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Introduction to Who's Who in Mass Toxic Torts

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AN INTRODUCTION TO WHO'S WHO IN MASS TOXIC TORTS*

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It was very generous of the *Cornell Law Review* and Professor Cramton to keep the leaves pasted on the trees so they would be here for this conference. Looking out the windows, at this beautiful setting, it's hard to imagine that all isn't right with the world. But, as those of us who study mass torts know, nature isn't always quite so kind.

ASBESTOS, AGENT ORANGE, DES

A good deal of the discussion in the papers that follow is about asbestos, a naturally occurring substance that has presented some of the most perplexing legal, social, and medical problems of our time. Four thousand years ago, members of some societies in Southeast Asia were buried under sheets of asbestos. Now millions of our citizens are buried with asbestos in their lungs—not as a sign of filial respect, but as a result of greed and incompetence. We should compensate the victims before they are laid to rest.

It was known more than fifty years ago that asbestos was dangerous and that workers who came into contact with it needed protection. The first cases to come to my attention, more than a decade ago, had their genesis in the Brooklyn Navy Yard. There, workers, most of them younger than the law students gathered in this room, built the huge aircraft carriers and battleships that helped win World War II. They labored in heavy asbestos dust without ventilation or masks.

The government was aware of the dangers. But nothing was done for the asbestos workers since there were more immediate concerns. A doctor testified before me that when he came to the Navy Yard he noticed that the workers were refusing to paint the underside of a major battleship with a highly toxic anti-fouling compound that had made many of them sick. Within a few days he designed a new face mask and the problem was largely solved. By contrast, he also observed fabricators working in heavy asbestos dust and he knew the prognosis. But because they would not become ill for many years, the navy did nothing to protect them.

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* Authority for statements in the text can be found in JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995).

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Forty years later many of these people were dying of mesothelioma. We were trying their cases in federal court in Brooklyn. I remember the testimony of one young woman of about twenty-four who had gone through a difficult divorce. She testified that if her father, who had died a sudden, painful death, had been alive, "he would have saved my marriage." Perhaps he would have; asbestos affects real people, sometimes for generations, and in ways we cannot always predict.

Agent Orange presented similar problems. People were deeply affected—perhaps physically and certainly psychologically—by exposure to the chemical used in Vietnam to clear foliage so that our troops would not be so easily ambushed. Many of the veterans in the Agent Orange case chose not to marry, and when they did marry they chose not to have children, because they were concerned that their children would be afflicted. The medical evidence did not justify these fears. But it is fear, as much as medical evidence, that brings plaintiffs into court; we must deal with perceptions as well as facts.

When I spoke in chambers to the women suffering because their mothers had taken DES, it was apparent that they wanted more than money. They needed a catharsis, as well as commitments to further research and guarantees of health insurance for their families—indications that society cared about their plight.

Helping People

Our courts and our legal structure exist to help these people, as well as to apportion loss among defendants, and to do it at a cost that does not destroy industries. Let us, during these next few days, keep in mind some of the many people who are suffering, and will suffer in the future, from mass toxic torts.

In the *Manville* asbestos cases,[1] there have been 200,000 claims to date. I appointed a panel, pursuant to Rule 706 of the Federal Rules of Evidence, to project the number of future claims through the middle of the next century. The panel's estimates ranged from a median of 53,000 additional cancer-related cases to a high of 209,000 cancer-related cases. Other, less serious cases will surely number in the hundreds of thousands. But these are projections within a wide margin of error. It is difficult to see into the future with precision.

The one thing I can predict, however, is that the cast of characters in the mass torts arena will continue to grow in number, in creativity, and in tenacity. Thus, I think it may be useful to touch just for a moment on these various players.

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[1] *See* In re Joint Eastern & Southern Districts Asbestos Litig. (Findley v. Falise), 129 B.R. 710 (E. & S.D.N.Y. 1991), *vacated and remanded*, 982 F.2d 721 (2d Cir. 1992), *on remand*, 878 F. Supp. 473 (E. & S.D.N.Y. 1995).

THE PLAINTIFFS

First, are, as I have already indicated, those claiming injury. They must be, in my opinion, the focus of our concern. They are our customers in the law business.

THE DEFENDANTS

Second, are the defendants. Some defendants put off problems until tomorrow, knowing that they have not adequately tested products and processes or that they have failed to properly warn. Some heads of companies are happy to avoid facing up to these realities. They want their bonuses today. That attitude, however, is beginning to change. Potential defendants are realizing more and more frequently that they have a special obligation—and will save money in the long run—if they settle these cases relatively quickly, and provide for the people who are hurt, or think they are hurt, when compensation is most needed. We are seeing more and more early settlements like those in the breast implant and heart valve cases. But such settlements themselves present unique legal, economic, and ethical problems.

THE LAWYERS

Third, are the lawyers. It is essential that we differentiate among the wide variety of plaintiffs' lawyers. Some of them operate boutiques, taking only those cases most likely to succeed. Others sweep up cases by the thousands, some good, some mediocre, and some without any merit at all. Generally, the mass tort lawyers are well organized, well financed, provided with adequate expert resources, and efficiently supplied with current information from all over the country. Without them, plaintiffs could not recover. (We need, however, to differentiate between the path breakers, who bring the first cases, and those who enter later.) The capital and skills in organization, advertising, and public relations of the plaintiffs' bar are impressive. Modern mass tort litigation has little in common with the kind of Lincolnesque model of one attorney representing one client.

The ethical problems facing mass tort lawyers are daunting. There are conflicts among clients. Some are very seriously injured; others are not. Which is the case the lawyers will want to, or should, push? There are conflicts between present claimants and future claimants. There are conflicts with respect to fees. A basic 33 1/3 percent contingency fee (which may be perfectly appropriate where there is one client) in the mass tort context can result in unjustifiably high earnings. There are problems of global settlements and how the pie should be divided among many individual clients.

Among the defendants' attorneys we have had, and still have, those who add to expenses through delay and who build up unnecessary deposition and other costs. That problem is in the process of being addressed, mainly for economic reasons, as the big corporations begin to control their attorneys' fees, and consequently, their attorneys. These attorneys too are among the best in the country. There are still, however, instances in which attorneys for both sides cooperate for their personal benefit, making it harder for other injured people to know they have been injured and have a right to seek compensation.

There are also problems created by extensive use of special masters and court-appointed class representatives. In *Manville*, I appointed a representative to engage in settlement negotiations for the hundreds of thousands of future claimants. I have used special masters in other complex cases.

THE COURTS

Fourth, are the judges. The courts have a variety of tools available to them to deal with mass torts. It was a series of equitable devices incorporated into the Federal Rules of Civil Procedure that created the modern class action. In the dispute between law and equity, equity won. Thus, federal judges have not only the chancellor's procedural powers, but, under *Erie*, the chancellor's substantive powers to shape new remedies. To justify approval of a settlement modifying the *Manville* trust, I traced the substantive law of trusts back to medieval times.

On the airplane coming up, Judge William Schwarzer and I discussed the issue of whether there is a common-law class action. I think not. That possibility has probably been blocked by the Federal Rules. Rule 23, however, is itself so flexible and there are so many other devices and powers available that a trial judge can deal with most procedural problems in mass torts effectively. Mass consolidations, for example, may take place outside Rule 23. In my view, the court can replace an attorney and limit fees not only in class actions, but also in consolidations; there is no clear distinction between these procedural devices. Bankruptcy jurisdiction can be invoked as well. Section 111 of the 1994 Bankruptcy Reform Act provides for injunctions against future lawsuits. Thus, a bankruptcy proceeding can provide the same relief to future claimants as can a class action.

What the courts should be doing, how they should act in these cases, and how they should cooperate present very difficult problems. I hope in the future more academics will come into the field to see how we are operating.

THE SCIENTISTS

Fifth, are the scientists. There are scientists who do the groundwork that gives us the information we need in the courts. There are scientists in the administrative agencies who should be protecting the public from danger. There are scientists who testify.

Science did not fail us in asbestos. It was the medical, engineering, economic, and legal institutions that got us into trouble with asbestos. We are taking small steps, in and out of court, to improve protection of the public. How we get the scientific community to give us timely information that is useful presents a difficult problem.

THE LEGISLATORS

Sixth, are the legislators. Some of them know they should be doing something. Many of them are beholden to some defendants' and plaintiffs' groups, and their lawyers, who help finance campaigns. That situation often leads to stasis at the state and federal levels. If the legislature does reduce the power of the tort law to protect the public, it would be absurd to at the same time decrease the effectiveness of the administrative agencies needed to defend society against unnecessary dangers.

THE PUBLIC

Seventh, is the public which creates a problem for us because it overestimates what we can do. We simply cannot accomplish much of what the public believes possible. Our procedural devices are limited. So is our understanding; we do not know enough about how these problems should be handled. We do not know enough about safety. We do not know how risks should be assessed. We do not know when to encourage or discourage risk-taking in order to promote better and safer products.

The public is entitled to less gobbledegook from the legal community. The people who are members, or potential members, of a class need to be told, in a way that makes sense to them, what their options are. We need to communicate more actively and more clearly.

THE MEDIA

Eighth, is a vital player, the media. It explains to the general public and potential claimants the significance of what is happening in the courts. It often simplifies into a form comprehensible by the lay person the excessively complicated legal documents utilized in settlements.

The media has its downside. Less responsible elements seeking to maximize public exposure may sensationalize aspects of a mass tort disaster and feed public hysteria. Effective problem solving is much more difficult in an atmosphere of fear than in one of informed, rationale concern.

THE ACADEMICIANS

Ninth, and last, are the academicians. They fall into three categories. First are the professors and students who provide the intellectual foundations for our future legal undertakings. It is their criticisms and their theories that we rely on in court. They also send us the clerks and the lawyers who guide us in the use of new ideas.

I was once an academician myself. So when, as a judge, I have a problem, I sometimes look inward for a solution. That is an easy way to make a mistake. But the law reviews and the appellate courts can correct these errors.

There is a second group of academicians, those available for hire by both sides. They are essentially litigators. Their academic garb enhances their prestige.

The third group of academicians is the ethicists. They may sell their services, in which case they are litigators, or they may be truly independent, giving general advice that we need to consider carefully. They are our conscience, in a realm where conscience is often our best guide.

That is the cast of characters, the *dramatis personae* for this public performance we call mass torts litigation. Keep it in mind as the drama unfolds.