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The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law

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The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law

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For the past decade or so, important aspects of American tort law have sought to reaffirm tort's ostensible commitment to individualized justice. In the courts, many of our leading jurists express a commitment to what Justice Souter in *Ortiz v. Fibreboard Corporation* called the "day-in-court ideal": "our deep-rooted historic tradition that everyone should have his own day in court."[1] And in the academy, we are in the midst of what appears to be a sustained revival of the closely related idea that tort law consists in the reciprocal relationship between plaintiff and defendant, in which the "bipolarity" of the dispute forms the heart of the tort system's aspiration for corrective justice.[2] "Tort law's structural core," writes Jules Coleman, for example, "is represented by case-by-case adjudication in which particular victims seek redress" from particular defendants, each of whom "who must make good her 'own' victim's compensable losses."[3]

Underlying these resurgent aspirations to individuation in the law of torts is, among other things, a common set of assumptions about the character of our "historic tradition," as Souter put it in *Ortiz*, in the law of torts.[4] At conference after conference, in article after article, that tradition is said to be grounded in a purportedly long-standing American

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[1]Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999).

[2]ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 63-66 (1995).

[3]Jules Coleman, The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory 16 (2001).

[4]*Ortiz*, 527 U.S. at 846.

commitment to individualized justice.[5]

To be sure, sophisticated observers of the legal system understand that the overwhelming majority of cases settle long before an individualized adjudication ever takes place. Yet the literature on torts settlements – inspired by Mnookin and Kornhauser's seminal article in the field of domestic relations[6] – adopts an individualized approach to thinking about bargaining in the shadow of the law. Settlement theorists have shown the deep significance of repeat-play agents in non-zero-sum fields like commercial litigation and negotiations among commercial entities, or in the non-zero-sum aspects of matrimonial law.[7] But there has been relatively little consideration of the significance of repeat play specialists and of the phenomenon of aggregation in tort settlements.[8]

Our question here is whether the description of American tort law that underlies recent case law and scholarship effectively accounts for the resolution of torts disputes in American law, either as a matter of historical tradition or as a matter of present reality.[9] Have tort cases really taken the individuated form that tort jurists like Souter and Coleman and settlement theorists inspired by Mnookin and Kornhauser suggest?

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[5]*See, e.g.,* John Goldberg, *20th Century Tort Theory,* 91 Geo. L.J. 513 (2003); John Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts,* 97 Colum. L. Rev. 2034 (1997); John Goldberg, *Reconstructing Liberalism Rights and Wrongs,* 97 Mich. L. Rev. 1828 (1999) [reviewing ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999)]; Stephen Perry, *Comment on Coleman: Corrective Justice,* 67 Ind. L.J. 381 (1992); Stephen Perry, *Harm, History, and Counterfactuals,* 40 San Diego L. Rev. 1283 (2003); Stephen Perry, *Method and Principle in Legal Theory*, 111 Yale L.J. 1757 (2002) [reviewing JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001)]; Stephen Perry, *The Distribution Turn: Mischief, Misfortune, and Tort Law,* 16 QLR 315 (1996); Stephen Perry, *The Moral Foundations of Tort Law,* 77 Iowa L. Rev. 449 (1992); Benjamin Zipursky, *Civil Recourse, not Corrective Justice,* 91 Geo. L.J. 695 (2003).

[6]Lewis Kornhauser & Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 Yale L.J. 950 (1979).

[7]Ronald Gilson & Robert Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation,* 94 Colum. L. Rev. 509 (1994). We set to one side the interesting and relatively new literature on the collective social norm shaping effects of legal norms. *E.g.,* WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State,* 112 Yale L.J. 1641 (2003). For an intriguing study along these lines in the law of torts, see LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985).

[8]Important exceptions include Adam Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance,* 86 Iowa L. Rev. 173 (2002) and Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DePaul L. Rev. 183 (2001).

[9]For a project that adopts a different approach to a similar end, see Robert Bone, *Rethinking the "Day in Court" Ideal and Non-Party Preclusion*, 67 N.Y.U. L. Rev. 193 (1992).

Indeed, can tort law in its current institutional form look the way the literature and the cases seem to indicate? Our answer is no. Mature torts – by which we mean those torts that develop repetitive fact patterns – have persistently resolved themselves into what are essentially bureaucratized, aggregate settlement structures. "Informal aggregation," as Howard Erichson has called it, is not the deviation but the norm in these cases.[10] Moreover, it almost always has been. From the very beginnings of the development of the law of torts in the United States, aggregate settlement institutions of a variety of kinds have virtually dominated the resolution of particular cases.

To a large extent, we seek merely to remake an insight that informed the initial development of the law of torts, but seems to have been significantly forgotten. Oliver Wendell Holmes, Jr., developed his early view of the law of torts around cases of isolated individual injuries with the classic bipolar structure. The case of *Brown v. Kendall*,[11] in which one man struck another with a stick while separating two fighting dogs, was thus the paradigm case for the theory of tort law he articulated in *The Common Law* in 1881.[12] Fewer than twenty years later in his "Path of the Law" address of 1897,[13] however, Holmes had come to view American tort law as organized not around chance interpersonal encounters, but rather around the apparently inevitable onslaught of injuries thrown off by the progress of industry.[14]

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[10]Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 Duke L.J. 381 (2000). Our project in this paper is to expand Erichson's claim that the conventional understanding of "a neat line between class and non-class litigation . . . misses important aspects of what happens in modern, large scale, non-class litigation." Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. Chi. Legal F. 519, 524 (2003). In Erichson's account, mass litigation in recent decades is often "handled through collective representation even if no class is certified." *Id.* Our point is that even from long before recent mass-tort cases, mature tort claims processing was carried on through collectivized aggregate institutions.

[11]60 Mass. 292 (1850).

[12]Oliver Wendell Holmes, Jr., The Common Law 84-85 (1881).

[13]*See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

[14]On this transition in Holmes's thought, see JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 7-8 (2004). On the early versus the late Holmes more generally, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 109-43 (1992) (contending that the late Holmes of the Path of the Law address had abandoned his earlier search for an immanent morality in the common law, in favor of the positivist separation of law and morals for which Holmes is now famous). For an account of the role of probabilistic thought in

Our aim in this Article is to adopt an approach very similar to that which has been adopted by prominent work in both the economics and the corrective justice literatures. In the former, Richard Posner's classic study of the law of negligence took the descriptions of reported negligence cases as its starting point.[15] In the latter, moral philosophers' accounts of tort law have sought to draw a moral account of tort law from the actual practices of tort jurists. Indeed, the philosophers of tort law may even be said to have successfully wrested the use of description in tort law away from the economists. Coleman's most recent book on the subject, to take only one prominent example among many, is expressly organized around advancing an account of tort law that best embodies the "concepts that organize our torts practice," concepts that are sometimes (as the corrective justice scholars take great glee in noting) difficult to square with economic principles.[16]

Yet if we are right, our descriptive claims have a number of important implications. The standard histories of civil litigation trace a long-term decline in the aggregation of civil claimants in which group litigation gave way to individualized claims.[17] In our view, by contrast, the decline of pre-modern groups has given rise to a tort system characterized (in mature torts, at least) not by the individualized treatment of claims but by a new set of distinctly modernist aggregating institutions and practices. The replacement for pre-modern group litigation has not been individualized claims adjudication, but rather privatized mechanisms of settlement that take classes of claimants as aggregates and develop mechanisms for the settlement of claims at the wholesale level rather than at the retail level. The insight here is an extension of an observation that

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shaping Holmes' intellectual environment in the post Civil War period, see LOUIS MENAND, THE METAPHYSICAL CLUB (2002).

[15]Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972). Kornhauser and Mnookin similarly ground their article in a description of the changing face of divorce settlement negotiations.

[16]COLEMAN, *supra* note 3, at xv; Stephen Perry, *Cost-Benefit Analysis and the Negligence Standard,* 54 Vand. L. Rev. 893 (2001); Perry, *supra* note 5; Zipursky, *supra* note 5; Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts,* 51 Vand. L. Rev. 1 (1998).

[17]STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); *see also* Robert Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation,* 70 B.U. L. Rev. 213 (1990) [reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)].

Max Weber made a century ago: that modern society often sees the development of institutionalized and bureaucratic modes of authority in the private sphere as well as in the public sphere.[18] The difference – and this is perhaps why academics and courts alike have failed adequately to recognize it – is that the private systems of aggregation in our tort system exist in a far-flung, decentralized, and under-the radar world that rarely comes to the attention of torts jurists. American accident law need not inevitably have developed in this way; as one of us has argued recently, our accident law is in many ways itself an artefact of eclectic experimentation with alternative accident law institutions in the decades around the turn of the twentieth century.[19] The Weberian irony, however, is that within the sphere of accident law that has been left to the tort system, the ostensible commitment to litigant autonomy seems to produce a settlement market in tort claims characterized by private aggregating bureaucracies.[20]

More concretely, at least two normative claims follow from the descriptive point we make, one in the domain of substantive tort law, the other in procedure. Some of what we say in this article will come as no surprise to specialist readers. The tort literature has long noted the ways in which settlement practices coexist with the formal law of tort such that, as an empirical matter, relatively few cases actually go to trial.[21] Focusing on the aggregating aspects of torts practices, however, calls into question the individualized accounts of tort practice that are increasingly influential in both the corrective justice literature of torts academics and the class

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[18]*See* MAX WEBER, ECONOMY AND SOCIETY 982-83 (1968).

[19]*See* WITT, *supra*, note 14.

[20]Weber's parallel point was to note the ways in which the forces unleashed by private enterprise were contributing to the bureaucratic rationalization of modern social life. See MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1958). To put it in the slightly different terms inspired by Robert Kagan's work on adversarial legalism, our claim is that the with respect to mature torts, the American preference for adversarial legalism over public, hierarchical bureaucracy often results in private systems of informally aggregated settlement that bear a closer resemblance to public compensation systems than Kagan allows. The contrast that Kagan and others observe between public hierarchical bureaucracies and privatized settlement (though important) may thus be less stark than it has been understood to be. See THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002); ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 125 (2001).

[21]*E.g.*, H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT (1980). Nonetheless, as one insurance company lawyer noted decades ago, personal injury settlements remain "the stepchild of law schools and of the legal profession." Lawrence E. Carr, Jr., *Settlement of Personal Injury Cases*, 9 For the Defense 43 (1968).

action decisions of the courts. In particular, the inevitable aggregation of claims in the settlement market suggests that the conventional wisdom about our traditions of individuation in tort and of the corresponding dangers of claims aggregation should be rethought.

Second, our focus on aggregation reorients the U.S. Supreme Court's concern over mass tort class action settlements. Tort settlement classes in recent years have come under especially acute fire as inconsistent with the claimed traditional approach of individualized inquiries and corrective justice in the law of torts. In our view, however, the class action cases that have drawn such extensive judicial and scholarly scrutiny – cases like *Amchem Products, Inc. v. Windsor*[22] and *Ortiz v. Fibreboard Corporation* – are not so much departures from the normal workings of tort law as they are points along a continuum of aggregating devices that have long characterize practice in the area of mature torts.[23] Class actions, to be sure, are considerably more transparent in their aggregation,more formal in their claims resolution processes, and more coercive in their compelled association. But class actions lay bare a process that exists below the surface of judicial scrutiny in tort settlement markets characterized by repeat-performance specialists.[24] Indeed, in some cases of mature torts, the absence of aggregation should be more troubling than its presence. The difficulty raised by cases such as *Amchem* and *Ortiz*, we will conclude, thus have less to do with the day-in-court idyll than with the problem of ensuring fairness in aggregate settlements that (a) replace markets in claims representation with monopolistic class representation, and (b) pose form-killing liability risks, often with long-tail time horizons.

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[22]521 U.S. 591 (1997).

[23]There is not necessarily, then, a stark "inherent tension," as the Court put it in Ortiz, 527 U.S. at 846, between representative class suits and the day-in-court ideal.

[24]Class actions have taken the place of private settlement administration where the small value of the claims in question inhibits private economies of scale; where there are limits on the funds from which claims may be collected; and where the future claims are of unknown and possibly large dimensions.

I. The Emergence of Repeat Players and Aggregated Settlements

The attention to tort law's ostensible individualism, though increasingly significant in the past few years, is hardly a new phenomenon. For almost as long as there have been tort jurists, they have described "individualism" as a primary value of Anglo-American tort law.[25] Even today, tort lawyers write that "[t]he principles embedded in tort law . . . constitute a fundamental aspect of liberal individualism."[26]

Even a cursory examination of the formal doctrine of the law of torts calls such claims into question. Common law tort doctrine has long adopted what we may call doctrines of substantive aggregation in tort. Consider the familiar choice – pervasive in the law of torts – between rules and standards. Tort law has traditionally been shot through with liability-limiting rules that cut off the inquiry into tort law's basic reasonableness standard.[27] In these areas of tort doctrine, as Frederick Schauer has recently noted, the choice of rules over standards is effectively a choice to adopt a one-size-fits-all rule – effectively aggregating the individualized details of whole classes of cases – over a standard of "reasonableness" or "negligence" that may be tailored to the particular circumstances of an individual case.[28] Indeed, if we simply take the rules / standards choice, the commitment of the American law of torts to individualized inquiries is at best only a relatively recent and partial trend, as over the course the liability-limiting rules of late-nineteenth-century tort law gave way to a relatively pure negligence standard. [29]

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[25]*E.g.*, J.M. Balkin, *Too Good to be True: The Positive Economic Theory of Law,* 87 Colum. L. Rev. 1447 (1987) [reviewing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987)] ("[T]here is a clear analogy between individualist attitudes toward economic regulation and tort duties."); Francis Bohlen, *Voluntary Assumption of Risk,* 20 Harv. L. Rev. 14 (1906); Daniel Polisar & Aaron Wildavsky, *From Individual to System Blame: A Cultural Analysis of Historical Change in the Law of Torts*, 1 J. Pol'y Hist. 133 (1989).

[26]Zipursky, *supra* note 5, at 754.

[27]Special limited- and no-duty rules, for example, cut off tort suits against landowners and occupiers, product manufacturers, charitable enterprises, family members, employers, and many other categories of defendants. Other rules have long limited tort plaintiffs' ability to bring actions for pure economic loss or negligent infliction of emotional distress.

[28]FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES (2003).

[29]Even then, this trend toward deciding landowner and occupier cases, for example, or negligent infliction of emotional distress cases under the reasonableness standard is one that many think has come to a halt over the past decade or so. We may, in other words, be witnessing the reemergence of

We could go on in this vein for some time. Many of the ostensibly individualized doctrines in the private law of tort adopt what are effectively aggregating strategies.[30] In this paper, however, we want to make a different point. Our goal here is not to describe the *substantive* aggregation provisions in tort doctrine, but to focus on the long-standing tradition, and indeed the inevitability, of *procedural* aggregation in the law of torts.

A. The beginnings of tort in mass industrial harm

In beginning our inquiry, we are drawn inescapably to the very idea of a field of tort law. For all the attention American tort lawyers show for their field's individualist traditions, it is a standard observation among historians that as a doctrinal field, Anglo-American tort law arose out of the mass harms thrown off by mid-nineteenth-century industrialization. As Lawrence Friedman has put it, "[t]he modern law of torts must be laid at the door of the industrial revolution, whose machines had a marvelous capacity for smashing the human body."[31] To be sure, there are a smattering of personal injury cases arising out of trespass and (later) trespass on the case going back to the early days of the English

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tort doctrine's long-standing tradition of aggregating particular cases for collective, one-size-fits-all resolution. See Gary Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law,* 26 Ga. L. Rev. 601 (1992). Indeed, notwithstanding the long tradition of claims by tort jurists to the contrary, we might even say that negligence rules and other liability-limiting provisions in the law of tort are not necessarily any more individualized than strict liability rules or liability-expanding provisions. To be sure, from the *ex post* perspective so long favored by common lawyers a choice not to reallocate accident costs from plaintiff to defendant is a choice plausibly described as consistent with individualism: *ex post* it is a choice to favor individual self-reliance over collective responsibility. But *ex ante,* the choice between letting accident costs lie where they fall or reallocating them through the law of torts is just as plausibly described not as a question of whether to adopt an individualist approach but as a question of how to adopt an individualist approach, or as a question of which individualist approach to adopt: one that protects victims' individualism against harms caused by doers, or one that protects doers individualism against the inhibiting force of others' claims in their individualism. Roy Kreitner, presentation at the annual conference of the American Society for Legal History, November 2003. See also Robert Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 Md. L. Rev. 1190 (1996).

[30] *Cf.* Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38 Pol. Sci. Q. 470 (1923); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System,* 97 Harv. L. Rev. 849 (1984).

[31] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 467 (2d ed. 1985).

common law writ system.[32] But bringing together the procedural forms of action of the writ system under the umbrella of a field called torts was a distinctly modern move, arising by almost all accounts out of the new pressures exerted by industrialization.[33] The first English-language treatise on torts, for example, appeared only in 1859,[34] followed over the next two decades by a flurry of successive editions and competing volumes, all seeking to keep up with what leading torts jurist Thomas Cooley called the ever "more frequent controversies" accompanying the "new inventions and improvements" of the machine age.[35]

For many observers, the most extraordinary feature of the new law of torts was the speed with which the dockets became crowded with personal injury cases. Contemporaries estimated that increases in personal injury suits in urban areas reached as high as 800 percent over the last two decades of the nineteenth century, a claim which historians today have confirmed.[36] "Negligence claims are blocking our calendars with a mass of litigation so great as to impede administration in all other branches of law," explained one awe-struck member of the New York State Bar Association in 1897.[37] George Fisher has recently even suggested that the growth in personal injury cases at the turn of the twentieth-century was so great that it had ripple effects across American law, placing pressures on court time that fundamentally altered the processing of cases even on the criminal side of the docket.[38]

Importantly for our purposes, substantial – and probably growing – parts of the new personal injury docket consisted of cases brought against large industrial concerns whose operations were the source of what is plausibly described as the first American mass tort dilemma: the inevitable cascade of injuries sure to arise out of industrial enterprises. In New York City, for example, work injuries accounted for 21 percent of all

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[32]MORRIS ARNOLD, STUDIES IN LEGAL HISTORY (1975).

[33]*See* Thomas Grey, *Accidental Torts,* 54 Vand. L. Rev. 1225 (2001).

[34]FRANCIS HILLIARD, TREATISE ON TORTS (1859).

[35]THOMAS COOLEY, TREATISE ON THE LAW OF TORTS (OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT) 1 (1879).

[36]WITT, *supra* note 14, at 59.

[37]*Id.*

[38]George Fisher, *Plea Bargaining's Triumph,* 109 Yale L.J. 857 (2000).

personal injury lawsuits in 1890 and 27 percent in 1910.[39] Across the country, in and around Oakland, California, "[c]ommon carrier accidents dominated the personal injury docket," with a few major players attracting substantial shares of the personal injury lawsuits.[40] As Lawrence Friedman and Thomas Russell have observed, by 1904 the court clerk in Alameda County Superior Court was regularly using a rubber-stamp with the words "Southern Pacific" on it rather than writing the words by hand![41]

It would be odd, of course, if the very industrialization processes that generated a crisis for Victorian individualism were responsible for the birth of an individualist institution in the form of Anglo-American tort law. Looking more closely, we can begin to see even in the beginnings of tort the emergence of structures and institutions for the mass resolution of claims.

One result of this growing mass of litigation against institutional repeat-players was the beginnings of defense-side organization in the personal injury bar. By the turn of the twentieth century, defendants' lawyers in personal injury litigation routinely handled significant numbers of personal injury claims.[42] Railroad attorneys in particular began to organize and coordinate their strategies, holding conferences at which they shared information and developed tactics for fighting off employee injury litigation. The first "railroad attorneys' conference" was held in 1906 in Louisville, Kentucky to discuss the possible effects of the Federal Employers' Liability Act on railroad employers' liability litigation. Subsequent conferences followed in Atlantic City in 1908 and elsewhere, and the organized defense bar was born.

A specialist plaintiffs' bar and its associated ranks of runners and claimants' agents of a variety of different kinds also began to develop,

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[39]RANDY BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK, 1870-1910 21 (1992). Work injuries' share of the personal injury docket was considerably smaller than their proportion of the total number of accidental injuries in the United States at the time, which has been estimated at between one-third of all accidental deaths and one-half of all disabling injuries. *See* WITT, *supra* note 14.

[40]Lawrence M. Friedman, Civil Wrongs, 1987 Am. Bar Foundation Res. J. 351, 361.

[41]Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-10,* 34 Am. J. Legal Hist. 295, 299 (1990).

[42]42% of defense lawyers in one sample handled 10 or more personal injury cases. BERGSTROM, *supra* note 39, at 97.

though it was relatively underdeveloped as compared to the lawyers on the defense side.[43] Commentators sympathetic with defendants were the first to identify the plaintiffs' bar. "Barratrous speculat[ors]," growled jurists like the New York Court of Appeals's Irving Vann at the turn of the twentieth century. But the phenomenon of specialist practitioners appears to have been more than just the hyperbole of hide-bound reactionaries like Vann. By the turn of the century, a few law schools had even begun to school students in soliciting personal injury clients.[44]

What exactly was the consequence of this early development of repeat-play interests around the personal injury problem? For one thing, it seems to have encouraged the settlement of claims rather than their prosecution to trial. Tort lawyers in the early twenty-first century regularly observe that only a tiny share of tort claims go to trial.[45] They less often note that this pattern of settlement rather than trial finds its roots in the early decades of the law of torts. Lawrence Friedman's study of Alameda County, California found that only 31.5 percent of 340 personal injury cases filed between 1880 and 1900 (a number that is undoubtedly significantly smaller than the total number of personal injury claims arising in the county) went to trial. Already by the beginning of the twentieth century the percentage of cases going to trial had begun to drop: only 20 percent of the personal injury cases filed in the same Alameda County courts between 1901 and 1910 went to trial.[46] By the late 1920s, the fraction of cases going to trial appears to have fallen even further: of a sample of almost 25,000 third-party liability insurance claims paid by the Travelers Insurance Company in the late 1920s, 82 percent were paid

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[43]Bergstrom finds that only 7.5% of plaintiffs' attorneys in personal injury cases filed 10 or more lawsuits in his sample, as opposed to 42% of defendants' attorneys. See *id.*

[44]WITT, *supra* note 14, at 61.

[45]*E.g.,* symposium, *Symposium on the Vanishing Trial* (2003).

[46]Friedman & Russell, *supra* note 41, at 307 (1990); *see also* THOMAS D. RUSSELL, BLOOD ON THE TRACKS: TURN OF THE CENTURY STREETCAR INJURIES, CLAIMS, AND LITIGATION IN ALAMEDA COUNTY, CALIFORNIA (1999) (finding that 19.4% of claims handled between 1897 and 1910 by an attorney for the Oakland Traction Company went to trial); Thomas D. Russell, presentation to the Law and Society Association Annual Meeting (May 28, 1999) (finding that 2 of 16 wrongful death actions filed against the Oakland Traction Co. between 1907 and 1910 went to trial). Russell's study of the Oakland Traction Co. indicates just how misleading even percentages of cases going to trial are when the denominator is cases filed in court rather than claims lodged with the defendant. Between 1903 and 1905, the Oakland Traction Co. made payments on 581 personal injury claims even though only 22 personal injury cases were filed against the company in the courts. *See* RUSSELL, *supra,* at 13.

without a suit ever having been filed; only two percent of the claims paid were paid after judgments.[47] A decade later, a federal study of railroad employee injuries under the Federal Employers' Liability Act found that of 14,000 claims settled with some cash payment by the railroad employer, only about 100 cases went to trial, though that figure included between 8 and 12 percent of the death and permanent total disability cases.[48] And by the middle of the twentieth century, industry studies estimated that only 1.7 percent of incurred automobile liability insurance losses was paid to claimants as a result of court judgments; over 98 percent of automobile cases were being settled rather than going to judgment.[49]

Such rising settlement rates in the early decades of the tort system suggest that specialized claims agents were filling the market opportunity opened up by the explosion in tort suits. Already by the turn of the twentieth century, the most insightful American jurists had begun to see that the development of repeat-play interests around personal injury settlements promised fundamentally to shift the nature of personal injury practice. Nicholas St. John Green and Oliver Wendell Holmes, Jr., in particular, glimpsed in the developing practices of the law of torts the halting and partial beginnings of a mature economy of mass harms. In the early 1870s, Green noted that American tort law had begun to develop along the lines of the kinds of aggregate actuarial phenomena with which insurance underwriters dealt.[50] And before the nineteenth-century was out, Holmes noted famously that "the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses" such as "railroads, factories, and the like." As Holmes pointed out, the significance of these repeat-play defendants was that they seemed to make tort cases a matter of aggregate rather than individualized treatment.

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[47]*See* COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 24 n.9 (1932).

[48]UNITED STATES RAILROAD RETIREMENT BOARD, WORK INJURIES IN THE RAILROAD INDUSTRY, 1938-40 9 (1947).

[49]Effective Auto Claims Handling Refutes Critics, 9 For the Defense 59, 59 (Oct. 1968); see also Comment, Settlement of Personal Injury Cases in the Chicago Area, 47 Nw. U. L. Rev. 895, 895 n.5 (1953).

[50]HORWITZ, *supra* note 14, at 59.

Liability for repetitive harms, Holmes explained, was readily estimated by defendants. Jury determinations in particular cases, by contrast, were mere "chance, once in a while rather arbitrarily interrupting the regular course of recovery," and perhaps " therefore better done away with."[51]

In one sense, the descriptions of the law of torts offered by Green and Holmes were wildly futuristic. Even at the beginning of the twenty-first century, a full century after Green's and Holmes's speculative musings, American tort jurists continue to resist the overt introduction of the actuarial tools of the statistician into the formal law of torts.[52] And yet Holmes and Green had a much better sense than many reluctant jurists in the century since of how the world of tort litigation was actually developing. For if tort lawyers have often resisted the introduction of statistical aggregation techniques at the retail level of decided cases and tort doctrine, they have been pioneers in the aggregation of tort cases at the wholesale level of settlement. In the deep shadows of the law of torts, out of the field of vision of the treatise writers and the jurists and the doctrinal synthesizers, American tort lawyers have for more than a century now been quietly developing a privatized, virtually unregulated, sometimes exploitative, but frequently quite sensible system of aggregated settlement techniques for the resolution of mature torts.

B. Mass Harms, Repeat Players, and Claims Brokers

Work accidents presented the first forum for the widespread development of the kinds of privatized settlement systems that have come to characterize tort practice in areas involving mature torts. Though Green and Holmes may have been the first to bring the mass-tort features of the emerging law of personal injury to the attention of elite jurists in Cambridge, New Haven, and New York, state civil servants had begun to make the same observation beginning in the 1870s and 1880s. "The

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[51] *See* Holmes, *supra* note 13.

[52] However, see Judge Weinstein's campaign for a different approach in cases like *In re* Simon II, 211 F.R.D. 86 (E.D.N.Y. 2002). For resistance among commentators, see SCHAUER, *supra* note 28, at xx; Charles Nesson, *The Evidence or the Event? on Judicial Proof and the Acceptability of Verdicts,* 98 Harv. L. Rev. 1357 (1985); Daniel Shaviro, *Statistical Probability Evidence and the Appearance of Justice,* 103 Harv. L. Rev. 530 (1989) (critically reviewing the reluctance of tort jurists to adopt statistical techniques); Lawrence Tribe, *A Further Critique of Mathematical Proof,* 84 Harv. L. Rev. 1810 (1971); Lawrence Tribe, *Trial by Mathematics: Precision and Ritual in The Legal Process,* 84 Harv. L. Rev. 1329 (1971).

Moloch of industrial activity," announced the reports of state departments of labor statistics, "demands a sacrifice of life and limb, constant, as the actuarial tables show, and inevitable so long as human contrivances and human understanding are fallible."[53]

Such reports on work accident statistics were published against the background of the enactment in western Europe of public compensation systems for work injuries.[54] Beginning with Bismark's Germany in 1884, the United States's peer industrializing nations were adopting formal, publicly-managed compensation systems for workplace accident victims.[55] In the United States, by contrast, the work injury crisis of the late nineteenth and early twentieth centuries generated (at least at first) a series of privatized compensation systems. We, however, want to challenge the conventional understanding that tort recoveries and administrative compensation systems under the aegis of the state stood in stark contrast to each other. Although the tort system priced harms through a market for claims rather than by administrative fiat, the operation of the two systems in practice looks not all that different. In the decades before the enactment of American workers' compensation statutes, many employers (and even some plaintiffs'-side representatives) developed private settlement structures that resembled the workmen's compensation schemes of Western Europe as much as they did the doctrinal architecture of the American law of torts.

For one thing, some American employers – especially the largest and most managerially sophisticated employers – began in the 1880s and 1890s to adopt employer-specific, contractual workmen's compensation systems in which employees waived their right to sue in return for scheduled accidental disability benefits.[56] When the ex ante waivers of the right to sue in these early examples of welfare capitalism were held unenforceable, employers often converted them into simple ex post settlement systems in which employees could choose between advancing

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[53]WITT, *supra* note 14, at 141.

[54]*See* DANIEL RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998); WITT, *supra* note 14.

[55]*See* RODGERS, *supra* note 54, at 223-35.

[56]*See* PRICE FISHBACK & SHAWN KANTOR, PRELUDE TO THE WELFARE STATE (2001); WITT, *supra* note 14; Richard Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775 (1982); John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 Colum. L. Rev. 1 (2003).

a case to trial or selecting from the compensation scheme's scheduled settlement offer.[57]

Even where employers did not adopt formal compensation schemes, however, studies of the ways in which work injuries were compensated in the pre-workmen's compensation era suggest that many employers developed stereotyped settlement practices that looked much like administrative claims processing. In a highly schematic model of work accident settlements outside the formal confines of a state-mandated workers' compensation system, we would expect employers regularly to trade the uncertainties of their negligence defense for limitations on the unpredictability of a jury award. Similarly, we would expect injured employees, characteristically deprived of their earning capacity, to opt for certain and immediate payment rather than the vagaries and delays of litigation. Moreover, as lawyers enter the picture and draw clients by holding out the promise of swift recovery, a further agent of expedited, quasi-administrative processes is introduced.

Further, we would expect the hallmark of such a private administrative settlement system to be its ability to discount settlement awards for the risk of plaintiff non-recovery across the entire at risk population, rather than in one case at a time. For example, assume a set of comparable industrial accidents were 70 percent likely to be the product of employer negligence, as opposed to contributory negligence, assumption of the risk, or any other defense to liability. Under an idealized system of individualized trials, the prediction is that the plaintiff will win 70 percent of the time, and the employer 30 percent of the time. In those cases where the plaintiff wins, however, the recovery would be 100 percent of the value of the injury; by contrast, where the plaintiff lost, the recovery would be zero. A mature administrative settlement system internalizes the proportionate win rates by reducing all awards to a corresponding percentage of what might be obtained at trial. In other words, a mature system spreads the risk of non-recovery across potential claimants, rather than concentrating the losses (and the gains of complete recovery) in a subset of claimants, some who come out ahead, and some who may be devastated losers.

As a result, in a mature system one would expect to find that a

[57] See WITT, *supra* note 14.

higher proportion of claimants are compensated than would be the case were all cases litigated to judgment and one would expect the recoveries to be less than that received by those who had actually litigated a case to judgment. This is precisely what we find.

Lawrence Friedman has observed that repeat-play defendants began to establish claims departments and to develop "standard procedures" for settling the repetitive claims that came before them.[58] Perhaps as a result of such standardized claims practices, Price Fishback and Shawn Kantor have found that employee accident compensation in practice tended to depart from what the formal law of torts might have provided in any individual case. Instead, in their account, employee recoveries under the tort system resemble in many ways those that would soon be produced by the workmen's compensation system. The records establish that a considerably higher percentage of work accident victims under the pre-workers' compensation tort system received payments from their employers than would have been able to obtain judgments in a tort suit.[59] At the same time, the dollar amounts of those payments were considerably smaller than would have been the case had those same employees prevailed in tort suits, typically amounting to only a fraction of the losses incurred by the injured worker recipients.[60] Indeed, we see virtually the same pattern in other studies.[61] When the Railroad Retirement Board studied work accidents on the railroads, for example, it found that average payments to injured employees under the Federal Employers' Liability Act were almost identical to average payments made in railroad injury cases falling under state workmen's compensation laws. Wage loss replacement for claims under the two systems – tort and workmen's compensation – tended to cluster between 30 and 60 percent of lost wages.[62] Only among higher-paid train and engine service employees, for whom state workmen's compensation award statutory

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[58]Friedman, Civil Wrongs, at 372; see also Hield, 13 Street Ry J. 770 (Nov. 1897).

[59]FISHBACK & KANTOR, *supra* note 56, at 34.

[60]*Id.* at 43-42.

[61]*See* COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, *supra* note 47, at 273 tbl.16 (automobile accident injury claimants in the late 1920s); RUSSELL, *supra* note 46 (streetcar injury claimants in the first decade of the 20th century).

[62]UNITED STATES RAILROAD RETIREMENT BOARD, *supra* note 48, tbl.27.

ceilings kicked in, did the tort system offer significantly different (because higher) average damage awards.[63] By the end of the 1950s, the most searching examinations of the operation of the personal injury settlement market were finding that tort law was not "the all-or-nothing proposition that its rules envision and its critics decry," but instead a matter of "part-recovery-most-of-the-time."[64]

Moreover, although common law tort doctrines "influenced the probability and level of accident payments, . . . they were clearly not the only influences and sometimes not even the dominant influence."[65] There is even some evidence to suggest that employer negligence did not raise the amount paid to accident victims in nonfatal accident cases, though the link between employer negligence and compensation paid is clearer in fatal accident cases.[66] Indeed, the relative unimportance of the fault question in some work accident settings appears on the face of the accident notice forms used by liability insurers and their insureds. In the years before workmen's compensation statutes, some employers' liability insurers even dropped the question whether the injury was "due to any negligence or fault" from their notice forms altogether.[67]

Particular employers' group personnel-management decisions often appear to have been more significant than the individual merits of any particular case in shaping the settlement values of pre-workmen's compensation work injuries. The management of labor turnover and workforce morale, for example, seems to have prompted many employers to provide small amounts of compensation to their injured employees even where the employer had not set up a formal work accident compensation scheme.[68] Similarly, employers' decisions to outsource work injury compensation by acquiring liability insurance appears to have

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[63] *Id.* tbl.22.

[64] Marc A. Franklin, Robert H. Chanin, & Irving Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation,* 61 Colum. L. Rev. 1, 35 (1961).

[65] FISHBACK & KANTOR, *supra* note 56, at 45.

[66] *Id.* at 44.

[67] Compare notices of accidents made out at Lyman Mills for the American Mutual Liability Insurance Company in Boston, available in Lyman Mills Records, box LAD-1, Baker Library, Harvard Business School. Notice forms prior to October 1910 ask for the employer's evaluation of fault and negligence; subsequent notice forms drop the negligence and fault question. Workmen's compensation legislation did not go into effect in Massachusetts until July 1912.

[68] See Baker Library Archive records, Harvard Business School.

significantly increased their injured employees' likelihood of receiving post-accident compensation.[69]

The insight offered by the early work accident compensation practices is that from the very beginnings of American tort law, we can see the emergence of a world of settlement practices involving repeat players. The first repeat play institutions, of course, were industrial firms themselves, whose injured employees represented a class of claimants with relatively stereotyped claims arising out of a common set of risks.

At the same time, the emergence of employers' liability insurance added an additional repeat-play institution to the settlement mix. The presence of employers' liability insurance appears to have increased the probability that an injured employee would receive some compensation from the employer.[70] Insurers, in other words, appear to have moved settlement practices closer to the idealized model of settlements we described above.[71]

It is also readily apparent from an examination of the files of employers' liability insurers that such insurers sought from early on to adopt streamlined bureaucratic mechanisms for settling work accident disputes. At one remove from the shop floor, early liability insurers developed rough rules-of-thumb for the evaluation of work accident cases, adopting categorical approaches to claims resolution rather than making individualized inquiries. Was the employee new to the machine at which he was working when injured, or was he experienced with it?[72] Was the employee engaged in her usual occupation when injured?[73] Did the injured employee speak the language in which warnings or safety

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[69] *Id.* at 48.

[70] *See* FISHBACK & KANTOR, *supra* note 56.

[71] See supra notes __-__.

[72] *See, e.g.*, Letter of Charles E. Hodges, American Mutual Liability Insurance Company, to Dwight Manufacturing Company, November 8, 1897, Letter File ML-30, and Letter of Charles E. Hodges, American Mutual Liability Insurance Company, to Dwight Manufacturing Company, May 6, 1907, Letter File ML-41, Dwight Manufacturing Collection, Baker Library, Harvard Business School.

[73] See, e.g., Lyman Mills Claims Forms, Folder LAC-1, August 1889-1895, Lyman Mills Collection, Baker Library, Harvard Business School; Accident Report Form, Folder GO-1, Lawrence Manufacturing Company Records, Baker Library, Harvard Business School.

instructions were posted?[74] Standardized form responses to employers' claims – typically reporting "no legal liability"[75] or that "no liability should attach"[76] – predominated, with individualized inquiries into the particulars of a given injury extraordinarily rare.

We have already suggested that repeat players developed much more slowly on the plaintiffs' side. Yet even in the late nineteenth and early twentieth centuries, in the years before workmen's compensation statutes, it appears that the market in work injury claims led again and again to the emergence of groups of claimant representatives – lawyers and otherwise – who developed portfolios of claims against precisely the kinds of institutions that were becoming repeat-players on the defense side.

Consider the picture of accident claims practice that emerges from the liability insurance files of the Dwight Manufacturing Company, a textile firm in Chicopee, Massachusetts, which employed a largely Polish-immigrant workforce to manufacture sheetings, shirting, and fancy cottons.[77] Dwight was insured by the American Mutual Liability Insurance Company based in Boston. The overwhelming majority of the accidents Dwight reported to American Mutual were relatively slight injuries to employees' hands, fingers, and feet, for which American Mutual typically paid minor medical expenses.[78] Not surprisingly, many of the patterns we have described above appear in Dwight's injury settlement practices as well, including the vastly disproportionate relationship of adjudicated cases to claims settled,[79] the adoption of

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[74]*See, e.g.*, Letter of Charles E. Hodges, American Mutual Liability Insurance Company, to Dwight Manufacturing Company, July 7, 1897, Letter File ML-30, Dwight Manufacturing Collection, Baker Library, Harvard Business School; Lyman Mills, LAD-1, Baker Library.

[75]Dwight Manufacturing Co., ML-35, Baker Library.

[76]Lawrence Mfg. Co., GP-1, Baker Library.

[77]For one account of the Dwight Manufacturing Co.'s accident compensation practices, see Carl Gersuny, WORK HAZARDS AND INDUSTRIAL CONFLICT (1976). Gersuny's early archival work put us on the track of the Baker Library's rich collection of employers' liability insurer records. We intend to pursue the Dwight Manufacturing Co. archives in more detail in future research.

[78]*See, e.g.*, Letter of Charles E. Hodges to Dwight Manufacturing Company, June 3, 1897, ML-30, Dwight Manufacturing Records, *supra* note __.

[79]Out of thousands of total claims in the Dwight Manufacturing Co. files, there is a mere one reported case arising out of injuries at the Dwight Manufacturing Co. before 1913. See Glover v. Dwight Mfg. Co., 18 N.E. 597 (Mass. 1888) (affirming jury verdict for thirteen-year-old female plaintiff whose fingers were injured while cleaning a machine on the ground that there was sufficient

settlement strategies designed for personnel management purposes rather than simply in exchange for waivers of prospective tort liability,[80] and the use of standard form denials of liability as a matter of course in the bureaucratic handling of claims.[81] There is also evidence of still another aggregating practice: trading off settlement funds from one claimant or group of claimants to another, as when Dwight encouraged American Mutual to provide extra funds to certain injured employees out of the savings of money that had been "kept back" from other injury claimants.[82]

It is also clear that Dwight and American Mutual sought to use their position as repeat players to improve their bargaining position as much as possible. In cases of severe injury, they put to use what they called the "Chicopee method of settlement," named after the location of the Dwight mill: waiting until the family members of a disabled Dwight employee "get hungry for money before going to see them."[83] And American Mutual often advised Dwight to take steps to ensure that it would maintain favorable asymmetries of information about the law and the facts. The insurer sometimes discouraged Dwight from asking pointed questions that might lead a possible claimant to infer the existence of a new legal rule around which she might tailor her testimony. In other cases, American Mutual instructed Dwight to bar injured employees and their representatives from access to the mill (and thus access to the scene of the injury) prior to receiving a waiver of liability.[84] In the work accident area, it seems, Marc Galanter's "haves" were coming out ahead

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evidence from which the jury could reasonably have found defendant negligent and plaintiff free of contributory negligence).

[80]*See, e.g.,* letter from Dwight Manufacturing Co. to American Mutual Liability Insurance Co. (Mar. 14, 1902) (on file at the Harvard Business School, HL-2).

[81]See, e.g., letter from Russell Gray, American Mutual Liability Insurance, to Dwight Manufacturing Co. (Oct. 24, 1889) (on file at the Harvard Business School, Baker Library, Dwight Manufacturing Co. Collection, ML-32).

[82]Letter from Dwight Manufacturing Co. to American Mutual Liability Insurance Co. (Apr. 24, 1902) (on file at the Harvard Business School, Baker Library, Dwight Manufacturing Co. Collection, HL-2).

[83]Letter from Dwight Manufacturing Co. to American Mutual Liability Insurance Co. (Mar. 17, 1902) (on file at the Harvard Business School, Baker Library, Dwight Manufacturing Co. Collection, HL-2).

[84]Letter from Charles Hodges to the Dwight Manufacturing Co. (Mar. 15, 1904) (on file at the Harvard Business School, Baker Library, Dwight Manufacturing Collection, ML-36).

already in the late nineteenth and early twentieth centuries.[85]

To the extent the haves were coming out ahead based on superior information, an entrepreneurial opportunity was created for agents able to amass claims and information. Thus we find, at almost the same time, an interesting phenomenon developing in Dwight's employees' accident settlement practices: the introduction of informal claimant-side agents or claims brokers who appear quickly to have built up portfolios of claims.

At Dwight, the claims brokers were not lawyers but interpreters, who served as intermediaries between the firm and its Polish employees. The first interpreter appears in Dwight's correspondence to American Mutual in 1902, and in a short time references to interpreters became commonplace. By 1909 and 1910, a small cadre of shady and often unnamed interpreter claims brokers, led by a man named Starzyk, appears to have come to play an increasingly important role in the management of employee injury claims at Dwight. Importantly, the introduction of claimant-side repeat-play agents had significant consequences for the claims settlement market. In particular, negotiations between Dwight and American Mutual, on one hand, and claims brokers, on the other, expressly took into account not just the circumstances of the particular case presented to them, but also the run of cases in the claims broker's portfolio. The settlement of injury cases thus became an increasingly less isolated, aggregate endeavor as the firm, the insurer, and the repeat-play claimants' agents sought to manage the run of claims arising out of the mill's operations.

Concentrating claims in the hands of these agents was not without peril for injured employees. Without clear competition among contending potential brokers and without easy recourse to the more transparent tort system, there was a strong risk of what might tactfully be termed, "high agency costs" – or not so tactfully, betrayal. In some cases, it seems clear that claims brokers may well have been colluding with firms to take advantage of the injured claimant.[86] We can tell from Dwight's files that

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[85]Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change, 9* Law & Soc'y Rev. 95 (1974).

[86]For parallels to the risks in the modern class-action context, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class-Action,* 95 Colum. L. Rev. 1343 (1995); John Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion,* 80 Cornell L. Rev. 851 (1995); Samuel Issacharoff, *Class-Action Conflicts,* 30 U.C. Davis L. Rev. 805 (1997); Samuel Issacharoff,

the brokers were taking payment not just from the claimants in the form of contingency fees, but also (and perhaps unbeknownst to the claimants) from Dwight itself. Indeed, Dwight regularly noted the assistance that "friendly" interpreters had provided in reducing the amounts claimed by injured employees. Brokers like Starzyk found themselves in the position of talking employees into accepting settlement offers the employees had previously viewed as too small. And claims brokers often warned Dwight about the arrival of "shyster lawyers" at an employee's doorstep.[87] In short, the claims brokers at least sometimes took advantage of their ability to offer something that mass tort defendants would later describe in precisely the same terms as Dwight managers and American Mutual officials: settlement "for the sake of peace."[88]

Yet it is worth noting that the claims brokers were also very plausibly providing a valuable service to injured employees who as Galanter's "one-shotters"[89] faced steep informational deficits and often powerful risk aversion obstacles to maximizing the value of their settlements.[90] It is entirely plausible to think that the claims brokers were as duplicitous (or more so) in their dealings with Dwight as they appear sometimes to have been in their dealings with their clients. But duplicity aside, the claims-broker go-betweens performed a valuable service in the informal accident compensation system at Dwight. With ongoing reputational stakes on both sides, the claims brokers served an important gatekeeper role, providing Dwight and American Mutual with a shorthand way of identifying credible claims worth compensating.[91] At the same

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Governance and Legitimacy in the Law of Class-Actions, 1999 Sup. Ct. Review 337 (1999).

[87]Letter from Dwight Manufacturing Co. to American Mutual Liability Insurance Co. (Mar. 21, 1902) (on file at the Harvard Business School).

[88]Letter from Charles Hodges to the Dwight Manufacturing Co. (Jul. 12, 1911) (on file at the Harvard Business School). See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class-Action,* 115 Harv. L. Rev. 747 (2002).

[89]Galanter, *supra* note 85.

[90]The consequences of claimant risk aversion in tort settlement appear to turn on the framing effects of whether the claimant sets his or her possible future tort judgment damages as the baseline, departure from which in the form of a settlement would be a downward departure, or instead sets the pre-judgment status quo as the baseline, departure from which in the form of a settlement would be an upward departure. See generally the literature on law and behavioral economics.

[91]Presentation of claims that turned out after the fact not to have been worth paying would have done in a claims-broker's reputation. On plaintiffs' representatives as gatekeepers, see Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System,* 81 Judicature 22 (1997). For an analogous treatment of lawyers' roles, see John Coffee Jr., *The Attorney as*

time, the claims brokers provided their employee-clients a modicum of expertise and repeat-play know-how in dispute resolution, while minimizing the risk that Dwight would single out their claim for hard-ball settlement tactics.[92] Indeed, Dwight and American Mutual seem to have understood very well the complex and potentially dangerous dual functions played by interpreters who could very quickly stir up expensive claims against them.[93]

In the Dwight case, the development of repeat-players on first the defense side and then later on both the defense and the plaintiffs' side had powerful consequences for the ways in which tort law played out in action. At Dwight and elsewhere, when we actually look through the layers of reported cases, jury verdicts, and case filings, then, to the ground-level practices of claims resolution in the first American experience of mass harm, we see a tort system that informally functioned much like the formal workmen's compensation system that replaced it.[94] Formal compensation systems, of course, operated with considerably greater systemic rationality than the informal aggregate settlement systems that they replaced; all too many needy and deserving claimants surely went uncompensated and under-compensated in the informal settlement regime that grew up in the pre-workmen's compensation era. And where the private administration of the tort system made it difficult for public institutions to collect information about the extent and severity of the work injury problem, formal compensation systems in the work accident

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Gatekeeper: An Agenda for the SEC, 103 Colum. L. Rev. 1293 (2003).

[92]On the value of lawyers as ongoing repeat-players in bargaining games, see Gilson & Mnookin, *supra* note seven. As Herbert M. Kritzer has pointed out, contingency fee agents such as lawyers are inhibited from seeking their own interests at their clients' expense by the need to maintain reputational capital among the pool of future clients. *See* Herbert M. Kritzer, *Contingent-Fee Lawyers and their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 Law & Soc. Inquiry 795 (1998).

[93]See, e.g., letter from Charles E. Hodges, American Mutual Liability Insurance Co., to Dwight Manufacturing Co. (Dec. 4, 1911) (on file with the Harvard Business School, Baker Library, Dwight Manufacturing Co. Collection, ML-44); letter from Dwight Manufacturing Co. to American Mutual Liability Insurance Co. (July 11, 1911) (on file with the Harvard Business School, Baker Library, Dwight Manufacturing Co. Collection, HL-4).

[94]Our observation here is consistent with the observations of many of those who have researched the law of torts in action. *See, e.g.,* ROSS, *supra* note 21, at 246; *see also* FISHBACK & KANTOR, *supra* note 56, at 59, for same conclusion as to damages amounts.

area served to create a mechanism for information collection.[95]

But the absence of systematic rationality should not distract us from basic similarities between the two regimes. Both compensated relatively large percentages of work injury victims – considerably more than the formal doctrine would have suggested – by providing them with awards that were more certain, albeit smaller, than that which might have emerged in fully litigated cases. Both adopted rule-of-thumb categories to determine questions of compensation. To be sure, the tort system allowed Holmes's "chance, once in a while" case[96] to go to a jury, but the available evidence suggests that such cases were especially few and far between when repeat-play defendants were involved.[97] Indeed, for most claimants, neither settlement in the shadow of the tort system nor compensation through a publicly-run system provided the claimant with a day in court. Instead, the private tort system, like its public counterpart, created institutional mechanisms to respond to "accidents" that were as probabilistically certain ex ante as who would be their individual victims was unknown.

C. Informal Aggregation in Early Mass Harms

The Dwight Manufacturing Company experience, of course, is just one case study. Much more work would need to be done across a wider spectrum of firms to conclude that the Dwight experience was representative of the claims practices in other repeat-player, mature tort contexts. But it is the very nature of the phenomenon that we seek to describe – privatized, informal, and unpublished – that makes the occasional glimpse into the real world of mature tort settlement practices so valuable.

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[95]For us, the diminishing role of trial as claims mature has a different significance than it does for discussions of doctrinal barriers to trial (such as summary judgment) or the development of alternative dispute resolution mechanisms in lieu of trial. Our point is that the private administrative system that we are describing is one that relies on privately-held information in the hands of repeat-players, and is one in which public information-production is not available.

[96]Holmes, *supra* note 13.

[97]See Friedman, Civil Wrongs, at 367, who notes that personal injury suits against common carrier defendants were much more likely than suits against other defendants to arise out of a death claim. Common carriers could of course inflict massive harms, but they also gave rise to huge numbers of relatively slight injuries. The suggestion of Friedman's finding may be that common carriers were settling their run-of-the-mill claims without even requiring the claimant to file a suit against them.

Moreover, there is good reason to think that the Dwight experience is not anomalous. In a variety of different contexts, in work accidents and elsewhere, repeat-play actors seem to have been filling the markets for settlement created by the late-nineteenth-century injury crisis. Consider the law practice of one Samuel Evans Maires of Philadelphia in the 1890s. Maires appears to have specialized in claims against the Philadelphia Traction Company, which operated trolleys. His practice consisted of essentially purchasing causes of action from his stable of claimants, providing them with much-needed cash and with the certainty of some kind of recovery while assuming the risk and the reward of an outsized judgment or settlement to himself.[98] Or think of the practice of Arthur E. Clark of upstate New York, who developed a portfolio of more than 2,000 claims by property owners against New York telephone and telegraph companies in the late 1890s. Clark effectively created economies of scale, spread claimants' risk of being subject to a down-side outlier judgment, and offered defendants the opportunity for a global (or near-global) settlement of claims.[99]

Similar early plaintiff-side aggregation practices seem to have arisen out of mass torts such as dam breaks, mine explosions, and train wrecks. In one 1911 dam break at Black River Falls, Wisconsin, for example, a single Wisconsin law firm signed up a large number of property damage claimants and arranged to have all its clients' claims assigned to one claimant for trial. Aggregation allowed the firm to create economies of scale by avoiding the multiplication of costs that would have been necessary to bring the claims individually.[100] Similarly, a 1902 mine explosion in Fraterville, Tennessee, led one law partnership to take on forty of the approximately 190 claims brought against the company. Risk-averse claimants may thereby have sought to reduce the risk that their case would produce a downside outlier judgment on either the question of liability or the question of damages. The law partners, by contrast, very likely sought to achieve some (if not all) of the economies of scale that the Black River Falls law firm would achieve a few years later.[101]

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[98]Maires's Case, 2 Pa. D. 297 (Pa. Common Pleas 1898).

[99]*In re* Clark, 77 N.E. 1, 5-6 (N.Y. 1906).

[100]Ellis v. Frawley, 161 N.W. 364 (Wis. 1917)

[101]Ingersoll v. Coal Creek Coal Co., 98 S.W. 178 (Tenn. 1906).

A few decades later, the Railroad Retirement Board study of railroad employee injuries under the Federal Employers' Liability Act found that fraternal orders and railroad brotherhoods were taking on a role in employee injury claims similar to the role played by repeat-play claims agents in the early mass torts. As the Board discovered, "[i]n the great majority of the serious injuries and in practically all the less severe injuries, claims under the liability act are settled by a quasi-bargaining process."[102] The railroads were represented by "claim agent[s] specializing in injury cases" who were "master[s] of the technique of 'adjusting' claims."[103] And though employee claimants generally went without representation, many such claimants were represented by a railroad brotherhood lodge chairman or other union official. Lodge and union officials were in an especially good position to minimize information asymmetries between the parties and to establish ongoing reputational stakes for railroad claims agents. Not suprisingly, claimants with representation from the unions did much better in settlement negotiations than those without.[104]

Of course, as in the Dwight case, such arrangements could sometimes involve abuses of the power of claimant-side agents. With at least one defendant, for example, Arthur Clark of upstate New York simply turned around and sold the claims in return for $3,000 for his own account, promising to "help . . . in the settlement of the[] cases" and keep his clients from going to other lawyers, and authorizing the company to settle claims with them "at your own terms and figures."[105] And whether or not Samuel Maires was offering a valuable service to some of his Philadelphia trolley car clients – and there is some reason to think he was – he also appeared to have systematically lied to other clients about the amounts received in settlement payments from Philadelphia Traction.[106]

Yet it is likely that abuses such as those which may have taken place in the Clark and Maires cases were the exception rather than the rule. Where the claimants' agent was not, like Clark, apparently planning

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[102]UNITED STATES RAILROAD RETIREMENT BOARD, *supra* note 48, at 10.

[103]*Id.* at 47.

[104]*Id.* at 10, 48.

[105]Clark would "write conciliatory letters to all who write asking about settlements, and to aid in every way possible in making the settlements." *In re* Clark, 77 N.E. at 5-6.

[106]Maire's Case, 2 Pa. D. at 297.

to exit the industry, claimants were often acting quite rationally to seek such repeat-players in the claimants' agent business. As Herbert Kritzer has observed, and as the Dwight Manufacturing Company's injured employees seem to have understood, the ongoing reputational interests of such agents in the pool of possible future clients effectively aligned the interests of contingency fee agents with their clients.[107] Far from being an indicator of exploitation, then, the aggregation of claimants by plaintiffs' agents must often have served as a bonding mechanism ensuring an agent's fidelity to the claimant's interests.[108]

The over-representation of cheats and swindlers in our story is in large part an artifact of the evidentiary sources: the best sources for otherwise invisible plaintiffs'-side aggregation are the disciplinary cases of state bar associations. Early attempts at aggregation by claimants' agents ran headlong into professional disciplinary prohibitions on champerty[109] and on the improper solicitation of claims.[110] And yet as one claimants'-side agent cogently put it in defense of his firm's solicitation practices, to obstruct claimants'-side agents from accumulating portfolios of claims was to leave the field to the repeat-players on the defense side: "their monopoly is established, competition is banished, rivals are crushed, [and] the trust rule is enthroned."[111] An occasional court agreed.

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[107]Kritzer, *supra* note 92.

[108]One index of the relative robustness of the market in claimants' agents even early in the twentieth century is the appearance of at least some informal price competition among the plaintiffs' bar. Of 186 cases in which the 1932 Columbia study of auto accident injuries was able to determine the amount of an arms-length lawyers' fee, 92 cases involved fees of 25 percent or less of the total recovery; 76 cases involved fees of between 25 and 50 percent of the total recovery; and 18 cases involved fees of 50 percent or more of the total recovery. *See* COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, *supra* note 47, at 42-43 n.23. One of the critiques of the lawyer-driven tort process is the apparent absence of price competition. *See, e.g.,* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is it Price Competitive?*, 25 Cardozo L. Rev. 65 (2003). This apparent absence, of course, has historically been exacerbated by the barratry and champerty limits on lawyer fee advertising. The Columbia study evidence suggests that in the settlement market, lawyers have long been engaged in informal forms of price competition. For contemporary anecdotal evidence, see Adam Liptak & Michael Moss, *In Trial Work, Edwards Left a Trademark,* NEW YORK TIMES, Jan. 31, 2004, at A1 [describing tort clients who reported that "all the lawyers they interviewed except Mr. Edwards wanted one-third of any award… (but that) Mr. Edwards offered to take a smaller percentage, unless the award reached unexpected heights"].

[109]*See, e.g.,* Ellis, 161 N.W. at 366.

[110]*See, e.g.,* Ingersoll, 98 S.W. at 190.

[111]Ingersoll, 98 S.W. at 187 (quoting plaintiffs' counsel).

After all, noted a Tennessee county chancery court shortly after the turn of the twentieth century, if a single lawyer or a single firm can represent "a large business in its operation causing or originating successive suits," ought not a plaintiffs'-side lawyer or firm be able to solicit the cases thus caused?[112]

D. An Excursion Into the Theory of Settlement: Market Makers and Settlement Values

Focusing on the colorful characters that emerge in the rough-and-tumble of early tort law should also not obscure the significance of these repeat actors in bringing an informal rationality to the tort system. The standard models explaining why cases settle and why some cases actually go to trial hinge largely on the availability of information about likely litigated outcomes.[113] In the Kornhauser / Mnookin account of settlements bargained in the shadow of the law, it is knowledge of likely results in litigation that allows parties to settle and jointly benefit from the lower transaction costs of not having to litigate. Similarly in the Priest-Klein model of why cases go to trial, information plays a central role.[114] According to what is now known as the Priest-Klein hypothesis, cases go to trial either because litigants erroneously overvalue their claims or, more likely, because there is sufficient uncertainty of the law that litigants are unable to form overlapping estimations of the value of the plaintiff's claim. In either case, according to Priest-Klein, there is no directional bias to which cases get to trial and, accordingly, the win-rates of plaintiffs and defendants should be about 50-50.[115]

Both Kornhauser/Mnookin and Priest/Klein rely on reported

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[112]Ingersoll, 98 S.W. at 182 [quoting (and reversing) the court below]. The same theory has animated the American Supreme Court's relaxation of the prohibitions on lawyer advertising in the modern era. *See* Florida Bar v. Went for it, Inc., 515 U.S. 618, 633-34 (1995).

[113]*See generally* Samuel Issacharoff, *The Content of Our Casebooks: Why do Cases Get Litigated?,* 29 Fla. St. U. L. Rev. 1265 (2002).

[114]See Benjamin Klein & George L. Priest, *The Selection of Disputes for Litigation,* 13 J. Legal Stud. 1, 4 (1984) ("according to our model, the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement").

[115]For testing of the Priest-Klein hypothesis, see Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial,* 90 Mich. L. Rev. 319, 361, 371-72 (1991).

decisional law and the knowledge of lawyer intermediaries to apprise disputants of likely litigation outcomes so that they might reach efficient settlements. While helpful, reported decisions are unlikely to give a full rendering of the value of highly fact-dependent tort claims. Decisional law will likely speak volumes about the doctrine of assumption of the risk, but it is unlikely to put a direct value on the idiosyncratic claim of a twenty-five year old Latino man with a high-school degree who catches his dominant hand in a stamping press. To bargain over highly-fact specific claims in the shadow of the law requires knowledge far beyond what the reported decisions can reveal. Effective claims agents need to know what similar claims settled for in the private market. They need to know how those claims compared to more and less serious injury claims, or even to death claims under similar working conditions. It is not too far a stretch to describe these plaintiff's-side intermediaries as market makers who, despite the presence of ruffians and cheats, allowed an informed bargain to be forged in the shadow of the thin body of actually litigated cases.

II. Stage Two: The Automobile Accident

By the 1920s, after the first wave of the American industrial accident crisis had passed, and as work accident rates in most U.S. industries began to fall, attention among tort jurists turned to the problem of automobile accidents. Here, too, it seemed, was a social phenomenon that produced an inevitable stream of injuries. Viewed from a sufficiently high level of generality, automobile accident injuries and deaths were the inevitable product of a mass driving society. Even as early as the late 1910s, this observation caused some observers to advocate the enactment of statutory automobile injury compensation systems in place of tort. Supporters of such systems hoped to do for motor vehicle accidents what workmen's compensation was doing for work accidents.[116]

In the decades since, the literature on automobile accidents has been largely preoccupied with the contest between such public compensation systems, on one hand, and the law of tort, on the other.

[116] *See* WITT, *supra* note 14; Jonathon Simon, *Driving Governmentality: Automobile Accidents, Insurance and the Challenge to Social Order in the Inter-War Years,* 4 Conn. Ins. L.J. 521 (1998).

With significant (but all too often ignored) exceptions,[117] this focus in the literature has been at once a symptom and a cause of many observers' failure to recognize the creation of institutions for the mass (albeit private) resolution of mature tort claims. Here, too, we can see the development of privatized systems of aggregate settlement in the stereotyped claims practices of automobile accidents' first repeat-play agents: insurance claims adjusters.

Of course, automobile accident claims posed significant obstacles to the development of repeat-play practices. Individual drivers, after all, tend to almost all be one-shotters in the tort claims system, and even the very worst drivers can hardly expect to develop too much repeat-play expertise. The relatively rapid spread of liability insurance in the automobile accident field, however, began to change this. The liability insurance premiums written by stock insurance companies (far and away the most important form of liability insurer) increased from $64 million in 1918 to $212 million in 1927, an 86 percent increase after adjusting for inflation.[118] In 1927, automobile liability insurance represented almost 70 percent of the entire tort liability insurance market.[119] The same year witnessed sharp growth in the number of states enacting "financial responsibility laws" that required motorists to have insurance or equivalent wherewithal to pay tort judgments. Connecticut enacted the first such statute in 1926, with Massachusetts, New Hampshire, and Rhode Island following in 1927. By 1935, twenty-eight states and District of Columbia had enacted the laws.[120] Ten years later, stock casualty insurance companies alone were adjusting some four million claims each year.[121]

The growing presence of liability insurance in the automobile accident area produced some of the same kinds of settlement patterns that

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[117]The best example here is ROSS, *supra* note 21.

[118]A.M. BEST COMPANY, BEST'S INSURANCE REPORTS (1919); A.M. BEST CO., BEST'S INSURANCE REPORTS (1928).

[119]15 Best's Insurance Reports 824. This tort liability insurance figure excluded workmen's compensation liability insurance. Total workmen's compensation liability insurance premiums written in 1927 (stock and mutual companies combined) amounted to $212 million, equaling the total liability insurance premiums written by stock companies in all other areas combined. *See id.*

[120]1935: Record Year for Financial Responsibility Laws, Best's Insurance News, Feb. 10, 1936, at 570.

[121]Dewey Doresett, *Human Relations,* BEST'S INSURANCE NEWS, May, 1946, at 47, 48.

we saw in the work accident context, though the process by which those patterns came about was different. In the work accident context, repeat-play claims agents, employers' ongoing interest in workforce morale, and insurers' ongoing reputational interests in the market for claims within the community of their insured's employees all powerfully shaped the dynamics of the settlement market and exerted concerted pressure toward the development of claims practices that advanced aggregate interests across time. Given the one-shot nature of automobile accidents, by contrast, these kinds of ongoing relationships rarely existed, at least in the early years of automobile liability practice. Instead, what we see in the automobile injury case is the development by liability insurers themselves of rules-of-thumb, settlement formulae, and claims categories for the ready resolution of ordinary cases.

To understand the claims practices in the auto accident field, it is important to begin with the point that liability insurance claims adjusting developed in the twentieth-century United States as a markedly low-status occupation.[122] The job came with little prestige, relatively low pay, and high turnover rates.[123] Insurers frequently complained about the difficulties recruiting skilled adjusters, and when they were able to do so, a good adjuster was likely to rise quickly into the hierarchy of the home office.[124] Yet the work of insurance adjusting seemed to require the exercise of considerable discretionary judgment: was settlement appropriate? How much money would purchase a release? How much was too much?[125]

Many insurers' response was to develop rules rather than discretionary standards for the management of their adjusters. These were claims management techniques designed by insurers "to protect [themselves] against the inexperience or the incompetency of the adjuster"[126] while ensuring the speedy processing of a large number of

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[122]*See* Wilson C. Jainsen, *Confessions of a Claim Man,* BEST'S INSURANCE NEWS, Sep., 1941, at 19; C.R. Carpenter, *Claim Administration,* BEST'S INSURANCE NEWS, March, 1963, at 131, 132-33 ("historically, in our business, there has been a concept that a claim man is a cross between a con-man and a house dick").

[123]*See* H.L. Handley, Jr., *Claims Adjusting,* BEST'S INSURANCE NEWS, Nov., 1964, at 114.

[124]*E.g.* Carpenter, *supra* note 122, 131-132; Handley, *supra* note 123.

[125]See, e.g., Insurance Is Good or Bad, 27 Best's Insurance News, June 10, 1926, at 27, 28; Fast and Fair Settlements, 2 For the Defense 49 (Sep. 1961).

[126]Charles N. Sergeant, *Personal Injury Claims,* BEST'S INSURANCE NEWS, Nov., 1950, at 41.

claims.[127] The aim was to manage claims settlements not to minimize the costs of any one settlement but "to produce *collectively* a satisfactory return."[128] And much as rules in the formal law of tort systematically aggregate through what we described at the outset of this paper as *substantive* aggregation,[129] the internal rules of liability insurers claims departments created strategies of *procedural* aggregation that exerted powerful effects on the resolution of automobile accident claims.

Automobile cases, as H. Laurence Ross noted some time ago, were "seldom individualized" in their claims settlement treatment. In the world of claims adjusters and claimant representatives, auto cases fell into slots on a pre-set liability grid, a pattern we shall subsequently see transposed onto the world of mass torts. In the context of automobile collisions, the seemingly infinite array of possible accident scenarios quickly boiled down into the basic categories of "rear-enders, red-light cases, stop sign cases, and the like."[130] Rules of thumb created rough-and-ready categories of claims, often based in actuarial findings such as the observation that drivers of new cars, for example, tended to get into accidents in the third month of ownership.[131] Braking distance and speed data gave rise to categorical liability estimates;[132] drivers emerging from streets governed by stop signs were assumed to have been negligent;[133] drivers making left turns in front of oncoming traffic were assumed to be liable.[134]

While determinations of liability lent themselves relatively readily to formulaic, on/off rules, the application of rough-and-ready approaches to damages (including bodily injury) was an even more significant development. Money damages are in some respects a supremely effective

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[127] *See* ROSS, *supra* note 21, at 134 (estimating that claims adjusters handled 30-50 new claims each month); *see also* Robert L. Lusk, *The Adjuster's Dilemma,* BEST'S INSURANCE NEWS, May, 1961, at 95, 96.

[128] ROSS, *supra* note 21, at 134 (emphasis added).

[129] See supra note __ and accompanying text.

[130] ROSS, *supra* note 21, at 135.

[131] L.J. McCrory, The Critical Period in Auto Collision, Aug. 1947, at 35, 35.

[132] Auto Accident Investigations: Simple But Valuable Calculations, 8 For the Defense 10, 10-11 (Feb. 1967)

[133] ROSS, *supra* note 21, at 99.

[134] *Id.* at 101.

technology for individuation.[135] They are minutely divisible to reflect the particular circumstances of the case in question.

Yet on the remedy side of the equation, we find a similar set of formulae shaping settlement values. The "most successful [] adjusters," as one leading adjuster put it, "have a uniform approach which has become a habit and does not yield to the necessities of changing circumstances."[136] By the middle of the twentieth century, claims adjusters had adopted a number of such formulae to deal with even the seemingly most idiosyncratic of personal injuries. The "'yard stick' approach . . . classifie[d] injuries by their nature, each having a fixed value, regardless of the extent thereof in an individual case."[137] The "three times three" rule multiplied the special damages of the claimant by a factor of three.[138] The "Sindell formula" generated a complex points system in which settlement value was calculated on the basis of likelihood of liability, "type" of plaintiff, "type" of defendant, actual losses, and the value of similar cases in the same jurisdiction.[139] Actuarial life insurance tables were used from early on to calculate lost future earnings.[140] As Ross put it, even the most individualized aspects of the claim – "the measurement of pain, suffering, and inconvenience" – was often "thoroughly routinized" by the "multiplying the medical bills by a tacitly but generally accepted arbitrary constant."[141]

Indeed, actuarial estimates of the possible exposure of the insurer became powerfully important in shaping settlement values. Liability insurance actuaries produced estimates of possible liability for virtually

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[135]Of course, a consequence of using money damages as a measure of individuation in personal injury cases is the suggestion that money and personal injury are commensurable, which at a deeper level undercuts the ability of money damages to individuate. *See generally* MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); Margaret Jane Radin, *Compensation and Commensurability,* 43 Duke L.J. 56 (1993).

[136]Sergeant, *supra* note 126.

[137]*Id.*

[138]CORYDON T. JOHNS, AN INTRODUCTION TO LIABILITY CLAIMS ADJUSTING, 367-68 (1965).

[139]ROSS, *supra* note 21, at 116.

[140]ROSS, *supra* note 21, at 239; FRANCIS TIFFANY, THE LAW PECULIAR TO ACTIONS FOR INJURIES RESULTING IN DEATH (2000).

[141]ROSS, *supra* note 21, at 239. Plaintiffs' lawyers began in the middle of the 20th century to push for the use not of arbitrary multipliers of special damages but of *per diem* multipliers.

every claim as a matter of course.[142] Claims adjusting departments, in turn, used these actuarially-derived reserve fund estimates as a benchmark by which to evaluate their claims adjusters' performance.[143]

To be sure, many claims adjusters contended that no formula or yardstick could capture the value of personal injury claims.[144] Perhaps as a form of craft pride or simply job trusting, they would argue that each claim needed to be evaluated on its own merits.[145] There was thus "no substitute for experience in claims handling," industry experts noted.[146] And as previous students of the claims business have noted, more individualized treatment was often the norm in high-value, outlier claims.[147] Yet despite the presence of outlier claims, and despite the self-interested craft arguments of the adjusters to the contrary, the fact remains that the insurance industry as a whole moved toward a comprehensive administrative model that seems to have encompassed even many of the most fact-dependent claims of individualized harm.

As a result, for the typical claims – the mature torts – that were the stuff of everyday claims adjusting practice, formulae and rules of thumb virtually covered the field.[148] As leading claims adjuster Corydon T. Johns noted, "the idea of an arithmetical relationship as a determiner of verdicts" was perhaps "pure myth," but it nevertheless was "widely

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[142]*See, e.g.*, *Claim Reserves*, BEST'S INSURANCE NEWS, Apr. 1958, at 131.

[143]*See, e.g.*, Dudley M. Pruitt, *In Reserving for Loss Claims*, BEST'S INSURANCE NEWS, Jan. 1951, at 29.

[144]Carr, *supra* note 21, at 44; Kenneth C. Berry, *Individual Claim Problems,* BEST'S INSURANCE NEWS, March, 1957, at 144.

[145]*E.g.* Charles B. Marshall, *The Most Common Mistakes,* BEST'S INSURANCE NEWS, Mar., 1967, at 70 (describing the "rule of thumb formulae used in various jurisdictions for the settlement of claims" as "a true bane of the insurance profession"); Forrest S. Smith, *What's a Claim Worth?,* BEST'S INSURANCE NEWS, Mar., 1956, at 33, 37 ("there is no yardstick by which to measure disability evaluation; each case is a problem unto itself, to be weighed and judged according to its own facts and circumstances").

[146]Hugh D. Combs, *Handling Negligence Claims,* BEST'S INSURANCE NEWS, Apr., 1956, at 127.

[147]ROSS, *supra* note 21, at 115.

[148]Another important source of the standardization of claims settlement practices was the use of claims reserves built by reference to actuarial tables. As claims managers noted, "statistical analysis of actual claims" could produce accurate predictions of aggregate claims values, even if the value of any one claim was itself difficult to predict. Thomas E. Murrin, *Comments on Loss Reserves,* BEST'S INSURANCE NEWS, May, 1966, at 20, 32. In turn, actuarially-derived claims reserves were often said to drive settlement values because of insurers' use of those reserves to evaluate the performance of claims adjusters. See Myron E. Garrelts, *Allocated Claims Expense,* BEST'S INSURANCE NEWS, Feb., 1961, at 45; J.H. Pittenger, *Claim Reserves,* BEST'S INSURANCE NEWS, Apr., 1958, at 131; Dudley M. Pruitt, *Problems in Reserving for Claims,* BEST'S INSURANCE NEWS, Jan. 1951, at 29.

accepted" and thus heavily influenced the behavior of claimants, insurers, and their agents. "The myth which probably has no reality as a verdict-predicter," Johns concluded, "is both real and influential in the attainment of settlements, especially in settlements made with plaintiffs' attorneys."[149] Moreover, in Johns's view, tort law's chief claim to rationality lay in the myths and folklore of the claims adjusters. In any one case taken on its own terms, there was simply no "scale of values"; "each jury is literally a law unto itself."[150] In the aggregate, however, "[t]he system as a whole does present a vague consensus of value."[151] As one casualty insurance actuary had noted some decades earlier, "statistical mass phenomenon exhibit a tendency to cluster around certain norms," and tort claims were no different.[152] Though the consensus was "dim" and "subject to some doubt," it was that dim consensus about aggregate claim values that drove the market in settlements.[153]

By the late 1920s, the consequences of such claims agent practices (though still in their infant stages) were already becoming apparent. The well-known Columbia University study of automobile accident injury compensation found that where defendant drivers were insured, extremely high percentages of claims resulted in some payment through the claims settlement process: 90 to 96 percent of claims in Philadelphia; 71 percent of temporary disability claims and 100 percent of fatality claims in Muncie, Indiana; and so on.

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[149] JOHNS, *supra* note 138, at 378.

[150] *Id.* at two.

[151] *Id.* Johns's point here is consistent with studies suggesting the extreme difficulty of predicting liability determinations and judgment values in American tort law. See KAGAN, *supra* note 20, at 116, 137-39; Kritzer, *supra* note 92, at 817-18.

[152] Comments of Arne Fisher, Proceedings of the Casualty Actuarial and Statistical Society of America (1919).

[153] JOHNS, *supra* note 138, at 2.

Closed Cases in the 1932 Columbia Study of Automobile Accident Injury Compensation: Paid According to Severity of Injury and Insurance Status

	Closed Insured			Closed Uninsured Cases		
	percentage of cases with			percentage of cases with		
	Temp	Perman	Fatal	Tempo	Perma	Fatal
Philade	90%	96%	93%	31%	33%	23%
New	84	100	88	16	0	6
Terre	81	90	75	22	11	0
Muncie	71	90	100	12	13	18
Califor	80	97	84	25	24	24
New	89	90	88	42	43	9
Rural	83	100	80	36	29	0
Boston	88	94	96	5	0	0
Worces	88	100	80	22	0	0
	86	96	88	27	21	17

Source: COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 273 tbl.16 (1932).

As the table from the Columbia study indicates, the number of claims paid as a percentage of the total number of claims was far lower in precisely those cases in which the repeat-play claims agents were not involved: the uninsured cases. To be sure, this no doubt reflects some percentage of uninsured claims in which defendant motorists' lack of insurance rendered them effectively judgment proof and thus unable to pay out on large claims.[154] Nonetheless, the vast disparity in the number of claims on which any payment was made at all suggests the dramatic consequences of repeat-play claims agents for the tort system.

These consequences grew still more pronounced over time. Increased coordination on both the defendants' side and the plaintiffs' side came slowly at first. The Liability Insurance Association began meeting in 1907, and was folded into the International Association of Casualty and

[154]On the other hand, motorist cases will usually involve defendant drivers with at least one asset: an automobile.

Surety Underwriters in 1911.[155] The International Claim Association was founded in 1909.[156] The Casualty Actuarial and Ststistical Society of America followed in 1914.[157] In 1920, *Best's Insurance News* founded its "Casualty Edition," which published regular reports on the field of liability insurance claims adjusting.[158] By the late 1920s, local claims adjusters clubs were springing up in cities like Washington, D.C.[159] On the eve of the Second World War, the Federation of Insurance Counsel brought together many of the nation's insurance lawyers.[160] And after the war, organizations like the Defense Research Institute and the Defense Information Office;[161] publications like *For the Defense*, the *Insurance Counsel Journal*, and the *Defense Law Journal*;[162] and local associations such as the Defense Counsel of Northern California and the Texas Defense Counsel[163] all functioned to coordinate tactics among the defense bar and to disseminate standard practices in the field such as the use of rough-and-ready rules of thumb.

Coordinating organizations developed on the plaintiffs' side as well, in a kind of dialectical arms race with defense organizations to arm their constituencies with the latest strategies and information. The National Association of Claimants' Compensation Attorneys, established by workmen's compensation lawyers in 1946, became in 1971 the

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[155] *See* FIRST CONVENTION, INTERNATIONAL ASSOCIATION OF CASUALTY AND SURETY UNDERWRITERS 17-20, 158 (1911).

[156] *See The International Claim Association*, 35 BEST'S INSURANCE NEWS 257, 257 (1934).

[157] *See* 5 PROCEEDINGS OF THE CASUALTY ACTUARIAL AND STATISTICAL SOCIETY OF AMERICA, 1918-1919, at 176 (1919).

[158] *See Introducing the Casualty News*, 21 BEST'S INSURANCE NEWS 1, 1 (1920); *see also Best's Recommended Insurance Attorneys*, 30 BEST'S INSURANCE NEWS 148, 148 (1929) (describing the ways in which Best's Insurance News functioned as a clearinghouse for insurance adjusting, investigation, and litigation).

[159] *See Claim Adjusters Club of D.C. Hold Annual Meeting*, 31 BEST'S INSURANCE NEWS 424, 424 (1930).

[160] *See* THE NINTH ANNUAL CONVENTION OF THE FEDERATION OF INSURANCE COUNSEL, 1949 (1949).

[161] *See The Defense Research Institute*, 1 FOR THE DEFENSE 33, 33-34 (1960); *Defense Information Office*, 2 FOR THE DEFENSE 55, 55 (1961).

[162] *See* 1 FOR THE DEFENSE (March 1960); 1 INSURANCE COUNSEL JOURNAL (1934); 1 DEFENSE LAW JOURNAL (1957).

[163] *See Local Defense Organization – San Francisco*, 1 FOR THE DEFENSE 41, 41-42 (1960); *Texas Defense Counsel Hold First Annual Meeting*, 2 FOR THE DEFENSE 65, 65-67 (1961); *see also The Work of Local Defense Groups*, 4 FOR THE DEFENSE 9, 9-10 (1963); *Defense Association of New York*, 6 FOR THE DEFENSE 49, 49-50 (1965).

American Trial Lawyers' Association.[164] Even before its formal renaming, the NACCA had become a clearinghouse for information among the plaintiffs' personal injury bar, forging referral networks and sharing information about settlement techniques, claims valuation formulae, and the like.[165] In particular, the "King of Torts" Melvin Belli, though more famous now for his flamboyant court-room theatrics, founded a system of information sharing, network connections, and training through the so-called Belli Seminars that beginning in 1951 preceded the annual NACCA conferences.[166] As Stephen Yeazell has pointed out with respect to plaintiffs' lawyers in more recent years, "[t]he plaintiffs' bar, with its system of referrals" had begun to "achiev[e] transactionally the kinds of specialization and breadth that the corporate bar is achieving by growth in firm size."[167]

Organization came hand in hand with increased specialization among the plaintiffs' bar. By the late 1950s, students of personal injury litigation in New York City were discovering that plaintiffs as well as defendants were able to take advantage of a pool of specialized repeat-play claims agents. Thirty-three specialist plaintiffs' lawyers – 1.8 percent of the total New York plaintiffs' bar – handled almost 13 percent of the personal injury claims in one sample.[168] Similarly, in 1960, the one hundred leading firms in the Federal Employers' Liability Act field brought some 4,974 interstate employee injury claims against railroads, resolving 1556 of them in that same year for a total of $23.5 million. The

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[164]WITT, *supra* note 14, at 196.

[165]Especially important here were the Belli seminars organized by Melvin Belli. See MELVIN BELLI, TRIAL AND TORT TRENDS THROUGH 1955 (1956).

[166]*Id.* at iii.

[167]*See* Erichson, *supra* note 10, at 535-36; Yeazell, *supra* note 8, at 202. Yeazell suggests that it is at least possible that "plaintiffs' firms are merely lagging the rest of the bar" and that plaintiffs' lawyers will soon begin to reorganize their practices as hierarchies rather than as markets. *Id.* It is also possible that the plaintiffs' firms are ahead of the curve, not behind it, and that referral markets and horizontal networks of practitioners may be an emerging model for law practice that elite corporate practice (now organized in hierarchically managed firms) will one day follow. For analogies in the literature on the history and theory of the firm, see Naomi R. Lamoreaux, Daniel M. G. Raff, & Peter Temin, *Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History,* 108 Am. Hist. Rev. 404 (2003); Charles Sabel & Jonathan Zeitlin, *Historical Alternatives to Mass Production: Politics, Markets and Technology in 19th Century Industrialization,* 108 Past and Present 133 (1985).

[168]Maurice Rosenberg & Michael Sovern, *Delay and the Dynamics of Personal Injury Litigation,* 59 Colum. L. Rev. 1115, 1167 (1959). Interestingly, the specialist bar in New York City was significantly less likely than the non-specialist bar to take their cases to trial. *Id.*

ten leading firms resolved claims worth $9.5 million.[169]

The increased role of repeat-players on the plaintiffs' side allowed individual claimants to spread the risk of outlier results within a class of mature torts. Insurance claims adjusters and claimants' agents developed some of the same kinds of relationships that we saw at the Dwight Manufacturing Company in the 1890s, forging settlements that took into account the ongoing relationships between the bargaining agents. "[Y]ou might even swap cases," as one insurance claims adjuster put it in the 1960s, "you might agree that in this case you'll go 50 percent if such-and-such other case is settled accordingly."[170]

The settlement of mature torts by repeat-play bargaining agents itself began to mature with the publication of verdict reporters in the 1950s. Even as late as the 1940s, claims adjusters could look to only a few sources for collections of verdict values.[171] But beginning in 1951 with Melvin Belli's collection of jury verdicts ("The Adequate Award") in the *California Law Review*,[172] the collection and publication of jury awards became an increasingly important part of the functioning of the tort claims settlement market. Verdict reporters brought into view what Corydon Johns had called the "dim consensus" of juries and courts as to claim value. Adjusting, in turn, was "done in the light of this . . . scale of values."[173] Settlements between repeat play bargaining agents thus became increasingly routine and increasingly relied on publications such as the California Jury Reports for valuations of both settlements and trial outcomes. Indeed, the occasional litigation of uncertain claims played the role anticipated in the Priest-Klein model of litigation as a mechanism for testing a judgment in the retail (trial) market in order to set wholesale (settlement) prices. As plaintiffs' lawyer Joseph Sindell of Cleveland, Ohio (after whom the Sindell Formula for settling cases had been named[174]) suggested,

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[169]FELA Specialists, 2 For the Defense 70, 70 (Nov. 1961)

[170]ROSS, *supra* note 21, at 143.

[171]See HOWARD L. OLECK, NEGLIGENCE INVESTIGATION MANUAL 99-100 (1953) [citing GEORGE HIRAM PARMELE, DAMAGE VERDICTS (1927) as the best source of verdict information].

[172]Melvin Belli, *The Adequate Award,* 39 Cal.L.Rev. 1 (1951); *see also* MELVIN BELLI, THE MORE ADEQUATE AWARD: A COLLECTION OF THE MORE ADEQUATE AWARDS TO FEB. 1952 (1952).

[173]JOHNS, *supra* note 138, at 348.

[174]ROSS, *supra* note 21, at 116.

> every once and a while we will run across a case where a claim man and myself will agree that this is the kind of case that has to go to trial, and the expression is used 'to send up a trial balloon' to see what the tenor of the time is, and how juries are reacting to the particular values and the injuries that they are told about and shown.[175]

The development and increased coordination of repeat-play claimants' agents, of course, promoted considerable anguish among certain sectors of the defense bar. Yet as some defense-side agents noted, the presence of bargaining agents who know the short-cuts, the heuristics, and the rules-of-thumb that had come to play such important roles in the claims settlement marketplace often made the settlement process considerably more efficient.[176] In Chicago, for example, insurers found that for precisely these reasons, the repeat-play plaintiffs'-lawyer specialist was "an easier man to deal with than a general practitioner." Insurers dealing with such lawyers reported that they were regularly able to strike "'package-deals'" in which they disposed of "a great many cases at one time."[177] Indeed, together the plaintiffs' bargaining agent and the liability insurer's claims adjuster were, as the vice-president of one early casualty insurance organization put it, the "lubricant" that made the law of torts "run with as little friction as possible."[178]

One result was that by the mid-1960s, automobile accident tort claims were being settled with much greater speed than other personal injury tort claims. Indeed, as the table set out here indicates, in terms of the speed of settlement, automobile accident claims more closely resembled workmen's compensation claims than other personal injury claims.

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[175] BELLI, *supra* note 162, at 307.

[176] ROSS, *supra* note 21, at 166-67.

[177] Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U. L. REV. 895, 904-905 & n.48 (1953).

[178] *Address of Vice-President J. Scofield Rowe*, THIRD CONVENTION, INTERNATIONAL ASSOCIATION OF CASUALTY AND SURETY UNDERWRITERS 55, 60 (1913).

Percentage of Total Dollars Paid in Months from Date of Injury

	12 Months	*24 Months*	*36 Months*	*48 Months*	*60 Months*
Bodily Injury Other Than Auto)	16%	42%	58%	75%	87%
Auto Bodily Injury	26%	62%	81%	90%	95%
Workmen's Compensation	35%	70%	83%	90%	92%

Source: Thomas E. Murrin, *Comments on Loss Reserves,* BEST'S INSURANCE NEWS, May, 1966, at 20, 24.

The first two lines of the table compare separate areas consigned to the tort system. The first, miscellaneous bodily injury, comprised an ad hoc array of disparate, non-routinized claims. The relatively slow speed of resolutions in this category of tort claims suggests that they had not been successfully integrated into an efficient claims management process. The settlement market in automobile injury cases, by contrast, appears to have become quite efficient in terms of speed. The striking feature is the similarity of the mature tort injury system in auto claims to the administrative system of workmen's compensation. The time frames in which the two claims management processes paid out claims were remarkably close. The use of administrative grids, whether in the public workers' compensation system or the private auto injury system, seems to have moved both systems toward similarly efficient resolution of claims.[179] By contrast, the non-routinized quality of the miscellaneous, non-auto bodily injury claims category appears to have led to significant delays and inefficiencies in the search for individual compensation assessments.

[179]The Columbia study of automobile accident injury compensation from three decades earlier found somewhat more delay in the settlement process, which is consistent with the evidence indicating that the specialist plaintiffs' bar in the auto injury field became much more robust during the 1950's. *See* COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, *supra* note 47.

Convergence between tort and workers' compensation is also apparent when we turn to the compensation system. Even as private administrative processing was making the tort settlement system more efficient, observers were noting that claims processing in the workmen's compensation system was slowing down. Claims in workers' compensation were attracting some of the same kinds of repeat-play claims agent practice that characterized the tort system.[180] Indeed, as Philippe Nonet noted of California in the mid-twentieth century, workmen's compensation proceedings were shifting from social work sessions organized around the needs of the claimants, to adversarial hearings with lawyers and claims representatives on both sides.[181]

It is no wonder, then, that looking at the development of claims settlement practices, on one hand, and the enactment of workmen's compensation and state disability insurance systems, on the other, loss adjusters in 1950 saw a "trend in claims . . . headed in the direction of specifically charted benefits" and away from the individualized awards of the negligence system.[182] The marketplace for the settlement of the ordinary tort claims that we have dubbed mature torts had come to operate much like the public compensation system that had replaced it in the field of work accidents.

III. Into the Twenty-First Century: Aggregated Settlement in Mature Torts

Looking back on the development of the settlement practices in the real world of tort, we can see the emergence beginning in the late nineteenth century – virtually coincident in time with the beginning of the law of torts itself – of a rough sequence of mature torts that gave rise to aggregated settlement institutions. Work accidents and early mass disasters, and then automobile accidents each provided a new stage on which repeat players emerged to manage the resolution of personal injury disputes.

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[180] *See* WALTER F. DODD, THE ADMINISTRATION OF WORKMEN'S COMPENSATION 314-20 (1936); PHILIPPE NONET, ADMINISTRATIVE JUSTICE; ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY 66-97 (1968); WITT, *supra* note 14, at 205.

[181] *See* NONET, *supra* note 177; see also WITT, *supra* note 14, at 205.

[182] Charles Gable, *Casualty,* BEST'S INSURANCE NEWS, Apr., 1950, at 37, 38.

Three defining features from the historical experience characterize an evolved or mature body of tort law. First, market pressures and the benefits to be gained from economies of scale seem to lead to the concentration of market share on both the plaintiff and defense sides into a small number of repeat actors. Second, as patterns of liability and damages stabilize, trials seem to become increasingly exceptional as claims are handled through routinized negotiations between established representatives. Third, mature torts seem to evolve grid structures for the actuarial treatment of accident claims.

What happens if we bring the analytic framework of these three defining characteristics to bear on the asbestos claims market? Although we could point to any number of mass harms in which claims are settled thousands at a time,[183] asbestos remains the paradigmatic case. Thirty years have passed since the threshold legal determination that asbestos manufacturers would be strictly liable for exposure-related illnesses and death[184] and more than two decades since the popular revelations of the health hazards of asbestos and the systemic efforts to suppress critical information about those hazards.[185] There is by now little doubt that asbestos litigation is an enormous weight upon the court system and upon the economy. Hundreds of thousands of asbestos cases clog the courts, with total corporate liability estimated to exceed $200 billion.[186] Since the initial insolvency of Johns Manville in 1982,[187] scores of firms have gone into bankruptcy as a result of asbestos liabilities and virtually no asbestos producers are still in business. [188] It is also beyond question that asbestos is a public health calamity of major proportions. Somewhere on the order of 20 million workers suffered occupational exposure in the U.S., some 250,000 have died from that exposure and hundreds of thousands more

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[183]See the excellent account of the prevalence of such mass claims in Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation,* 2003 U. Chi. Legal F. 519, 534-35 (describing mass settlements in, e.g., Norplant, Fen-Phen, and similar mass harm cases).

[184] *See* Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973).

[185]PAUL BRODEUR, OUTRAGEIOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985).

[186]*See* Roger Parloff, *The $200 Billion Miscarriage of Justice,* FORTUNE, Mar. 4, 2002, at 154.

[187]*In re* Johns Manville Corp., No. 82 B 11, 656, 676 (Bankr. S.D.N.Y. 1982).

[188]*See* Deborah H. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz,* 80 Tex. L. Rev. 1899 (2001).

have exposure-based illnesses.[189] Beyond the sheer numbers, asbestos has served as the focus for the Supreme Court's most important pronouncements on the procedural dimension of mass torts in *Amchem* and *Ortiz*. It is, after all, in the context of overturning a proposed massive asbestos settlement that Justice Souter invoked the day-in-court ideal and expressed skepticism that adequate representation could ever be provided by lawyers holding huge inventories of individual cases.[190]

When we test our three historically-derived hypotheses against asbestos litigation, we do indeed find concentrations of claims in particular claimants' agents, very few trials, and standardized treatment of settlement amounts. Our aim, however, is not simply to challenge the Supreme Court's idealized world of individual justice. Focusing on the unexceptional features of class action aggregation in mature torts practice casts in clearer light two features that do distinguish the current mass tort cases from their predecessors in the field of mature torts.

First, the use of the class action as a vehicle for crafting aggregate settlements ushers in exclusivity of representation. No matter how concentrated the market in claims, no matter how centralized dispute resolution may have been in the hands of a translator or other early claims broker, there was always some capacity for a rival representative to challenge the merits of the deals offered. Anti-competitive bar association disciplinary rules such as prohibitions on advertising and bans on claims-running posed obstacles to competition in the claims representation market, but the potential challenge of competition among claims agents existed nonetheless. Placing exclusive rights of representation in class representatives and class counsel, however, serves as an extreme barrier to entry making challenge to the misconduct of settlement agents particularly problematic.

Second, whether on the factory floor or in the insurance-driven world of auto accidents, the cost of injury, once routinized, was built into the cost of doing business on a going-forward basis. Firms continued to produce notwithstanding employers' liability; cars continued to roll in the face of products liability for auto manufacturers. In theory, such liabilities prompted increased safety measures as firms internalized the cost of accidents into the costs of doing business.

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[189] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 631 (1997).

[190] *Ortiz*, 527 U.S. at 846-48.

By contrast, while asbestos litigation shares the central characteristics of the repeat accident cases, it also involves injuries on a scale too great and with latency periods too long to be internalized on a going-forward basis. Sometimes this is the result of the scope of the harm simply exceeding the capacity of the firm to withstand judgments, as with the bankruptcy of A.H. Robbins as a result of the dalkon shield IUD. In other instances, as with many asbestos manufacturers, a single product proven to be harmful so dominates the economic activity of a particular firm that the withdrawal of that product from the market effectively dooms the enterprise. Under such circumstances, not only is the scope of the potential harm likely to dwarf the resources of the negligent firm, but the potential for latent harms makes even a guess at the projected liabilities itself a hazardous enterprise.[191]

Monopolistic representation and long-tail, firm-killing liability – not aggregation and not the day in court ideal – are the features that distinguish the class action from the practices that have long characterized American tort law. We conclude with a discussion of what we take to be the lessons of *Amchem* and *Ortiz,* focusing on these unique features of the class action.

A. The Market for Asbestos Claims

As we set out at the beginning, the "day in court" ideal invoked by Justice Souter in *Ortiz* presupposes the "bipolarity" of litigation, as the tort scholars would have it. To focus on bipolarity in the context of asbestos, however, is to miss the point. While it is certainly true that any individual's particular exposure, injury, and disease pathology could – should it come to trial – play out along the customary tort lines of duty, breach, causation, and damages, the sheer volume of claims is the defining point of this drama. An estimated 10,000 Americans still die each year from asbestos-related diseases, a number that is expected to hold constant for the next decade.[192] Perhaps even more significant for the prospects of individual litigation, approximately 80 firms have gone into bankruptcy

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[191] Insert data about original projections of claims against Manville Trust and actual claims to date.

[192] *See* JoAnne Allen, *Study Warns U.S. Facing Asbestos Crisis,* 2004, at http://www.reuters.com.printerFriendlyPupup.jhtml?type=topNews&storyID=4498945 (reporting on a report by the Environmental Working Group).

as a result of asbestos litigation,[193] forcing all potential claimants into aggregated workouts regardless of hopes for a private day in court.

In a system where so many claims raising similar issues compete for the limited resources of a few enterprises, and in which trials require massive expenditures, it would be difficult to imagine that such claims would end up widely dispersed among individual lawyers, each representing one plaintiff. And, indeed, such a system does not exist. Asbestos cases have even generated claim and client aggregation on the defense counsel side. One need look no further than the record in *Amchem* to find that the ultimately failed national settlement was negotiated between a handful of plaintiffs' lawyers claiming a significant percentage of the asbestos cases on one hand, and a consortium of asbestos manufacturer defendants, on the other. The joint asbestos defense enterprise organized around the Center for Claims Resolution (CCR)[194] functions as the state-of-the-art reincarnation of the Railroad Attorneys' Conference of 1906.[195]

While both the plaintiffs' and defense bars in mass harm cases such as asbestos gravitate toward the concentration of claims in a few hands, there is a significant difference in how this is accomplished. In the defense context, one or more powerful institutional actors select lawyers to serve as organizers of their defense across a large number of cases.[196] Through in-house counsel or through an oversight law firm, these institutional actors (like the Dwight Manufacturing Company a century ago) readily discern the aggregate nature of the claims against them. Indeed, the disclosure requirements of modern financial markets have made the aggregate character of mass torts all the more abundantly apparent. Insurers, the Security and Exchange Commission, investment banks, accounting firms, and many of the other financial intermediaries with which firms routinely do business typically require overall risk assessments as to liability exposure. In turn, accountants and actuaries estimate potential liabilities from firm- and industry-wide data on type of

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[193] S.D. CARROLL, DEBORAH HENSLER, MICHELLE WHITE & J. GROSS, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK (2001).

[194] 521 U.S. at 599-601.

[195] See supra note __ and accompanying text.

[196] For a description of the various techniques of coordination used by defense firms, see Erichson, *supra* note 10, at 401-08.

use of asbestos, on the years of exposure, and on the state of employee industrial protections as awareness of risk improved.[197]

Coordination on the plaintiffs' side is more difficult. Unlike the accident markets of old, mass harms are likely to have nationwide impact. The simple face-to-face and word-of-mouth strategies that worked to create networks of claimants in Massachusetts textile mills, Wisconsin dam breaks, and Tennessee coal mine explosions are unlikely to achieve the consolidation necessary for the effective management of mass harm cases. The sophisticated epidemiological studies and other costly undertakings typical to such cases all too often simply overwhelm relatively isolated local plaintiffs' counsel. While certain pioneers of centralized information, such as Melvin Belli, foresaw the need for these approaches, communication and information-sharing were significant barriers. Routine access to fax machines dates back only a little more than two decades, and electronic transmission of data goes back only one decade as an integral part of legal practice. In asbestos, for example, it was only an external shock that brought about the initial national coordination among the leading plaintiffs' firms. As the central plaintiffs' lawyer in *Amchem* and *Ortiz* observed, "it was only when we arrived at the Manville bankruptcy hearings [in 1982 or so] and saw lawyers from all over the country pursuing the same cases with the same issues that we realized that we needed a nationwide strategy. We realized that Manville had a nationwide approach to the cases and that we needed to have one as well."[198]

Even before asbestos, the plaintiffs' bar had made a number of halting but significant steps toward specialization and the bundling of claims to amortize costs. Howard Erichson quotes one leading plaintiffs' lawyer aptly summing up the bottom line: "If you can't sign up enough plaintiffs, the economics don't work."[199] As bar association rules on referrals and advertising were liberalized, the plaintiffs' bar began to

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[197] *See, e.g.*, Susan L. Cross & John C. Doucette, *Measurement of Asbestos Bodily Injury Liability,* CASUALTY ACTUARIAL SOCIETY FORUM, summer, 1994, at 161, 200; Kevin M. Madigan & Claus S. Metzner, *Reserving for Asbestos Liability,* CASUALTY ACTUARIAL SOCIETY FORUM, fall, 2003, at 173. There is a burgeoning market in econometric studies of mass tort liability for firms and their insurers. *See, e.g.*, National Economic Research Associates, Product Liability and Mass Torts Valuation (promotional literature of leading economic consulting firm advertising proprietary analyses for forecasting future product liability exposure of an enterprise).

[198] Interview with Joe Rice, Feb. 7, 2002.

[199] Erichson, *supra* note 10, at 547 (quoting Alexander MacDonald).

divide between firms that actually handled cases and those that primarily served as the initial contact for plaintiffs, often the photogenic entrepreneurs of late-night television.[200] What emerged was a widespread "hub-and-spoke structure in which referring lawyers remain involved in a limited capacity in their clients' cases, serving as the primary client contact, while the lawyer to whom the cases are referred performs the bulk of the work in litigation and negotiation."[201] The law has evolved to the point that lawyers who refer work to each other may, in some jurisdictions, claim quantum meruit recovery for the value of their services, even absent contractual agreement from the client.[202]

Specialization and concentration, however, is a double-edged sword. While a mature tort with clear liability rules and relatively settled expectations of damages rewards the entrepreneurial skill of the aggregators of claims, the earlier stages of untested mass harm claims pose grave risks for the initial bundlers of claims. Few individual plaintiffs' firms in the early years of plaintiffs'-side aggregation in mature torts could withstand the potential risk of investing sufficiently to challenge a defendant whose existence might be on the line in a mass harm case. A firm that specialized in a high-risk new tort claim and invested the resources necessary to develop the litigation potential of the claim would find itself in violation of the basic portfolio precepts of any Finance 101 course, or the more quotidian admonition not to put all your eggs in one basket. The lack of diversification and the sheer magnitude of the risk created the kinds of pressures toward quick (and cheap) settlement identified in some of the academic commentary.[203]

A second step in plaintiffs'-side aggregation emerged in the

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[200]Referral fees are a traditional source of controversy, as with the current proposed rule 8a of the Texas Rules of Civil Procedure, in which referrals are associated with claims runners and the frowned upon practices of trolling for claims – vilified as the practices of the ambulance chaser. The historic origins of the practice are actually more complicated and may reflect the split nature of the bar in England, with referring country solicitors, managing town solicitors, and barristers, all of whom shared in the resulting fees. See JULES H. COHEN, THE LAW: BUSINESS OR PROFESSION? 226 (1916); Thomas J. Hall & Joel C. Levy, *Intra-Attorney Fee Sharing Arrangements,* 11 Val. U. L. Rev. 1, 2 (1976).

[201]Erichson, *supra* note 10, at 536.

[202]*See* Huskinson & Brown, LLP v. Wolf, 9 Cal.Rptr.3d 693 (Cal. 2004).

[203]*See* Coffee, *supra* note 86, at 1363-64; Bruce Hay & David Rosenberg, *Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy,* 75 Notre Dame L. Rev. 1377, 1378 (2000); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't,* 37 Harv. J. on Legis. 393, 430 (2000).

aftermath of the Manville Bankruptcy, and accelerated through improvements in communications technology: the litigation consortium.[204] Either formally through the Multi-District Litigation process, or informally through private agreement, or more likely, through both, plaintiffs' firms undertook joint ventures in order to pool risk and capitalize expensive litigation efforts. The by-product was further coordination and concentration of the handling of related claims. In a sense, the plaintiffs'-side litigation consortium is the late twentieth and early twenty-first-century maturation of the consolidations that we observed going back to the 19th century.

To return to asbestos, the result is a highly concentrated market in which roughly 10 firms account for more than 50 percent of the asbestos claims in the country and 50 firms effectively control the market. The best documentation comes from the Manville Trust which has the longest history of public accounting for the processing of asbestos claims. According to Manville Trust documents, 55 firms represent approximately 85 percent of all claimants to Trust assets.[205] Similarly, the most recent study of asbestos litigation by the Rand Institute reports about the same number of firms controlling the same percentage of the docket today. An interesting illustration of the effect of the centralization and coordination of the plaintiffs' bar comes from the venturesome, if ultimately doomed, effort of Owens Corning to protect itself from insolvency. Under the innovative National Settlement Program, general counsel Maura Abeln Smith sought to use the concentration of the plaintiffs' bar to create a sustainable cash flow for asbestos claims. Smith first arranged for the acquisition of Fibreboard by Owens Corning to create, in effect, the largest concentration of asbestos liability since the bankruptcy of Johns Manville. Smith then negotiated a structured workout of yearly claims with a cash flow cap for any given year.[206] Plaintiffs' firms with large inventories would then have had an incentive not to try to bust the bank on any large judgment, and to bring all new claimants into the settlement structure, for fear that a bankruptcy of the newly minted Owens Corning

[204]The evolution is discussed in Erichson, *supra* note 10, at 546-47.

[205]Samuel Issacharoff, *"Shocked:" Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz,* 80 Tex. L. Rev. 1925, 1930 n.21 (2002) (quoting Manville Trust General Counsel David Asutern, presenting at Seminar on Contemporary Controversies in Complex Litigation, Columbia Law School, Apr. 4, 2002).

[206]This parallels what was attempted in both Amchem and Ortiz.

Fibreboard would compromise the yearly payment stream to their thousands of existing clients.

What the Owens-Corning plan sought to do was to return the mass tort asbestos cases to the ongoing basis of earlier mass harm experiences such as the work accident toll of a century ago, and to do so without the use of the class action device. The plan ultimately failed. Absent the coercive powers associated with class action status, adverse-selection effects kept the high-end cases out of the deal. But what is significant for our purposes is just how concentrated the bulk of the asbestos bar proved to be – in effect, the centralization of plaintiffs' claims was the predicate for Smith's bold gambit. According to Smith, to settle 176,000 claims – nearly 90 percent of the claims pending against OCF – she needed to negotiate with only fifty law firms.[207]

B. The Disappearing Trial

In the real world of asbestos, the "day-in-court ideal" of *Ortiz* is the rare exception. There is no doubt that asbestos *claims* are flooding the courts. By one estimate in 1994, 50 new asbestos cases were being filed each day in the U.S.[208] Estimates suggest that the total number of claims is likely to reach as high as 2.5 million before the epidemic recedes. But the press of litigation should not be confused with large numbers of trials. According to data collected by the Rand Institute, between 1993 and 2001, despite hundreds of thousands of cases on file, many actively litigated, there were a grand total of 527 trial verdicts involving 1598 plaintiffs in the entire country. This is a total of about 60 asbestos trials a year.

C. Administrative Damage Models.

The "day-in-court" ideal is further complicated by the rise of damage models that diverge from the norm of individualized justice informing the disposition of immature tort claims.[209] Among the most notable trends is the rise of administrative grids similar to those used in workers' compensation and auto accidents to manage settlements. Since

[207]*See* Hensler, *supra* note 185, at 1913; Issacharoff, *supra* note 202, at 1937.

[208]Hensler, *supra* note 185, at 1900.

[209]Issacharoff, *supra* note 202, at 1936.

Cimino v. Raymark Industries,[210] the use of such grids has -– despite significant legal challenges – come to represent the tool of choice for plaintiffs' attorneys pursuing mature asbestos claims.[211]

Cimino was the first attempt to bring the valuation grids used in workers' compensation and other mature repeat claims into the aggregate trial resolution of a class of all pending claims in the Eastern District of Texas.[212] The experiment turned on the ability to jump-start a stalled market in asbestos claims by filling in directly the valuations for each cell in a damages grid. What had been the norm in mature areas of tort claims, such as the industrial accidents and auto cases that we have previously discussed, was now brought out into the open as an experimental trial mechanism. To accomplish this end, in *Cimino*, each plaintiff's claim was reduced to a common set of variables often used in settling cases such as length of exposure, severity of disease, and the plaintiff's smoking history. The proposed plan of aggregation would then have categorized all class members to establish classes of claims and in turn to select representative cases for trial from among the general mass of cases then pending in Eastern District of Texas.[213] Special trials of representative claims would then have been held to establish a set of benchmark or model valuations for each class of claims.

Although this approach was ultimately rejected by the Fifth Circuit,[214] *Cimino* brought into the light of day what had previously been the private settlement practices of evolved tort markets. Once brought into the open and having been adopted by at least one court, *Cimino*-styled grids have now been integrated into every important subsequent attempt

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[210]751 F. Supp. 649 (E.D. Tex. 1990).

[211]*Id*. On the evidentiary sources, see Peter Blanck & Micheal Saks, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts,* 44 Stan. L. Rev. 815 (1992); Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial,* 88 Va. L. Rev. 405 (2002). For an account of the theory of the Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Tex. 1990), sampling trial strategy, see Shari Diamond, Linda Dimitropoulos, Stephan Landsman & Michael Saks, *Be Careful What you Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages,* 1998 Wis. L. Rev. 297 (1998); Micheal Saks, *Do we Really Know Anything About the Behavior of the Tort Litigation System – and Why not?,* 140 U. Pa. L. Rev. 1147 (1992); Jack Ratliff, *Special Master's Report in Cimino v. Raymark Industries,* 10 Rev. Litig. 521 (1991).

[212]One of the authors worked as a special master in the design of the Cimino trial model. See Samuel Issacharoff, *Administering Damages in Mass Tort Litigation,* 10 Rev. Litig. 463 (1991).

[213]*Id.*

[214]*In re* Fibreboard Corp., 893 F.2d 706, 710-11 (1990).

to craft a litigation-based workout of the asbestos mess.[215] In *Amchem Products, Inc. v. Windsor*, for example, CCR (which coordinated settlements on behalf of twenty major asbestos defendants) developed injury matrices using the same criteria as in *Cimino*. Calculating from historic averages for each injury grid point, CCR then discounted to reflect the fact of settlement.[216] A similar approach was later incorporated in *Ortiz v. Fibreboard,* where structured settlements of Fibreboard served as a template for assigning value to present and future claims against the trust negotiated and agreed upon in case.[217]

Grids do not in themselves produce settlement. Plaintiffs, defendants, and insurance providers will often not come to the settlement table unless a mass tort is "sufficiently mature so that all the players had some common estimation of the value of the underlying individual tort claims."[218] Indeed, detailed knowledge of the nature of the claim agreement on a claim's value is often a crucial variable not only for plaintiffs, but also for defendants, in inducing momentum for a settlement class.[219]

Myriad factors have contributed to– and continue to inform– the routinized valuation of claims, particularly in the asbestos context. Lawyer specialization is perhaps the least surprising.[220] As trial lawyers become more experienced in trying cases, they become more adept at assessing injuries and the value of those injuries at trial.[221] Some of this expertise comes from the personal experience attributable to successful lawyers' development: as lawyers become repeat players, they come to better understand the science behind a particular injury, as well as the risks and chances of success of pursuing different litigation strategies.[222]

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[215]Issacharoff, *supra* note 202, at 1936-40.

[216]521 U.S. at 599-604.

[217]Issacharoff, *supra* note 202, at 1937.

[218]Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments,* 39 Ariz. L. Rev. 615, 633 (1997).

[219]*Id.*

[220]THOMAS WILLGING, TRENDS IN ASBESTOS LITIGATION 21 (1987).

[221]*See id.* (noting that "[o]rganization of lawyers into specialists promotes simplification" as "[e]valuations of cases and development of settlement formulae become easier").

[222]This also leads to simplification of the litigation process as the reduced parties to a negotiation leads to dealing with one major adversary on a repeated basis. *Id.*

With better information, claim valuation paradoxically becomes more accurate as a gauge of settlement values in the claims market, even as it becomes more standardized through the application of rules of thumb and settlement grids. Significantly, an attorney's individual trial experience may play only a minor role in the routinization of claims valuation, particularly given the small number of cases that actually go to trial in a mass harm as well matured as asbestos. More important is the expanding universe of auxiliary service providers that collects and disseminates information used by lawyers to value claims in what has become a nearly $200 billion industry.[223] As the roster of potential defendants has expanded beyond first-line asbestos manufacturers to include blue-chip companies, insurance companies, and re-insurers, a vast supporting cast has expanded to provide information to plaintiffs' and defendants' claims agents.[224] Outsourced actuaries and economists,[225] as well as accounting firms[226] all provide important information for plaintiffs, defendants, and insurers pertaining to claim valuation, risk of liability and adverse court decisions, and in the process guide parties towards efficient disposition of claims.

On both the plaintiff and defendant side of settlement disputes, economic consulting firms estimate in the aggregate the extent of future and pending economic liability facing companies and their insurers.[227] Various "top down" and "bottom up" actuarial strategies are employed to analyze the aggregate risk environment facing companies, as well as the specific cases pertaining to individual asbestos defendants. Top down

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[223]Michael E. Angelina & Jennifer L. Biggs, *Sizing up Asbestos Exposure,* EMPHASIS, Mar. (2001), at http://www.towersperrin.com/tillinghast/publications/publications/emphasis/Emphasis_2001_3/2002041814.pdf.

[224]Issacharoff, *supra* note 202, at 1931.

[225]*See, e.g.*, http://www.nera.com/practice_area/_template.cfm?c=6109&o=3538, a web page provide by NERA economic consultants, advertising both economic and actuarial services for law firms, companies, insurers and reinsurers in calculating asbestos liability and supporting commercial litigation.

[226]Here large accounting firms have developed considerable practices offering services designed to assist insurers and other companies in understanding their asbestos liability both in and out of the litigation context. See, e.g., http://www.pwcglobal.com/Extweb/service.nsf/docid/48FBB9EA28AE371085256C6C00000A13 (the PriceWaterhouseCoopers actuarial and insurance management web-page, noting the firm's assistance in claim validation in the context of insurance coverage or reinsurance contract disputes and settlement agreements).

[227]See *supra* notes 199-203 and accompanying text.

analysis evaluates the number of plaintiff personal injury filings through epidemiological analysis of the disease in question, and takes into consideration personal experiences, as well as the mortality rates of claimants. It also examines average indemnity awards by disease and future trends in order to help insurance companies retain sufficient reserves for remaining solvent. Bottom up analysis involves the construction of databases of defendant experience by tier, and incorporates information such as number of filings and average indemnity by degrees of severity, as well as expense to indemnity ratios.[228]

As in the formulation of settlement grids, such forecasts adopt a routinized accounting of individual factors in assessments of claim viability and value. Forecasts comprise an estimation of number of people ever exposed to asbestos, as well as the rate at which they sue (as well as the causes for the rate).[229] Thus one part of any analysis involves exposure—often carried out by epidemiologist, demographers, and even dermatologists—in order evaluate the causes and distribution of diseases.[230] Next, the rate at which individual subsets sue is extrapolated, as well as their probability of success. Factors include duration of exposure, age of the plaintiff, and smoking habits. Elderly patients usually receive lower awards in settlement given their shorter life expectancy relative to other claimants. Similarly, smokers will be less likely to successfully make out lung cancer claims against an asbestos defendant because of a belief that they bear some responsibility for the disease.[231]

Such claims evaluations processes are the contemporary elaboration of practices that actuaries were already doing for liability insurers in the mid twentieth century. More than fifty years ago, actuaries' estimates of insurers' exposure for the purposes of creating reserve funds were used as mechanisms for monitoring the work of

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[228]Angelina & Biggs, *supra* note 220.

[229]*Id.*

[230]NERA, PRODUCTS LIABILITY AND MASS TORTS VALUATION 4 (2004), at http://www.nera.com/wwt/publications/6501.pdf (noting how the company brings together specialists from disparate disciplines to provide its services).

[231]Frederick C. Dunbar, *Forecasting Mass Tort and Liability Claims* (2002), at http://www.mmc.com/frameset.php?embed=views2/spring02Dunbar.php (demonstrating forecasters quantify the cause-and-effect relationships of the principals in mass torts to make accurate predictions of future claims).

insurance claims adjusters.[232] Today, the often considerably more sophisticated forecasts of economists and consultants is readily available to the economists and consulting firms that work with defense lawyers during the claims valuation process. And though the forecasts are most often used to predict claims totals and aggregate exposure, they are regularly incorporated into claims and litigation strategies just as the claims reserves estimates shaped the settlement strategies of an earlier generation of insurance claims adjusters.[233]

In less dramatic fashion, routinization of claims management is also made possible on distinctly individual grounds by comparisons of jury verdicts throughout the country. Some of this is done by large consulting firms for their clients[234] – though it may also carried out by lawyers individually. The electronic reference guide "What's it Worth" provides through Lexis a wide range of data as to the market value of various injuries due to asbestos. Through this service, a plaintiff's lawyer can discover in a matter of seconds the various jury verdicts against defendants in, for example, asbestosis claims brought by working class carpenters and laborers. Short profiles then provide a baseline for appraisals of the value of individual claims at dispute.[235] In disseminating such information, these constantly updated electronic databases provide up-to-the minute information for lawyers in prosecuting their claims or defending their clients. They behave, in short, in a manner analogous to analysts for investment banks: they provide information for specialists to apply their expertise and make a "bid" or offer to which a counter-party responds.

Professional organizations further aid in the process of information dissemination. Where once individual entrepreneurs like Belli ran seminars for plaintiffs' lawyers, now Mealey's, a for-profit clearinghouse, offers seminars on asbestos litigation. Individual sessions

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[232] *See supra* notes __-__ and accompanying text.

[233] *See, e.g.,* NERA, *The Modern Mass Tort,* "M" MAGAZINE, spring, 2003, at http://www.nera.com/wwt/publications/5959.pdf (noting how two companies, Marsh and NERA, serve clients involved in mass torts by minimizing exposure with risk management and insurance solutions, as well as economic analysis that enables clients to develop litigation strategies).

[234] *See* NERA, *supra* note 227, at 5-6.

[235] Such an approach was presaged by Glen O. Robinson & Kenneth S. Anderson, *Collective Justice in Tort Law,* 78 Va. L. R. 1481, 1492 (1992) (recommending the use of statistical claim profiles to set baseline appraisals of the value of individual claims).

are devoted entirely to the valuation of claims, as well as to techniques that heighten plaintiffs' chances of success.[236] Results of the conference are then available for purchase nationwide to interested members of the bar.[237]

The same consulting firms that forecast claims also model the litigation decision process itself, and construct models comparing the costs and benefits to defendants of alternative litigation strategies.[238] Furthermore, the growth of claims management facilities on the defendant side has led to not only the reporting and analysis of claims, but also a one-stop resource for outsourced settlement negotiation online.[239] These administration services not only process claims, but also provide historical data reconciliation and conversions, thus providing defendants with their own baselines for monitoring claims, estimating their value, and preventing fraud.[240]

D. The Class Action as Hybrid Between Litigation and Administration

Although the claims settlement process in asbestos and other contemporary mass torts resembles in many respects the basic patterns of claims aggregation apparent from the very beginnings of American tort law, there are two critical differences. Significantly, neither of them emerges from either the fact of aggregation or the reality of settlement. Those are and have been the norms in any developed area of tort law.

First the class action confers a state created monopoly on representation.[241] In the historical examples of aggregation through market forces, legal barriers to entry for rivals in the market for representation were only partially realized. To be sure, many features of

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[236]See, e.g., Asbestos 101 Conference 2004, recorded at http://216.239.41.104/search?q=cache:y8I3o1LLYMQJ:www.mealeys.com/conferences/asb101_0204.pdf+asbestos+101&hl=en&ie=UTF-8.

[237]See MEALEY PUBLICATIONS AND CONFERENCES GROUP, MEALEY'S ASBESTOS 101 LITIGATION CONFERENCE AUDIOTAPE (Mealey Publications and Conferences Group 2002).

[238]*See* NERA, *supra* note 227.

[239]See, e.g., http://www.navigantconsulting.com/A559B1/navigant.nsf/fCNTDspMain?OpenForm&Cat1=Galt2&Cat2=Page6&Cat3=Sub1 (demonstrating the services provided by the Navigant claims facilities).

[240]*Id.*

[241]*See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation,* 148 U. Pa.. L. Rev. 2119 (2000).

legal practice created obstacles that impeded the free flow of information to potential claimants. For example, there are and have been prohibitions on lawyer advertising, or the identification of possible cases by claims runners, or the inability to incentivize private parties through fee-sharing agreements. Whether we examine the translators in immigrant factory communities or the consolidators of streetcar accidents, the market placed some (admittedly imperfect) constraints on agent opportunism. Too much collusion, too high a fee, and suddenly market rivals would appear. Unlike the coordination on the defense side through contract, the certification of a class confers exclusivity of representation on a non-contractual basis. The exclusivity of the class action, in turn, defeats the markets in mature claims that have so long characterized American tort law.[242]

In this light, the real insight of the Supreme Court's asbestos cases is not the invocation of individualized justice but the insistence in both *Amchem* and *Ortiz* on "structural assurances of fairness,"[243] something that would seem an odd concern were the Court really to have sought to restore individualized norms of representation. This focus on fairness rather than individuation helps to explain recent reforms such as securing a second chance to opt out of a proposed class action settlement.[244] It also reinforces the centrality of accountability and other governance norms as the key to the settlement class action.[245] The erosion of market checks on inadequate representation and the role of the state in conferring a binding structure formally align the settlement class action more closely to the administrative models than the sometimes robust, sometimes anemic, private tort markets of old.[246]

Second, the inability of many firms to internalize the costs of mass

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[242]Because of the potential for market alternatives, it is easier to fit even mass representation within a traditional attorney-client contractual relation than it is in class actions. See Nagareda, *supra* note 88, at 768 (although there may be "little or no supervision of plaintiffs' counsel by the client in mass representation, the consensual nature of the attorney-client relationship nonetheless is what gives aggregate settlements their legitimacy").

[243]*Amchem*, 521 U.S. at 595; *see also Ortiz*, 527 U.S at 855.

[244]See FED. R. CIV. P. 23(e)(3). See also John Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,* 100 Colum. L. Rev. 370 (2000) (giving theoretical account for why the opportunity for relational exit promotes agent loyalty).

[245]*See* Issacharoff, *supra* note 86; Nagareda, *supra* note 88.

[246]For attempts to impose models of administrative legitimacy on the settlement class, see Nagareda, *supra* note 88.

torts on a going forward basis requires settlements that close out liabilities for the future. It is therefore not surprising that the most difficult features of mass tort class actions deal with future claimants, whether as a matter of formal representation[247] or as a matter of ensuring sufficient reserves to pay latent claims.[248] Where solvency allows the firm to internalize future costs, creative governance mechanisms have salvaged the settlement class action, even in sweeping mass torts.[249] Where such internalization is not possible, as in asbestos, the picture is decidedly less rosy.

How the mass tort settlement class will ultimately be managed is beyond the scope of this Article. The historical record from the last century of practice in the area of mature torts, however, powerfully suggests that it will not be on the basis of individual claimants, individually represented, seeking their day in court. As Richard Nagareda aptly summarizes the world of the mature, mass harms in aggregated proceedings: "Transactions, not trials are overwhelmingly the endgame of class lawsuits."[250]

III. Conclusion

- Is aggregate settlement really inevitable? Well, no; one could imagine a legal system that would adopt more thoroughgoing controls over settlement. The great irony then is that aggregated settlements are inevitable in a system committed to litigant autonomy. Mass settlement structures emerge out of the play of precisely the private interests to which American tort law claims allegiance.

- So why the myth of individualism and the day in court ideal? Well, for one thing, the world of privatized aggregation and

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[247]521 U.S. at 627-29 (discussing inherent conflicts between current and future victims of asbestos-related disease and the need for separate representation).

[248]*See, e.g.*, the miscalculation in the Manville Trust and the diminution from paying 100 percent of assessed claim value to paying 5 percent. For an analysis of Amchem and Ortiz focusing on the futures issue as the critical failing in the proposed settlements, see Geoffrey C. Hazard, Jr., *The Futures Problem,* 148 U. Pa. L. Rev. 1901 (2000).

[249]*See* Nagareda, *supra* note 88.

[250]Richard A. Nagareda, *Administering Adequacy in Class Representation,* 82 Tex. L. Rev. 287, 289 (2003).

settlement we have described here exists outside of the universe of legal materials from which torts jurists have traditionally drawn their descriptions of the law of torts. Aggregated settlement happens virtually unseen and unobserved, in the darkest shadows – indeed, in the recesses – of the law of torts.

- But another important part of the explanation may be, paradoxically, the selling of corrective justice by entrepreneurial plaintiffs' and defense bar alike. They are both the parties that best understand how an evolved tort system functions, but who share an interest in securing client representation based on what, from the client's perspective, looks to be the resolution of a particular claim. Thus, it is striking that much of the evidence that can be gleaned about nineteenth and early twentieth century aggregation is to be found in cases on lawyer discipline: constituencies within the bar have had a vested interest in the day-in-court myth because it obstructs transaction-cost-minimizing reform.[251] There is a curious combination of institutional conservatism and self-interest that characterizes the response of the legal profession to institutional innovation. Perhaps the same impulse that has often united the defense and plaintiffs' bars in defeating efforts to replace the tort system with alternative arrangements, including comprehensive administrative measures such as auto no-fault systems,[252] may explain some of the resistance to recognizing formally how the press toward aggregation alters fundamentally the practice of law.

- Similarly, we see that it is vested interests in the bar that respond to the threat of public compensation systems by championing the "moral and ethical foundations"[253] of tort law, the "moral

[251] *See, e.g.*, the bar's attack on claims adjusting as unauthorized practice of law. See Raymond N. Caverly, *What Constitutes Practice of Law,* BEST'S INSURANCE NEWS, May 10, 1938, at 7.

[252] Edward C. Stone, *Compulsory Automobile Liability Insurance,* BEST'S INSURANCE NEWS, Feb. 10, 1927, at 283, 284; John Alan Appleman, *Jury Verdicts and Insurance Rates,* BEST'S INSURANCE NEWS, Oct. 1962, at 53, (insurance company lawyer defending the civil jury); Guy E. Mann, *Compensating Auto Accident Victims,* BEST'S INSURANCE NEWS, Dec. 1965, at 14.

[253] What Does the Future Hold?, 1 For the Defense 9, 10 (Apr. 1960).

principle"[254] of fault, and calling for the "preserve and maintain the very institution of trial practice itself,"[255] knowing full well that in practice the tort system looks a lot like a compensation regime.

- Torts jurists in the law schools and in the courts have for the most part either ignored, missed the significance of, or maybe even been unaware of the practices that animate the means by which tort law actually resolves the bulk of claims. They have drawn their understanding of the law of torts from formal, doctrinal sources that fail to appreciate the institutional settings through which tort law is practiced.

- Following the von Clausewitz-inspired idea of a leading claims adjuster from the middle of the twentieth century, we might even say that "adjusting stands in the same relation to law as politics to the art of war."[256] Aggregate claims settlement practices are tort law by other means.

[254]Justice in Court After the Accident, 9 For the Defense 11, 11 (Feb. 1968)

[255]Coordination of Defense Publications, 4 For the Defense 14, 14 (Feb. 1963)

[256]JOHNS, *supra* note 138, at 395.