

Economic Harm Torts and Liability Insurance Approved

ALI members voted at this year's Annual Meeting to approve two Restatement projects: Restatement Third, Torts: Liability for Economic Harm and Restatement of the Law, Liability Insurance. The project Reporters are Ward Farnsworth, Dean of the University of Texas at Austin School of Law (Torts), and Tom Baker of the University of Pennsylvania Law School and Associate Reporter Kyle D. Logue of the University of Michigan Law School (Liability Insurance).



Reporter Ward Farnsworth during the Economic Harm Torts project session

Liability for Economic Harm is the fourth installment of the Restatement Third of Torts to be completed. It follows on the footsteps of Products Liability, Apportionment of Liability, and Liability for Physical and Emotional Harm. Two additional projects are currently being drafted: Intentional Torts to Persons and Property Torts, which is also being undertaken as part of the Restatement Fourth of Property.

The Economic Harm Torts Restatement covers the topics of unintentional infliction of economic loss, including professional negligence, negligent misrepresentation, negligent performance of services, and public nuisance. It also addresses fraud, breach of fiduciary duty, interference with contract, unjustifiable litigation, and civil conspiracy.

THE DIRECTOR'S LETTER BY
RICHARD L. REVESZ

Restatements as Legislative Enactments

We normally think of our Restatements as being addressed to the courts and of our model codes as being addressed to legislatures. Our Style Manual makes this distinction clear. But in the 1950s, in order to jump-start their common law, two of the United States' overseas territories, the Northern Mariana Islands and the U.S. Virgin Islands, enacted legislation adopting the Restatements—all of them—as the common law of their respective jurisdictions.

After World War II, the Northern Mariana Islands, along with other Pacific territories under Japanese control, were organized under a U.N. mandate into a territorial trust controlled by the United States. The 1952 Trust Territory Code repealed “[a]ll laws, regulations, orders and ordinances” made by the previous colonial possessors (Spain, Germany, and Japan), replaced them with American federal law and “[t]he Common law of England and all Statutes of Parliament in aid thereof in force and effect

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ALI Director Richard L. Revesz, William C. Hubbard of Nelson Mullins, Kenneth S. Abraham of UVA School of Law, Associate Reporter Kyle D. Logue, Reporter Tom Baker, ALI Deputy Director Stephanie A. Middleton, Gary L. Sasso of Carlton Fields, and ALI President David F. Levi

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ALI Elects Two Council Members

During Monday's Reports and Business session at the Annual Meeting, Nominating Committee Chair Anthony J. Scirica of the U.S. Court of Appeals for the Third Circuit presented to the membership two nominees for the ALI Council. Both were approved by the membership to a five-year term. The new Council members are Donald B. Ayer of Jones Day and Abbe R. Gluck of Yale Law School. Short biographies of Council members can be found on the ALI website.



ALI's newest Council members Abbe R. Gluck and Donald B. Ayer

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on July 3, 1776, and as interpreted by American decisions..." In 1959, the territory's High Commissioner amended this language to provide that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision..." A 1975 referendum approved a Covenant with the United States to reorganize the territory as a Commonwealth. After the legislature provided a mechanism for the revision of Northern Marianas law, the Law Revision Commission promulgated Section 3401 of the Commonwealth Code:

"In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth."

As a result of Section 3401, the Northern Mariana Islands Supreme Court described itself as "not vested with a similar degree of freedom in formulating our own common law as that exercised by courts in other jurisdictions, because of the statutory dictate that we apply the Restatement." Moreover, the Restatements are to be followed even if they conflict with the common law of the majority of U.S. jurisdictions. In one case, the parties agreed that Restatement rule and the majority rule conflicted but disagreed about which of these rules should govern their dispute. The Northern Mariana Islands Supreme Court held that "the Restatements are the operative rules of decision in the Commonwealth, even when the relevant provision does not accord with United States common law."

Section 3401 was challenged under the territorial constitution on the grounds that the provision violates separation of powers principles, legislates without representation thus abridging the right to vote, and is void for vagueness. The Northern Mariana Islands Supreme Court rejected the challenge on jurisdictional grounds but suggested that it would have also rejected it on the merits as well.

In the Virgin Islands, the adoption of the Restatements as positive law through a legislative act had a similar genesis. After the United States bought the islands from Denmark in 1916, the new territorial code mandated that "[t]he common law of England as adopted and understood in the United States shall be in force...except as modified by this ordinance." Applying this mandate, in 1955 the District Court of the Virgin Islands resolved a conflict of laws case in accordance

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The ALI Reporter (ISSN 0164-5757) is published quarterly by The American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104-3099. Nonprofit U.S. postage paid at Langhorne, PA.

POSTMASTER: Send address changes and any other communications to 4025 Chestnut Street, Philadelphia, PA 19104-3099.

with the “generally accepted common law rule...[as] laid down in the Restatement of Conflict of Laws.” The Third Circuit, which has appellate jurisdiction over this district court, affirmed in an opinion by Judge Albert Maris, an active member of The American Law Institute. It held that “the district court in applying those rules is justified in following the well considered expressions of them which the American Law Institute has incorporated in its Restatements of the Law.”

Two years later, the Virgin Islands Legislature codified and extended this decision, adopting Section 4 of the territorial code:

“The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.”

The interpretive issues proved to be less straightforward in the Virgin Islands than in the Northern Mariana Islands. In 1977, the Third Circuit considered the question of whether a dispute should be decided by reference to the Restatement provision in effect at the time of the enactment or to a later draft, which had not yet been formally adopted by the ALI. It opted for the latter approach indicating that it read Section 4 “as looking to the Restatements only as an expression of ‘the rules of common law.’” It added: “[W]e do not believe it contemplates strict adherence to old Restatements which no longer accurately summarize the common law.”

In 1993, then Judge Samuel Alito, concurring in an en banc decision of the Third Circuit, stated that Section 4 “does not incorporate all of the Restatement provisions in effect in 1957 as if they were actual statutory text; nor does it delegate to the American Law Institute the authority to enact changes in the law of the Virgin Islands in all of the areas covered by the Restatements.” He indicated that “[w]hile some of our opinions cite provisions of the Restatements as if they were statutory law, I respectfully submit that these references (which I take to be merely a form of shorthand) are potentially misleading.”

In 2005, the Superior Court of the Virgin Islands considered whether it should apply the rule in the most recent Restatement as opposed to the one in effect at the time Section 4 was enacted. In contrast to the approach in the Northern Mariana Islands, it opted for the latter approach, concluding that the statutory provision’s reference “to the ‘restatements’ refers to the Restatement in existence at the time of its enactment in 1957.”

The status of Restatements in the Virgin Islands further changed when the Virgin Islands legislature established a Supreme Court of the Virgin Islands in 2004 and conferred on it the jurisdiction’s “supreme judicial power.” In 2011, the Third Circuit certified to this new court a question concerning the choice between the Restatement Second of Torts (holding lessors of defective products liable only for negligence) and the Restatement Third of Torts: Products Liability (subjecting them to strict liability). In this connection, the territorial supreme court considered whether it “is bound to follow the most recent version of the Restatement approved by the American Law

Institute whenever it is required to decide an issue of first impression, or whether, like other courts of last resort, this Court possesses the inherent power to shape the common law in the Virgin Islands.” It decided that it was not compelled “to mechanically apply the most recent Restatement” because inherent in the idea of the “supreme judicial power of the territory” is the ability to create common law. Thus, it determined that by establishing a Supreme Court, the Virgin Islands legislature had implicitly repealed Section 4. Nonetheless, Restatements continue to be treated as persuasive authority in the Virgin Islands.

Despite similar statutes, the status of Restatements took different turns in the Northern Mariana Islands and in the Virgin Islands. But in both, they fulfilled the legislative goal of jump-starting the development of the common law in the respective jurisdictions.

Editor’s Note: A version of this Director’s Letter that includes a bibliography of related material with links to relevant documents is posted on the News page of the ALI website: www.ali.org/news.