

MASS TORT CLASS ACTIONS – PAST, PRESENT, AND FUTURE

ALEXANDRA D. LAHAV[†]

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INTRODUCTION

The history of the mass tort class action is a story of lost opportunity because of the failure of substantive tort law to take scientific and procedural developments into account. This Essay shows that there is little relationship between tort doctrine—the law “on the books”—and both tort theory and procedural law. By contrast, there is a strong relationship between the embrace in law and economics of the deterrence theory of tort law and the procedural law in mass torts. In mass tort litigation, the practices that reflect deterrence theory are not embodied in the substantive doctrine nor always codified in the formal rules of procedure, but are found in informal mechanisms that have become, in a common-law-like fashion, an observable and (somewhat) predictable procedural regime.

This phenomenon is an example of Holmes’ aphorism that “the life of the law has not been logic: it has been experience.”¹ It is also an example of the awkward relationship between procedure and tort law and further evidence that procedure is not always the handmaiden of the substantive law. Procedural developments reflect academic theories of tort law more than tort doctrine does, but procedure too has reached a limit. That limit arises from the nexus between the formal

[†] Ellen Ash Peters Professor, University of Connecticut School of Law. I am grateful to the organizers of the Rule 23@50 Conference, to the participants in that conference for their incisive comments, to Kenneth Abraham, whose comments significantly improved this essay, and to Mort Horwitz and Greg Keating, whose insights were extraordinarily helpful to my thinking. Thanks also to the editors of the NYU Law Review, especially Ryan Sila.

¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

procedural law and tort doctrine, which cannot be overcome by informal procedural practices. Because judges and legislatures making tort law either cannot or will not appreciate the role of probability and risk very well, the doctrine has failed to adopt a probabilistic view of harm. This is a problem from the perspective of the development of the law, and it animates the divide I describe.

The first observation, relying on a Holmesian aphorism, leads to a second one. Holmes is also famous for writing that “[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”² For tort law and, consequently, for the procedural law that effectuates it, that future seemed imminent but never arrived. This Essay tells the story in three parts. The first part describes the growth of three phenomena that are relevant to understanding the idea of a mass tort class action: the advent of modern products liability, the development of law and economics theories of tort, and the improving science of epidemiology. The second part describes how, through the class action device, formal procedural law initially incorporated some of these new ideas into litigated cases but ultimately rejected them. The third part describes how the rejection of risk-based tort doctrine has led to the incorporation of those ideas into litigation in informal ways that seem to be just as powerful as the formal procedural law.

I

TORT DOCTRINE, TORT THEORY, EPIDEMIOLOGY, AND THE CLASS ACTION

In 1966, the federal rule makers adopted the modern class action rule, with its innovative provision for money damages class actions. They were careful to write in the Notes to that revision that this rule was inappropriate for “mass accident” cases.³ In 2004 I interviewed Benjamin Kaplan, the Reporter on the 1966 rule, and he confirmed what the historical record reveals: that the drafters of the rule did not believe it was appropriate for use in the tort law context. Given the state of the law, this makes sense. In the 1950s and ’60s, only a clairvoyant could have predicted the mass tort cases that would arise in the 1970s and afterwards. The cases with which the rules drafters were

² Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

³ ADVISORY COMM. ON CIVIL RULES, PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 46 (1965) (“A ‘mass accident’ . . . is ordinarily not appropriate for a class action because of the likelihood that significant questions . . . would . . . affect[] the individuals in different ways. In these circumstances an action . . . would degenerate in practice into multiple lawsuits separately tried.”).

familiar were mass accident cases such as airplane or train accidents, or cases involving environmental damage in a contained geographic area. These were (and are) capable of aggregation without the class action device.⁴

Whether such lawsuits should be amenable to class treatment as a matter of policy was discussed and rejected early on. Jack Weinstein—then a professor at Columbia Law School—addressed the issue in a law review article that was cited in the same Advisory Committee Note.⁵ Weinstein rejected tort class actions in his discussion of a class action rule proposed in New York State at the time that could, theoretically, be used in negligence cases. First, he noted that the contingency fee ensured access to lawyers for tort victims. He explained that cases in mass accidents are not tried, but instead are “referred to specialist attorneys who represent a number of parties, actions are consolidated, and settlement negotiations dispose of most claims. . . . Both the plaintiff’s . . . and defendant’s bar[s] in the negligence field are so closely knit that, as a practical matter, they can informally provide most of the advantages of class actions.”⁶ He went even further, suggesting that class treatment for negligence cases would bring an “unseemly rush to bring the first case” and would result in “a kind of legalized ambulance chasing.”⁷ Weinstein’s focus on the role of lawyers in this early work is crucial to understanding the structure of the resolution of mass tort cases then and now. It explains how a substantive law hostile to aggregation has nevertheless permitted large-scale aggregate resolution of tort cases, albeit not through the class action device but rather through a combination of formal aggregation procedures such as transfer under the multidistrict litigation statute and aggregate settlements reached with judicial assistance.⁸

⁴ Procedural mechanisms permitting aggregation include: FED. R. CIV. P. 20 (joinder of parties); FED. R. CIV. P. 42 (consolidation of cases for trial); 28 U.S.C. § 1407 (2012) (multidistrict litigation statute). In addition, the practice of most federal district courts is to assign related cases before a single judge in the district, which serves to aggregate cases. *See, e.g.*, *Obert v. Republic W. Ins. Co.*, 190 F. Supp. 2d 279, 290–91 (D.R.I. 2002) (noting that “[a]ssigning related matters to the same judge” is a “well-established exception[] to the general practice” of random case assignment). Personal jurisdiction doctrine was also more friendly to joinder at that time. *See Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1781 (2017) (limiting state personal jurisdiction over corporations in a mass tort case).

⁵ Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 *BUFF. L. REV.* 433, 469 (1960).

⁶ *Id.*

⁷ *Id.*

⁸ 28 U.S.C. § 1407 (permitting transfer of cases to a single judge). The quasi-class action, discussed *infra* note 55 and accompanying text, is an example of an informal judicially created mechanism for assisting in settlement.

In the period that Weinstein was writing and members of the Federal Civil Rules Committee were discussing revisions to the class action rule, three other developments occurred that would prove central to the progress of the law in this area. The first is the growth of products liability doctrine as we know it today. The second is the development of law and economics, and especially the deterrence theory of tort law. The third is the advancement of the science of epidemiology. Each of these stories has been well-told elsewhere with richer nuance and greater detail; in this space I can provide only a brief overview. The reason to recall these narratives is that understanding them *together* is necessary to seeing the full picture of the relationship between procedural law, practice, tort theory, and law on the books in mass torts.

The doctrinal developments in product liability law are well known. In 1944 Justice Traynor published his now-famous concurrence in *Escola v. Coca Cola Bottling Co.*⁹ That case involved a rare manufacturing defect, unlikely to be widespread or result in a mass tort, but Traynor's was the first notable judicial statement of the idea of loss spreading, a justification that would animate much of products liability law going forward.¹⁰ That view became the law of California in 1963 when the California Supreme Court held, in an opinion authored by Traynor, that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”¹¹ In support he cited a 1960 law review article arguing that loss spreading, rather than deterrence, is the best justification for strict products liability.¹² In 1965, this approach was

⁹ 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring).

¹⁰ Of course, this concept had been discussed by academics and commentators much earlier. For example, in *The Path of the Law*, Holmes wrote: “[T]he traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, . . . while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal.” Holmes, *supra* note 2, at 466. For a description of the rise of the idea of loss spreading prior to the 1960s, see Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 636–37 (1992).

¹¹ *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963). Here, too, the rationale was loss spreading: “The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” *Id.* at 901.

¹² *Id.* (citing William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). Prosser argued that the “‘risk-spreading’ argument” was “[e]ntitled to more respect” than the deterrence argument. Prosser, *supra*, at 1119–20.

adopted in the American Law Institute's Restatement (Second) of Torts § 402A, which relied largely on the cost-spreading rationale.¹³

Tort theory initially evolved on a similar timeframe to tort doctrine, but very soon burgeoning economic ideas of cost internalization and accident prevention gained greater traction in theory than in doctrine. The loss spreading rationale appeared in academic journals in the early 1950s.¹⁴ The idea quickly became unexceptional, as the 1959 edition of Gregory and Kalven's torts textbook explained: "[T]he central policy issue in tort law is whether the principal criterion of liability is to be based on individual fault or on a wide distribution of risk and loss."¹⁵ In the 1960s, however, a second rationale for products liability law developed. This was the theory of accident reduction, which posited that an enterprise is in a better position to identify and reduce risks than courts applying a fault standard.¹⁶ These ideas were part of the evolution of the law. When the drafters of section 402 of the Restatement (Second) wrote that provision, they "were drawing not only on recent case law but also [on] an evolving intellectual background supporting the expansion of liability."¹⁷

At the same time that products liability law was developing new standards to address the widespread harms caused by defective products, and tort theorists were grappling with these issues by developing conceptions of tort law that took account of risk, a third intellectual

¹³ RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. LAW INST. 1965).

¹⁴ See, e.g., Fleming James, Jr., *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 365 (1946) ("There is a growing belief . . . that the social consequences of uncompensated loss are dire and far exceed the amount of the loss itself; and that more good will come from distributing these losses among all the beneficiaries of mechanical progress than by letting compensation turn upon an inquiry into fault."); Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537, 538 (1952) (invoking workmen's compensation as an example of loss-spreading); Clarence Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1173-74, 1176 (1952) (explaining the theoretical rationale for loss-spreading); Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 233 (1914) ("There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice who can best bear the loss, and hence to shift the loss by creating liability where there has been no fault."). Kenneth Abraham dates loss spreading as a rationale in tort scholarship to the 1930s. KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 140 (2008).

¹⁵ Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 499 (1961) (citing CHARLES O. GREGORY & HENRY KALVEN, JR., *CASES AND MATERIALS ON TORTS* 689 (1959)).

¹⁶ See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 68-130 (1970) (describing the accident reduction concept and describing why case-by-case determinations of risk of distribution are inferior). See generally Gregory C. Keating, *Products Liability as Enterprise Liability* 5-6 (Dec. 5, 2016) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880705.

¹⁷ ABRAHAM, *supra* note 14, at 146.

development was underway: the science of epidemiology. While epidemiology has existed for hundreds of years, the science made considerable strides in the 1950s and 1960s.¹⁸ In 1948 researchers began to conduct the first large longitudinal study of populations to determine risk factors for cardiovascular disease.¹⁹ The first study revealing the connection between smoking and lung cancer was published in 1950.²⁰

These developments are important for understanding the limits and possibilities of tort law because, during the period beginning in 1950, epidemiologists began to analyze chronic diseases that had multiple causes, a feat that was not possible with the tools previously available. Because much of products liability involves drugs, toxic substances, and medical devices used by individuals with preexisting conditions, the ability to differentiate among multiple causes is very useful. Moreover, the scope of tort liability may also implicate the extent to which manufacturers or developers of products test them; epidemiology is a key tool for regulating product safety.²¹

The distinction between risk and harm is important to the relationship between the developments in epidemiology, tort law, and procedural developments, particularly class actions. A deterrence or accident prevention rationale for tort law is concerned with the actuarial risk of harm, and this risk is the object of tort law's social control. In other words, the deterrence rationale is concerned with risk reduction. The cost-spreading rationale for tort law, by contrast, addresses the distributional question of who should bear the cost of the harms experienced by some users of a product. It begins with the assumption that the risk in question is worth taking, or in any event unavoidable.

¹⁸ See OFFICE OF WORKFORCE & CAREER DEV., CTRS. FOR DISEASE CONTROL & PREVENTION, PRINCIPLES OF EPIDEMIOLOGY IN PUBLIC HEALTH PRACTICE: AN INTRODUCTION TO APPLIED EPIDEMIOLOGY AND BIostatISTICS 1-7 to -11 (3d ed. 2006, updated 2012), <https://www.cdc.gov/ophss/csels/dsepd/ss1978/SS1978.pdf> (“The period since World War II has seen an explosion in the development of research methods and the theoretical underpinnings of epidemiology.”).

¹⁹ *History of the Framingham Heart Study*, FRAMINGHAM HEART STUDY, www.framinghamheartstudy.org/about-fhs/history.php (last visited Aug. 17, 2017). See also Joseph Stokes, III & Thomas R. Dawber, *Rheumatic Heart Disease in the Framingham Study*, 255 NEW ENG. J. MED. 1228 (1956) (among the first publications of the results of the Framingham study).

²⁰ See Richard Doll & A. Bradford Hill, *Smoking and Carcinoma of the Lung: Preliminary Report*, 2 BRIT. MED. J. 739, 746 (1950) (“We . . . conclude that smoking is a factor, and an important factor, in the production of carcinoma of the lung.”).

²¹ See Steven Shavell, *Liability and the Incentive to Obtain Information About Risk*, 21 J. LEGAL STUD. 259, 260 (1992) (noting that the socially optimal level of care a party should exercise depends on the level of existing risk); Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 775 (1997) (arguing that manufacturers are deterred from performing studies on their products because the data produced can be used against them in court to establish liability).

But a tort doctrine grounded in conceptions of *actual* harm inflicted does not leave much room for a tort law based on controlling the *risk* of harm. At the doctrinal level, tort law has continued to require actual harm for recovery. Both the cost-spreading and accident-prevention rationales were prominent in the case law and legal theory from the 1950s through the 1960s, around the time that the damages class action became an available tool for lawyers and judges. The class action provided a way to fully realize both of these ideas in legal doctrine because it provided a formal mechanism for collective resolution of claims, which in turn enabled courts to force defendants to internalize the cost of all accidents they caused and to pay all those who suffered harm resulting from the risk they created.

The tort theories that focused on risk of harm, combined with the insights of epidemiology, could have been used by courts to expand product liability law but never were. From the perspective of tort doctrine, epidemiology has a significant drawback: It cannot be used to prove specific causation but instead is only able to show risk and probability.²² This is a problem because tort law is focused on the *specific cause* of an individual plaintiff's realized harm, rather than on the *risk* of harm. For this reason, advocates of the mass tort class action adopt deterrence theories of the tort system. This is also why their theories have not held sway in court.²³

Around 1970, the theoretical tools for a mass tort class action were available. Theorists recognized risk of harm, cost spreading, and accident prevention as part of the law of torts. Products liability law was evolving to similarly recognize that not only imposition of actual harm, but also increased risk of harm in an industrialized, consumer-oriented society, ought to play a role in determining liability. The science of epidemiology had developed to permit analysis and disaggregation of multiple causes of chronic diseases of the type imposed by drugs, toxic substances, and medical devices.²⁴ These developments could have led to a procedural and substantive law that allowed col-

²² For a related analysis, see Mark Geistfeld, *Scientific Uncertainty and Causation in Tort Law*, 54 VAND. L. REV. 1011, 1024–25 (2001). Geistfeld points out: “[s]uch epidemiological studies are the only reliable evidence showing that the substance more likely than not caused the plaintiff’s injury.” *Id.* at 1013.

²³ See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002) (advocating a deterrence rationale for liability and an insurance rationale for compensation); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002) (promoting the mandatory class action—from which parties cannot opt out—as ideal for achieving deterrence, and criticizing an alternative view).

²⁴ See OFFICE OF WORKFORCE & CAREER DEV., CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 18, at 1-7 to -11 (describing the history of the field of epidemiology); Ezra Susser & Michaeline Bresnahan, *Origins of Epidemiology*, 954

lective resolution of mass tort claims through the class action device under both the deterrence and cost-spreading rationales articulated by tort theorists, particularly by the deterrence rationale that was so strongly developed in the law and economics scholarship. But they did not.

The period immediately following the publication of the Restatement (Second) of Torts was a fruitful one for the expansion of products liability law, but it lasted only a short time. Since the mid-1980s, products liability doctrine has stabilized around a strict liability standard, which still requires plaintiffs to prove individual causation.²⁵ Kenneth Abraham writes: “By the mid-1980s these doctrinal expansions of products liability ceased, but that expansion had already proceeded pretty far. Products liability doctrine had at that point reached the plateau on which it has stood for nearly 25 years now.”²⁶

There are a number of possible reasons for this plateau. One reason might be the conservative turn in public policy away from social insurance generally, both in the academy and outside of it, which calls into question the loss-spreading rationale in tort law.²⁷ A related reason could be that the cost of tort liability to manufacturers was greater than judges had envisioned during the period of expansion.²⁸ In the late 1980s, manufacturers were perceived as more fragile than they had been in the 1960s.²⁹ A change in the makeup of the

ANNALS N.Y. ACAD. SCI. 6, 12–13 (2001) (tracing the rise of chronic disease epidemiology).

²⁵ See Schwartz, *supra* note 10, at 648–49 (noting that it is fair to characterize tort law as having stabilized since the 1980s, despite some exceptions).

²⁶ ABRAHAM, *supra* note 14, at 147. Abraham argues that the ALI revision of the standard for design defect was a reflection of existing law. *Id.* But others strongly disagree with that evaluation. See George W. Conk, *Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished*, 26 REV. LITIG. 799, 838–43 (2007) (stating that courts have not embraced the Third Restatement’s view of drug and device liability and listing the reactions of specific states to the revisions).

²⁷ There was a general perception during this period of a “liability crisis.” See, e.g., Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) (describing the broad feeling of disillusionment with the civil justice system that emerged during the 1970s and consisted of the perception that people were suing each other indiscriminately and that the resulting jury verdicts were destroying the economy); see also Schwartz, *supra* note 10, at 694–95 (discussing academic trends towards conservative law and economics). A prominent and influential example of the law and economics critique of strict liability in design defect claims is George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (arguing against strict liability in defective products cases).

²⁸ See Schwartz, *supra* note 10, at 690 (“[I]t seems clear enough that those judges foresaw very little of the heavy cost burden of modern tort liability. Rather, those judges were clearly assuming that even in its expanded form liability would not be especially expensive for individual or institutional defendants.”).

²⁹ *Id.* at 691 (using the American auto industry as a specific example).

judiciary or a shift in judicial attitudes as a result of the success of the tort reform movement are other related explanations.³⁰ Whatever the reasons for this doctrinal plateau, the result, as we shall see in the next section, was that the experiment with mass tort class actions was anemic, albeit somewhat spectacular in a few particular instances that have captured the academic and professional imagination.

II THE SEPARATION OF THEORY AND DOCTRINE IN TORTS AND PROCEDURE

There have been very few mass tort class actions, fewer still that have survived appeal. My review of published federal cases revealed approximately seventy-three cases that could be classified as attempted mass tort class actions between 1970 and 1996. Many of these were not certified as class actions in the end, but the question was litigated and produced opinions. It is possible that there were other class actions in which no opinion was reported in the database. The pattern emerging from the early cases in the 1970s was that some cases involving concentrated mass accidents were certified. Examples include a plane crash,³¹ a fire,³² and food poisoning aboard a cruise ship.³³ Cases involving diffuse torts were not certified.³⁴

One turning point seems to have been *Payton v. Abbott Labs*, decided in 1979, which conditionally certified a pharmaceutical products liability action concerning DES.³⁵ This was a diffuse tort—victims

³⁰ See *id.* at 685–88 (noting that replacing “liberal” with “conservative” judges can impact the amount of liability found and describing examples of this). See also Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 734 (1992) (noting that “[a] widespread, independent shift in judicial attitudes continues to be the likely major source of the decline” in plaintiff success in product liability cases and attributing this shift to the success of the tort reform movement).

³¹ See, e.g., *In re Gabel*, 350 F. Supp. 624 (C.D. Cal. 1972) (plane crash), *overruled by* McDonnell Douglas Corp. v. U.S. Dist. Court for the Cent. Dist. of Cal., 523 F.2d 1083, 1085, 1088 (9th Cir. 1975) (rejecting *In re Gabel*'s class certification as inappropriate under Rule 23). During this period, courts also certified classes in cases involving other types of transportation accidents. See, e.g., *Sala v. Nat'l R.R. Passenger Corp.*, 120 F.R.D. 494 (E.D. Pa. 1988) (train accident).

³² See, e.g., *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977) (fire). *But see* *Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977) (declining to certify in a case involving property damage and personal injury from a flood).

³³ See, e.g., *Bentkowski v. Marfuera Compania Maritimas, S.A.*, 70 F.R.D. 401 (E.D. Pa. 1976) (food poisoning on a cruise); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973) (same).

³⁴ See, e.g., *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (denying certification for employees alleging harms related to asbestos exposure in the workplace).

³⁵ 83 F.R.D. 382 (D. Mass. 1979), *vacated*, *Payton v. Abbott Labs (Payton II)*, 100 F.R.D. 336 (D. Mass. 1983).

of DES were widely spread out across the country. That experiment in class certification ultimately failed because the plaintiffs lost their argument favoring enterprise liability in the state court and in the process their claim to predominance under the class action rule.³⁶ Still, the District Court's readiness to certify that type of diffuse class seemed to be the harbinger of a new era. The District Court decision in *Payton* was quickly followed by the *In re "Agent Orange" Product Liability Litigation* in 1980.³⁷ The class action in that case was upheld on appeal.³⁸ During the next year, 1981, a class action involving the Dalkon Shield was certified, although it was quickly de-certified on appeal.³⁹

In 1984, the first asbestos class action was certified in the Third Circuit.⁴⁰ That case involved only property damages, and the appellate court, in certifying a class much narrower than the district court, made careful note of the fact that the plaintiffs would not be as attached to their claims as those bringing personal injury litigation and that litigation justified collective treatment.⁴¹ The *Three Mile Island* class action had earlier been certified with a similar limitation to property damages only.⁴² Still, an asbestos personal injury class action was certified two years later in the Fifth Circuit.⁴³ For a brief period in the 1990s, it appeared that the class action might be a way to resolve the morass of asbestos litigation in the federal and state courts.⁴⁴ This experiment ended, at least temporarily, with the Supreme Court's decisions in

³⁶ *Payton II*, 100 F.R.D. 336.

³⁷ 506 F. Supp. 762, 787–92 (E.D.N.Y. 1980) (certifying a class of Vietnam veterans exposed to Agent Orange).

³⁸ 818 F.2d 145, 163–67 (2d Cir. 1987). The effect of the ruling was undone many years later by the Second Circuit's decision to permit collateral attacks on the class settlement by future plaintiffs who had not received compensation under the class settlement. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

³⁹ *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 894–903 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982).

⁴⁰ *In re Asbestos Sch. Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *amended by* 107 F.R.D. 215 (E.D. Pa. 1985), *aff'd in part, rev'd in part sub nom. In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986).

⁴¹ *In re Sch. Asbestos Litig.*, 789 F.2d at 1009.

⁴² *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa. 1980) (certifying classes where damages were limited to economic harm, but finding that a class for personal injuries was inappropriate because each class member's claim was individual and personal).

⁴³ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986).

⁴⁴ *See, e.g., Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 314–19 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Joint E. & S. Dists. Asbestos Litig.*, No. CV 93-2129, 1993 WL 604077 (E. & S.D.N.Y. July 1, 1993).

*Amchem Products, Inc. v. Windsor*⁴⁵ and *Ortiz v. Fibreboard Corp.*,⁴⁶ which seem to close off the use of mass tort class actions in cases involving future claimants and perhaps in all mass tort cases.⁴⁷

This early period reflected what was to be a pattern in mass tort class actions involving personal injury through the 1990s, especially those arising out of pharmaceuticals and medical devices: the occasional adventuresome district court using an ultimately unsuccessful procedural tool.⁴⁸ (The notable exception was *In re A.H. Robins*.⁴⁹) Overall, there have been very few mass tort cases certified as settlement or other class actions over the nearly fifty-year period during which mass tort class actions have been theoretically available.⁵⁰

III

THE INCORPORATION OF THEORY INTO PRACTICE (WITHOUT DOCTRINE)

We have seen that the use of the mass tort class action to aggregate personal injury claims, and in general any tort claim, was sporadic and largely unsuccessful. What is consistent is the focus on aggregate settlement. Indeed, the pattern for resolution of mass tort cases has been aggregated settlement since at least the Industrial Revolution.⁵¹ These aggregations often occurred outside the courts. Whether aggre-

⁴⁵ 521 U.S. at 626–28 (noting the tensions between the interests of presently injured members and those who may suffer future harms as a result of exposure and the risk that future victims were not adequately informed of the class settlement).

⁴⁶ 527 U.S. 815, 854–57 (1999) (denying class certification because, among other deficiencies, the class did not sufficiently protect the conflicting interests of present and future victims).

⁴⁷ For criticism of the trial and district court's decision in *Georgine*, and the mass tort model in general, see Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995). For a discussion of the dynamics of settlement with reference to the mass tort context, see Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 472–75 (2000).

⁴⁸ See, e.g., *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239 (S.D. Ohio 1984), *rev'd on mandamus*, 749 F.2d 300 (6th Cir. 1984).

⁴⁹ 880 F.2d 709 (4th Cir. 1989) (upholding class certification on appeal), *abrogated by Amchem*, 521 U.S. at 591.

⁵⁰ I discuss more recent cases in which personal injury class actions were certified for settlement purposes only in the next section. See *infra* notes 63–82 and accompanying text.

⁵¹ See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (demonstrating that aggregate settlement was always part of the resolution of tort claims, often through casualty insurers).

gated through insurers,⁵² plaintiffs' attorneys,⁵³ the multidistrict litigation statute,⁵⁴ or all three, in one way or another the past, present, and future of mass torts is aggregation. Yet the legal doctrine has never been comfortable with this fact. Indeed, the insistence on proof of actual harm and the rejection of risk of harm as a basis for liability even after the changes to the law of products liability in the early 1960s led to informal aggregation. The development of largely consensual practices outside of the strictures of tort law was aided by procedural mechanisms such as multidistrict litigation, the quasi-class action,⁵⁵ and the occasional settlement class action.

One explanation for the phenomenon of informal aggregation and settlement over litigated class actions could be that the requirements of the class action rule,⁵⁶ especially predominance and superiority, cannot be met in the mass tort context. There are at least three arguments against mass tort class actions. First, choice of law problems in tort cases, which state law ordinarily governs, mean that individuals must be treated separately or in groups too small to make the class action an efficient approach to litigation, such that these individual issues *predominate* over collective issues. Second, as Weinstein pointed out in 1960,⁵⁷ individuals with relatively high-value cases can bring individual actions, and since they can do so, the class action is not *superior* to individual litigation. It is important to recognize, however, that whatever happens in terms of class certification, these individual actions are very often aggregated both by lawyers and the courts, such as by the Judicial Panel on Multidistrict Litigation. Finally, as a doctrinal matter, it is generally the case that plaintiffs bear the burden of proving specific causation, and in many cases there are individual confounding factors that make it impossible to prove

⁵² See *id.* at 1591–94 (describing aggregation through insurance in 1890s); *id.* at 1610–12 (describing aggregation of mass torts through insurance in 1960s); *id.* at 1628–30 (describing twentieth century developments).

⁵³ See Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 807, 816–17 (2011) (discussing how contemporary personal injury attorneys mass-advertise and settle low-stakes claims in high volumes).

⁵⁴ 28 U.S.C. § 1407 (2012).

⁵⁵ The quasi-class action is a term coined by Judge Jack Weinstein which refers to an aggregate litigation resolved as a class action and has been used to justify judicial intervention in aggregate settlements even where no class was certified. See *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (justifying judicial adjustment of attorneys' fees on the ground that judges have power to manage litigation to best serve justice and efficiency); Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 529–30 (2015) (discussing the role of the quasi-class action in the relationship between class action law and aggregate litigation).

⁵⁶ FED. R. CIV. P. 23(a), (b)(3).

⁵⁷ See Weinstein, *supra* note 5, at 469 (describing how contingent fee litigation induces a rush to litigation that incentivizes defendants to enter settlement negotiations).

causation on a population-wide basis, again defeating predominance. These barriers stand in the way of the mass tort class action even in the absence of concerns about distributional fairness among claimants. As a formal matter, the requirements of commonality, predominance, and superiority apply equally to litigated and settlement class actions, but in practice courts treat these requirements more loosely in the settlement context.⁵⁸

William Rubenstein has convincingly shown that these barriers do not necessarily need to stand in the way of certification.⁵⁹ There are other types of cases involving contract or fraud which have been certified as class actions, although they too could be argued to have the same type of predominance, superiority, and adequacy problems as mass tort class actions. For example, defendants may argue that the decision to enter into the contract varies across plaintiffs, or that causation is sufficiently different to require individual determinations, or that damages are too varied across class members. Recent settlement class actions in mass tort litigation prove Rubenstein's point. So what accounts for the difference in treatment between mass tort cases and other class actions? Rubenstein argues that judges feel less comfortable overseeing what is in effect a massive transaction of payment for mass tort claims, as contrasted with overseeing a massive transaction involving areas of law that more expressly involve transactions, such as securities.⁶⁰ The core difference between torts and securities in this setting, he argues, is that in the mass tort class action the judge must be an active manager to reach settlement, whereas in the securities context, a settlement is brought to the judge wrapped in a bow.⁶¹ The judge's own interests in the mass tort transaction are readily, and uncomfortably, apparent. Rubenstein explains:

In mass tort actions, the judge's activities are not strictly managerial because they are not neutral "managers" of outsiders' lawsuits—

⁵⁸ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (noting that while the named parties had a range of complaints, the parties were representative of the whole). For a discussion of the different treatment of settlement and litigated classes, see Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 *UCLA L. REV.* 1494, 1504–11 (2013).

⁵⁹ See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 *GEO. L.J.* 371, 386–408 (2001) (comparing torts and securities class actions and showing that neither predominance, superiority, nor requirements of individual causation explain the differing outcomes in these sets of cases).

⁶⁰ *Id.* at 425–26.

⁶¹ The reason for this difference may be that damages in contracts and securities are more easily calculated than damages in tort cases, although claims administration facilities can solve this problem and obviate the need for close judicial management. See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 *STAN. L. REV.* 1361, 1364–74 (2005) (describing types and functions of claims administration facilities).

they have a distinct, and hardly minor, stake in the outcome of the transaction. This is because a, if not the, central rationale for aggregative treatment of mass tort actions is efficiency, and in particular, cost savings for courts throughout the country. This is a nonjudgmental way of saying that what is really at stake in efficiency class actions is judicial time, or judges' interests.⁶²

In other words, if mass tort class actions do not save judicial resources, they are less appealing and this drives the interpretation of the class action rule. The use of special masters, however, can help alleviate some of these problems, as the below example demonstrates.

Since Rubenstein wrote his article in 2001, some judges have embraced a transactional approach to mass tort claims both inside and outside the class action. There are numerous examples,⁶³ but the one I will focus on here is the 9/11 First Responders' Litigation.⁶⁴ That was an aggregate litigation involving approximately 10,000 individuals who had a variety of ailments and were different from one another in every conceivable way: types of illness, types of toxins to which they were exposed, preexisting conditions or risk factors such as tobacco use, age, and more.⁶⁵ The same kinds of problems that plague other types of mass torts—whether environmental damages or prescription drugs—and seem intractable for collective resolution were even greater in this litigation. Importantly, there was also a pot of insurance money that was available, and transparently so.⁶⁶ It is not always the case that the amount of insurance coverage is so large and so well known to the bar and the judge, but insurance plays a significant and

⁶² Rubenstein, *supra* note 59, at 426.

⁶³ Examples include the litigation against British Petroleum arising out of the Deepwater Horizon oil spill, litigation against the National Football League relating to concussion injuries suffered by players, and litigation against Merck arising out of injuries allegedly caused by the drug Vioxx. See *In re Deepwater Horizon*, 739 F.3d 790, 810–11 (5th Cir. 2014) (certifying economic injury settlement class); *In re NFL Players' Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. 2014) (certifying personal injury settlement class); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 277–78 (2011) (describing Vioxx litigation).

⁶⁴ See Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127 (2012) (analyzing the strategies leading to settlement of the 9/11 tort litigation). Rubenstein distinguishes the transactional model from the managerial model, although putting together the transaction requires judicial management, as he notes. I do not think that Hellerstein's use of the term "managerial" as opposed to "transactional" makes a significant difference for the point made here.

⁶⁵ *Id.* at 131–32.

⁶⁶ In 2003, Congress created the Captive Insurance Company and allocated one billion dollars to resolving claims arising out of debris removal from the World Trade Center site. Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11, 517–18 (2003). See also Hellerstein et al., *supra* note 64, at 128–29 (discussing Congress's creation of the Victim Compensation Fund and the Captive Insurance Company); *id.* at 144 (describing discovery order mandating disclosure of insurance coverage).

underappreciated (by the scholarly literature at least) role in the resolution of mass tort litigation.⁶⁷

The judge addressed the heterogeneity problem by first hiring two special masters, Professors James Henderson and Aaron Twerski, who also happen to have been the reporters on the Restatement (Third) of Products Liability. Together they developed a method of pricing the cases in this massive litigation. This method involved collecting data on the individual plaintiffs and categorizing them into groups. The judge ordered the plaintiffs to provide information about their claims to populate a database which would categorize the plaintiffs. Analysis of the database revealed that there were relatively few serious injuries.⁶⁸ The special masters created a subcategory of 200 of the most severe cases, and the parties and the judge would select a total of six cases for early trial from that smaller group.⁶⁹ Ultimately, the parties reached a settlement before any trials were conducted. When the judge indicated that he did not approve of this settlement, the parties improved it by increasing the amount of the insurance coverage which would go to claimants, changing the attorneys' fees, and making other concessions.⁷⁰ Notably, judicial approval is not formally required for settling aggregated cases that are not certified as class actions, but the judge nevertheless asserted this power, borrowing from the class action rule.⁷¹

The method of resolving these aggregated suits had some actuarial qualities, but it was not a social science methodology. The database allowed for determining the variance among the plaintiffs and aided in pricing their claims. Plaintiffs were subclassified into groups that made sense from the perspective of type and severity of injury using criteria promulgated by professional medical associations.⁷² But in designating cases for early trial, the judge and special

⁶⁷ ABRAHAM, *supra* note 14, is a welcome exception.

⁶⁸ According to the special masters' analysis, an estimated total of 68.9% of the entire plaintiff population had not manifested serious injuries. Hellerstein et al., *supra* note 64, at 153–54.

⁶⁹ Hellerstein et al., *supra* note 64, at 148–49.

⁷⁰ *See id.* at 157–60 (discussing Judge Hellerstein's rejection of the settlement because of insufficient insurance coverage for claimants, excessive attorneys' fees, and other issues).

⁷¹ This decision was controversial. *See* Howard M. Erichson, Commentary, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1025 (2013) (arguing that “a judge overseeing non-class litigation has no general power to accept or reject a settlement”).

⁷² *Id.* at 145 (“[M]onographs published by the American Medical Association (AMA) and the American Thoracic Society (ATS) supplied objective criteria for those categories of diseases that plaintiffs reported with greatest frequency to have resulted from their exposures to the WTC site.”).

masters made the common mistake of selecting “representative” plaintiffs rather than selecting randomly, and of choosing the number of cases selected based on convenience rather than statistical analysis.⁷³ Statisticians know, however, that random sampling is better because it “make[s] transparent the process by which items are chosen for observation. This is important because without randomization, biases can creep in, whether advertent or inadvertent, that can destroy the validity of the inference to unobserved members of the population.”⁷⁴

The particular special masters selected by Judge Hellerstein can be fairly categorized as traditional torts scholars. I predict that if they were asked, they would not suggest that the standard for tort liability should be changed from specific to general causation, for example, or that actuarial methods such as those described above can be substituted for more traditional modes of proof at trial.⁷⁵ Because general causation and statistical damages models are inconsistent with tort doctrine, such practices only exist on the margins, or in the shadow of the law. The problem is that these aggregated mass tort cases are not on the margins of litigation anymore, at least in the federal courts. They now likely form roughly thirty-five percent of the federal caseload.⁷⁶ Instead, doctrine is set aside, and the parties agree to substitute requirements such as specific causation and individualized determinations of harm with probabilistic models, although a showing of actual harm is still required even in settlement. Examples of such settlement class actions include *In re Diet Drugs Products Liability*

⁷³ For a discussion of reliable sampling techniques, see Joseph B. Kadane, *Probability Sampling in Litigation*, 18 CONN. INS. L.J. 297 (2012), and Alexandra D. Lahav, *The Case for “Trial by Formula”*, 90 TEX. L. REV. 571, 629–33 (2012).

⁷⁴ Kadane, *supra* note 73, at 297.

⁷⁵ See, e.g., Aaron D. Twerski & James A. Henderson, Jr., *Fixing Failure to Warn*, 90 IND. L.J. 237, 246 (2015) (“In asserting a warning claim, the plaintiff must establish specific causation by showing that reasonable product marketing would have reduced or prevented his harm.”). In this article, the authors advocate for a standard in warning defect cases that requires the plaintiffs to present a reasonable alternative warning in order to impose more rigorous specific causation requirements. *Id.* at 254. Perhaps I am wrong to paint these scholars in such a broad brush. See Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379 (2000) (advocating for proportional causation).

⁷⁶ In 2015, thirty-eight percent of the federal docket consisted of multidistrict litigation (MDL) cases. JUDICIAL PANEL ON MULTIDISTRICT LITIG., 2015 YEAR-END REPORT 1 (2016). In 2014, pending MDL cases made up thirty-six percent of the federal docket. DUKE LAW CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES, at x (2014). Eighty-eight percent of the MDL docket consisted of mass tort cases in 2014. *Id.* at xi. If that percentage remained steady, about thirty-five percent of the federal docket would have been mass tort MDLs in 2015.

*Litigation*⁷⁷ which was settled around 2000, and the *NFL Players Concussion Injury Litigation*, settled in 2013.⁷⁸ The class action arising out of the Deepwater Horizon oil spill in the Gulf of Mexico, settled in 2012, is a bit closer to the traditional mold than these because it involved economic injuries rather than personal injuries.⁷⁹ The more recent mass tort cases certified as settlement class actions followed on developments in multidistrict litigation which mimicked the class action.⁸⁰

As evidenced by their willingness to approve such settlements, judges appear to feel increasingly comfortable adopting the transactional model of litigation Rubenstein describes even in mass tort cases, and are willing to sanction informal mechanisms for risk spreading using aggregation (either through attorney agreement, a quasi-class action, or a formally certified settlement class action). It may be that the judges more amenable to such approaches are the ones assigned to these aggregated cases. Or perhaps judges assigned these cases adopt the transaction mindset because they see no realistic alternative,⁸¹ or at the behest of repeat players on all sides who have structured these types of deals before.⁸²

CONCLUSION: TORT LAW'S FAILURE TO THRIVE

The inevitability of aggregation and the use of probabilistic methods for creating settlement matrices and ultimately resolving mass tort litigation has led to our present situation where the resolu-

⁷⁷ Nos. 1203, 99-20593, 2000 WL 1222042, at *1 (E.D. Pa. Aug. 28, 2000), *enforcement denied*, No. CIV. A. 99-20593, 2003 WL 22594339, at *5 (E.D. Pa. Oct. 10, 2003), *enforced*, No. CIV. A. 99-20593, 2003 WL 22798013, at *3 (E.D. Pa. Nov. 13, 2003), *enforcement denied*, No. CIV. A. 03-20566, 2007 WL 518549, at *3 (E.D. Pa. Feb. 12, 2007).

⁷⁸ *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016) (affirming the trial court's class certification and settlement approval).

⁷⁹ *In re Oil Spill by Oil Rig Deepwater Horizon in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 900–01 (E.D. La. 2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014).

⁸⁰ Perhaps they are a reaction to those attempts at reaching global peace outside of the class action device, which raised some ethical concerns. For discussion of the increasing use of negotiated settlements, see Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 *FORDHAM L. REV.* 3233, 3234 (2013). For a discussion of the Vioxx litigation settlement agreement, see Erichson & Zipursky, *supra* note 63, at 279–81.

⁸¹ *But see* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 *WIDENER L.J.* 97, 135–43 (2013) (describing deployment of early discovery and other orders to resolve asbestos litigation using an adjudicative rather than transactional approach).

⁸² *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 *VAND. L. REV.* 67, 73 (2017) (stating that only a “handful” of lawyers end up playing leadership roles).

tion of tort suits advocated by deterrence theorists has become the dominant mode in practice. In the meantime, the dominant paradigm on the level of formal doctrine is one of harms and wrongs.⁸³ As noted in the beginning of this Essay, products liability doctrine has failed to evolve much in the last thirty or more years. Yet the courts circa 1985 could not have had such a good grasp on the relationship between the science of epidemiology, the possibilities of procedure, and the law of torts that theirs should be the last word.⁸⁴ The most significant influence on the law over this period has been in the attitude toward tort liability, yet the cases continue to come because the harms continue to occur. Current doctrine leaves insufficient room for the adventurous approaches of the mass tort bar on both the defense and plaintiff's side or for inventive judges to aggregate cases. As a consequence, lawyers and judges reach informal solutions to mass tort litigation despite the law on the books.

Is it a problem that the chasm between the law in practice and the law on the books has become so wide? We need to understand better why this has become the case, including which market and intellectual forces have made it so. No longer is it really possible to say that these aggregative settlements are in the shadow of the law—practically speaking, they *are* the law. They even produce persuasive precedents followed in subsequent cases.⁸⁵

It is possible to bridge the gap and to develop a normatively attractive tort law that adequately takes into account the role of risk, the science of epidemiology, and the possibilities of statistical proof. One can imagine a tort doctrine that took into account epidemiology, replacing specific with general causation, and determining damages probabilistically based on the increased risk posed by the product or disaster. It might look something like the procedures adopted in the *9/11 First Responders Litigation* formalized into law. The advent of aggregate litigation in mass torts through nearly formal mechanisms

⁸³ See John C.P. Goldberg & Benjamin C. Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411, 1414 (2000) (“[J]udicial adoption of a scheme of *pro rata* recovery would constitute the abandonment of the causation element of negligence law.”); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

⁸⁴ For a somewhat different view on the evolution of the law, see Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

⁸⁵ For a description of a number of such settlements, finding patterns, see Burch, *supra* note 82, at 86–134. For an example of a court following the procedural roadmap created in a previous mass tort case, see Order Regarding Selection of Personal Injury and Wrongful Death Bellwether Cases and Early Trial Schedule, *In re General Motors LLC Ignition Switch Litigation*, MDL No. 2543 (S.D.N.Y. Nov. 19, 2014), <http://gmignitionmdl.com/wp-content/uploads/GM-order-25.pdf>.

like the quasi-class action⁸⁶ or the settlement class action demonstrate that such a project is possible.⁸⁷ One cannot help but conclude that tort doctrine has failed to develop in part because it has ceased to grapple with risk. Procedure, which is willing to do so, has overtaken it.

⁸⁶ See also PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.18 (AM. LAW INST. 2010) (proposing judicial review of settlements in some situations).

⁸⁷ Indeed, Issacharoff and Witt point out in a footnote that there is a narrative about tort law as a non-individualized project. See Issacharoff & Witt, *supra* note 51, at 1578–79 n.34. In an unpublished article, Roy Kreitner explains that, even in the nineteenth century, “judges understood common law disputes about rights as containing an element of tension between individual and communal interests.” Roy Kreitner, *Insurance at the Crossroads: Nineteenth Century Law and the Appropriation of Risk* 5 (2003) (unpublished manuscript) (on file with the New York University Law Review). These communal interests included loss spreading. In so doing, judges were arguing about how to conceptualize risk.