, which holds that "reasonable care for health care providers is defined as conduct 'regarded as competent' by medical peers. Customary practices are relevant but do not bind the jury."<sup>25</sup> He argues that the law is already evolving in this positive direction and the Restatement will hasten the migration.

In her remarks,<sup>26</sup> Professor Nina Kohn is generally enthusiastic about the Restatement, but offers two criticisms. First, while acknowledging the jurisdictional split on the provider-centered standard for informed consent, she argues that it "reeks of the type of old-fashioned decisional paternalism that is increasingly rejected by state legislatures even for very vulnerable adults."<sup>27</sup> Kohn's concern is that there are many areas in which providers do not respect patient self-determination. Her second criticism is apropos: she argues the Restatement should explicitly provide the effect of failure to comply with patient directions.<sup>28</sup>

Plaintiffs' attorneys Brian Panish and Jesse Creed delivered the keynote symposium luncheon presentation.<sup>29</sup> They discussed their work to reach a settlement in the Porter Ranch gas leak litigation, which was the largest gas leak in the history of the United States, involving 108,000 cubic metric tons of chemicals released and resulting in 8,000 people being relocated from their homes.<sup>30</sup> The \$1.8 billion settlement involved 36,000 people.<sup>31</sup>

The third panel turned to medical monitoring and mass torts. In their article, defense attorneys Victor Schwartz and Christopher Appel discuss a provision of the Restatement (Third) of Torts: Miscellaneous Provisions that would allow recovery for medical monitoring expenses without a

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23. See generally Philip G. Peters, Jr., *Modernizing the Medical Malpractice Standard of Care*, 52 SW. L. REV. 465 (2024).

24. See *id.* at 469–70.

25. *Id.* at 465.

26. See generally Nina A. Kohn, *Informed Consent in the New Restatement on Medical Malpractice: A Friendly Critique*, 52 SW. L. REV. 478 (2024).

27. *Id.* at 480.

28. *Id.* at 481.

29. See generally Brian Panish & Jesse Creed, *Keynote Symposium Presentation of Brian Panish and Jesse Creed*, 52 SW. L. REV. 484 (2024).

30. *Id.* at 485.

31. *Id.*

present physical injury.<sup>32</sup> Opposing that approach, Schwartz and Appel argue that “[t]he existence of an injury has traditionally served as the linchpin for tort liability” and that the proposed Restatement provision “breaks with that tradition so that unimpaired claimants can obtain a tort recovery where they have been exposed to a ‘significantly increased risk of serious future bodily harm.’”<sup>33</sup> Schwartz and Appel suggest courts follow the reasoning articulated by the Illinois Supreme Court, which held that a present injury “requirement establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability.”<sup>34</sup>

In his article,<sup>35</sup> Professor Mark Geistfeld observes that a cause of action for medical monitoring turns on whether physical harm is required. He then discusses principles that undergird the physical-harm requirement tort law, analyzing first the importance of physical harm compared to other types of harms and next the contractually based economic loss rule.<sup>36</sup> He finds that under each rationale, medical monitoring should be permitted.<sup>37</sup> Therefore, he concludes that the same principles that generally require physical harm for negligence in fact support medical monitoring.<sup>38</sup>

The fourth panel examined damages. In their article, defense attorneys Mark Behrens and Christopher Appel discuss innovator liability theories, under which a branded pharmaceutical manufacturer may be held liable for the injuries to one who has ingested a generic version of the drug by another company, based on alleged misrepresentations or omissions by the branded pharmaceutical manufacturer.<sup>39</sup> In particular, Behrens and Appel scrutinize a section of the Restatement (Third) of Torts: Miscellaneous Provisions that would allow recovery for “negligent misrepresentation causing physical harm,” under which one could recover “regardless of whether the person who received or relied upon the actor’s

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32. See generally Victor E. Schwartz & Christopher E. Appel, *The Restatement (Third) of Torts Proposes Abandoning Tort Law’s Present Injury Requirement to Allow Medical Monitoring Claims: Should Courts Follow?*, 52 SW. L. REV. 512 (2024).

33. *Id.* at 513.

34. *Id.* at 534 (quoting *Berry v. City of Chicago*, 181 N.E.3d 679, 688 (Ill. 2020)).

35. See generally Mark A. Geistfeld, *The Equity of Tort Claims for Medical Monitoring*, 52 SW. L. REV. 493 (2024).

36. *Id.* at 496–511.

37. *Id.*

38. *Id.* at 511.

39. See generally Mark A. Behrens & Christopher E. Appel, *Why Courts Should Continue to Reject Innovator Liability Theories That Seek to Hold Branded Drug Manufacturers Liable for Generic Drug Injuries*, 52 SW. L. REV. 580 (2024).

misrepresentation is the person who suffered physical harm.”<sup>40</sup> While the Restatement does not take a precise position on innovator liability, Behrens and Appel argue that “[t]he overwhelming case law rejecting innovator liability takes the right approach” and that “[j]udges should continue to reject innovator liability notwithstanding the proposed Restatement.”<sup>41</sup>

In her article, Professor Martha Chamallas explores the concept of trauma in tort liability and damages.<sup>42</sup> She examines trauma in tort settings involving marginalized groups, particularly addressing rape, racial, and birth trauma.<sup>43</sup> From these contexts, she draws three lessons.<sup>44</sup> She first notes that “trauma defies classification as either a physical or emotional injury yet is grievous enough to justify full recovery for damages sustained as a result of it.”<sup>45</sup> Second, she argues that “the pervasiveness of trauma, particularly among vulnerable groups, requires a recommitment to the eggshell plaintiff doctrine and the idea behind it.”<sup>46</sup> Third, she observes that “to appreciate trauma and its potentially important role in tort law requires a social justice lens that considers systemic forms of injustice in the larger society.”<sup>47</sup>

The remarks of several presenters on panel four on damages are also included. Professor Anthony Sebok analyzes the doctrine of multiple sufficient causes as set forth in the Restatement.<sup>48</sup> Plaintiffs’ attorney Ibiere Seck relates her task as a tort trial lawyer arguing damages, noting that “[a]t the core of what [she is] listening for is what makes what happened to my client relevant, how does it affect humans and the human condition, how does it affect people” and that she is “interacting with strangers, and . . . trying to find commonality.”<sup>49</sup> Finally Judge Kevin Brazile of the Superior Court of Los Angeles County in California draws on his vast experience as a trial judge and former trial lawyer to provide advice about how lawyers should try damages issues before juries.<sup>50</sup>

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40. *Id.* at 595–96 (quoting RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 18A (AM. L. INST., Tentative Draft No. 2, 2023)).

41. *Id.* at 606.

42. *See generally* Martha Chamallas, *Trauma Damages*, 52 SW. L. REV. 543 (2024).

43. *Id.* at 553.

44. *Id.* at 577.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See generally* Anthony J. Sebok, *Damages: Symposium Presentation of Anthony Sebok*, 52 SW. L. REV. 607 (2024).

49. *See generally* Ibiere N. Seck, *Damages: Symposium Presentation of Ibiere Seck*, 52 SW. L. REV. 615 (2024).

50. *See generally* Hon. Kevin C. Brazile, *Damages and Trial Practice: Symposium Presentation of Judge Kevin Brazile*, 52 SW. L. REV. 618 (2024).

Professors Green, Freeman Engstrom, and Hall closed the symposium day, remarking that they would take their notes from the symposium into their continuing deliberations on the Restatements.