

Restatement Third of Torts: Coordination and Continuation*

With the near completion of the project on Physical-Emotional Harm, the Third Restatement of Torts now covers a wide swath of tort territory, including many of the subjects that have evolved most dramatically since the Second Restatement. The very scope and complexity of the work thus far raise some important questions. One is coordination of the three completed projects. The other relates to continuation of the Restatement Third.

This Essay addresses these two topics—coordination and continuation. The Essay begins with the history of these two issues, and then discusses the status of each.

I. At the Outset: Foreseeing Coordination and Continuation

When the ALI began the Third Restatement of Torts, it anticipated the eventual need to address coordination and continuation. Both topics appeared in then-Director Geoffrey Hazard’s proposal to the ALI Council, on October 8, 1991, that “the Institute commence a project for a Restatement of Products Liability as the next component of the eventual revision of the Restatement Second of Torts.”

The proposal recognized the issue of continuation:

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[T]he project would supersede the Restatement Second of Torts in the matters addressed, but would otherwise recognize the continued authority of the Restatement Second of Torts until other segments of the latter are revised.

It is further contemplated that, after the Restatement of Products Liability is well begun, further topics in the field of torts will be undertaken. . . .

The proposal also recognized the issue of coordination:

The proposed plan would take up, one by one, major topics within the domain of torts; publish those as Restatements standing on their own; and only then consider a Restatement Third of Torts that would integrate these components. At a later stage, some years from now, consideration could be given to revising those portions of the Restatement Second of Torts that had not by then been covered by revisions. This seems more manageable than undertaking a comprehensive revision of the present Restatement. . . . The Council might conclude that there is no need for an integrated Restatement Third if the field had been largely covered by the more particularized Restatements.

Several years ago, Director Lance Liebman gathered together a working group to discuss a plan for coordination and continuation of the Third Restatement of Torts. The group met once and discussed a number of issues relating to coordination and continuation. A slightly expanded group met several months later, and reviewed multiple memos and draft outlines arising from the first discussion. The rest of this Essay sketches out the basic decisions that emerged from these discussions. In addition, the Essay explains the steps that have been taken thus far, and the work that remains.

For convenience, the Essay sometimes refers to the existing Restatement Third projects as follows: Products Liability (PROD), Apportionment (APP), and Liability for Physical and Emotional Harm (PHY-EM).

II. A Complete and Integrated Third Restatement?

The first and most basic question that the working group considered is the final outcome of a coordination project. Two possible but very different choices are (1) an integrated “full” Third Restatement of Torts, or (2) an integration of existing Restatement Third Torts projects (PROD, APP, PHY-EM) and several others, along with a catalog or index guiding the user as to which portions of Restatement Second remain current even after the completion of the Restatement Third projects.

The working group agreed that the preferable goal is to complete an integrated and complete Third Restatement of Torts. The goal, in other words, is a Third Restatement that eventually will supersede and replace all the volumes of Restatement Second. The rub, of course, is how to reach this goal.

One possible option that the working group considered is whether some topics within tort law—such as intentional torts—could be revised and updated with a process less exhaustive than a full restating of the topic. This might be the case if the law in the area has remained relatively stable, and if a revised-updated version of the topic could be shaped to fit within a coordinated Third Restatement.

The best way to test out this “Restatement light” approach—updating and revising rather than restating certain topics—was to produce a sample version of an updated-revised topic. Thus, the working group created and reviewed a Restatement-light version of Sections 1-64 of Restatement Second. Although the Restatement-light approach had seemed an appealing option in theory for some topics, the sample quickly led to abandonment of the option. The problems included: an overall disconnect between the style and particularized approach of the Second Restatement with the Third Restatement; and the inability to alter the deeper architecture of Division One (“Intentional Harms to Persons, Land, and Chattels”) of the Second Restatement in the ways that might be necessary to fit with future restated topics.

Having rejected the use of a Restatement-light approach to any subpart of the Restatement, the working group agreed that completion of a complete Third Restatement requires two different tasks. One, which can be completed in the near future, is coordinating PROD, APP, and PHY-EM. The second is identifying and launching the projects that, when combined with the completed segments, will form a complete Third Restatement. Section III discusses coordination in more detail, and Section IV addresses additional projects.

III. Coordinating Products Liability, Apportionment, and Liability for Physical and Emotional Harm

The three completed or near-complete segments of the Third Restatement are Products Liability, Apportionment, and Liability for Physical and Emotional Harm. Even if the Restatement Third were to proceed no further than these segments, some coordination work would be necessary.¹ In addition, given that the Third Restatement will include other projects, this coordination should be undertaken in a way that is most workable in light of future projects while retaining the integrity and content of these completed segments. An additional guiding principle is that coordination would not entail altering the substantive and doctrinal decisions underlying previous work.

Through most of 2008, coordination work on these three segments took place. The process started with a coordination-oriented review and revision by Ellen Pryor of these three projects. The tentative revisions then were distributed to the Reporters of these projects. To a large extent, agreement now exists on the necessary areas of coordination and the proposed revisions.

For purpose of this Essay, it is not necessary to review all the coordination areas or revisions. Rather, what follows is discussion of a few topics that can convey the nature of the coordination work.

“Harm to Persons or Property” in PROD; “Physical Harm” in PHY-EM

¹ For instance, the term “legal cause” appears in both PROD and APP. Later, PHY-EM would disfavor the use of “legal cause,” instead enunciating and distinguishing between factual cause and scope of liability. Thus, it is both consistent and helpful to modify PROD and APP to clarify when “legal cause” means factual cause, scope of liability, or both.

PROD was completed before PHY-EM. PROD § 21 uses the phrase “harm to persons or property.” PHY-EM § 4 uses the term “physical harm,” and defines it to include bodily harm and property damage. Both terms could be retained if the two phrases meaningfully signaled different harms. By contrast, if both phrases designate the same meaning, then using the same term would be preferable.

At first glance, the two sections differ from each other in several respects. Yet, on closer inspection, the reasons for the differences are not about the core meaning of “physical harm” (PHY-EM) or “harm to persons or property” (PROD). Rather, the difference is that PROD, in enunciating the meaning of “harm to persons or property,” addresses several doctrinal points not reached under § 4 of PHY-EM. These are:

- The issue of harm to the property itself.
- The fact that some economic losses—lost wages and medical bills—are not excluded from the coverage of these sections.
- The fact that the definition of “physical harm” (or “harm to persons or property”) does not exclude coverage for economic losses based on derivative claims.

Put another way, if PHY-EM, in § 4, had addressed these topics, the substantive law associated with § 4 would have been basically the same as that of PROD § 21. Thus, one could simply change the phrase “harm to persons and property” in PROD to “physical harm.” This would probably be fine, but it leaves something to be desired. The problem is that the three doctrinal points above also apply to negligence, which of course is the

core coverage of PHY-EM. Thus, there is some awkwardness in having the initial definition of “physical harm” not address several of the topics that the corresponding provision in PROD will cover.

After considering these points, the working group agreed on the following:

- A new Comment *e* should be added to PHY-EM § 4; the comment would briefly refer to the “damage to property itself” doctrine without purporting to address it as fully as does PROD or as would a later project on pure economic loss.
- “Harm to persons or property” in PROD should be changed to “physical harm.”
- All of of PROD § 21 should be retained. Including the three doctrinal issues not addressed in PHY-EM § 4 will not create a problem for § 4 because a new Comment *e* will contain a “looking ahead” reference to the “damage to property itself” issue. And the other two issues addressed in § 21 arguably warrant discussion notwithstanding that § 4 does not address them. This is because, in a volume devoted to Products Liability, a rule that need not be noted in general negligence coverage might require special attention in PROD.

Cause

PROD § 1 includes the phrase: “subject to liability for harm to persons or property *caused by the defect*” (emphasis added). Section 1 contains no comment on “cause”; rather § 15 sets out the general rule on cause in products liability. Section 15 states:

“whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.”

At the time that PROD was drafted to include reference to the “prevailing rules and principles governing causation,” the notion of causation in the Second Restatement included what, in current understanding as reflected in PHY-EM, has been separated into the distinct concepts of factual cause and scope of liability. Thus, the phrase “prevailing rules and principles governing causation in tort” needs to be understood as referring both to factual cause notions and to scope of liability.

Thus, it is necessary to alter § 15 slightly, and then change other references to causation as necessary. For instance, the word “cause” in the black letter of sections 1, 5, 6, 7, and 8 needs to be changed to include reference to both factual cause and scope of liability.

Section 5 of PHY-EM

Section 5 of PHY-EM contains an umbrella rule relating to intentional torts. The coordination edit on this section is primarily mindful that a future ALI project will likely restate the law on intentional torts. Thus, the edit of § 5 omits many of the specific references to the Second Restatement on various intentional torts and the defenses to those torts. The benefit of not citing these is to omit, to the extent possible, references to the Restatement Second when we expect that a future Third Restatement project will

address the topic. The text that remains in § 5 is safe—that is, the text will be valid and not outdated when an intentional torts project is undertaken.

IV. Future Projects, with the Goal of a Complete Third Restatement

The coordination work is largely complete. The more challenging task is defining and launching the projects that should be commenced for a complete Third Restatement.

Many specific decisions about definition and ordering of projects still remain. But there is agreement on a number of important questions and principles. This section discusses these.

A. Organization of the Third Restatement. The working group did not make final recommendations at the level of the detailed Table of Contents for a full Third Restatement. But the working group did agree on the major topics that should form a Third Restatement, including the scope of each topic. Each topic would probably form the basis of a Restatement project. In addition, each topic would eventually yield a volume or volumes with section numbers attached to that volume, rather than sequenced with section numbers from other volumes. What follows is the list of major topics that might someday constitute the volumes of the Third Restatement.

- Accidental Physical and Emotional Harm
- Products Liability
- Apportionment

- Damages for Accidental Physical and Emotional Harm (future substantive tort projects would each address remedies pertinent to the torts covered in the project, with reference as appropriate to this stand-alone volume)
- Intentional Torts to Persons
- Economic Torts
- Torts Relating to Interests in Land and Water
- Defamation and Privacy
- Additional topics (for instance, some have urged a project on the uniquely complex aspects of medical or other professional malpractice torts not present in the usual negligence cases)

The first volume of the Third Restatement—Accidental Physical and Emotional Harm—is basically the content of PHY-EM.² The next two volumes will be, respectively, the coordinated-revised PROD, and APP. More detail about the other major topics appears below.³

² Those familiar with the coverage of PHY-EM might wonder about the reference to “accidental” because PHY-EM starts with definitions of intent and recklessness. Yet these definitions can plausibly and helpfully be retained at the start even though intentional torts will actually be taken up in a separate project. The general definition of these three levels of fault is a useful backdrop even though the rest of the volume concentrates on negligence and common law strict liability. An additional section that might seem out of place is coverage of intentional infliction of emotional distress. Initially, the working group proposed holding this section out. But Pryor’s reconciliation edit of PHY-EM keeps this section in. The risks of confusion that § 45 poses as to the final, reconciled Restatement Third, Torts are not high. When an intentional torts project commences, the project can reference this one intentional tort—IIED.

³ The working group concluded that it would not be necessary to include, as does the Second Restatement, an initial chapter defining “terms used throughout this Restatement.” Instead, references to definitions at certain junctures can work as well, without posing the hazards defining a key term in a way that applies “throughout the Restatement.” In the Chapter One of the Second Restatement, the definition of consent in § 10A is not especially useful because it is narrower than the later discussions of consent in §§ 892-892D.

B. Clarifying Which Parts of the Second Restatement Remain Effective. Thus far, each Restatement Third project (PROD, APP, and PHY-EM) has included detail about which sections of the Second Restatement are modified or supplanted by the project as a whole or by particular sections in the project. This mapping process, understandably, has led to concerns that everyday users of the Third Restatement are unable to keep track of which portions of the Second Restatement remain effective and which are supplanted.

The publication of these first three volumes as coordinated, which is not far in the future, will do much to clarify the relationship of the Third Restatement with the Second Restatement—especially which portions of the latter have been supplanted by the former. Basically, the first three volumes of Restatement Third will replace entirely Division Two (Volume 2) of Restatement Second.⁴

C. Adding to PHY-EM a new chapter on liability of employers of independent contractors. Currently, PHY-EM ends with Chapter 9 on the duty of land possessors. I have been engaged to draft a new Chapter 10 restating current Chapter 15 of the Second Restatement (“Liability of an Employer of an Independent Contractor”). Several reasons support including this topic within the coverage of PHY-EM. First, this body of law is

⁴ One might ask whether Second Restatement Division 2 contains any other doctrines that require restating and that are not covered by any of the Restatement Third projects. One is current Chapter 15, titled “Liability of an Employer of an Independent Contractor.” This material does need to be included in PHY-EM, as described in text *infra*. Another question that the working group considered is whether Chapter 14 of Restatement Second contains any material that still needs restating. The title of Chapter 14 is: “Liability of Persons Supplying Chattels for the Use of Others.” It consists of §§ 388-408, and includes § 402A as well as several other doctrines that are restated in PROD. But PROD does not completely supplant Chapter 14. PROD addresses “the liability of commercial product sellers and distributors for harm caused by their products.” A “commercial product seller or distributor” is not co-extensive with a “person supplying chattels for the use of others.” Nonetheless, by working through the sections of Chapter 14, the working group determined that Chapter 14 does not contain any significant unrestated material, given the combination of PHY-EM and PROD.

frequently invoked and fits within the umbrella of negligence. Second, it is not possible to “stretch” the current content of PHY-EM to cover the subjects of Chapter 15. Third, locating this topic after a chapter on the duty of land possessors is conceptually appropriate because, like land possessors, independent contractors are subject to limitations on liability that stem from reasons other than the risk creation rationale of the basic duty rules in PHY-EM.

D. Remedies/Damages. On the critical topic of damages, the working group discussed two possible approaches. One is to produce a comprehensive treatment of remedies in tort. This would (1) start with general principles about remedies in tort, and then (2) contain comprehensive coverage of remedies and damages for tort law, including compensatory damages for personal injury, economic torts, defamation and privacy, property damage, etc., as well as punitive damages, restitution, injunctions, and other remedies.

A second approach is to cover remedies with respect to each major project or area in tort law. Thus, the first damages-remedies project would probably be limited to damages for physical harm and emotional distress (whether under strict liability, products liability, negligence, or intentional torts). Other projects (e.g, economic torts, defamation-privacy, land-water torts) can include, within their scope, coverage of remedies and damages specific to those torts, resorting as necessary to the general principles at the outset of the initial damages volume.⁵

⁵ The Institute is in the process of writing its first Restatement of Employment Law, and the chapter on public policy tort law is up for approval in May 2009. The proposed scope of that Restatement includes a

The group favored the second approach. The reasons are both practical and conceptual. First, it is much easier to envision the completion of the “primary” damages rules for personal injuries. Second, completing this project sooner rather than later is appealing because the damages project would complete the “accident” law segment of tort law that has been the main subject of the three projects to date (PROD, APP, and PHY-EM). Finally, it would be conceptually difficult to restate all remedies for torts when the restatement process for some of the underlying torts has not even begun. An example is addressing damages for the torts of defamation and privacy, areas in which damages are closely intertwined with other elements of the torts.

E. Intentional Torts to Persons. A new tort project should produce a Restatement volume covering battery, assault, false imprisonment, intentional infliction of emotional distress,⁶ relevant defenses-privileges, and relevant remedies. This volume would not include intentional torts to land or personal property because these are envisioned to be included in a separate Restatement project on torts relating to land and water. Nor would it include personal property torts, which might be better included within economic torts.

In covering defenses and privileges, the Reporter for the contemplated future work should be mindful of the best way of setting the conceptual framework for similar defense-privilege concepts that will appear in other topics. For instance, in the Second

remedies chapter, presumably addressing employment torts as well as other employment claims. In addition, other ALI projects do or may speak to tort remedies pertinent to the project; to the extent they do, the Third Restatement of Torts can cross-reference the other ALI work.

⁶ As to intentional infliction of emotional distress, see *supra* note 2.

Restatement, consent is the subject of fourteen sections in intentional torts to persons, nine sections in trespass to land, and six sections in trespass to chattels. In addition, four sections relating to consent appear in one of the final chapters of the Second Restatement: Chapter 45 on “Justification and Excuse.” Even granting that important differences exist for defenses and privileges for various torts, the Third Restatement should aim to identify common conceptual territory and articulate it in ways that can apply to multiple torts.

F. Torts Relating to Interests in Land and Water. The Second Restatement separately addresses: trespass to land (§§ 157-215); nuisance (§§ 821A-833); invasions in the support of land (§§817-821); and interference with use of water rights (§§ 841-864). The tentative recommendation is to combine these into a project on torts relating to land and water. The common law in these areas remains important, continues to evolve, and is unsettled in some areas. Conceptually and as a matter of litigation, the areas often overlap.

F. Additional Topics. The list in subsection A includes a place for “Additional Topics.” This does not mean that every topic not yet covered within one of the other items on the list will be included in a volume titled “Additional Topics.” Rather, the reference to “additional topics” acknowledges the need to consider how to address several topics not obviously covered elsewhere. One example is Division Eight of the Second Restatement, “Interference in Domestic Relations.” The Division includes two chapters, one relating to the “Marriage Relation” and one relating to “Relation of Parent and Child.” Both areas have expanded and contracted doctrinally since publication of

Restatement Second. In addition, some doctrines in this Division (such as consortium, both as to spouses and as to the parent-child relationship) might best be incorporated into the volume on damages-remedies.

V. Conclusion: Coordinated Continuation

This Essay has tried to give a concise but useful sense of how the ALI can proceed in producing a coordinated and complete (or nearly complete) Third Restatement of Torts. The steps described in this Essay, however, prompt an important question. Given that the proposal would require several Reporters and projects to be engaged over a period of years, how can these efforts remain “coordinated” and coherent? For several reasons, continued work on a Third Restatement should be able to go forward in a way that is mindful of, and consistent with, a coordinated Restatement Third.

First, the need to reconcile and coordinate will not again arise “ex post.” Second, the work completed thus far covers a wide yet bounded territory that forms a clear working backdrop for future projects. Third, new tort projects would generally not be contingent on how certain principles are worked out in other, still-to-be-completed projects. Thus, for instance, a land-water torts project would not require significant conceptual decisions linked to the content of an intentional torts project or a defamation-privacy project.

The Reporters and others thus far involved in the Third Restatement efforts have restated a wide territory of tort law with great clarity, conceptual depth, and practical value. On

its own, this accomplishment is both significant and durable. Yet this work has yielded even greater benefit, because its quality and scale now provide a sufficient foundation to envision and work towards an integrated, comprehensive Third Restatement of Torts.