

SOME REFLECTIONS ON THE FUTURE OF MASS TORTS

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INTRODUCTION

This conference, as I understand it, is meant to be an exercise in expert prognostication. Such an exercise is a welcome diversion from the more familiar but daunting tasks of trying to understand the congeries of problems that mass tort adjudication has bequeathed to us, and then figuring out how best to clean up the mess; particularly the need to compensate deserving victims while marshalling the requisite corporate and governmental resources for doing so.

We have had less occasion to think about the *future* of mass torts, and perhaps it is just as well since our prognostication about such things is notoriously fallible. It was a wise Chou en-lai who, when asked in the 1950s what the effect of the French Revolution had been, replied “it’s too soon to tell.” Imagine being asked in the late 1960s, when the *Borel* case¹ went to trial, what the mass tort system would look like in 2006. Who could have anticipated the course of Hurricane Asbestos—the swath of destruction leaving millions of past victims and future claimants; the scores of bankruptcies and judicially-established trusts; the rejection by the Supreme Court of the only practicable judicial solution, global settlements; the remarkable development of a sophisticated, “teched-up” plaintiffs’ bar capable of redressing some if not all of the imbalances that previously favored defendants; the massive insurance coverage litigation annexed to many mass tort cases; novel discovery and claims-splitting rules and other elements of what Lester Brickman has called a special asbestos law; collateral mini-trials to determine market share, *Daubert*² challenges to expert testimony, pre-bankruptcy solvency risks, and the like; and, most recently, Judge Janis Jacks’ thunderbolt in 2005 debunking the tactics of plaintiffs’ lawyers and their hired B-readers in asbestos, silicosis, and perhaps other cases. I think that it is fair to say that much of what has actually transpired in mass torts litigation would have been quite unimaginable at the time. So we should be humble about prognostication.

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1. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1075 (5th Cir.), *cert. denied*, 419 U.S. 869 (1974).

2. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Hindsight being 20-20, it is considerably easier to identify some of the most salient and distinctive features of mass torts, features that would-be reformers must take very seriously. We can best identify these features by examining asbestos litigation. I certainly do not claim that asbestos is a typical mass tort. Indeed, it is quite distinctive in some respects. But this is also true of other mass torts. For example, Agent Orange involved the U.S. military. DES created multi-generation risks and difficult product identification problems. Silicone gel breast implants and Dalkon Shields were in high demand by millions of women. The scientific, legal, and insurance coverage issues—to name just a few—differed for each of these litigations.

For present purposes, I claim only that anyone seeking to assess the future of mass torts should attend carefully to certain features of asbestos litigation that are illustrative and recurrent in most other litigation of this kind. I shall very briefly mention only four of these features: (1) the nature of the causal evidence, (2) the large number of product distributors and their risk heterogeneity; (3) the immense liability costs borne by the defendants and their insurers; and (4) the fecklessness of the tort system in dealing with the problem.³

I. CAUSAL EVIDENCE

Asbestos is not the only mass tort involving strong toxicological evidence against the product—cigarettes, lead paint, and some pharmaceuticals are others—but the evidence in asbestos is especially damning. This evidence secured the claims of a large and steadily growing group of claimants, a high percentage of whom have consequently received some compensation. The unusually long latency periods associated with asbestos-related illnesses both multiplied the number of such claimants and increased the difficulty of product (and hence defendant) identification, necessitating some evidentiary innovations in order to facilitate the claims. For most other completed mass torts—Agent Orange,⁴ Bendectin,⁵ silicone

3. For a detailed discussion of, and evidence on, each of these features, see Stephen J. Carroll, et al., “*Asbestos Litigation*,” RAND Institute for Civil Justice, available at http://www.rand.org/pubs/monographs/2005/RAND_MG162.sum.pdf (last visited July 25, 2006).

4. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURT* (enlarged ed., 1987).

5. See generally MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGE OF MASS TOXIC SUBSTANCES LITIGATION* (1998).

gel breast implants,⁶ and even Love Canal and Chernobyl⁷—the scientific basis for the causal claims was weak, and has actually become weaker with the passage of time.

II. NUMBER AND RISK HETEROGENEITY OF DEFENDANTS.

The number of actual and potential asbestos defendants is very large. This reflects not only the many firms involved in its manufacture, distribution, and application, but also the large number of bankruptcies among the larger defendants, which causes plaintiffs' lawyers to engage in an ever more desperate and creative search for companies that had even the most peripheral role in the use of asbestos. This heterogeneity among defendants has led to even higher litigation costs and much unfairness in the distribution of liability burdens.

III. LIABILITIES

The magnitude of established and potential asbestos-related liabilities is staggering, leading to numerous bankruptcies, inadequate compensation of many of the victims, reduced availability of insurance, immense transaction costs, long litigation delays due to the higher stakes, and many other problems. If economic incentives mean anything, one must suppose that these consequences will affect calculations by manufacturers, insurers, research programs, and many other actors about whether to invest in product development that carries such risks. Some of this calculation, of course, should properly be considered as desirable deterrence of unreasonable risk creation, but significant *over*-deterrence is another, not inconsistent possibility.

IV. TORT LAW'S CAPACITY TO REGULATE MASS TORT RISKS EFFECTIVELY.

Here, I mean to invoke a technocratic, means-ends rationality criterion of effective risk regulation and problem-solving. In this context, it implies administering a set of rules and institutions that create optimal deterrence, provide adequate and prompt compensation to deserving victims, affirm (or

6. See generally MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVID. AND THE LAW IN THE BREAST IMPLANT CASE* (1996).

7. Elisabeth Rosenthal, *Experts Find Reduced Effects of Chernobyl*, N.Y. TIMES, Sept. 6, 2005, at A10; Anthony DePalma, *Pollution and the Slippery Meaning of 'Clean,'* N.Y. TIMES, Mar. 28, 2004, at p.3.

at least do not undermine) social norms of morality and fairness, and achieve these goals with an acceptable level of competence and efficiency.

I am hardly the first commentator to doubt the tort system's ability to effectively regulate the kinds of risks and claims involved in asbestos and many other mass tort litigations. Numerous judges, lawyers, scholars, members of Congress, and other analysts without a personal stake in the system have joined me in both entertaining and strongly expressing such doubts.⁸ Our case is easy to make, at least in absolute terms. The tort system has provided neither timely nor fair compensation to deserving claimants, including some of the most severely harmed. It has failed to devise meaningful screens that can discriminate, long before trial, between strong claims and the much larger number of weak or spurious ones, which has shifted the center of gravity in the litigation toward the latter. It has managed to create inadequate deterrence of unreasonable risk (after all, *Borel* was decided only after many decades during which asbestos was in widespread use), while at the same time likely over-detering desirable investment in products that are socially beneficial but carry some risks. It has produced so many instances of inaccurate fact-finding and inconsistent verdicts that one cannot accurately predict outcomes and conform one's conduct accordingly.⁹ As already noted, the transactions costs in these litigations are very high relative to the returns to victims.

V. ALTERNATIVES TO REGULATING MASS TORT RISKS THROUGH LITIGATION

Tort law is not the only available instrument for regulating these risks. This point, which should be obvious, is often overlooked. Consider the alternatives. The vast majority of risks of injury by far are regulated by private insurance and other commercial contracts governed by traditional or modified contract law rules, often through alternative dispute resolution (ADR) processes. Almost all job-related health risks are covered by workers' compensation schemes. Many environmental, product-related, occupational, and other risks are regulated by administrative agencies

8. *E.g.*, MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), available at http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage?openform&url=/library/fjc_catalog.nsf/bysubjectfirm?openform&category=Complex+Litigation (last visited July 25, 2006); Hearings on the Asbestos Litigation Crisis, S. No. J-108-4, Mar. 5, 2003 and June 4, 2003, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:89326.wais.

9. Among the litigations illustrating the tort system's erratic outcomes are the Bendectin, tobacco, breast implant, and the Vioxx litigations.

pursuant to statutory delegations of authority. Indeed, most of the risks that mass tort litigation has targeted were already subject to regulatory limitations. I shall mention still other alternatives below.

In the brief time that remains, I want to focus on one of these alternatives, administrative regulation, by comparing it to the tort law system that we have been so carefully dissecting over the last few days. I want to emphasize some distinctive advantages that society would gain by mobilizing the regulatory agencies and techniques that are already in place rather than relying as much as we do on the tort system. I shall do this by calling attention to some of what I take to be the distinctive institutional and operational differences between the two systems. I want to emphasize that I am not making a strong categorical claim that managing risk through regulatory processes is superior to doing so through court litigation, although I do think that this is true in many, many situations. Nor am I suggesting that the two systems cannot live side by side, as indeed they do under existing law in many areas. My point, rather, is that the relationship between the tort and administrative systems of regulation is not as well-designed as it could and should be, particularly with respect to implied pre-emption.

Let us consider, then, a number of differences between them, differences that ought to be a focus of regulatory redesign in the future. In each case, I shall emphasize the comparative advantages of administrative regulation over litigation, while mentioning some of tort law's countervailing advantages.¹⁰ The first difference between the two systems is that regulation through the FDA, EPA, OSHA, and other agencies established to manage health and safety risks is largely *preventive*. Its orientation is to the future, not to the past. It manages risks so that injuries will not occur, rather than seeking, as tort law does, to compensate for injuries that have already happened. It is both more humane and more socially efficient to prevent injuries rather than simply compensating their victims when they occur. The key word here, of course, is "simply." In principle, tort law prevents as well as compensates—by deterring the creation of undue risks. In practice, however, tort-generated deterrence is often unsystematic, distorted, and either too weak or, occasionally, too strong,¹¹ to be effective.

10. For an earlier version of this comparison, see Peter H. Schuck, *The New Judicial Ideology of Tort Law*, in *NEW DIRECTIONS IN LIABILITY LAW* 14-17 (Walter Olson ed., 1988).

11. See generally DON DUFF, DAVID DEWEES, & MICHAEL J. TREBILCOCK, *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING FACTS SERIOUSLY* (1996); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 *CAL. L. REV.* 558 (1989).

A second difference that generally favors regulatory agencies relative to tort system juries and generalist judges is the agencies' greater expertise. Health and safety agencies, it should be recalled, were usually established because of the inadequacies of the tort system in regulating those risks. In principle and in fact, agencies study—more or less systematically—the nature and magnitude of risks and the alternative techniques for managing them. They are also more likely to study and take account of the tradeoffs among competing risks. A constitutive feature of tort law is that it focuses evidence and the jury on one risk only—the risk presented by the suspect product or environmental hazard. In the real world, however, we are almost always faced with the much more complex dilemma of risks versus risks, requiring tradeoffs that may not be presented in the evidence and that a jury is singularly ill-equipped to assess.¹² The Vioxx case exemplifies this problem. The lawsuits challenging Vioxx have focused, as they must, on the risk of heart disorders from taking Vioxx. But Vioxx also possesses certain advantages in dealing with a variety of widespread and serious pain conditions. If tort law discourages the use of Vioxx, it magnifies those other pain-related risks. In contrast, the FDA considered those tradeoffs in deciding whether and under what conditions (including labeling) to allow the marketing of Vioxx. FDA may make the wrong decision about those tradeoffs, but at least it is asking the right questions – and more of them.

Regulatory agencies are also more expert with respect to the conflicting social values implicated by a decision about how to manage risk. They employ procedures that are designed to elicit and explicate those values and to provide some information about the intensity with which those values are embraced by different groups in society. Notice-and-comment rulemaking procedures, for example, are calculated to elicit widespread public participation by the affected interests in the form of reason-giving and evidence. Regulatory agencies are also responsive—some would say *too* responsive—to a politically accountable Congress and President and thus are responsive indirectly to the interests that those institutions represent. In contrast, judges and juries are meant to be quite independent of such influences; they wear their institutional independence as an emblem of constitutional integrity and honor. The jury, moreover, is—and is designed to be—a black box from which only an oracular, opaque decision emerges.¹³ Although jurors inevitably express their values through their

12. See generally JOHN D. GRAHAM & JONATHAN B. WEINER, *RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT* (1997).

13. See generally GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES* (1977).

decisions, they neither explain those decisions nor identify their values. Indeed, they provide no materials from which others might be able to deduce their social meanings.¹⁴

Regulatory agencies also foster more accurate and consistent fact-finding; they do not exclude any evidence that seems relevant to the problem at hand and they draw on a wide variety of sources. They do not base their decisions on individual trials whose shape and outcomes turn on contingencies such as the quality of the lawyering and judging, the kinds of evidence that the lawyers decide to adduce and the judges admit, the tactical choices that both sides make, and so forth. The trial produces a highly stylized factual basis for decision that is much narrower than that used by an agency. Another way of putting this is that the standard deviation from the truth with respect to agency-found facts is likely to be much smaller than in the case of a jury decision. An important virtue of accurate and consistent decisions, moreover, is predictability. Consider again the Vioxx litigation. After a little over a year of jury verdicts, the score is now 5-4 against Merck. Merck's lawyers must ask themselves: What do we advise our client to do now? The answer is not at all clear. To be sure, the plaintiffs in these nine cases were different people who presented different facts. Nevertheless, these nine verdicts are totally inconsistent on the key issue: the adequacy of the warning (approved by the FDA) that Merck used for Vioxx.

Another important difference between regulatory agencies and the tort system concerns the variety of tools that they can deploy to shape the behavior of the groups and individuals subject to their power. Where tort law possesses only one instrument—the incentives created by the prospect that the court and jury will award money damages—regulatory agencies can wield a formidable armamentarium of weapons. They include regulatory standards, research, negotiation, publicity and public education, investigation, injunctive relief, and the application of a variety of sanctions.

Perhaps the most important advantage of agencies over the tort system is what I call the capacity for rapid social learning. Consider Linda Mullenix's charming chronology of how asbestos litigation evolved. It took the tort system *forty years* to learn about the risks of asbestos. The plaintiffs' lawyers did a wonderful job of developing some of the information that has propelled this litigation, and my hat (if I wore one) is off to them for this achievement. In stark contrast to this laborious, incremental process of case-by-case adjudication, regulatory agencies have

14. For an elaboration of this point in the Vioxx context, see Peter H. Schuck, "When Juries Send Messages," LOS ANGELES TIMES, Aug. 29, 2005, at B11.

the capacity to conduct research, hold hearings, learn from experience, and quickly incorporate that experience into their risk management apparatus. As their information changes concerning the nature of the problem and the best remedy for it, the agency can adjust accordingly. A court that concludes that it has adopted the wrong legal rule must nevertheless wait for the next case to come before it that presents that legal rule. Even then, of course, the court is to some extent bound by precedent and constrained by the arguments presented by counsel.

By the same token, regulatory rules can be more detailed, more refined, and more contextualized than even the most open-textured rules of tort law, such as the negligence standard. (Juries' decisions can be extraordinarily contextualized, but the opacity of the elements of those decisions means that the rest of us will know only the outcome of this contextualization, not its nature or elements). Although regulatory rules are often criticized as too rigid and one-size-fits-all, they need not be. Consider the FDA's regulation of Accutane, a wonder drug that is used to heal severe acne but can be very dangerous to pregnant women. FDA has designed a monitoring program to identify potential users who are pregnant and inform them of the high risk that they face and prevent them from using the drug while allowing others to use it who do not bear that risk. This system is far from perfect, I hasten to add, but it suggests the degree of differentiation and refinement in regulatory requirements that is possible.

Another difference between tort law and regulation has to do with the magnitude and incidence of transactions costs. This conference has delved deeply into this subject, so I won't say more about it here except that most of the costs of regulation are borne by taxpayers, whereas litigation costs are borne by the parties and their lawyers. One would expect, therefore, that the investment in a tort litigation would be highly targeted on what the lawyers need to win their case rather than on what society needs to solve the larger problem of which the individual case is merely a symptom – and, given the litigation selection bias, probably an atypical one at that.

I readily acknowledge that there are some counter-arguments—that the tort system has some attractive features lacking in administrative regulation. Perhaps the most attractive, even iconic one is the principle that every individual enjoys a constitutional right to a day in court. In a liberal, highly individualistic society that is congenitally suspicious of governmental power, this right is indeed precious. But if there is any clear lesson that comes from our discussion during the last two days, it is that the individualized opportunity to seek a form of justice tailored to one's own circumstances is utterly mythical, at least in the context of asbestos litigation and many other mass torts. In reality, the most that an individual

asbestos claimant can hope for is that he will be a member of a larger class that will achieve a generous settlement in which he can share in an amount that roughly reflects the strength of his claim and the nature of his loss. Whatever this hope is—and as noted above, mass tort litigation mocks it at many points—the reality is decidedly *not* an individual day in court.

A second counter-argument is that regulatory agencies are not the neutral expert entities depicted in the Progressive ideal, but rather political entities that are readily captured by special interests. Different people have different views as to who is capturing whom. Most political scientists now consider the capture thesis to be vastly oversimplified—and in many cases, flatly wrong. At the very least, the question of which interests influence agency decisions, in what ways, and with what consequences, is very complex, context-dependent, and usually in the eye of the beholder.

A third counter-argument, and one that I take very seriously, is that the quality of regulatory personnel is not what it should be—or, perhaps, used to be, as the gap between public and private sector compensation has grown. This possibility is especially disturbing with respect to the kind of scientific expertise and competence that FDA, EPA, OSHA, NRC, and other health and safety agencies need in order to do their work effectively. This is certainly a legitimate concern, but it is one that I think can be at least partly addressed by improving regulatory conditions, performance, and the resulting reputation that regulatory agencies enjoy so that they can attract better people.

Again, however, the comparison to the tort system is revealing. There, the crucial decision makers consist of a generalist judge and a jury of twelve people who have been conscripted on the basis of their ordinariness, people who the *voir dire* will assure know nothing about the subjects on which they will be asked to render a decisions. Now, the jury as an institution possesses many great strengths—perhaps Judge Kosinski will want to comment on this—and most judges who deal with juries claim to hold them in very high regard. I do as well.¹⁵ But as a matter of comparative institutional competence, they score low in their ability to comprehend and analyze the kind of complex scientific evidence that underlies most mass tort cases, and to do so consistently and transparently.

Regulatory agencies clearly need more and better epidemiological research if they are to develop sound safety standards directed at risks that the population encounters in occupational, environmental, and other contexts. This is a matter of money and of designing and conducting

15. Peter H. Schuck, *Mapping the Debate over Jury Reform*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM ch.9 (R. Litan, ed. 1993).

reliable studies, which is not easy to do. Nevertheless, the courts often rely on epidemiological research and some judges, like Judge Weinstein in the Agent Orange litigation, hold that in many mass tort situations, epidemiological research is the only kind of proof of general causation (specific causation being even harder to prove) that can be submitted to the trier of fact.¹⁶ In any event, the inadequacy of epidemiological evidence is as much an argument against the accuracy of tort system judgments as it is against leaving risk management decisions to the regulators.

I could go on and on, but my bottom line is that we ought to consider a very specific remedy for the ills of the tort system—reform of the tort law doctrine of implied preemption. This doctrine holds that unless the legislature makes it very clear that it intends to pre-empt the common law action, the jury may second guess the regulators' decision on the risk management issue. It may utterly ignore a standard that the agency may have taken twenty years and two hundred million dollars of research, analysis, and public participation to develop. It may simply arrive at its own determination as to whether a product is safe enough or whether the warning is informative enough, with little or no regard to the agency's considered decision, even one reviewed by Congress and the executive branch before its issuance. This doctrine strikes me as plainly irrational.¹⁷

CONCLUSION

In closing, I want to insist that we do not have to choose between managing risks through regulatory standards and having a tort system. In some respects, they have different tasks and serve different functions. My point is that there are better ways in which to integrate those two valuable institutions. We should think very carefully about, and law reformers should design, forms of interaction between them with a view to identifying those conditions of administrative regulation that are necessary in order for society to have a high level of confidence in an agency decision, so that it becomes binding in subsequent tort litigation. Once we identify those conditions, we can allow pre-emption in some cases but not in others, rather than leaving it to the courts, absent clear legislative direction, to make it up as they go along. This has usually meant allowing juries to jettison what the regulatory agency has painstakingly wrought and

16. Peter H. Schuck, Commentary, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479 (1998).

17. For a contrary view by a leading commentator on both tort law and administrative regulation, see Robert L. Rabin, *Regulatory Compliance As a Defense to Products Liability*, 88 GEO. L.J. 2049 (2000).

to substitute their own intuitive and common sense judgments on technical issues as to which intuition and common sense provide little useful guidance for far-reaching social policymaking.

