Kenneth S. Abraham describes himself as a “practical theorist.” “I have always thought that law teaching and legal scholarship must be theoretical or they will be nothing more than reporting and description,” he says. “But my taste runs to the kind of theory that can actually help to solve real-world problems.” Over a career that now spans more than two decades, Abraham has “tried to use theory—and show my students and those who read my work how to use theory—to solve actual legal problems.”

Abraham began teaching Torts at Case Western Reserve in 1974. That year saw the first appellate decision in the mass-tort, products-liability litigation involving asbestos. Similar cases involving DES and the Dalkon Shield contraceptive device were brought later in the decade. Then, as now, virtually every torts casebook
excerpted Justice Roger Traynor's 1944 opinion in *Escola v. Coca Cola Bottling Co.*, where he argued that manufacturers should be strictly liable for injuries caused by defective products. Traynor asserted that manufacturers could insure against the risk of injury more easily than could victims, an assertion that soon became the standard rationale for strict enterprise liability for defective products and for injuries arising from a variety of other activities.

During the first few years of his academic career, Abraham taught the standard insurance rationale for enterprise liability to students. Although they accepted it without objection, he began to wonder whether it was really true that enterprises could easily insure against the new liabilities courts were imposing on them. Finding little help in the literature, Abraham (then at the University of Maryland School of Law) volunteered to teach Insurance Law. His dean, who had been teaching the course himself, was only too happy to give up what he considered the dreariest of subjects.

Abraham did not find it so. His first article, entitled “Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured,” 67 *Virginia Law Review* 1151 (1981), explored how judicial decisions create new insurance, much in the same way that they make new law. This article attracted the attention of his future colleagues, who invited Abraham to visit Virginia and then to join the faculty as a tenured full professor, which he did in 1984.

By the time he arrived in Charlottesville, Abraham had completed a draft of the book that was to launch his national reputation, *Distributing Risk: Insurance, Legal Theory, and Public Policy* (Yale University Press, 1986), raised questions that not only had not previously been addressed in legal analysis, but in some cases had not even been recognized as questions. For the first time, Abraham systematically examined insurance law from the perspectives of rights theory, economic analysis, and the comparative competence of the various legal institutions that regulate insurance. Today, *Distributing Risk* is an obligatory citation in virtually every law review article on insurance. The book's intellectual reach and theoretical depth have assured its continued relevance in a rapidly changing field. The chapter on the tension between efficiency and fairness in risk-classification, for example, originally had particular relevance to sex-based insurance pricing. Today, the “hot” issue is genetic discrimination in insurance, but the terms of Abraham's analysis still inform scholarly debate.

When public controversy about an insurance “crisis” mounted in the mid-1980s—see, for example, Kenneth S. Abraham, “Making Sense of the Liability Insurance Crisis,” 48 *Ohio State Law Journal* 399 (1987)—the American Law Institute (ALI) undertook a major, long-term study of the tort liability of business enterprises. This massive project had five original reporters: three from Harvard, one from Yale, and Abraham from Virginia. Their work culminated in a two-volume study, *Enterprise Responsibility for Personal Injury* (1991), which proposed both expansions of and restrictions on tort liability. Work on this project also led to Abraham's collaboration with fellow reporter Paul Weiler of Harvard on an ambitious proposal for major reform of liability for medical malpractice, published as “Enterprise Medical Liability and the Evolution of the American Health-Care System,” 108 *Harvard Law Review* 381 (1994), and eventually to Abraham's election to the Council of the American Law Institute. Abraham's participation in this body places him at the nerve center of the nation's most productive collaboration of practitioners, judges, and academics.
As his work on the original ALI project wound down, Abraham began work on a casebook, *Insurance Law and Regulation* (Foundation Press), first published in 1990 and now in its second edition, focuses equally on commercial insurance and personal insurance. Moreover, he introduces the full texts of insurance policies into discussions on coverage issues. As a result, students are able to study entire insurance policies while reading cases that explore their meaning and application. *Insurance Law and Regulation* quickly became the leading casebook in the field and is now used in more than 50 American law schools.

At the same time, Abraham became increasingly interested in the effects of a new form of liability on liability insurance. New federal legislation, enacted in 1980, mandated the cleanup of hazardous waste sites across the nation. Under this “Superfund” legislation, companies were required to pay for the cleanup of hazardous waste produced by the company. With the cost of a typical cleanup often running into the hundreds of millions of dollars, companies began turning to their liability insurers for reimbursement.

Abraham’s first foray into this new field of environmental liability insurance was as a consultant to policyholders suing their insurance carriers for coverage of the costs of environmental remediation. He quickly realized the need for an analytic treatment of this emerging field, and the result was *Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues* (Prentice Hall Law & Business, 1991). This work helped cement Abraham’s reputation as “Mr. Insurance.”

Abraham’s interest in environmental liability insurance also led to his involvement in one of the Law School’s first Principals and Practice course offerings. In 1995, Abraham and Robert Sayler, a partner in Covington & Burling and one of the nation’s leading insurance lawyers, joined forces to teach Complex Insurance Litigation: Principles and Practice. The course required students to apply legal theory to practical problems. Of necessity, Abraham and Sayler prepared the teaching materials for the course; these consisted mainly of sophisticated problems involving client counseling, argument of dispositive motions, use of expert witnesses, and the negotiation of complex settlements.

Abraham’s experience teaching the Principles and Practice course prompted him to introduce practical problems into his first-year Torts course. These problems are designed not only to develop lawyering skills but also to teach students to think more rigorously and analytically about tort doctrines. He recently published a book for students, *The Forms and Functions of Tort Law* (Foundation Press, 1997), which already is widely used as a supplement to traditional torts casebooks.

As he nears 25 years in law teaching, Abraham continues to explore new issues in insurance and tort law. Currently he is focusing his attention on new forms of insurance designed to cover liability arising from the use and misuse of intellectual property. He also is monitoring the spread of negligence as a liability standard from personal injury into fields such as defamation and civil rights violations. Abraham describes this development as “largely undesirable” and is working on an article (or perhaps a book) discussing his views tentatively entitled *Against Negligence*.

Whatever his specific projects, Abraham will continue to explore the complex relationships between civil liability and insurance. His work in that field has already brought him to national prominence. Building now on years of intellectual investment and scholarly achievement, Kenneth Abraham will continue to set the standard for the “practical theorist” in American law.
Becoming a Generalist: Membership on the American Law Institute’s Council

IN THE SPRING OF 1997, KENNETH S. ABRAHAM, University of Virginia School of Law Class of 1962 Professor of Law and Albert Clark Tate, Jr. Research Professor, was honored with an invitation to join the highly respected and accomplished practitioners, judges, and academics who make up the Council of the American Law Institute (ALI). The council is the governing body of the ALI, which was organized in 1923 after a prominent group of judges, lawyers, and teachers, including such noted judges as Learned Hand and Benjamin Cardozo, conducted a comprehensive study of American law and found that uncertainty in the law, and its increasing complexity, resulted in a general dissatisfaction with the way justice was administered. Based on the recommendations of this study group, the ALI was created to clarify and simplify the law, improve the administration of justice, and promote and conduct scholarly legal work.

In its early years, chief among the ALI’s priorities was an effort to address uncertainty in the law. ALI founders, convinced that one cause of
uncertainty was a lack of agreement among members of the profession on the fundamental principles of the common law, sought to rectify this problem through the restatement of basic legal subjects. The first Restatements of the Law were developed between 1923 and 1944 and covered such subjects as agency, conflict of laws, contracts, property, torts, and trusts. Since then, other subjects have been addressed and early restatements updated. Other ALI projects include influential Model Codes, including a Model Penal Code, Model Code of Evidence, Model Code of Pre-Arraignment Procedure, and a Model Land Development Code.

A more recent ALI priority has been an effort to enhance the competence of the practicing bar through a national program of continuing legal education. Since 1947, the ALI has collaborated with the American Bar Association to provide instruction, books, periodicals, and audiovisual materials covering most areas of practice to practitioners throughout the country.

The ALI boasts a membership of 3,000 judges, lawyers, and academicians from around the U.S. and some foreign countries. They are selected based on their professional achievement and demonstrated commitment to improving the law. Council members serve nine-year terms and are elected by their peers from among the ALI membership. The 60-plus current members of the council include a former U.S. attorney general, a former deputy U.S. attorney general, six U.S. court of appeals judges, four chief justices of state supreme courts, several former members of the cabinet, the president of a major university, several past presidents of the American Bar Association, the general counsel of one of the largest automobile manufacturers in the country, and eight law school professors, including two deans.

The council is responsible for determining which projects, programs, and activities the institute will undertake. Once a particular project is identified, the council selects an expert in the field, usually an eminent legal scholar, to serve as a reporter for the project. Council members must approve all works of the institute before they can be considered by the membership at large. The final product, the result of the careful and searching review by experienced and highly competent members of the bench and bar, often carries great authority, sometimes rivaling the authority accorded judicial decisions. ALI council members are thus afforded an opportunity to influence the law in a way few can.

Abraham finds his work on the council both challenging and tremendously rewarding. As a council member, Abraham, an expert in the field of insurance law, is called upon to evaluate works from many varied fields, a task that requires intellectual agility and a willingness to educate himself on matters far removed from his field of expertise. “At our last meeting, we spent nearly a day each on drafts of the Principles of the Law of Family Dissolution, the Restatement of the Law Governing Lawyers, and a new Uniform Commercial Code article addressing sales transactions over the Internet,” he said. “For each several-day meeting, we typically have over 1,000 pages of dense material to digest and debate.”

Working closely with other members of the council on Restatements, Principles of the Law, and other works of the ALI, Abraham has had a chance to learn about less-familiar fields from some of the leading experts in the country and to become a generalist again after years of specialization. He finds this transition very satisfying. “It has been a challenge to get up to speed on this material, but it is also a terrific way to get an education in new fields,” he said. “I have been very impressed by the insights that council members have about the issues we discuss. I have learned a lot simply by listening to what these wise and seasoned lawyers have had to say.”
AWARDS FOR PAIN AND SUFFERING perform a number of functions. First, in the case of serious injuries, few people would think that providing compensation for out-of-pocket loss alone could ever make the plaintiff “whole.” Money paid for pain and suffering may not remove that loss, but it does acknowledge rather than ignore the plaintiff’s intangible losses. Second, even if the plaintiff’s pain and suffering cannot ever be fully compensated for with money, the plaintiff may be able to use an award to provide activities or enjoyments that substitute for those lost as a result of the injury in question. . . .
Regardless of whether money can compensate in any way at all for pain and suffering, there can be little question that pain and suffering [are] consequences with respect to which the law aims to achieve optimal deterrence. . . . [E]ven if there were no benefit obtained from paying pain and suffering awards to victims, it would make sense to hold injurers liable for these damages. From the standpoint of optimal deterrence it really does not matter whether the defendant pays these damages to the plaintiff, or to a charitable foundation instead, or the amount of pain and suffering damages the defendant is required to pay is put in a bucket and burned in the courtroom. What matters is that the defendant has to pay the money. The requirement of payment assures that other potential injurers are threatened with liability not only for out-of-pocket, but also for pain and suffering damages. And this threat promotes optimal deterrence by encouraging potential defendants to take into account the cost of the pain and suffering that their activities may cause in deciding what safety precautions are worth taking.

Admittedly, in certain contexts this deterrence argument is less persuasive than in others. For example, whenever potential plaintiffs are in a direct or indirect contractual relationship with potential injurers—in fields such as medical malpractice or products liability—the right to bring a tort action can be understood as insurance for which potential plaintiffs pay in advance through increased medical expenses or product costs. Strong arguments have been made and contested in the literature about whether rational purchasers of medical services and products would want to pay for insurance against pain and suffering. If they would not, some commentators argue, then pain and suffering awards should not be made at all. Other commentators have suggested that it is rational to want to purchase pain and suffering insurance. This issue remains contested. But as long as we have a general law of damages rather than damages rules applying separately to malpractice and products liability—and as long as tort law is conceived as more than a mere “insurance” system—the deterrence arguments for awarding pain and suffering damages seem highly likely to prevail.

Excerpted from The Forms and Functions of Tort Law (Foundation Press, 1997).
Publications of Kenneth S. Abraham

**BOOKS**


*The Forms and Functions of Tort Law* (Foundation Press, 1997).

**CHAPTERS IN BOOKS**


**ARTICLES AND PAPERS**


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