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MASS TORTS AND LITIGATION DISASTERS

*Alvin B. Rubin **

Recent developments in product liability law have combined with heightened consumer awareness and mass marketing of products to produce a vast increase in the number of product liability suits. High-speed mass transit, new construction methods and materials, industrial accidents in the manufacturing of explosives and toxic chemicals, tort law developments shifting the risk of loss, as well as the increasing size of personal injury awards, have united in a similar fashion to create a mammoth increase in litigation concerning single catastrophes. The disposal of hazardous wastes has also generated hundreds of personal injury suits involving insidious diseases that may not be manifested for years. These mass tort claims have a number of similarities: they result in the filing of many suits; they produce high litigation costs; they are generally resolved only after great delay; they affect not only the litigants but other users of the court system; and their total human and economic costs affect all of society.

Let us look briefly at a few of the better-known product liability cases. Asbestos has been used since the fifth century B.C. It is basically indestructible and is remarkably resistant to heat. More than 3000 products commonly used in the home and at work contain asbestos. Today, however, it is regarded as "one of the most dangerous of all

* United States Circuit Judge, Fifth Circuit Court of Appeals. I express my appreciation to two fine lawyers each of whom devoted part of a one-year term as my law clerk to assist me in thinking about this subject and in writing this article, Andrew P. Schultz, B.A. Swarthmore College, 1979, M.S. School of Urban & Public Affairs, Carnegie-Mellon University, 1981, J.D. University of New Mexico School of Law, 1984, who was my law clerk during the 1984-85 period, and Nancy F. Meloy, B.A. University of Iowa, 1980, M.A. University of Virginia, 1982, J.D. University of Iowa College of Law, 1985, who was my law clerk during 1985-86.

In preparing the speech which served as the basis for this article, I relied on a number of sources and append a bibliography of major sources. Most of the "facts" are widely known and many sources can be found for each. My discussion of the state of the law and recommendations for its change, whether they are original with me—as few are—or were espoused by someone else, must stand on their own merits or collapse as a result of defects, latent or patent.

natural materials."¹ Inhalation of asbestos fibers may cause not only bronchial problems but also asbestosis, mesothelioma, and pulmonary bronchogenic cancer. Since the beginning of World War II, more than 11,000,000 workers have been exposed to asbestos, and uncounted millions of others have lived in homes, attended schools, or worked in buildings insulated with it. Various studies estimate that each year at least 8500 and perhaps as many as 67,000 persons die from asbestos-related causes. The number of deaths is not expected to decrease until 1990 because precautions against its dangers were not implemented until the 1960's and producers were slow in introducing substitute products. More than 30,000 suits against asbestos manufacturers have already been filed; about one-third of these suits are in federal court. This number includes class actions by public agencies seeking to recover the costs of removing asbestos insulation from public buildings, litigation concerning insurance coverage, and, of course, thousands of individual plaintiff suits. Additional suits are being filed at the rate of 500 a month.²

Asbestos litigation has resulted in far more expense than in recovery of damages for injured persons. A Rand Corporation study estimated that injured persons receive less than thirty-seven percent of the total amount spent on litigation. Almost two-thirds of the total expenditures are for attorneys' fees and other litigation expenses.³

Some women who have used the Dalkon Shield, a contraceptive device manufactured by the A.H. Robins Company, have suffered pelvic inflammatory disease, spontaneous abortion, sterility, and various other serious afflictions. The device may have also caused birth defects in children. More than 2,000,000 women used the device, which was last sold in the United States in 1974 and in other countries in 1975. Users of the Dalkon Shield have filed more than 13,000 suits against Robins. Robins has settled 8750 claims, totaling \$343,000,000, but 4472 cases are still pending. Of the 13,000 cases, only 59 have been tried. Plain-

¹ Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 38 VAND. L. REV. 573, 579 (1983) (quoting Mehaffy, *Asbestos-Related Lung Disease*, 16 FORUM 341, 341 (1980)).

² Most of the data in this paragraph are taken from Special Project, *supra* note 1, at 578-81.

³ J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM, M. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii-xix (1984) (published by the Rand Corporation's Institute for Civil Justice).

tiffs have won 32 of these and Robins 17.⁴ In August 1985, Robins, following the lead of four asbestos manufacturers, filed a bankruptcy petition contending that it would be unable to satisfy all pending and potential claims.

Agent Orange is a herbicide that was used by United States military forces in Vietnam between 1961 and 1972 to clear jungles and destroy crops. Seven companies⁵ manufactured it for the United States. After more than 600 individual suits had been filed, the cases were consolidated into a class action, which was ultimately assigned to Chief Judge Jack Weinstein of the United States District Court for the Southern District of New York. The class was estimated to include between 600,000 and 2.4 million persons; 2,440 persons opted out of the class although 600 individuals later asked to be reinstated. With court approval, all of the class claims were settled in 1984 for \$180,000,000. This sum is to be divided among the persons who have manifested an illness claimed to result from exposure to Agent Orange, persons whose injuries will become manifest only at a later time, the children of veterans who were exposed to Agent Orange who elect to join the class, including children not yet born, and the 4,500 plaintiffs' lawyers, whose costs have exceeded \$3,000,000 and whose fees have been set at \$10,000,000. The settlement was reached twenty-three years after the first person was exposed to Agent Orange, twelve years after its last use, and six and one-half years after the first suits were filed. Forty-five appeals from this settlement are now pending. Even if the settlement is eventually approved, the distribution of funds will not begin until late 1986 or later.

Litigation seeking to establish the liability of tobacco manufacturers for lung cancer and other diseases started in the 1960's. So far, neither smokers nor their heirs have collected a cent either in judgment or in settlement. Now plaintiffs, taking advantage of changes in product liability law, have resumed litigation. Since the earlier litigation, the doctrine of strict liability has been more fully developed, and the rule of comparative fault has been adopted in many states, removing the

⁴ The data in this paragraph are taken from *Court is Asked to Find Robins Liable for All Dalkon-Shield Injury Claims*, Wall St. J., Aug. 5, 1985, at 5, col. 2.

⁵ Dow Chemical Company, Monsanto Company, Hercules Chemical Company, Thompson Chemical Companies, T.H. Agriculture & Nutrition, Diamond Shamrock, and Uniroyal Incorporated.

bar to recovery formerly created by the contributory negligence rule. In addition, the warranty to consumers has been broadened, and it is now generally assumed that a product carries an implied warranty that it may be safely used. These developments create a new legal environment for tobacco-created disease litigation. Smokers are not the only litigants: in October 1985, an asbestos manufacturer sued six cigarette manufacturers seeking contribution to damage claims on the basis that the claimant's lung cancer had been caused by the cumulative effect of exposure to asbestos and smoking.⁶

Many other types of mass products liability claims have been filed. Only time will reveal the claims yet to mature. Claims now in court, as well as those that may be expected, include those of consumers who have used the drugs benedictin and DES; veterans exposed to radiation during military testing of atomic weapons; persons exposed to various toxic substances, such as herbicides and pesticides; persons exposed to contaminated ground water or to toxic wastes; persons who have inhaled benzene or gasoline fumes; and workers who have contracted silicosis as a result of inhaling injurious substances.

Mass catastrophes present another unique demand on our tort system. The single event in which hundreds or thousands of people are injured or killed arouses horror, sympathy, and media attention. We all know of the Bhopal disaster in which, as a result of the release of noxious chemicals from a Union Carbide plant in Bhopal, India, more than 1700 persons were killed and 200,000 were injured. When a Pan American Boeing 727 crashed into a residential area near the New Orleans Airport on July 9, 1982, 179 people died. The collapse of a skywalk at the Hyatt Regency Hotel in Kansas City in 1981 resulted in 114 deaths and hundreds of injuries. In 1985, 500 people died in an airline crash in Japan, 174 in a Delta Airlines crash at the Dallas airport, and 57 persons in a crash of a Midwestern Airlines plane.

Under present law, it is usually impossible for a single court or court system to acquire jurisdiction over all the claims arising from a single disaster, much less the use of a single product. Such claims are typically based on state law; federal courts, therefore, have jurisdiction only when the parties are of diverse citizenship. Thus, some claims concerning the same product or disaster may be filed in federal courts

⁶ The data in this paragraph are taken from *Cigarettes and Cancer: Lawyers Gear Up to Battle Tobacco Firms*, Wall St. J., Apr. 29, 1985, at 27, col. 4.

and some in state courts. When filed in state courts, the claims may be filed in the various states where the plaintiffs reside, where the defendants have a business situs or, in the case of a mass disaster, in the place where the accident occurred.

Even when suits are all filed in a single court system, the court may be unable to conduct unitary trial proceedings. The Federal Rules of Civil Procedure and many state class action statutes cannot be utilized for individual product liability claims because courts have found that, generally, particular questions affecting individual members preponderate over the questions of law or fact common to all class members.⁷ These include such questions as: Was this plaintiff exposed to the product? Did this plaintiff have notice of the risk? Was the alleged injury caused by use of the product? How much damage did the plaintiff suffer? This "commonality" requirement also creates a barrier to class certification in mass disaster cases.⁸ In addition, the fact that all the victims are identified in mass disaster cases may mitigate against a finding of the numerosity essential for a class action.

Pursuant to statutory authority,⁹ separate federal cases may be consolidated for pretrial proceedings by the panel on multidistrict litigation. The statute permits consolidation only for pretrial preparation; in some instances, however, the parties themselves agree to try their case in the court that conducted pretrial preparation. Whether the case is tried by the court in which pretrial preparation is conducted or is sent for trial to the court in which the plaintiff initially filed suit, each case that was part of the pretrial consolidation effort must eventually be separately tried on its own merits. Hence, the progress of litigation is still slow.

I. PROBLEMS IN THE PRESENT SYSTEM

The present system is slow, inefficient, costly, and potentially unjust both to injured parties and defendants. Let me summarize its inadequacies:

⁷ See generally Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180 (1983). But see *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986).

⁸ See FED. R. CIV. P. 23(b).

⁹ 28 U.S.C. § 1407 (1982).

A. *Delay*

In the Eastern District of Texas, 700 asbestos cases are pending. Despite able judicial management, the time until a case is settled or tried is rarely less than two years. The district's need for additional judges aggravates the problem. Some cases pending eight years still have not been heard. Cases that are tried are frequently appealed, adding two or three years to their span. In the Northern District of Ohio, Judge Thomas D. Lambros, with the aid of two special masters, Professors Eric D. Green and Francis E. McGovern, has crafted a management schedule for asbestos cases that is, to us who are judges and lawyers, a model. Nonetheless, it allows each case 480 days for discovery and preparation for trial. Another example of delay is the litigation arising from the Pan Am plane crash near New Orleans on July 9, 1982. The airline conceded liability; the only litigated issue was the amount of damages due each claimant, and yet, at the time of this writing, only two-thirds of the cases filed have been finally concluded.

B. *Expense*

As I have mentioned, in asbestos-related litigation more than twice the amount recovered by injured persons is spent in the opposing efforts of plaintiffs' and defendants' counsel to increase and reduce that amount of recovery. Asbestos-exposure litigation is not unique. According to calculations derived from a 1977 United States Insurance Service Office survey, for every dollar paid to claimants in product liability cases, insurers paid an average of forty-two cents in defense costs. Claimants paid a contingent fee averaging thirty-three cents, in addition to litigation expenses. The costs of litigation (apart from those furnished by the taxpayer in providing a free legal system) are more than twice the amount of the net recovery by successful claimants.¹⁰ A Rand Corporation study reached a similar conclusion: the study found that for every fifty-nine dollars paid to claimants in product liability cases, ninety-nine dollars is paid by both claimants and defendants just for legal services.¹¹

¹⁰ These data are derived from SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, PRODUCT LIABILITY ACT REPORT, S. REP. NO. 476, 98th Cong., 2d Sess. 7 (1984).

¹¹ J. KAKALIK, P. EBENER, W. FELSTINER, M. SHANLEY, COSTS OF ASBESTOS LITIGATION (1983) (published by the Rand Corporation's Institute for Civil Justice).

This litigation industry benefits successful claimants, but it also rewards lawyers, both those asserting claims and those defending against them. Yet neither group of lawyers should be seriously faulted. Defendants' counsel are not villains for tenaciously resisting demands on their clients, nor are plaintiffs' counsel evil for attempting to secure all that the law allows for injured claimants. These lawyers are only making diligent efforts to protect those whom they are hired to represent, to exploit the strategic tactics and manipulation that the present rules permit, and to earn the fees they are paid. Neither group of lawyers, however, deserves medals of honor. While the recompense of some is contingent, all are working for a monetary reward that is, more often than not, very substantial.

C. Insurance Costs

Apart from the actual payments made to injured persons and defense costs, uncertainties in product liability law add to the cost of product liability insurance and put financial pressure on insurance companies. Some members of Congress have noted that, in the past, product liability insurance and other costs of product liability litigation have amounted to only one percent of sales. Within the past year, however, the cost of such insurance has vastly increased and some potential defendants may soon be unable to buy insurance at any price. Product liability insurers' losses (and the losses of other casualty companies) have been so great that 400 insurance companies are on the "watch-lists" of various state insurance commissioners. Higher insurance rates reflect the unpredictability of the legal standards that may apply in future claims against manufacturers and product sellers. The rising cost of insurance is also, of course, passed on to consumers in the form of higher prices. And this is as it should be, for loss distribution is the primary rationale for imposing liability on product manufacturers regardless of fault.

D. National Economy

Uncertainties in the product liability litigation system also adversely affect the national economy. Legal expenses incurred by manufacturers to keep abreast of variations and changes in the law divert resources from production efforts and product research. Management time is devoted to the assessment of legal claims rather than to efficient production. In addition, the vagaries of product liability tort law may deter the development of new or improved products: in some in-

stances, product improvement has been used to prove that an earlier product was defective.

Some businesses have eliminated a particular product line because the costs of product liability exposure have become too burdensome. For example, anti-polio vaccine, for reasons unknown, causes a small but predictable number of cases of polio, sometimes afflicting the parents of the vaccinated child. The suffering of those who contract polio is real. But the cost of their suits is mounting to the extent that it may make the vaccine prohibitively expensive.

E. International Trade

American manufacturers and product sellers generally pay product liability insurance rates twenty times higher than those in Europe. While this rate differential is due in part to the greater protection accorded American consumers, it is also partly attributable to the uncertainty and higher operational expenses in our tort litigation system, and the prospect of punitive damages awards. Foreign producers are generally not subject to these expenses, except those arising from litigation in this country. Higher American expenses are necessarily reflected in the price of American goods, which, in turn, adversely affects the balance of trade.

F. Justice

A just legal system would allot the benefits and costs of tort litigation rationally and equitably. It would assure that persons suffering similar injuries receive comparable compensation. The present American system, however, includes numerous elements that preclude such predictability and comparability. For example, the availability of punitive damages diminishes the probability of like awards for those in like circumstances. Even judge and jury awards of compensatory damages for like injuries differ vastly.

When and where a claim is filed may also affect a claimant's potential award. At some point, the potential and actual damage awards may loom so large that the depletion of the assets of some defendants and their insurers is a real concern. If the assets of a business are insufficient to satisfy all claimants, they may be distributed on a first-come, first-served basis. That may be a fine way to run a movie theater, but it is hardly a fair way to recompense injury. It is possible that the asbestos manufacturers and the drug manufacturers who have sought refuge in bankruptcy do have assets sufficient to satisfy all the

claims against them, although that has not yet been demonstrated. A special master appointed by the bankruptcy court in which the Johns Manville action is pending, however, has proposed that Johns Manville in effect turn over eighty percent of its corporate equity to claimants. This proposal may not be accepted, but it indicates that, even if all claims against it are compromised, Johns Manville is close to insolvency.¹²

Another element of injustice in our present tort litigation scheme arises from the standard of proof of causation necessary to establish a claim. In toxic substance cases, each claimant must establish by a preponderance of the evidence that the toxic substance caused his injury. Rarely is a particular toxic agent the exclusive cause of a disease. As Professor David Rosenberg has emphasized, most insidious diseases may be caused by a number of factors, each of which may not by itself have been sufficient to bring about the condition or each of which may not be identifiable as its single cause.¹³ Statistical evidence may show only the probability of causation. If a plaintiff can show only a *likelihood* that exposure to the substance caused or contributed to his injury, he can recover nothing.

The same rule may work injustice on defendants. If the toxic agent can be shown to have been "more likely than not" the cause of the plaintiff's injury, even though the probability is only fifty-one percent, the manufacturer may be held liable on all of the damages. This is true even though background risks might have been responsible, say, for forty-nine percent of the reported cases. If 100 claimants sued, the manufacturer would be liable for all their damages, even though forty-nine percent of the claimants would have contracted the disease had they never used the accused's product.¹⁴

Proof of causation is further complicated by scientific uncertainty. Existing product liability law may expect too much of scientists. In the absence of scientific activity about causation, the courts may dilute traditional causation requirements with such doctrinal devices as mod-

¹² *Manville Alternative Reorganization Proposal Could Result in Stock Dilution of as Much as 80%*, Wall St. J., May 17, 1984, at 61, col. 3.

¹³ Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 856-58 (1984).

¹⁴ For a discussion of such problems and one proposed solution, see Note, *Industry-Wide Liability and Market Share Allocation of Damages*, 15 GA. L. REV. 423 (1981).

ifying the meaning of "preponderance of the evidence" and by finding causation through aggregate statistics when a specific causal connection to individual harm cannot be shown.

II. PROCEDURES PRESENTLY IN USE¹⁵

Accutely aware of the need for reform, some lawyers and judges have attempted to improve our present methods. Let me summarize briefly some of the procedural devices presently used to adjudicate mass torts.

A. *Managerial Role for Judges*

While there has been some dissent,¹⁶ most lawyers and commentators want judges to become managers of the litigation process, and judges have themselves responded to that demand. The recent amendment of Rule 16 of the Federal Rules of Civil Procedure reflects the view that the judge, while still remaining neutral with regard to substantive issues, should assume an active role in shaping the case for trial, defining the issues, and controlling discovery. The Manual for Complex Litigation (Second) supports this view.¹⁷

B. *Organization of Lawyers*

Particularly in mass litigation, both plaintiff and defense attorneys have begun to organize their efforts and exchange data. In class actions, the single lawyer working autonomously has been replaced by court-appointed and court-supervised counsel. An elaborate structure of committees is created, including lead counsel and teams of discovery counsel. Plaintiffs' counsel sometimes avoid class and multidistrict actions in an effort to preserve the supposed sanctity of each plaintiff's (and lawyer's) case and to safeguard the individual lawyer's potentially higher fees. While jealously guarding their individual cases, these lawyers have developed voluntary groups to share helpful information. Defense lawyers are also using regional or national management

¹⁵ This section borrows from McGovern, *Management of Multiparty Toxic Tort Litigation; Case Law and Trends Affecting Case Management*, 19 FORUM 1 (1983). This article contains an exhaustive listing of cases.

¹⁶ See generally Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (the problems raised by managerial judging are too important to be left to the discretion of judges alone).

¹⁷ MANUAL FOR COMPLEX LITIGATION § 33.21 (2d ed. 1985).

schemes to share information and trial techniques. The defendants themselves are coordinating their strategy in order to present a united front. On both sides, specialized counsel are more frequently appearing as trial counsel in suits that once would have been tried by less experienced local counsel.

C. *Class Actions*

The most potentially useful device for handling multiple claims by a single court is the class action under Rule 23 of the Federal Rules of Civil Procedure, a rule that has a counterpart in some but not all states. The rule has substantial limitations. At the moment, efforts to increase the effectiveness of class actions focus on situations in which a limited damages fund is available. Class actions to fix and allocate punitive damages have generally not been allowed.¹⁸

D. *Multidistrict Litigation*

A federal statute authorizes the consolidation of similar actions filed in different federal district courts for pretrial procedures.¹⁹ But the statute does not permit the cases to be joined for trial. Absent stipulation for a common trial, the cases must be returned for trial to the district whence they came. Lawyers can avoid even pretrial consolidation by filing suit in a state court and joining a nondiverse defendant. If diversity or federal question jurisdiction is lacking, a federal forum is not available. Over one hundred multidistrict cases are now pending, and despite considerable efforts by the transferee judges, the very nature of the cases prevents expedition. Indeed the oldest case, though it is by no means typical, was filed in 1967.

E. *Consolidation of Cases with Joint Trial of Some Issues*

Several courts have consolidated numerous asbestos injury cases for trial on the liability issue. If one or more defendants are found liable, separate trials of damages claims are presented to the same jury.²⁰ This is a commendable attempt at efficiency, but it is likely to also have

¹⁸ See, e.g., *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liability Litigation*, 693 F.2d 847, 850-51 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). *But see* *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986).

¹⁹ 28 U.S.C. § 1407 (1982).

²⁰ See *Hendrix v. Celotex Corp.*, Cv. 479-237 (S.D. Ga.); *Neal v. Carey Canadian Mines Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982).

substantive impact: although the jury may be more likely to perceive the plaintiffs' proof that asbestos is defective and that it caused their harm as stronger, it may also tend to cluster awards about a median amount. A lower average verdict is the probable result.

F. Other Management Devices

Other management devices to expedite and simplify mass litigation include: (1) intensive use of pretrial procedures; (2) scheduling of test cases so as to create precedents and a groundwork for collateral estoppel; (3) the employment of parajudicials, such as magistrates and special masters; (4) the appointment of court-designated experts; and (5) resort to alternative, nonjudicial, dispute resolution.²¹ Although each of these approaches is useful and has ameliorated the mass litigation situation, each has some disadvantages. First, they may increase the cost of litigation. Second, the use of special masters may also raise serious questions of due process concerning the relationship of master to judge and the absence of traditional institutional constraints on the court, with personality, ability, and courage of judge and master alike being key variables. Finally, litigants are understandably reluctant, particularly in an emotionally-charged case like Agent Orange, to accept any management device and may insist upon a full blown trial. The arsenal of weapons for attack on the problems generated by mass litigation needs to be both better utilized and better stocked.

III. SEARCH FOR SOLUTIONS: THE ORGANIZED BAR

Recognizing the problematic state of our tort litigation system, the American Bar Association appointed a special committee on the Tort Liability System. After two years of study, the committee reported that the present tort litigation system is "vital and responsive as a working process." Of the seventeen recommendations made in the report, none proposes drastic change. The only suggestion that directly addresses mass tort litigation calls for special procedures to handle "[e]xceptional circumstances, for example those arising from catastrophic occurrences or from chains of events otherwise generating many cases with closely related facts."²²

²¹ McGovern, *supra* note 15.

²² THE SPECIAL COMM. ON THE TORT. LIAB. SYS., TOWARDS A JURISPRUDENCE OF

The dilemma is clear. The reforms essential to speedy and inexpensive determination of mass torts, like any other major change in tort law, have been blocked by a lack of consensus concerning the substance of reforms and the opposition of those who are so close to the present system that they cannot perceive its defects. As Dean Richard Pierce has said, "No consensus is likely to develop because neither potential accident victims nor society at large has an effective voice in the lawmaking process."²³

IV. REFORMS

All of the procedural devices presently available are, even when employed by the ablest lawyers and judges, but palliatives. The immanent problems cannot be solved without changes in both substantive and procedural law. Law reform, particularly the reform of established legal principles and institutions that have been so advantageous for legal professionals, has many opponents, few advocates (literally or professionally), and is beset with obstacles and objections. An illness so systemic cannot be remedied by symptomatic treatment or mild analgesics.

Let me state my thesis: the traditional two-party adversary system was not developed and can no longer function efficiently or fairly to adjudicate mass injury and mass catastrophe cases under presently applicable substantive and procedural rules.²⁴ As Dean Pierce has stated, "It is no secret that tort law performs all of its primary functions poorly."²⁵ No secret, that is, to anyone but to those of us who, as lawyers and judges, have come to accept the familiar. The primary functions of tort law are compensation of victims and deterrence of wrongs. Modern tort law performs neither task adequately. "Its deterrent effect is weak and uneven at best . . . Its compensation system is seriously inadequate. It only sometimes compensates, often undercompensates, and rarely provides timely compensation."²⁶ Today's tort

INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW § 13-1 to -10 (1984) (Report to the American Bar Association, M. Shapo reporter).

²³ Pierce, *Institutional Aspects of Tort Reform*, 73 CALIF. L. REV. 917, 918 (1985).

²⁴ Cf. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975) (contrasting two models, behavior modification and conflict resolution, for governing civil actions).

²⁵ Pierce, *supra* note 23, at 917.

²⁶ *Id.* at 917 n. 1 (citation omitted).

litigation is hand-to-hand combat. Its conduct is based on a passive, case-by-case, private law process of adjudication that has not been modified to accommodate changes in the bases for liability.

An injured party certainly deserves full recompense, and it is better that innocent victims be compensated than that the culpable be sheltered. Our society, however, now favors the distribution of risk and spreading the cost of injury among producers. Whether or not we favor imposing the cost on consumers, the consumer is likely eventually to bear the cost. Little or no regard is given to the fault of those immediately cast in judgment, and liability is imposed independent of any fault on the part of those on whom the cost is ultimately imposed.

This change from punishing the guilty to compensating the innocent and imposing the risk of loss on those who are able to bear and distribute it has been superimposed on a legal system previously geared to individualized damage adjudication. The momentum of seeking what associations of plaintiffs' attorneys call the "adequate award" has resulted in ever-increasing judgments. If the right to recompense bears little or no relationship to fault, and if damages are to be awarded purely on a spread-the-risk basis, the quantum of damages awarded in individual cases should be limited. At the same time, risk distribution should be made more nearly complete by modifying the burden of proof of causation. Liability for toxic-substance injury, for example, should perhaps be imposed, and compensation distributed, in proportion to the probability of causation assigned to the excess disease risk in exposed populations. These proposed changes should not sound novel to most lawyers. Similar steps were taken when workers' compensation laws were adopted by the states.

In a thoughtful paper, Judge Jack B. Weinstein has suggested that optimum handling of mass torts can be achieved only if seven changes in our present methods are made:²⁷

1. The decisionmaking of the parties is concentrated.
2. The litigation is in a single forum before a single judge.
3. A single set of substantive legal principles is applicable.
4. The tribunal has adequate support to perform its function.
5. Flexible methods of fact-finding are authorized.

²⁷ These seven general points are introduced and discussed in Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 *Geo. L.J.* 1389, 1390-92 (1985).

6. Total maximum liability for a single disaster is limited, a method for allotting costs among the defendants is devised, and there is a sure source of funds.
7. A single distribution plan, which eliminates punitive damages and extreme claims for pain and suffering, is adopted.

I endorse all of these principles. The changes I suggest conform to them in substance.²⁸

*A. Uniform Substantive Law*²⁹

The obligations of product sellers and the rights of consumers are governed, primarily, by the laws of the consumer's domicile. Thus sellers' duties are determined by fifty different standards: the rights of two consumers who are otherwise identically situated may be different because one lives in Nebraska and the other in Texas. Different legal standards may apply in cases arising from a mass disaster as well. For example, in an airplane crash case, where the claimant lived, where the plane ticket was purchased, and where the crash occurred are all factors that may affect which state's law is to govern a particular plaintiff's case. Standards in the various states are not only different, they are also uncertain, as is the application of statutes of limitations. These differences lead to forum shopping by both plaintiffs' and defendants' lawyers.

For producers who engage in national distribution, product liability is a national, not a local, problem. They must design and market uniform products, not those made to a different specification for each state. Defects in their products may cause injury anywhere in the nation. Fear arising from possible product defects may dramatically affect the demand for a product, as the Tylenol tampering episodes have proven.

Consumers also deserve a uniform national standard for both the time when their claims must be asserted and the liability for injuries they suffer. The person who buys a product in State A, which has restrictive rules on product liability, pays something for the claims that

²⁸ Weinstein, *Preliminary Reflections on Managing Disasters*, 11 COLUM. J. ENVTL. L. ___(1985).

²⁹ For some of the ideas in this section, I have drawn on Schwartz & Bares, *Federal Reform of Product Liability Law: A Solution that Will Work*, 13 CAP. U.L. REV. 351 (1984).

will be made for injuries suffered by a consumer in State B, whose rules and juries are more liberal. And the consumer in State B enjoys a benefit paid for by the consumers in State A, whose legal benefits are circumscribed.

Apart, therefore, from the content of a uniform federal rule, uniformity is itself desirable. The rule may simply be a direction to the federal and state courts to apply "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This is the direction given by the Federal Rules of Evidence for determining what evidence is privileged. The Fifth Circuit Court of Appeals, in an asbestos case, refused to hold that the judiciary might itself imply a single national common law rule.³⁰ Congress, however, has the power to give the courts a mandate to develop such a uniform rule. Its necessity is clear. Chief Judge Charles Clark and I differed on whether the Fifth Circuit should certify to the United States Supreme Court the question whether federal common law should apply to the award of punitive damages and the accrual of latent causes of action. But I agree with him that "a flood of interrelated actions . . . cannot properly be decided as individual actions or under the legal rules of any single state"³¹ or, I add, under the differing rules of fifty. "[D]isparate awards to early claimants can destroy the courts' ability to do justice."³²

If given the duty and the power to apply a uniform product liability law, the federal courts should be guided by the authoritative principles set forth in the *Restatement of Torts (Second)*, prepared by the American Law Institute. These principles not only codify the common law, they have greatly influenced the law's development in every state, including our one civil law state, Louisiana.

The Constitution gives Congress the power to regulate commerce among the states. That power has been used by Congress to establish uniform national rules for many industries and many purposes. For example, Congress regulates wages and hours, collective bargaining, transportation, radio and television broadcasting, sex and race discrimination, antitrust, and food and drugs. Even when Congress has failed explicitly to regulate a certain area of commerce, some state

³⁰ Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985).

³¹ *Id.* at 1335.

³² *Id.*

regulation has been held so antipathetic to national uniformity as to be unconstitutional.

Some commentators have expressed doubt about the constitutionality of such national legislation. It is difficult to believe that the injuries to which thousands of consumers are exposed by products distributed and used throughout the United States have less impact on interstate commerce than the food service in a single restaurant, condemned as a violation of the Public Accommodations Act,³³ or the effect of wages paid and hours worked of any enterprise that employs four or more persons, which is regulated by the Fair Labor Standards Act.³⁴

B. Substantive Federal Standards

Better yet, Congress should formulate a national product liability standard, at least for products distributed in more than one or two states. Opponents of national legislation urge that the various state courts might interpret parts of a federal statute differently and, because the Supreme Court would not be likely to review such differences, even a national statute would produce disparate applications. Differences would certainly exist. But it is doubtful that such inconsistencies would be of any greater significance than those that now exist as a result of interpretation of federal laws by the twelve Circuit Courts of Appeals. The number of differences will certainly be less than the present multitude of differences among the fifty states. Federal courts will likely cleave to well-reasoned opinions from other circuits. From time to time the Supreme Court might be expected to resolve the most significant differences of opinion. The inability to achieve complete homogeneity is no reason to suffer gross disparity.

My endorsement of national legislation does not imply endorsement of specific statutes that have been introduced. Some of these would sacrifice the welfare of injured persons to business interests and would accord more protection to manufacturers than the laws of most states. Other proposals are innovative and, I think, commendable, particularly the Danforth Bill's proposal for an expedited claims procedure involving minimal proof requirements and a limitation of damages.³⁵

In addition to a uniform product liability law, Congress should consider adopting a statute imposing a single rule for the determination

³³ 42 U.S.C. § 2000a (1982).

³⁴ 29 U.S.C. § 201 (1982).

³⁵ S. 1999, 99th Cong., 1st Sess. (1985).

of liability and damages arising from a single mass disaster. The basis for federal legislation governing transportation calamities is patently interstate commerce. Other disasters affecting, say, 100 or more persons, may have sufficient impact on interstate commerce to justify federal legislation. If not, the fact that some of the 100 or more plaintiffs reside in states other than the one in which the disaster occurred should suffice to justify a statute conferring jurisdiction on a single court system. This might be, as previously stated, the courts of the state in which the disaster occurred.

C. Causation

Under prevailing tort rules, a plaintiff is entitled to full compensation if, but only if, he proves that his injury was more probably than not caused by the defendant's actions. As I have already mentioned, this rule operates unfairly in toxic tort cases. Let us take the case of an asbestos products worker who, twenty years after his last exposure, develops pulmonary cancer. The evidence may show a 40% probability that his illness was caused by inhalation of asbestos fibers and a 60% probability that it was caused by other factors. Under present law, he would receive no damages, and asbestos producers would bear none of the cost of his illness. If the probabilities are reversed, however, the injured party receives 100% redress and the manufacturer could bear all of the costs of every such case, although it was responsible for only 60% of them. In either case, the present system provides no means to give the worker a fair amount of damages and assess the manufacturer with a burden equivalent to the increase in risk it has created.

Professor David Rosenberg has suggested a "public law" method of handling toxic tort injuries that warrants further study.³⁶ The public law approach would replace the preponderance of the evidence standard with a standard of proportional liability. Courts would impose liability and distribute compensation in proportion to the probability that the toxic agent involved caused the disease in the exposed population, regardless of whether that probability was more or less than fifty percent. By imposing liability based upon market share, the proportionality rule would also be used when the identity of the specific manufacturer of the agent that contributed to the disease is unknown.

³⁶ Rosenberg, *supra* note 13.

In the public law system proposed by Professor Rosenberg, a toxic tort claim would be treated as a class claim on behalf of all victims. If held liable, the defendant would be required to compensate all members of the class and provide a reserve or insurance to compensate those whose illness develops later. The system would also require remedial changes, such as the use of scheduled or nonindividualized damages and insurance fund judgments. The cost-spreading effect would also provide redress for those whose damages are modest in amount and who therefore have difficulty in gaining access to the courts. Participation in class actions would be mandatory, and claimants would either be forbidden to opt out or permitted to do so only if they are willing to pay the court costs incurred in separate trials.

D. Other Substantive Rules

Fair legislation would provide reasonable compensation for injured persons; recognize the possible claims of those whose injuries are yet inchoate; permit the prompt resolution of claims; and minimize the difficulties involved in proving exposure to the product, causation of injury, and the identity of the manufacturer of the product causing the injury.

In return for those benefits to injured persons, manufacturers might be relieved of liability for punitive damages. Punitive damages might still have a part to play, even in a risk-distribution system, to punish the willful or grossly negligent, but in such cases awards of punitive damages should be limited in amount and distributed to the class or group of injured persons, not treated as individual bounties. In fact, the private attorney general who seeks out the wrongdoer is typically the lawyer not the client. Charging attorney's fees to the manufacturer would accomplish the desired societal benefit without mulcting defendants.

These changes might be accompanied by a change in the manner of computing individual damages. Compensatory damages might be limited in amount.³⁷ An injured person should receive adequate reimbursement for all actual damages, but the award for psychic injury and pain and suffering might be limited. At least in product liability cases, some limitation might be imposed on the collateral source rule, which computes damages without regard to other sources of compen-

³⁷ See, e.g., Atomic Energy Act, 42 U.S.C. § 2210 (1982).

sation. The award might be paid on a monthly schedule to the injured person and, in the event of death caused or accelerated by the injury, to his surviving beneficiaries.³⁸

If a uniform law of this type were enacted, many injured persons would receive less than they would receive if they were permitted to litigate their claims under the presently applicable law of the states in which they live. Others would receive more. Nonetheless, consumers as a group and the nation as a whole would gain substantial benefits. Uniformity, predictability, even-handed justice, and lower prices benefit everyone. Awards, even if they may be smaller, will be paid more quickly, with less uncertainty and less litigation expense.

Furthermore, federal statutes need not aggravate the workload problem of federal courts. The Danforth Bill, like previously proposed federal legislation, does not create federal court jurisdiction and leaves the resolution of product liability claims to state courts except those that might be brought in federal courts based on diversity jurisdiction.³⁹

E. Workers' Compensation

Uniformity in protecting consumers should be accompanied by greater protection for workers injured or killed by exposure to insidious disease in the course of their employment. The American Insurance Association has issued a comprehensive report calling for reform in the area of workers' compensation as an indirect way to attack the tort law crisis. This is worth debate. I do not suggest that federal legislation preempt state workers' compensation laws. Federal legislation might, however, require state laws to provide benefits for workers who suffer from insidious disease. This requirement would assure all workers some protection and might alleviate problems of proof of causation and other present barriers.⁴⁰

F. Class Action Changes

Whatever changes are made, or not made, in the substantive law, the class action rules should be revised for mass tort cases to give

³⁸ For discussion of such legislation, see U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT VII 64-84 (1978); see also Schwartz & Bares, *supra* note 29.

³⁹ S. 1999, 99th Cong., 1st Sess. (1985). See S. 44, 98th Cong., 1st Sess. (1983); H.R. 2729, 98th Cong., 1st Sess. (1983).

⁴⁰ See Locke, *Adapting Workers' Compensation to the Special Problems of Occupational Disease*, 9 HARV. ENVTL. L. REV. 249 (1985).

jurisdiction to a single forum. This change might be accomplished either by a statute that gives federal courts jurisdiction over mass tort actions, or by a federal statute that creates such a device for use in state courts. The right to opt out should be eliminated or restricted perhaps to those who can show grave hardship or who are willing to pay the full costs of litigation in another forum. Conflicting state and federal jurisdiction might be eliminated by providing for removal of mass tort cases pending in state courts or by "reverse removal" of federal cases to a state court so that all cases could be tried in one forum. Questions concerning both the constitutionality of such provisions and the details of their operation are apparent. Yet these questions seem to me to be answerable.

G. *Jury Trial*

The seventh amendment to the Constitution guarantees the right to a jury trial of tort claims against private parties. The typical jury panel includes many jurors who may not be capable of understanding complex issues. In such cases, counsel should suggest or trial judges should attempt to induce counsel to stipulate that only jurors having certain qualifications will be selected. If, for example, counsel stipulate that no person shall be called that does not have a college degree, the jury clerk can select and call only persons who have that education and background by examining the juror qualification form. In districts that use computers to choose venires, it is possible to program the computer to make such a selection. Special care can be taken that, notwithstanding use of selection criteria, the selection of those who have the necessary criteria is random and the jury remains a cross section of that part of the community. Professors Luneburg and Nordenberg also suggest the possibility that a similar type of "blue ribbon" jury might be selected on the court's order if permitted by a statute without violating the seventh amendment.⁴¹

CONCLUSION

Innocent victims of product injuries must be protected. They must receive prompt and fair compensation for their injuries. Even when

⁴¹ Luneburg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 942 passim (1981).

manufacturers are without fault, manufacturers and ultimately consumers should pay the cost of injury of persons whose lives are altered as a result of their use of products that prove to be deleterious. The victims of mass disasters should also be accorded prompt and fair recompense. I do not suggest less, but I do recommend that we eliminate the roulette-wheel characteristics of our present mode of adjudication.

Wrongdoers and even those who inflict injury without fault should make their victims whole, but they need not make some rich while leaving others undercompensated. They should adequately compensate all those whom they contributorily injure. When causation cannot be precisely determined but probability can, damages from exposure to toxic and other damaging products should be assessed on a proportional basis. The rights and liabilities of all those involved in mass torts and mass disasters should be determined expeditiously and without excessive expense.

The changes necessary to accomplish those results will be opposed by all who find advantage in our present system, not because they are greedy or shortsighted, but because they believe fervently in the fairness of litigating one claim at a time, whatever the cost and whatever the delay. Meanwhile, the opponents of major change will propose minor repairs to our bizarre structure. It is for the rest of us, the consumers, the potential victims, and the contributors who will bear the extravagant costs, to insist upon change.

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APPENDIX

Pro cui bono?

“[R]epresenting plaintiffs who have been injured by the myriad chemicals in the modern environment involves an enormous investment of time and money—at great risk of no recovery. The stakes are high enough, however, to attract the adventurous [lawyer].” U.S. Law Week, August 13, 1985, 54 L.W. 2095 (reviewing the 1985 program of the American Trial Lawyers’ Environmental and Toxic Tort Litigation Section).

