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MASS TORTS AND THE RHETORIC OF CRISIS

John A. Siliciano†

In tort circles, it passes as something close to gospel truth that mass torts present a special case. They are widely viewed as creating crisis conditions within the tort system that call for radical and innovative reforms. Hence, the debate among academics, lawyers, and judges has focussed almost exclusively on which one of the proposed remedies—ranging from modifying procedural rules¹ to reordering the priority of claimants² to removing such cases from the tort system altogether³—is best suited to meet the threat posed by mass torts. Most recently, this crisis rhetoric has been invoked to justify perhaps the most radical and controversial of all such reforms, the settlement class action.

This Article eschews the endgame debate about remedies and instead asks a more preliminary question: is the nearly universal perception of crisis really justified?⁴ In answering this question, this Article takes a purposely narrow perspective. It is conceded that large numbers of any kind of claim—be they RICO suits or disability appeals or diversity cases—can burden the courts and thereby invite procedural innovation. It is also conceded that the collective treatment of large numbers of cases involving large amounts of money may pose special ethical dilemmas for the attorneys and judges involved. These are issues of judicial administration and professional responsibility, upon which tort scholars have no particular claim to expertise.

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¹ See, e.g., Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986).

² See, e.g., Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992).

³ See, e.g., Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE. L.J. 813 (1989) (reviewing PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURT* (1987)).

⁴ The crisis metaphor has infected almost all writing on the subject of mass torts. For a very partial sampling, see Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383 (1993); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429 (1986); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994); Jack B. Weinstein & Eileen Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269; Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983); Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991) [hereinafter *Judicial Conf. Rpt.*].

Rather, the question of interest from the tort perspective is whether such claims, because of either their substance or their size, tend to create conditions of pathology within the tort system. This Article first considers the substantive nature of such cases *as tort claims*, in contrast to any other kind of case that might, in sufficient numbers, create administrative challenges for the courts or ethical dilemmas for the bar. Put differently, how much of the prevailing apocalyptic attitude towards mass torts is appropriately attributable to their nature as torts as opposed to their simple mass?

After suggesting that mass torts present few interesting or novel questions of doctrine or substance, this Article next considers whether the size of some mass tort actions alone may make the whole something considerably worse than the sum of its parts. Specifically, are the frequently catalogued symptoms of crisis—long delays, high transaction costs, defendant bankruptcies, and unpaid claimants—really signs of size-related pathology? To the contrary, this Article concludes that such conditions will naturally and inevitably arise when *any* liability-based system of injury compensation confronts large numbers of similar cases.

Because such conditions are not pathologies but instead are inherent in the nature of the torts process, this Article suggests that most crisis-based reform efforts are asking the wrong question. Rather than attempting to identify and correct what has gone wrong with the tort system, a more fruitful inquiry would ask whether we should abandon tort law altogether as a means for compensating the victims of mass torts. Crisis rhetoric impairs our ability to think constructively about this general question and instead invites chaotic and haphazard reforms. This Article concludes by considering whether asbestos litigation represents an exception to the not-so-special problem of mass torts.

I

WHAT ROUGH BEAST SLOUCHES TOWARDS BETHLEHEM?

The assumption implicit in much of the literature on mass torts is that they differ, in some fundamental respect, from the “everyday” cases that the common law was designed to handle. Thus, their impact on the tort system has been labelled “unprecedented,”⁵ “bizarre,”⁶ and “pathological.”⁷ And not only are mass torts new and bad, but they are mutating into even more dangerous forms: we now

⁵ Weinstein & Hershenov, *supra* note 4, at 270.

⁶ Rubin, *supra* note 4, at 450.

⁷ Edley & Weiler, *supra* note 4, at 395.

have not simply mass torts to contend with, but “monstrous mega-mass torts.”⁸

Yet are mass torts really a different animal, one capable of creating a crisis for tort law? In most salient respects, the answer would almost certainly have to be no. As a threshold matter, mass torts feature rather pedestrian fact patterns.⁹ Airline crashes and oil spills are dramatic lessons on the perils of mechanized transportation, but the underlying story is completely familiar and always the same: something breaks or somebody goofs. Asbestos, Agent Orange, DES, the Dalkon Shield, breast implants, and heart valves are, in the end, simply manifestations of our age-old talent as a species for finding new ways to poison or otherwise injure ourselves in the name of progress.

Nor do such cases often raise challenging issues that stretch the boundaries of our rules of liability or damages.¹⁰ Their familiar fact patterns easily fit within the traditional forms of action for negligence, strict liability, or products liability. Mass torts generally do not depend on the acceptance of novel theories of recovery, such as liability for pure emotional harm or consequential economic loss,¹¹ but rather concern the kinds of physical injuries that have traditionally been the focus of tort law.

At best, the substantive nature of mass torts is noteworthy in that some cases raise interesting and thorny issues of causation.¹² This is particularly true with respect to cases such as those involving asbestos, Agent Orange, and DES, where the claims of injury are based on exposure to carcinogenic or otherwise harmful substances. In such cases, complicated and diverse patterns of exposure, multiple actors introducing the same substance into the environment, possible interactions with other causal agents, and fundamental uncertainties re-

⁸ Weinstein, *supra* note 4, at 568.

⁹ Some commentators have recognized their familiar nature. See Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Mislabeled*, 88 Nw. U. L. Rev. 579, 581 (1994) (characterizing mass torts as “garden variety tort[s]”).

¹⁰ This is not to suggest that such boundaries are necessarily correct as currently configured or that courts never err in the application of such rules. Courts on occasion commit both kinds of mistakes—adopting overly expansive liability rules or misapplying sound rules in a given context. See *infra* notes 53-55 and accompanying text. Either kind of error can cause special problems in the mass tort context, simply because of the number of cases involved. The point, then, is not that mass torts are immune from such problems, but that because mass torts litigation draws both its doctrine and its process from the mainstream of tort law, it does not present a special or unique risk of doctrinal or process-related error.

¹¹ In some instances, however, courts have allowed claims for unrealized or intangible harms to proceed. This has contributed substantially to the size of some mass tort litigations. See *infra* notes 78-79 and accompanying text. However, such decisions are not restricted to the mass tort context, but instead can also occur in traditional single-plaintiff cases. See, e.g., *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (negligently inflicted emotional distress).

¹² See Rosenberg, *supra* note 4.

garding the etiology of the claimed harms often work together to cloud the basic issue of causation.¹³

When the recoveries of large numbers of plaintiffs are at stake, it is tempting to escape these causation conundrums by easing or ignoring wholesale the traditional requirements of proof. There may be circumstances in which it may be appropriate to give in to this temptation—to cut a global deal between large numbers of plaintiffs with tenuous causation claims and groups of defendants who might be better off in the long run paying such plaintiffs to go away. The disposition in the Agent Orange case has elements of this kind of horse trading.¹⁴

But whether or not such resolutions ultimately serve the ends of tort law—a question to which we will return¹⁵—it is still important to realize that the difficulty of the causation issues in such cases has nothing to do with their “unique” nature as mass torts claims. Rather, such causation problems typically stem from the inherent difficulty of reconstructing events in the distant past, the perennial problem of separating multiple causal influences, and the general limits of scientific knowledge. These same difficulties in proof can present themselves in single-plaintiff, one-of-a-kind cases as well.¹⁶ This observation is not meant to minimize the problem that causal indeterminacy poses for tort law,¹⁷ but only to emphasize that this problem is not restricted to the multiple plaintiff context. The only thing “unique” about causation issues in mass tort cases is that the sheer number of claims makes more visible to the naked eye the common—and commonplace—weaknesses such cases share with respect to the issue of causation.¹⁸

At this point in the literature of crisis, one often senses a “where there’s lots of smoke, there must be some fire” argument regarding the causal indeterminacy problems raised by mass torts. David Rosenberg, for example, argues that there is a difference in the nature of causal uncertainty depending upon the number of claimants involved:

The preponderance rule may be adequate for the set of sporadic accident cases in which causal indeterminacy arises randomly and

¹³ See, e.g., Rabin, *supra* note 3, at 820 (“As long as scientific understanding of the toxicity of various synthetic products remains so rudimentary, the existing frontiers of knowledge provide virtually no guidance on the incidence and magnitude of harm from new chemical products; and, as a result, judges and juries have almost unlimited discretion in determining causation.”).

¹⁴ *Id.* at 816.

¹⁵ See *infra* note 75 and accompanying text.

¹⁶ See, e.g., *Summers v. Tice*, 199 P.2d 1 (Cal. 1948); *Smith v. Rapid Transit Inc.*, 58 N.E.2d 754 (Mass. 1945).

¹⁷ See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980). See generally Richard Delgado, *Beyond Sindell: Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881 (1982).

¹⁸ See Rosenberg, *supra* note 4, at 858.

always signifies a substantial chance that the defendant in fact harmed no one. But the rule is neither a rational nor a just means of resolving the systematic causal indeterminacy presented by mass exposure cases involving defendants whose tortious conduct has caused or will cause a statistically ascertainable increase in the incidence of a particular disease.¹⁹

This is an interesting point, but if anything, it indicates that some causation issues actually become *easier* in the mass tort case. In separate "sporadic accident cases," weak evidence on causation is invariably fatal even though we know as a statistical matter that some such causation hypotheses must in fact be true. In the mass tort context, the same failure of proof problem can occur at the level of individual claims, but at the aggregate level one may observe statistically significant proof of generic causation by virtue of the large numbers involved. It may be a good idea to do something creative with this information, as Rosenberg suggests, but that opportunity exists because of, rather than in spite of, the nature of mass torts causation issues.

Indeed, to a significant extent, the perception that mass torts cases present "special" problems of causation may arise not from the cases themselves, but from the threshold decision to view them as mass torts. The asbestos cases, for example, if treated as a single, undifferentiated "mass tort," present truly insolvable issues of causation. But the difficulty is in substantial part the result of the decision to lump all such claims together. The case of a nonsmoking shipyard worker with years of direct exposure to asbestos dust who has developed the signature injury of mesothelioma presents a much different causation picture than a claim based on asymptomatic pleural thickenings in the lungs of a life-long smoker who had only occasional, non-occupational exposure to asbestos.²⁰ When we consider the cases independently, it quickly becomes clear that one plaintiff has a relatively strong case on causation, while the other does not.

Thus, the "insolvable" causation issues in some mass torts cases actually become easier to resolve when such cases are *dis-aggregated* instead of collectivized. The "monster" of asbestos is a prime candidate for such taming.²¹ Of course, this process will reveal hopelessly inadequate proof of causation in some sub-classes of mass torts claims, their survival to date having depended on their parasitic attachment to stronger claims. But the demise of such claims, once isolated from the host body, is not a problem peculiar to mass torts. Indeed, it is not a problem at all, but instead is a natural outcome in any system of

¹⁹ *Id.*

²⁰ See Schuck, *supra* note 2, at 545-50.

²¹ See *infra* part IV.

civil liability that is keyed to the question of defendant responsibility rather than plaintiff need and that insists on a certain quantum of proof to establish that responsibility.

This point deserves reiteration. A painful but unavoidable consequence of requiring a plaintiff to bear the burden of proving the defendant's responsibility by a preponderance of the evidence is that recovery will be denied in some situations where causation—as a purely factual matter—probably exists despite our present inability to prove it. If there is a hint of unfairness,²² it inheres in the process of proof applicable to all civil litigation; it is not some dysfunction peculiar to mass torts, or even to tort law in general.²³ We as a society may ultimately determine that the problem of uncompensated plaintiffs is so serious that we should abandon our traditional focus on determining responsibility and instead get busy paying anyone with a vaguely colorable claim of injury. Such a decision essentially entails replacing the tort system with a comprehensive mechanism of social insurance.²⁴ If we are going to make such a bold move, we should do so openly and honestly.²⁵ We should admit forthrightly that we are abandoning tort law, not because it cannot “handle” the problem of causation in mass torts, but rather because it *does* handle the problem, but in a manner that no longer suits our mood.

In sum, if mass torts really are something new and different, their novelty is not readily apparent in the nature of the injuries, claims, or legal issues involved. In these respects, they bear a very familiar face. The case for special treatment, if it can be made, therefore must rest primarily on the argument that the sheer number of such claims causes fundamental distortions within the tort system. We now turn to that question.

II

DOES SIZE MATTER?

Most of the literature of crisis begins with a recitation of the large numbers of individual claims that make up mass tort cases.²⁶ The standard incantation that asbestos-related claims number over 100,000 *and are still growing* is frequently asserted as if that bare fact should end

²² This “unfairness,” of course, is offset by a reciprocal risk that defendants bear under a preponderance of evidence standard that causation will be found to exist in situations where it is absent as a matter of fact.

²³ See Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985).

²⁴ See *infra* notes 70-73 and accompanying text.

²⁵ Some commentators have recognized that the “problem” of mass torts is really a general question about the tort system’s general approach to accident compensation. See, e.g., Rabin, *supra* note 3, at 829.

²⁶ See, e.g., Edley & Weiler, *supra* note 4, at 383; Rubin, *supra* note 4, at 430.

all quibbling about the existence of a crisis demanding bold measures. But it probably pays to quibble, at least a little bit, when what hangs in the balance is a wholesale restructuring of common law institutions. Specifically, it is important to develop some more refined understanding of why and when size matters.

In searching for such an understanding, it is also important to guard against confusing a crisis that demands reforms with an opportunity that merely invites efforts to increase adjudicative efficiency. The desire to kill many birds with one stone is natural and is certain to arise whenever large numbers of cases share some factual or legal issues. It *feels* wasteful and redundant to relitigate the same basic questions, time and again, when through some collective process we could resolve them once and for all. But this view, standing alone, does not justify the claims of crisis, unless we are simply talking about a crisis of tedium.²⁷ A real crisis requires a showing of pathology, of breakdown, of desperate times that justify desperate measures.

Put differently, it is one thing to say that we *could* obtain some useful savings through various reforms, but another to say that the tort system *must* embrace such reforms or face imminent collapse. The first position is merely an observation of opportunity; the second is a claim of crisis. Now, exploring opportunities is not necessarily a bad thing. Other considerations aside, improving the efficiency of the tort system is a positive move. The problem is that we cannot so easily set other considerations aside: the values of collective resolution come at a cost to other concerns that are also central to a fair system of litigation. These concerns include not only the amorphous entitlement to one's "day in court," but also the practical violence that can be done to non-common issues of fact and law when they are herded into a common pasture.²⁸

This is not to say that collectivizing is impermissible, but only that it does not inevitably produce a net gain. Rather, the goal is to strike a sensible balance between the benefits and costs of collective resolution. Indeed, many features of our existing system of civil litigation are explicitly aimed at achieving such a balance. Procedural rules directed towards joinder, consolidation, and issue preclusion all seek to increase adjudicative efficiency. Most notably, the federal class action, which authorizes class actions in cases where common issues of law

²⁷ See, e.g., Williams, *supra* note 4, at 328 (arguing that appellate courts should be more willing to approve class action certification of mass tort cases in order to "do a better job of relieving judges of litigation 're-runs' for those who face a series of identical pending cases").

²⁸ See Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69; Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985); see also James A. Henderson, Jr., *Optimal Issue Separation in Modern Products Liability Litigation*, — TEX. L. REV. (forthcoming 1995).

and fact predominate over non-common issues,²⁹ explicitly attempts to optimize the costs and benefits of collective resolution. Indeed, some mass tort cases meet this standard and quickly fade from view.³⁰ It is with respect to those that don't go away that the itch of opportunity still lingers.

Scratching that itch can be dangerous. If, at bottom, the calls to reform the tort system are driven by the simple desire for enhanced adjudicative efficiency, several thorny questions ought be confronted. First, in the absence of a true crisis, why should the seemingly sensible balance represented by Rule 23 and similar procedural devices be redrawn? Unless we are confronting a systemic emergency that requires some form of legal triage, it is hard to justify tilting this equilibrium radically in the direction of collective adjudication. Moreover, if we are bent upon extracting more savings, why do it from mass torts, or from the tort system at all? Why not pick on diversity actions or prisoner suits or penny ante drug prosecutions? It seems a rather wooden position to conclude that simply because a certain kind of claim is becoming more numerous, the rules for resolving *that* category of claim require streamlining. There is no ceiling on the percentage of tort claims within the total docket, anymore than there is a quota for criminal cases. Efficiency-based reform, if it is to be principled, ought to cast a wide net.

Perhaps because of the difficulties of advancing a pure efficiency-based justification for major reforms in the mass torts area, most efforts are grounded in a perception that the sheer number of claims in such cases creates a bona fide crisis for the tort system itself. Put differently, the case for treating mass torts differently is usually premised on the belief that the tort system, while efficient in handling one-on-one litigation, seriously malfunctions when it attempts to resolve mass

²⁹ FED. R. CIV. P. 23(b)(3). With respect to mass tort actions, the Advisory Committee Note to the 1966 Revision of Rule 23(b)(3) (39 F.R.D. 69, 103) observed:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Consistent with this view, class action certification has been rejected in a number of mass tort actions. *See, e.g., In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.) (asbestos), *cert. denied*, 479 U.S. 852 and 479 U.S. 915 (1986); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (Bendectin claims); *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (Dalkon Shield), *cert. denied*, 459 U.S. 1171 (1983).

³⁰ Or at least they should. They continue to be catalogued in the literature of crisis, seemingly in an effort to demonstrate the size of "the mass tort problem." For a general discussion of the use of class actions in the mass torts context, see Mullenix, *supra* note 1.

tort cases.³¹ Among the warning signs of this alleged crisis, four enjoy consistent prominence as horsemen of the apocalypse.

First, it is argued, the congestion resulting from mass tort claims causes *intolerable delays* in these cases and caseloads in general.³² Second, resolution of such cases involves *unacceptably high transaction costs*, with claimants often recovering only thirty to forty cents per dollar of the total amount expended in litigation.³³ Third, mass tort cases, if handled by the tort system, can easily result in the *bankruptcy of defendants*.³⁴ Finally, and in part because of such bankruptcies, late-arriving claimants face the prospect of inadequate damage awards because *compensation funds are exhausted*.³⁵ These contentions are considered separately.

A. Intolerable Delays

Mass tort litigation inevitably contributes to the congestion and delay in the civil litigation system. For example, it takes an average of thirty-one months to dispose of an asbestos claim in the federal courts—almost twice the time required in a typical civil claim.³⁶ The degree of delay may pose severe financial problems for claimants who face uncovered medical expenses in the interim. Moreover, the large number of mass tort claims in the courts imposes significant collateral costs on other cases in the docket.

The observation that mass tort claims increase courtroom congestion and delay, however, does not prove the existence of a problem, let alone one massive enough to require revamping or even discarding the tort system.³⁷ In fact, the delays may be normal, and the congestion may in some ways be beneficial.

How can delay be normal? Well, except in the world of television fiction, delay is the norm rather than the exception; all adjudicatory

³¹ See, e.g., Jack B. Weinstein, *A View from the Judiciary*, 13 CARDOZO L. REV. 1957, 1957 (1992) ("The tort system works fairly well in individual cases. . . . It does not work well with mega-mass tort cases."); Weinstein & Hershenov, *supra* note 4, at 276 ("Mass tort cases have outstripped the ability of the common law, with its relatively rigid adherence to precedent, to fashion remedies that adequately redress the harms of modern technological society.").

³² See, e.g., Judicial Conf. Rpt., *supra* note 4, at 10-11.

³³ See, e.g., Schuck, *supra* note 2, at 554-55.

³⁴ See, e.g., Edley & Weiler, *supra* note 4, at 391.

³⁵ See, e.g., Rubin, *supra* note 4, at 436.

³⁶ See, e.g., Judicial Conf. Rpt., *supra* note 4, at 10-11.

³⁷ The delay and congestion argument falls within a broader genre bemoaning the so-called "litigation explosion." See, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 9-10 (1988); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 694-95 (1987). The rhetoric of crisis adopted by such sources is not born out by available data. See, e.g., Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7-16 (1986); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

processes are time-consuming. The Civil Justice Reform Act of 1990 sets eighteen months as an *aspirational* target for the processing of an *average* civil case.³⁸ It should hardly be surprising that many mass tort cases exceed this benchmark. As the proponents of major reform are fond of noting, mass tort cases are often considerably more complicated than the average civil suit. They often involve multiple parties and complex issues of responsibility and causation. Thus, even under optimal adjudicative conditions, such cases will take longer to resolve accurately and fairly than do simpler cases.

In short, the argument of intolerable delay fails because it lacks an objective benchmark. How long *should* a complex tort case take in a crowded and constrained judicial system? Two and one-half years is no sprint, but it isn't *Bleak House* either. In between the poles of instant resolution and interminable litigation, the answer is relative, not absolute. The argument of intolerable delay presupposes that there is another, faster way to address complex issues in our crowded adjudicative system. But none of the proposed reforms has produced such a contender. Instead, they attempt to improve adjudicative efficiency by jettisoning important procedural or substantive features of the tort system. Yet lightening the load in this manner invalidates precisely the kind of comparative inquiry necessary to establish intolerable delay.

One might attempt to rejuvenate the delay argument with reference to the difficulties plaintiffs can suffer as a result of long delays. Again, however, this problem is hardly unique to mass torts, or even to tort law in general; all plaintiffs suffer this risk as a consequence of the law's decision to make compensation contingent upon a determination of liability. Although the resulting hardships are more painful to observe in the tort context than elsewhere, such hardships are more accurately attributable to the inadequacies of our social insurance and health care systems than to any crisis within tort law.

To continue with this heretical line of reasoning, not only may the delays in mass tort cases be normal, but the resulting congestion of court dockets may be beneficial, or at least not worth doing anything dramatic about. First, it pays to note that the large surges of injuries characteristic of mass tort cases are not generated by the tort system and thus are not responsive to tort reform. Rather, such widespread harm is inevitable in a society that accepts a "play now, pay later" philosophy toward the use of new and potentially hazardous products. Tort reform may displace these surges into some other system of injury compensation, but the big numbers will not go away.

³⁸ 28 U.S.C. § 473(a)(2)(B) (1988 & Supp. V 1993).

Moreover, there is substantial doubt that the problem of courtroom congestion can be significantly improved. The underlying thesis of the congestion argument seems to be that if mass tort cases were resolved collectively or removed from the courts, dockets would return to a tranquil, uncongested state. This is fantasy, and of an unhealthy sort. As has been argued convincingly elsewhere,³⁹ judicial caseloads tend towards an equilibrium that naturally entails a fair degree of congestion. This occurs because potential claimants typically factor delay-related costs into their decisions to bring suit. Uncrowded dockets act like a litigation vacuum, drawing marginal claims into the courts, while highly congested dockets suppress the incentive to sue. Thus, condensing or removing mass tort cases may have little long-term impact on courtroom congestion, and may have the short-run cost of providing room for less meritorious claims to sprout.⁴⁰ If we clear the courtroom, more will come, and we may not like them any better.

B. Unacceptably High Transaction Costs

Although firm figures are hard to come by, it seems clear that successful plaintiffs receive less than half of each mass tort litigation dollar.⁴¹ The greater portion pays for plaintiffs' and defendants' attorney's fees, the cost of hiring experts, and related litigation expenses. Almost without exception, the proponents of comprehensive tort reform characterize these "transaction costs" as "extraordinarily high"⁴² and "unconscionable."⁴³

This transaction cost argument suffers from the same threshold deficiency as the delay argument. Except in the abstract world of Coasean forms,⁴⁴ transaction costs permeate legal institutions and decisionmaking. Pronouncing such costs "too high" begs the question, "compared to what?" Unless we believe that we can simply intuit the issue—that we know excessive transaction costs when we see them—it is necessary to agree upon a controlling benchmark.

³⁹ See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400-10, 445-48 (1973); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 533-44 (1989).

⁴⁰ Priest, *supra* note 39, at 557 (noting that "the parties' litigation decisions will serve to offset the effects of congestion reform. Indeed, the more effective a particular reform, the greater the offsetting response, as parties choose to litigate rather than settle their disputes").

⁴¹ DEBORAH HENSLEY, *ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW* 20 (1992); JAMES S. KAKALIK & NICHOLAS M. PACE, *COSTS & COMPENSATION PAID IN TORT LITIGATION* 74 (1986).

⁴² Schuck, *supra* note 2, at 554.

⁴³ Judicial Conf. Rpt., *supra* note 4, at 13; see also Schuck, *supra* note 2, at 554.

⁴⁴ See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (hypothesizing transactions incurring no costs for information, negotiation, and execution).

Unfortunately, such agreement is hard to come by. Many commentators on the mass tort problem avoid or simply fail to grasp the unavoidably comparative nature of the inquiry. Those that do generally suggest that transaction costs in the mass tort area are too high when compared to alternative systems for compensating accident victims, such as no-fault insurance or workers compensation schemes.⁴⁵ Yet, such comparisons are inherently unfair. To be sure, compensation is a goal, or at least a salutary by-product, of the tort system, but it is inaccurate to characterize tort law solely as an accident compensation scheme. It is much more than that.

Specifically, tort law serves both the noninstrumental end of corrective justice and the instrumental goal of deterring socially wasteful activities.⁴⁶ Both efforts depend on a particularized and nuanced determination of defendant responsibility. This determination, which is played out in the often thorny questions of fault and causation, can be costly. In some areas, we as a society have decided that the game is not worth the candle, and have created simpler schemes more keyed to compensation of injured parties and less driven by the question of responsibility.⁴⁷ Such schemes have lower transaction costs because they aspire to far less. We may ultimately follow this path with respect to mass torts, concluding that it no longer pays to inquire whether the defendant did anything wrong or even whether the defendant's actions caused the harm for which compensation is sought. But such a change, if it is to be made, demands a clear understanding of the broader trade-offs at stake, and should not be simply a visceral and uncalibrated reaction to the costs of adjudicating mass torts.

If pure compensation schemes do not represent a good benchmark for assessing the level of transaction costs in mass tort cases, then what does? Presumably, the best benchmark would be tort cases in general, or at least other forms of civil litigation where fault and causation play key roles. Good data in this area are generally lacking, but some arm-chair calculations may be revealing. Under the contingency fee arrangement in an "ordinary" tort case, a successful plaintiff receives about two-thirds of the judgment, with the plaintiff's attorney receiving the remaining one-third. The defendant's litigation costs, including attorney's fees, should correspond roughly to those of the plaintiff. Even in a simple case, then, the transaction costs incurred in compensating the plaintiff begin to approximate the amount of compensation received and therefore substantially exceed those gener-

⁴⁵ See, e.g., Schuck, *supra* note 2, at 554 n.52 (suggesting that appropriate comparison is with "almost any alternative compensation system that one can imagine, including some that, *mutatis mutandis*, are already in place").

⁴⁶ See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 28-32 (4th ed. 1994).

⁴⁷ See Rabin, *supra* note 3, at 827-28. See generally *infra* part III.

ated by pure compensation schemes. When the added complexity of mass tort claims is factored in, the cost of adjudication naturally increases, so that the figures in the mass tort area become less surprising.

As an empirical matter, then, the case for excessive transaction costs is far easier to assert than to prove. But the doomsayers' contentions also have a normative cast: such costs are bad not only because they are too big, but also because they shortchange worthy claimants "while attorneys and experts prosper."⁴⁸ The insinuation here—that mass tort litigation squanders resources by making gratuitous welfare payments to a privileged and parasitic group—may carry a nice rhetorical sting, but it is ultimately without substance. Absent an argument that the markets for legal and expert services are inefficient, presumably these payments are for something of real value to the plaintiffs and defendants that make them.

Indeed, we need not even presume what that value might be, for it is clear. Mass tort cases raise important and often complex issues relating to responsibility and causation, issues which are only resolved through the services of lawyers and experts. Advocates of broad reforms cannot have it both ways. They cannot argue that mass torts involve "serious political and sociological issues" that affect "the health and . . . security of many individuals and the viability of major economic institutions,"⁴⁹ while characterizing the costs entailed in resolving those issues as "simply deadweight losses, pure social waste that imposes costs with few offsetting benefits."⁵⁰

C. Bankrupt Defendants

Perhaps the strangest argument in the literature of crisis, at least when it issues from the mouths of tort scholars, is the concern repeatedly expressed over the potential of mass tort cases to bankrupt corporate defendants. If one subscribes *at all* to the dominant view that tort law's primary instrumental function is to encourage actors to make socially optimal investments in safety, then occasional bankruptcies should be expected and even welcomed. This is because the encouragement tort law offers to actors to behave reasonably comes not in the nature of a polite request, but in the harsher form of liability judgments indicating that the actor has failed to act appropriately.⁵¹ If an

⁴⁸ Edley & Weiler, *supra* note 4, at 396.

⁴⁹ Weinstein, *supra* note 4, at 474, 476.

⁵⁰ Schuck, *supra* note 2, at 555.

⁵¹ See John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1825 (1987). This is true even in products liability cases that involve alleged flaws in the design, testing, and marketing of products. Although these claims, which constitute the majority of products liability cases, are handled under a "strict" liability regime, the determination of defectiveness inevitably requires a negligence-type reasonableness in-

actor makes too many such mistakes, just as if it habitually overspends on labor or energy or some other cost of business, insolvency naturally follows. Thus, it simply does not play to cast companies that suffer tort-related bankruptcies as the noble martyrs of an unjust tort system.⁵² In reality, they are chronically careless actors that have caused more harm than they can pay for. One need not view bankruptcy as their just desert in a retributive sense to see that it is an appropriate disposition simply as a matter of both necessary deterrence and simple accounting.

Of course, unwarranted bankruptcies can occur if the tort system consistently overstates defendant liability. Such errors may arise in a variety of ways. For example, aberrant and expansive judicial approaches to the question of fault can hold defendants liable for harms that they could not reasonably foresee.⁵³ Moreover, punitive damage awards in separate cases against a single defendant for the same general conduct can act as a form of civil "double jeopardy," resulting in excessive aggregate damages relative to the wrongdoing at issue.⁵⁴ Finally, judges and juries may err in applying legal rules in a way that systematically favors plaintiffs, thus overtaxing defendants with liability.⁵⁵

Regardless of the abstract plausibility of such concerns, there is no reason to believe that the liabilities of now-bankrupt mass tort defendants were overstated. First, despite the conventional belief in a "liability explosion," the best evidence indicates that as a matter of both doctrine and practice the trend in tort cases decidedly favors defendants.⁵⁶ Moreover, in light of the numbers of claims involved, it seems implausible that the insolvencies that have occurred could have been avoided under even the most favorable pro-defendant conditions imaginable. Finally, the claim of pathology in the literature is not even based on the actual occurrence of *unwarranted* bankruptcies, but instead arises from the mere prospect of *any* bankruptcy among

quiry. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. c (Council Draft No. 2, Sept. 1994).

⁵² See, e.g., Edley & Weiler, *supra* note 4, at 391.

⁵³ See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) (asbestos producer legally responsible for dangers that were not discoverable at time of production). The aberrant approach in *Beshada* has been rejected by other courts. See, e.g., *Feldman v. Lederle Lab.*, 479 A.2d 374 (N.J. 1984).

⁵⁴ See Griffin B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 22 U. RICH. L. REV. 1 (1987); Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987).

⁵⁵ See generally James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

⁵⁶ See Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992); Henderson & Eisenberg, *supra* note 37; James A. Henderson, Jr. & Aaron D. Twerski, *Commentary, Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332 (1991).

mass tort defendants. As noted above, however, this squeamishness about bankruptcy is inappropriate in light of the critical role it plays in eliminating actors who chronically generate excessive levels of risk.

Nor is it a sufficient rebuttal to cite the impact defendant bankruptcies have on "larger communities than those encompassed by the litigants before the court,"⁵⁷ including "the workers, pensioners, and communities that rely on the economic viability of the defendant businesses."⁵⁸ This sentiment—and that is all it is—is seriously misplaced. First, the collateral impact of bankruptcy is not particular to the mass torts context; this concern can be advanced against any bankruptcy. Second, the ongoing "economic viability" of such defendants is an illusion; such companies are already dead by their own hand, and the precipitation of bankruptcy merely confirms this sorry fact. In this context, the prevailing imagery—in which "monstrous" mass tort actions "cause" bankruptcies that threaten the future of "pensioners"—is all wrong. Rather, it is the repeated, unreasonable, and harmful actions of defendants that generate overwhelming liabilities, which the defendants themselves then seek to manage and adjust by taking shelter in the bankruptcy laws.

Finally, and most importantly, if we are to worry about the "larger communities" affected by the potential bankruptcy of a mass tort defendant, both the best and the only legitimate place to do such worrying is in the context of bankruptcy itself. Bankruptcy is not the seventh ring of Hell, but instead is a powerful, comprehensive, and flexible device for determining in a broad and equitable sense whether all the constituencies with a stake in the bankrupt enterprise are better off with the company dead than alive. If continued "economic viability" serves this broader community, Chapter 11 provides the legally authorized mechanism for such redemption.⁵⁹ In this regard, tort claimants have no more interest than any other stakeholder in precipitating the liquidation of a defendant; they will typically do so only if the company is so economically feeble that liquidation is the only sensible alternative.⁶⁰

Not only is the fear of bankruptcy misplaced, but the attempt to circumvent it through judicially-initiated systemic reforms raises seri-

⁵⁷ Weinstein, *supra* note 4, at 474.

⁵⁸ Edley & Weiler, *supra* note 4, at 396.

⁵⁹ See generally Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617 (1992) (discussing success of the A.H. Robins/Dalkon Shield reorganization).

⁶⁰ See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 *B.U. L. REV.* 659, 677-78 (1989) (noting that bankruptcy claimants "are united by a common interest in maximizing returns from a fixed asset base that diminishes over time. Each party owns a common resource and, since neither party can act unilaterally, the parties must agree on how to share that resource").

ous questions of legitimacy. It is fine for tort claimants and defendants to agree voluntarily to readjust liabilities to avoid an incipient bankruptcy, but it is altogether different for a crusading court to coerce such an arrangement to protect "public interest" from such an outcome. In the latter case, Congress has already defined a comprehensive scheme for the mandatory reorganization of liabilities. If this legislative device is functioning poorly, then legislative amendment is the appropriate solution, not ad hoc common law substitutes. To the extent that mass tort litigation is truly "akin to public litigations,"⁶¹ that public law is to be found in the Bankruptcy Code.⁶² Paradoxically, then, it is the unnatural fear of bankruptcy that pervades the literature of crisis rather than the actual occurrence of defendant bankruptcies that represents a true pathological response to mass torts.

D. Exhaustion of Compensation Funds

As noted above, occasional bankruptcies are an inevitable feature of the tort system. When they occur, late-arriving claimants are often unable to recover because the corporation's assets will have been depleted by prior judgments and dispersed in the liquidation process. This problem of the late-arriving claimant is frequently cited as further evidence of a crisis within the tort system that mass tort litigation created.⁶³ Thus, one commentator observed that such claimants may receive less compensation (if any at all) "for no better reason than that they were exposed later, contracted their disease later, learned of their disease later, selected a lawyer who filed a claim later, or were grouped by their lawyer with a batch of other claims scheduled for later settlement." Such an outcome is characterized as "manifestly unfair."⁶⁴

Unfair indeed, but it is important to understand the source of the unfairness. Again, much of the crisis talk in the mass torts area misses the point. The unfairness to late-arriving claimants does not stem from their status as mass tort plaintiffs, but instead is endemic to any competition for scarce resources, including the competition among claimants to a defendant's assets. If a defendant company's assets are sufficient to cover its liabilities, then the timing of claims is irrelevant. But limited capitalization and limited liability—key features of corpo-

⁶¹ Weinstein, *supra* note 4, at 472.

⁶² See Vairo, *supra* note 59 (arguing that the A.H. Robins bankruptcy reorganization plan, established to cover Dalkon Shield Claims, represents a model for resolving the competing interests at play in mass tort cases).

⁶³ See, e.g., Rubin, *supra* note 4, at 436; Jack B. Weinstein, *A View from the Judiciary*, 13 CARDOZO L. REV. 1957, 1958-59 (1992) (discussing difficulties of allocating funds between present and future asbestos claimants).

⁶⁴ Schuck, *supra* note 2, at 561.

rate law—inevitably create the danger that actors will incur liabilities in excess of their assets and thus will be unable to satisfy all claimants.

Of course, we can devise schemes to limit the horizontal inequities that result from the exhaustion of compensation funds. We could, for example, wait for the pool of claimants to stabilize before making distributions.⁶⁵ This, however, generates an offsetting inequity for early-arriving claimants, who may need compensation before the full scope of liability can be determined.⁶⁶ We could create free-standing compensation funds, thus reserving resources to cover latent injuries. But if bankruptcy is really a threat, such schemes cannot solve the problem. Rather, they merely redistribute the pain by short-changing early-arriving claimants to preserve funds for subsequent plaintiffs.⁶⁷

It is, in the end, a zero-sum game. The fundamental problem is resource scarcity, a problem that exists whether we are discussing mass-tort-related bankruptcies, or bank runs, or a kindergarten game of musical chairs. Any effort to escape this fact either generates the kind of internal trade-offs just noted or else pits tort law against other important public policies. Specifically, while the tort system aims at full compensation for all injured plaintiffs, both corporate and bankruptcy law establish the *right* of corporate actors, under some circumstances, to avoid paying all or part of their liabilities.⁶⁸ This right is a key feature of our system because it serves a variety of social goals unrelated to compensating harm: it encourages capital formation and entrepreneurial risk-taking, improves the liquidity of equity markets, broadens the base of business ownership, and decreases the costs of monitoring management.⁶⁹ These benefits come at a clear cost; when things go badly, those with a stake in the corporation—whether they be shareholders, debtholders, employees, pensioners, suppliers, *or* potential tort claimants—face the prospect, and indeed the likelihood, of an incomplete recovery. But these costs are not the product of mass tort litigation, and they cannot be willed away by tort reform.

⁶⁵ See *In re Silicone Gel Breast Implants Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp.) Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994). These cases highlight the difficulty that problems of damage indeterminacy pose for assessing proposed class action settlement of breast implant claims.

⁶⁶ Indeed, reformers frequently cite delays in compensation as further evidence of crisis. See *supra* part II.A.

⁶⁷ Schuck, *supra* note 2, at 577 (“The risk of defendants’ insolvency will exist in any event; the only question is which claimants must bear it.”).

⁶⁸ See Siliciano, *supra* note 51, at 1834-53.

⁶⁹ *Id.* at 1860-63. But see H. Hansmann & R. Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991).

III OF REASONS AND RHETORIC

It is possible to continue dissecting the literature of crisis, but at this point, the general theme is clear. The motivating idea behind the crisis rhetoric—that mass tort litigation has produced pathological distortions in an otherwise swift, fair and efficient tort system—is simply not accurate. To be sure, mass torts raise many troubling questions. Uncompensated plaintiffs, bankrupt defendants, costly litigations, and congested courts: these are not pleasant things to gaze upon. But they are not the peculiar result of mass torts. Rather, mass torts simply serve as a magnifier that makes visible to us the problems and tensions inherent in the way we live and the way that the tort system resolves disputes.

The related problems of defendant bankruptcies and inadequate plaintiff recoveries, for example, stem from sources completely external to tort law. As a society, we like our technology and we like it now. We continually overlook, against all reason, the possibility that a new invention or concoction may pose hidden or poorly understood risks. We market and consume such products on a massive scale without insisting that their creators and sellers be sufficiently capitalized to guard against all potential losses. Thus when the inevitable happens and a lurking risk appears, there are always many bodies on the ground.

At this point, *any* system of redress that seeks to extract compensation from harm-causing actors will manifest symptoms of bankruptcy and incomplete recovery.⁷⁰ We might alter the mix somewhat by discounting plaintiff recoveries to avoid defendant insolvencies or short-changing early claimants to protect later ones, but the pie will never be big enough no matter how it is sliced. The ideal of full recovery and unimpaired solvency, implicit in much of the literature of crisis, is just not of this world.

Other troubling characteristics of mass tort litigation, such as delay, transaction costs, and failures of proof, are internal to the adjudicatory process. But within that domain, the potential for these problems is universal rather than restricted to the mass tort area. Again, mass tort litigation merely helps us see key features of our approach to injury compensation. If we stop blaming the messenger and consider the message, the relevant inquiry shifts in a subtle but important way. No longer is it a question of what kind of emergency reform will best solve the crisis created by mass torts; instead, the issue

⁷⁰ See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 668 (1979) (noting that "[t]he 'big case' is an inevitable byproduct of the mass character of contemporary American society," which exists independent of the specific means employed to resolve mass disputes).

becomes whether tort law *in toto* should be replaced by some other method of injury compensation.⁷¹

When we reframe the question this way and think dispassionately about the continued utility of the tort system, the interest in radical reform may diminish. Of course, if compensating injured parties is the *only* goal we wish to pursue, then the tort system must go. It is not hard to imagine cheaper, quicker, more consistent systems of compensation. Concededly, this is just what the critics have been saying, but if they are truly committed to the singular goal of full compensation, their reform proposals ought to be much *more* radical, along the lines of universal health insurance and comprehensive disability coverage financed by general revenues.

Yet even reformers resist this move for a variety of reasons. As a society, we like a little responsibility with our compensation. When one actor's wrongdoing has caused injury to another, we prefer that the injury be redressed by the harm-causing actor rather than by the public fisc.⁷² Alas, there lies the rub. There is no such thing as a "little responsibility," or a "bit of causation."⁷³ Once these issues are introduced into the compensation process, it becomes an altogether different enterprise: liability, rather than need, drives the payment process and compensation is no longer the sole purpose of the system. Instead, issues of corrective justice and deterrence heavily influence the system's contours. Such changes will inevitably make the compensation process measurably more costly, slow, and uncertain. In short, we will have built, or perhaps rebuilt, a tort system. Finetuning of various sorts—from adjusting the liability rules to shifting burdens of persuasion on causation questions—may marginally enhance the system's compensatory function but it will not alter the compromise nature of a responsibility-based system of compensation.

In sum, the costs, delays, and uncertainties of mass tort litigation are not pathologies; they are instead the inevitable by-products of a system that serves multiple, competing and important public policies. Nor are such phenomena purely negative, for the spectacle of the system in action serves an important educational function. Slow and costly as it is, mass tort litigation is one very public forum in which society works out its complex and ambivalent attitudes toward technology, progress, risk, uncertainty, and responsibility. Part tragedy and

⁷¹ Some commentators have grasped the fundamental and difficult nature of the question at issue. See Rabin, *supra* note 3, at 822-29 (emphasizing the overall nature of the problems with the tort system).

⁷² In addition, pure social insurance schemes present their own daunting design and administrative challenges. See *id.* at 827-29.

⁷³ See *id.* at 826 ("Only when disability becomes a sufficient condition for reparation—in other words, when a social insurance model is adopted—are the causal issues put to rest.").

part farce, epic in scope and expensive to produce, it is a hell of a play, and one we may derive substantial benefits from watching.

We should at least consider the value of those benefits in debating whether other, less visible but "more efficient" means of compensating the victims of mass torts ought be adopted. In the areas of accident law, such as automobile no-fault systems, where questions of responsibility and causation have been jettisoned to enhance compensation, there was little social learning left to do. Litigating car crashes added scarce insight to the lessons of experience; the risks associated with automobiles were so universally understood and reciprocal in nature that the question of fault held little dramatic interest.

Not so with mass torts. They emerge, more often than not, on the frontier of knowledge and technology, and the issues they present merit thorough consideration. After all, selling bags of liquid silicone so that people can surgically alter their physical contours is *quite* an idea, one worth a serious chat. We ought to hear from each of the actors involved, and probably more than once. Perhaps the tort system is as good a place as any to have such a conversation.⁷⁴

In short, the central defect of the commentary invoking the rhetoric of crisis is that it asks the wrong question. Rather than debating what has gone wrong with the tort system, the core inquiry should focus on whether we wish to retain the system at all. This reframing of the question is not merely a matter of semantics. Crisis talk is cheap and dangerous; it encourages impulsive and partial solutions and diverts attention from the full nature of the problem.⁷⁵

Moreover, in the context of mass torts, there are special reasons to regard claims of crisis with more than a modest degree of skepticism. Defendants naturally will support any reform that allows them to escape, limit, or delay the imposition of liability for harms they have caused. Crisis-mongering clearly furthers that end. Plaintiffs' attorneys representing large classes of existing and potential claimants also stand to reap enormous financial benefits by working out "creative" settlements with such defendants. Doomsaying on their part helps convince the courts that must approve such settlements that they indeed are fair and in the public interest. Even academics and judges, who have little opportunity to tap the huge amounts of money at stake, may achieve professional and personal satisfaction by fashioning and implementing bold solutions to avert disaster.

⁷⁴ Indeed, in this regard, the proposed class action settlement in the silicone breast implant cases may have occurred *too early* in the process of social education. There may be considerable benefits in allowing the litigation process to proceed until such cases are "ripe" for collective resolution. See McGovern, *supra* note 60 (analyzing the success of judicially created innovations in the context of "mature" mass torts).

⁷⁵ See Siliciano, *supra* note 51, at 1853-63.

This is not to say that all efforts toward private resolution or legal innovation should be met with suspicion, but only that we will think more clearly about the value of such solutions if we turn down the volume. It may well be that some initial alarmism about mass torts helped to unleash the creative energies of the common law. But as Peter Shuck's companion article in this symposium makes clear, those energies are now fully engaged in managing the challenges posed by mass torts. Crisis rhetoric no longer plays a useful role. If anything, the continued recycling of such rhetoric may propel the process of innovation too far in the direction of oversimplification and speedy resolution. The advent of settlement class actions certainly raises substantial concerns on this score. We will be better able to assess the merits of such solutions if freed from the doomsaying that spawned them.

IV

YEAH, BUT WHAT ABOUT ASBESTOS?

If mass torts do not generally represent a pathological breakdown of the tort system, can the same really be said about asbestos litigation? As two scholars have noted, "[a]sbestos litigation has been a bitter pill for the American judicial system to swallow."⁷⁶ Even if delay, congestion, well-fed lawyers, disappointed claimants, and insolvent defendants are natural features of the torts landscape, their concurrent manifestation in asbestos cases occurs on such a grand scale that the asbestos problem might arguably qualify for special consideration.

Perhaps, but there may be lessons to be learned in looking at the asbestos "disaster" a little more critically. Specifically, it pays to ask whether the real problem is as big as the numbers seem to indicate, or whether prior errors in judgment, classification, and disposition have served to catapult the asbestos litigation to an abnormal level of unmanageability. As previously noted,⁷⁷ one reason asbestos may assume "monstrous" dimensions is that courts and commentators have been insufficiently rigorous in separating the wheat of asbestos claims from the chaff. A critical eye can segregate strong asbestos claims from weak ones by focusing on the potentially dispositive issues they present. The weak cases should not be allowed to free-ride on the strength of the former, yet the tendency to think about "the asbestos problem" encourages precisely this kind of parasitic fusion of strong and weak cases.

⁷⁶ Henderson & Twerski, *supra* note 56, at 1336.

⁷⁷ See *supra* notes 19-21 and accompanying text.

Take, for example, the problem of “unimpaired asbestos claimants.” These are individuals who manifest pleural plaques or pleural thickenings—small scale changes in the lung lining that generally cause no discernable physical impairment but may (or may not) be the precursor to debilitating conditions.⁷⁸ It is possible that half or more of currently docketed asbestos cases involve plaintiffs who have not yet suffered any actual impairment.⁷⁹

This is shocking, and raises the obvious question of what such cases are doing in the courts in the first place? The state of “being impaired,” of suffering actual damages, is a fundamental prerequisite for tort recovery. Courts should have exercised a vigorous gatekeeper function, summarily excluding such cases from the tort system. Yet, perhaps anticipating the impact of statutes of limitation and the single judgment rule on these claims should harm materialize in the future,⁸⁰ or perhaps bewitched by the idea of recovery for the mere fear of future illness,⁸¹ courts left the gate open and the caseloads surged. Indeed, from the individual plaintiff’s perspective, filing was a sensible move; why endure the risks suffered by late-arriving claimants when you can get in line now?

But surely there was another way to go. Statutes of limitation and the single-judgment rule are malleable enough that courts could have easily preserved the rights of asbestos litigants to bring suit in the future without needing to hear from them now. While deferral registries are a sensible idea for handling the mess we have,⁸² it is important to realize that the problem might have been avoided altogether by a more hard-hearted and rigorous up-front scrutiny. Applying the same critical attitude to the issues of fault and causation might similarly serve to thin the claimants class. If we are going to stick with a responsibility-based compensation system, such a critical approach is essential to controlling dockets and ensuring that the limited funds available for compensation are distributed to the most “worthy” claimants, at least in a legal sense.

In sum, the unmanageability of the asbestos cases may stem not from a failure of the tort system, but from a failure to observe the ground rules of that system. To guard against “the next asbestos,” courts must honor those rules. This is not an easy task, for it means

⁷⁸ Schuck, *supra* note 2, at 544-48.

⁷⁹ *Id.* at 549 n.36.

⁸⁰ “Cancerphobia” claims are a dangerous creature regardless of setting, but are particularly disruptive in the mass tort context. Courts should have kept a tight rein on such exotica.

⁸¹ Schuck, *supra* note 2, at 575. Some courts held the line. *See, e.g., Giffear v. Johns-Manville Corp.*, 632 A.2d 880, 888 (Pa. Super. Ct. 1993), *appeal granted*, 651 A.2d 539 (Pa. 1994).

⁸² *See* Schuck, *supra* note 2.

denying recovery to large numbers of claimants simply because their causation hypotheses are as yet unprovable or because they had the "bad luck" of not yet suffering any impairment. But if compensation truly depends upon a legally sufficient showing of responsibility for harm caused, such claimants must be denied.

What if, despite a renewed commitment to careful gatekeeping, the number of asbestos cases keeps growing? It has been estimated that over twenty-one million American workers were significantly exposed to asbestos.⁸³ If *that* crowd shows up, we are in big trouble. But in some sense, the course would be clear. We will be faced with a situation that transcends our remedial powers, regardless of whether the tort system or some other means of compensation is employed. At some point, harms become so widespread that they defy any effort to think in terms of responsibility and causation.⁸⁴ When that threshold is reached, when the sheer mass of the claims defeats their characterization as torts, the options are limited. We can devise distracting schemes to move money from one pocket to another. Or we can accept such losses as part of the background risk that characterizes modern life. But rectification lies forever beyond our reach.

CONCLUSION

The "crisis" of mass torts may, in the end, be a crisis of faith. Unlike the obscure dramas of "everyday" torts, the lessons learned from mass torts are big and ugly and hard to ignore. They threaten our faith in our ability to harness technology as well as our faith in the capacity of the legal system to make things right should that technology rise up and betray us. This is all for the good, for some searching doubt on both scores was probably long overdue. Our time in the desert will have been well spent if we return more humble and more realistic about some basic truths.

Crisis talk inhibits this needed reckoning by suggesting both that things are worse than they really are and that they can be made better than is probably possible. By viewing the tort system's delays, costs, and insolvencies as symptoms of illness, such talk bewitches us with the vision of a free and frictionless system of accident compensation. Once we accept, however, that such conditions are to a significant degree inherent in any responsibility-based system of compensation, it becomes possible to think more clearly about the wisdom of retaining such a system. When the alternatives are considered, we may ultimately conclude that the tort system's approach to accident compensation makes the best of a bad situation.

⁸³ See *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985).

⁸⁴ Consider, for example, mass tort litigation seeking recovery for the harms caused by smoking, or alcohol consumption, or the hole in the ozone layer.

It is important to realize, however, that we may not find the "best" to be very good. There may be ways to improve marginally the system's fairness and efficiency, but the tort system will never be transformed into an enterprise that is quick and cheap, with happy faces all around. It is not in the nature of the beast.