

Rethinking Mass Tort Law

Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices. By Jack B. Weinstein.*
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I

The rapid rise in the number of mass tort claims over the past twenty years has put a great strain on our legal system. Unlike a simple tort, in which there is a single, identifiable wrongdoer and a definite injury, mass torts often involve multiple exposures to harm, multiple and unidentifiable wrongdoers, and latent injuries. These mass torts have taken a heavy toll on corporate defendants. Litigation over silicone breast implants—a recent, notable mass tort action—has attracted over 400,000 potential claimants,¹ some consolidating their claims into a class action and others opting to pursue their claims individually.² Dow Corning, the leading national manufacturer of breast implants, filed for Chapter 11 bankruptcy protection after the collapse of a proposed \$4.25 billion settlement.³ In so doing, Dow Corning joins asbestos manufacturer Johns Manville Corporation and Dalkon Shield contraceptive manufacturer A.H. Robins on the list of formerly profitable corporate defendants who have succumbed to Chapter 11 in the face of voluminous mass tort claims.⁴

While large mass tort judgments against corporate defendants have resulted in conservative agitation for tort reform,⁵ Judge Jack Weinstein finds tort law to be deficient from the victim's point of view as well. Judge Weinstein's judicial experience includes presiding over some of the most notable mass tort trials in U.S. legal history.⁶ His ad hoc "communitarian"⁷ solutions to the problems he faces have resulted in appellate reversal frequently enough to earn

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1. Max Boot, *Tort Lawyers Gear Up for More Silicone Silliness*, WALL ST. J., Oct. 4, 1995, at A15.

2. See generally Joseph Nocera, *Fatal Litigation*, FORTUNE, Oct. 16, 1995, at 60 (discussing plaintiff strategies of individual versus consolidated mass tort litigation in breast implant context).

3. See, e.g., Barry Meier, *Judge Discloses New Details on Settlement of Implant Suit*, N.Y. TIMES, Oct. 28, 1995, at 10.

4. See *The Breast Implant Tragedy*, WALL ST. J., May 19, 1995, at A14.

5. See, e.g., Richard B. Schmitt, *'Tort Reform' Action Is Urged by Coalition*, WALL ST. J., Aug. 7, 1995, at B5.

6. See, e.g., DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991) (agent orange); *In re Joint E. & S. Dist. Asbestos Litig.*, 769 F. Supp. 85 (E. & S.D.N.Y. 1991) (asbestos).

7. Weinstein discusses his view of communitarian ethics at length on pp. 46–52.

him the nickname "Reversible Jack."⁸ In *Individual Justice in Mass Tort Litigation*, Weinstein advocates expansive revisions of legal and ethical rules in an effort to better serve the interests of individual claimants in the mass tort context. Most significantly, Weinstein calls for a legislative initiative that would eliminate the need for victims to rely on tort law for compensation, or, in the alternative, the protection of the victim community through the use of courts' equitable powers. Weinstein's proposals, though well intentioned, fall short of a realistic solution to the problems presented by mass torts. Specifically, his proposed legislative initiative lacks a realistic source of funding, and his reforms in the name of the individual actually do more to serve the interest of the community.

II

In response to the legal system's inability to handle mass torts, Judge Weinstein calls for a broad compensatory legal framework that would dispose of most tort litigation. His plan includes creating a national health care system and extending Social Security disability benefits to all persons. These reforms would give victims a means of recovery independent of tort law (pp. 4–5, 120). Weinstein advocates making protection available through first-party insurance or worker fringe benefits (p. 33). Government regulatory agencies would be strengthened to monitor corporations adequately, thereby deterring tortious behavior and effectively "serv[ing] as the first and main line of defense" (p. 32). Weinstein also proposes enacting a uniform national tort law to replace the many different state tort laws (pp. 4, 21, 146) and creating a National Disaster Court to handle any "substantial" mass tort accidents (p. 34).

Critics may be quick to label Weinstein's proposals big-government solutions. His fundamental premise, however, seems sound: In the absence of guaranteed health care, tort law is the primary means of redress for many of the injured. Victims without medical insurance must sue in order to purchase the care that they need. This reliance on tort law creates incentives for victims to exaggerate injuries both to ensure a recovery and to increase possible pain and suffering awards.⁹ A national health care system would reduce mass tort victims' need to bring suits that inflict financial pain on corporate defendants. Victim-claimants would have their injuries redressed without obtaining a judgment against a corporate tortfeasor. Judges would be less inclined to use tort law to provide victims with third-party insurance and could tailor awards to maximize the deterrent function of the tort system.¹⁰ In sum, corporate

8. Michele Galen, *The Man Who's Cutting Through the Asbestos Mess*, BUS. WK., Jan. 28, 1991, at 71, 72.

9. See Stephen D. Sugarman, *Doing Away With Tort Law*, 73 CAL. L. REV. 555, 586 (1985).

10. See Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1353–54 (1994).

defendants would have less financial exposure, and more victims could receive compensation.

The most notable manner in which Weinstein's proposals would mitigate the mass tort burden on corporate defendants is by eliminating punitive damage awards (p. 35).¹¹ Not only would barring these awards directly reduce damages against corporations,¹² it would also halt the great influx of claims that often follows such awards. For example, after a jury awarded a plaintiff \$25 million in a breast implant case, the number of breast implant lawsuits nationwide doubled in a matter of months.¹³ Eliminating punitive damages would go a long way toward cooling off the mass tort fire.

Ultimately, however, Weinstein's call for legislative action raises serious questions of cost. He envisions a grand regulatory scheme in which government has the ultimate responsibility for regulating corporate activity, deterring corporate torts, and providing tort victims with health care. This call for action comes at a time when both Medicare and Medicaid have been targeted for reduction. In such a political environment, it is unlikely that any broad-based legislative initiative to expand health care entitlements would receive serious consideration. Indeed, Weinstein himself acknowledges the danger of relying on government-supported agencies, which are subject to political pressures and in constant danger of being emasculated with a swing of a fiscal conservative's axe (p. 169). For Weinstein to advocate seriously for legislative adoption of such an expansive government role, he must simultaneously propose realistic financing measures. Without a financing proposal, his legislative initiative remains politically unrealistic.

III

Weinstein ultimately believes that individual justice is best achieved by protecting the interests of the community. He argues that, in the absence of a legislative overhaul, judges should resort to using their equity powers in order to protect the interests of the victim communities. In this regard, *Individual Justice* is a misnomer: Weinstein's *communitarian* ethic leads him to criticize legal rules and ethical guidelines ostensibly designed for *individual* protection. A striking example is Weinstein's dissatisfaction with class action opt-out provisions. He believes that these provisions "may make full use of the class action device [in mass torts] impossible" (p. 26). He prefers the use of Rule 23(b)(1)(B) limited-fund class actions¹⁴ or consolidated actions modeled after

11. For additional arguments against punitive damages, see Gary T. Schwartz, *Mass Torts & Punitive Damages: A Comment*, 39 VILL. L. REV. 415 (1994).

12. Punitive damage awards have soared recently. See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993) (upholding punitive award 526 times greater than actual damages).

13. Nocera, *supra* note 2, at 82.

14. Rule 23(b)(1)(B) deals with class actions in which individual prosecution would "as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially

bankruptcy proceedings for resolving mass torts (pp. 134–37).¹⁵ These actions are preferable because they preclude individuals from opting out and pursuing claims independently (p. 136, 155). In fact, in the Agent Orange case, Weinstein threw out for lack of causation cases brought by veterans who took advantage of the opt-out provision of the 23(b)(3) class action.¹⁶ These veterans were thus excluded from a class settlement approved by Weinstein in which corporate defendants paid \$180 million into a settlement fund on the conditions that this sum would represent their total liability and that individual claims would thereafter be banned.¹⁷ The reason for Weinstein's preference is clear: If plaintiffs can opt out, and enough of them do so, defendant-corporations will be disinclined to settle class actions because any settlement will represent only a portion of their total potential liability. "Global peace" will be impossible to achieve (p. 136). Even when defendants are inclined to settle, the presence of pending claims filed by plaintiffs who opted out can induce the corporations to file for Chapter 11 bankruptcy,¹⁸ thus placing all potential creditors on hold and disrupting settlement negotiations.¹⁹ Weinstein envisions the use of consolidated proceedings as a means not only of compensating victims, but also of funding communitarian initiatives such as support groups for the relatives of the injured, extensive research, medical advice, and other remedies, the benefits of which would extend beyond those immediately injured (pp. 7–8, 87, 96). By opting out, plaintiffs discourage corporate defendants from settling or push such corporations into Chapter 11 bankruptcy, thus delaying or preventing community-oriented settlements.

Pursuant to his procommunity philosophy, Judge Weinstein also takes aim at traditional rules of legal ethics. In particular, he attacks the notions that "the plaintiffs' attorney's duty of loyalty requires her to put the client's interests ahead of all others," and that "the lawyer has no ethical obligation to consider the interests of third parties" (p. 66). As an example, Weinstein discusses a defendant's demand for the inclusion of a secrecy provision in a settlement agreement (pp. 66–67). Under traditional rules of legal ethics, the plaintiff's attorney would have little choice but to accept a secrecy provision because the plaintiff's interest would be served by a defendant's willingness to "sweeten" the deal to secure such an agreement (p. 67). This ethical framework ignores the adverse effect of lost information on the relevant community. Weinstein

impair or impede their ability to protect their interests." FED. R. CIV. P. 23(b)(1)(B).

15. Weinstein finds the bankruptcy proceeding appealing since it "give[s] the judge considerable equitable powers of supervision" (p. 137) including the power to stay both state and federal proceedings.

16. See Nocera, *supra* note 2, at 75.

17. Ryan v. Dow Chem. Co., 781 F. Supp. 902, 918–20 (E.D.N.Y. 1991); see also Nocera, *supra* note 2, at 75 (discussing Weinstein's grant of defendant's motion to dismiss opt-out plaintiffs' individual suits).

18. Filing for bankruptcy under Chapter 11 prevents claims against the debtor from being litigated during the reorganization process. See 11 U.S.C. § 362 (1994).

19. See Milo Geyelin & Timothy D. Schellhardt, *Dow Corning Seeks Chapter 11 Shield, Clouding Status of Breast-Implant Pact*, WALL ST. J., May 16, 1995, at A3.

believes that there is great societal interest in knowing "what went wrong and why" (p. 67), and in this regard "[s]ometimes the needs of individual members of the community must yield to those of the community as a whole" (p. 68). This communitarian ethic leads Weinstein to advocate "a new formulation of the lawyer's ethical duty" in which the attorney considers the ultimate impact of litigation on the community (p. 87).

Weinstein advocates the integration of modern communications technology into the litigation process to give victims a voice and increase the flow of information. He mentions e-mail, a 1-800 number, and cable TV links as examples of technology that could increase participation in the legal process (pp. 57-58). He also calls traditional notions of individual attorney-client contact "ludicrous" when applied to mass tort cases (p. 54). He acknowledges, however, that victims who join together in a class action are still "surrender[ing] their rights to a system in which they have little or no input" (p. 54). In those instances in which the attorney is unable to pursue zealously the individual client's rights, Weinstein sees a need for the legal system to administer some "TLC" to the victims of a mass tort (p. 55). He recommends the use of courthouses for town meetings and encourages judges to attend such meetings and listen to the concerns of the victim community (p. 99).²⁰ In support of his participation remedy, he cites studies suggesting that increasing plaintiffs' participation in litigation results in a corresponding increase in their perception of the result's value (p. 56).²¹

Such community-based solutions call the theme of "individual justice" into question. In his concern for the community interest and judicial efficiency, Weinstein advocates the revision of ethical guidelines and legal rules that were specifically designed to protect individual litigants' rights. In return, he offers litigants the opportunity to vent their frustrations to a judge, to a telephone operator, or via the information superhighway. These alternatives are designed to create a "belief" (p. 14) among litigants that they have participated. The ethical codes that require zealous advocacy and legal rules that allow individual litigants to control the course of litigation, however, do more than just create a sense of participation—they ensure real, meaningful participation. Weinstein's proposals for enhanced communication would provide only superficial compensation for the loss of this meaningful, individual protection. Perhaps Weinstein should have chosen the title "*Community Justice*" or even "*Judicial Pragmatism*" since his proposals, though arguably protecting the victim community, are, at least in part, at the individual victim's expense.

The danger of replacing individually oriented procedures with community-oriented solutions is that the definition of the victim community is subject to

20. Weinstein used this technique in a case involving the Shoreham nuclear power plant controversy. See *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989).

21. See Tom R. Tyler, *The Role of Perceived Injustice In Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984).

differing interpretations. Judge Weinstein may feel confident that he could appropriately define such communities, but are we willing to allow all judges to invoke their equitable powers to subordinate individual protections for the good of a community that each judge would have the power to define? Such case-specific definitions of the relevant community could generate more disparities among the courts, increase forum shopping, and ultimately make Weinstein's goal of a nationally uniform substantive law unachievable. Individual victims are more easily identifiable than a victim community. Rules that protect the individual provide definitive means for preventing her from being swept aside in the name of a judicially defined greater good. An individual's "belief" that she is participating must be based on some guarantees, such as the right to opt out or to hire counsel who will zealously advocate her *individual* case. The right to e-mail complaints or to be heard at town meetings does not sufficiently protect individual interests in the absence of real substantive and procedural guarantees.

Nevertheless, any criticism of Weinstein must be tempered in light of the framework in which he works. Mass torts just do not fit the mold of traditional litigation. Traditional canons of zealous advocacy for individual clients and procedural opt-out rights are in large part unrealistic in the mass tort context. Any solution, however, must still provide substantive and procedural protections for the individual even as it accounts for the community interest. Weinstein is more successful in describing the defects in the current legal system to address mass tort disasters than he is in proposing a clearly superior alternative. Although his proposals may be viewed cynically by those searching for an idyllic legal system, they do recognize the need for tough choices. Weinstein acknowledges the shortcomings of the legal system as it now exists and calls on both the legislature and the judiciary to take notice of them.

IV

Absent Weinstein's proposed legislative initiative, we are left with a pragmatic, patchwork tort system. Tort law will continue to be invoked as a means of deterring corporate tortfeasors and compensating mass tort victims. The judiciary will have the responsibility of ensuring that the legal system adequately meets these goals, and meeting this responsibility may require more judicial initiative and effort than simply a rigid application of the current legal framework. The presence of judges (like Jack Weinstein) who are aware of the problems mass torts entail and who are willing to look beyond the individual parties to the broader implications of the litigation in crafting solutions—even when this may result in a nickname such as "Reversible Jack"—suggests that the legal system will continue to evolve to meet the mass tort challenge.

—Charles T. Kimmett