COMPENSATING LARGE NUMBERS OF PEOPLE
FOR INFLICTED HARMs

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

Shall the resulting damages be compensated for 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 apply to cases arising in many states and nations? On what theory can a useful conflict of laws rule applicable to group litigations be devised?

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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?

Which prospective defendants should be subject to jurisdiction? The laws of personal jurisdiction vary widely. Many countries would reject, for example, United States "tag jurisdiction." Should treaties or rules permit one tribunal to bind all possible parties -- plaintiff and defendant, those injured in the present and past -- as a result of one or related incidents? What should those personal jurisdiction rules be?

Are there procedures capable of handling such 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 10,000 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 a matter suggesting further discussion.

Put aside for the moment the procedural problems in juridically finalizing a settlement or trial of a school desegregation case, the horrendous "slave laborers" cases, the human rights cases of the Philippines or the holocaust victims assets cases. Turn to a, by comparison, banal example of future litigations.

Assume a popular 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 “Dot Com” 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 on-line directly from the manufacturer and in almost any drug store. Brand names are used, but "The Product" is generic. Telephone, internet orders and credit cards utilize satellites, and electronic bank transfers settle accounts, mainly through New York, London and Tokyo. Suddenly, indications are that the product has long-term adverse effects.

Assume an action by 1,000 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, a non-federal substantive claim, 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.

United States courts strongly attract such global disputes. This magnetism is due to four factors. First, our procedural and jurisdictional rules are in general helpful to plaintiffs. Second, our courts tends to award high money judgments. Third, the substantive law tend to favor plaintiffs; recently for example, Canada sued in an American court for tobacco related damages because of the available treble damages under our federal racketeering law and stronger fraud provisions; and, of course, there is the possibility of almost limitless punitive damages. Fourth, there is a powerful plaintiffs bar capable of financing 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 technological order requires some rethinking of our jurisdiction and choice of law shibboleths.

Disasters such as those sketched in the hypothetical – be they chemicals in the Danube, extensive human rights deprivations, securities frauds or individually imbibed pharmaceutical poisons – know no national boundaries. How should we handle them?

Along with issues of choice of substantive law, 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? While individual nations have used scientific panels, an international pool 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 United States beef are carcinogenic or DNA
tampering with grain is harmful. The German system and our
Daubert pretrial expert gatekeeping hearings or
appointments of expert panels can prove useful in such
litigation.

The question we must address is how within the rule of
law we can 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. We need to try avoid destroying
whole industries. We need to reduce transaction costs and
burdens on our judicial structures.

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

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 security welfare system where the state will fully compensate. Most countries are moving away from this solution as too burdensome for the nation.

3. Combine some mix of public welfare, private assistance as by workers compensation, and court or administrative remedies -- the United States approach.

The United States system relies heavily on court adjudicated tort claims. In this model at its simplest level, there is a single victim and a single defendant. 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 damages
When the dispute involves many claims, we allow for the transfer of actions from one federal court to another -- sometimes for the pretrial stages only -- and their consolidation. Transfer from state to state is not directly possible. The federal courts in the United States have established a panel on multi-district litigation that attempts to coordinate and consolidate large actions. These devices reduce the burdens of multiplicative litigation and allow a single judge to develop a greater familiarity with the case. In addition, they often facilitate a global settlement of all claims.

The effect of non-class action consolidation (as well as of class actions) 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 are 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.

2. Administrative

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 or by 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 safe 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 so that it will reimburse its individual customers by three hundred million dollars for false advertising. 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 dollars. Large fines by the Occupational Safety and Health Administration, the Consumer Safety Products Commission, the Security and Exchange Commission, and the Food and Drug Administration serve the same kind of role.

Modifications of available administrative practice to force disgorgement to those injured as in the Comptroller of the Currency case is desirable. This approach has not yet been generally embraced.
I have urged more use of what I referred to in an opinion as the "French model." 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 model 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 in the civil class action for fraud; both cases had been assigned to me as related.

3. 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.

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

The American class action offers the advantages and disadvantages that come from the 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 the class action include the following:

1. They eliminate duplication of discovery, motion practice, and pretrial procedures.

2. They allow a single judge to familiarize him- 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.

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 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.

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. It is incumbent upon judges to 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 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 largely obviated by the fact that the people with the most valuable claims can usually opt-out and litigate on their own behalf.

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, 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 lawyer and industry lobbyists.

A recent amendment to the class action rules of the federal courts provides for immediate review of the class certification decision. 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 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’

atorneys 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 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 best result in many class actions continues to be settlement. This outcome, bringing to an end festering disputes, reduces transaction costs and provides a matrix for a fair distribution of any monetary settlement. 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.

I take it that this brave 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.)