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ESSAY

BACK TO BASICS: A COMMENT ON THE "REVIVED CASE" FOR ENTERPRISE LIABILITY

Virginia E. Nolan*
Edmund Ursin**

I. INTRODUCTION

In an ambitious series of articles, most recently in the *Michigan and Harvard Law Reviews*, Professors Steven Croley and Jon Hanson undertake the task of rescuing the strict products (enterprise) liability revolution.¹ These articles, which have already attracted academic attention, and even a following, are a provocative addition to the literature.² In this Essay, however, we demonstrate that Croley and Hanson share with "enterprise liability" critics a fundamental misunderstanding of the enterprise liability theory—a misunderstanding that has important

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1. See Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993) [hereinafter Croley & Hanson, *Rescuing the Revolution*]; Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995) [hereinafter Croley & Hanson, *Pain-and-Suffering Damages*]; Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 8 (1991).

2. See Note, *Absolute Liability for Ammunition Manufacturers*, 108 HARV. L. REV. 1679 (1995) (adopting the methodology of Croley and Hanson). Joseph Page has written that Croley and Hanson have provided an "elegant exposition of the case for enterprise liability in the products context." Joseph A. Page, *Liability for Unreasonably and Unavoidably Unsafe Products: Does Negligence Doctrine Have a Role to Play?*, 72 CHI.-KENT L. REV. 87, 105 n.86 (1996). Page concludes, however, that their proposal for absolute manufacturer liability is both "[u]nworkable and [r]adical." *Id.* at 118; see also Alexandra Lahav, Book Note, 32 HARV. C.R.-C.L. L. REV. 565, 570 n.30 (1997) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)) (characterizing Croley and Hanson's approach as "left-leaning" law and economics).

consequences for the ongoing debate over practical issues of tort reform.

The enterprise liability revolution was led by “first generation”³ scholars and judges, such as Professor Fleming James, Jr. and Justice Roger Traynor, who emphasized the goals of victim compensation and loss spreading,⁴ or risk distribution, as Croley and Hanson prefer.⁵ In recent years, however, “second generation” scholars have assailed judicial attempts to apply strict liability in cases of design and warning (as opposed to manufacturing) defect cases and have urged a return to a negligence-like standard of liability.⁶ These scholars also assert that manufacturer-provided insurance through tort liability is unnecessary and inefficient.⁷ Some, including Professor George Priest, believe that compensation through the tort system is unnecessary because existing first-party insurance provides adequate compensation.⁸ More moderate tort critics believe that, even if compensation is needed, tort law is an inefficient, and thus improper, means to provide that compensation.⁹ These critics argue that compensation through the tort system is overgenerous and regressive because it includes large awards for pain and suffering, and because the collateral source rule permits recovery of amounts covered by first-party insurance.¹⁰ Moreover, the defect requirement of strict products liability robs the tort system of the assurance of

3. See Croley & Hanson, *Rescuing the Revolution*, *supra* note 1, at 691 n.29.

4. See VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 3-12 (1995); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 470, 498-99 (1985). For a compilation of decisions utilizing the loss spreading rationale, see Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 302 n.470 (1981).

5. See Croley & Hanson, *Rescuing the Revolution*, *supra* note 1, at 711.

6. See James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1334 (1991); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 709-10 (1992); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 653-54 (1992); see also James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) (discussing the change in direction of judicial decisionmaking in products liability cases).

7. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1586-87 (1987).

8. See *id.*

9. See 1 AMERICAN LAW INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 29-30 (1991) [hereinafter 1 ALI REPORTERS' STUDY].

10. See 1 *id.* at 29; George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 15-18 (1987); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 361 (1990).

prompt compensation that is implicit in the loss spreading goal.¹¹ Second generation critics thus conclude that “the use of tort law as a device for expanding insurance protection against disabling injuries is . . . a questionable enterprise.”¹²

Croley and Hanson bring “the tools of law and economics to the defense of the premises of the first generation of products scholars and judges.”¹³ They identify market failures that justify the expansion of manufacturer liability and argue that expansion has not gone far enough—that the “vice of the first generation was not overambition but underambition.”¹⁴ Thus, Croley and Hanson urge the adoption of absolute manufacturer liability—liability without a defect requirement.¹⁵ Their “enterprise liability . . . would place on manufacturers the full costs of product-caused accidents.”¹⁶

In contrast to second generation critics who use the existence of widespread first-party insurance as an argument against expanded

11. See 1 ALI REPORTERS’ STUDY, *supra* note 9, at 35-37; Schwartz, *supra* note 10, at 360-61. In addition, comparative fault defenses further complicate tort litigation. See 1 ALI REPORTERS’ STUDY, *supra* note 9, at 29-30; Priest, *supra* note 10, at 11. Croley and Hanson point out that some critics also object to the loss spreading goal because its resultant liability rules are seen to remove consumer incentives to prevent accidents. See Croley & Hanson, *Rescuing the Revolution*, *supra* note 1, at 720-21. The first generation, in its emphasis on victim compensation, had downplayed “the theoretical possibility that . . . consumers [would] have less incentive to prevent accidents under strict liability than they did under the previous negligence regime.” *Id.* at 710-11 n.105. We believe that this theoretical possibility is just that—theoretical. Little incentive to take care is lost since fear of physical injury or death provides ample safety incentives. See *infra* note 69 and accompanying text.

12. 1 ALI REPORTERS’ STUDY, *supra* note 9, at 30.

13. Croley & Hanson, *Rescuing the Revolution*, *supra* note 1, at 769; see also Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 OHIO ST. L.J. 835 (1996) (analyzing the economics analysis of Guido Calabresi).

14. Croley & Hanson, *Rescuing the Revolution*, *supra* note 1, at 797. We focus on Croley and Hanson’s attempt to resurrect the first generation’s primary justification for enterprise liability—the risk distribution goal. Croley and Hanson also identify market failures that they believe revive other facets of the enterprise liability theory. First, they argue that consumers lack the full information necessary for them to make consumption and warranty decisions that reflect their true preferences. See *id.* at 770. Their imperfect information exists because information is costly, and “any means of obtaining . . . information requires investment.” *Id.* Croley and Hanson argue that the costs of information undermine “the efficiency of consumer product markets.” *Id.* They further argue that a market failure arises because “manufacturers are not well informed of consumers’ warranty preferences.” *Id.* at 779. Because of this, “products and warranties may not efficiently conform to those preferences.” *Id.* Croley and Hanson argue that in some circumstances “the average consumer . . . experiences ‘exploitation’ at the hands of manufacturers as a result of their efforts to maximize profits by providing both products that are less than optimally safe and warranties that are less than optimally generous.” *Id.* at 781. They call this the “new exploitation theory.” *Id.*

15. See *id.* at 789.

16. *Id.* at 787.

manufacturer liability, Croley and Hanson argue that widespread first-party insurance provides a *justification* for absolute manufacturer liability.¹⁷ They note that first-party insurers “rarely and imperfectly adjust premiums to reflect each consumer’s decisions concerning which products are purchased, how many of each product are purchased, or how carefully those products are consumed.”¹⁸ They argue that consumers who are compensated for pecuniary losses through such first-party insurance will ignore those costs, thereby creating what they call the “first-party insurance externality,”¹⁹ a phrase first coined in an article by Jon Hanson and co-author Kyle Logue.²⁰ This “first-party insurance externality poses a potentially substantial obstacle to . . . deterrence objectives,”²¹ and Croley and Hanson argue that absolute manufacturer liability “which would place on manufacturers the full costs of product-caused accidents”²² is “the only rule that will accomplish those goals.”²³ Thus, Croley and Hanson transform the first generation’s *goal* of risk distribution into the *fact* of risk distribution, which creates a need for absolute liability on accident prevention grounds.

Croley and Hanson note that there is no first-party externality with respect to nonpecuniary risks because these risks are rarely covered by first-party insurance.²⁴ They also state that insofar as enterprise liability compensates for “risks that are not or cannot be deterred, it serves only an insurance function.”²⁵ Second generation scholars assert that “consumers do not demand insurance for nonpecuniary losses, as evidenced by the absence of a significant market for such insurance.”²⁶ Croley and Hanson, in contrast, argue that consumers may demand nonpecuniary loss insurance.²⁷ If so, they write, the first generation’s risk distribution

17. See *id.* at 785. It is unclear whether Croley and Hanson fully accept the view that widespread first-party insurance obviates the need for victim compensation. Their argument is often carefully stated in a contingent form. Thus, for example, they write that their analysis and proposals apply “[t]o the extent that consumers are compensated for their pecuniary losses through first-party insurance.” *Id.* at 785-86.

18. *Id.* at 785.

19. *Id.*

20. See Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 131 (1990).

21. Croley & Hanson, *Rescuing the Revolution*, *supra* note 1, at 786.

22. *Id.* at 787.

23. *Id.* at 793.

24. See *id.* at 795.

25. *Id.*

26. *Id.*; see also Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 524 (1984); Priest, *supra* note 7, at 1553.

27. See Croley & Hanson, *Pain-and-Suffering Damages*, *supra* note 1, at 1812-13.

justification for the shift toward enterprise liability would be “revive[d] in original form”—the lack of first party insurance could justify liability rules that spread nonpecuniary losses.²⁸ Thus, in Croley and Hanson’s “revived” case for enterprise liability, the first generation’s loss spreading goal survives only to justify absolute liability for nonpecuniary losses arising out of unpreventable accidents—and then only if Croley and Hanson can establish, against the overwhelming weight of scholarly thought, that fully informed consumers would demand nonpecuniary loss insurance.

In this Essay we argue that the debate over enterprise liability needs to go back to basics—that the first generation’s theory of enterprise liability needs to be understood, not “revived.” We demonstrate, for example, that first generation scholars questioned the desirability of compensation for nonpecuniary losses, thereby undermining second generation criticisms and placing the first generation at odds with Croley and Hanson. We also argue that the “unrevived” enterprise liability theory provides a blueprint for the development of a personal injury law suitable for the twenty-first century. We demonstrate that contrary to the assertion of some critics, the first generation goal of compensation for pecuniary loss has not been satisfied by first-party insurance. To achieve that goal, we argue that courts should adopt a strict enterprise liability that dispenses with the defect requirement of products liability. Unlike Croley and Hanson, however, our “first generation” doctrine draws upon the strict products liability precedent but incorporates the insights of no-fault compensation plans, which we demonstrate are a product of the enterprise liability theory.

II. THE NEED FOR VICTIM COMPENSATION

George Priest notwithstanding, there is every reason to believe that a need for victim compensation for pecuniary loss persists.²⁹ The 1991 American Law Institute’s *Reporters’ Study: Enterprise Responsibility for*

28. Croley & Hanson, *Rescuing the Revolution*, *supra* note 1, at 795. Croley and Hanson note that if their intuition is wrong and consumers do not demand insurance for nonpecuniary losses, at most this would imply that “damages under [enterprise liability] should be reduced to cover only the pecuniary component of unpreventable accidents.” *Id.* Croley and Hanson also argue that the case for absolute manufacturer liability for nonpecuniary losses can be made on deterrence, as opposed to insurance, grounds. *See id.* at 795 n.448. Thus, “the beneficial deterrence effects of awarding nonpecuniary-loss damages for unpreventable accidents may outweigh [any possible] deleterious insurance effects.” *Id.* at 795 n.451.

29. *See* Priest, *supra* note 7, at 1587. It is unclear whether Croley and Hanson fully accept the view expressed by Priest. *See supra* note 17.

Personal Injury (“*ALI Reporters’ Study*”), for example, found that “[a]t least 30 million individuals in this country are without insurance for health care.”³⁰ By 1994 it was widely reported that the figure was closer to thirty-seven million,³¹ and that figure exceeded forty million by 1996.³² Moreover, the *ALI Reporters’ Study* found that “another 10 to 20 million are significantly underinsured.”³³ This figure increased to twenty-nine million by 1996.³⁴ The *ALI Reporters’ Study* concluded that “[i]t would be rash . . . to dismiss out of hand the role that tort damage awards play in providing a form of health care insurance for the victims of enterprise injuries.”³⁵ Moreover, “an even starker gap [in the social safety net] confronts people who lose earnings due to injury.”³⁶ With respect to disability and life insurance, the *ALI Reporters’ Study* found that “[d]isability insurance—particularly long-term disability insurance—is not widespread.”³⁷ Furthermore, “life insurance . . . probably does not provide a substantial economic cushion to the families of most breadwinners upon their death.”³⁸ Thus, the *ALI Reporters’ Study* concluded that “compensation paid to the victims of injury . . . from all sources is far from adequate.”³⁹

III. UNDERSTANDING ENTERPRISE LIABILITY

Even if a need for victim compensation exists, second generation critics argue that tort law is an inappropriate vehicle to provide that compensation.⁴⁰ These critics, however, misunderstand the enterprise liability theory. They correctly link strict products liability and other expansive tort developments of recent years to that theory, but they fail to recognize that these developments are merely one facet of a broader tort theory. In fact, compensation plans formed the centerpiece of early enterprise liability scholarship. Inspired by the enactment of workers’ compensation plans, scholars such as Leon Green and Fleming James

30. 1 ALI REPORTERS’ STUDY, *supra* note 9, at 156.

31. See Gregg Easterbrook, *Back to Basics on Health Care*, L.A. TIMES, Oct. 2, 1994, at M1.

32. See Edwin Chen, *Number Without Health Insurance Rises*, L.A. TIMES, Apr. 27, 1996, at A5.

33. 1 ALI REPORTERS’ STUDY, *supra* note 9, at 156.

34. See Chen, *supra* note 32, at A5.

35. 1 ALI REPORTERS’ STUDY, *supra* note 9, at 156.

36. 1 *Id.* at 44.

37. 1 *Id.* at 163.

38. 1 *Id.*

39. 1 *Id.*

40. See *supra* notes 7-10 and accompanying text.

sought for decades to supplant tort law and its requirement that victims prove negligence with legislatively enacted compensation plans tailored to discrete categories of accidents, including, most notably, automobile accidents.⁴¹

Only after it became clear in the 1940s that automobile compensation plan proposals had foundered on the legislative seas of special interest politics did enterprise liability advocates look seriously to courts and the common law to achieve their goal of victim compensation. It was not until the mid-1950s, for example, that Fleming James recognized the potential of strict products liability to achieve that goal, literally on the eve of the strict products liability revolution of the 1960s.⁴² The 1960s also saw a major advance on the automobile compensation plan front with the 1965 publication of *Basic Protection for the Traffic Victim* by Robert Keeton and Jeffrey O'Connell.⁴³ That work built on previous enterprise liability scholarship and found success with the flurry of legislative enactments of no-fault plans in the early 1970s.⁴⁴

Strict products liability and no-fault compensation plans, therefore, are aspects of a broader enterprise liability theory, and they were recognized as such by their proponents. For example, Fleming James, the leading academic advocate of the application of "strict enterprise liability" in products cases,⁴⁵ hailed the automobile no-fault compensation plan proposed by Keeton and O'Connell as a promising new

41. See Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 277-79 (1929); Leon Green, *The Individual's Protection Under Negligence Law: Risk Sharing*, 47 NW. U. L. REV. 751, 756 (1953); Fleming James, Jr., *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1157-58 (1941); Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 716 (1938); Fleming James, Jr., Book Review, 4 U. CHI. L. REV. 158, 159-60 (1936-1937) (reviewing CHARLES O. GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936)). A landmark contribution was a 1932 Columbia study which proposed a compensation plan for automobile accidents. See Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 408-11 (1959).

42. See Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44, 192 (1955) (published in two parts and discussing duties to all suppliers and manufacturers).

43. ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965). Other important works focusing on the problem of automobile accidents include ALFRED F. CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964); and Clarence Morris & James C.N. Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

44. See Jeffrey O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, 56 NEB. L. REV. 23, 26 (1977).

45. See Priest, *supra* note 4, at 470, 478.

“system[] of enterprise liability.”⁴⁶ O’Connell similarly recognized automobile no-fault and his own proposed extensions of no-fault insurance beyond automobile accidents as a “form of tort liability called ‘enterprise liability.’”⁴⁷

Given the compensation plan origins of the enterprise liability theory, it should come as no surprise that damages reform was also an important, although today overlooked, aspect of that theory. Indeed, by the early 1960s, the leading academic advocate (Fleming James), the judicial architect (Roger Traynor), and scholar (Albert Ehrenzweig) who gave the enterprise liability theory its name unambiguously endorsed the need for damages reform and courts as the agent of that reform as tort law embraced the loss spreading premise.⁴⁸ And Leon Green, the seminal figure in the early development of enterprise liability thinking, had lent his support to this view.⁴⁹ The damages reform theme, which called into question both the collateral source rule and the traditional award of damages for pain and suffering, is, of course, congruent with the approach of no-fault compensation plans, which provide for assured, but limited, compensation.

IV. THE ENTERPRISE LIABILITY RESPONSE TO SECOND GENERATION CRITICS

The enterprise liability response to second generation critics who decry the fact that compensation through the tort system is overgenerous (and funded regressively) because of awards for pain and suffering and because of the collateral source rule is simple. Unlike these critics who assume that “[n]o matter how passionately they wish to compensate victims, judges are stuck with the administrative apparatus of tort law, [including] the rules of damages,”⁵⁰ enterprise liability scholars endorsed

46. Fleming James, Jr., *The Future of Negligence in Accident Law*, 53 VA. L. REV. 911, 916-17 (1967) (referring to KEETON & O’CONNELL, *supra* note 43).

47. Jeffrey O’Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 773 (1973); *see also* JEFFREY O’CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975).

48. *See* Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 344 (Cal. 1961) (in bank) (Traynor, J., dissenting); ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* 47-55 (1951); 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 25 (1956); Fleming James, Jr., *Damages in Accident Cases*, 41 CORNELL L.Q. 582, 583-84 (1956).

49. *See* LEON GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 92-96 (1958) (proposing an automobile compensation plan which would not compensate victims for pain and suffering).

50. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* 36 (1989); *see* 1 ALI REPORTERS’

the idea that courts should play a role in damages reform. The answer to critics of the compensation and loss spreading goals is that these goals point to the need for damages reform linked to the expansion of liability.

Similarly, once one recognizes the compensation plan origins of the enterprise liability theory, it becomes apparent that the defect requirement is not integral to the enterprise liability theory and, indeed, is an impediment to the achievement of the goals of that theory. In fact, early in the history of strict products liability, Justice Traynor advised that the "complications surrounding the definition of a defect suggest inquiry as to whether defectiveness is the appropriate touchstone of liability."⁵¹ The enterprise liability response to critics of strict products liability, therefore, is that courts should explore the possibility of a strict liability regime that does not require defectiveness as a prerequisite to victim compensation.

Second generation critics have asserted that the "abandonment of the traditional defect requirement . . . is one significant step in the evolution of American products liability that our courts never will take."⁵² These critics point to the fact that in many accidents more than one product is causally involved, and they ask how, absent a defect criterion, one is to allocate liability—for example, among automobile, truck, bicycle, and telephone pole manufacturers in an accident involving all of these (and more, such as tires and asphalt) products.⁵³ The enterprise liability answer is that these critics focus too narrowly on the existing doctrine of strict products liability. A broader focus would reveal that courts can craft a common law enterprise liability that eliminates the defect requirement while also avoiding the multiple product problem.

V. ILLUSTRATIVE ENTERPRISE LIABILITY PROPOSALS

We believe that courts can craft a common law enterprise liability that eliminates the defect requirement while limiting damages awards. Moreover, we believe this can be done as a "natural and easy extension" of existing doctrine—by courts operating "well within the framework of

STUDY, *supra* note 9, at 29-30.

51. Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 372 (1965).

52. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1329-30 (1991).

53. *See id.* at 1280-81.

our common law tradition."⁵⁴ In fact, two distinct doctrinal sources are available for use by courts, and we offer two proposals to illustrate how courts might create a "first generation" enterprise liability.

First, it is hornbook law that the strict products liability doctrine applies to business premises whose activities fall within the "license to use" and "hybrid sales-service" categories of strict products liability.⁵⁵ Thus, strict liability applies to a laundromat whose washing machine malfunctions⁵⁶ or to a beauty parlor that applies a defective permanent wave solution to a patron.⁵⁷ It would seem a small step to apply a broader business premises strict liability to cases that fail to fit precisely into the "license to use" and "hybrid sales-service" categories. Thus, courts could easily recognize a doctrine of business premises enterprise liability applicable to persons injured on the premises of supermarkets, department stores, restaurants, and similar establishments. In contrast to strict products liability and previous proposals to extend "strict" liability, victim compensation under our proposal would not turn on whether an enterprise's premises could be characterized as "dangerously defective." Instead, the proposed doctrine would impose a strict enterprise liability for personal injuries *arising out of* the use of business premises by entrants on those premises.

A second doctrinal source for a new enterprise liability, the hazardous activity strict liability doctrine, already dispenses with the defect requirement. The growth of this doctrine has been inhibited by the Restatements of Torts, which preclude the application of strict liability to hazardous activities that are "a matter of common usage."⁵⁸ Nevertheless, courts have increasingly ignored this criterion while imposing strict liability on such diverse and common activities as oil drilling,⁵⁹ fumigation,⁶⁰ crop dusting,⁶¹ hauling of fuel by tanker trucks,⁶² and

54. Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 924 (1957).

55. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 719-21 (5th ed. 1984).

56. See *Garcia v. Halsett*, 82 Cal. Rptr. 420, 423 (Ct. App. 1970).

57. See *Newmark v. Gimbel's Inc.*, 258 A.2d 697, 701 (N.J. 1969).

58. RESTATEMENT (SECOND) OF TORTS § 520(d) (1977); RESTATEMENT OF TORTS § 520(b) (1938). The operation of automobiles, for example, although recognizably dangerous, is "a matter of common usage." RESTATEMENT (SECOND) OF TORTS § 520 cmt. i.

59. See *Green v. General Petroleum Corp.*, 270 P. 952, 955 (Cal. 1928) (holding that even the lawful maintenance of an oil well can result in liability when oil harms neighboring lands).

60. See *Luthringer v. Moore*, 190 P.2d 1, 8 (Cal. 1948) (in bank) (stating that the common use of certain gases among fumigators does not qualify such activity as a matter of common usage).

the storage of gasoline by service stations in underground tanks.⁶³

This case law could easily provide the precedent for a broader enterprise liability. Courts, for example, might impose strict liability on railroads for injuries occurring when trains collide with persons or vehicles at crossings or elsewhere and when train derailments cause injury to passengers or bystanders. In *Siegler v. Kuhlman*, the Washington Supreme Court applied strict liability to a trucker whose gasoline trailer overturned and exploded.⁶⁴ It would be no stretch to move from *Siegler* to railroad strict liability. Indeed, railroading clearly meets the criterion for liability that is emerging in the case law. Like the commercial hauling of fuel, railroading creates hazards unlike those routinely created by individual citizens pursuing their everyday activities.⁶⁵

Although these enterprise liability proposals eliminate the defect requirement, they do not run afoul of the multiple product problem associated with absolute *manufacturer* liability.⁶⁶ Like workers' compensation plans and auto no-fault, these proposals look to the specified activity or locus of the accident to allocate no-fault enterprise liability. The owners of a railroad or supermarket (or their insurers), for example, would compensate the person injured—even if several products are causally related to the injury.

These proposed doctrines would also eliminate defenses based on victim fault. The early enterprise liability precedent is, of course, workers' compensation, and the inappropriateness of these defenses was recognized by James in the 1940s⁶⁷ and O'Connell in the 1970s.⁶⁸ As

61. See *Loe v. Lenhardt*, 362 P.2d 312, 318 (Or. 1961) (noting that cropdusting can damage neighboring crops even when care is used); *Langan v. Valicopters, Inc.*, 567 P.2d 218, 223 (Wash. 1977) (en banc) (noting that although common in some areas, cropdusting is not a matter of common usage).

62. See *Siegler v. Kuhlman*, 502 P.2d 1181, 1187 (Wash. 1972) (en banc).

63. See *City of Northglenn v. Chevron U.S.A. Inc.*, 519 F. Supp. 515, 516 (D. Colo. 1981) ("The widespread use of gasoline in no way diminishes its inherently dangerous character.")

64. See *Siegler*, 502 P.2d at 1187.

65. See Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 297 (1987).

66. See *supra* note 53 and accompanying text; see also JOSEPH A. PAGE, *THE LAW OF PREMISES LIABILITY* § 6.9, at 142 (2d ed. 1988) (pointing to the "nettlesome" defect problem).

67. See Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 780 (1950) ("[T]he abolition of the defense of contributory negligence . . . clearly adds a further incentive to safety on the part of perennial defendants . . .").

68. See Jeffrey O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L.F. 591, 592. O'Connell suggests that states interested in alleviating inefficient administration and inadequate compensation problems of traditional tort systems use a "rule making almost any faulty conduct on

the *ALI Reporters' Study* has recently reiterated,

[L]ittle incentive to take care is lost when a patient (or worker or consumer) [or person injured on a business premises or by a railroad] is told that even though he might suffer a painful, perhaps even fatal injury, he or his surviving dependents will be able to recover compensation for the losses.⁶⁹

Because our proposed doctrine provides an assurance of compensation, it should, as suggested by Justice Traynor, be accompanied by "curbs on . . . inflationary damages" so that "the cost of assured compensation [does not] become prohibitive."⁷⁰ The substantive premises have long been in place for the judicial reform of damages law. In 1977, for example, the California Supreme Court in *Borer v. American Airlines, Inc.* described the "strong policy reasons" that argue against compensation for "intangible, nonpecuniary loss."⁷¹ Such losses were seen as "difficult to measure," and the court stated that they "can never be compensated" by money damages.⁷² Moreover, "the burden of payment . . . must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without any insurance."⁷³ These policy considerations, of course, support judicially created limitations on recoverable damages.⁷⁴ Similarly, *Li v. Yellow*

the part of an injured victim irrelevant for purposes of liability or damages." *Id.* (footnote omitted).

69. 2 AMERICAN LAW INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 511 (1991) [hereinafter 2 ALI REPORTERS' STUDY].

70. Traynor, *supra* note 51, at 376.

71. *Borer v. American Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977) (in bank).

72. *Id.* at 862-63.

73. *Id.* at 862.

74. See, e.g., *Fein v. Permanente Med. Group*, 695 P.2d 665, 680-81 (Cal. 1985) (in bank) (upholding legislative cap on pain and suffering damages); *Turpin v. Sortini*, 643 P.2d 954, 964 (Cal. 1982) (in bank) (denying pain and suffering damages in a wrongful life action). In their consideration of the proper measurement of damages in this new enterprise liability, courts could examine the array of approaches suggested by the enterprise liability scholars in the 1950s and early 1960s, as well as more recent proposals by O'Connell and others. See 2 ALI REPORTERS' STUDY, *supra* note 69, at 159-316; Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 937 (1989); Danzon, *supra* note 26, at 533; O'Connell, *supra* note 68, at 592. O'Connell has proposed that courts simply abolish the award for pain and suffering, as well as the collateral source rule, while making an explicit award of attorneys' fees. See O'Connell, *supra* note 68, at 592. This proposal has the merit of a clean solution, clearly crafted along no-fault lines. Courts might prefer, however, to formulate their new damages rules in Louis Jaffe's terms, stating as a guideline that "the award for pain and suffering . . . be measured and justified in terms of a contribution to the real costs of the litigation." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 235 (1953). Or courts might prefer, at least initially, to adopt Justice Traynor's rule of thumb that "ordinarily the part of

*Cab Co.*⁷⁵ and other decisions abolishing the contributory fault defense can be seen as the first step in the judicial alteration of damages law since their comparative fault rule commands a reduction in damages based on comparative fault. These decisions also pave the way for a more rational enterprise liability doctrine that eliminates any consideration of victim fault.

VI. CROLEY AND HANSON'S "REVIVED" CASE COMPARED

Our "first generation" proposals differ fundamentally from Croley and Hanson's revived case for enterprise liability. First, by shifting the focus from manufacturers to specified activities or the locus of an accident (business premises, railroads), our proposals avoid the problem of allocating liability in multiple product cases. More fundamentally, the policy premise of our proposals is the assurance of adequate compensation for accident victims; consistent with that premise, our absolute liability is linked to damages reforms such as limitations on damages for pain and suffering and the abolition of the collateral source rule.

In contrast, Croley and Hanson argue that traditional damages rules are necessary to prevent accidents efficiently. They would, therefore, retain the traditional award for pain and suffering, and they would shift losses already compensated by first-party insurance to manufacturers on accident prevention grounds. While we clearly would not favor a tort regime in which accident levels would rise significantly, we, like the first generation, believe that the primary focus of enterprise liability should be victim compensation. Moreover, we believe, along with the ALI reporters and others, that doctrines, such as ours, designed on the third-party liability, no-fault model create "a considerable financial incentive to take the measures necessary to reduce hazards . . . including the human errors of . . . managers and employees."⁷⁶ Our proposals offer the "promising blend of efficient compensation, economical adminis-

the verdict attributable to pain and suffering [should] not exceed the part attributable to pecuniary losses." *Seffert v. Los Angeles Transit Lines*, 364 P.2d 337, 346 (Cal. 1961) (in bank) (Traynor, J., dissenting). This approach, in fact, would provide for attorneys' fees while decreasing the amount of litigation sparked by uncertainty regarding the size of pain and suffering awards. Each of these approaches would, as James urged, recognize "within the framework of common-law development . . . the need for . . . progressively adopting a functional view of the amounts to be recovered." James, *supra* note 48, at 585.

75. 532 P.2d 1226, 1243 (Cal. 1975) (in bank) (abolishing the rule of contributory negligence in favor of "pure" comparative negligence).

76. 2 ALI REPORTERS' STUDY, *supra* note 69, at 507.

tration, and efficient prevention”⁷⁷ that has recommended no-fault plans from workers’ compensation to recent medical nonfault proposals.⁷⁸ If our proposals (and further extensions) alleviate the need for victim compensation, the question remains whether tort law should shift all product-related accident costs to manufacturers through the sort of absolute liability proposed by Croley and Hanson. Whether such a venture would be worth its cost and whether such a system could be fashioned by courts are the sorts of questions that the first generation asked about proposed reforms.

77. 2 *Id.* at 534; see also Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA L. REV.* 377, 430 (1994) (noting that third party liability of workers’ compensation “may achieve about as much by way of deterrence as any other liability regime”). In addition, it “eliminates the need to expensively litigate issues such as negligence and contributory negligence. Also, it satisfies injured workers’ basic insurance needs.” *Id.* at 430 n.261.

78. See 2 *ALI REPORTERS’ STUDY*, *supra* note 69, at 494; Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 *HARV. L. REV.* 381, 432-36 (1994).