

Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano

Francis E. McGovern

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 *Cornell L. Rev.* 1022 (1995)
Available at: <http://scholarship.law.cornell.edu/clr/vol80/iss4/11>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in *Cornell Law Review* by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

LOOKING TO THE FUTURE OF MASS TORTS: A COMMENT ON SCHUCK AND SILICIANO

Francis E. McGovern†

Both Peter Schuck and John Siliciano suggest that the commonly perceived "crisis" in mass torts mischaracterizes reality. Their respective analyses quite correctly reflect the amazingly adaptive and recuperative powers of the common-law tort system. This commentary on the articles presented by Professors Schuck and Siliciano, rather than critiquing their formidable arguments, builds on their papers and focuses on various prospects for future adaption and recuperation in the world of mass torts. Will mass torts continue to inhabit the existing legal framework but in a mutated form, and, if so, what form? Will the existing system be replaced altogether? Or, will we have a combination of the above as multiple forces push for change and confront a perpetually malleable tort system?

PROFESSOR SILICIANO

John Siliciano suggests that the problems raised by mass torts fall into two categories: (1) problems that would exist under any compensation system or (2) problems common to all torts.¹ A fundamental issue facing us, he correctly asserts, is not just a crisis in the tort system but a failure to "focus on whether we wish to retain the [tort] system at all."²

Professor Siliciano's observation prompts me to pose another fundamental inquiry: If mass torts are nothing more than torts on a mass scale, why aren't more torts like mass torts? If there are no "tort-like" differences between torts and mass torts, why aren't all torts brought *en masse*? Moreover, why is a plaintiff with a possible mass torts claim more likely to file suit than a plaintiff with a potential individual tort claim? There is reasonably reliable data that garden-variety tort filings by injured plaintiffs represent between ten and twenty percent of the actionable tort cases that could be pursued in the litigation

† Francis H. Hare Professor of Torts, The University of Alabama School of Law. Many thanks go to Peter Morgan, Steve Snyder, Patty Lovelady Nelson, Penny Gibson, and Luke Richbourg for their assistance in the preparation of this Article.

¹ See John Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 991 (1995).

² *Id.* at 1009.

system.³ Studies of randomly selected medical files by neutral physicians reveal that for every 100 files that contain evidence of medical malpractice, only ten resorted to the tort system.⁴ Other studies suggest that .3% of all persons who are injured file a tort action.⁵

Although the reasons for this underreporting and underfiling of tort claims are quite complex, they include several factors that appear to be intuitively correct. When injuries are private, such as a fall in a bathroom, as opposed to public, such as an automobile accident on a busy roadway, there is less likelihood of a law suit being filed.⁶ Potential claimants who view themselves as less likely to be received warmly by the litigation process—minorities and women, for example—are less likely to file suit.⁷ Those who tend to ascribe causation of harms to natural forces or to themselves, or those who are not eager to invest in obtaining the information necessary to substantiate a claim, are also less prone to litigate.⁸ In addition, there is a host of social and behavioral barriers as well as substantial information costs that impede access to the tort system.⁹

The opposite phenomenon seems to occur, however, in mature mass torts;¹⁰ it is quite likely that in excess of 100% of the genuinely actionable claims are pursued. In the Dalkon Shield litigation, for example, by the time the A.H. Robins Company filed for bankruptcy in August of 1985, nearly 10,000 cases had been resolved by trial or set-

³ For a comprehensive analysis of the data on claiming behavior, see DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 109-39* (1991). Other frequently cited studies of claiming rates include ALFRED F. CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964); PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY* (1985); DONALD HARRIS ET AL., *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* (1984); HARVARD MEDICAL PRACTICE STUDY, *PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK* (1990); ROGER B. HUNTING & GLORIA S. NEUWIRTH, *WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS* (1962); ELIZABETH SPRINKEL, *ATTORNEY INVOLVEMENT IN AUTO INJURY CLAIMS* (1988); UNITED STATES DEPARTMENT OF TRANSPORTATION, *COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOWUP REPORT ON NO-FAULT INSURANCE EXPERIENCES* (1985); Richard Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC. REV.* 525 (1980-81).

⁴ See sources cited *supra* note 3.

⁵ See sources cited *supra* note 3.

⁶ See sources cited *supra* note 3, in particular the discussions in HENSLER ET AL. and HARRIS ET AL.

⁷ See sources cited *supra* note 3.

⁸ See sources cited *supra* note 3.

⁹ See sources cited *supra* note 3.

¹⁰ Mass tort litigation has matured "where there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted." Francis E. McGovern, *Resolving Mature Mass Torts*, 69 *B.U. L. REV.* 659, 659 (1989).

tlement, and approximately 6,000 cases were pending.¹¹ Thus the tort system had captured roughly 15,000 cases during the fifteen plus year history of the litigation. When the bankruptcy court approved a deadline for filing any additional cases against A.H. Robins over 300,000 claims were received.¹² Approximately 100,000 claims were dismissed for failure to comply with procedural guidelines or because of a lack of continued interest in the litigation, and almost 85,000 claims were settled for approximately \$725 apiece.¹³ One could argue that these data suggest that a maximum of 115,000 claims were of tort-litigation calibre. This argument suggests that the tort system found less than fifteen percent of the actionable torts, but when Dalkon Shield became a mass tort, more than 200% of those claims were made. The phenomenon of unmeritorious claims is exacerbated by the generally accepted belief that there are significant numbers of false positive cases currently filed in "normal" torts. In the same study of medical malpractice referenced above, the researchers found that only seventeen percent of the plaintiffs who actually entered the tort system had valid claims.¹⁴

The Dalkon Shield litigation is not unique in this regard. In the Hyatt Skywalk cases, more people filed claims than there were people who could have possibly been in virtually every hotel in Kansas City.¹⁵ The number of asbestos claims, including massive false-positive filings, is likewise legion.¹⁶ In any number of toxic soup cases, there will often be modest initial filings followed by substantial overreporting.¹⁷

Many of the behavioral, social, and economic impediments to accessing the tort system are alleviated in the context of mass torts. When the tort becomes public, plaintiffs become more fungible, which reduces the importance of demographics. Personal responsibility shifts to defendant responsibility, and information becomes more available. The trend then leads to overclaiming rather than underclaiming.

¹¹ McGovern, *supra* note 10, at 676; see also RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALCON SHIELD BANKRUPTCY* (1991).

¹² McGovern, *supra* note 10, at 677.

¹³ Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617, 633 (1992).

¹⁴ See sources cited *supra* note 3.

¹⁵ See Symposium, *A Case Study in Mass Disaster Litigation*, 52 *UMKC L. REV.* 151 (1984).

¹⁶ Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *BROOK. L. REV.* 961 (1993); Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 *TEX. L. REV.* 1115 (1995).

¹⁷ Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 *LAW & CONTEMP. PROBS.* 61 (1990).

Will this trend of overclaiming become infectious as more mass torts are discovered and the rate of claiming for all torts increases such that more torts will become "mass"? Will we, as a society, appreciate the unappreciated secret of the tort system—underutilization rather than overutilization—which could drive the tort system into an era of unmanageability by overuse? Will the tort system succeed in capturing all compensable harms and then fall of its own tort-induced weight?

PROFESSOR SCHUCK

Peter Schuck, while pursuing his elegant thesis of "institutional evolution," provides us with the seeds of answers to these inquiries.¹⁸ Professor Schuck observes that many of the "problems" with mass torts raised by commentators are dated, that is, directed at a mass tort world that no longer exists.¹⁹ Such a lag between analysis and reality is not unique to mass torts.²⁰ He suggests that there has been significant "incremental system building" involving lawyers, loss and risk spreading, and judicial management, and that claim values and global settlements have moderated and mediated excesses in mass tort litigation.²¹ The common-law process, he argues, has developed methodologies for handling mass torts that may, from a public policy perspective, be superior to other governing processes.²² Finally, he suggests that this "natural" selection among institutional designs has created an admittedly eclectic but functioning system that compares favorably to the alternatives of collective claims processing, a market in tort claims and administrative compensation.²³ Reminiscent of Calabresi's *Torts: The Law of the Mixed Society*,²⁴ Professor Schuck presents the notion that critical commentary on mass torts has become outdated by an often messy and inelegant, but politically acceptable, process for coping with mass torts.

To return to our inquiry of whether all torts will be brought *en masse* and create potentially unsupportable pressures on the tort system, Professor Schuck's institutional evolution thesis can be pushed to provide some insight. He is purposefully conservative in describing at least two areas of institutional change: (1) the plaintiffs' bar²⁵ and (2)

¹⁸ See Peter A. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941 (1995).

¹⁹ *Id.* at 942-44.

²⁰ *Id.*

²¹ *Id.* at 950-51.

²² *Id.* at 974-75.

²³ *Id.* at 980, 988-89.

²⁴ Guido Calabresi, *Torts: The Law of the Mixed Society*, 56 TEX. L. REV. 519 (1978).

²⁵ See Schuck, *supra* note 18, at 951-53, 955-56.

the judiciary.²⁶ There is great support for the notion that an innovative segment of the plaintiffs' bar has developed a new generation of law firms that are evolving into investment engines for mass torts. Asbestos, Dalkon Shield, and other mass torts have provided the funding, the incentive and, arguably, the necessity for the creation of institutional structures unknown in the traditional plaintiffs' bar. Large plaintiffs' firms, national plaintiffs' firms, extensive cooperation and networking, and investment pools for risk and profit sharing are quite new, at least in the tort world. Borrowed from the securities and antitrust bars and fed by an enormous pool of plaintiffs with compensable harms and by huge returns on investment, there is currently a virtual stampede of plaintiffs' lawyers into this "mass" world.

It seems inevitable that, once created, these "mass" institutions will demand to be used. The traditional filtering function of plaintiffs' lawyers—selecting only those cases for the tort system that will individually justify punishment—has evaporated. Why try 2,000 cases when 8,500 cases can just as easily be resolved?²⁷ The incentive has changed; the more the better. "Massness" is good, not bad. The future is in Albuterol, Norplant, RSI, tobacco, and Persian Gulf chemicals.²⁸

At the same time, as Professor Schuck notes, there has been an equally notable evolution in judicial attitudes toward accommodating mass torts.²⁹ At the state level, a committee of the Conference of Chief Justices—the Mass Tort Litigation Committee (MTLC)—has been created to promote information sharing among state trial judges confronting mass torts. MTLC meets several times a year and invites academics, lawyers, federal judges, and other judges to join in their discussions. There appears to be an eagerness on the part of some judges to create new methodologies of judicial management to facilitate access to the courts. If it is possible to resolve large numbers of cases, so the argument goes, it must be possible to resolve huge numbers of cases. Again, why try 2,000 cases when 8,500 cases can just as easily be resolved?³⁰ Waiving filing fees, providing forums that are

²⁶ *Id.* at 956-58.

²⁷ Consolidation file No. 89-236704, *In re* Baltimore City Personal Injury and Wrongful Death Asbestos Cases, (Cir. Ct. Baltimore City, Apr. 24, 1990) (order granting consolidation); Julie G. Shoop, *Massive Asbestos Trial Opens in Baltimore*, TRIAL, May 1992, at 98; see also Md. R. Civ. P. (eff. July 1, 1990).

²⁸ Milo Geyelin & Tom Knudson, *Law Firm's Ads Pursue Users of Recalled Drug*, WALL ST. J., Feb. 3, 1994, at B1; Julie Brienza, *Norplant Suits Multiplying*, TRIAL, Oct. 1994, at 17; John R. Engen, *Apple, IBM and RSI Go to Court*, S.F. EXAMINER, Jan. 22, 1995, at C5; Glenn Collins, *Judge Allows Big Suit On Tobacco Industry*, N.Y. TIMES, Feb. 18, 1995, at A1; Coleman v. Alcolac, Inc., Civ. A. No. G-94-415 (S.D. Tex. June 6, 1995) (order on motion to dismiss) (class action of veterans of the Persian Gulf War).

²⁹ See Schuck, *supra* note 18, at 947, 956-58.

³⁰ See *supra* note 27 and accompanying text.

conveniens, creating pretrial consolidation to reduce discovery costs, and using class action or common issue trials to reduce litigation expenses are but a few of the techniques that some courts have used to increase case resolutions.³¹

This confluence of lawyer institutions to generate cases and of judicial institutions to resolve cases has altered the historic barriers to entry into the tort system.³² No longer, if this trend continues, will there be few mass torts and ten to twenty percent filing rates. Instead, every tort could be a mass tort.

LOOKING TO THE FUTURE

Is this trend toward increased filings of both meritorious claims and unmeritorious claims good or bad? Normative judgments will probably be in the eyes of the beholder. The more neutral issue for the tort process observer is what a progressive and substantial increase in the volume of tort cases will do to the overall system. To follow Professor Schuck's critique of the critics, what will this mean for the future? Will these institutional engines generate so much speed that they run off the tort tracks? Will we move to alternative processes to resolve cases? Will we retrench in a *déjà vu* movement, or will we continue to muddle through? Will the continued transmogrification of the tort system be ephemeral or perpetual? Functioning crystal balls being in scarce supply, perhaps several visions or dreams or nightmares are in order.

Rapid Evolution: The United Nations Compensation Commission

One vision of the future suggests that we will continue to push the envelope of new procedures, not at warp speed, but certainly into new dimensions. This vision can be illustrated by the United Nations Compensation Commission (UNCC). Its task has been to resolve some 2.5 million claims totaling \$160 billion with a staff of less than 100 over a period of three to five years.

The UNCC was created by the United Nations Security Council in 1991 to resolve claims for reparation arising from the Iraq-Kuwait con-

³¹ 28 U.S.C. § 1914 (1988); *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986); *In re Complex Asbestos Litig.* (Cal. Sup. Ct., City and County of San Francisco June 21, 1985) (General Order No. 29 Re: New Filings); *Alfaro v. Dow Chem.*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991); *Turley v. Owens Corning Fiberglas Corp. et al.*, No. 84-C-3321 (Cir. Ct. of Kanawla County, W. Va. Feb. 17, 1989).

³² Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995).

flict in 1990.³³ The UNCC consists of a Secretariat led by an Executive Director with policy guidance provided by a Governing Council.³⁴ The Governing Council, upon the Secretariat's recommendation, appoints separate commissioners to decide the validity of claims filed by nations either on their own behalf or on behalf of their citizens. The UNCC is neither a classic reparations program, such as those negotiated after World War II, nor a classic international arbitration program, such as the Iran-U.S. Claims Tribunal. Under the traditional reparations model, a fixed amount of money is placed in a closed-end fund that is administered and allocated by the recipient nation. Under the UNCC system the amount of money to be allocated to reparations is open-ended and administered by an international entity. Under traditional arbitration the amount of money to be allocated is not typically restricted and the affected parties participate in allocation decisions. In the UNCC there is a less significant role for the payor nation, thereby the payor nation has limiting adversariness in the determination of monies available for distribution. The UNCC model is, then, an open-ended fund financed by Iraq and administered inquisitorially by an international body.³⁵

Building on international innovations in mass tort resolution, the UNCC has adopted a series of alternative methodologies for filing and resolving claims. The concept is like the approach contained in the *Manual for Complex Litigation*.³⁶ The *Manual* gives judges a menu of options for managing complex litigation and allows them to tailor procedures for each case rather than forcing judges to follow a single, predetermined process.

The UNCC has provided different procedures and processes for different types of claims. It allows claimants to select the type of claim they wish to file rather than mandating a single procedure selected by the claims facility.³⁷ Thus a person who does not wish to provide extensive proof or to undergo a lengthy decisionmaking process may select a payment option that is more rapid, albeit with less compensation, and based upon less scrutiny. People desiring higher awards, on the other hand, can choose a payment option that requires greater proof and more extensive review but may result in a larger payment. The common thread among the UNCC options is found in a hierar-

³³ THE UNITED NATIONS COMPENSATION COMMISSION: THIRTEENTH SOKOL COLLOQUIUM (Richard B. Lillich ed., 1995) [hereinafter THE UNITED NATIONS COMPENSATION COMMISSION].

³⁴ *Id.*

³⁵ *Id.*

³⁶ MANUAL FOR COMPLEX LITIGATION (Second) (1985).

³⁷ UNITED NATIONS COMPENSATION COMMISSION, PROVISIONAL RULES FOR CLAIMS PROCEDURE (1992) [hereinafter PROVISIONAL RULES FOR CLAIMS PROCEDURE].

chy of value placed upon information: the more proof a person can provide, the greater the compensation that person may receive.³⁸

Focusing on Professor Siliciano's fundamental concern regarding what compensation system is most appropriate for mass torts, the UNCC has made explicit trade-offs in the classic allocation dilemma: time, expense, or quality—pick any two. The Governing Council and Secretariat have decided to err on the side of timeliness in processing smaller claims, seeking to resolve these claims as rapidly as possible consistent with acceptable accuracy. Larger claims, however, are to be handled more traditionally with a corresponding increase in time and cost. The UNCC has divided the claims into six categories: "A," "B," and "C"—claims that call for expedited resolution based upon limited information—and "D," "E," and "F"—claims that are to be handled more traditionally.³⁹

The "A" claim forms request only a limited amount of information and are for people who departed Iraq or Kuwait during the conflict.⁴⁰ No information is requested beyond the claim form itself, and countries actually submit the "A" claims in a computerized format to facilitate processing. The amount of money that can be awarded for each claim varies from \$2,500 to \$8,000, but there is no aggregate limit on the total value of all "A" claims. Approximately 900,000 "A" claims have been filed.⁴¹

The theory behind the "A" claims is that large numbers of people deserve to receive relatively small sums of money for having been subjected to the trauma associated with their dislocation. The general approach is for rough justice in the processing of "A" claims with low levels of proof required and generous criteria for recovery established by the Governing Council and applied by the commissioners. The methodology the UNCC has adopted for resolving the "A" claims is a rules-based decision-tree model with database verification from multiple sources.⁴² The commissioners have made a number of generic decisions which can be applied to large numbers of claims via a series of inquiries or rules devised to filter claims. If a claim meets the criteria established by the rules, an award will be made. Claims that do not satisfy the first series of inquiries go on to a second series of inquiries

³⁸ EJAN MACKAAY, *ECONOMICS OF INFORMATION AND LAW* (1982).

³⁹ The data concerning the status of UNCC claims and procedures can be found in the various reports made in accordance with Article 16, *PROVISIONAL RULES FOR CLAIMS PROCEDURE*, *supra* note 37, Decision No. 10, as adopted by decision of the Governing Council of the United Nations Compensation Commission taken at the 27th meeting, June 26, 1992.

⁴⁰ United Nations Compensation Commission, Individual Claim Form, Form A.

⁴¹ Francis E. McGovern, *The Intellectual Heritage of Claims Processing at the United Nations Compensation Commission*, in *THE UNITED NATIONS COMPENSATION COMMISSION*, *supra* note 33, at 187.

⁴² *Id.*

to determine eligibility. After a claim has gone through all the branches of the "A" claim decision tree, it is possible to filter out claims that do not qualify. In addition, the commissioners use various sampling techniques to apply the decisions in claims that have been individually examined to those that have not.

The second option is the "B" claims program for claims involving serious personal injury or death.⁴³ Only 5,348 "B" claims have been filed.⁴⁴ Although the total value of "B" claims is open ended, payment to any single claimant is limited to between \$2,500 and \$10,000, and the transaction costs and the time allotted for processing claims has been reduced. The information each claimant must provide is limited, although supplemental material may be provided. In formulating this approach, the Governing Council assumed that there was responsibility for personal injury or death to noncombatants caused by the conflict and established a rigid payment scale. It did not, however, assume causation in every case and left the task of determining a causal relationship between the conflict and the harm in each case to the "B" commissioners. Like the "A" claims, the decisionmaking process for "B" claims is inquisitorial, although the proof level is somewhat higher for "B" claims than for "A" claims.

Decisionmaking in the "B" claims more closely resembles case matching.⁴⁵ The Secretariat has taken the claims and organized them by outcome-determinative issue, creating large groups of cases. The Secretariat has then presented the issues to the commissioners for resolution not in the abstract, as with "A" claims, but in the context of an actual claim or claims. Once a "test" case is resolved, the Secretariat matches its holding to similar unresolved cases. The commissioners are then given groups of like claims to determine whether the outcomes are consistent and individually correct. The luxury of this individual case examination is possible in "B" claims because of their relatively small number. The Secretariat and commissioners have selected more traditional decisionmaking approaches when time and resources permit.

The third option, "C" claims, are quite different. Up to \$100,000 can be awarded and claims can recover damages for departure, personal injury, death, personal property loss, lost securities, lost income, real property damage, and individual business losses.⁴⁶ Over 1,600,000 "C" claims have been filed.⁴⁷ The total amount of money that can be awarded for all "C" claims is open ended as is the amount

⁴³ United Nations Compensation Commission, Individual Claim Form, Form B.

⁴⁴ See *supra* note 39.

⁴⁵ See McGovern, *supra* note 41.

⁴⁶ United Nations Compensation Commission, Individual Claim Form, Form C.

⁴⁷ See *supra* note 39.

of information that can be provided to support a "C" claim. Because the error costs are higher than in "A" and "B" claims, more complex scrutiny is given to "C" claims. Again, the Governing Council assumed liability but left issues of causation and damage amount to be determined by the "C" commissioners.

Also, unlike the "A" and "B" claims, the types of supporting documentation provided for "C" claims vary considerably. It is not unusual to find absolutely no documentation to support some claims, while unsubstantiated lists of information, incomplete third-party documents, or fully complete third-party proof may be provided to support others. One would certainly expect that the circumstances of departure might overtake the demands of gathering documentary evidence of loss. Yet, the commissioners have an obligation to dispense funds based upon a reasoned process, not to act as a relief agency.

The "C" claims are the most complex of the three categories of rapidly processed claims: their number is daunting, their variations are extreme; and the stakes are high.⁴⁸ As might be expected, the Secretariat has approached these claims with a significant degree of flexibility, and the commissioners have been quite innovative in devising various decisionmaking methodologies. The departure claims, for example, have been handled consistent with the "A" claims using a computerized decision-tree model. The personal injury and death claims, at least in the first installment, have been decided using case matching as with the "B" claims. The personal property and lost income sections have been resolved with a combination of rule-based decisions, regression analysis, and independent verification. Real property and individual business losses have been decided almost on a case-by-case basis with some case matching to ensure consistency.

The most interesting and compelling use of innovative claims-handling processes will occur when the Secretariat and commissioners move from the first installment of 2,848 claims to subsequent and much larger installments. If all the "C" claims are to be decided in a timely fashion without an enormous increase in staff and commissioners, use of random and representative samples, common-issue extrapolation, statistical analysis (including regression modeling), and perhaps even expert systems must increase.⁴⁹

"D" claims are identical to the "C" claims except that there is no cap on the amount of individual awards.⁵⁰ Because priority has been given to "A," "B," and "C" claims, there has been little analysis of the 8,288 "D" claims filed thus far.⁵¹ However, there will likely be substan-

⁴⁸ See McGovern, *supra* note 41.

⁴⁹ See McGovern, *supra* note 41.

⁵⁰ United Nations Compensation Commission, Individual Claim Form, Form D.

⁵¹ See *supra* note 39.

tial similarity between the processing of "C" and "D" claims with more extensive scrutiny for higher awards.

Resolving "E" (corporate) claims and "F" (governmental) claims will likely involve more traditional litigation or arbitration modes⁵² because both time and resource constraints on resolution are less severe.⁵³ It is possible, however, to contemplate the use of some hybrid techniques developed in "A," "B," and "C" claims to resolve both single and multiple claims.

"Déjà Vu All Over Again": Private Rationing

A second vision of the future arises from an analogy with the recent health care reform debate. Americans are particularly fond of the fiction that they can receive infinite amounts of health care when they are, or fear they might be, sick. We still carry an image of teams of physicians armed with the latest biomedical technology, albeit no longer with Marcus Welby demeanor, squeezing out the last drop of life for those in need. Yet the recent health care debate revealed not only that this image was inconsistent with reality, but also that forty-one million Americans lived without any health care insurance in 1993.⁵⁴ When confronted with this reality and the costs associated with rectifying the gap between the image and reality, our representative government could not decide on a course of action.⁵⁵ Rather than face the explicit economic burdens associated with providing assistance for all, by default we favored the implicit funding of health care through less obvious economic transfers or cost shifting between insureds and uninsureds. Rather than face an overt or explicit rationing of health care, we decided to keep our rationing private and implicit.⁵⁶

One could argue that an analogous decisionmaking process is emerging in our justice system. There is little doubt that public-private rationing exists in our criminal law system. Justice for O.J.

⁵² United Nations Compensation Commission, Individual Claim Form, Forms E and F.

⁵³ See PROVISIONAL RULES FOR CLAIMS PROCEDURE, *supra* note 37.

⁵⁴ Employee Benefit Research Institute, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 1994 Current Population Survey*, EBRI SPECIAL REP. SR-28 (Feb. 1995).

⁵⁵ David Blumenthal, *Health Care Reform—Past and Future*, 332 N. ENG. J. MED. 465, 465-68 (1995).

⁵⁶ ROBERT H. BLANK, RATIONING MEDICINE 27 (1988); *see also id.* at 77-134 (chapter 3, "The Allocation and Rationing of Medical Care"). Most health policy analysts believe that explicit rationing is inevitable, and as E. Haavi Morreim put it, "Somehow a distinction must be made between what physicians are expected to do for their patients and the ways in which resources are allocated." E. Haavi Morreim, *Rationing and the Law*, in RATIONING AMERICA'S MEDICAL CARE: THE OREGON PLAN AND BEYOND 163 (Martin A. Strosberg et al. eds., 1992).

Simpson does not look at all like justice for typical plea bargainers. This observation is not intended as a normative judgment concerning either the process or the outcome of individual cases, it is simply to state—just as Peter Schuck has attempted to remain descriptive—that our public image of criminal justice often diverges from reality. As Professors Calabresi and Bobbitt have described in *Tragic Choices*,⁵⁷ societies are forced to define themselves by their fictions and their choices in the allocation of limited resources, and we have made our choices.

The analogous, popularly accepted image of the tort process as providing an indefatigable plaintiffs' lawyer for each injurious wrong is also flawed. The bulk of the cost of tortious risk taking and injury causing activity has remained in the private realm—with those harmed. This occurs because of the previously described underutilization of the tort system by injured persons. The predictable outcome of this phenomenon is that costs imposed by tortfeasors are borne by those harmed rather than by tortfeasors themselves. In the context of mass torts, the reality of underclaiming has now become public. One issue facing us is whether we will, as a society, confront this reality or recoil at the potential expense to tortfeasors or to the public for all claims and return to our earlier fiction. In other words, will the institutions that have been most successful in stimulating mass filings ironically lead to a legal retrenchment that will inhibit future mass torts?

Certainly defendants have attempted to overrule court decisions favorable to plaintiffs by recourse to legislatures. Their success rate, however, has been somewhat limited except in the area of medical malpractice. There are, however, a number of pending legislative proposals, applicable to virtually all torts, that would raise the access and transaction costs for plaintiffs' counsel and, at the same time, lower potential recoveries.⁵⁸ There are also judges who have decided to limit the velocity of case dispositions by requiring a controlled flow of individual trials or who have attempted to reduce potential recoveries by restricting punitive damages.⁵⁹ If the "elasticity" of mass torts—the amenability of a tort, in accordance with the applicable substantive law and procedure to be expanded in scope, and the tendency of more plaintiffs to file suit as the case disposition rate increases and transaction costs decrease—is contained and if plaintiffs' lawyers are forced to engage in more rigorous case selection, we

⁵⁷ GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

⁵⁸ See, e.g., H.R. 10, 104th Cong., 1st Sess. (1995); H.R. 753, 104th Cong., 1st Sess. (1995); H.R. 93, 104th Cong., 1st Sess. (1995); S. 303, 104th Cong., 1st Sess. (1995); S. 243, 104th Cong., 1st Sess. (1995); S. 144, 104th Cong., 1st Sess. (1995).

⁵⁹ See proceedings under *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991); see also Andrew Blum, *Asbestos Group Asks for Halt to INDL Process*, NAT'L L.J., July 13, 1992.

could return to our more traditional world of tort litigation.⁶⁰ Whether the proponents of this type of change fully appreciate the dynamics of mass torts sufficiently to accomplish such a retrenchment remains to be seen.

All of the Above

A third vision of the future is "all of the above." We are in transition, so the argument goes, and there will inevitably be modifications that restrict or expand liability and that nurture traditional and novel mechanisms for resolving tort claims. Such modifications are based not only upon the strategies of the immediate players, but also on externalities derived from currently unrecognized and unpredictable exogenous forces.⁶¹

The area of subrogation, for example, is driving some changes that may be quite far reaching. In the silicone gel breast implant cases, a consortium of health care entities and the U.S. government in its capacity as a health insurer have sought to intervene in the proposed global settlement in order to recover health care payments previously made to implant recipients.⁶² The consortium has also offered to assist the plaintiffs, both legally and financially, in obtaining recoveries from the defendants. This strategy is driven by the practical difficulties associated with obtaining subrogation recoveries for previously expended health care costs. If the consortium of health care entities could work together with the personal injury plaintiffs to establish a common fund, this fund could be used both to compensate plaintiffs and to reimburse health care entities. Needless to say, neither the plaintiffs nor the defendants have been very receptive to this proposal since it would divert the flow of money out of their respective pockets. One could, however, quite readily envision a scenario where the financial pressures on the private and public health care industries could lead to a governmentally assisted expansion of mass torts in order to (1) eliminate the double recoveries for plaintiffs that as a practical matter are currently available under most tort law and (2) transfer the costs of medical expenses from the health care industry to tortious defendants.

An unusual alliance is similarly evolving between workers' compensation insurance carriers and plaintiffs' lawyers. In instances

⁶⁰ McGovern, *supra* note 32.

⁶¹ In hindsight virtually all outcomes are predictable. In the area of products liability the more conservative trend in substantive law opinions documented by Professors Henderson and Eisenberg was certainly predictable, but very few people actually predicted the trend. See James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

⁶² *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994).

where an employee sues a third party for personal injury and the workers' compensation carrier seeks to recoup payments made to the employee pursuant to its workers' compensation coverage, mutually acceptable arrangements have been made whereby the carrier agrees to provide a financial benefit to the injured employee and plaintiff's lawyer if they are successful. The financial incentives accompanying these types of arrangements could either encourage plaintiffs' lawyers to file more lawsuits because of the additional compensation they may receive or deter them from doing so by raising the threshold of the potential recovery for their clients.

Other related activities by the plaintiffs' bar could also drive an expansion or a contraction of tort liability. There is little question that some plaintiffs' lawyers have become quite wealthy and that they are willing to use that wealth in political forums. At the same time, other plaintiffs' lawyers have been emulating the success of their peers by filing cases in areas of tort law other than personal injury. In Alabama, for example, we have seen so-called boutique plaintiffs' lawyers—those who have traditionally handled one case at a time and only cases that had the potential for substantial individual damages—move first into mass personal injury torts and then mass consumer torts.⁶³ Recent class actions have been filed involving consumer financial arrangements that potentially involve substantial amounts in controversy.⁶⁴ Whether or not the vested interests of the plaintiffs' bar will become so large that any counterattack by defendants would be futile or that their success will breed an adverse reaction remains to be seen.

On the conceptual front, there is the counterintuitive possibility of an alliance between the law and economics tort theoreticians and the traditional or non-class action plaintiffs' bar.⁶⁵ Although there may be a distinct difference of opinion between these two groups on the issue of the distribution of income, on matters such as efficiency, elitism, and populism there may be an unanticipated agreement that could lead them to become ideological allies. The law and economics concept of a marketplace of litigation with a multitude of discrete tri-

⁶³ *Princess Nobels v. Associates Corp. of N. Am.*, No 94-T-699N (M.D. Ala. 1995); *Annie E. Erkins v. First Franklin Fin. Corp.*, No. 94-03629-W (Cir. Ct. Jefferson Co. Ala. 1995); Maurice L. Shevin, *Chaos in the Consumer Finance Industry in Alabama*, 48 CONSUMER FIN. L.Q. REP. 313 (1994); *Judge Says Millions Can Join Action Over Contact Lenses*, WALL ST. J., Nov. 2, 1994, at B4 (Bausch & Lomb, Inc.).

⁶⁴ Laurie P. Cohen, *Lawyer Gets Investors to Sue GE, Prudential in Poor Border Town*, WALL ST. J., Nov. 30, 1994, at A1; *Consumer Class Actions: An Emerging Remedy*, EMOND & VINES REV., Jan. 1995, at 1; *Flood of Lawsuits Threatening Industry*, ADAA NEWS, Sept./Oct. 1994, at 1; *NationsBank Pays \$6.2 Million to Settle Suit*, ORLANDO SENTINEL, Jan. 28, 1995, at C1.

⁶⁵ After this Article was drafted, Judge Posner wrote an opinion reflecting this thought while rejecting class action certification. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

als that will set efficient values for cases is not inconsistent with the plaintiffs' counsel view of open access to courts and unlimited trials. At the same time there is arguably a common thread in allowing the most populist of all governmental institutions—the jury—to resolve tort litigation rather than by having more elite institutions, such as an administrative agency, make compensation decisions. Thus, there may be quite a cacophony in the theoretical underpinnings of what has traditionally been a plaintiffs-to-the-left and defendants-to-the-right debate over tort reform.

Likewise, there may be a historically unusual alliance between defendants and class action plaintiffs' counsel over the use of class actions. On the one hand, defendants are generally opposed to the use of class actions for trial purposes, but, on the other hand, defendants have become increasingly supportive of the use of class actions for settlement purposes. This asymmetry reflects the defendants' efforts to reduce the elasticity of mass torts and to contain them from expansion. At the same time the class action device can provide finality and commercially valued predictability for corporate defendants. Whether or not it will be feasible for defendants to increase the scope and reach of class actions for settlement purposes without a corresponding strengthening in the use of class actions for trial is an issue that is currently before the Advisory Committee on the Federal Rules of Civil Procedure. Proposed legislation and efforts like the American Law Institute's Complex Litigation Project to promote the aggregation of claims do not seem to generate as much current interest. At the state level, however, there is a movement to facilitate the consolidation of mass tort cases at least for pretrial and docket control purposes.

There is a saying that "you can't see the bottom of the creek until the hogs get out of the water." The situation is indeed murky, and predictions, albeit enjoyable, are quite dangerous, particularly if you are a minnow.