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CONTINUING TENSIONS IN THE RESOLUTION OF MASS TOXIC HARM CASES: A COMMENT

Robert L. Rabin†

I

About a decade ago, observers of the tort system began to comment critically on the special character of mass toxic harm cases.¹ Today, a revisionist backlash against the chorus of criticism may be in the offing. For example, in a commentary on Judge Jack Weinstein's essay on ethical dilemmas in mass tort controversies, Professor Linda Mullenix underscored her skepticism about the distinctive character of the mass toxic tort case, referring to it as a “garden variety tort.”² And in the present symposium, Professor John Siliciano expands on the notion that the questions of size and substance in mass tort cases are really nothing new to the tort system.³

Close observers of tort law might find something of an irony here. Until recently, despite a rising backlog of cases and steady growth of administrative costs, the judiciary evinced great reluctance to accept the invitation to adopt a “public law” vision in disposing of mass tort cases—a vision featuring some combination of class action treatment, insurance fund judgments, probabilistic causation, and other case management and remedial devices more closely akin to the design of an administrative compensation scheme.⁴ Now, just as the courts begin to venture forth, encouraging and facilitating class action settlements that rely on the full panoply of funding and damage scheduling techniques, skeptical voices can be heard raising the question of whether there is anything special about the character of mass torts after all.⁵

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⁵ For indications of the courts becoming more venturesome, see, for example, In re Silicone Gel Breast Implant Prods. Liab. Litig., Nos. CV92-P-10000-S, CV94-P-11558-S, MDL
And a fair question it is. At the threshold, before one considers the propriety of particular class action certifications and settlements, the ethics of class representation arrangements, and the fairness of innovative damage-scheduling schemes, another look at the tort system is warranted. It is critical to ensure that the traditional tort process—the mainstay of two centuries of common-law tort adjudication—is indeed institutionally flawed for meeting the demands that are being made upon it.

In my view, the case for the shortcomings of the traditional tort process remains very strong. In assessing its adequacy, it is a mistake to parse mass tort actions into segments that are then labelled "doctrine," "number of claims," "size of awards," and so forth. Concealedly, there is nothing particularly distinctive about the tort doctrine—negligence, failure to warn, design defect—that provides the legal theories on which the claims are founded. Nor are the size of the awards or the number of related claims necessarily singular: there are blockbuster awards, including punitive damages, in some motor vehicle defect cases.\(^6\) There are large groups of related cases, and huge total damage awards, in occasional nontoxics mass torts such as airline disasters.\(^7\) This is, however, really to miss the forest for the trees.

As I have argued elsewhere, mass toxic harm cases place singular strains on the traditional tort process because of the aggregate effect of a number of process-related characteristics.\(^8\) For present purposes, let us assume that tort law does a tolerably good job of identifying a responsible party and measuring the victim's damages in a classic two-party accident situation. Nonetheless, it is far less suited for scientific determinations of causation in long-latency illness and disease cases involving clinical, epidemiological, and statistical analysis. Moreover, tort law has always dealt uneasily with assessments of intangible harm; cancerphobia and related emotional distress claims in mass toxics cases compound these difficulties. These complexities are multiplied

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\(^6\) See, for example, the widely-noted Ford Pinto case, described in detail in Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 Rutgers L. Rev. 1013 (1991).

\(^7\) See, e.g., *Executive Summaries of the Aviation Accident Study* (RAND Institute for Civil Justice 1988) (summarizing four RAND studies of aviation accident litigation); Hensler & Peterson, *supra* note 5, at 970-77 (discussing a number of nontoxics mass accident cases, including the Beverly Hills Supper Club fire, the Hyatt Skywalk collapse, the MGM-Grand Hotel fire, and the DuPont Plaza Hotel fire).

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by thousands of such cases, each with a wide spectrum of exposures and diseases. The consequence is a very serious strain on a system designed essentially for resolving two-party interpersonal conflicts.

As a result, the courts have experienced gridlock, or judicial anxiety about gridlock, that can trigger problematic resort to expedient strategies for disposition of mass tort claims. The system has also generated enormous administrative costs, even by the standards of a normally costly process for disposing of accidental harm cases. And, there has been wide variance in the size of awards in like cases. All of these results are objectionable, by any standard of fairness.

Thus, it seems only natural that pressures would build within the judiciary, exacerbated by the critical commentary from tort scholars, either to develop a hybrid process or to abandon the tort system altogether in mass toxic harm cases. What has been the result?

Professor Peter Schuck offers an assessment of what we have learned over the past twenty-five years about dealing with the difficulties that mass toxic tort cases pose for the system. As he sees it, the most critical problem is uncertainty. This view is not without substance. Surely, both the causation dilemmas resulting from reliance on incomplete and complex scientific evidence, and the damage assessment difficulties posed by intangible or probabilistic harm generate great uncertainty. And the potentially huge, unascertainable number of claims in the early stages of most mass tort incidents only serves to exacerbate the problem.

With reduction of uncertainty as his criterion for progress, Schuck offers a guardedly optimistic portrayal of the "institutional evolution" of mass tort handling and disposition in recent years. His generally positive view of developments is based on a number of converging factors, among the most salient of which are:

1) plaintiffs' lawyers have become more sophisticated at techniques of aggregating and evaluating claims—and financing mass tort ventures;

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10 Hensler, supra note 9, at 1977.


12 See generally Siliciano, supra note 3.


14 Id. at 948-49.
2) defendants have developed institutional strategies for organizing collective responses and identifying key stakeholders on the opposing side; and

3) judges have become more responsive to innovative techniques for aggregating and disposing of large-volume, seemingly disparate claims.\(^\text{15}\)

These developments, evident in recent mass tort settlements such as the breast implant litigation\(^\text{16}\) and the Philadelphia asbestos agreement,\(^\text{17}\) appear to Schuck to suggest the dawning of a new era in which more efficient disposition and greater certainty of outcome will come to characterize the handling of future mass tort incidents. Because I have a different view of the central tension in these cases, I am less confident about these developments.

II

While I would not discount the importance of uncertainty as a pervasive influence on mass tort litigation, in my view the dominant tension in achieving a satisfying resolution of mass tort cases has been—and continues to be—a tension between our continuing impulse to do *individual justice* and a more modern compensation-driven conception of *collective justice*. To put the point in sharper focus, it may be useful to distance ourselves briefly from the world of asbestos and other mass torts.

Consider instead a scenario in which an earthquake of momentous proportions—8.5 on the Richter Scale—strikes at the height of the rush hour, devastating a metropolitan region. Thousands of lives are lost and an astronomical injury toll, along with staggering property damage, ensues. When a tragedy of such dimensions occurs, one in which no responsible party can be identified, how does the system respond? Or perhaps more importantly, how do we as a society expect the system to respond?

While psychological counselling centers might well be established, it seems unthinkable that the thousands of victims would be awarded "loss of community" or other traumatic reaction benefits on an individual basis.\(^\text{18}\) Similarly, it would be considered unreasonable to award loss of consortium or wrongful death damages to survivors

\(^\text{15}\) *Id.* at 954-58.


on an individual basis modelled on tort relief.\(^{19}\) Nor could the immediate victims harbor any expectation of present recovery based on physical consequences that might develop in the future.\(^{20}\)

Rather, a natural disaster of this sort is viewed as a collective tragedy, to be addressed by bureaucratic procedures that minimize special pleading, advocacy, and delay—not because we are indifferent to the individual human dramas, but because we realize that in a world of limited resources, when mass tragedy randomly strikes, society must of necessity recognize as its primary concern economic loss targeted at survival and rehabilitation.\(^{21}\)

To what extent should this collective model govern our approach to mass torts, where we can identify responsible parties? On this question, our legal system remains highly ambivalent. The traditional aspiration of the tort system to do individualized justice exerts a strong influence on our thinking. Indeed, so long as we recognize two discrete systems for processing toxic harm disputes—our common-law system for non-mass claimants and a collective, hybrid approach for mass claimants—a tension between the two perspectives is virtually inevitable.

As an initial consideration, the dual-system approach creates threshold boundary issues with at least two troublesome dimensions. First, there is an equity issue. Should the system, as a matter of fundamental fairness, afford a strikingly different remedy to a limited number of neighborhood toxic waste dump victims as contrasted to mass asbestos victims suffering from a similar life-endangering disease? An affirmative answer implicitly assigns a great deal of weight to numerosity as a justification for hybrid treatment, since the other features of mass toxic harm cases—scientific uncertainty, intangible harm, and such—are not distinctive in these two scenarios.

Second, there is an administrative feasibility issue. Is it possible to do a satisfying job of gatekeeping? To put it another way, can the system effectively identify the appropriate incidents in the spectrum of accidental harm cases for collective justice (hybrid) treatment? To be concrete, when, if ever, do repetitive stress syndrome claims become ripe for collective disposition? What about claims by those exposed to

\(^{19}\) For an illustrative judicial treatment of individualized relief claims from a toxic tort perspective within the judicial system, see Mauro v. Raymark Indus., Inc., 561 A.2d 257 (N.J. 1989).


\(^{21}\) Whether, in the real world, administrative systems effectively realize these goals is, of course, another question.
magnetic fields? To second-hand cigarette smoke? In making these
gatekeeping determinations, the stakes may be very high: Invoking
the hybrid approach may mean scheduling the damages of present
claimants and establishing the rights of future claimants by reference
to categorical determinations that are indifferent to particularized
claims of harm. The stakes are high, and the disparity is so evident,
precisely because of the tension between doing individual justice and
providing collective remedies.

Beyond boundary issues, the same tension between individual
and collective justice underlies a sense of unease about the emerging
characteristics of the hybrid system. The contentious debate over
Georgine v. Amchem Products, Inc.22 is illustrative.23 The immediate
question is whether the present clients of plaintiffs' class attorneys re-
ceived especially beneficial treatment to the detriment of a future
class of claimants—a particularly vivid instance of the clash between
individualized and collective justice perspectives on the issue of effec-
tive representation. But even if the Georgine settlement itself is ulti-
mately regarded as a sell-out of the future claimants, and prospective
measures are adopted to avoid collusive practices, the problem of
later-arising claims is a real one. Our unease about the lack of in-
formed consent by the future claimants is precisely because of a fair-
ness concern about individual treatment within the framework of a
collective dispute resolution agreement.

On that score, it remains an open question whether and to what
extent an exit mechanism—the opt out—can be incorporated into
the hybrid approach in a fashion that satisfies individual justice con-
cerns yet avoids undermining the collective justice remedial system.
Only case-by-case resolutions of mass tort controversies in the near
future will provide an answer.

Ironically, as the Georgine controversy illustrates, the increasing so-
phistication of the stakeholders—a positive attribute of institutional
evolution, as Schuck sees it—arguably exacerbates the tensions be-
tween individual and collective justice themes in resolving mass toxics
cases. Sophistication facilitates settlement. And settlement is, by defi-
nition, a cooperative activity—one that involves give and take on all
sides. If some sides are unrepresented, or relegated to compensation
under a different approach, then it becomes imperative to rethink
fundamental issues of institutional design.

23 See John C. Coffee, Jr., Summary, The Corruption of the Class Action: The New Technol-
eyogy of Collusion, 80 CORNELL L. REV. 851 (1995) [hereinafter Coffee, Summary]; Susan P.
Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 CORNELL L.
REV. 1045 (1995); John C. Coffee, Jr., The Corruption of the Class Action, WALL ST. J., Sept. 7,
While I have recently explored the issues involved in processing mass toxic harm controversies under an administrative compensation scheme, I have no intrinsic hostility towards accomplishing similar objectives through reliance on flexible, hybrid common-law processes. As it happens, many of the complex issues of institutional design that pose challenges to establishing a satisfying administrative compensation system raise corresponding problems in creating a hybrid tort scheme.

Consider, for example, the boundaries issue. Precisely the same need to define the compensable event that warrants removal of a mass toxics controversy from traditional tort treatment arises whether the replacement system is hybrid tort (in which case the issue is characterized as amenability to class action treatment) or a legislatively created compensation scheme (in which case the issue is one of status qualification). In fact, the boundaries issue can only be put to rest by adopting a comprehensive first-party social insurance scheme that completely replaces the tort system and recognizes no distinction between compensating for accident and illness. More generally, an individual justice-collective justice tension is endemic to the central trade off in any partial tort replacement scheme, because that trade off largely rests on a notion of fairness that substitutes achieving horizontal equity for attending to individualized loss.

The concern must be to avoid the polar positions that can easily be adopted as a reaction to the central tension I have been discussing. On the one hand, it is certainly possible to find a commonality between mass tort and traditional tort harms, if one simply focuses on the bipolar wrongdoer-victim-injury features of a generic "tort" case, to the exclusion of all the critical distinctions discussed earlier. This can lead, in turn, to advocating retention of a status quo that has been a failure on all important dimensions: fair compensation, effective deterrence, and reasonable administrative costs. On the other hand, a clear perception of the disastrous consequences of adhering to the status quo can lead to a quick-disposition-at-all-costs mentality that invites expedient settlements with serious discrimination against sub-classes of stakeholders.

There is a middle-ground, along the lines proposed by Professors Roger Cramton and John Coffee in their contributions to this symposium, that would focus on three salient elements of institutional de-
sign as safeguards to individual rights within a collective system: 1) the opt-out (including back-end opt-outs under some circumstances); 2) the structure of representation of the plaintiff class; and 3) the nature of judicial supervision of the litigation (in particular, any settlement agreement). More effective institutional design along these lines provides no pat answer to the dilemmas of mass toxics litigation. But it is essential that such measures be adopted if the tort system is to address effectively the barrage of justifiable criticism of the manner in which mass tort cases continue to be resolved. Meanwhile, we remain at midstream in troubled waters.