Mass Torts

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Mass accidents have become a familiar incident of the modern way of life, a by-product of advancing technology in the production, distribution and use of toxic agents, dangerous pharmaceuticals, fast modern transport and other hazardous activities. A single type of product like asbestos or thalidomide, released on a mass market by one or numerous manufacturers, may inflict injury or disease on a vast multitude of consumers or their offspring. Or a single accident, like an aeroplane collision, explosion or escape of poison gas (Bhopal), may bring injury or death to thousands and dislocation to a whole region. The first is sometimes called a mass products case, the second a mass accident. Both entail injury to multiple victims and present adjudicatory problems very different from those faced in routine accidents. The traditional method of case-by-case adjudication and the applicable principles of substantive law, still largely based on an individualistic philosophy of "corrective justice" between man and man, is rather unequal to this challenge.

TWO ENGLISH CASES

Two mass product disasters have been conspicuous in English experience: thalidomide in the 1960's, Opren twenty-five years later.

Thalidomide (Contergan)[1]

Between 1958 and 1961, the Distillers Company manufactured and marketed under licence in the United Kingdom a drug developed by a small, upstart and aggressive German pharmaceutical firm, Chemie-Grünenthal. The drug was recommended as a non-barbiturate, atoxic sedative and, among others, was taken

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1. The best account, with special focus on the English scene, is by the *Sunday Times* Insight Team, *Suffer the Children: The Story of Thalidomide* (1979). Sjöström and Nielsson, *Thalidomide and the Power of the Drug Companies* (1972) deals also with litigation in other countries, including a summary of the German court's justification for terminating the criminal proceedings against officials of Chemie-Grünenthal. The latter is fully reported in [1971] *J.Z.* 507.

by women to counteract the strains of early pregnancy. By 1961 a number of newborn infants were born with no, or deformed, limbs, a condition which was linked to the drug about the same time by two gynaecologists, one in Australia, the other in Germany. Eventually some 450 victims emerged in Britain, altogether some 8,000 in thirty different countries. In England between 1962 and 1966 proceedings were commenced by the parents of 70 children, 65 of which were settled in 1968 on the basis that they receive 40% of what would have been recoverable if judgment had gone against the defendants.[2] The size of the reduction, far beyond a normal discount or settlement, was due, besides disputed fault in testing, to doubts whether the common law recognised a cause of action for pre-natal injury – doubts which, at a later stage of negotiations, were somewhat lessened by a favourable Australian decision[3] and, later yet, prospectively removed by the Congenital Disabilities (Civil Liability) Act 1976, one of the few lasting legacies of the thalidomide affair.

By 1969 Distillers had paid out some £1 million to 58 of the claimants. This left 389 other claims which had been started later but eventually qualified under the Limitation Act. By 1971 Distillers, as an act of grace, offered to set up a trust fund of £3¾ million (originally £2.5 million), spread over ten years. These terms were scathingly castigated by the *Sunday Times* in an attempt to arouse public indignation, but Distillers immediately sought an injunction against any discussion pending acceptance of the settlement terms on the ground that it constituted an attempt to interfere with the course of justice.[4] This legal manoeuvre, supported by the Attorneys-General of two successive governments, succeeded in stifling to the very end all factual information regarding the (inadequate) testing procedure by Distillers and their German licensors. It is an episode, far better remembered among lawyers, and certainly journalists, than any other aspect of the thalidomide litigation, because it involved an even more divisive issue – freedom of the press – and an eventual censure of the House of Lords by the European Court of Human Rights.[5]

At first, even discussion in Parliament was resisted by invoking the rule against debate on matters *sub judice*. The matter finally came up on a motion calling on Distillers to face up to their moral responsibility and for immediate legislation to establish a trust fund for the children. As a result of continuous agitation in the Press and pressure on and by the Government the settlement offer was in the end, *i.e.* after more than 10 years in the courts, increased to £20 million, estimated to be well above the full tort measure of damages.

2. *S.* v. *Distillers Co* [1970] 1 W.L.R. 114 (two representative actions to set a standard for assessing damages under the settlement).
3. *Watt* v. *Rama* [1972] V.R. 353.
4. *Att.-Gen.* v. *Times Newspapers* [1973] Q.B. 710; [1974] A.C. 273. The injunction was eventually discharged in 1976, shortly before the last four cases were settled.
5. *The Sunday Times* v. *U.K.* [1979] 2 E.H.R.R. 245.

Lessons

At least two major lessons emerge from this protracted saga. First, that the ultimate outcome was achieved not through the legal process but through extra-legal means. Second, that the outcome was not bottomed on principles of legal liability but on an overriding sense of justice.

The dismal failure of the legal process revealed several fundamental flaws in the ability of the English system to cope with effective personal injury litigation, especially of mass claims. It is a frequently voiced boast that the division of the English legal profession into solicitors and barristers tends to assure the most skilful representation of the client. Alas, this viewpoint focuses primarily on the choice of barrister and trivialises the role of the solicitor. Few solicitor firms, outside trade union solicitors, specialise in personal injury claims and acquire anything like the expertise and stamina necessary for energetic litigation. Also, litigation being less remunerative than conveyancing and other non-litigious work creates a temptation for less than a hundred per cent effort and, as Hazel Genn has shown, for cajoling clients into under-value settlements so as to get paid more quickly than in case of protracted proceedings. The original thalidomide claimants did not give careful consideration to the choice of a solicitor with the special expertise and experience their cases required, and there has been criticism of the way in which he dealt with the matter. This points to two critical failures of the afore-mentioned image of superior client representation. First, the choice of solicitor is a blind man's bluff in the absence of advertising or other facilities for identifying specialists in personal injury litigation. Fortunately, the intervening years have seen a great improvement in this regard, so much so that it has brought upon the Law Society angry complaint from the BMA.[6] Secondly, the critical task of assembling the evidence falls to the solicitor; the barrister may not even establish contact with witnesses prior to the trial and is therefore entirely dependent on, and may be handicapped by, the solicitor's preparation.[7]

The solicitor's task is aggravated by his inability under English procedure to obtain judicial assistance for discovery of evidence (other than of documents). Under American practice wide-scale discovery, including the deposition of adversaries and witnesses, is a routine procedure with the result that all relevent evidence available from all sources is likely to be known to both parties prior to trial. By contrast, the thalidomide defendants successfully employed every legal device to withhold information and forbade the use of information from other sources such as the contemporaneous German proceedings.

The illuminating forensic history of the thalidomide affair by the Insight team of the *Sunday Times*, *Suffer the Children*, contains a startling indictment of ineptitude

6. See *The Times*, 18 April 1988, protesting the Law Society's public call on would-be claimants to contact lead solicitors. A recent publication, *The Legal 500* (1988), addressed to potential solicitor recruits, contains information on firms specialising in personal injury work.

7. Defending that rule as ensuring the barrister's primary loyalty to the Court, is a letter by Mr Gray QC in *The Times*, 18 April 1988.

in the cause of the claimants. Nor was it confined to the matters already mentioned. The most egregious was the alleged pressure put on clients to accept the defendant's pusillanimous settlement offer which was conditioned on unanimous acceptance. This included the threat of loss of Legal Aid – an unpropitious model for current proposals to channel Legal Aid to a "lead team" in mass litigation.[8] The most troublesome aspect of this story is that these flaws are systemic and unlikely to be effectively remedied without radical reforms affecting the legal profession and legal procedure. It compares most unfavourably with American legal representation on behalf of tort claimants, conducted by specialised and publicity seeking plaintiff's attorneys driven by the incomparable incentive of the contingent fee. The current proposal, discussed later, for modifying Legal Aid can only marginally affect this comparison.

In summary, then, the eventual successful outcome for the thalidomide victims was achieved, not through but *notwithstanding* the legal process. It was due to the dedicated pursuit of a handful of doctors, scientists and reporters who ultimately succeeded in arousing public indignation through the media and Parliament, and forcing Distillers to capitulate to terms of social justice.

The second lesson was closely related to the first, *viz.* that the settlement did not reflect principles of tort law so much as superseding notions of social justice, consonant to the imprecation of the *Sunday Times* that "there are times when to insist on the letter of the law is as exposed to criticism as infringement of another's legal rights."[9] It will be recalled that the original settlement offer was discounted to 40% in part because of evidential uncertainties brought about in large measure by the defendant's own conduct. This blanket of information in particular obscured proof of the defendant's testing procedures and knowledge or suspicion of the drug's teratogenic potential, elements essential for proof of negligence. Beyond that lay the problem of a duty of care to the unborn, already alluded to. The only official response to the public indignation over the thalidomide tragedy (apart from a small grant to the trust fund in order to offset income tax) was the appointment of a Royal Commission, the Pearson Commission, to report on the general problem of *Civil Liability and Compensation for Personal Injury*. But though its Report in 1979 recommended, *inter alia*, the introduction of strict liability for harmful products to cover situations like thalidomide, it remained stillborn. When eventually strict liability was introduced, it was under compulsion of an EC Directive. Moreover, it was the British Government which insisted on the optional incorporation of a "development risk" defence[10] and further diluted that defence

8. Another, *horribile dictu*, was an attempt, foiled only by the Court of Appeal, to make the children of dissenters wards of the court and thus obtain judicial co-operation. See *Suffer the Children, supra* n.1, ch.11.

9. 24 September 1972. The writer had in mind that the defendant's last year profits were £64.8 millions and that its assets are worth £421 millions.

10. Allowing the defendant to plead that "the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to *enable* the existence of the defect to be discovered": Art. 7(e). The defence has not been adopted by the Francophone countries and the Netherlands.

in the course of enacting it into the domestic legislation of the Consumer Protection Act 1987.[11] Thus in the end, twenty-five years of soul searching have brought us little, if any, nearer to matching the law to popular expectations, and bode ill for any replay, heaven forbid, of the thalidomide tragedy. A recurring refrain calls for no-fault compensation for dangerous drugs, such as was put into place in Sweden and Germany in the aftermath of thalidomide.[12] But why, it has been asked, stop at drugs and not extend the programme to all products; indeed, having regard to need, why differentiate between any causes of injury for accident, or, better still, between incapacity from whatever source?[13]

Opren

Once again a licensed drug, developed abroad, for dealing with arthritic disease was withdrawn from the American and British markets amidst accusations that it caused serious side effects, including even death. The American manufacturers denied responsibility, contending that all but 30 among 1,300 British claimants suffered symptoms not attributable to the drug and that these and others were caused by excessive doses being prescribed. Attempts by 450 British claimants to have their cases tried in Indiana, headquarters of the manufacturer Eli Lilly, were rejected by an Indiana court in 1983 on grounds of *forum non conveniens*. Last year Eli Lilly offered a settlement of £2¼ million for the 1,200 odd surviving claimants, which was harshly attacked by their lawyers and the media on grounds both of the defendant's profitability and the "grotesque disparity" in the treatment of American and British claimants, the former being paid "gigantic sums" including a $6 million verdict, while the latter were receiving an everage of only $1,800.[14]

Conspicuous in the Opren controversy was the impecuniosity of many claimants, which at one time threatened abandoning their claims[15] until a good fairy in the shape of Mr Godfrey Bradman came to their rescue.[16] Their plight emphasized the failure of the Legal Aid system to ensure access to justice for that vast portion of the population who were just above the poverty line but lacked the resources to pursue claims in lengthy litigation with a risk, in case of failure, of having to pay the fees not only of their own lawyers but also the defendant's. Indeed, even plaintiffs under legal aid have to face the risk of having to bear a, for them, frightening percentage of legal costs.[17]

11. Section 5(e): ". . . was not such that a producer . . . might be *expected* to have discovered". This version is currently being contested by the E.C. Commission.
12. See Fleming, "Drug Injury Compensation Plants", 30 *Am. J. Comp. L.*297 (1982).
13. See Stapleton, *Disease and the Compensation Debate* (1986).
14. *Times*, 11 December 1987.
15. This was precipitated by a ruling (C.A.) requested by the Government, that the legal costs would have to be borne *per capita* by all claimants, including those not qualifying for Legal Aid: see *Law Magazine*, 12 June 1987.
16. See *Law Magazine*, 26 June 1987.
17. Say, 10 per cent of an estimated £1.5 million in the whooping cough vaccine litigation. Total costs were estimated at £5 million: *Law Magazine*, 2 October 1987. Successful plaintiffs do not derive any benefit from Legal Aid because the residue of legal costs (after the costs taxed against the defendant) are retained by Legal Aid out of the award: see *Davies* v. *Eli Lilly & Co.* [1987] 1 W.L.R. 1136, at p.1140 ("Legal Aid helps those who lose cases, not those who win them": *per* Lord Donaldson M.R.).

Their condition compared, in the view of media commentators, very unfavourably with that of American claimants. The latter had – so they said – the advantage, first of all, of strict products liability. In reality, the more difficult hurdle was that of causation, from proof of which strict liability would no more exempt claimants than a regime of fault liability. We shall see later how American law has sought to ease that burden. In any event, a more significant advantage enjoyed by American litigants was the availability of the contingent fee, hailed as "the key of the door to the courthouse". Under what Goodhart has called the "American rule", each litigant bears his own lawyer's fees and there is no fee shifting from victor to loser. Moreover, in tort cases, the plaintiff does not even have to pay his own lawyer if he loses, the risk being thus borne by the attorney rather than his client. Since individual plaintiffs are generally risk averse, if not altogether unable to pay legal fees, this arrangement removes the fearful consequences of losing their case, and indeed provides a partial explanation for American litigiousness and a greater willingness to pursue marginal causes. There is, of course, a price to be paid: if successful, the plaintiff's lawyer becomes entitled to a portion of the award – one third to one half – in order to remunerate him for his efforts in this and other, unsuccessful cases. Thus, in a sense, the successful litigant subsidised the unsuccessful; the lawyer, for his part, is an entrepreneur who can evaluate the odds and spread the risk among a larger number of clients.[18]

For several reasons, the most cogent being tradition, the contingent fee has been condemned in England (and many other countries) as champerty, in company with such other un-Christian vices as usury and gambling. Quite frankly, access to justice has not traditionally ranked as an important social goal in this country. Not only is actual litigation deplored and discouraged, but the very pursuit of legal claims is viewed with ambivalence. This has borne down hardest on the low-income classes and accounts for the systemic (even systematic) denial of justice for tortious injuries during the nineteenth century and beyond. In order to correct this historic injustice the *Times* leader writer, among others, therefore advocated the "careful" introduction of contingent fees, especially in cases such as Opren: "it was reasonable to ask lawyers to share some of the risks; their advice would be none the worse for it", and "it would be a mistake to regard ['the ambulance chasing' lawyer] as the complete refutation of the principle on which the system is based."[19]

Some years ago *Justice*, the association of reform-minded lawyers, unsuccessfully argued for a modified version of contingent fees in its submission to the Royal Commission on Legal Services.[20] A more propitious time was now when the clamour over Opren had aroused public concern.[21] This was a mass tort with

18. See Fleming, *The American Tort Process* (1988), ch.6.
19. *Times*, 16 December 1987.
20. *Justice, Lawyers and the Legal System: A Critique of Legal Services in England and Wales* (1977). See White, "Contingent Fees: A Supplement to Legal Aid?" 41 *M.L.R.* 286 (1978).
21. See my article "How Enterprising Lawyers Could Help the Less Well Off", *Financial Times*, 11 March 1988.

more than a thousand plaintiffs. If, instead of handling each claim as a separate unit, they could be aggregated as in an American class action, and a team of lead counsel could represent the whole class before the court, considerable economies could be achieved and legal aid, funnelled to that team, be afforded for the benefit of all. This was the new proposal of the Law Society to which in substance the Lord Chancellor gave his blessing in an amendment to the Legal Aid Bill last February.[22] Procedural changes on the lines of a class action, he added, could be accomplished without legislation by Rules of Court. We shall try presently to see what can be learned from American experience in such aggregated proceedings. In any event, it is doubtful if such a reform would have produced a different and more satisfactory resolution of the Opren litigation.

On 9 December 1987, Hirst J took the unusual step of canvassing in open court the terms of a settlement reached by the six leading firms of solicitors representing the main body of plaintiffs and Eli Lilly's solicitors, with the agreement also of the Government defendants, the Committee on Safety of Medicine and the licensing authority.[23] After stating that the Court was neutral, Hirst J urged all plaintiffs in the strongest terms to accede lest the settlement break down, and warned that their legal aid might otherwise be discontinued. You will recall a similar episode when the lead counsel for the thalidomide plaintiffs made the same point in order to corral all into a unanimous settlement. This tactic raised not only serious concern on the early occasion about counsels' conflict of interest but also the larger question whether legal aid does not unduly subordinate the interest of individual litigants to administrative efficiency and what is perceived to be the best interest of the group as a whole. This problem would become endemic under the contemplated modification of legal aid in multi-plaintiff litigation, where all claimants are represented by only one legal team. Does such a team owe loyalty to each of its many clients? In the United States critics of class actions, among them many plaintiff's lawyers, raise the same objections, though they are often suspected of concern more for their own fees than their clients' welfare.

THE AMERICAN EXPERIENCE

Class actions

In the light of American experience,[24] English advocates of class actions may be promising themselves too much. Those responsible for the introduction of class actions by the Federal Rules of Civil Procedure in the mid-1960's did not contemplate their application to tort litigation at all. Their principal reason was that tort claims even in mass accidents were unlikely to satisfy one of the essential conditions for class certification, *viz.* commonality, because damages vary with each plaintiff and are central to their claim. Even more, in mass product disasters causation looms large and offers few, even subsidiary, common issues. To revert to

22. *Davies* v. *Eli Lilly & Co.*, *N.L.J.* Law Rep., 18 December 1987, p.1183.
24. See in more detail Fleming, *supra* n.18, ch.7.

the Opren case by way of illustration, even if the drug was *capable* of causing any of the harmful effects complained of, the question whether it *actually caused* them in each individual case would depend on numerous individualistic factors varying with each patient, such as that his or her deteriorating vision might have been the result of the synergistic effect of other drugs or of consuming excessive doses or just of ageing, not unnatural with a group of arthritic patients. Thus, only a negative answer to the only common issue, *viz.* was the drug *capable* of causing any of the injuries, could have disposed of all claims *uno ictu* (in one blow) as indeed it did in the recent whooping cough test action.[25]

Another reason for regarding class action treatment as unsuitable for tort claims is that its primary purpose is to make claims for minor losses, which individually would not be worth pursuing, viable when aggravated by numerous plaintiffs, such for example as systematic overcharging of interest by credit card issuers or discriminatory practices in employment or leasing. Class actions for such "non-viable, irrecoverable" claims provide an incentive for private law enforcement of social policies and thus occupy a place along with punitive damages and fee shifting (allowing recovery of legal costs, including attorney fees, from the loser as an exception to the general rule). By contrast, tort claims are usually sufficiently substantial in amount to attract lawyers on a contingent fee and can therefore be left to their own devices.

American appellate courts have therefore hitherto given no encouragement to certification of class tort actions, to the chagrin of many trial judges overwhelmed with a flood of claimants and the discordant voices of their lawyers, many of whom have reason to dislike class actions because it will adversely affect their fees unless they participate as lead attorneys. More official support has been forthcoming for class actions under a different qualification, *viz.* where a common fund is inadequate to satisfy all claims, as where the defendant's assets are liable to be exhausted by successive awards of punitive damages and late-comers are at risk of recovering nothing. Notably, it is only in this category that all claimants, willy nilly, can be forced into a class action; in cases of commonality so-called "opting-out" must be tolerated for constitutional and other technical reasons.

As a result, almost all the spectacular mass tort trials in the United States have relied on other than class action certification. Only in the *Agent Orange* case, among the more conspicuous mass tort cases, was the trial judge's certification of a class action upheld on appeal; I will later return to other, far more dramatic innovations engineered by the redoubtable Judge Weinstein in the course of ultimately putting a painful and controversial settlement to bed.

The most common aggregative proceeding is the consolidation of claims, especially by multi-district panels which can assign claims from federal registries all over the country to a single judge for pre-trial disposition. This includes not only the broad-range discovery possible under American procedure (thereby

25. See *In re Paris Aircraft Crash of March 3, 1974*, 399 F. Supp. 732 (D.C. Cal. 1975).

saving a great deal of duplication), but extends also to motions on the pleadings and even of summary judgment on particular issues, such as choice of law. Indeed in practice, it almost invariably culminates in a settlement into which the judge cajoles the more or less reluctant attorneys and their clients. A paradigm is the Turkish airline litigation before the late Judge Pierson M. Hall, a highly experienced aviation judge.[26] Thus, just as in England,[27] consolidation accompanied by one or more test trials on an issue of law or damages and followed by settlement remains the usual mode of disposition of mass tort claims.

Another procedural device, first attempted by the Johns-Manville Corporation in coping with asbestos claims,[28] and later followed by the A. H. Robbins Co., manufacturer of the Dalkon Shield,[29] is to seek shelter under Chapter 11 of the Bankruptcy Act. This permits corporate reorganisation where creditors' claims exceed the resources of the enterprise but it is in the creditors' interest to encourage its continued functioning in order to obtain additional compensation out of future profits.

Burden of proof

One of the most frequent difficulties encountered in mass accident cases relates to proof of causality. It has two aspects. First, there is the problem of the indeterminate defendant. It is often unclear which of several manufacturers of, say, a drug produced the particular unit of the product that harmed the plaintiff. The generic character of the product, the inconspicuousness of the exposure event, and the long latency period frequently prevent precise identification of the responsible manufacturer. Secondly, there is the problem of the indeterminate plaintiff. Especially in pollution cases, the plaintiff can often rely only on general statistical information to suggest that the defendant's emission merely increased the number of sufferers beyond those who could have contracted the disease in any event from other human agents or perhaps legally non-responsible background risks. Does this sufficiently identify the plaintiff as one injured, rather than merely threatened, by the defendant?

The traditional requirement that the plaintiff prove causality against each defendant on a balance of probabilities reflects our notions of procedural fairness in the individualized confrontation typical of random accidents. It is argued, however, that this "rule is neither rational nor a just means of resolving the systematic causal indeterminacy presented by mass exposure cases."[30]

27. One of the earliest sensational test actions arose from the Thetis submarine disaster in which 99 lives were lost (see *Duncan* v. *Cammell Laird* [1942] A.C.264). Recent examples are *Thompson v. Smiths Ship Repairers* [1984] Q.B.450, involving more than 20,000 claimants for loss of hearing in shipbuilding work, and *Loveday* v. *Wellcome Foundation, supra* n.25, the whooping cough case.
28. See Hensler, Felstiner, Selvin and Ebener, *Asbestos in the Courts: the Challenge of Mass Toxic Torts* (Rand Corp. 1985).
29. See Mintz, *At Any Cost: Corporate Greed, Women and the Dalkon Shield* (1985).
30. Rosenberg, "The Causal Connection in Mass Exposure Cases: a 'Public Law' Vision of the Tort System", 97 *Harv. L. Rev.* 849, at p.858 (1984).

This postulate calls essentially for modification of conventional substantive law in order to exploit the procedural advantages of class actions in mass tort cases. To what extent has substantive law in America already bent to this challenge?

1. The Indeterminate Defendant

Modifications of the conventional rule, which places the burden of proof on the plaintiff to identify which one among a group of potential culprits was responsible for his injury, have actually preceded the advent of class actions. Most of these emanated from California, and especially the more radical of them have not, at least not yet, been widely followed elsewhere. While the earlier cases involved random accidents, the problem is destined for a more prominent role in products liability claims involving design defects, as already shown by the DES, Agent Orange and asbestos cases.

Alternative liability

The earliest, so-called "alternative liability", theory originated in the case of *Summers* v. *Tice*[31] where two hunters, using shotguns, fired simultaneously in the direction of the plaintiff, one shot putting out his eye. The court reversed the conventional burden of proof, holding that where a single injury has been inflicted by one or the other of two negligent defendants, but the plaintiff cannot prove which one, it was for each of them to exculpate himself by establishing on a balance of probabilities that he was not the one. The rationale of this decision was that the equities between an innocent plaintiff and two negligent defendants, each one of whom could have caused his injury, favour placing the risk of proof uncertainty on the latter.[32]

It has been questioned whether this principle should be confined to two defendants, in which case the odds on either one's being the culprit are 50:50. Contribution could ensure that each bore 50 per cent of the loss, so that the extent of each one's liability would in effect reflect the probability of his having caused the injury. While we are in general reluctant to accept statistical proof of culpability, particularly on the question of identification, those concerns have much less weight in application to defendants whose negligence has once been established. Moreover, matching the extent of liability to the degree of probable causation is an accepted rule for assessing damages for future contingencies.[33] Thus the chance of future arthritis or epilpesy, even if less than "more probable than not" (51 per cent?), justifies an award, not for 100 per cent, but for the discounted value of its probability (which may be more or less than 50 per cent). Applying the same

31. 33 Cal.2d 80, 199 P.2d 1 (1948); followed by the Supreme Court of Canada in *Cook* v. *Lewis* [1951] S.C.R.830.

32. *Restatement, Torts, Second* S433B (1965). This principle has been repeatedly applied in chain collision and water pollution cases. It is also behind cases which shift the burden of proof to a negligent tortfeasor to show for how much of the damage he is not responsible.

33. This is well established in English law: see Fleming, *The Law of Torts* 7th ed. (1987), at p.206. Not so well in American Law: see King, "Causation, Valuation and Chance", 90 *Yale L.J.* 1353 (1981).

rationale to proof, uncertainty on causation – both with respect to the question of whether it would have made a difference had the defendant been careful[34] and to the present question of which one of several negligent actors caused the injury – is therefore not as great a departure from conventional premises as might have first appeared.

On the other hand, the principle would not reach to cases where the alternative cause or causes are of innocent origin as in *Wilsher* v. *Essex Area Health Authority*.[35] That was the case of a prematurely born infant suffering from various illnesses including oxygen deficiency. While in intensive care he was negligently given excessive oxygen and later discovered to be suffering from damaged retinas, a condition that could have had other causes. The House of Lords refused to shift the burden of proof to the defendant on the issue of causation as the lower courts had done, merely because the defendant's negligence had entailed a substantial risk of being responsible. That this decision, though couched in rather conservative terms, does not foreclose a different result when the alternative causes are all of negligent origin could look for support to another pair of cases[36] whose compatibility rests on just such a distinction in the context of "superseding causation". Whether it will is a question raised in a pending appeal to the Lords in a case where the plaintiff suffered tetraplegia after being struck successively by two negligent drivers.[37]

Market share

The most innovative theory to date was launched by the California Court in *Sindell* v. *Abbott Laboratories*.[38] Having rejected all the preceding precedents, including that of joint enterprise, as unsuitable for application against the more than 300 manufacturers of DES because they would have exposed each of them to joint and several liability for every injury caused by a "defective"genetic drug, the Court discerned a more equitable solution in limiting each manufacturer's liability merely to its market share. That way, when all claims had been satisfied, no one defendant would have had to pay for more injuries than were statistically attributable to him.

A number of objections have been raised against this solution. Perhaps the most formidable is that it departs from the prior art not merely by lacking all precedent but by being incompatible with the traditional notion of tort as a system of individual responsibility. This was not corrective but distributive justice. Allocation of responsibility was based no longer on proof of particular but of statistical causation. Despite the Court's disavowal, this was indeed an

34. However, the House of Lords have recently declined to do so: *Wilsher* v. *Essex A.H.A.* [1988] 2 W.L.R. 557; see also *Kay* v. *Ayrshire & Arran H.B.* [1987] 2 All E.R. 417 (H.L.).
35. *Supra* n.34.
36. *Jobling* v. *Associated Dairies* [1982] A.C.794; *Baker* v. *Willoughby* [1970] A.C.467.
37. 26 Cal.3d 588, 607 P.2d 924 (1980).
38. See *Fitzgerald* v. *Lane* [1987] Q.B.781 (C.A.).

industry-wide liability. Even if defensible in terms of economic efficiency,[39] it did not conform to basic notions of individual justice.

Secondly, the assumption that all would work out at the end of the day was wishful thinking. The Court was content with the plaintiff's joining the manufacturers of a "substantial share" of the DES market, apparently viewing even 70/80 per cent as too ambitious. Moreover, it was left uncertain whether a plaintiff could still collect the whole of his judgment from any one defendant or was limited to the latter's market share. In the first eventuality, the cost of securing contribution and the risk of insolvency beyond his own share would still be borne by each defendant. How does this really differ from solitary liability except insofar as contribution will be regulated by reference to market share rather than other possible criteria of responsibility?

The Indeterminate Plaintiff

In the preceding situations the plaintiff knew that he had suffered injury as a result of another's tort but did not know precisely whose. This, the problem of the indeterminate *defendant*, has its converse image in situations where the claimant is one of several victims, only some of whom have been injured by a single tortfeasor, but who are unable to say which one among them. To illustrate this, the problem of the indeterminate *plaintiff*, suppose she is one of a group of persons exposed to a toxic emission from the defendant, but the same symptoms also emanate from independent "background risks". For example, in the *Nevada Nuclear Explosion* case the plaintiffs could point to a strong positive association between their cancer and exposure to ionizing radiation, but their cancer was indistinguishable from that also prevalent and attributable to unknown causes.[40] Similarly, in the *Agent Orange* case, dioxin was present in the Vietnam countryside besides the amount in the defoliant used by the US forces, procured from seven identified American chemical companies.[41]

Typically, the association of the injury with the defendant's activity rests on statistical rather than specific (anecdotal) evidence. Thus the evidence may show that, after the defendant's emission, the incidence of the particular disease rose from 100 to 190 for a given population. Here, doubts about statistical proof are compounded by the fact that it does not even tip the balance of probabilities, *i.e.* 50 per cent plus. In the wake of *Sindell*, proposals have been made to apply a mirror-image solution to the instant problem so that the defendant would be held responsible for, and the plaintiffs as a group could recover, 9/19 of their injuries.[42]

39. See Calabresi, "Concerning Cause and the Law of Torts", 43 *U.Chi.L.Rev.* 69 (1973), especially at pp.84-91.
40. *Allen* v. *U.S.* 588 F.Supp. 247 (D.Utah 1984). The same applies to adverse reactions from many drugs, without any clear distinction between iatrogenic and spontaneous illness: see Newdick, "Strict Liability for Defective Drugs in the Pharmaceutical Industry", (1985) 101 *L.Q.R.* 405, at pp.420-30.
41. In re *"Agent Orange" Product Liability Litigation* 597 F.Supp.740 (E.D.N.Y. 1984).
42. Delgado, "Beyond Sindell: Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs", 70 *Calif. L. Rev.* 881 (1982).

The proposed formula would exact from the defendant an amount precisely proportioned to his share of responsibility for the total incidence of the disease in the area. Besides loss spreading, it would promote deterrence and economic efficiency by internalizing the accident cost to the enterprise that is in the best position to reduce accidents and pass on the cost to its beneficiaries by means of insurance and higher prices.

Rather less satisfactory is the solution at the plaintiffs' end. Proportional recovery, by which each member of the class is compensated in proportion to the damages sustained by the class as a whole, undercompensates some (90 in the preceding example) and overcompensates others (100). But this is still better, so it is contended, than either to compensate none or to compensate all for the full amount of their injuries.

The first to adopt this rationale was the ever innovative Judge Weinstein, in certifying *Agent Orange* for class action treatment.[43] The departure from traditional concepts, propounded in *Agent Orange*, is indeed manifold and startling. On the basis of mere statistical evidence of a product's propensity for injury, it sanctions a cause of action by unidentified plaintiffs against unidentified defendants without specific proof of the defective nature of the product or of its having caused injury to a particular plaintiff. In short, most elements of products liability have been collapsed into mere statistical proof of causation.[44] While it is true that, strictly speaking, the Court's reasoning related only to the fairness of the settlement, it sought approval for an approach to liability that would sever most links to traditional tort principles.

Afterthought

The prospect of enlisting class actions for the radical solution of social problems envisaged by these proposals enjoys far from universal support. For even if the goals are worthy, to entrust such drastic legal change to a selection of activist judges instead of to the traditional venue for political decision in a democracy challenges accepted constitutional understandings. The distance separating these perspectives is nowhere more strikingly illustrated than by the justification for the *Agent Orange* settlement enforced by Judge Weinstein:

> "Even though the evidence presented to the court to date suggests that the case is without merit, the testimony of almost 500 witnesses undoubtedly did serve once again to bring to the public's attention how unfairly Vietnam veterans have been treated. They have been abused, rejected and humiliated after serving bravely. Their voices should be heeded by the government and public for whom they fought . . .

43. *Supra* n.40.
44. Sherman, "Agent Orange Problem and the Problem of the Indeterminate Plaintiff", 52 *Brooklyn L. Rev.* 369 (1986), at p.390.

> Whether or not that pain was caused by *Agent Orange*, it is shared by a disproportionately large number of Vietnam veterans. They and their families should receive recognition, medical treatment and financial support . . . The public received the 'benefit' of combat service and should help to defray the cost . . .
>
> Our country is rich in public and private resources of every kind. Those resources should be made available to members of the class."[45]

This statement not only turns its back on any dichotomy between principle and policy in judicial decision making, but invokes a goal of social psychology as justification for wealth re-distribution, far removed from any conventional objective of accident compensation policy, let alone of tort law. One might be tempted to dismiss this scenario as but illustrating the jazzy strain of American jurisprudence, but should be chastened by the memory that the thalidomide settlement also fell well beyond the "shadow of the law", though lacking so indiscreet a spokesman.

Mass litigation is not the only solution for mass accidents. Whether the procedure is individualized or aggregative, the tort system reveals its inefficiencies in starkest colour in dealing with mass claims. The funds available for compensation are limited by the resources of the defendants, including liability insurance cover. That even industrial giants can be driven into bankruptcy has been translated from rhetoric to reality in the wake of the asbestos litigation. The most depressing feature is that the exorbitant cost of administering the tort system not only threatens the survival of industries peculiarly exposed to risk of mass claims, like the pharmaceutical and chemical industries, but depletes the available funds for compensating victims by staggering litigation costs. To the extent that traditional rules are already being modified in order to facilitate recovery by victims, the tort system is being distorted, even superseded. If the conventional tort law is thus proving itself inadequate to the task, should we not, instead of merely tinkering with it, consider the more radical solution of entirely replacing it by a compensation scheme?

45. *Supra* n.39, at pp.857-58.