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Recommended Citation

Robert L. Rabin, *Judge Jack Weinstein and the World of Tort: Institutional and Historical Perspectives*, 64 DePaul L. Rev. (2015)
Available at: <https://via.library.depaul.edu/law-review/vol64/iss2/17>

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JUDGE JACK WEINSTEIN AND THE WORLD OF TORT: INSTITUTIONAL AND HISTORICAL PERSPECTIVES

*Robert L. Rabin**

INTRODUCTION

It is conventional wisdom that tort law entered a new era beginning around 1960, emerging from a sleepy backwater area of the law in which *MacPherson v. Buick Motor Co.*¹—decided nearly half a century earlier—remained the landmark of twentieth-century accident law. The new era, spearheaded by the California Supreme Court under the intellectual leadership of Justice Roger Traynor, cut across virtually all categories of liability for unintentional injury. These developments included recognition of new and expansive duties of due care in personal injury claims for landowner liability,² intrafamily liability,³ professional liability,⁴ and stand-alone emotional distress,⁵ among others, and eroded existing defenses (contributory negligence and express assumed risk)⁶ and immunities (governmental, in particular).⁷

But the hallmark of the reconstituted law of tort was in the area of products liability, where the California Supreme Court moved beyond the constraints of negligence law, and in a series of influential opinions beginning with *Greenman v. Yuba Power Products*,⁸ the court enunciated a principle of strict liability for product defects. Conventionally, *Greenman* is viewed as building on the foundation of Justice Traynor's earlier concurring opinion in *Escola v. Coca Cola Bottling*

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1. 111 N.E. 1050 (N.Y. 1916).

2. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

3. *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971).

4. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

5. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

6. *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226 (Cal. 1975) (judicially adopting comparative fault); *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (redefining and limiting express assumed risk).

7. *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961).

8. 337 P.2d 897 (Cal. 1963).

Co.,⁹ in which he made the case for abandoning negligence as the standard for determining the liability of a product manufacturer for defect-related injuries.¹⁰ And *Greenman* might also be viewed as a sympathetic response to the New Jersey Supreme Court's decision, just three years earlier, in *Henningsen v. Bloomfield Motors, Inc.*,¹¹ similarly departing from the pathway of negligence in favor of a strict liability principle of recovery.

These traces of the *Greenman* antecedents, however, slightly miss the mark. For in his *Escola* concurrence, Justice Traynor still felt the need (admittedly, perhaps as a makeweight) to argue pragmatically that strict liability was closely akin to *res ipsa* negligence for a product defect. And *Henningsen* was premised on warranty liability, which Justice Traynor outright rejected as excessively formal and limiting as a lynchpin for strict liability.

In fact, the lodestar for *Greenman* and the reconstituted products liability is found not in tort law *per se*, but somewhat paradoxically in the abandonment of tort law at the beginning of the twentieth century in favor of workers' compensation for victims of industrial injury.¹² It was here, in the domain of social welfare legislation, that the conceptual core of strict liability for product injuries—the theory of enterprise liability—was initially articulated.

Indeed, Justice Traynor's commitment to this paradigm shift in tort responsibility is spelled out at the very outset of his *Escola* concurrence. Addressing the responsibility of the defendant manufacturer for injury from an exploding soda bottle, he begins:

Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.¹³

9. 150 P.2d 436 (Cal. 1944).

10. *Id.* at 443–44.

11. 161 A.2d 69 (N.J. 1960).

12. See generally Robert L. Rabin, *Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts*, in *EXPLORING TORT LAW* 52 (M. Stuart Madden ed., 2005).

13. *Escola*, 150 P.2d at 440–41 (Traynor, J., concurring).

This two-pronged concept of enterprise liability—liability that creates optimal incentives to safety and widely distributes the consequences of personal injury—would serve as his guiding principle two decades later in *Greenman*, when a majority on a reconstituted California Supreme Court shared his proactive philosophy of responsibility for accidental harm.

Refinements would soon follow out of necessity. Justice Traynor's court never clearly distinguished between manufacturing, design, and warning defects.¹⁴ Unmoored, design defect liability would be tantamount to absolute liability, not strict liability: a manufacturer of a high-lift loading vehicle would be responsible for injury resulting from capsizing even if the vehicle were being driven up a mountainside. Some limiting conception of what constituted a defect was essential. In the negligence domain, similar refinements of the duty of due care followed.¹⁵ Nonetheless, accident law—and especially products liability law—was now firmly anchored in the two-pronged rationale of enterprise liability.

Tort law had come to be driven by public law principles of a functional nature—in particular, tort theory characterized in regulatory and distributional terms—in contrast to its traditional private law character as a system of corrective justice.¹⁶ Critically, however, from a structural perspective, the character of the new tort law remained firmly embedded in a two-party interpersonal relationship between plaintiff and defendant.

This structural continuity is perhaps most clearly evident in the landmark expansions of the duty of due care in negligence cases: the traditional interparty nexus remained a constant in *Rowland v. Christian*,¹⁷ *Tarasoff v. Regents of the University of California*,¹⁸ and *Dillon v. Legg*.¹⁹ In some instances (e.g., *Tarasoff* and *Dillon*), these expansionary holdings raised floodgates issues. But the court addressed

14. See, e.g., *Cronin v. J. B. E. Olson Corp.*, 501 P.2d 1153, 1163 (Cal. 1972) (failing to distinguish between a manufacturing defect and a design defect in a case involving an injury to a bread-truck driver from a defective latch holding rear-vehicle trays in place).

15. See, e.g., *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (taking a restrictive approach to the *Dillon v. Legg* bystander liability guideposts).

16. In the academic realm, this paradigm shift is best represented by Guido Calabresi in his highly influential *The Costs of Accidents* and the more general attentiveness to tort in the law and economics movement. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

17. 443 P.2d 561 (Cal. 1968) (landowner's liability to injured entrants).

18. 551 P.2d 334 (Cal. 1976) (therapist's responsibility to protect third parties from serious harm).

19. 441 P.2d 912 (Cal. 1968) (driver's responsibility for stand-alone emotional distress to third parties eye-witnessing serious personal injury).

those issues by fashioning duty limitations in the context of traditional two-party suits.²⁰ Moreover, it is critical to note that duty obligations remained the focal point in these cases; the cause in fact of harm was rarely in dispute.

Importantly, the same observation holds for the paradigm shift in products liability. The *Greenman* line of cases, defining the borders of the new strict liability principle, arose in a two-party context, raising questions in the first instance of whether to extend liability to those in the vertical sales chain²¹ and to injured bystanders.²² Indeed, the court's failure to distinguish between manufacturing and design defects in cases such as *Greenman*, which involved a consumer personal injury from a defective power tool, and *Cronin v. J. B. E. Olson Corp.*,²³ is worlds apart from potential mass tort concerns. As long as the structural focal point remained the failure to safeguard against an undisputed injury to the immediate victim, a classic case-by-case framework smoothly accommodated doctrinal refinement.

Even as the products liability doctrine evolved to explicitly recognize limitations on design defect liability in subsequent cases such as *Barker v. Lull Engineering Co.*²⁴ and *Soule v. General Motors Corp.*,²⁵ the refinements were effectuated in the traditional two-party interpersonal structure of tort claiming. Scenarios of indeterminate responsibility among joint defendants, let alone aggregation of large numbers of claimants, was conspicuously absent.

In the midst of these developments, Jack Weinstein was appointed to the federal bench in 1967. As I will indicate, he was in fact strongly influenced by these proactive crosscurrents in tort law. But the cases that would make his reputation and demonstrate his creative approach to assigning responsibility for accidental harm, while building on this foundation of evolving tort law, were of a strikingly different character—and they signaled a critical shift in the cutting-edge class of injuries testing the expansive capacity of tort law. Under the now-familiar characterization of “mass tort,” these cases generated institutional capacity issues of a new order.

In the following section, I will offer four representative illustrations of Judge Weinstein's creative efforts to recast traditional tort concepts in a fashion responsive, by his lights, to accident law claims that

20. *Tarasoff*, 551 P.2d at 340; *Dillon*, 441 P.2d at 920–25.

21. *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964).

22. *Elmore v. Am. Motors Corp.*, 451 P.2d 84 (Cal. 1969).

23. 501 P.2d 1153, 1163 (Cal. 1972); *see also supra* note 14 and accompanying text.

24. 573 P.2d 443 (Cal. 1978) (high-lift loader injury).

25. 882 P.2d 298 (Cal. 1994) (auto floorboard post-collision injury).

pressed against the boundaries of the conventional interpersonal tort law process. In the first of these cases, dealing with a cluster of blasting cap injuries to minors, Judge Weinstein addressed the puzzle of the indeterminate defendant.²⁶ In the second, war veterans' claims from Agent Orange exposure in Vietnam (arguably his most notable case management effort), he wrestled with the indeterminacy of both defendants and plaintiffs.²⁷ In the third, the handgun cases, the mass claims dimension so evident in *Agent Orange* was less salient than the public safety perspective that animated his doctrinal creativity.²⁸ And finally, in the tobacco punitive damages class action, he returned to a concern for reaching closure in a seemingly intractable public health controversy that served as an underlying theme in *Agent Orange*, as well.²⁹

Each of these cases, in its own way, served as a vehicle for Judge Weinstein to realign enterprise liability theory to give priority to risk spreading over risk allocation as an expression of his distinctive commitment to redress of injury victims.³⁰ In the final section of this Article, I will discuss how these judicial strategies mesh with Judge Weinstein's published efforts in the academic sphere to articulate his vision of the role of tort law.³¹

II. TORT IN THE WEINSTEIN COURTROOM: PARADIGMS, OLD AND NEW

A. *Initial Foray: Blasting Caps*

The imprint of these landmark California products liability decisions was central to Judge Weinstein's initial foray into the world of enterprise tort responsibility in 1972, just as these decisions crystallized into an identifiable foundation for a new paradigm of liability for product injuries. In *Hall v. Du Pont*, a cluster of accidents resulting from the detonation of blasting caps manufactured by six companies injured children, providing the entrée for Judge Weinstein to spell out

26. *See infra* Part II.A.

27. *See infra* Part II.B.

28. *See infra* Part II.C.1.

29. *See infra* Part II.C.2.

30. This may seem least evident in the class action punitive damages case involving big tobacco. But as I will indicate, the closed-end single judgment remedy that Judge Weinstein proposed was in part intended to assure that serial judgment punitive damages cases did not compromise the prospect of future compensatory damage awards for victims of tobacco-related disease.

31. *See infra* Part III.

his views on the emerging substantive law of accidental harm caused by defective products.³²

In *Hall*, he began with a recitation of the California Supreme Court's newly articulated products liability principles as applied in this distinct injury setting.³³ Duty raised no substantive obstacles for Judge Weinstein, either under negligence or the emergent strict liability in tort, because "enterprise responsibility" for foreseeable misuse of the blasting caps was consonant with the "two reasons for imposing strict liability on manufacturers . . . summarized by the phrases 'incentive' and 'risk allocation.'"³⁴ The Traynor court's legacy is explicit in the opinion, as Judge Weinstein drew on and cited *Escola*, *Greenman*, *Vandermark*, and *Elmore*.³⁵

But Judge Weinstein moved beyond these now-baseline precepts when he confronted the "central question . . . [of] whether the defendants can be held responsible *as a group* under any theory of joint liability for injuries arising out of their *individual* manufacture of blasting caps."³⁶ This question raised an issue that could not be accommodated by simply taking another step forward in the proactive line of California products liability decisions because the blasting cap cases challenged the fundamental two-party, individual responsibility nexus on which traditional tort law was premised. The blasting cap manufacturers responsible for the particular injuries suffered by virtually all of the plaintiffs could not be individually linked. Recovery, if allowable, would be premised instead on a concept of collective responsibility generated by collective risk creation and anchored by participation in an industry-wide safety program.

Spelling out this expanded conception of tortious responsibility, Judge Weinstein asserted that:

[P]laintiffs can submit evidence that defendants, acting independently, adhered to an industry-wide standard or custom with regard to the safety features of blasting caps. Regardless of whether such evidence is sufficient to support an inference of tacit agreement, it is still relevant to the question of joint control of risk. The dynamics of market competition frequently result in explicit or implicit safety standards, codes, and practices which are widely adhered to in an entire industry. Where such standards or practices exist, the industry operates as a collective unit in the double sense of stabilizing the production costs of safety features and in establishing an industry-wide custom which influences, but does not conclusively determine,

32. *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 386 (E.D.N.Y. 1972).

33. *Id.* at 362.

34. *Id.* at 368.

35. *Id.* at 368-70.

36. *Id.* at 370-71 (emphasis added).

the applicable standard of care. . . . [W]here . . . individual defendant–manufacturers cannot be identified, the existence of industry-wide standards or practices could support a finding of joint control of risk and a shift of the burden of proving causation to the defendants.³⁷

Here, Judge Weinstein posited responsibility outside of the long-established conventional approach to causation through the introduction of what came to be called “the indeterminate defendant.”³⁸ Indeed, Judge Weinstein posited such responsibility with a flourish beyond the named defendants, highlighting as well the salience of burden of proof considerations:

The possibility—admitted by plaintiffs—that the caps may have come from other, unnamed sources, does not affect plaintiffs’ burden of proof. Plaintiffs must show by a preponderance of the evidence—i.e., that it is more probable than not—that the caps involved in the accidents were the products of the named defendant–manufacturers. Plaintiffs do not have to identify which one of the defendant–manufacturers made each injury-causing cap. To impose such a requirement would obviate the entire rule of shifting the burden of proving causation to the defendants. It must be more probable than not that an injury was caused by a cap made by some one of the named defendant manufacturers, though which one is unknown.³⁹

Within a decade, the *Hall* opinion, although distinguishable on its facts, would strongly influence the California Supreme Court’s widely noted market share liability decision in the diethylstilbestrol (DES) case, *Sindell v. Abbott Laboratories*,⁴⁰ and the still more expansive New York Court of Appeals approach to DES liability.⁴¹ And the

37. *Id.* at 374 (citations omitted).

38. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 819 (E.D.N.Y. 1984).

39. *Hall*, 345 F. Supp. at 379.

40. 607 P.2d 924 (Cal. 1980). The DES cases involved a mass-produced miscarriage-preventative drug ingested by the mothers of daughters who at a later age developed various forms of cervical cancer. *Id.* Complicating these cases, the mother of a DES-injured daughter in almost all instances could not specifically identify the manufacturer whose product she had ingested. Unlike *Hall*, *Sindell* did not involve collective activity on the part of the defendants and did involve a far greater number of defendants. *Id.* Some 200 drug manufacturers marketed DES at one point or another. *Id.*

41. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989). The *Hymowitz* court took a dramatic step beyond *Sindell* by holding that even if the defendant could establish that it had not manufactured the pills taken by the plaintiff’s mother—e.g., Rexall pills were only sold in Rexall pharmacies, and clearly most of the DES mothers would not have been Rexall purchasers—those defendants would nevertheless bear market share responsibility. *Id.* at 1078–80. This step is tantamount to creating a no-fault compensation scheme to assess defendant responsibility, rather than applying strict tort liability.

Hall opinion would be of great salience for Judge Weinstein's own collective responsibility thinking in the *Agent Orange* litigation.⁴²

It was, in fact, in the latter litigation—arguably Judge Weinstein's most prominent contribution to a singularly new perspective on responsibility in tort—that he closed the circle. In hindsight, the critical dimension of *Hall*, involving eighteen separate accident claims, remained consonant with the traditional framework of plaintiff-side allegations of tortious responsibility. Consolidation of a judicially manageable number of claims within a single action was not unheard of. But *Agent Orange* brought the claims of *thousands* of Vietnam veterans to the courthouse door, alleging a variety of harms from exposure to dioxin. The *Agent Orange* litigation was a game-changing introduction of the mass tort concept, and an introduction of tort claiming in its most perplexing setting: toxic harm exposure.

B. Addressing Mass Tort: Agent Orange

Much has been written about *Agent Orange*, the case in which Judge Weinstein masterminded a \$180 million settlement of a bitter controversy that had dragged on for over six years in the halls of the Veterans Administration and then the federal courthouse with no apparent end in sight—until Judge Weinstein emerged on the scene. Early on, I offered my own thoughts in a review of Peter Schuck's excellent volume, *Agent Orange on Trial: Mass Toxic Disasters in the Courts*.⁴³ In a highly skeptical vein, it appeared to me, as to many others, that the \$180 million figure had “simply been picked out of the air,” bearing no apparent relationship either to the aggregate harm allegedly suffered by the plaintiff class or to prospective optimal deterrence of future toxic exposures.⁴⁴ An expertise-based administrative no fault compensation scheme seemed a preferable institutional approach to resolving a mass claims episode of such staggering proportions—a conclusion, it should be noted, that was not at all inconsistent with Judge Weinstein's own thinking.⁴⁵

But of course, he did not share the luxury of academic speculation. Whatever might have been the optimal institutional forum for resolving the *Agent Orange* toxic exposure claims, Judge Weinstein had in-

42. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 183–84 (enlarged ed. 1987).

43. Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 *YALE L.J.* 813 (1989) (reviewing SCHUCK, *supra* note 42).

44. *Id.* at 819.

45. Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 *COLUM. J. ENVTL. L.* 1, 3–5 (1986).

herited the multidistrict litigation (MDL) assignment to address the controversy as a Rule 23 class action in tort.⁴⁶ And from a tort perspective, *Agent Orange* picks up the narrative that began in *Hall*. If the blasting cap cases raised the specter of the indeterminate defendant, *Agent Orange* trumped them by also introducing the dilemma of the indeterminate plaintiff.

In *Agent Orange*, Judge Weinstein confronted the challenge of a new era of tort claiming, for the indeterminate defendant and indeterminate plaintiff are not mirror image concerns. Where the indeterminate defendant raises the issue of proportionate risk allocation among parties who concededly share in the collective risk creation, the indeterminate plaintiff raises the issue of probabilistic risk identification among a class, some of whom would have suffered injury or disease regardless of the defendants' conduct. Clearly, these are two distinct notions of indeterminacy, even though both are intrinsic to the tort law requirement of cause in fact.

Judge Weinstein drew on the ideological underpinnings of *Hall* to assert the collective enterprise responsibility of the eight manufacturers of Agent Orange. As in *Hall*, the individual responsibility of each manufacturer was indeterminate: the Agent Orange supplied to the Army had been pooled for purposes of foliage spraying. But it required only a modicum of creativity on the causal relationship dimension to index the responsibility of each manufacturer by volume and toxicity. While assigning joint responsibility here was a far cry from the errant pair of quail hunters in *Summers v. Tice*,⁴⁷ from one vantage point, the case for shifting the burden on causal responsibility to the defendants in *Agent Orange* was stronger. Only one of the hapless hunters in fact caused the injury to the unfortunate victim in *Summers*; by contrast, all of the Agent Orange manufacturers caused harm to members of the victim class (assuming, of course, a toxic exposure/disease connection).

Indeed, the far more difficult barrier to collective responsibility of the manufacturers was a more conventional doctrinal tort question: whether the defendants would be shielded from responsibility by invoking the government contractor defense.⁴⁸ Judge Weinstein's engagement on this issue deserves a brief digression, for it provides a broader insight into his contrasting perspectives on mass tort responsibility and enterprise liability tort responsibility.

46. FED. R. CIV. P. 23. For a discussion of Judge Weinstein's takeover of the case, see SCHUCK, *supra* note 42, at 110–11.

47. 199 P.2d 1 (Cal. 1948).

48. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 843 (E.D.N.Y. 1984).

This sharp contrast is highlighted by fast-forwarding to the *Agent Orange* postscript some twenty years after the historic settlement. In his 1984 fairness opinion approving the settlement, Judge Weinstein discerned sufficient ambiguity on the government contractor defense to approve the settlement, rather than dismiss the claims outright—particularly, ambiguity on the third prong of the defense, which he articulated as whether the government knew as much or more than the manufacturers regarding the toxic risks of dioxin.⁴⁹ Yet two decades later, in addressing the “futures claims” by plaintiffs whose cancers had not yet ripened at the closure date of the *Agent Orange* settlement fund, Judge Weinstein authored a scholarly opinion on the government contractor defense, which dismissed the claims and asserted that from the outset it was clear the government had superior risk information—from testing it had undertaken—than the manufacturers.⁵⁰

He then proceeded to underscore the policy reasons supporting his dismissal of the *individual* opt-out claims two decades earlier, as well:

Failure to apply the government contractor defense in cases such as this one would substantially inhibit the United States from obtaining equipment and products for its armed forces in time of emergencies or war. Failure to afford this defense would have the potential of enormously increasing the cost to the government of purchasing such materials because suppliers would have to include in the price the cost of almost unlimited and unknowable possible liability for future tort claims. Added to costs of such prospective suits would be the difficulty of resolving many claims through a global settlement protecting against future claims—a problem illustrated by this very litigation and the overhanging huge numbers of potential future like suits.⁵¹

What bears emphasis, then, is the cleavage in Judge Weinstein’s thinking between tort law as an instrument of compensation in cases of interpersonal harm, with enterprise liability serving as the outer bound of responsibility, and tort law as an instrumental strategy for facilitating mass or collective relief when other institutional forums seem to be incapacitated—which appears to have driven his earlier refusal to invoke the government contractor defense against the plaintiff settling class in *Agent Orange*.

49. *Id.* at 795–99. The other two prongs of the defense are stated as (1) production in compliance with the government’s specifications; and (2) provision of a warning about any product dangers that the manufacturer knew or should have known. *Id.* at 843; *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988).

50. *In re* “Agent Orange” Prod. Liab. Litig., 304 F. Supp. 2d 404, 427–30, 442 (E.D.N.Y. 2004).

51. *Id.* at 442.

This point comes into even sharper focus in viewing the indeterminate plaintiff side of the *Agent Orange* case. Here, the paradox implicit in reliance on the traditional more-probable-than-not standard of proof in toxic exposure cases had been underscored in contemporaneous scholarly academic literature.⁵² If one hundred victims exposed to defendant's toxic emissions could only establish a 30% likelihood of injury above baseline risk, then none would in fact reach the threshold for recovery under the traditional standard. Looking to facilitate settlement in *Agent Orange*, Judge Weinstein unveiled the prospect of subclassing by disease, location, and duration of exposure, and, most importantly, recognizing probabilistic recovery. This innovative move was quite clearly the key to reaching the settlement—indeed, it served as the cornerstone of the postsettlement distributional scheme.⁵³ In Judge Weinstein's view, the collective claim for a responsive forum animated a bold departure from traditional more-probable-than-not standard of proof requirements.

As in the case of the government contractor defense, however, Judge Weinstein made clear that this proactive strategy was grounded in aggregate, or collective, thinking, in which a conceptual approach is fashioned to embrace a communal harm. Once a plaintiff left the collective, via opt-out, his claim was dependent on remaining within the parameters of traditional tort law precepts—parameters that remained faithful to a plaintiff-specific determination of cause in fact.⁵⁴ Lacking any prospect of a successful evidentiary showing, Judge Weinstein proceeded to dismiss the opt-out claims.⁵⁵

52. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984). For a later exposition, see Michael D. Green, *The Future of Proportional Liability: The Lessons of Toxic Substance Causation*, in *EXPLORING TORT LAW*, *supra* note 12, at 352.

53. SCHUCK, *supra* note 42, at 184–89, 268–72; see also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 26 & 201 n.88 (1995) (pointing to the 1984 *Agent Orange* litigation settlement fund as an example of compensation being “divided on some statistical basis among those injured”).

54. It can be argued that Judge Weinstein is less than entirely consistent here with his willingness to look beyond traditional tort causal requirements in the blasting cap cases. See *supra* notes 36–39 and accompanying text. But in those cases, it was clear that the plaintiffs' injuries were a consequence of exposure to the defendants' product; in *Agent Orange*, the linkage between the plaintiffs' diseases and the product exposure was far from clear.

55. *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1223, 1260–64 (E.D.N.Y. 1985).

C. Conceptual Applications: Later Cases

1. On the Frontiers of Established Doctrine: The Handgun Cases

A leading illustration of Judge Weinstein addressing more conventionally structured nonaggregative tort claims—a conceptually proactive Judge Weinstein, but operating within a broadly defined domain of enterprise liability—are his decisions in the handgun cases, *Hamilton v. Accu-Tek*⁵⁶ and *Johnson v. Bryco Arms*.⁵⁷ Reduced to its essentials, *Hamilton* involved the consolidation of a small number of violent incidents in which either death or serious injury resulted from unidentified handguns of the type manufactured by the defendants, all constituent firms in the handgun manufacturing industry.⁵⁸ The handguns were distributed through a chain of sales to retail outlets, which in turn were responsible for selling the guns ultimately used by the perpetrators of the violent acts.⁵⁹ The precise chain of causation between manufacture and injury in each case was not possible to trace because the sales records and the guns themselves could not be individually identified.⁶⁰

Nonetheless, Judge Weinstein sustained jury verdicts in this diversity action while asking the Second Circuit to certify two questions to the New York Court of Appeals.⁶¹ *Hamilton* is particularly notable in the context of the two foundational Weinstein opinions discussed in the preceding sections, *Hall* and *Agent Orange*, as a return to the pathway forged in the former case. In *Hamilton*, once again there was industry-wide activity posing a substantial risk of personal injury: the manufacture of handguns. Yet, the setting was sharply distinct from the aggregated claims dilemmas posed by a mass tort like that in *Agent Orange*. To be sure, handgun violence can be regarded as a social problem of first-order magnitude. But the claims arise case by case, in contrast to the aggregate numbers, as well as the cause-in-fact dilemmas that characterize mass toxic exposures like that in *Agent Orange*.

56. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

57. 304 F. Supp. 2d 383 (E.D.N.Y. 2004).

58. *Hamilton*, 62 F. Supp. 2d at 808.

59. *Id.*

60. *Id.* at 808–10.

61. *Id.* at 847–48. The Second Circuit granted Judge Weinstein's request and certified two questions: "Whether the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture?"; and "Whether liability in this case may be apportioned on a market share basis, and if so, how?" *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 39 (2d Cir. 2000). The New York Court of Appeals took up both questions and answered both in the negative. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1068 (N.Y. 2001).

As such, Judge Weinstein resorted to conventional tort doctrine—in particular, the concept of negligent entrustment—to develop the case for a threshold duty of due care on the part of the defendants. In his characteristically proactive mode, however, he pressed the outer bounds of the doctrine. It is one thing to recognize a legal obligation to a third-party victim when the defendant has carelessly enabled a high-risk individual, such as a minor, to gain access to a firearm, or given an intoxicated individual access to a motor vehicle. A sense of immediacy of risk-generating conduct in these situations bridges the gap of no direct contact with the injury victim. It is a step beyond these scenarios to recognize entrustment liability forged through a chain of commercial transactions between the manufacturer and vendors, let alone a straw purchaser in many instances, before the weapon ends up in the hands of a malevolent individual.

Along with the attenuated chain of commercial transactions, the case for responsibility turns on baseline empirical data establishing a manufacturer's foreseeability of reckless conduct on the part of the ultimate vendor, the retailer, in effectuating the sale of the handgun. In fact, the New York Court of Appeals rejected Judge Weinstein's expansive version of the entrustment theory, but was not entirely unsympathetic to his conceptual argument, finding the empirical evidence on suspect sales wanting.⁶²

The attenuated chain of sales posed a second issue for which Judge Weinstein needed to draw creatively on tort doctrine. Since the weapons in *Hamilton* had not been recovered, it was impossible to link respective defendant manufacturers to victims.⁶³ Again, Judge Weinstein was forced to bridge a gap: this time on the causal relation issue. To do so, he relied on the newly fashioned doctrine of market share liability brought to fruition in the DES cases, most notably

62. *Hamilton*, 750 N.E.2d at 1064.

The negligent entrustment doctrine might well support the extension of a duty to manufacturers to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis. Here, however, plaintiffs did not present such evidence. Instead, they claimed that manufacturers should not engage in certain broad categories of sales. Once again, plaintiffs' duty calculation comes up short. General statements about an industry are not the stuff by which a common-law court fixes the duty point. Without a showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert.

Id. (footnotes omitted). Based on the answer to the certified question, the Second Circuit reversed Judge Weinstein's decision. *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 25 (2d Cir. 2001).

63. *Hamilton*, 62 F. Supp. 2d at 808–10.

Sindell and *Hymowitz*. This doctrine, as mentioned, could trace its lineage back to Judge Weinstein's approach in the blasting cap cases.⁶⁴

But extending this freshly minted concept required another leap. Courts had been, and remain, wary of extending market share liability beyond the fungible drug setting of DES.⁶⁵ Judge Weinstein, however, saw no reason to draw the line at DES; reminiscent of the blasting cap manufacturers, he reasoned that handgun manufacturers collectively, even if not as coconspirators, constituted an industry producing and marketing a product without regard for the risks it posed to innocent third parties. Once again, a more cautious New York Court of Appeals responded negatively to this second certified question—"Whether liability in this case may be apportioned on a market share basis, and if so, how?"⁶⁶—that would have recognized a broader applicability of market share liability-based causation.⁶⁷

In *Hamilton*, Judge Weinstein had arguably taken tort doctrine to creative ends with an eye on a major social issue—certainly to the frontier of what duty and causal responsibility might dictate. As it turned out, this was hardly the end of the handgun tort story in Judge Weinstein's courtroom. Just three years later, in *Johnson v. Bryco Arms*, another victim of handgun violence, shot in the course of an armed robbery, brought a claim against a handgun manufacturer, along with wholesalers and the retail vendor who sold the weapon to a straw purchaser—an "underground market," as the court put it.⁶⁸ This time, however, the weapon had been retrieved and the gun manufacturer identified.⁶⁹ Moreover, the identified distributors in the sales chain were empirically linked, through reliance on trace data from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to a disproportionately high number of handgun-related deaths

64. See *supra* notes 36–39 and accompanying discussion.

65. See, e.g., *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 697 (Ohio 1987) (declining to apply marketshare liability to manufacturers of asbestos products due to the fact that "[a]sbestos-containing products [did] not create similar risks of harm because there [were] several varieties of asbestos fibers, and they [were] used in various quantities, even in the same class of product").

66. *Hamilton*, 222 F.3d at 39.

67. *Hamilton*, 750 N.E.2d at 1067–68.

We recognize the difficulty in proving precisely which manufacturer caused any particular plaintiff's injuries since crime guns are often not recovered. Inability to locate evidence, however, does not alone justify the extraordinary step of applying market share liability. . . .

. . . [P]laintiffs here have not shown a set of compelling circumstances akin to those in *Hymowitz* justifying a departure from traditional common-law principles of causation.

Id.

68. *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 389–90 (E.D.N.Y. 2004).

69. *Id.* at 389.

and injuries in the New York City area⁷⁰—which was not feasible in *Hamilton*.

This more advantageous factual setting animated a new approach to the issue, circumventing exclusive reliance on the problematic negligent entrustment theory and obviating the need to invoke market share liability. Instead, Judge Weinstein pressed forward on another frontier: the outer limits of the hoary doctrine of public nuisance.

A long but narrowly delineated tradition of public nuisance law grounded legal responsibility in conduct involving “a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience.”⁷¹ Efforts to give this rather fuzzy concept a modern-day public health and safety gloss have generally been rebuffed. A widely noted illustration is the lead paint litigation, about which the Rhode Island Supreme Court had the following to say:

Although the state asserts that the public’s right to be free from the hazards of unabated lead had been infringed, this contention falls far short of alleging an interference with a public right as that term traditionally has been understood in the law of public nuisance. The state’s allegation that defendants have interfered with the “health, safety, peace, comfort or convenience of the residents of the [s]tate” standing alone does not constitute an allegation of interference with a public right. The term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way. Expanding the definition of public right based on the allegations in the complaint would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended⁷²

Interestingly, Judge Weinstein did not directly confront the traditional constricted limits of public nuisance theory as spelled out in the lead paint litigation. Instead, in near-*ipse-dixit* fashion, he leaned heavily on the “public safety” rationale for public nuisance that he articulated in *NAACP v. AcuSport, Inc.*,⁷³ holding that “an interference with a public right occurs when the health, safety, or comfort of a considerable number of persons in New York is endangered or injured, or the use by the public of a public place is hindered.”⁷⁴ Then,

70. *Id.*

71. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

72. *State v. Lead Indus. Ass’n*, 951 A.2d 428, 453 (R.I. 2008) (citations omitted).

73. 271 F. Supp. 2d 435, 448–49, 499 (E.D.N.Y. 2003). Similarly, *Acusport* is a handgun public nuisance case, but the claim was dismissed because the plaintiff organization did not meet the requirement of a private injury distinct from an injury to the public at large. *Id.* at 499.

74. *Id.* at 448.

working from this baseline of substantive responsibility, he filled in the blanks of public nuisance theory: a private injury to the plaintiff in the case, distinct from the heightened general risks to the community at large, and a vertical chain of obligation—no horizontal market share issue here—established by the trace data identified with the participants in the distributional system.

If *Hamilton* pressed duty and causal responsibility to the outer limits of negligence theory, *Bryco Arms* entered a new domain of public nuisance and once again, working within the framework of the interpersonal structure of tort law, expansively read a long-standing doctrine in notably proactive fashion.

Ultimately, Judge Weinstein's creative gloss on a conventional doctrinal concept in *Bryco Arms* once again went for naught. But this time, it is ironically because he (and the handful of other courts receptive to public nuisance theory) was arguably *too* persuasive. Rather than appellate reversal, in 2005, Congress intervened at the behest of a beleaguered handgun industry and enacted a special immunity from tort responsibility for handgun manufacturers and distributors.⁷⁵

2. *Beyond the Frontier: Class-Wide Punitive Damages and a Reprise on Mass Tort*

When Judge Weinstein crafted the settlement in *Agent Orange*, it gave every appearance of being the mass tort *nonpareil*: it involved many thousands of potential claimants, indeterminate plaintiffs, scientific uncertainty, and more. But one distinctly troublesome question that has come to hang like a shadow over mass tort litigation had not yet clearly emerged at the time: how can the court address the issue of punitive damages arising from a single course of conduct that affected such large numbers of victims?

Along with the other aspects of mass tort litigation, mass punitive damages claims are ill suited for resolution within the structure of traditional interpersonal tort responsibility. The central dilemma is by now well recognized. If punitive damages are relegated to case-by-case treatment—i.e., serial awards of punitive damages—there are deeply rooted fairness concerns for both plaintiffs and defendants. On the defendant's side of the ledger, there is the basic fairness notion that no matter how grievous one's misconduct, there should not be repeated punishment for a course of conduct without reference to the sanctions already doled out. On the plaintiff's side of the ledger, there is the more practical concern, similarly grounded in fairness notions,

75. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (2012).

that mass tort responsibility should as a baseline matter attend to all of the compensatory harm done; repeated case-by-case punitive damage awards may exhaust the defendant's resources, leaving many injury victims without recourse to compensatory awards.

In the absence of legislative resolution, the natural turn is to mass tort aggregation. But that pathway is littered with obstacles. The tobacco litigation in *Simon II*,⁷⁶ where Judge Weinstein would have imposed this strategic resolution, is a case in point. In the traditional tort setting, punitive damages accompany a compensatory award to the victimized individual plaintiff.⁷⁷ But the mass tort version of this foundation rests on a nationwide (or more modestly, statewide) class action for compensatory damages—i.e., an aggregation of viable compensatory claims. That route has proven to be a dismal failure for plaintiffs in the tobacco litigation: the widely noted nationwide class action for compensatory harm in *Castano v. American Tobacco Co.* was decertified by the Fifth Circuit Court of Appeals,⁷⁸ and follow-up statewide class actions suffered a similar fate.⁷⁹ Repeatedly, appellate courts found insufficient commonality among smokers' expectations, awareness of risk, and diseases suffered to support class treatment. Thus, the threshold requirement for an aggregate punitive damages award—class-wide compensatory damages—appeared to undercut this strategy.⁸⁰

In Judge Weinstein's courtroom, *Simon I*⁸¹ started down the same route, as a case in which certification was sought for both compensa-

76. *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002).

77. This is not to suggest that the compensatory award is necessarily a conventional "make whole" assessment. Some cases involve nominal physical harm, but the conduct is viewed as socially outrageous. See, for example, the classic case of *Alcorn v. Mitchell*, 63 Ill. 553 (1872), in which the defendant spat in the plaintiff's face in the courthouse. The tobacco tort cases, however, like most punitive damages claims, have been grounded in a compensatory claim for disease-related out-of-pocket and nonpecuniary loss suffered by the victim.

78. *Castano v. American Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996).

79. See Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1364–75 (1999) (describing the failure of state class actions against tobacco producers in the aftermath of *Castano*).

80. One class action in Florida state court actually went to trial and resulted in a \$145 billion punitive damages award for the class on top of \$12.7 million in compensatory damages for three individual plaintiffs. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006) (per curiam). The Florida Supreme Court held that no finding of compensatory damages was required before a jury could award damages, but that a finding of liability was a necessary predicate to an award of punitive damages. *Id.* Nonetheless, the Florida Supreme Court overturned the punitive damages award, finding it excessive as a matter of law. *Id.*

81. *Simon v. Philip Morris Inc. (Simon I)*, No. 99 CV 1988, 2000 WL 1658337 (E.D.N.Y. Nov. 6, 2000). It is worth noting that Judge Weinstein referred to the *Simon I* class for compensatory and punitive damages as "viable," but did not certify the class because he determined that *Simon II* would better preserve court resources; in his order denying certification for the class in *Simon*

tory and punitive damages. True to his disposition in mass tort controversies, Judge Weinstein consolidated the smokers' class action with other third-party claims against the leading U.S. tobacco companies for settlement discussions.

One can speculate that these discussions with the tobacco industry went nowhere.⁸² But out of the process emerged a separate effort, *Simon II*, in which the plaintiffs proposed a nationwide certification solely for punitive damages.⁸³ In response, Judge Weinstein certified a non-opt-out limited fund class under Rule 23(b)(1)(B)⁸⁴ of current and past smokers suffering from a wide array of smoking-related diseases.⁸⁵ He anticipated a three-stage process, succinctly summarized by the Second Circuit Court of Appeals in its opinion decertifying the class:

In the first stage, a jury would make “a class-wide determination of liability and estimated total value of national undifferentiated compensatory harm to all members of the class.” The sum of compensatory harm would “not be awarded but will serve as a predicate in determining non-opt-out class punitive damages.” . . . In the second stage, the same jury would determine whether defendants engaged in conduct that warrants punitive damages. In the third stage, the same jury would determine the amount of punitive damages for the class and decide how to allocate damages on a disease-by-disease basis. The court would then distribute sums to the class on a pro-rata basis by disease to class members who submit appropriate proof. Any portion not distributed to class members would be “allocated by the court on a *cy pres* basis to treatment and research organizations working in the field of each disease on advice of experts in the fields.”⁸⁶

Had this process—bearing strong resemblance to the resolution of *Agent Orange*—emerged from a settlement among the parties, it might well have served as a final resolution, at least for the tobacco wars, of then-outstanding claims for punitive damages, putting to rest

I, he anticipated that *Simon II* would allow for a compensatory damages class to be certified under Rule 23(b)(3). *Id.*

82. The tobacco industry has been resolutely opposed to settling either individual or class tort cases from the 1950s onward. See generally Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992); Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721, 1741–44 (2008) [hereinafter Rabin, *Tobacco Control Strategies*].

83. *In re Simon II Litig.*, 211 F.R.D. 86, 96 (E.D.N.Y. 2002).

84. FED. R. CIV. P. 23(b)(1)(B).

85. *Simon II*, 211 F.R.D. at 96–97.

86. *In re Simon II Litig.*, 407 F.3d 125, 131 (2d Cir. 2005) (citations omitted) (quoting *Simon II*, 211 F.R.D. at 100).

the fairness issues inherent in serial punitive damages litigation.⁸⁷ But as a strategy for boldly recasting punitive damages in tort law, it clashed in fundamental ways with the interpersonal structure of determining such awards.

Stage one would have required open-ended speculation, in hypothetical terms, regarding the number and character of colorable compensatory claims. At the same time, it offended emerging constitutional due process doctrine—*BMW v. Gore*,⁸⁸ soon to be followed by *State Farm v. Campbell*⁸⁹ and *Philip Morris v. Williams*⁹⁰—in which the United States Supreme Court sought to cabin punitive awards to conduct directed at litigants whose claims were before the court, refusing to recognize course-of-conduct harm beyond the immediate parties.⁹¹ And finally, Judge Weinstein’s non-opt-out proviso challenged yet another Supreme Court directive, found in *Ortiz v. Fibreboard*,⁹² where the Court had taken a restrictive view of the scope of limited fund class actions under Rule 23(b)(1)(B).

On the latter score, there was a radical disjuncture between Judge Weinstein’s conception of the limited fund threshold for applicability of Rule 23(b)(1)(B) and the more conventional conception spelled out in *Ortiz*. Put simply, *Ortiz* envisioned the trigger for limited fund class certification as prospective mass tort claims that would threaten to deplete the limited pool of assets available to discharge the company’s prospective legal liability, thereby generating later-arising claims for which no compensation would be available. By contrast, Judge Weinstein defined the “limited fund” as an upper limit on aggregate punitive damages necessitated by the loosely defined constitutional due process ratio between compensatory and punitive damages articulated in *Gore*.⁹³

87. Of course, “futures cases”—those arising out of tobacco-related harm not yet realized at the point of decision—might have resurrected the issue. But this is premised on highly speculative claims of continuing clandestine deceptive practices by the defendants.

88. 517 U.S. 559 (1996).

89. 538 U.S. 408 (2003).

90. 549 U.S. 346 (2007).

91. *Simon II*, 407 F.3d at 138–39. Confusingly, the *Williams* court held that a jury might consider harm inflicted on others for purposes of determining reprehensibility of the defendant’s conduct. *Williams*, 549 U.S. at 356–57. But at the same time, a jury could not punish a defendant for harm to others. *Id.* The Second Circuit feared that without a nonhypothetical finding of compensatory damages, the punitive award could not be measured for proportionality to the cognizable harm suffered—proportionality serving as another guidepost to satisfying constitutional due process requisites. *Simon II*, 407 F.3d at 138.

92. 527 U.S. 815 (1999).

93. See *supra* note 91 for reference to the proportionality guidepost.

In short, Judge Weinstein's trigger for imposing limited fund treatment was a ratio-sensitive ceiling on aggregate punitive damages, which could only be effectuated, as he saw it, by avoiding virtually limitless serial punitive damages claims through aggregate class disposition, whereas *Ortiz* had defined the trigger as a ceiling on available corporate assets. In this regard, it is critical to note that had Judge Weinstein adopted the *Ortiz* mandate, the case for nationwide class certification against the tobacco industry would have immediately collapsed: there was no basis for predicting that the cash-rich tobacco industry would be threatened with insolvency from continuing serial liability for punitive damages.⁹⁴

The shaky foundation on which limited fund treatment rested in *Simon II* only served to highlight the still more fundamental two-pronged departure from the conventional common law approach to punitive damages. The limited fund ceiling propounded by Judge Weinstein was ungrounded in recognized compensatory damage claims, or indeed, even in empirically based speculation as to the aggregate figure. Correlatively, it was not limited to course of conduct aimed exclusively at identifiable parties to the litigation.

In this latter regard, one sees the ill fit between the traditional interpersonal tort claims structure and the conception Judge Weinstein had for a national resolution. But how could it be otherwise? How could a two-party tort process, featuring, as a focal point, individualized recompense for a "deserving" plaintiff, be squared with Judge Weinstein's aspiration to overcome the intrinsic incapacity for resolving the dilemma posed by mass course-of-conduct harm?

Interestingly, had these stage one barriers been surmountable, Judge Weinstein's creative mastery in reformulating conventional tort doctrine could have been made into a perfectly respectable case for proceeding as he envisioned at stages two and three. Essentially, stage two would have replicated the narrative of industry deceit and misrepresentation through the mid-1990s that has been the standard fare of every individual fraudulent conduct tort claim against the tobacco companies during the past twenty years.⁹⁵ Because those industry advertising and promotion stratagems, as well as the suppression of scientific findings, were targeted at smokers and potential smokers at large, class-wide treatment of the evidence seems uncontroversial—

94. Plaintiffs in the tobacco tort litigation have, in fact, realized successful outcomes in only a relatively modest number of cases. Robert L. Rabin, *Reexamining the Pathways to Reduction in Tobacco-Related Disease*, 15 THEORETICAL INQUIRIES IN L. 507, 523–24 (2014).

95. See Rabin, *Tobacco Control Strategies*, *supra* note 82, at 1732–35, 1741–44.

commonality of claims based on the narrative of malfeasance would have been readily established.

Stage three would have been devoted to two distinct allocational issues. To be sure, Judge Weinstein's anticipated pro rata distribution of damages on a disease-by-disease basis is in the creative settlement mode of *Agent Orange*, but in the present context outside the flexible framework of a settlement agreement. However, it is critical to focus on the fact that distribution here would have entailed punitive damages. As a consequence, the due process concerns raised by a subcategory treatment of compensatory damage claims seem inapplicable to the setting, because the focus is on the defendant's wrongdoing, not on the compensatory needs of individual victims.

This, in turn, makes Judge Weinstein's related intention to distribute some portion of the award to treatment and research programs even less controversial. Once again, individual claims to recompense from a punitive damage award are attenuated: the sanctions are aimed at accounting for socially deleterious conduct, not at providing add-on compensation for the victim's injuries.⁹⁶ Indeed, the *cy pres* strategy envisioned by Judge Weinstein has been employed both in the legislative and judicial domain in other cases.⁹⁷

It is beyond the scope of this paper to trace comprehensively the many byways addressed by Judge Weinstein in the domain of tort, which might be characterized as "Tort Law Unbound," pressing tort law to the limits of its capacity for responsively addressing grievances when the essential character of the claim falls within the recognized boundaries of the tort process, and in another vein, administering tort as an institutional forum of last resort in controversies beyond the ken of the conventional tort process. I have simply attempted to be illustrative.⁹⁸

96. Another way of putting this point is that plaintiffs serve, in essence, as private attorneys general in punitive damages cases, rather than as continuing claimants for redress of individualized harm.

97. See *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 145–46 (Ohio 2002) (relying on common law authority to allocate partially to a fund); see also Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 414–28 (2003) (describing state statutes directing a portion of a punitive damages award to a "public" purpose).

98. I have also attempted to select illustrative cases in which the dominant focus is on tort issues. In fact, Judge Weinstein's work product in the array of tort-related cases in which he has crafted notable opinions have in most instances involved an inextricable mix of tort and civil procedure issues. See *supra* Part II. Judge Weinstein's handling of those civil procedure dimensions of his work on the bench is discussed in other contributions to this symposium. See Howard M. Erichson, *Judge Jack Weinstein and the Allure of Antiproceduralism*, 64 *DEPAUL L. REV.* 393 (2015); see also Alexandra D. Lahav, *Participation and Procedure*, 64 *DEPAUL L. REV.* 513 (2015); David Marcus, *Two Models of the Civil Litigant*, 64 *DEPAUL L. REV.* 537 (2015); Linda S.

Instead, I will turn briefly to comment on Judge Weinstein outside the courtroom, where perhaps unsurprisingly, given his distinguished academic career, he has contributed through scholarship to offering a broader perspective on his conception of tort law as a forum for resolving accidental harm controversies.⁹⁹

III. TORT SCHOLARSHIP: AN INSTITUTIONAL PERSPECTIVE

As might be expected of a judicial figure who has achieved such prominence, and particularly one with an academic bent, Judge Weinstein has taken numerous opportunities to reflect in writing on tort law. Many of his publications are occasional pieces—mere fragmentary reflections.¹⁰⁰ But not all. Some thirty years ago, he published an article entitled *Preliminary Reflections on the Law's Reaction to Disasters*,¹⁰¹ offering his comprehensive view of tort from a comparative institutional perspective—a perspective reaffirmed a decade later in his volume *Individual Justice in Mass Tort Litigation*.¹⁰² The article provides an invaluable backdrop against which to read his leading judicial opinions.

As a starting point, it is notable that Judge Weinstein's central preoccupation in addressing accidental harm issues from an intellectual perspective is channeled to mass tort cases, as the title of his aforementioned book indicates. Indeed, on many occasions, almost as an aside, Judge Weinstein expresses relative satisfaction with tort law as a process for resolving traditional interpersonal claims—or, for that matter, what might be viewed as mass tort claims such as airline

Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601 (2015).

99. For biographical treatment of Judge Weinstein, see JEFFREY B. MORRIS, *LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN* (2011).

100. E.g., Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451 (2012); Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, CARDOZO L. REV. DE NOVO 1 (2009), available at www.cardozolawreview.com/de-novo-2009.html; Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165 (2001); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145 (2001); Jack B. Weinstein, *The Restatement of Torts and the Courts*, 54 VAND. L. REV. 1439 (2001) [hereinafter Weinstein, *The Restatement and the Courts*]; Jack B. Weinstein, *Notes for a Discussion of Mass Tort Cases and Class Actions*, 63 BROOK. L. REV. 581 (1997); Jack B. Weinstein, *An Introduction to Who's Who in Mass Toxic Torts*, 80 CORNELL L. REV. 845 (1995); Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 TOURO L. REV. 1 (1988); Jack B. Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 GEO. L.J. 1389 (1985).

101. Weinstein, *supra* note 45.

102. WEINSTEIN, *supra* note 53, at 15–37 (covering “The Law’s Reaction to Disasters”); see also Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

crashes, where aggregation of like cases transfigures the multiplicity of claims into what is tantamount to an interpersonal tort structure.¹⁰³

How is the system to address what this modern age has wrought? With advances in technology, science, and industrial productivity, accidental harm is generated not only on a massive scale but also, in many instances, with an insidious newly recognized dimension: toxic exposure. Here one finds resonances in his judicial opinions. The toxic exposure element is critical to reassessing the institutional capacity of traditional tort law. As long as relatively large numbers of injury victims suffer similar injuries under roughly similar circumstances—ranging from airline crashes to blasting cap injuries—tort law maintains sufficient flexibility to satisfy traditional goals of corrective justice and welfare aims. But once diversity of mass claims, both in terms of exposure and scientific uncertainty are introduced—characteristic of mass toxic incidents—conventional tort processing is radically compromised.¹⁰⁴

Surprisingly perhaps, in view of the widespread notion that Judge Weinstein is the prototypical example of a judge bent on establishing the hegemony of tort, he in fact subscribes to a strikingly modest institutional role for courts to play in addressing the dilemmas of accidental harm in the context of mass tort incidents. In these scenarios, Judge Weinstein's model for institutional responsiveness would *not* rely on tort in the first instance. Instead, in recognition of the inevitability of such low incidence/high magnitude risks coming to fruition, he would attend to the baseline needs of the randomly injured vic-

103. See WEINSTEIN, *supra* note 53, at 16–17, 181 n.11 (describing similar “cataclysmic” events that can be “handled relatively effectively by our tort system” such as gas leaks, chemical explosions, the Kansas City Skywalk collapse, and the Beverly Hills Supper Club fire that killed 164 people in 1977); *see also* Weinstein, *supra* note 45, at 6–8 (covering the same material).

104. Judge Weinstein sorts disasters into four different types: “Clear Cause—Single Event—Injuries Proximate in Time and Space” (the collapse of two walkways at the Hyatt Regency Hotel in Kansas City, Missouri, that killed 113 people in 1981), “Clear Cause—Multiple Events—Injuries Nonproximate in Place” (the Dalkon Shield), “Unclear Cause—Multiple Events—Injuries Nonproximate in Time and Place” (claims for injuries from radiation released by American military nuclear testing), and “Unclear Cause—Multiple Events—Injuries Nonproximate in Time and Place—Identities of Both Producers and Injured Unclear” (DES). WEINSTEIN, *supra* note 53, at 16–19, 181 n.11, 183 n.21. For each type, Judge Weinstein acknowledges that there are obstacles to recovery, but does not seem to consider any type uniformly unsuited to adjudication as a mass tort. *Id.* at 16–19.

Under certain circumstances, one can discern that the mass scale of class litigation itself would suffice to overtax traditional tort, irrespective of the distinct causal complexities introduced by toxic exposure. Presumably, in a 9/11-scale disaster, even in the absence of second-order toxic exposures, the sheer magnitude and urgency of personal injury claims, in the context of traditional doctrinal uncertainty, would overtax the capacity of tort law, from Weinstein's perspective. From another vantage point, mass punitive damages claims, discussed *supra* Part II.C.2., similarly challenge traditional tort system capacity.

tims—medical and rehabilitative expenses and lost income—in the same fashion as those similarly disabled when disaster strikes unexpectedly from natural causes in everyday life: through first-party government insurance.¹⁰⁵ Because he views these injuries as the inevitable by-product of industrial progress—rather than from the conventional tort perspective of “deserving victim” and “wrongful malefactor”—he consistently deprecates both punitive damages and make-whole pain and suffering awards.¹⁰⁶

But Judge Weinstein, ever the realist, recognizes that first-party coverage for death and disability, no matter the source, is not a realistic proposition in the political culture of this country. As a modified strategic approach, he endorses a no fault workers’ compensation model, devoid of preoccupation with wrongdoing.¹⁰⁷ Indeed, he goes so far as to suggest that tort might well have been replaced by workers’ compensation in the most vexing of twentieth-century mass torts, asbestos: “Were workers’ compensation legislation modernized, workers injured by products such as asbestos would collect only workers’ compensation, albeit at more realistic payment levels. Third-party suits against asbestos suppliers could then be eliminated without shocking our sense of fairness.”¹⁰⁸

At the same time, he is not indifferent to either conscious wrongdoing or general deterrence. But in his idealized system, these objectives would be achieved by criminal and regulatory penalties, along with

105. WEINSTEIN, *supra* note 53, at 4–5 (considering a national health care system and an expansion of Social Security Disability as suitable replacements for judicial treatment, and envisioning that individuals could purchase extra coverage or negotiate for it with their employers).

106. *Id.* at 5, 22.

Pain and suffering will probably not be directly compensated [in a government insurance scheme]. These elements can, unfortunately, be deemed the normal aspects of life in our mass technological society On the whole, speaking only of health, the steady increase in life expectancy in our nation suggests that the benefits of mass technology and chemistry far outweigh the risks.

. . . .

. . . Essentially, a workers’ compensation-like scheme crafted for the individual case is necessary. Punitive damages and large claims of pain and suffering are probably impractical and undesirable.

Id. This proposed model of social welfare necessarily sacrifices a systemic focus on individual justice, which Judge Weinstein recognizes as a priority worth protecting. *Id.* at 1–3.

107. *Id.* at 22 (“The workers’ compensation framework can be equitable because in return for forgoing large recoveries, workers are assured compensation even when there is insufficient proof of specific causation—provided that the plan takes account of such factors as inflation and new hazards.”).

108. *Id.* at 28. Moreover, were it realistic, Judge Weinstein seems attracted to *universal* no-fault coverage along the lines of the New Zealand comprehensive approach. *See id.*

prospective governmental subrogation claims against specific injury-generating firms.¹⁰⁹

Idealization aside, in the realm of interpersonal accident law, compensation remains front and center for Judge Weinstein: “Primarily through tort law the courts compensate those injured by others. Secondary aspects of our work such as deterrence or forcing tortfeasors to pay the full social costs of their activities are minor and collateral.”¹¹⁰

In a distinctly second-best world, where no fault compensation for mass injury victims is not forthcoming and regulatory initiatives serve an exclusively deterrent function, Judge Weinstein similarly views the first-order business of tort law as providing for the basic pecuniary needs of injury victims as best it can, by restructuring both procedural strategies (e.g., liberalizing aggregation; promoting mass settlement) and remedial measures (e.g., extending nonfault responsibility; adopting probabilistic causal attribution; scheduling damages), along with a host of jurisdictional and choice of law strategies aimed at creating a single decision-making forum that can attend to collective needs—frequently through collective responsibility.¹¹¹

These strategies are delineated in his 1986 article *Preliminary Reflections on the Law’s Reaction to Disasters*.¹¹² Much of this thinking, it seems fair to say, grew out of Judge Weinstein’s *Agent Orange* experience. Some two decades later, drawing on a succession of mass tort case management responsibilities in the ensuing years, he offered further reflections on the advantages of aggregation of claims:

First is an available substantive advantage to plaintiffs suing in a group or through class consolidation. If no one person can show by a preponderance of evidence that he was injured by a toxic substance or false claim, but demographics, epidemiology, and statistics can demonstrate that some large number—say thirty percent—were injured by the substance and seventy percent by endogenous factors, the parties responsible should be ordered to pay the thirty percent (which they caused) of the damage to be divided among the whole class. In some cases the courts must use a “fluid recovery,” as

109. *Id.* at 5, 166, 170–71. For an earlier scholarly proposal along these lines, see Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 V.A. L. REV. 774 (1967).

110. Weinstein, *The Restatement and the Courts*, *supra* note 100, at 1439.

111. See WEINSTEIN, *supra* note 53, at 20–23 (identifying these attributes as “Desirable Conditions for Disaster Management by Courts”). At the same time, Judge Weinstein maintains that any system for compensating victims of mass harms should endeavor to protect “the sense of individual justice and control of their case by parties,” even if by, among other things, enabling complaints to be heard by phone or mail. *Id.* at 1–3, 9–14, 167–71.

112. Weinstein, *supra* note 45, at 16–21.

in the nuclear plant litigation I conducted involving Long Island where the recovery against the Long Island Lighting Company had to be divided among past and present ratepayers, with some receiving less and some more than their equitable share because this was the only practicable way to divide the appropriate recovery.

Second, the procedural advantages by suing in a class or in consolidated actions are substantial to injured plaintiffs: jurisdiction in one court may be more easily obtained; costs of discovery, retention of experts, legal research and legal fees can be substantially reduced; and small consolidated claims that would not otherwise be viable can support a suit. Defendants can obtain peace against future claims so they can get on with their business.¹¹³

From an institutional perspective, Judge Weinstein's vision of the mass tort claims adjudicator essentially frames the judge as a national no fault administrator in a world where true national no fault is simply off the table as a politically viable proposition. This vision runs as a *leit motif* from *Agent Orange* through landmark decisions of his that are beyond the scope of my present coverage.¹¹⁴

At its core, the tobacco epidemic—assignable to an industry clearly at fault—revealed a similar disjuncture, from Judge Weinstein's perspective, between the procedural underpinnings of traditional tort law, and the mass claims of diseased smokers. In his light cigarette decision, he once again turned to consolidation as a counter to case-by-case replaying of the narrative of industry irresponsibility against a backdrop of defenses turning on particularized reliance.¹¹⁵ And to Judge Weinstein, it was just such traditional fealty to individualized

113. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 *CARDOZO L. REV.* 1, 172–74 (2008) (footnotes omitted).

114. See, e.g., *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (certifying a class action Racketeer Influenced and Corrupt Organizations (RICO) claim against tobacco companies for fraudulently inflating the price of “light” cigarettes by falsely claiming they were a safer product, and permitting the plaintiffs to show reliance by generalized statistical proof), *rev'd sub nom.* *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *In re Zyprexa Prod. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006) (imposing a limit on attorney fees and exercising other oversight controls on a privately negotiated settlement, which Judge Weinstein declared a “quasi-class action,” though no class certification had been sought); *In re Breast Implant Cases*, 942 F. Supp. 958 (E. & S.D.N.Y. 1996) (denying the defendants' summary judgment motion for systemic disease claims even though the plaintiffs had yet to raise sufficient proof of causation, and allowing the plaintiffs to proceed on their claims for local injuries by severance from claims regarding systemic diseases); *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992) (holding that DES manufacturers would be severally liable for the plaintiffs' injuries according to national market share at the time of injury, and that New York jurisdiction could be exercised over DES manufacturers that never distributed in the New York market); *In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710 (E. & S.D.N.Y. 1991) (certifying a Rule 23(b)(1)(B) limited fund class to benefit from a settlement trust created by asbestos manufacturers' bankruptcy plan), *rev'd*, 982 F.2d 721 (2d Cir. 1992).

115. *Schwab*, 449 F. Supp. at 1046, 1099, 1248.

treatment of compensatory claims that stood as an obstacle to an efficient collective determination of punitive damages, as well.¹¹⁶

Once again, regulatory action that might have appropriately side-stepped the need for judicial intervention was wanting. As he saw it, a notable institutional vacuum called for unprecedented judicial creativity in the tort forum. Small wonder, then, that Judge Weinstein has been an *agent provocateur* both of academic critics and of appellate judges assigned to review his decisions.

116. In the latter case, of course, Judge Weinstein was not motivated to aggregate in order to meet the basic pecuniary needs of the victim class. Still, as mentioned earlier, even in this punitive mode, his intent was to set aside a substantial portion of the award for treatment and research programs. *In re Simon II Litig.*, 211 F.R.D. 86, 100 (E.D.N.Y. 2002).

