

NORTHWESTERN LAW JUDICIAL EDUCATION PROGRAM
Fourth Annual Civil Justice Program
Chicago, IL
December 7, 2009

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**THE RESTATEMENT OF TORTS THIRD, LIABILITY FOR PHYSICAL &
EMOTIONAL HARM: WHAT IT MEANS TO YOU**

- I. The Total Picture Of the New Restatement Third: A Herculean Task Accomplished By Professor Michael Green, Texas University President William Powers and the Late Professor Gary Schwartz: First Year Torts in a Kaleidoscope

- II. Two Key Areas of Sound Judgment
 - A. The Restatement's Duty Concept and How It Applies to State Government Lawsuits Based on Prevention of Externalized Risks¹
 - 1) The "general principle" of tort liability in the new Restatement is that people have "a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *See* Restatement (Third) of Torts: Liab. for Physical Harm, ch. 7 scope note (Proposed Final Draft No. 1, 2005).
 - 2) The core of externalization of risk actions: exposing the "wizard" behind the curtain of traditional labels such as public nuisance and abnormally dangerous activities.
 - 3) To overcome the fundamental Restatement duty requirement, state attorneys general have argued that they should not have to meet the same burden as an individual private plaintiff.

¹ *See* Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009).

- 4) Most courts have rejected these arguments and have adhered to the “general principle” set forth in the new Restatement. *See, e.g., State v. Lead Industries Assn*, 951 A.2d 428, 414 – 435 (R.I. 2008).
- 5) These decisions have a sound public policy basis. The ends do not justify the means for government externalization of risk litigation.

B. The Restatement’s Treatment of Noneconomic Damages for Pet Injury or Death Holds the Line

- 1) A loss of, or injury to a pet or animal, can bring about true sadness and emotion, but that feeling should not be transferred into a claim based on emotional harm in tort law. *See Restatement of the Law Torts: Liability for Physical and Emotional Harm, Preliminary Draft No. 5, Page 64 (March 13, 2007).*²
- 2) Allowing noneconomic damages such as loss of companionship and pain and suffering would have negative policy consequences for pet owners and their pets.

III. Two Key Areas of Concern

A. Over-Relaxation of Causation and Expert Testimony Standards

- 1) The new Restatement says that plaintiff has the burden of proof in showing causation – We can all agree.
- 2) Under the new Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm § 28 (a), if the plaintiff claims that multiple parties caused his harm, the burden of proof shifts to the defendants to show who did what – Why this is a radical and unusual change in law.
- 3) Under the new Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm § 28, comment c, epidemiological evidence becomes nice, not necessary. The basic reason: plaintiff’s lawyers may not have the evidence. But, as a matter of logic, where does this take you?

² *See also* Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227 (2006).

- 4) Are rules about what is good and bad science really substantive tort law, or are they more directed at questions raised under *Daubert*³ or *Fry* “judicial gatekeeper” hearings?

B. Putting Out the Welcome Mat and Creating a Duty on the Part of Landholders to Trespassers is Neither Necessary nor Wise

- 1) The no duty to trespasser rule, what is its basis?
- 2) Sound exceptions have been developed over centuries, but they do not swallow up the rule.
- 3) We all learned about the “categories” in law school, trespasser, licensee, and invitee. Do they really create confusion? Injustice?
- 4) The fifty year old plus experiment of *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), unlike *Greenman v. Yuba Power Products*, 377 P. 2d 897 (Cal. 1963), never caught on in other states. Even the California legislature created 25 exceptions to the *Rowland*.
- 5) But wait, there is an exception to the new and largely unprecedented duty to trespasser rule; there is no duty to the “flagrant trespasser.” ALI – watch out for Jay Leno.
- 6) But seriously folks . . .
 - a) It is not needed
 - b) Will cause more confusion than it is meant to resolve
 - c) Could spike homeowners insurance costs at the very wrong time
 - d) Could create huge and uncertain liability exposure for
 1. people with second homes
 2. railroads and utilities
 3. homeowners in places where the buffalo roam

IV. Conclusion – A Monumental Work That Should be Welcomed, but a Few Parts Should be Approached with Care

³ See Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217 (2006)