

The Honorable Franklin D. Burgess

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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10 CYNTHIA CORRIE AND CRAIG CORRIE,)
ON THEIR OWN BEHALF AND AS)
11 PERSONAL REPRESENTATIVES OF THE)
ESTATE OF RACHEL CORRIE AND HER)
12 NEXT OF KIN, INCLUDING HER)
SIBLINGS, MAHMOUD OMAR AL)
13 SHO'BI, ON HIS OWN BEHALF, ON)
BEHALF OF HIS SURVIVING SIBLINGS)
14 MUHAMMAD AL SHO'BI AND SAMIRA)
AL SHO'BI, AND ON BEHALF OF HIS)
15 DECEASED FAMILY MEMBERS, UMAR)
AL SHO'BI, FATIMA AL SHO'BI, ABIR AL)
16 SHO'BI, SAMIR AL SHO'BI, ANAS AL)
SHO'BI, AZZAM AL SHO'BI AND)
17 ABDALLAH AL SHO'BI; FATHIYA)
MUHAMMAD SULAYMAN FAYED, ON)
18 HER OWN BEHALF AND ON BEHALF OF)
HER DECEASED SON, JAMAL FAYED)
19 AND HIS NEXT OF KIN; FAYEZ ALI)
MOHAMMED ABU HUSSEIN ON HIS)
20 OWN BEHALF AND ON BEHALF OF HIS)
SONS, BAHJAT FAYEZ ABU HUSSEIN,)
21 AHMED FAYEZ ABU HUSSEIN, NOUR)
FAYEZ ABU HUSSEIN AND SABAH)
22 FAYEZ ABU HUSSEIN; MAJEDA)
RADWAN ABU HUSSEIN ON HER OWN)
23 BEHALF AND ON BEHALF OF HER)
DAUGHTERS, HANAN FAYEZ ABU)
24 HUSSEIN, MANAL FAYEZ ABU)
HUSSEIN, INSHERAH FAYEZ ABU)
25 HUSSEIN, AND FADWA FAYEZ ABU)
HUSSEIN; EIDA IBRAHIM SULEIMAN)
26 KHALAFALLAH ON HER OWN BEHALF)

No. C05-5192-FDB

**OPINION OF PROFESSOR DANIEL
MORE IN SUPPORT OF DEFENDANT
CATERPILLAR INC.'S MOTION TO
DISMISS UNDER FED. R. CIV. P. 12(b)(6)
FOR FAILURE TO STATE A CLAIM
AND PURSUANT TO THE POLITICAL
QUESTION AND ACT OF STATE
DOCTRINES**

1 AND ON BEHALF OF HER DECEASED)
2 HUSBAND, IBRAHIM MAHMOUD)
3 MOHAMMED KHALAFALLAH AND)
4 NEXT OF KIN,)
5 Plaintiffs,)
6 vs.)
7 CATERPILLAR, INC., a foreign corporation,)
8 Defendant.)

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EXPERT OPINION

Name of Expert: Professor Daniel More

Place of Work: Faculty of Law, Tel Aviv University

I the undersigned, **Professor Daniel More**, have been asked by **HOWREY** Law Offices Los Angeles branch, (via Adv Hanan Melcer from Tel-Aviv, Israel), to offer my legal opinion on the issues described below which are related to the First Amended Complaint as well as the original Complaint in **Civil Action No. C05-5192** that was filed to the **UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE**.

I submit this opinion in lieu of testifying in Court and I declare hereby that I know well that, for the purpose of the Israeli Criminal Law regarding sworn false testimony in Court, my opinion, signed by me, has the same effect as if I rendered a sworn testimony in Court.

My professional C.V. & list of publications is attached as **Appendix A** hereto.

The following is my opinion:

-Introduction-

1. I have been asked by the aforementioned to provide information to the American Court concerning Israeli law with respect to several issues. Specifically, I have been asked to address:

- A. General background concerning the nature of the Israeli judicial system.
- B. Whether claims could be asserted in an Israeli court such as those asserted in the Complaint in *Corrie v. Caterpillar Inc.*, C05-5192, now pending in the United States District Court for the District of Washington, U.S.A. (the "Corrie Complaint") as well as the First Amended Complaint thereof.

2. In order to study the issues in dispute I received the following documents from Adv. Melcer's office:

- A. A copy of **Civil Action No. C05-5192** as mentioned hereinabove.
- B. A copy of the **First Amended Complaint** as mentioned hereinabove

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C. A copy of the Statement of claim 371/05 'X that was filed to the Haifa District Court on the 15.3.2005.

My opinions with respect to those issues are discussed below-

The Israeli Judicial System

3. The Israeli tort system follows in the foot steps of the English common law. The Israeli law of torts however, has been tremendously influenced also by American Law. Thus, in 1975, no fault insurance was introduced into the field of road accidents¹. In 1980 Israeli law adopted strict products liability². The Learned Hand calculus is often employed in negligence cases³. In many major decisions in the law of torts, Israeli courts and most notably the Israeli Supreme Court quote American cases and law articles published in American law reviews⁴.

4. In Israel, trials are conducted before a magistrate judge or a judge of the district court. In the first case the party who lost in the trial can appeal to the district court and if her appeal will be dismissed, she can in certain cases appeal to the Supreme Court. In the second case the losing party has a right to appeal to the Supreme Court. In both cases, and in rare circumstances, if the appeal is finally dismissed, it is possible to apply for a further review of a legal question by an extended board of the Supreme Court.

5. Civil procedure under Israeli law resembles the English civil procedure. There is a procedure for discovery. Within 30 days of the submission of the response to the claim, each party can write to the other party requesting her to disclose relevant documents. After receiving the list of relevant documents, each party can request the other party to show or produce copies of certain or all disclosed documents.

In addition, each party can request that the other party will supply additional details to the details written in the claim or in the response and he can request the other party to answer in an affidavit, a list of questions.

¹ Compensation for Road Accidents Victims Law 1975

² Liability for Defective Products Law 1980

³ See for instance Civil Appeal 5604/94 **Hamed v. The State of Israel**, Tak-Supreme 94(4), p. 256 (12.1.04).

⁴ Thus, in a minority decision in the recent decision of the Israeli Supreme Court regarding specific and general causation, the judge quoted 20 American cases, more than 20 Articles published in American Law Reviews, 6 American textbooks and 1 American Report (Civil Appeal 1639/01 **Kibutz Mayan Zvi v. Krishov and the State of Israel**, Tak-Supreme 2004(2), p.1870 (2.6.04).

It is also possible to require the other party to admit certain facts or the existence or the content of certain documents. In the pretrial proceedings the Registrar or the judge deals with the parties' requests and disputes and sometimes require the parties to try to reach an agreed list of facts and documents. In most personal injury cases the court asks each one of the parties to produce a document in which she explains briefly her arguments on the merits of the case as well as her detailed assessment of damages and just compensation.

6. The parties have a right to cross-examine witnesses at trial. In many cases the Court orders the parties to submit their evidence in affidavits and enables each party to cross examine the witnesses of the other parties.

7. Plaintiffs' attorneys are allowed to enter into contingent fee contracts. Indeed, in claims for personal injury, this is the standard arrangement for the plaintiffs' attorneys. The usual percentage is 20% of the money awarded or received in settlement. Since, under Israeli law, the loser must pay the winner's attorneys' fees and costs, most plaintiffs in effect actually pay their lawyer about 5% of the money awarded or received in settlement. The attorney fee decided by the judge belongs to the plaintiff. Similarly, in case of a settlement, the party paying a sum in settlement also usually pays attorneys' fees.

8. Non-party witnesses can be compelled to come to court to testify at trial. The testimony of witnesses outside the State of Israel (e.g. in the U.S.) can be recorded and used at trial, provided such testimony is allowed by the court. Audio or videotapes of the testimony can be permitted.

The Claims Asserted In the Corrie Complaint

9. Under Israeli law the death of the injured person, either as a result of the civil wrong committed against her or otherwise does not put an end to her cause of action. The survivors and the dependents of this dead person can sue the wrongdoer and its employer and/or insurer for damages, for committed tort/s against the deceased. The most common torts in wrongful death cases are strict liability, negligence, breach of statutory duties and assault and battery.

10. A victim of a war crime could attempt to bring a civil action in Israel for breach of a criminal statute applicable to war crimes. It is not clear whether an Israeli court would allow such a cause of action.

Undoubtedly, however, the facts which constitute the alleged war crime **including the ones alleged in the Corrie Complaint** could be classified under the heading of a tort that an Israeli court would definitely recognize, such as battery or negligence. Indeed, violations of Human Rights can fall within the ambit of the torts recognized under Israeli law, especially assault and battery and negligence and in cases of property damage, various property torts.

Israeli law recognizes the authority of the courts to impose punitive damages.

Proof of malice is a precondition for such damages.

Israeli Tort Law Applicable To The Alleged Facts In The Corrie Complaint

11. Israeli law recognizes the right of a person who suffered an injury as a result of the defendant's tort to sue him for damages. When the injured party is a minor, his parents can bring the action as his representatives.

Israeli law recognizes two different and independent types of claim arising from a wrongful death. The first one is an action by the estate of the deceased. Upon death, the victim's rights against the wrongdoer are transmitted to the victim's heirs. Under section 19 of the Civil Wrongs Ordinance, the heirs (or the survivors) are suing on behalf of the deceased and are entitled to compensation for the damage inflicted upon the deceased. To bring such a claim, the plaintiff must be legally entitled to act as the representative of the decedent's estate. In a case in which the death was caused as a result of the tort committed against the deceased, the action encompasses past peculiar loss of the deceased, such as lost earnings and expenses, the economic loss during the "lost years".

Israeli law also recognizes a cause of action on behalf of the dependents of the deceased. Siblings, aunts, uncles and their offspring cannot bring such a claim. Also, parents cannot bring such a claim unless the deceased actually supported the parents or it was reasonably expected that the deceased would support them in the future. A pre-condition of a cause of action on behalf of the dependents is the existence of a causal connection between the defendant's tort and the death of the deceased. Damages under this cause of action are economic only; Israeli law does not recognize damages for loss of society.

12. The tort of public nuisance is recognized under Israeli law. A claim for a public nuisance can only be brought by someone who suffered a pecuniary loss as a result of the public nuisance.

13. Israeli tort law requires a showing of causation. The defendant's alleged wrong must be both a factual and a legal cause of the plaintiff's loss. Factual causation means that the defendant's alleged wrong was the cause of the plaintiff's damage in the physical, scientific sense. The major test for determining the existence of factual causation is the "but-for" test. Plaintiff's loss would not have occurred but-for the defendant's alleged wrong. Legal causation means that there is a sufficiently close connection between the alleged wrong of the defendant and the plaintiff's loss so that it is both fair and consistent with wise public policy to hold the defendant responsible in damages. Israeli courts apply three tests of legal causation, supplemented by section 64 of the Civil Wrongs Ordinance, negating factors of decisive fault and extraordinary natural occurrence. The first test is the **reasonable foreseeability** test which is an integral part of the liability regime in negligence and fault-based liability. The two other tests may be employed, in addition to foreseeability.⁵ In strict and absolute liability, the **scope of risk** test has become the dominant rule⁶. This test inquires whether the risk which actually materialized belongs to the risks that made given conduct tortious. The third test is the **common sense** test. Somehow, these three tests of legal causation coexist. If compensation is claimed not only for the initial damage but also for damage that developed from it, then the rules of remoteness of damage come into operation and focus on the chain of events between the initial damage and the consequential damage.⁷

14. To determine whether particular facts establish causation, Israeli judges look to the precedent of Israeli cases. Israeli judges usually also look to cases decided under English common law, American law and sometimes also European law as persuasive authority.

15. The Israeli Courts have never confronted a claim similar to the Corrie case. Courts in Israel have not addressed the theory underlying the Corrie Complaint,

⁵ See Civil Appeal 576/81 **Ben Shimon v. Barda**, Supreme Court Judgments Vol. 38(3), 1984, p. 1.

⁶ See Civil Appeal **Shulman v. Zion Insurance Co**, Supreme Court Judgments Vol. 42(2), 1988. p. 844, p.p. 864-868.

⁷ According to section 76(1) of the Civil Wrongs Ordinance: "When the plaintiff has suffered damage, compensation shall only be awarded in respect of such damage as would naturally arise in the usual course of things and which directly arose from the defendant's civil wrong" See also C.F.H **Leon v. Ringer**, Supreme Court Judgments Vol. 18(4), 1974, p. 701.

namely that producers should be liable not only for harm inflicted as a result of a manufacturing defect or a design defect or a defect in the user's manual, in the product they introduced into the market, but also for harm sustained by a third party as a result of the use of the product by its customer.

An Israeli court, is likely to handle such a case in a fair and intelligent manner, employing a decision- making process and legal analysis pretty close to the one practiced in courts in the U.S. Israeli courts are independent and judicially active.

They are likely to read the major decisions and law review articles published in the U.S.A on the legal questions presented by the Corrie case and give to them a substantive weigh.

Israeli Courts do not hesitate to find against the State of Israel. They most vigorously protect civil and political rights.

16. The Palestinian plaintiffs in the Corrie case can sue Caterpillar Inc. in Israel. Furthermore they can also sue there the State of Israel. Many hundreds of claims have been brought in Israeli courts against the State of Israel by Palestinians injured in Judea, Samaria or the Gaza Strip. In many of these cases the plaintiffs won substantial compensation. Thus, for instance I won a few months ago a unanimous decision of the Israeli Supreme Court, deciding for the plaintiff in a personal injury claim brought against the State of Israel. My client was a Palestinian who was severely injured by Israeli soldiers in the city of Nablus⁸ in Judea and Samaria and unfortunately died a few weeks ago⁹.

17. So far the State of Israel have never denied jurisdiction in cases of Palestinians and others injured in Judea Samaria and the Gaza Strip, suing the State of Israel in Israeli courts. They have also refrained from claiming forum non convenience against such claims.

18. Many claims which are pending in Israeli courts deal with the same issue presented in the First Amended Complaint. Palestinian whose houses were destroyed by the Israeli Defense Forces (IDF) including ones who suffered personal injury as a result of those acts have sued In Israel. We are still waiting for a court decision on this subject.

19. In an Israeli court, Caterpillar Inc. can issue third party proceedings against

⁸ It is the same city in which the late Mahmoud Omar Al Sho'bi lived. His survivors are among the plaintiffs in the First Amended Complaint. The same is true with regard to the survivors of the late Jamal Fayed who lived in Jenin, a city near Nablus.


⁹ Civil Appeal 1354/97 Akash v. The State of Israel, Dinim-Supreme Vol. 70, p. 252, (Dec 6 2004).

the State of Israel, claiming its right to be compensated and/or remunerated by this third party in a case the action by Corrie and the others against Caterpillar Inc. will be prevailed.

20. In the pending action of Corrie against the State of Israel, in the district court in Haifa, Israel, the State of Israel can be expected to produce evidence to support its version of the factual basis of the claim.

21. The law governing both the issue of liability and the issue of damages in the Corrie case is the Israeli law. It is definitely also the proper law of the tort as well as actually the *lex loci delicto*.

I declare under penalty of perjury under the Laws of the United States of America that the foregoing is true and correct.


Professor Daniel More

May 24 2005

Professor Daniel More

Tel -Aviv University
Law Faculty

Curriculum Vitae

Place and Date of Birth: Israel -November 2nd, 1944.

Marital Status: Married + 3 children.

Military Service: 1967-1971.

Education

1962-1967: LL.B. Studies, Law Faculty, Hebrew University of Jerusalem, Tel-Aviv Branch.

1969-1970: LL.M. Studies, Faculty of Law, Hebrew University (magna cum laude).

Title of Master's Thesis: "Products Liability".

Supervisors: Professor I. England and Professor A. Barak.

1972-1975: J.S.D. Studies, Faculty of Law, Yale Law School, New Haven, Conn. U.S.A.

Title of Doctoral Dissertation: " Liability in Intentional Private Nuisance in Environmental Pollution Cases".

Supervisors: Professor G. Calabresi, Professor W. M. Reisman and Professor J.W. Bishop.

Academic And Professional Experience

Teaching Experience

1968-1970: Teaching Assistant, Faculty of Law, Tel-Aviv University.

1971-1972: Assistant, Faculty of Law, Tel-Aviv University.

1975-1976: Teaching Associate with the rank of Lecturer, Faculty of Law, Tel-Aviv University.

1976-1980: Lecturer, Faculty of Law, Tel-Aviv University.
1980-1984: Senior Lecturer, Faculty of Law, Tel-Aviv University.
1985-1986: Visiting Professor, Temple Law School, Philadelphia Penn. U.S.A.
Since 1986: Senior Lecturer, Faculty of Law, Tel-Aviv University.
Since 1994: Associated Professor, Faculty of Law, Tel-Aviv University.

Professional Experience

1966-1967: Law Clerk of Judge Z. Zeltner, President of Tel-Aviv District Court.

1968-1970: Military Prosecutor, Judea and Samaria.

1970-1971: Assistant to the Legal Advisor of the Occupied Territories.

1977-1978: Member of a statutory committee appointed by the Minister of Justice to draft the New Version of the Education Ordinance.

1977-1981: Legal Advisor (voluntary) to two of the major consumer organizations in Israel.

1977-1979: Member of the Appeal Tribunal of the Israeli Chess Federation.

1978-1980: Member of two enquiry committees appointed by the Minister of Health.

1980-1982: Member of the "Helsinki Committee" of Tel-Aviv Medical Center.

1980-1982: Chief Editor "Tel Aviv University Studies In Law".

Since 1982: Editor, Civil Law Cases of Piskei Din-the official publication of the judgments of the Israeli Supreme Court.

Since 1982: Member of the editorial board of Pesakim, the official publication of selected judgments of the various District Courts.

Since 1983: Member of a legal committee appointed by the Minister of Justice, concerning compensation of road accident victims in Israel.

1986-1993: Chairman Disciplinary Tribunal (Students) in Tel-Aviv University.

1986-1990: Chairman Review Committee of the union of the academic staff in Tel-Aviv University.

Since 1988: As part of my reserve duty I have served as a Judge in the Israeli Defense Forces (now retired).

Since 1988: Member of a legal committee appointed by the Minister of Justice to draft the Computers Law.

Since 1988: Member of the Codification Committee headed by Justice Barak.

July 1988: Head of a law students' delegation, representing Tel-Aviv University, Law Faculty in combined seminars with European Jurists in three Max Planck Institutes.

July 1991: Co-heading (with Prof. Shapira) of a law students' delegation, representing Tel-Aviv University, Law Faculty in combined seminars with European Jurists in two Max Planck Institutes.

1993: Vice president Disciplinary Tribunal of Appeals (Students) in Tel-Aviv University.

1994-2002: President Disciplinary Tribunal of Appeals (Students) in Tel-Aviv University.

Since 1995: President Tribunal of Appeals The Israeli Chess Federation.

Active Participation In Scientific Meetings

1981: The Jerusalem International Symposium "Inflation And The Law (The Hebrew University and Tel-Aviv University with the collaboration of Paris University, Stasbourg University and Pennsylvania University).

1983: The Tuebingen Conference on Human Rights (The Tuebingen University the collaboration of the Hebrew University and Tel-Aviv University).

1987: International Conference on Comparative Constitutional Law (San Diego).

1988: International Conference on Products Liability (Tel-Aviv).

1991: International Conference on "Human Rights in Private Law" (Tel-Aviv).

1992: International Conference on Comparative Law (Tel-Aviv).

2001: International Conference Germany-Israel Multicultural Societies – Realities and Challenges (Tel-Aviv)

2001: International Conference The Law of Education (Tel Aviv)

2001: Lectures to Faculty in Northwestern Law School and Fordham Law School

2004: International Conference on Codification" (Haifa University).

2004: Conference on Codification (The Hebrew University in Jerusalem)

Academic And Professional Awards

1972-1975: J.S.D. Studies, fellowship, Yale Law School, U.S.A.

1986-1987: An Award, given by the Insurance Institute for the best paper in a competition of papers on Insurance Law.

Membership In Professional Societies

Since 1972: Member of the Israeli Bar Association.

Supervision of L.L.M and Ph.D. Students

1987-2004: Supervision of many LL.M and Ph.D. students. In the last five years, 10 of them received LL.M and JSD degree

Extra-Legal Activities

1961-1962: Youth Chess Champion of Israel.

1978-1985: Member of the Tel-Aviv Singers.

Publications

Publications in Hebrew

Articles

1. D. More

"Restrictive Trade Practices- A Civil Wrong?" (Hebrew)

23 **Hapraklit** 78-87 (1966).

2. D. More

"The Application of the Maxim 'Ex Turpi Causa Non Oritur Actio' in the Law of Torts" (Hebrew)

26 **Hapraklit**. 254-270 (1971).

3. D. More

"Products Liability"-Part 1" (Hebrew)

5 **Tel Aviv U. L. Rev.** 303-331 (1976).

4. D. More

"Products Liability"- Part 2" (Hebrew)

5 **Tel Aviv U. L. Rev.** 581-607 (1976).

5. D. More

"The Motor Vehicle Insurance Ordinance (Consolidated Version) 1970,
As Amended By The Road Accidents Victims Compensation Law 5735-1975"
(Hebrew) 31 **Hapraklit** 440-464 (1977)

6. D. More

"Products Liability- Policy Considerations" (Hebrew)
6 **Tel Aviv U. L. Rev.** 78-99 (1978).

7. D. More

"Compensation of Road Accident Victims For Non-Pecuniary Losses"
(Hebrew) 6 **Tel Aviv U. L. Rev.** 397-412 (1978).

8. D. More

"Assumption of Risk, Contributory Negligence and "Travelling with a Drunken
Driver" (Hebrew). 32 **Hapraklit** 16-26 (1978).

9. D. More

"Periodical Compensation of Road Accident Victims" (Hebrew)
6 **Tel Aviv U. L. Rev.** 643-663 (1979).

10. D. More

" The Products Liability Bill 1979" (Hebrew)
7 **Tel Aviv U. L. Rev.** 114-167 (1979)

11. D. More

"Who Will Compensate An Uninsured Driver Injured in a Road Accident?"
(Hebrew) 2 **Bar Ilan U. L. Rev.** 141-179 (1982)

12. D. More

"Old Age Pension, 'Theoretical' Pension and Dependents Torts' Action"
(Hebrew) 37 **Hapraklit** 434-458 (1985)

13. D. More

"Who Will Compensate the Dependents or an Unlicensed Driver Killed in Road Accidents?" (Hebrew)

12 **Tel Aviv U. L. Rev.** 345-391 (1987)

14. D. More

"The Civil Wrongs Ordinance Viewed from the Perspective of Forty Years of Case-Law" (Hebrew).39 **Hapraklit** 344-413 (1990)

15. D. More "The Etinger Decision- An Anatomy of a Controversial Case"

4 **Aley Mishpat** 101-149 (2005)

Accepted for Publication

D. More "The Draft of the New Codification- A Critical Analysis of Tort Law Reform" to be published in **Mishpatim** 2005

Chapters in Books

1. D. More

"Deterring Road Accidents" (Hebrew)

in **Lowenberg Book** pp. 257-293 (**Bursi** Tel Aviv 1987).

2. D. More

"Civil Procedure in 1990-1991" (Hebrew)

in **Sefer Shenath Hamishpath 1990-1991** pp. 271-338 (Dean Rozen-Zvi Editor).

3. D. More

"Civil Procedure in 1991-1992" (Hebrew)

in **Sefer Shenath Hamishpath 1991-1992** ("Dean. Rozen-Zvi Editor)

4. D. More

"A Negligent Opinion" in **"The Court- Fifty Years of Adjudication in Israel"**
1999(David Heshin Editor).

Publications in English

1. D. More

"Films and Theater Censorship in Israel". **Israel Yearbook On Human Rights** vol. 9
pp. 225-251 (1979).

2. D. More

"The Coase Thorem and the Reciprocal Nature of Land Use
Conflicts In Pollution Cases".
Tel Aviv U. Stud. In Law vol.4 pp. 86-114 (1978-9).

3. D. More

"Re-examining Strict Products Liability Goals and Justifications".
Tel Aviv U. Stud. In Law vol. 9 pp. 165-203 (1989).

4. D. More

"Informers, Defamation and Public Policy".
Geo. J. Inter.& Comper. L. vol. 19 pp.503-534 (1989)

5. D. More

"Human Rights From Tort Law Perspective"
1994-1995 **Tel-Aviv U. Stud. In Law**

6. D. More

"The Boundaries of Negligence" 4 **Theoretical Inquiries in Law** 339-365 (2003)

Chapters In Books

D. More

"Products Liability in Israel"
in **Products Liability An International Manual Of Practice**
(90 pages) (Oceana Publications Inc. London, Rome, New York 1987).

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