

Chapter I

INTRODUCTION TO THE PROBLEM OF MASS TORT LITIGATION

On August 10, 1990, ten federal district court judges from around the country handling large asbestos personal injury dockets issued an unprecedented order creating a nationwide, mandatory class action.¹ The very fact that a group of judges had convened to take action to do something about mass tort litigation was a unique event in judicial history. Within a week of the judges' order, the Sixth Circuit struck down the novel class action plan stating that it was "unable to find any Congressional authority for an 'ad hoc coordinating committee' to issue orders as an Article III court." The appellate court went further to opine that the federal judges had exceeded their Article III constitutional powers in their efforts to coordinate asbestos litigation on a nationwide basis.²

What had impelled the federal judges to take this unusual step that caused such a swift rebuke from the Sixth Circuit? The federal judges were reacting to the very concrete crisis on federal civil dockets relating to asbestos litigation. Although asbestos litigation, as a discrete mass tort phenomenon, first was noticeable on federal dockets in the late 1970s, the asbestos crisis is still very much upon the federal courts at the end of this century. The incidence of newly filed personal injury and product liability cases continues apace, without a correlative capacity of the judicial system to efficiently or fairly adjudicate these cases. As of January 1, 1990 there were approximately 30,000 asbestos cases pending in all districts of the federal court system. While a significant number of cases have been terminated through various means, statistics reflect a steady flow of new cases into the system with a total net increase in pending cases. Moreover, whereas in the 1970s these cases were centered primarily in six judicial districts, the trend of the 1980s and 1990s is that asbestos personal injury claims are now dispersed throughout the

1. This introduction is adapted from Linda S. Mullenix, *Problems in Complex Litigation*, 10 Rev. Litig. 213 (1991).

2. *In re Allied-Signal, Inc.*, 915 F.2d 190, 191 (6th Cir.1990).

entire federal system. In this sense, then, asbestos litigation has become the Sisphyean task of the federal court system: no matter how efficiently the courts have been able to process asbestos lawsuits, more cases keep coming into the system without any signs of respite.

While the judges' meeting and subsequent class action order seemed to have appeared from the blue, causing some asbestos attorneys to label the judges' behavior as "truly bizarre" and "getting stranger and stranger," to any close observer of the mass tort phenomenon the judges' action seemed a logical, if perhaps desperate, outgrowth of nearly a decade of frustrated attempts at legal reform. What was going on here was judicial action to remedy a litigation crisis in the face of legislative lassitude. If institutional law reform groups were ineffective to induce change and Congress was unable to enact meaningful legislative measures, then the judges would take matters into their own hands and begin to solve the complex mass tort litigation crisis. The response of the Sixth Circuit to the district judges, predictably, was "Thou shalt not legislate."

How had it come to pass that federal judges hoped to usurp the prerogatives of legislators? The answer lies, in part, in surveying the last decade's complex mass tort litigation problems as well as the failed reform efforts to relieve this phenomenon. To be sure, the concept of complex litigation is not new. Complex cases involving multiple parties, with claims dispersed over time and place, have existed as long as litigation has existed. The Federal Rules of Civil Procedure, as enacted in 1938, recognized the need for a procedural vehicle for collective action in the class action rule. In addition, the rules encouraged increasingly complex litigation through various liberal joinder provisions relating to claims and parties.

Notwithstanding these procedural vehicles for adjudicating large scale litigation, the complex litigation phenomenon did not fully evolve until mid-century. In the 1950s the federal courts experienced the massive electronics antitrust litigation, and in the 1960s, with amendment of the class action rule, the judicial system experienced vigorous prosecution of civil rights and institutional reform litigation. This first experience with system-wide complex litigation revealed problems with the judicial system's ability to fairly and efficiently adjudicate complex cases under rules and procedures then governing the system. This recognition, in turn, fostered the first reform efforts directed specifically at complex cases, resulting in the enactment of the multidistrict litigation statute.

Complex civil rights, antitrust, securities, and institutional reform cases remained fixtures of the litigation landscape through the 1980s. But the 1980s witnessed the advent of a new kind of complex case, with new characteristics and new challenges for the judicial system: the multiparty, multiforum mass tort litigation. The roll call of such mass tort cases is now well known to the general public and well documented in the academic literature: litigation involving Agent Orange, Bendectin,

the Dalkon Shield, swine flu vaccine, and asbestos. Added to this parade of horrors have been mass disaster cases, most notably spectacular hotel calamities such as the collapse of the skywalk at the Kansas City Hyatt-Regency hotel, and the MGM Grand and Dupont Plaza hotel fires—events that killed or injured thousands of people. Rounding out this gloomy scenario are environmental pollution disasters such as Bhopal, Love Canal, and Three Mile Island.

These large scale mass tort litigations have refocused attention on the various inabilities of the judicial system to resolve these cases in a fair, expeditious, and equitable fashion. The academic literature of the 1980s is replete with discussion and analysis of the failure of the judicial system to adequately deal with this newer phenomenon of complex litigation. In turn, these new problems of complex mass tort litigation have fostered reform efforts by various academics and institutional law reform groups, such as the American Bar Association, the American Law Institute, the Federal Judicial Center, and the Rand Institute for Civil Justice.

The following readings are intended to introduce the problem of mass tort litigation. This chapter begins with a selection of stories about the people who, through their personal injuries, unwittingly became involved in dispute resolution on a grand scale. These are the stories of the people behind the mass tort cases. The readings then shift to a wider-lens, academic view of the mass tort phenomenon, setting forth analytical frameworks for thinking about mass torts. After these analytical frameworks are set out, the chapter presents the overarching jurisprudential problem raised by modern mass tort litigation: the fundamental question tension between the litigant autonomy and aggregate procedure. Finally, the chapter examines some special problems of professional responsibility engendered by mass tort cases.

A. CASE STUDIES IN MASS TORT LITIGATION

MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD *

New York: Pantheon Books (1985) at 3-8.

In January 1971, the A.H. Robins Company began to sell the Dalkon Shield, promoting it as the “modern, superior,” “second generation,” and—most importantly—“safe” intrauterine device for birth control. Robins, a major pharmaceutical manufacturer in Richmond, Virginia, distributed 4.5 million of the IUDs in eighty countries before halting sales in the mid-1970s. There followed a catastrophe without precedent in the annals of medicine and law.

* FROM *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD* by Morton Mintz Copyright © 1985 by Morton Mintz.

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The seriously injured victims number in the tens of thousands. Nearly all suffered life-threatening forms of infections known as pelvic inflammatory disease (PID). In the United States alone, PID killed at least eighteen women who had been wearing Shields. Most of the infections impaired or destroyed the women's ability to bear children.

Not only was the Shield unsafe, it was surprisingly ineffective. The number of wearers who became pregnant with the devices in place was on the order of 110,000, or 5 percent—a rate nearly five times the one falsely claimed in advertising and promotion to physicians and women, and a rate sharply higher than that for many other IUDs. More than ordinary commercial puffery, the exaggerated and bogus claims led women to reject more effective birth control in favor of the Shield; and this led directly to consequences far worse than unwanted pregnancies. Statistically, half of all women who became pregnant with an IUD miscarry. But in fact, of the estimated 110,000 women who conceived while wearing the Dalkon Shield, 66,000—or 60 percent—miscarried. Most suffered the previously rare miscarriages called *spontaneous abortions* in either the first or second trimester. Others, in the fourth to sixth months of pregnancy, experienced the still rarer infected miscarriages, or *septic spontaneous abortions*. By the count of the Food and Drug Administration, 248 women just in this country endured this dangerous, Shield-related complication; for 15 of them, these septic abortions were fatal.

Moreover, hundreds of women throughout the world who conceived while wearing the Shield gave birth prematurely, in the final trimester, to children with grave congenital defects including blindness, cerebral palsy, and mental retardation, or that were stillborn. No one can pinpoint the exact number of such women, partly because no one knows how many times women or their doctors failed to make a proper connection between the Shield and the premature birth of a defective baby.

Robins distributed about 2.86 million Shields in the United States, and doctors implanted them, by the company's estimate, in 2.2 million women. Abroad, Robins distributed about 1.7 million Shields, and in June 1974 it estimated that 800,000 to one million were implanted. The Agency for International Development (AID) brought more than 697,000 Shields for use in the Third World, slightly more than half of them for the International Planned Parenthood Federation and most of the rest for the Pathfinder Fund, the Population Council, and the Family Planning International Assistance. AID said in a report in 1985 that nearly half of the Shields it had bought were returned unused to Robins and that a review of cables to the agency left the impression "that very few Dalkon Shield insertions were made." But whatever the precise numbers of Shield insertions in African, Asian, Middle Eastern, Caribbean, Latin American, and South American countries, poor medical conditions made lethal complications more likely. My guess is that Shield-related PID killed hundreds—possibly thousands—of women outside of the United States. Dr. Richard P. Dickey, a former member of the Food and

Drug Administration's obstetrical and gynecological devices advisory panel, has seen at first hand the conditions faced by a woman who suffers PID. An infected Shield wearer, "where there are no doctors, no antibiotics, she's going to die," he told me.

In 1974, increasing numbers of Shield-related spontaneous septic abortions became known to the FDA, and the agency asked Robins to suspend Shield sales in the United States. It did so on June 28, 1974. After the sales suspension, the company retrieved unsold Shields from supply channels in this country. Plaintiffs' lawyer Dale I. Larson asked company chairman E. Claiborne Robins why this had been done. Because "it was the proper thing to do," the chairman swore. Larson, trying to find out if the retrieved devices may have been exported, asked if the Shields had been destroyed, and how and when—and why "the proper thing" had not also been done for less-developed countries—where product liability lawsuits and adverse publicity about a defective product are rarities. To all such questions the chairman's answer was that he did not know.

In fact, after halting domestic sales, the company continued to distribute Shields abroad for as long as nine months—"at the request of * * * specific governments," Robins swore at a deposition in January 1984. Asked who had told him that, he replied, "I don't know that. It seems to me I saw a memo somewhere, but I don't remember when or where."

In El Salvador in 1975—a year after the suspension of Shield sales here—Martine Langley was a volunteer in a family-planning clinic. Now a lawyer in Austin, Texas, she recalls that the only IUD the clinic's doctors were inserting was the Shield, and that some clinics in El Salvador continued to implant Shields until 1980. "Sometimes the doctor would say to the patient, 'This is from the United States and it's very good,'" Langley told David Phelps, a Washington correspondent for the *Minneapolis Star and Tribune*. Then, she said, the doctor would motion toward her and tell the woman, "She is from the United States and people [there] use it."

Today, more than a decade after Shield sales officially ended, legacies of death, disease, injury, and pain persist. Even women who have had the Shield removed are not out of danger. Because PID is not an affliction that is simply treated and is then over and done with, large numbers of former Dalkon Shield wearers suffer chronic pain and illness, sometimes requiring repeated hospitalizations and surgery; many have waged desperate battles to bear children despite severe damage to their reproductive systems. More cheerless news came in April 1985 from two studies funded by the National Institutes of Health. They showed that childless IUD wearers who have had PID run a far higher risk of infertility if their devices were Shields than if they were other makes. Not even women who currently wear the Shield with no apparent problem are safe: they run the risk of suddenly being stricken

by PID. In the words of Judge Lord, they are wearing "a deadly depth charge in their wombs, ready to explode at any time."

The exact number of women still wearing the Shield is unknown. By early 1983, some Food and Drug Administration officials and OBGYNs were confident that few American women, probably only hundreds, still used it. Other qualified observers, however, were estimating the figure to be much higher, anywhere from 80,000 to more than half a million. Certainly the response to Robin's own call-back campaign of October 1984 suggests that the higher figures are closer to the mark. By February 1985, a \$4-million advertising drive, which urged women still wearing the Shields to have them removed at Robins's expense, had drawn more than 16,000 phone calls on toll-free hotlines; by the end of March 4,437 women had filed claims for Shield removals. The claims were flowing in at the dramatic rate of more than one hundred a week.

And what of women in the seventy-nine other countries where the Shield was distributed? The company told the FDA that it had notified first the countries' ambassadors in Washington and then their senior health officials at home of its Shield-removal campaign in the United States, and had "sought direction on whether a similar program would be appropriate in those countries." By early April 1985, Australia, Canada, and the United Kingdom had requested, and the company had put into effect, one or another kind of removal program. New Zealand, too, was considering a program. Sixteen other countries had simply acknowledged receipt of Robins's letter. Eight others—Denmark, Mexico, Norway, Pakistan, the Philippines, South Africa, Tanzania, and Zambia—had declined any removal program. From the rest of the countries, of which there were fifty-one, Robins had received no response almost a half-year after inviting one. If this record suggests indifference to the health and safety of women, at least a partial explanation may be found in the company's adamant refusal to admit to the special dangers inherent in its device. "Robins believes that serious scientific questions exist about whether the Dalkon Shield poses a significantly different risk of infection than other IUDs," it said in an interim report to the FDA.

Another measure of the extent of the damage is provided by the lawsuits and unlitigated claims filed by Shield wearers in the United States. Nearly all of these women had suffered PID followed by damage to or loss of their ability to bear children. The large majority had not been pregnant when stricken. Through June 30, 1985, by the company's own count, the total number of cases was 14,330, and new ones were being filed at a rate of fifteen a day. The company continues to experience a dramatic upsurge in the number of new Shield claims, president E. Claiborne Robins, Jr., told the annual stockholders' meeting on May 30, 1985. "I want to emphasize that the company anticipates that a substantial number of new claims will be filed in the future," he said. Through June 30, 1985, Robins and its former Shield insurer, Aetna Life & Casualty Company, had paid out \$378.3 million to dispose of cases, plus \$107.3 million in legal expenses. Juries have awarded \$24.8 million in punitive or exemplary damages, which are intended to

punish wanton or reckless behavior and to deter it repetition or emulation.

Still, no summary of suits and claims can come close to accounting for the total number of Shield injuries. By Robins's own conservative estimate in April 1985, 4 percent of the wearers were injured—that is, nearly 90,000 women in the United States alone. Of course, only a fraction of these will file suit. It is conventional wisdom among medical scientists that adverse reactions to drugs are always grossly underreported, and this is surely true of Shield injuries, too. Also, some Shield victims who stood to win substantial damages chose not to sue, either because they wanted to put a horrifying experience behind them, or because they placed a higher value on avoiding public disclosure of a matter as private and sensitive as the impairment or destruction of their ability to bear children. Other victims did not know or had forgotten the makes of their IUDs, as confirmed by Robins in its report to the FDA. By January 17, 1985, it said, 3,939 calls had come in on its special phone lines “from women presently wearing an IUD but of unknown type.”

Furthermore, some of the women who might have sought compensation were certainly intimidated by Robins's brutal invasions of privacy and courtroom techniques. Judge Lord charged:

When the time came for these women to make their claims against your company, you attacked their characters. You inquired into their sexual practices and into the identity of their sex partners. You exposed these women—and ruined families and reputations and careers—in order to intimidate those who would raise their voices against you. You introduced issues that had no relationship whatsoever to the fact that you planted in the bodies of these women instruments of death, of mutilation, of disease.

Again, if the claims against Robins in the United States represent only a fraction of the incidence of injury, they represent an even smaller fraction worldwide, since figures are simply unavailable from most of the countries where the Shield was used.

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PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL *

New York: Pantheon Books (1985) at 3-6.

When the Manville Corporation, the world's largest asbestos company, with twenty-five thousand employees and more than fifty factories and mines in the United States and Canada, filed a debtor's petition for reorganization and protection under Chapter 11 of the federal Bankrupt-

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cy Code, on August 26, 1982, it did so in order to force a halt to thousands of lawsuits that had been brought against it by workers who claimed that they had developed lung cancer and other diseases as a result of their exposure to asbestos in Manville's insulation products, and who were alleging that the company had failed to warn them of the dangers involved. The story made the front page of virtually every major newspaper in the country, because Manville (formerly the Johns-Manville Corporation) was not only the largest American industrial company ever to file under Chapter 11—at the time, it ranked 181st on *Fortune's* list of the nation's 500 leading industrial corporations—but, with assets of more than \$2 billion, was also one of the most financially healthy companies ever to take such action. In a full-page statement that appeared on August 27 in the *New York Times*, the *Washington Post*, the *Wall Street Journal*, and other leading papers, John A. McKinney, Manville's chairman and chief executive officer, announced that the company was "overwhelmed by 16,500 lawsuits related to the health effects of asbestos." McKinney said that lawsuits were being brought against Manville at a rate of 500 a month, and that the company could expect to be named as a defendant in at least 52,000 asbestos-disease lawsuits before the litigation ran its course. He estimated that at present settlement cost of about \$40,000 per case the lawsuits would create a potential liability of \$2 billion, requiring Manville to set aside a reserve fund that would wipe out most of its net worth and cripple its operation. For these reasons, he declared, the company's board of directors had decided to file for relief in the hope of establishing an effective system for handling the asbestos claims under Chapter 11.

In his statement, McKinney took pains to point out those people whom he considered responsible for Manville's predicament. He began by blaming the federal government for refusing to admit responsibility for asbestos disease that had developed among Second World War shipyard workers, who made up half the plaintiffs in the lawsuits brought against Manville. He criticized Congress for failing to enact a statutory compensation program for the victims of asbestos disease "so that the thousands of citizens and voters caught up in this problem will be spared the expensive, inefficient, and haphazard litigation system we have been saddled with." In addition, he castigated the insurance companies with which Manville had been doing business over the years for refusing to pay claims against product-liability policies totaling hundreds of millions of dollars. As for any responsibility that Manville might have incurred for the plight of the insulation workers, McKinney implied that the company was not at fault because "not until 1964 was it known that excessive exposure to asbestos fiber released from asbestos-containing insulation products can sometimes cause certain lung diseases." Since the mid-1970s, he said, Manville had disposed of some thirty-five hundred lawsuits by settlement or trial, and in a significant number of the cases that had gone to trial, he said, "juries have found that we are not at fault and acted responsibly in light of then existing medical knowledge."

In many ways, McKinney's statement was more revealing for its omissions than for what it contained. By neglecting to mention that Manville and its insurance carriers had settled out of court approximately thirty-four hundred of the thirty-five hundred lawsuits it had disposed of, and that it had paid out some \$50 million in doing so, he ignored the extent to which his company had already acknowledged responsibility for the incidence of asbestos disease in insulation workers. In claiming that insulation materials containing asbestos were not known to be dangerous until 1964—an assertion that had constituted Manville's chief legal defense for many years—he ignored the fact that this defense had been rejected by juries across the country, and had recently been struck down by the New Jersey Supreme Court. Far and away the most self-serving of the omissions in McKinney's statement, however, was his failure to go beyond a bare mention of the fact that punitive damages had been awarded against Manville. Not only had juries found Manville liable for punitive damages in ten of some sixty-five asbestos lawsuits involving the company that had been tried in the United States during 1981 and the first half of 1982, but the average amount of punitive damages in the first six months of 1982 was about \$600,000 a case. It is usually not possible to insure against punitive damages, which are assessed for outrageous and reckless misconduct, and McKinney could not have been unaware of their potential effect upon his company, for the simple reason that the likelihood of their being awarded in subsequent trials had been listed as a chief reason for Manville's financially uncertain future in a sworn affidavit that Manville's treasurer had submitted to the United States Bankruptcy Court of the Southern District of New York on the previous day. Moreover, in testimony given before the Senate Committee on Labor and Human Resources two years earlier, McKinney himself had underscored the devastating implications of punitive damages when, in order to substantiate his denial of the charge that employers had knowingly exposed workers to the hazards of excessive asbestos dust, he had pointed out that in all the litigation to date there had not been a single instance in which a jury or a trial judge had awarded punitive damages against any asbestos company. "I can think of no greater demonstration that the cover-up charge is a complete fabrication," he declared.

By and large, the newspaper stories that appeared on August 27 tended to describe Manville as a beleaguered giant reeling under the burden of mass litigation, and to portray McKinney as an embattled business manager fighting for his company's survival. Few of them reported the fact that juries had assessed punitive damages against Manville after hearing evidence that the company had engaged in a cover-up of the asbestos hazard for nearly five decades. The *Times*, for example, not only neglected to tell its readers initially that punitive damages had been assessed but also ran an editorial that compared the suffering of asbestos workers with the fiscal woes afflicting the asbestos companies. "Asbestos is a tragedy, most of all for the victims and their families but also for the companies, which are being made to pay the

price for decisions made long ago," the editorial read. The editorial warned Congress to address the asbestos problem "before more victims die uncompensated and other companies follow Manville into the bankruptcy courts."

During the remainder of August and in the first part of September, the economic, legal, and political ramifications of Manville's Chapter 11 petition received daily attention in the press, which speculated at length on the dilemma it presented to Manville's stockholders and creditors, on the problems it posed for bankruptcy court, and on the pressure it placed on Congress to enact legislation that would help Manville overcome its financial difficulties. Considerably less attention was given to a grim prediction made by Dr. Irving J. Selikopff, who was director of the Environmental Sciences Laboratory at the Mount Sinai School of Medicine, in New York, and was widely acknowledged as the world's leading expert on asbestos disease. Selikopff estimated that among the twenty-one million living American men and women who had been occupationally exposed to asbestos between 1940 and 1980 there would be between eight and ten thousand deaths from asbestos-related cancer each year for the next twenty years. As for the culpability of Manville and other leading asbestos companies in helping to create this immense human tragedy, it either went unreported or was mentioned only in passing. By the last week of September; when the story of Manville's Chapter 11 petition had dropped from the headlines, few people were aware that the bankruptcy filing was simply the latest episode in a fifty-year history of corporate malfeasance and inhumanity to man that is unparalleled in the annals of the private enterprise system.

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PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS *

The Belknap Press of Harvard University Press (1986).

3-6; 10-12, 13-15.

This * * * is about two urgent social problems and about the extraordinary lawsuit they have spawned.

The first problem arose from the smoldering ashes of Vietnam. For many of the millions of American soldiers who returned home from that charnel house, the future was filled with bitterness, dread, controversy, and debilitating illness. In 1978 the veterans sued a number of chemical manufacturers, blaming them for various diseases and traumas that they and their families had allegedly suffered because of exposure to Agent Orange, a herbicide the United States Army had used to defoliate Vietnam's luxuriant jungle cover. The law, the veterans hoped, would assuage their pain and vindicate their sacrifices. Today, almost a decade

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later, they are still waiting. For many of them, the law has become a mockery of justice, an object of derision.

The second problem arose from a very different set of social facts. We live in the midst of a burgeoning technological revolution. For several decades a torrent of new synthetic chemicals has cascaded out of our laboratories. Complex industrial processes have been developed, and intricate patterns of distribution, consumption, and disposal have evolved. These innovations have benefited American society enormously, but they have also created new kinds of risks. Agent Orange, originally hailed by some environmentalists and even by one of the veterans' lawyers as a model herbicide, was later found to harbour insidious dangers as well; in this respect it was a characteristic product of the great scientific advance.

It might seem surprising that these two disparate social problems—the one produced by unspeakable human suffering, the other by unparalleled human ingenuity—came together in a courtroom. On the surface, each of these problems seems quite unsuited to resolution at the instance of private parties wrangling before a judge. War, after all, leaves many bitter legacies; distributing its burdens is ordinarily the stuff of national politics, not of private litigation. By the same token, environmental risk management is an immensely complex technical task; controlling such risks is usually the responsibility of legislatures and regulatory agencies, not of courts.

Students of the contemporary legal system, however, know better. Times have changed. Traditionally, tort (personal injury) cases were generally regarded as essentially isolated disputes in which the law's role was simply to allocate losses between putative injurers and victims according to a moral conception that Aristotle called corrective justice; the law required that a wrongdoer return to a victim, typically in the form of money damages, what the former had "taken" from the latter. Such disputes were readily managed by the parties and the court system. Typically, the parties would adduce a relatively simple, comprehensible body of evidence before a detached arbiter, usually a jury. Applying general and familiar norms of conduct to the facts of the case, the jury would reach a decision, one that bound the parties but, because it was so fact-specific and was not explained by the jury, had little precedential effects on other cases.

Today, the law books abound with tort cases, especially in the product liability area, that involve not a few individuals but large aggregations of people and vast economic and social interests. These cases are not preoccupied with corrective justice between individuals concerned solely with past events. Instead, they concern the public control of large-scale activities and the distribution of social power and values for the future. The court and the jury in these cases do not simply prescribe and apply familiar norms to discrete actions; they function as policy-oriented risk regulators, as self-conscious allocators of hard-to-measure benefits and risks, and as social problem solvers.

The Agent Orange case carries this trend to its logical (or, as we shall see, perhaps illogical) extreme. Apart from its locus in a courtroom, it bears little resemblance to traditional tort adjudication. Its magnitude and complexity beggar imagination, as a few crude numerical indicators will suggest. The case is actually a consolidation into one class action of more than 600 separate actions originally filed by more than 15,000 named individuals throughout the United States, and almost 400 individual cases not included in the class action ("opt out" cases). The parties in these consolidated actions consist of some 2.4 million Vietnam veterans, their wives, children born and unborn, and soldiers from Australia and New Zealand; a small number of civilian plaintiffs; seven (originally twenty-four) corporate defendants; and the United States government.

In a typical case litigated in the federal district court in which the Agent Orange case was heard, the docket sheet is one or two pages long and contains perhaps sixty individual entries, each representing a filed document. The Agent Orange docket sheet in the district court alone is approximately 425 single-spaced pages long. It contains over 7,300 individual entries, many representing documents that are hundreds of pages long. The files of briefs, hearing transcripts, court orders, affidavits, and other court documents in the case were so voluminous that the already cramped clerk's office had to take the unprecedented step of devoting an entire room, staffed by two special clerks, to house them.

The financial and personnel demands of the case are even more staggering. The plaintiffs are represented by a network of law firms that numbered almost 1,500 by May 1984, located in every region of the country; the documented cost of their activities to date certainly exceeds \$10 million and increases daily. It has been estimated that defendants spent roughly \$100 million merely to prepare for the trial, utilizing hundreds of lawyers and corporate staff in their Herculean effort.

The court has also borne an enormous administrative burden. The current district court judge—the second to preside over the Agent Orange case—had to create a considerable bureaucracy within its chambers simply to enable him to run it, employing additional law clerks and paralegals. And although it is highly unusual for a judge to appoint even one special master to handle particular aspects of a litigation for him, this judge used no fewer than six special masters (four or five of them simultaneously) plus a federal magistrate, and they in turn sometimes hired consultants to assist them.

Finally, the case resulted in the largest tort settlement in history. That settlement, reached in May 1984 after almost six years of litigation, created a fund of \$180 million; with accrued interest, it now totals more than \$200 million, increasing at the rate of more than \$40,000 each day. The case is now on appeal; since the settlement has been challenged, the court will not be in a position to begin distributing that fund for years, even if the plan is ultimately upheld. Nevertheless, simply to maintain the fund, the court has already been obliged to disburse more than two

million dollars. For example, it had to create an Agent Orange computer center to process the almost 250,000 claims that class members have filed against the fund.

But the significance of the Agent Orange case is not confined to the features that have been mentioned—its symbolic reenactment of the war, its heralding of a new role for courts and juries, or its gigantic dimensions. Even more important is what the case reveals about a new and far-reaching legal and social phenomenon—the “mass toxic tort”—and society’s response to it. The Agent Orange case is not the first mass toxic tort litigation (the diethylstilbestrol, or DES, and asbestos litigations began earlier), but it is probably the most revealing and perplexing example of the legal genre. In the Agent Orange case, we confront an unprecedented challenge to our legal system: a future in which the law must grapple with the chemical revolution and help us live comfortably with it.

The mass toxic tort has only become possible in recent years, as a vibrant chemical technology converged with mass distribution techniques and mass markets. We have not yet grasped its full meaning and implications. To begin to understand what is truly distinctive about it, we must isolate the three constitutive elements—mass, toxic, and tort.

* * *

The Agent Orange case dramatically illustrates each of these distinctive characteristics of mass toxic tort litigation. Its *mass* aspect, as we have already seen, is especially striking, creating the prospect of ruinous liability for defendants, stupefying organizational complexity for plaintiffs, and unprecedented problems of procedural, evidentiary, and substantive law for the court.

Even more than the mass character of the claims, however, the *toxic* nature of the injury in Agent Orange defines the case as extraordinary. This is especially evident when Agent Orange is compared with the two most important and difficult toxic tort litigations that had been brought previously, those involving asbestos and DES. Although each of these litigations presented its own unique array of complications, the issue that would prove most perplexing in Agent Orange—the question of whether the chemical caused plaintiffs’ injuries—was far more straightforward in the asbestos and DES cases. First, the objective symptoms of asbestosis and mesothelioma, the two most common asbestos-related diseases, and the vaginal adenocarcinoma caused by DES, are relatively exposure-and-disease-specific, distinctive, and easily observed. Second, the long latency periods for those diseases (often twenty years or more) had already run their courses by the time many of the cases reached trial. Third, the exposure levels of asbestos workers and of women who had ingested DES during pregnancy were relatively high and sustained.

None of these conditions obtained in the case of Agent Orange: the cancers and birth defects that it allegedly caused were not distinctive; the exposures had occurred less than fifteen years earlier and thus may

not yet have fully revealed their toxic effects; and the levels of dioxin (the highly toxic contaminant of Agent Orange) to which the veterans were exposed were generally quite low. For these and other reasons, the obstacles to establishing general causation and damage, easily overcome in the earlier toxic tort cases, would prove decisive in shaping the Agent Orange litigation and settlement and the public reaction to them.

By the same token, the task of establishing the liability of particular defendants was far more daunting in the Agent Orange case. The DES cases presented the indeterminate defendant problem; the pills, although manufactured by many different drug companies, were fungible and had been consumed long ago. Some asbestos cases presented the problem of indeterminate plaintiffs; certain injuries, especially cancer, were not asbestos-specific.

The Agent Orange case, however, presented both the indeterminate defendant and indeterminate plaintiff problems and in extreme forms. The Agent Orange was produced by different companies, but their formulations were mixed together in nonidentifiable steel drums before being sent to Vietnam. The most serious injuries of which the veterans complained apparently are not dioxin-specific. And although in the asbestos cases the issue of which particular firms were liable was sometimes complicated by a number of variables (type of asbestos, condition of packaging and handling, use of respirators) that were not usually relevant to Agent Orange, the issues of which individuals were exposed and at what levels were even more difficult in Agent Orange.

But this case also reveals in an unusually clear and arresting form the distinctive moral dilemma that characterizes tort disputes. From the perspective of the veterans who sued, the case's significance lay less in large questions of public policy, such as the conduct of the Vietnam War and the social control of toxic substances, than in their claim to what tort law has traditionally promised—corrective justice. The veterans viewed the case as their opportunity to settle accounts, to recover from the government and the chemical manufacturers some portion of what the Vietnam War had taken from them in the name of duty: their youth, their vigor, and their future. The case came to symbolize their most human commitments and passions: their insistence upon respect and recognition, their hope for redemption and renewal, and their hunger for vindication and vengeance. For them, it was a searing morality play projected onto a national stage. These deeply personal aspirations pervaded the case, influencing the strategies of plaintiffs' counsel, shaping certain issues, and casting a shadow over the negotiated settlement that would obscure its legal status for years to come.

Agent Orange, however, is more than a paradigm of a particularly difficult kind of mass toxic tort case. It also exemplifies a long historical development in the structure and underlying assumptions of tort law generally. This development consists of three interwoven themes. * * * First, tort law has moved from an individualistic grounding toward a more collective one. In defining the parties' legal rights and duties,

tort law has come to be concerned with them less as discrete, idiosyncratic actors than as relatively interchangeable units of large, impersonal aggregations—broadly defined classes, epidemiological populations, or stochastic events. Second, the criteria for evaluating the parties' behavior have moved from moral categories to more functional ones. Evaluations of conduct based on fault, specific causation, and corrective justice norms have increasingly given way to considerations of compensation, deterrence, and administrative efficiency. Third, tort law has come to legitimate a judicial role that is less arbitral and more managerial in nature. Today's judge does not simply decide between the competing proofs and legal theories offered by the parties; he or she is also widely expected to administer large-scale litigation with an eye to achieving broad social purposes. The judge is supposed to allocate scarce resources wisely, develop legal rules that advance sound public policy, ensure that lawyers adequately represent their clients, and consider the social and political implications of settlements.

* * *

But for all its unique features, it would be profoundly mistaken to regard the case as only an interesting oddity, a sort of legal sideshow of interest to veterans, to be sure, but without larger significance for American society generally. * * * In reality, the Agent Orange litigation prefigures a grim dimension of our future; it is a harbinger of mass toxic tort cases yet to come. Future disputes will surely possess their own idiosyncratic elements; for example, they may involve pharmaceuticals, food additives, industrial compounds, pollutants, toxic wastes deposited in landfills, radiation, or some other effusion of modern technology. The causal linkages between toxic agents, exposure levels, and pathological symptoms may be more or less elusive than was true of Agent Orange. The injurers' identity and responsibility may be more or less determinate than in this case. The judges who adjudicate future cases may have very different conceptions of the court's role and of the nature of mass toxic tort litigation than did Judges Pratt and Weinstein. Other differences will surely exist. The contours of the new cases are no more predictable today than the Agent Orange case was twenty-five years ago.

* * *

But emphasizing the case's significance as a lodestar for future litigants and judges is to miss what in the end may be an even more profound lesson. The Agent Orange case is not simply a response to the veterans' anguish and to the social risks from toxic chemicals. It is, most pointedly, an attempt to solve these problems in a particular way. Tort litigation is an exceedingly valuable mechanism of social integration and control, a mechanism of which Americans appear to be unusually fond. But it is by no means our only, or necessarily our most promising, remedy for mass toxic harms. It is only one in a repertoire of policy instruments, including regulation, administrative compensation

schemes, collective bargaining, and insurance, by which society can attempt to control risks and compensate harms.

* * *

It may seem odd to close this introduction by emphasizing the particularized, idiosyncratic, human dimension of the Agent Orange case. After all, [it has been] stressed that its causes, character, and consequences are firmly rooted in technological developments, fundamental legal structures, and large historical and political forces. These are social phenomena in which the role of individuals might seem insignificant or at most merely epiphenomenal. Yet the truth is that almost every aspect of the Agent Orange litigation has been influenced by contingent human choices. Dedicated but deeply divided veterans; flamboyant trial lawyers; class-action financial entrepreneurs; skillful, Machiavellian special masters; a Naderesque litigation organizer; a brilliant, crafty judge—these forceful personalities continually collided in a kind of Brownian motion of strategic choice, high idealism, seat-of-the-pants innovation, and human folly. Seldom has the contradiction between the popular, intuitive aspiration for law and its technical, formal reality been more vividly revealed. The Agent Orange case reminds us that the great historic developments not only play upon, but may also be the playthings of, ordinary men and women who are sometimes capable of doing extraordinary things.

* * *

Notes and Questions

1. The Dalkon Shield litigation, the asbestos cases, and the Agent Orange litigation represent three complex mass torts that have merited in-depth case studies of the social and legal problems surrounding resolution of these cases. These three mass torts will provide a continuing source for many of the case excerpts presented in this text. For other book-length treatments of mass tort litigation, see Ronald J. Bacigal, *THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY* (1990); Henry S. Cohn and David Bollier, *THE GREAT HARTFORD CIRCUS FIRE: CREATIVE SETTLEMENT OF MASS DISASTERS* (New Haven: Yale University Press, 1991); Sheldon D. Engelmayer and Robert Wagman, *LORD'S JUSTICE: ONE JUDGE'S BATTLE TO EXPOSE THE DEADLY DALKON SHIELD I.U.D.* (1985); Michael Green, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGE OF MASS TOXIC SUBSTANCES LITIGATION* (1995); Karen M. Hicks, *SURVIVING THE DALKON SHIELD IUD: WOMEN V. THE PHARMACEUTICAL INDUSTRY* (1994); Susan Perry & James Dawson, *NIGHTMARE: WOMEN AND THE DALKON SHIELD* (1985); and Richard B. Sobol, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (Chicago: The University of Chicago Press, 1991); Jack B. Weinstein, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995). See also *VIETNAM VETERANS, THEIR FAMILIES, THEIR LEGACY* (1994).

In addition, there is a growing academic literature of case studies of mass tort litigation aimed at “[expanding] the analytical literature describing new case management techniques” so that “[w]ith a sufficient database of case histories, it may be possible by reasoning inductively to develop a

functional approach for the judicial management of complex cases." See Cheryl Frank, *Mass Tort: Salmonella Cases; A Model?*, A.B.A.J., Aug. 1985, at 5; Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L.Rev. 659 (1989). Professor McGovern has been a leading expositor of mass tort case studies. See McGovern, *An Analysis of Mass Torts for Judges*, 73 Texas L.Rev. 1821 (1995); (descriptive analysis of mass tort litigation); McGovern, *The Alabama DDT Settlement Fund*, 53 Law & Contemp. Probs. 61 (1990); *Resolving Mature Mass Tort Litigation*, *id.* (case studies of *Jenkins v. Raymark Industries, Inc.* and *In re A.H. Robins Co.*); McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U.Chi.L.Rev. 440 (1986)(case studies of Michigan fishing rights litigation, Alabama utility ratemaking, and Ohio asbestos litigation); see also, Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 Wm & Mary L.Rev. 475 (1991)(case studies of the *In re School Asbestos Litigation* and *Cimino v. Raymark Industries* cases); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 Hastings L.J. 301 (1992); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U.Chi.L.Rev. 337 (1986)(case study of the Agent Orange litigation with a focus on settlement techniques).

2. The excerpts from Mintz, Brodeur, and Schuck books concerning the Dalkon Shield, asbestos, and Agent Orange litigations suggest similarities and differences in these mass tort cases. What commonalities exist across these cases? What differences? To what extent do these cases suggest a paradigmatic mass tort case? The Dalkon Shield litigation, in addition to its intrinsic mass tort characteristics, raises interesting questions concerning the legal and ethical obligations of corporations in their activities in the international arena. What is a corporation's legal liability for marketing and distributing a defective product abroad? How is this determined? Does it make a difference if distribution is in a so-called "third world" country, or, as Mintz describes, that a foreign country's government requests that a product continue to be distributed? What are a corporation's ethical responsibilities once the product has been recalled or suspended in the American market? See e.g., Renee B. Allen, *International Regulation of Defective Medical Devices: Protecting the Foreign Consumer Through Recall*, 7 B.U. Int'l L.J. 85 (1989); Bruce F. Meyers, *Soldier of Orange, The Administrative, Diplomatic, Legislative and Litigatory Impact of Herbicide Agent Orange in South Vietnam*, 8 B.C. Env'tl. Aff. L. Rev. 159 (1979); Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. Chi. L. Rev. 1369 (1991); Russell J. Weintraub, *A Proposed Choice-of-Law Standard for International Products Liability Disputes*, 16 Brook. J. Int'l L. 225 (1990).

3. Paul Brodeur's book raises the issue of the appropriateness of bankruptcy as a vehicle for resolving mass tort claims. The literature of mass tort litigation tends to focus on the harm to individual victims, with less attention paid to the effects of mass tort litigation on corporate solvency. The Brodeur excerpt also raises the issue of the impact of possible repetitive punitive damages on corporate malfeasors. The issues relating to mass torts and bankruptcy will be considered in Chapter XIII, and punitive damages in Chapter VII.

4. The excerpt from Professor Schuck's book suggests that Professor Schuck views the Agent Orange litigation as the paradigmatic mass tort litigation. Professor Richard Marcus has disagreed, stating: "The message he chose to emphasize, however, seems to be the wrong one. Treated as a parable for the failure of the tort system, the Agent Orange story is a poor fit because it is such a special case. Even as a harbinger of mass exposure litigation, it is of doubtful value; the recent books on asbestos and Dalkon Shield litigation suggest that the tort system serves a purpose in such cases." Richard L. Marcus, *Apocalypse Now?*, 85 Mich.L.Rev. 1267 (1987)(reviewing Schuck, *AGENT ORANGE ON TRIAL*). Professor Marcus believes that the real value to be derived from the Agent Orange litigation is in its lessons for active judicial promotion of settlement. See also Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxic Tort Litigation*, 98 Yale L.J. 813 (1989)(reviewing Schuck's *AGENT ORANGE ON TRIAL*); Frank A. Lalle, Comment, *Agent Orange As A Problem of Law and Policy*, 77 Nw. U.L. Rev. 48 (1982). The Dalkon Shield settlement is discussed in Chapter II, and the Dalkon Shield bankruptcy trust fund is explored in Chapter XIII. One of the recurring themes of this casebook is the extent to which both the procedural and substantive law "systems" have failed in the context of mass tort litigation.

5. It is perhaps useful, at the outset, to distinguish between "mass-accident" cases and "mass tort" litigation, as a number of commentators and courts do. Most so-called mass-accident or mass-disaster cases involve situations in which a number of persons are simultaneously harmed by a single act of the defendant. Usually these cases do not involve complex questions concerning the time between the defendant's wrongful conduct and the plaintiff's injury, remoteness of damage, contributory negligence, or assumption of risk. Typical examples are airplane crashes, explosions, catastrophic fires, and oil spills. See *In re Beverly Hills Fire Litigation*, 639 F.Supp. 915 (E.D.Ky.1986)(nightclub fire killing or injuring over 300 persons); *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.1982), *vacated* 680 F.2d 1175 (8th Cir.1982), *cert. denied sub nom. Rau v. Stover*, 459 U.S. 988, 103 S.Ct. 342, 74 L.Ed.2d 383 (1982)(Hyatt-Regency hotel skywalk collapse killing more than 100 people and injuring over 220); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006 (5th Cir.1977). The so-called "modern" mass tort is characterized by multiple occurrences of various related harms over time, with geographical dispersion of claims and claimants. For a discussion of this distinction, see Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex.L.Rev. 1039, 1044 n.19 (1986); see also Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N.Ky.L.Rev. 541, 546-48 (1989)(distinguishing mass accident cases from mass exposure cases); Georgene M. Vairo, *Multi-Tort Cases: Cause For More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 Fordham L.Rev. 167 n.1 (1985)(distinguishing mass accident cases from toxic tort cases); Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324 n.1 (1983)(distinguishing mass-accident cases from mass products-liability cases); Deborah Deitsch-Perez, Note, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Actions Under Rule 23*, 49 Brook.L.Rev. 517, 517 n.6

(1983)(distinguishing mass-accident cases from products liability cases); Note, *Mass Accident Class Actions*, 60 Cal.L.Rev. 1615, 1616-17 (1972).

6. The Advisory Committee's note to Federal Rule of Civil Procedure 23 indicates that the class action rule is generally not a suitable procedural mechanism for litigating mass-accident cases. Through the 1970s and 1980s this Advisory Committee note was frequently cited to justify denying class certification in mass-tort cases. See e.g., *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir.1982)(de-certifying classes in Dalkon Shield litigation), *cert. denied* 459 U.S. 1171, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 263 (S.D.Cal.1988)(denying class certification in flea and tick spray products liability litigation). For a further discussion of this problem, see Chapter II, A, *infra*, discussing the class action rule and mass torts.

7. For capsule descriptions of a number of recent mass accident and mass tort cases, see William W. Schwarzer, Nancy E. Weiss, and Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va.L.Rev. 1689 (1992). Of what possible importance, as a matter of substantive and procedural law, is the distinction between mass accident and mass tort cases? For recent discussions of current issues in mass tort, see Jack B. Weinstein, *An Introduction to Who's Who in Mass Toxic Torts*, 80 Cornell L. Rev. — (1995); Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising From Disasters*, 5 Tuoro L. Rev. 1 (1988); Symposium, *Mass Torts After Agent Orange*, 52 Brook. L. Rev. 329 (1986).

B. ANALYTICAL FRAMEWORKS

THE AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS

(1994) at 7-18.

THE PROBLEM OF COMPLEX LITIGATION

a. Introduction. "Complex litigation" has no uniform definition, and the term sometimes is used to refer to litigation that concerns complex issues even if the dispute takes place only between two parties in a single forum. As used in this Project, however, "complex litigation" refers exclusively to multiparty, multiforum litigation; it is characterized by related claims dispersed in several forums and often over long periods of time and presents one of the greatest problems our courts currently confront. Repeated litigation of the common issues in a complex case unduly expends the resources of attorney and client, clogs already over-crowded dockets, delays recompense for those in need, and brings our legal system into general disrepute. Creative lawyers and judges have shown that both justice and efficiency can be achieved by those willing to stretch the bounds of the existing procedural scheme, but as Congress, the profession, and newspaper journalists have noted, we are in urgent need of procedural reform to meet the exigencies of the complex litigation problem.

Complex cases may arise under state or federal law and in the courts of either system. They are generated by a variety of circumstances—from a single mass disaster such as the collapse of a Hyatt Hotel skywalk, from myriad individual contacts with a hazardous product such as asbestos, or from allegations of antitrust violations committed by one of the world's largest corporations or a number of small ones. The claims in a complex case may accrue all at once as in an air crash, or they may be latent for generations and mature at different times, as in the case of DES. See, e.g., *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982). But complex cases share two defining characteristics: they all involve duplicative relitigation of identical or nearly identical issues, and consequently, they all involve the enormous expenditure of resources.

* * *

b. *A description of the history of complex litigation.* The history of complex litigation is a litany of gargantuan and often well-known cases that have posed unprecedented challenges for the courts. An outline of some of the most important developments in that history follows and illustrates the current problem posed by this form of litigation.

In the early 1960's, as the House Judiciary Committee has noted, "[f]ollowing the successful Government prosecution of the electrical equipment manufacturers for antitrust law violations, more than 1,800 separate damage actions were filed in 33 federal district courts. This wave of litigation threatened to engulf the courts." House Judiciary Committee Report No. 1130 (1968). As a result, a Coordinating Committee for Multiple Litigation was established, without whose efforts, in the late Chief Justice Earl Warren's view, "district court calendars throughout the country could well have broken down." *Manual for Complex Litigation* vii (4th rev.ed.1977). Congress eventually responded to the electrical equipment cases by creating the Judicial Panel on Multidistrict Litigation, see 28 U.S.C. § 1407, one of the most important tools for processing complex litigation that the federal system has developed to date. As of December 31, 1987, after two decades of operation, the Multidistrict Litigation Panel had consolidated 16,173 separate civil actions for pretrial proceedings. Report of the Proceedings of the Judicial Conference of the U.S., March 15, 1988, at 5. Despite the Multidistrict Litigation Panel's past success and undoubted future potential, however, the much-criticized provisions that limit its authority to consolidation for pretrial purposes have prevented it from serving as anything like a comprehensive solution for the complex litigation problem.

* * *

After a 1963 grand jury indictment charged the Wm. Merrell Company with falsifying data submitted to the Food and Drug Administration, fifteen hundred plaintiffs brought suit claiming injuries due to MER/29. MER/29 cases "were begun in almost every state and in many

different courts, both state and federal, within most states.” Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Cal.L.Rev. 116, 121 (1968). MER/29 was one of the great success stories of voluntary cooperation among litigants—a lawyers’ committee was able to consolidate pretrial discovery effectively, and because there was only a single defendant, the few cases that went to trial served as test cases that facilitated settlement. The lawyers even established a MER/29 “school” to train plaintiffs’ attorneys in the facts of the case. Nevertheless, MER/29 was the type of exception that proves a rule—altogether extraordinary effort, trust, and good faith were necessary to prevent the disintegration of the litigation into a fight to the last ditch that could have generated immense legal fees at the expense of the tort victims and the defendant.

The giant of complex litigation has been and continues to be asbestos. Asbestos litigation on a large scale began in the mid-1970s and has continued to grow. As a result, so many asbestos-related personal injury claims now have been brought that, in 1986, “[a]pproximately 20,000 damage actions by asbestos disease victims, mostly workers, [were] pending in state and federal courts across the country, and the number [was] increasing by several hundred new claims each month.” Rosenberg, *Book Review*, 99 Harv.L.Rev. 1693, 1693-94 (1986). An even larger estimate was suggested in a 1987 study for the Federal Judicial Center: “Exact counts of pending asbestos cases are impossible to find. Recent estimates * * * range from about 33,000 to 50,000. New cases continue to be filed, and Johns-Manville estimates that it will have to pay between 83,000 and 100,000 personal injury claims.” T. Willging, *Trends in Asbestos Litigation* 12 (1987). Asbestos also has spawned a great number of ancillary suits seeking to determine responsibility for removing the substance from buildings or to apportion blame among defendants. It should not be surprising, therefore, that “[t]he estimated legal bill for all facets of the asbestos litigation easily exceeds a billion dollars.” Rosenberg, *supra*, at 1694.

Many complex cases over the past three decades have arisen from single mass catastrophes. United States Circuit Judge Alvin Rubin provides a simple but moving catalog:

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.

Rubin, *Mass Torts and Litigation Disasters*, 20 Ga.L.Rev. 429, 432 (1986). Because catastrophes like these invariably raise complex issues

of fact, they can have a much greater impact on the courts than the small number of the cases suggests. It is not uncommon that cases may be dispersed in both the state and federal judicial systems. For example, after the Hyatt Hotel skywalk collapse, hundreds of virtually identical lawsuits were filed in state court as well as before United States District Court Judge Scott Wright. See Williams, *Mass Tort Class Actions, Going, Going, Gone?*, 98 F.R.D. 323, 331 (1983).

In the early 1980's, "Agent Orange" was perhaps the most highly visible complex case in the federal system. After more than 600 individual suits were filed, first Judge Pratt and then Chief Judge Jack Weinstein of the United States District Court for the Eastern District of New York certified a plaintiff class containing an estimated 2.4 million members. Efficient handling of the case was made more difficult by the decision of 2,440 individuals to opt out of the plaintiff class, although 600 of them later asked to be reinstated. The controversy over Judge Weinstein's aggressive management of this case, his tactics in achieving settlement, and the adequacy of the settlement he obtained, may not abate for years to come. Nevertheless, a seemingly hopeless litigation morass was resolved. The case is a perfect example of the inadequacy of our traditional procedural system to cope with mass disasters or the demands of modern substantive law. See P. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (1986).

The sometimes devastating impact of complex litigation is suffered by large defendants, as well as individual plaintiffs. This fact was underscored recently when two mass tort defendants, asbestos producer Johns-Manville and Dalkon Shield manufacturer A.H. Robins, resorted to bankruptcy in order to resolve the outstanding tort claims against them. See *In re Johns-Manville Corp.*, Nos. 82 B 11,656 to 82 B 11,676 (S.D.N.Y., filed Aug. 26, 1982). Although the invocation of bankruptcy procedures may be one method of achieving the consolidated adjudication of a complex case, it is by no means obvious that it is the optimal means for handling mass tort claims. Indeed, the very propriety of using bankruptcy in this setting has proved extremely controversial. See, e.g., Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 Harv.L.Rev. 1121 (1983). Serious questions also can be raised as to whether bankruptcy courts can cope with the massive litigation ancillary to a complex case, or can achieve equity between early-and-late filing claimants.

At times the complexity of some cases goes beyond what appears on the surface of the litigation. For example, in massive environmental clean-up litigation what already is a highly complex basic dispute is compounded by the complexity of deciding the applicability of insurance coverage as well as assigning the liability among multiple insurers.

Even this brief summary suffices to show that huge multiparty, multiforum disputes have become a recurring feature of modern litigation. In many cases systemic resources have been saved and costs reduced by good sense, procedural creativity, and judge or lawyer initia-

tive. Nevertheless, the time has come to replace ad hoc innovation with procedures developed specifically for complex cases. This is especially true because the essential features of complex litigation are predictable, and the number of cases is bound to increase.

* * *

c. *Cost of duplicative litigation.* Rule 1 of the Federal Rules of Civil Procedure specifies a tripartite goal for the federal procedural system: “the just, speedy, and inexpensive determination of every action.” Unfortunately, complex litigation can yield determinations that are slow, enormously expensive, and potentially unjust.

Complex litigation as defined in this proposal is not limited to cases involving complex substantive issues. Rather, it is characterized by the wasteful multiplication of proceedings, needless costs, and the likelihood of injustice resulting from inconsistent adjudications. Judicial overload also leads to delay and costs throughout the entire judicial system. See D. Hensler, *Trends in Tort Litigation: The Story Behind the Statistics* 33 (1987). It is worth stressing, however, that the effect of long court delays does not fall equally on all members of society—although a large corporation may be able to wait many years to obtain a tort or contract recovery, or may be content to defer liability for that length of time, someone who is poor and seriously injured may find that justice delayed is indeed, as the saying goes, justice denied.

Duplicative litigation of the issues in a complex case also can lead to injustice in more direct ways. “[B]eyond the sheer economy of not having to litigate the same matters twice,” authors Rowe and Sibley point out, “consolidation of related proceedings can reduce such problems as inconsistent outcomes, whipsawing (from the ability of defendants in separate litigation to point to a nonparty as the one truly liable), and uncoordinated scrambles for the assets of a limited fund.” Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U.Pa.L.Rev. 7, 15 (1986). The ultimate result of an “uncoordinated scramble,” of course, can be a defendant’s bankruptcy before all potential plaintiffs have been paid, and this risk particularly is plausible in cases allowing plaintiffs to obtain large and often widely differing punitive damage awards. In addition, consolidation of related claims can ensure that people with modest means or those with relatively small claims can gain access to justice; forcing individual litigation of propositions that are true but expensive to demonstrate can be tantamount to barring the courthouse doors.

Finally, the most striking problem caused by complex litigation is its enormous cost. That cost cannot be measured precisely, but every indication is that it is staggering.

Even saving one week of judicial time per case would, as most trial judges know, be substantial * * *. [I]n the Dalkon Shield litigation, the record disclosed that, if the usual percentage (90) of the 100 members [in a] statewide class settled their cases, the savings of

judicial resources in the trial of the remaining 100 would amount to 400 weeks, or, roughly eight years of trial time. In addition, there would be an estimated savings of \$26 million in litigation expense to the parties and \$7 million of court expenses.

Williams, *supra* at 328. If a 90% settlement rate in a single thousand-member portion of a nationwide complex case can achieve savings of \$33 million plus eight years of judicial time, it seems clear that the savings from a carefully planned consolidation procedure for all types of complex litigation might prove to be billions of dollars. This conclusion is reinforced by the fact * * * that the legal bill for asbestos cases alone already has been estimated at over \$1 billion. See Rosenberg, *supra*, at 1694.

The economic expense of complex litigation also can be estimated by tabulating the cost of its component parts. As of 1982, an hour of judicial time cost approximately \$600. See Levin & Colliers, *Containing the Cost of Litigation*, 37 Rutgers L.Rev. 219, 27 (1985). In addition, studies have shown that each dollar of plaintiff recovery typically costs two dollars in attorney's fees. Thus, assume that the crash of a small plane injured ten plaintiffs and that the litigation brought by each cost the defendant \$100,000 in legal fees and compensation after an individual ten-hour trial. Based on that, and even without adjusting the estimated system costs to take into account of cost-of-living increases in judicial salaries, it can be estimated that the plaintiffs will take \$333,000, the lawyers \$666,000, and the court system \$60,000. In other words, it will have cost \$726,000 to generate only \$333,000 in plaintiff recovery.

This example of a ten-person air crash, a case almost certainly too small to be considered complex and consolidated by current procedures, demonstrates that a two-thirds reduction in court and lawyer time would save almost \$500,000, or half of the total costs of compensation. Equally, a reduction in litigation time of only fifty percent would save \$363,000, or 36% of the costs of compensation. Moreover, because this estimate is based on only three assumptions—that legal services take two-thirds of compensation costs, that court time costs \$600 per hour, and the claims will require on average one hour per \$10,000 to litigate—it should be subject to generalization. That is, so long as a case requires about one hour of court time per \$10,000 of compensation, any consolidation that cuts legal time in half will save an average of 37% of the total costs of compensation, and this is true even if the parties' own expenditure of time and effort is left out of the equation. Thus, to the extent that empirical data are available, they provide a dramatic confirmation of Professor Chafee's statement that "[i]n matters of justice * * *, the benefactor is he who makes one lawsuit grow where two grew before." Chafee, *Bills of Peace with Multiple Parties*, 45 Harv.L.Rev. 1297 (1932).

**AMERICAN LAW INSTITUTE, ENTERPRISE
RESPONSIBILITY FOR PERSONAL IN-
JURY (REPORTERS' STUDY 1991)**

389-93.

* * * From the process perspective, the salient defining characteristics of a mass tort include:

(1) numerous victims who have filed or might file damage claims against the same defendant(s);

(2) claims arising from a single event or transaction, or from a series of similar events or transactions spread over time;

(3) questions of law and fact that are complex and expensive to litigate and adjudicate—frequently questions that are scientific and technological in nature;

(4) important issues of law and fact which are identical or common to all or substantial subgroups of the claims;

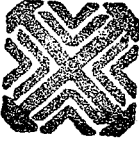
(5) injuries that are widely dispersed over time, territory, and jurisdiction;

(6) causal indeterminacy—especially in cases involving toxic substance exposure—that precludes use of conventional procedures to determine and standards to measure any causal connection between the plaintiff's injury and the defendant's tortious conduct;

(7) disease and other injuries from long delayed latent risks, especially in cases involving toxic substance exposure.

The standard lawsuit embodies the ideal of individual justice through its strong procedural preference for adjudicating tort claims *de novo*, one by one, and for customizing judgments according to the particular facts and circumstances of each case. Yet, as Holmes put it, this ideal may be more consistent with, if not largely the creation of, “[o]ur law of torts . . . from the old days.” In contrast to the bygone era “of isolated, ungeneralized wrongs, assaults, slanders, and the like,” modern tort law is primarily concerned with the “incidents of certain well known businesses . . . injuries to person or property by railroads, factories, and the like.” Since Holmes’s observations nearly a century ago, substantive tort rules have undergone major reforms that take account of the systemic and statistically predictable risks created by business activity.

Tort process, however, remains largely unchanged. In mass tort cases the wholesale infliction of injury is still redressed at retail. Adjudicating mass torts on an individual basis entails great costs that may preclude or disable the effective preparation and prosecution of a large number of claims. This means that many claims are redressed at a steep—and, in fact, standardized—discount, while a substantial number are not redressed at all. Consequently, standard tort process not only



sacrifices potential gains in compensation, prevention, and administrative efficiency, but also undermines its patron norm of individual justice.

* * *

MARK A. PETERSON AND MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES

Rand, *The Institute for Civil Justice* (1988) at vii, 31-37.

Mass tort litigation presents unique problems for courts and litigants:

- The large number of litigants, plaintiffs as well as defendants, makes mass litigation burdensome. These large numbers significantly complicate the processing and resolution of litigation with procedures that evolved primarily for "simple" lawsuits—i.e., those involving one or two parties on each side.
- Mass tort litigation can involve enormous personal, financial, and political stakes for parties on all sides. It also imposes large burdens on the court system in terms of both public costs and concentration of cases within particular jurisdictions.
- Timing is critical for plaintiffs with significant disabilities and expenses. Yet as the number of claims increases, the need of plaintiffs for prompt compensation becomes harder to satisfy. The complex issues and larger numbers of parties can result in long delays in processing and resolving cases.
- Litigation involving toxic torts presents particular difficulties centering on issues, both technical and legal, about the causation and documentation of injuries and diseases. The frequently long latency period between exposure to a toxic substance and injury, together with the need to identify the products to which exposure occurred, further complicates legal and technical issues.
- Finally, mass litigation presents special threats to the fairness of our justice system, raising the possibilities that outcomes will be inconsistent; that defendants faced with a great number of claims may be forced to make significant settlements even when liability is unlikely; that defendants can avoid responsibility by aggressively pursuing litigation; that compensation is not related to the seriousness of injuries; and that the burdens on defendants might not accurately reflect their relative culpability.

* * *

CONCEPTUAL OVERVIEW OF MASS TORT LITIGATION

The impact aggregative procedures is both complex and significant, primarily because of the complexity of mass tort litigation. Each instance of mass personal injury litigation involves a multitude of parties

and a maze of issues, procedures, and strategies, and each can lead to outcomes that can have varying effects on hundreds or thousands of participants * * *. The overview also provides a common way of looking across various instances of mass tort litigation so that inferences can be drawn about similarities and differences in the effects of aggregative procedures.

The overview is primarily intended as a means for organizing elements of mass tort litigation by grouping those elements in the following manner (Fig. 2, next page):

Characteristics

What is the litigation about?

Who are the participants?

What are the objectives and strategies of the participants, and what are the relationships among them?

Approach

What is the formal organization of the litigation?

What aggregative procedures are used?

What are the features of those aggregative procedures?

Course of the litigation

What procedural actions have been taken?

How have those actions been carried out?

What informal actions have been taken, such as negotiations and contacts among parties?

Outcomes

Has the litigation been resolved?

Was the resolution comprehensive—i.e., did it include all issues and all parties?

How was compensation distributed among plaintiffs?

What were defendants' relative contributions?

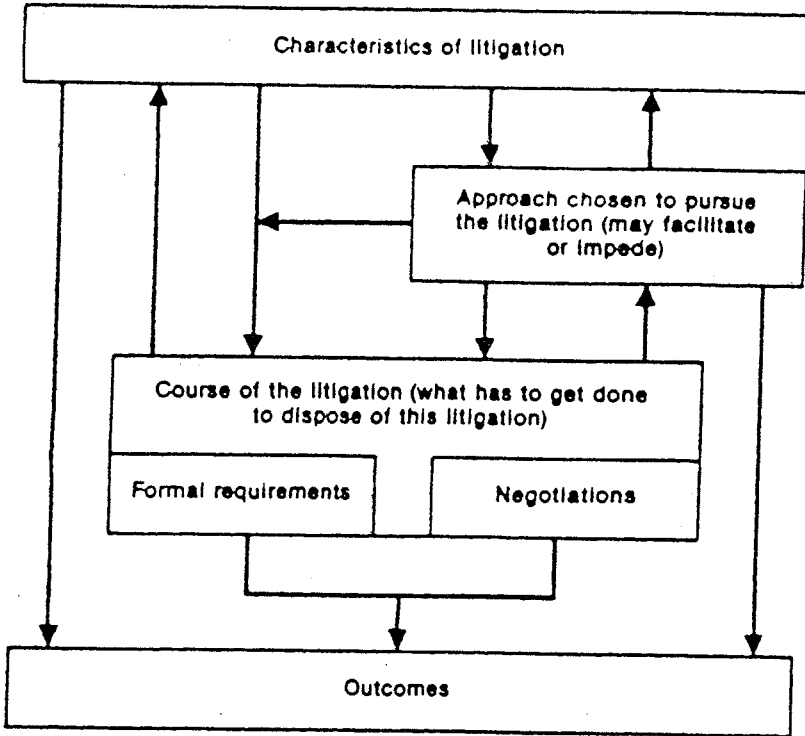
How satisfied are the parties with the outcome?

How much did the litigation cost? What were the transaction costs?

How long did the litigation take?

Figure 3 provides a working list of * * * elements. Some of the characteristics listed are obvious determinants of the course and outcomes of litigation, while others have been deemed important in previous discussions of mass litigation. * * *

FIGURE 2—GENERAL OVERVIEW OF MASS TORT LITIGATION



This overview lists characteristics that are particularly critical to mass litigation—i.e., traits that seem to have a direct effect on the course and outcomes of mass litigation or that interact with aggregative procedures to have such effects.* Figure 3 lists these characteristics, grouping them as “issues,” “participants,” and “organization of litigation.” We used these groupings to stress relationships among various characteristics rather than to draw sharp definitional lines for each group.

In addition to listing elements important to mass litigation, the overview serves as a kind of flow chart; the arrows on the overview suggest relationships among the elements in mass litigation. For example, the course of litigation, subsuming both informal and formal (procedural) activities, contributes to the determination of outcomes. In turn, the activities of litigation are affected by the characteristics of that litigation, such as the nature and strength of liability claims or the relative resources of the parties. The course of litigation is also affected by the approach toward handling the litigation—i.e., whether it is

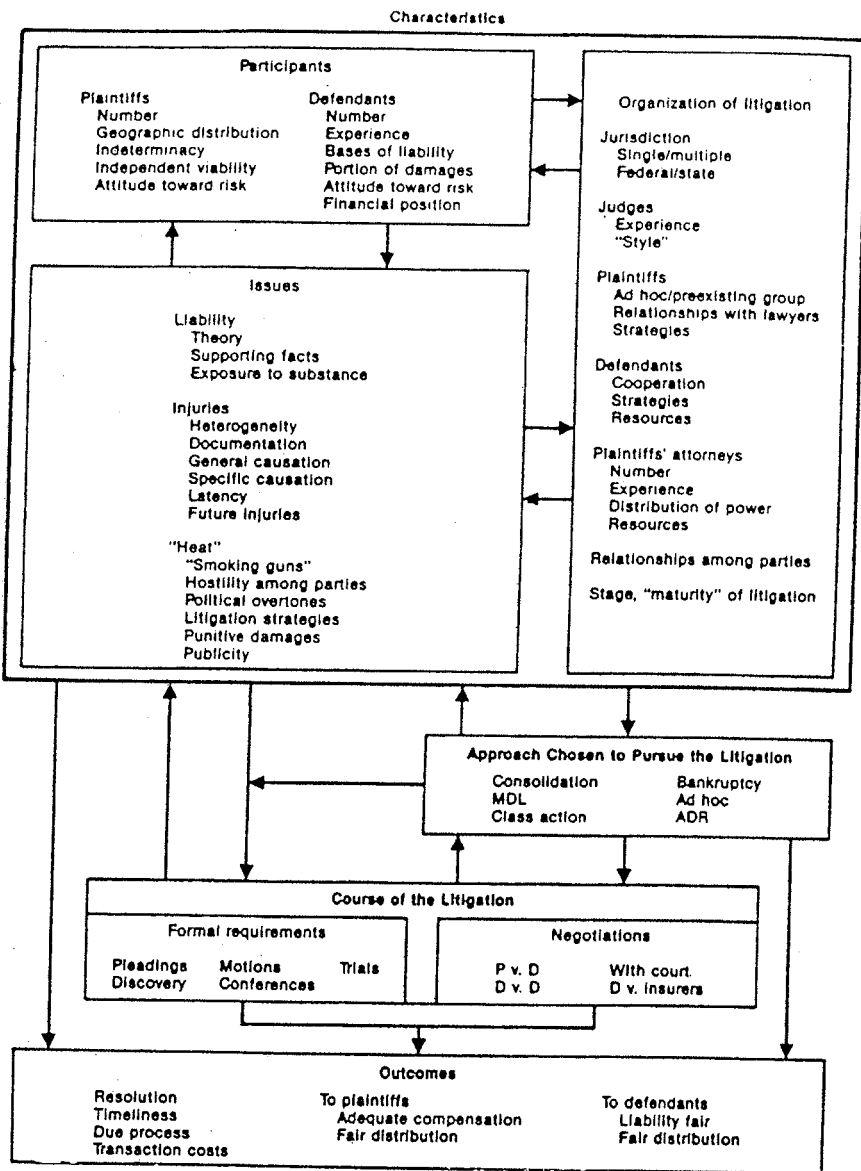
* The overview lists characteristics that may be systematically related to the use of aggregative procedures in mass litigation. Other characteristics might be important in particular litigation but may not have such a systematic relationship. For example, the quality of defense attorneys might play a critical role in a particular case, but there

may be less case-by-case variance in the organization, strategies, and experience of defense lawyers than among plaintiffs' lawyers. And differences among cases do not have as much significance for the course and outcome of litigation as do differences in plaintiffs' lawyers, who usually finance and control litigation for plaintiffs.

handled through traditional means or through specific types of aggregation.

While some of the relationships shown on the overview are obvious, others are more complex. For example, the choice of approach to handling mass litigation—traditional case-by-case litigation or the type of aggregative procedure, if any,—is driven by characteristics of the litigation, particularly the complexity of issues and number of parties. Decisions bearing on whether to aggregate and on the type of aggregative procedure to apply will also be affected by the progress of the

FIGURE 3—DETAILED OVERVIEW OF MASS TORT LITIGATION



litigation. Different types of aggregative procedures have been used at different stages of the same mass litigation.

Issues and participants can combine in several ways to change the nature of litigation. For example, mass toxic litigation in which there are questions about exposure to a toxic agent—or about injury causation or latency—may pose the problem of “indeterminate plaintiffs.” Plaintiff indeterminacy makes it difficult to fashion aggregative procedures that will produce comprehensive and final resolution.

The characteristics of litigation will affect the impact of aggregative procedures. Differences among claims may diminish the effectiveness of aggregative procedures. Issues of liability and injuries usually vary among plaintiffs so that there is a distribution in the strength of claims. This distribution affects matters of cooperation and power among plaintiffs’ attorneys as well as their likely response to aggregative procedures. * * * The distribution of injuries—i.e., the relative number of plaintiffs with weak as opposed to strong claims—may markedly affect the success of aggregative procedures. Aggregative procedures can be frustrated if the strength of claims is varied and plaintiffs with strong claims choose not to cooperate in the aggregative procedure, as in the Hyatt Skywalk case.

The overview illustrates the complex relationships among the characteristics of mass litigation. Issues and litigants’ characteristics not only shape but can also be affected by the organization of litigation. In Fig. 3, for example, we have described a set of issues as “heat”: emotional matters that can inflame jurors, producing extreme verdicts, and that can upset litigants, making settlement difficult. Emotional issues might arise with (or even before) the filing of claims (as occurred following the 1984 Union Carbide gas leak at Bhopal, India) or they may grow out of the process of litigation (as in the discovery of incriminating documents or attempts to frustrate litigation). Heat might also be generated, however, by the manner in which litigation is organized or carried out. Much of the fervor among plaintiffs and plaintiffs’ lawyers in the Dalkon Shield litigation grew out of an aggressive litigation strategy by the defendant that included thorough investigation and trial of claimants’ sexual histories.

The general overview also identifies several other hypotheses that will be explored. * * * We expect to find that the approach adopted to handle mass litigation—the type of aggregative procedure—affects many of the litigation outcomes. Aggregative procedures are employed to change litigation activities and are intended to change some outcomes, such as faster resolution of claims or comprehensive resolution of all claims, but the procedures may also change substantive results. For example, a given aggregative procedure might affect the comprehensiveness of resolution. Bankruptcy and class actions are both methods that might be used to resolve all claims. In contrast, MDL [multidistrict

litigation procedure] has no formal legal provisions for comprehensive resolution of claims.

Another hypothesis of our * * * studies is that aggregative procedures and characteristics interact to determine the course and outcome of mass litigation; the characteristics of litigation will influence how those aggregative procedures affect the course and outcome.

A third hypothesis is that aggregative procedures can change other important characteristics of litigation—e.g., redefining and adding issues, adding or subtracting parties, changing jurisdictions or judges, or altering the organization of litigants and their lawyers.

Observations and hypotheses suggested by the arrows indicate the complex relationships between aggregative procedures and characteristics that complicate our research. Since each aggregative procedure is used in distinctive litigation, we must understand the central characteristics of that litigation, how those characteristics shape the litigation in their own right, how they affect the consequences of the aggregative procedure, and how aggregative procedures in turn reshape the characteristics. * * *

* * *

Notes and Questions

1. There can be little doubt that complex mass tort cases, however described or defined, present a litigation model distinct from the traditional model of adjudication described by Professor Chayes in his famous article on public law litigation. See Abram Chayes, *The Role of The Judge in Public Law Litigation*, 89 Harv.L.Rev. 1281 (1976). In that article, Professor Chayes discussed five characteristics of the traditional civil case: (1) the lawsuit is bipolar, (2) the litigation is retrospective, (3) the right and remedy are interdependent, (4) the lawsuit is a self-contained episode, and (5) the process is party-initiated and party-controlled. Professor Chayes then described a new "public law" model of adjudication as one "sprawling and amorphous," "subject to change over the course of the litigation," "suffused and intermixed with negotiating and mediating processes at every point," with the judge as a dominant figure in organizing and guiding the case, as well as continuing involvement in administration and implementation of relief. The paradigmatic public law litigations have involved school desegregation, employment discrimination, and prisoners' or inmates' rights cases.

The question is whether complex mass tort cases, based as they are in the adjudication of private harms, are emerging as yet another model of civil dispute resolution anchored in the "public law" concept of the 1960s. A consistent proponent of engrafting a "public law" litigation model onto the mass tort context has been Professor David Rosenberg. See e.g., David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv.L.Rev. 849 (1984); Rosenberg, *Class Actions For Mass Torts: Doing Individual Justice By Collective Means*, 62 Ind. L.J. 561 (1987); Rosenberg, *Toxic Tort Litigation: Crisis or Chrysalis? A Comment on Feinberg's Conceptual Problems and Proposed Solutions*,

24 Hous.L.Rev. 183 (1987). For a competing view questioning the wisdom of the trend towards a new model of aggregative procedure, exemplified in mass tort litigation, see Judith Resnik, *From "Cases" to "Litigation,"* 54 Law & Contemp. Probs. 5 (1991); cf. Ralph K. Winter, Comment: *Aggregating Litigation,* 54 Law & Contemp. Probs. 69 (summer 1991)(responding to Resnik). In addition, this view has been endorsed by Judge Weinstein; see Jack B. Weinstein, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation,* 88 Nw. U.L.Rev. 469 (1994). See also section C, note 6, *infra* (on the aggregation debate).

2. Professor Francis McGovern, who has served as special master in several mass tort and complex litigations (see *supra* n.1 at p. 17), has developed a concept of the "mature" mass tort litigation. Writes Professor McGovern:

The traditional view of the civil litigation system as an individualized, rights-based adjudicatory system dedicated to victim compensation has faced mounting pressures in recent years. In particular, the litigation process has been challenged by notions that emphasize the collective interests of society by centralizing rulemaking and by fostering inquisitorial fact-finding. The paradigm cases for these alternative views are "mature mass torts" or mass tort litigation, where there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted. The East Texas asbestos class action in *Jenkins v. Raymark* and the Dalkon Shield bankruptcy in *In re A.H. Robins Company* are examples of mature mass tort litigation.

Francis E. McGovern, *Resolving Mature Mass Tort Litigation,* 69 B.U.L.Rev. 659 (1989); see also Francis F.E. McGovern, *An Analysis of Mass Torts for Judges,* 73 Tex.L.Rev. 1821 (1995). Professor Rosenberg has challenged the usefulness of this concept of "mature" mass torts, noting: "On its face, the maturity standard is simply too vague to provide courts with useful guidance in determining when to use class actions and other collective procedures. McGovern's criteria * * * are not only slippery tests, [but] they also require courts to engage in a highly complex analysis. More seriously, the 'maturity' prerequisite ironically fails to fulfill its objective of providing a reliable and fair predicate for collective settlement and disposition precisely because it effectively *forbids* collective processing." See Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons From a Special Master,* 69 B.U.L.Rev. 695, 707-08 (1989).

3. The American Law Institute's COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS is interesting not only for the scope of that enterprise, but for what it deliberately leaves out. As the excerpt suggests, the Reporters decided at the outset to exclude from consideration any alternative dispute resolution techniques for resolving mass torts, or other compensation systems. As it turns out, administrative models, claims facilities, alternative dispute resolution, bankruptcy, and trust funds have been, to

date, the chief vehicles for resolving mass tort claims. See Chapters XI-IV *infra* for a discussion of these methods for dealing with mass tort litigation.

4. The ALI COMPLEX LITIGATION project focused exclusively on procedural problems relating to mass tort, dealing primarily with issues relating to jurisdiction, intra-system and intersystem consolidation, and applicable law. Not only has the project eschewed discussion of alternative dispute resolution techniques, but it also has excluded consideration of substantive tort issues. This gap is somewhat filled by the ALI *Reporter's Study* in ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991), in which the Reporters divide contemporary tort litigation into three tiers: (1) ordinary accident litigation, (2) products defects and medical malpractice, and (3) mass toxic tort cases. Discussing this "third-tier" tort litigation, the Reporters note, at 10:

Even graver concerns arose about the capacity of our centuries-old tort regime to grapple with a new third tier of litigation. This category involves the "mass" tort of toxic exposure of a large number of people to a product or environmental hazard that may cause cancers or other serious illnesses a decade later. Although such mass tort episodes have been relatively few in number and their legal treatment is still in a state of flux, the third tier involves the highest stakes of all. A single product from a single firm, such as the Dalkon Shield, can produce tens of thousands of disabling injuries and tort claims, and, like the asbestos cases, can threaten to swamp the legal system with several hundred thousand lawsuits around the country. At the same time, because of the long latency period between initial exposure and eventual manifestation of diseases such as cancer without a single standard cause, knotty questions were presented to the tort system about precisely which product or firm was responsible for a particular victim's present condition or fatality. And liability insurers, themselves not much better able than their policyholders to predict the scope and limits of mass tort liability, displayed greater and greater reluctance to provide any future coverage against it.

5. How does one calculate the costs of complex mass tort litigation? The Rand Institute for Civil Justice has conducted a series of empirical studies of the costs of litigation. See Kakalik, James S., et al., *Costs and Compensation Paid in Aviation Accident Litigation* (1988); Kakalik, James S. and Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* (1986); Kakalik, James S., et al., *Variation in Asbestos Litigation Compensation and Expenses* (1984); Kakalik, James S., et al., *Costs of Asbestos Litigation* (1983); Kakalik, James S., et al., *Costs of Civil Justice System: Court Expenditures for Various Types of Civil Cases* (1983); and Kakalik, James S., et al., *Costs of the Civil Justice System: Court Expenditures for Processing Tort Cases*. See also Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 *Law & Contemp. Probs.* 113 (1991). A highly contentious area of mass tort litigation has centered on the question of attorneys' fees, which will be discussed at D.3, *infra*, and Chapter IV.G, *infra*.

C. THE JURISPRUDENTIAL DEBATE: LITIGANT AUTONOMY VERSUS AGGREGATIVE JUSTICE

MERTENS v. ABBOTT LABORATORIES

United States District Court, District of New Hampshire, 1983.

99 F.R.D. 38.

FRANCIS J. BOYLE, CHIEF JUDGE, Sitting by Designation.

This action was brought by twelve Plaintiffs. Eight of them are women who allege that by reason of exposure to diethylstilbestrol (hereinafter referred to as DES) *in utero*, they suffered various injuries, including cancerous or pre-cancerous conditions, repeated pregnancy losses, infertility, incomplete, defective or abnormal development of their reproductive tracts and other adverse effects. They seek damages and a variety of other forms of relief, including the establishment of a fund, treatment facilities for themselves and persons who in the future might suffer similar injury. The eight female Plaintiffs contend that they have sustained a variety of injuries by reason of their *in utero* exposure to DES. One of these eight Plaintiffs seeks damages for multiple surgeries to eradicate adenocarcinoma and sterility. The other seven seek damages for the following, respectively: genital tract abnormalities requiring frequent medical procedures; spontaneous abortions, tubal pregnancy and uterine and cervical adenosis; chronic cervicitis dysplasia with foci of carcinoma *in situ* requiring frequent medical procedures; irregular cervix necessitating surgery and the development of tissue abnormalities; adenosis in the genital tract and deformed cervix; irregular cervix; and hyperkeratosis and glycogenital squamous epithelium of the genital tract.

Defendants are eleven firms that allegedly manufactured DES. They assert that the companies which manufactured DES numbered in the hundreds. Some of the Plaintiffs can produce evidence to identify a specific Defendant as manufacturer of the product that allegedly harmed them. In other claims, the manufacturer is probably either one of two Defendants, and in still other actions the manufacturer of the DES is not and cannot be identified.

Plaintiffs seek a determination that this action can be maintained as a class action. * * *

* * *

Rule 23(b)(3) requires a finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: "(A) the interest of members of the class in individually controlling the prosecu-