

## Keynote Address

# COMPENSATING LARGE NUMBERS OF PEOPLE FOR INFLICTED HARMS

JACK B. WEINSTEIN\*

This conference was appropriately set at Geneva, just a few miles from the great collider at CERN where cosmologists and physicists are testing the theory that ours is only one of many side-by-side universes with far more than three dimensions, operating particularly on gravitons in the company of quarks.<sup>1</sup> Perhaps in civil procedure too, we live in separate universes—but, we can visit with each other and perhaps find commonalities.

The message is, “Open up your minds, almost anything is possible.” I will emphasize the universe I know best, that of the United States.

Acts by individuals and entities sometimes have adverse impacts on many people. Globalization and changes in technology increase hazards and a growing nucleus of potential litigants.

Shall the resulting damages be compensated by those who create the harm? How? Should large groups of injured be treated differently from those persons hurt in individual occurrences?

What substantive laws should apply? Can one substantive law control cases arising in many states and nations? On what theory can a useful conflict of laws rule be developed for group litigations?

What courts or administrative bodies should have competence? Plaintiffs usually have a wide choice of venue. Preemption and other considerations may reduce those options. Should they? How?

Which prospective defendants should be subject to jurisdiction? The laws of personal jurisdiction vary widely. Many countries would

---

Copyright © 2001 by Jack B. Weinstein.

\* United States Senior District Judge. This paper is a slight modification of the keynote address at the Conference on Group Litigation in Comparative Perspective sponsored by the Duke University School of Law and the University of Geneva Faculty of Law, Geneva, Switzerland, July 21-22, 2000.

1. See Nima Arkani-Hamed et al., *The Universe's Unseen Dimensions*, SCIENTIFIC AMERICAN, Aug. 2000, at 62.

reject, for example, United States “tag jurisdiction.” Should treaties (now developing) or rules permit one tribunal to bind all possible parties<sup>2</sup>—plaintiff and defendant, those whose injuries are already manifest and those who will learn of them in the future? What should those personal jurisdiction rules be?

Are there procedures capable of handling such large aggregations of claims and parties fairly and speedily? What are they?

Each of our countries gives different answers to these questions. Even within the United States more than fifty sovereignties, federal and state, result in almost unimaginable complexities in mass adjudications.

We have created practices through class actions, consolidations, transfers of cases, cooperation among courts, mass merchandising of lawyers’ services so one law firm may control and dispose of more than ten thousand cases at a time, and settlement techniques that may prove of some interest at this conference. Whether any part of our exotic practice can or should take root elsewhere is not apparent.

Put aside for the moment the procedural problems in juridically finalizing a settlement or trial in U.S. courts of a school desegregation case, the “slave laborers” cases,<sup>3</sup> the human rights cases of the Philippines,<sup>4</sup> or the holocaust victims’ assets cases.<sup>5</sup> Turn to a, by comparison, banal example of future litigations.

Assume a popular unregulated herbal supplement is being manufactured by companies in many states and countries. Some produce and sell only locally. Others operate nationally and internationally. Distributors use worldwide internet, television, and other forms of

---

2. See, e.g., Lawrence W. Newman, *Disputes with Foreign States*, N.Y. L.J., Oct. 30, 2000, at 3 (noting recent trend to reduce the scope of sovereign immunity, which has “manifested itself in the arbitration context, as private parties investing in foreign countries have been afforded, by way of investment and other treaties, the right to bring arbitration proceedings against foreign countries for violations of obligations under those treaties”); see also Michael Goldharber & Michael J.N. Bowles, *The Court That Came in from the Cold*, THE AMERICAN LAWYER 101 (noting the increased presence of American lawyers in international arbitrations, which is driven, ironically, “by the decline of the American hegemony”).

3. See, e.g., Edmund L. Andrews, *Germans Sign Agreement to Pay Forced Laborers of Nazi Era*, N.Y. TIMES, July 18, 2000, at A3; *Romanian Gypsies Wait for Slave-Labor Payment*, N.Y. TIMES, July 15, 2000, at A4.

4. See *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996) (permitting jury to hear compensatory damages claims brought by class of political opponents of Ferdinand Marcos who allegedly suffered human rights abuses at his behest).

5. See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (approving settlement agreement which called for the payment of \$1.25 billion by two leading Swiss banks to a class of Holocaust victims).

merchandising. Some foreign companies (and their holding companies) sell in very small quantities in each of many states in the United States. Purchases can be made online directly from the manufacturer and in almost any drug store. Brand names are used, but “The Product” is generic. Telephone, internet, and credit card orders utilize satellites, and electronic bank transfers settle accounts, mainly through New York, London, Zurich, and Tokyo. Suddenly, there are indications that the product has serious adverse effects.

An action is brought on behalf of plaintiffs from all over the world (with lots more to come) against distributors and manufacturers in a New York Federal District Court. Were this, as I assume, an action not based on federal substantive law, there would be no diversity jurisdiction for named plaintiffs from some of the states; they could not join the action except as non-named parties in a class action.

U.S. courts strongly attract such global disputes.<sup>6</sup> This magnetism is due to four factors. First, our procedural and jurisdictional rules are in general helpful to plaintiffs (and our judges are likely to be independent). Second, our courts tends to award high money judgments. Third, the substantive law tends to favor plaintiffs; recently for example, Canada sued in an American court for tobacco related damages because of treble damages available under our federal racketeering law and stronger fraud provisions,<sup>7</sup> and, of course, there is the possibility of almost limitless punitive damages. Fourth, there is a powerful plaintiffs’ bar capable of financing and prosecuting these cases.

Nevertheless, our federal system creates special problems in efficiently resolving a mass dispute in one court. Congress and the courts are reluctant to recognize that a new world economic and technologi-

---

6. See, e.g., David Rhode, *Jury in New York Orders Bosnian Serb to Pay Billions*, N.Y. TIMES, Sept. 26, 2000, at A10 (“A jury in federal court in Manhattan. . . ordered Radovan Karadzic, the former Bosnian Serb wartime leader, to pay \$4.5 billion in damages to victims of rape, torture and genocide”); cf. Sean Farrell, *U.K. Group Actions Don’t Pay Like U.S. Class Actions*, NAT’L L.J. July 10, 2000, at B20 (“The scope for multiparty actions in England is far more limited than it is in the United States. For a start, class actions are not allowed.”). But cf. Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 2 CLASS ACTION LITIGATION REPORT 362 (May 2001) (criticizing this tendency to disregard limits other nations may have on litigation); Mark Ballard, *Foreign Firms Get New Appeal Right, Panel rules NAFTA shield covers Canadian, Mexican gripes about U.S. verdicts*, NAT’L L.J., May 19, 2001, at 1.

7. See Julian Beltrame & Gordon Fairclough, *Canada Accuses R.J. Reynolds Tobacco of Smuggling Plot, Sues for \$1 Billion*, WALL ST. J., Dec. 22, 1999, at B2.

cal order requires some rethinking of our narrow jurisdiction and choice of law shibboleths.

Disasters such as those sketched in the hypothetical, be they chemicals in the Danube, an explosion of an atomic electric plant, extensive human rights deprivations, securities frauds, or individually imbibed pharmaceutical poisons, know no national boundaries.<sup>8</sup> How should we handle them?

Along with issues of choice of substantive law, tribunal competence, personal jurisdiction, and appropriate venue, there are abstruse difficulties in factual determinations, particularly those dealing with science. How can the plaintiffs prove general and specific causation in the hypothetical? What discovery procedures should be available? National and international pools of scientists may well be needed. Some in France have called for an international world scientific body to resolve disputes such as whether hormones in U.S. beef are carcinogenic or DNA modifications in grain are harmful. The German system and our *Daubert* pretrial expert gatekeeping hearings or appointments of expert panels may prove useful in such litigation.

How, within the rule of law, can we promptly make whole the many who have suffered as a result of acts of others? We need to try to deter such events in the future as well as compensate the injured promptly. We need to try to avoid destroying whole industries. We need to try to reduce transaction costs and burdens on our judicial structures.

Underlying the inquiry is a fundamental issue: how should we compensate the injured? We can:

1. Ignore them and leave them to their extended families or private charity on the theory that their suffering is simply the cost of living in a modern society. This will not be acceptable in a relatively wealthy western democracy;
2. Provide a full social welfare system. Most countries are moving away from this solution as too burdensome for the nation; or

---

8. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal and Tort Law*, Address Before the University of Illinois Law School (Oct. 17, 2000) in 2001 U. ILL. L. REV. (forthcoming 2001); Jack B. Weinstein, *The Restatement of Torts and the Courts*, 54 VAND. L. REV. 1, 5 (2001); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145, 154-55 (2001); see also Michael Tigar, *Justice isn't local anymore*, NAT'L L.J., June 12, 2000, at A21.

3. Combine some mix of public welfare, private assistance as by workers' compensation, and court, administrative, and alternative dispute resolution (ADR) remedies.

### I. INDIVIDUAL COURT ACTIONS

The United States relies heavily on a court adjudicated tort claims component for compensation. In this model at its simplest level, there is a single victim and a single defendant.<sup>9</sup> A jury is called upon to determine what occurred, whether the defendant was negligent, and how much in compensation the plaintiff is entitled to. These individual cases usually avoid difficult issues of choice of law, complex statistical models to prove causation, and the possibility of bankrupting damage awards.

When the dispute involves many claims, we allow the transfer of actions from one federal court to another—sometimes for the pretrial stages only—and their consolidation. Forum non conveniens is seldom relied upon.<sup>10</sup> Direct transfer from one state's court to that of another state is not possible. The federal courts and many states attempt to coordinate and consolidate large actions. Aggregation reduces the burdens of multiplicative litigation and allows a single judge to develop a greater familiarity with the case. In addition, it often facilitates a global settlement of all claims.<sup>11</sup> Recent proposed legislation to permit removal of mass cases from state courts to the federal courts for national consolidation has been opposed by the plaintiffs' bar as a step in reducing plaintiffs' rights.<sup>12</sup>

---

9. See Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 KAN. L. REV. 59, 67 (1999) (“[T]raditional tort theorists look[ed] at the law of torts. . . as an effort to develop a coherent set of principles to decide whether *this* plaintiff was entitled to compensation from *this* defendant as a matter of fairness between the parties.”) (citations omitted).

10. *But see, e.g.,* *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 89 (2d Cir. 2000) (applying doctrine of *forum non conveniens* to suits under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, involving alleged abuses of the international law of human rights); Friedrich K. Juenger, *Forum Non Conveniens—Who Needs It?*, Address Before the Tulane Colloquium of the International Association of Procedural Law (Oct. 1998) (“Lawyers who attempt to enhance their clients’ chances of success by litigating in a friendly forum do not deserve censure. Indeed, because attorneys are duty-bound to further their clients’ interests, their failure to exploit the benefits of jurisdictional overlap may amount to malpractice.”).

11. See Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 PA. L. REV. 1943, 1949 (2000) (“Aggregation has many advantages. It offers the promise of a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a mass tort.”) (citations and quotations omitted).

12. See Elizabeth S. Strong, *Supreme Court Considers Class Action Jurisdiction*, N.Y. L.J., Mar. 29, 2000, at 1 (“Class action plaintiffs have also turned to state courts specifically to avoid the application of the more stringent federal class certification standards.”).

The effect of non-class action consolidation is sometimes achieved by one law firm taking on many thousands of clients through its connections to unions or by advertising. Many thousands of such cases have been settled this way in my court. They have involved defective breast implants and injuries caused by pharmaceuticals and by asbestos. A special master is often appointed by the court to assist the parties in resolving the claims. A few cases are usually tried to fix settlement values for the rest. Fees are not controlled by the court and, in total, they may be excessive in these non-class actions.

## II. ADMINISTRATIVE ACTIONS

An alternative or supplement to the traditional tort model is the administrative one. Compensation may be provided directly through such devices as Social Security Disability awards, workers compensation, or Securities and Exchange Commission orders.

Administrative agencies, for example the Occupational Safety and Health Administration and the Food and Drug Administration, prescribe rules that seek to protect individuals. If a company complies with these regulations, should it be protected from tort liability?

Beyond the prescriptive role, administrative agencies also play an enforcement role. They investigate potential violations and have in many cases the power to prosecute such offenses civilly.

The federal Comptroller of the Currency, for example, recently settled an enforcement proceeding against a large credit card company (Provident) so that it will reimburse its individual customers by three hundred million dollars for false advertising.<sup>13</sup> Civil class actions pending in state court in California were coordinated and the District Attorney of San Francisco and the Attorney General of California participated in the criminal aspects. Other related actions across the country are still pending.<sup>14</sup>

Similarly, the Federal Trade Commission has just agreed on a settlement in a price-fixing case using most of the money to reimburse consumers in the sum of almost \$150 million. At least one state Attorney General participated.<sup>15</sup> The Insurance Commissioner of Florida just negotiated a settlement of more than \$200 million for all

---

13. See David Leonhardt, *Credit Card Issuer Will Repay Millions to Some Customers*, N.Y. TIMES, June 29, 2000, at A1.

14. See *id.*

15. See Stephen LaBaton, *Generic-Drug Maker Agrees to Settlement in Price-Fixing Case*, N.Y. TIMES, July 13, 2000, at A1.

states for overcharging African Americans. Fines were paid to some states.<sup>16</sup>

Large fines by the Occupational Safety and Health Administration, the Consumer Products Safety Commission, the Securities and Exchange Commission, and the Food and Drug Administration serve the same kind of role. In the tobacco cases the Attorneys General of all the states settled part of the litigation, leaving the federal Attorney General's action and private actions unresolved.

Modifications of available administrative practice to force disgorgement to those injured as in this series of recent litigations seems desirable. This developing approach has not yet, however, been generally recognized.

I have urged more use of what I referred to in an opinion—somewhat misleadingly—as the French model.<sup>17</sup> It combines aspects of the administrative, traditional tort, and criminal practice. In this model, administrative agencies (or courts) impose fines or restitution on companies or individuals to punish them for violating the rules. The proceeds of these orders are then used to compensate victims in lieu of their having to rely on the tort system.

This integrated approach avoids problems such as exist in a case presently before me based on a security fraud. My court has the criminal action, another court has a class action by shareholders, and still a third has proceedings brought by the Securities and Exchange Commission. By contrast, in a recent criminal case I provided for restitution to be distributed by class counsel in the related civil class action for fraud; both cases had been assigned to me as related.

One problem with integration is that many state and federal agencies and courts may be involved creating coordination problems. There are differences in burdens of proof and other complications that present difficulties. Some federal legislators would permit mass actions to be removed to the federal courts to enhance coordination and avoid some federalism problems.<sup>18</sup>

---

16. See Joseph B. Treaster, *Insurer Agrees it Overcharged Black Clients: Restitution in Bias Case is Set at \$206 Million*, N.Y. TIMES, June 22, 2000, at A1.

17. See *United States v. Ferranti*, 928 F. Supp. 206, 217 (E.D.N.Y. 1996) (“The analogous but more developed procedure used by the respected French criminal-civil system demonstrates that restitution as an added feature of criminal law is not inconsistent with due process.”); see also *United States v. Hollman Cheung*, 952 F. Supp. 148, 150 (E.D.N.Y. 1997) (“Successful examples of consolidated criminal and civil proceedings can be observed in the Swedish and French systems, among others.”).

18. See Class Action Fairness Act, S. 353, 106th Cong. (2000); *Senate Judiciary OKs Class Action Bill, Rejects Attempts to Carve Out Exemptions*, U.S.L.W., July 4, 2000, at 2006.

I should like to get the reaction of some members of this audience to the notion that integration of the criminal, the administrative, and the tort models to compensate for large scale delicts is now in order in the United States and elsewhere.

### III. CLASS ACTIONS

An alternative that has received increasing attention in recent years is the class action model. This device is frequently used in state and federal courts where there are alleged injuries to large numbers of people or institutional reform is sought.

Class actions can seek injunctive relief as well as money damages. This device, for example, was effectively used in civil rights cases seeking injunctive remedies to require desegregation of schools or reform of prisons.

The American class action offers the advantages and disadvantages that come from centralization of litigation. The problems of administration are compounded by two local factors: the constitutionally required jury system and the American federal structure.

The jury system requires that evidence in these often complex cases, if they reach trial, be tailored to a lay-body. In addition, a jury often requires damages to be determined individually for each claimant. For example, pending before me is a class action brought on behalf of hundreds of thousands who suffer from cancer of the lungs claimed to have been induced by smoking. A judge (or settlement) might provide a matrix that fits the entire class. A jury will generally need to make an award smoker by smoker—except possibly for punitive damages.

Federalism may permit settlement in one state court binding the nation. But the federal system may also mandate subclasses for each of our states with a different tort law.

Advantages of class actions include the following:

1. They reduce duplication of discovery, motion practice, and pretrial procedures.
2. They allow a single judge to familiarize himself or herself with the legal and factual issues.
3. They provide consistency of result for all the injured and for the defendants.
4. They enhance the possibility of a single action resolving the entire problem, hence preventing the need for repetitive litigation of similar issues. Those who opt out of the class (as is

often possible) will generally represent but a small percentage of possible claimants.

5. They permit plaintiffs' attorneys to generate enough capital to conduct the litigation on a playing field level for both sides.
6. They enhance the possibility of a global settlement, which can provide reasonable relief for prospective claimants while limiting the costs for both parties and providing closure to the dispute for defendants.
7. They provide the possibility of a single fair punitive damage amount instead of repetitive and overlapping punishment. The question is open on whether there can be a free-standing punitive class without an individually compensated class. Such a free-floating class would be helpful in cases such as tobacco.
8. They give the court power to control legal fees which may otherwise be much greater than warranted.
9. They allow a single appellate panel to review the case.
10. Perhaps most important, they permit recoveries for small claims by those who may not even know they were injured and almost certainly would not bother to sue even if they had known. By, in theory, requiring a defendant to pay the entire social cost of its delicts they should avoid much of the reason for high punitive damages.

Disadvantages include the following:

1. The judge may lack familiarity with the law if more than one jurisdiction's substantive law must be applied.
2. They increase the complexity of the litigation.
3. They place a significant burden on individual courts, since they are time consuming, containing more factual and legal issues than any individual case.
4. They remove local issues from their normal venue. Forum shopping problems are compounded.
5. They supersede the local jury's role and replace it with a jury that may be unfamiliar with local conditions.
6. They often require the application of many different substantive laws, some of which are still in a state of uncertainty.

7. They attenuate the usual individual client-attorney relationship, creating new ethical pressures.
8. They are often in significant tension with federalism assumptions. One elected state county judge may bind the nation.
9. They may force defendants to settle because of the threat of huge awards.
10. Finally, there is the fundamental problem that the Supreme Court has been dealing with—protecting the rights of those class members with little knowledge of the suit, virtually no ability to monitor their attorneys, and potential conflicts with other members of the class.

These representational, ethical, and other problems can be dealt with. Judges can closely monitor the adequacy of representation and the fairness of any proposed settlement in class actions while at the same time assuring the court's neutral indifference to the result.

There is a fundamental factor that weighs in favor of the class action, assuming it is properly regulated—equalization among claimants and between claimants and defendants. I have presided over Agent Orange, Asbestos, Breast Implants, Repetitive Stress Syndrome, and DES cases, as well as civil rights, education, and prisoner cases. Some say class actions necessarily deprive people of due process. I think they are wrong.

The main advantage of such mass actions—as I have observed them—is that one litigation protects the rights of many. Persons who would otherwise have claims that are too small to warrant the attention of entrepreneurial lawyers or who simply do not know that their rights have been violated can be protected.

Paradoxically, such suits can sometimes frustrate equalization. They tend to elevate the recovery of those with the most modest claims above what might have been obtained in individual trials while reducing recoveries for those with the most potent claims. That problem is somewhat obviated by the fact that those with the most valuable claims can usually opt out and litigate on their own behalf. There are often bitter battles between class attorneys and attorneys who want to prosecute individual cases as well as struggles to dominate in control of the litigation and for fees.

Class actions also offer a great advantage to defendants, enabling them to bring to a close complex disputes so that they can get on with their affairs and avoid the drain and transactional costs of continuing

litigation. Typically, even large settlements result in an increase in stock market value of corporate defendants.

Prison and education authorities often welcome an authoritative, face-saving decree. Class actions are then a force for social advocacy.

Increasingly, as I have suggested, in our integrated global-electronic-communication society, we find people from all over the world using the almost unique procedures of the United States for class actions to meet worldwide tort and other problems of the oppressed. Already we have entertained actions against foreign tyrants trampling on human rights from the Philippines to Paraguay, those responsible for atrocities in Bosnia, as well as against multinational corporations, banks and large institutions that cheated and abused individuals during and following the Nazi regime, and for an explosion in Bhopal, India, that harmed tens of thousands of people.

Nevertheless, there is a growing antipathy, particularly in federal appellate courts and in legislatures, to mass actions designed to protect the rights of many of those outside the mainstream of society. Restrictions on tort actions of all kinds have been adopted. What has been characterized as the proper end for tort law—"efficient compensation, economical administration, and effective accident prevention"—is sometimes lost sight of in the lobbying game between lawyers and industry lobbyists.

A recent amendment to the class action rules of the federal courts provides for immediate review of the class certification decision.<sup>19</sup> The greater control by appellate courts implied in this limitation on our former strict non-interlocutory appeals procedure is expected to restrict further class actions, which tend to be more favored by trial than by appellate judges.

Some justification for this opposition to class actions and other forms of consolidation does exist. They can be powerful clubs against defendants who may be overwhelmed by the risks involved in opposing them. They can be used to craft collusive settlements for the benefit of plaintiffs' attorneys and defendants. But such risks and other problems can be met by strict and strong judicial control.

As I noted at the outset, class actions present added difficulties when they include an international element. The problems of jurisdiction and choice of law when the dispute only involves American

---

19. See FED. R. CIV. P. 23(f) (1998) ("A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.").

parties is compounded when international parties are added. Within the United States, we have a fairly uniform legal system, attitude, and history from state to state, and each state is constitutionally required to give full faith and credit to the decisions of another state. This common history and constitutionally mandated acceptance is absent across international lines.

The American background explains much of the basis for the success of the class action and of our amour for it. Whole law school courses, casebooks, and treatises are devoted to it. Perhaps this fond relationship stems from our love of mass production, as in the case of the old black Ford Model T.

The favored result in many class actions continues to be a global settlement. This outcome, bringing to an end festering disputes, reduces transaction costs and provides a matrix for a fair distribution of compensation. In addition, non-monetary individual remedies can be crafted which may permit opt-in to a court-administered medical payment plan, as in one defective heart valve settlement, when injuries develop in the future.

There is, I respectfully and with some diffidence suggest, a democratic and participatory aspect of the U.S. congregate mass actions that may not exist in some of the compensation systems of the other countries we will be discussing here.

We proceduralists seldom ask what may be the most pertinent question: how do those injured feel about how their injuries are to be compensated by the legal system? Do they have a sense that there is empathy for their suffering? Do they have an active role in the proceeding, and what is it? From a comparative viewpoint much of our "customer's" reactions and expectations will depend upon what society has thus far afforded people like them. Procedural law is notably inertia bound—we think that what we have for the moment is timeless—and that lack of openness to the new is stronger in layman and legislators than in those of us actually involved in adjudication.

In the class action the plaintiff can vote with his or her feet by opting out of the class. He or she will have the right to be heard in person, by lawyer, or by correspondence directed to the judge at the "fairness hearing," should the case be settled. In bankruptcy there will be a vote. Lawyers have developed ways of dealing with large numbers of claimants they "represent" through television cassettes, "800" no charge telephone calls, setting up committees of claimants, holding meetings with claimants, and utilizing court appointed special masters. In the diethylstilbestrol and other cases I supervised there

was an opportunity to explain their situation to a judge or court appointed special master. By contrast, a European system that depends upon a government compensation scheme or suit by a non-governmental organization (NGO) does not use such a democratic system except in the broadest sense that the government is democratic; the NGO may be operating without an active membership determining who it sues or what it settles for.

In this respect the U.S. system may be loosely described in some respects as a “bottom-up” system rather than one utilizing a “top-down” approach. The former model sometimes leads to a more chaotic situation, but democracy tends sometimes, by its very nature of limited control—contrary to a strong hierarchical system—to be somewhat unruly and even, in the short run, relatively expensive.

It might be useful to consider some detailed case histories—the Exxon Valdez oil spill in Alaska compared to the spills off the French coast and how the various potential injured parties were dealt with. Explosions in Mexico, the United States, Italy, and elsewhere, as well as other environmental and chemical problems such as diethylstilbestrol or thalidomide, provide comparable examples. There are no dearth of them in modern society.

I take it that this audience does not suffer from what Professor Mary Davis calls “fear of the ‘mass’” problems, stemming “from the proceduralist’s [excessive] concern with the traditional right to individualized, case-by-case adjudication” and the need to “insure. . . integrity [of the judicial system] *only* through the traditional adversary system.” (emphasis added).<sup>20</sup> Not fear, but open-minded concern *is* appropriate as we discuss these matters today and tomorrow.

---

20. Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 159 (1998).