
Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues

Mark C. Weber

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Mark C. Weber, *Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues*, 48 DePaul L. Rev. 463 (1998)

Available at: <https://via.library.depaul.edu/law-review/vol48/iss2/16>

This Commentaries is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

MASS JURY TRIALS IN MASS TORT CASES: SOME PRELIMINARY ISSUES

Mark C. Weber*

Mass tort proceedings¹ are a major subject of the current debates in civil procedure,² and mass tort trials are one of the thorniest topics within those debates. This year's Clifford Symposium focuses on the role of the civil jury in contemporary American litigation, so it is important to consider the role of the jury in large-scale tort trials. This contribution seeks to frame that issue by raising several preliminary questions. What mass tort trials have been conducted? Are mass trials of mass torts desirable, apart from considerations directly related to juries? Do courts even have the legal authority to order mass trials in tort cases? Part I of this Article discusses the current record of mass trials in mass torts.³ Part II takes up the legal and policy issues involved in framing mass trials, discussing in subpart A the advisability of holding the proceedings and in subpart B their legal permissibility.⁴ The Article concludes with some assessments of whether, when, and where mass tort trials should take place.

I. A LOOK AT THE LANDSCAPE

The study of mass tort cases has largely been the study of consolidated pretrial proceedings.⁵ Mass trials of mass torts have remained

* Professor of Law, DePaul University, B.A. 1975, Columbia; J.D. 1978, Yale. Thanks to Victoria Napolitano for her research assistance.

1. Mass tort cases are those arising out of a single-incident disaster with many injuries and suits for tort liability, as well as dispersed product injuries, which are similar injuries or illnesses alleged to be caused by a defective product, giving rise to many tort claims. See generally 3 HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 17.06 (3d ed. 1992) (defining various forms of complex litigation).

2. For a recent collection of articles on the topic, see *Symposium on Mass Torts*, 31 *LOY. L.A. L. REV.* 353 (1998).

3. See *infra* Part I.

4. See *infra* Part II.

5. See, e.g., Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 *BYU L. REV.* 879; Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 *TEX. L. REV.* 1039 (1986); Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 *F.R.D.* 597 (1990); William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 *TEX. L. REV.* 1529 (1995); Mark C. Weber, *Managing Complex Litigation in the Illinois Courts*, 27 *LOY. U. CHI. L.J.* 959 (1996).

rare, and their study even rarer.⁶ Of course, compared to other dispositions of civil litigation, a trial is an infrequent event.⁷ Those complex tort cases that do go to trial, however, usually go to single-plaintiff or small-group trials.

The best-established pattern is with asbestos cases in the state courts.⁸ There, the typical practice is to have coordinated or consolidated proceedings for preliminary motion practice and discovery, followed by individual or small-group jury trials for plaintiffs whose cases have not been settled or dismissed out.⁹ The cases that are tried in groups are those with common defendants and similar allegations concerning exposure.¹⁰ In locales that have large numbers of cases, state court systems have frequently appointed a single judge to coordinate the pretrial proceedings; that person assigns out a portion of the cases to other judges for trial as docket space permits.¹¹

6. One study is Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991). Also of significance are Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992) and Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69. Articles on the use of juries in complex cases, but not specifically in mass torts, include: Maxwell M. Blecher & Howard F. Daniels, *In Defense of Juries in Complex Antitrust Litigation*, 1 REV. LITIG. 47 (1980); Committee on Fed. Courts of the N.Y. State Bar Ass'n, *Improving Jury Comprehension in Complex Civil Litigation*, 62 ST. JOHN'S L. REV. 549 (1988); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981); William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575 (1990); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49 (1997).

7. The percentage of civil cases that go to trial is in the single digits. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1212-15 (1992) (analyzing federal and state statistics regarding trial and settlement rates).

8. Comprehensive studies of asbestos litigation include: PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985) and Charles D. Maguire, Jr. et al., Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573 (1983). Shorter treatments include: STATE JUDGES ASBESTOS LITIG. COMM., *MEGATORTS: THE LESSONS OF ASBESTOS LITIGATION* (1992) and THOMAS E. WILLGING, *ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES* (1985).

9. See, e.g., *In re All Asbestos Litig.* Filed in Madison County (Ill. Cir. Ct. Nov. 17, 1995) (standing case management order for all asbestos personal injury cases).

10. See *id.* at 15 (providing for grouping of cases for trial based on work site, craft, trade or union, and disease).

11. See *id.* at 14; see also WILLGING, *supra* note 8, at 31-32 (noting that group trials of five to ten asbestos cases are common in federal courts). See generally ALEXANDER B. AIKMAN, *MANAGING MASS TORT CASES: A RESOURCE BOOK FOR STATE TRIAL COURT JUDGES* 106-30 (1995) (discussing trial procedures in mass tort cases). Dispersed product injury cases cluster in particular districts, swamping the dockets in those locations. See, e.g., Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479, 495-96 (1987) (noting that occupational exposure and other factors cause geographic concentration of filings). Appointing a single judge to manage the cases is a common response to the backlog that develops. See Weber, *supra* note 5, at 968.

Larger-scale mass tort trials are truly rare events, and quickly become the stuff of legal folklore.¹² One proceeding, the Baltimore asbestos litigation,¹³ merits description here because the combined trial used in that case contrasts with the coordinated-pretrial-separate-trial approach to asbestos cases that prevails in other jurisdictions.¹⁴

In the Baltimore litigation, actions for asbestos exposure that had been filed in the Maryland courts were consolidated in the Baltimore Circuit Court.¹⁵ The transferee court initially devised a plan to coordinate pretrial proceedings and try those cases that had not settled or been dismissed in groups of ten.¹⁶ Then, realizing that annual new filings were ten times the number of cases that could be tried annually, the court modified the plan so that there would be a four-phase combined trial embracing the claims of 8,555 plaintiffs and, ultimately, six defendants.¹⁷

In phase one, all defendants were tried as to the issues plaintiffs had in common against them.¹⁸ The jury determined that as to specific products of each defendant (and one of two additional cross-claim defendants) that the defendants were negligent and strictly liable.¹⁹ In phase two, the jury decided six representative plaintiffs' cases as to all

12. A few of the mass tort trials that have occurred are: *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988) (affirming jury finding of no causation in limited-issues trial of 1,180 claims regarding drug said to cause birth defects); *In re Salmonella Litig.*, 556 N.E.2d 593 (Ill. App. Ct. 1990) (affirming jury verdict denying punitive damages in class action over contaminated milk products); *County of DuPage v. Helmuth, Obata & Kassabaum, Inc.*, No. CV 92 L 1779 (Ill. Cir. Ct. May 25, 1993) (order setting trial date) (involving mass trial over respiratory illnesses allegedly caused by defective ventilation system in building); *In re Beverly Hills Fire Litig.*, No. CV 77-79 (E.D. Ky. Apr. 7, 1980) (entering judgment on verdict for defendants on causation issue in trial of 200 plaintiffs against 23 defendants over allegedly defective wiring said to cause restaurant fire), *rev'd*, 695 F.2d 207 (6th Cir. 1982) (reversing verdict on ground of jury misconduct).

13. See *AC & S, Inc. v. Godwin*, 642 A.2d 192 (Md. 1994) (concerning exposure to asbestos), *modified on reconsideration*, 667 A.2d 116 (Md. 1995); see also *AC & S, Inc. v. Abate*, 710 A.2d 944 (Md. App. 1998) (concerning exposure to asbestos products).

14. Also providing a useful contrast is the *Jenkins-Cimino-Raymark* asbestos litigation, *Jenkins v. Raymark, Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd sub nom.* 782 F.2d 468 (5th Cir. 1986) (interlocutory appeal approving plan to try asbestos cases of 2,298 plaintiffs against five defendants on limited issues); *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990) (adopting procedure of averaging representative jury verdicts to determine damages), but it will not be described here because of the ample commentary available elsewhere. See, e.g., Mullenix, *supra* note 6. Contrasting with both individual trial litigation and mass trial litigation in asbestos cases is class action or other large-scale settlement of the claims. On that topic, see Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. (forthcoming 1999) (collecting other commentary).

15. *Godwin*, 667 A.2d at 119.

16. *Id.*

17. *Id.* at 120.

18. *Id.* at 120-21.

19. *Id.*

remaining issues.²⁰ The three plaintiffs selected by plaintiffs' counsel received verdicts, and the three selected by defendants' counsel lost, with the jury finding that they did not have asbestos-related disease.²¹

The third and fourth phases of the trial addressed punitive damages for the four defendants whose cases had not already settled or been dismissed with regard to the issue, with phase three establishing liability for each of them, and phase four establishing a multiplier amount for compensatory damages in order to determine punitive damages awarded against each of the defendants.²²

In deciding the defendants' appeal, the highest court in Maryland ruled that the consolidation of the trial as to the issues regarding the state of the art was proper in light of the common nature of the determination.²³ At the same time, it reversed one of the individual plaintiff determinations²⁴ and ruled that the evidence did not support the punitive damages determination.²⁵

The trial of the common issues in one proceeding plainly prevented the duplication that would have occurred in separate, small-group trials, thus saving significant time and expense while bringing the matter closer to conclusion for more than 8,500 plaintiffs. It is possible that some of the same savings might have been realized by using issue preclusion doctrines against defendants under a separate-trial procedure, but few courts have applied offensive issue preclusion in asbestos cases.²⁶ It may well have induced the settlements by the defendants who left the litigation before the trial. To what degree the procedure has hastened the ultimate resolution of the 8,449 cases that were not tried as to all issues remains unclear. The verdict on the common issues and the representative cases will affect settlement dynamics, as will the appellate resolution of the punitive damages issue, but it is hard to determine whether the settlement effects would be greater, or in other respects different, than would be those of the first cases going to verdict had the original group-trial plan been pursued. Obviously, had the liability phase of the trial gone against the plaintiffs, econo-

20. *Id.* at 121.

21. *Godwin*, 667 A.2d at 121.

22. *Id.*

23. *Id.* at 150.

24. *Id.* at 127.

25. *Id.* at 144.

26. Courts have stressed the disuniformity of results in previous cases in rejecting application of preclusion. For a discussion of this topic, see Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 147-52, 172-78 (1984).

mies would have been realized, though the plaintiffs would have claimed that the cost-saving came at the expense of justice.

II. LEGAL AND POLICY ISSUES IN MASS TRIALS

The two questions about mass jury trials that I would like to highlight are the general desirability of holding a large-scale trial proceeding, and the authority of the courts to put cases in a posture where the question of desirability can even be raised.

A. *Desirability of Consolidated Jury Trials*

A long list of issues confronts anyone contemplating the desirability of conducting a mass trial in a mass tort. Apart from concerns specifically having to do with jury competence and rights to trial by jury, the issues include efficiency, consistency, participation, risks of legal error, settlement pressure, issue separation, and choice of law.

1. *Efficiency Considerations*

The most obvious benefit from a mass trial is judicial economy: witnesses need be heard only once; the judges and attorneys do not have to conduct an endless succession of similar contests; and a single appeal can determine any disputed matters of controlling law. As Professor Zechariah Chafee commented half a century ago, "In matters of justice . . . the benefactor is he who makes one lawsuit grow where two grew before."²⁷

Nevertheless, judicial economy as such may be overrated as a benefit of mass trial proceedings. Even the most carefully constructed trial may become bogged down in the testimony of hundreds of individuals, their families, and treating physicians, concerning exposure or damages.²⁸ Juries may or may not be good judges of scientific matters, but even with documentary materials and visual aids, they may have trouble keeping straight the specifics regarding large numbers of plaintiffs. For this reason and others, judges conducting mass trials usually do not include all issues. Matters of individual exposure or damages are typically left for future proceedings, in which judicial adjuncts may be used.²⁹ This solution, however, generates its own problems, for the separation of issues into distinct proceedings may affect the outcome of the case.³⁰ Small-group trials may be the prefer-

27. ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 149 (1950).

28. See Transgrud, *supra* note 6, at 76.

29. See *supra* text accompanying notes 12-26 (discussing mass trials).

30. See *infra* text accompanying note 50.

able option, perhaps using videotape testimony and similar devices to achieve some economies.

An overriding efficiency consideration, however, at least to the plaintiffs, is the problem of waiting for docket space for individual trials. Because mass tort cases cluster in particular locations,³¹ congestion diminishes the likelihood of any particular plaintiff's case going to trial in a reasonable time. Defendants can exploit the backlog by refusing to settle except on terms highly favorable to them.³² A single proceeding brings everyone to the beginning of the line.³³ Even if the trial does not dispose of all issues, a decision in plaintiffs' favor makes the settlement dynamics far more favorable for the claimants.

Of course, this delay-elimination benefit will not apply to all plaintiffs. Those already at the head of the line in their particular locations usually prefer to go ahead with their own proceedings.³⁴ But for the larger number of victims of a mass tort, a mass trial might be the best way to achieve compensation in their lifetimes.³⁵

2. Consistency Advantages

Consolidation leads to similar results in similar cases. The same decision maker can ensure that the same legal principles and factual conclusions are applied across the board to all persons involved in the case.³⁶ Having consistent results in like cases is a laudable goal, and contributes to both the real and the perceived fairness of the judicial system.

Nevertheless, justice is furthered only when the decision of the court in the consolidated trial proceeding is consistently correct; the system should prefer one wrong decision and one right decision to two identical decisions that are consistently wrong on the facts or the law.³⁷ Foolish consistency must be avoided, and it is foolish indeed to elevate consistency of results over justice in particular cases.

31. See Hensler, *supra* note 11, at 495-96.

32. See HANS ZEISEL ET AL., *DELAY IN THE COURT* 128 (2d ed. 1978) (explaining effect of delay in decreasing size of settlements).

33. See Weber, *supra* note 14 (discussing similar effects from class certification).

34. If an opt-out class action is used to consolidate the cases, these individuals may choose to exit in order to make use of their advantageous position in their particular venues.

35. See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 666 (E.D. Tex. 1990) ("It is apparent from the effort . . . to try 160 [asbestos] cases [to date] that unless . . . some . . . procedure that permits damages to be adjudicated in the aggregate is approved, these cases cannot be tried.").

36. See Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 253-54 (1994).

37. See *id.* at 254 n.209.

Even apart from the risk of compounding error, inconsistency may be necessary to preserve important policy interests of the states. For example, many states have passed tort reform statutes that limit or deny traditional elements of recovery in tort cases.³⁸ In a given dispersed-injury case, such a law may apply only to the victims who reside in or were injured in one of those states. The only way to further the state's policy is to limit or deny the recovery pursuant to the statute, even if that result makes the plaintiffs to whom the law applies worse off than plaintiffs from other places.³⁹ Nevertheless, if the trial court applies different law depending on the origin of the victim or geographic location of the injury, the efficiency of trial consolidation will be reduced, perhaps to the vanishing point, as the finder of fact hears different evidence made relevant to various parties by differing statutes, and tries to sort out which plaintiffs are entitled to what.⁴⁰

3. Participation Issues

Professor Roger Transgrud's ground-breaking article stressed the loss of individual control that comes with mass trial proceedings,⁴¹ and that concern has generated the greatest commentary with regard to consolidated tort proceedings, particularly trials.⁴² The primary argument in response has not been to deny the likelihood of loss of individual control, even when the consolidation is nominally joinder of individual cases, rather than a class action proceeding. Instead, proponents of consolidation have argued that the actual plaintiffs—the clients, not the attorneys—have very little control or opportunity for participation even in individual, unconsolidated proceedings.⁴³ Hence, there is less to lose from consolidation than some might think. Proponents of consolidation concede that opportunities for client par-

38. See MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 710-15 (5th ed. 1992) (collecting and analyzing statutes).

39. See Robert A. Sedler & Aaron Twerski, *State Choice of Law in Mass Tort Cases: A Response To "A View From The Legislature,"* 73 MARQ. L. REV. 625, 635 (1990).

40. See *id.* at 628.

41. Transgrud, *supra* note 6, at 69, 74-76, 82-84. Other concerns noted include distortion of the relationship of client and attorney, risks of coercive settlement, and distortions of underlying law. *Id.* at 82-85.

42. Professor Resnik's work on this subject is particularly illuminating, and also discusses related issues. See, e.g., Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Procedural Innovations, Sloshing Over*, 73 TEX. L. REV. 1627 (1995). Other important sources include Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273 (1991) and Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231 (1991).

43. See, e.g., Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92-100.

icipation might be enhanced in individual litigation, but the same opportunities might be afforded in consolidated trial proceedings as well, perhaps through the use of judicial adjuncts.⁴⁴

4. *Risks of Legal Error*

When the number and complexity of issues in a trial rises, so does the risk of legal error. No judge knows everything, and clever advocates sometimes try to invite error when they feel that the trial results are going to go against them. A case with hundreds of evidentiary rulings and dozens of crucial instructions is all but certain to have a judicial mistake somewhere. If the mistake leads to an appellate order for a new trial, there will be massive duplication of litigation costs for all the parties, wiping out many of the gains from consolidating the trial in the first place.⁴⁵

A concomitant risk is that an appellate court seeking to avoid the imposition of those costs might distort legal principles, or at least bend the harmless error doctrine, to uphold a verdict. This desire to prevent expensive trial proceedings may have motivated the Second Circuit in affirming Judge Weinstein's approval of settlement in the *Agent Orange* litigation.⁴⁶ The costs, and even the logistics, of any trial must have appeared forbidding. The court of appeals approved a number of dubious propositions to avoid ordering the district court to conduct a trial, notably the prediction that all of the district courts in which the cases were filed would have applied the choice-of-law principles of their states to decide that a "national consensus" tort law should apply to the issues of the case.⁴⁷

There have not been enough mass trials to determine whether verdicts will be reversal-prone or reversal-proof. If mass trials become prevalent, both effects will probably appear, depending on the case and the predilections of the appellate court. In some cases, it will be impossible for the trial judge to get it right, and in others, it will be impossible to get it wrong. Justice will suffer in both situations.

5. *Settlement Pressure*

The flip side of solving the problem of trial delay is that a consolidated proceeding will actually reach a result sooner, rather than later,

44. See, e.g., Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 693-94 (1989).

45. See *id.* at 694 (discussing problem of magnification of error in consolidated proceeding).

46. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987).

47. *Id.* at 182-83 (upholding application of national consensus tort law to district court's evaluation of strength of case for purposes of approval of class action settlement).

and any negative effects of the result on the defendant will be felt severely and all at once.⁴⁸ Fear of a bet-the-company case may induce the defendant to settle on terms it would not otherwise contemplate. This outcome effect is well recognized in class action cases.⁴⁹

There is no way to avoid some effect on settlement in making the consolidation decision, for if consolidated treatment is denied, many cases do not go to trial in a reasonable time, forcing the plaintiffs to settle cheap. Moreover, even the loss of cost-sharing from denial of group treatment makes individual expenses rise, eliminating cases at the margin as they become uneconomical. Neither individual nor consolidated treatment has a superior claim as the baseline.

6. *Issue Separation Considerations*

With the desire to handle all aspects of a case in a single proceeding comes the desire to simplify the case so that it can actually be decided. The issues that all the mass tort cases likely have in common are general causation, facts pertaining to the defendant's conduct and knowledge, and similar matters. Courts have tried these issues separately, leaving individual facts of exposure, specific causation, and damage to later, probably non-consolidated proceedings. The judges reason, quite correctly, that a decision for the plaintiffs on the common issues will induce the defendant to settle most of the individual claims, while a decision for defendant will end the case, except for the inevitable appeals.

The picture is neither as simple nor as rosy as this analysis suggests, however. Plaintiffs typically resist separation of liability issues from damage issues, arguing that trying liability by itself creates an unrealistic, sterile setting that makes it easier for judges and juries to side with defendants. For their part, defendants frequently argue that issue separation enhances the accuracy of trial results by preventing juries from hearing evidence of horrible sickness or injury and awarding something to the plaintiffs, irrespective of the defendant's true responsibility.

Where one stands on the issue depends on where one sits at the trial. There is little doubt, however, that separation of liability and

48. Consolidation alone, without the prospect of a joint trial, may induce the same effect, however. Denial of the defendant's motion for summary judgment in a case consolidated only for pretrial proceedings creates the prospect of many dispersed trials, a similar degree of liability, and just as much pressure on the defendant to settle.

49. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (granting writ of mandamus to overturn class action certification in product liability case, stating that class action procedure may create irresistible pressure to settle).

damages does have effects on the outcome of tort cases.⁵⁰ For this reason, it seems particularly inappropriate to leave the decision on bifurcation of the trial to the trial judge's discretion, as Federal Rule 42⁵¹ is generally held to do.⁵² Judges should not be making random, near-irreversible, low-visibility decisions about matters affecting compensation of vast numbers of seriously injured individuals and staggering liabilities for defendants. The relevant jurisdiction should have a rule about when to separate issues and when not to do so.

That there should be a rule is clearer than what the rule ought to be. In a thoughtful exposition, Professor James Henderson and his co-authors have argued that issue separation should take place only in a bet-the-industry case, such as a class action concerning an allegedly defective drug said to have caused severe injury to thousands of individuals.⁵³ Others disagree, arguing either against or in favor of bifurcation in various classes of cases.⁵⁴ One mechanism for hedging the bets on the issue is to conduct a trial as to some issues with regard to the entire group of plaintiffs, combining that proceeding with a plenary trial for several, apparently typical plaintiffs.⁵⁵ The representative plaintiffs' cases may help bring home to the jury the human dimension of the case.

7. Choice of Law Problems

At one time, tort law in the United States may have been converging towards a set of common principles, with differences among states falling into predictable categories, such as automobile guest statutes and the existence of intrafamily immunities. As noted above, however, the wave of tort reform legislation in the 1980s and 1990s has shattered any emerging tort law consensus. Even if the approach

50. See Weber, *supra* note 5, at 978 nn.128-30 (citing collections of studies).

51. FED. R. CIV. P. 42.

52. See, e.g., *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988); *In re Paris Air Crash of Mar. 3, 1974*, 69 F.R.D. 310, 318-20 (C.D. Cal. 1975). For a compact but authoritative discussion of this topic, see 8 STEPHAN LANDSMAN, *MOORE'S FEDERAL PRACTICE* §§ 42.20-.24 (3d ed. 1998).

53. See James A. Henderson, Jr. et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 TEX. L. REV. 1653, 1694-96 (1995).

54. See, e.g., McGovern, *supra* note 44, at 691-92.

55. Cf. *AC & S, Inc. v. Godwin*, 667 A.2d 116 (Md. 1995) (affirming in part verdicts in case adopting common-issues, then representative-plaintiff trial procedure). The *AC & S* case, however, divided the common-issue trial and the representative-plaintiff trial into distinct phases, with separate jury verdicts at the end of each phase, thus undercutting the value of the procedure to eliminate the problem of a sterile trial setting for the determination of liability. See *supra* text accompanying notes 15-25 (describing Baltimore asbestos litigation).

taken by various tort law initiatives is misguided,⁵⁶ state experimentation with tort law has its merits. The states are indeed serving as laboratories of democracy,⁵⁷ and a vigorous policy debate has emerged on important tort law issues, with advocates citing the experience of the various states.⁵⁸ Moreover, the diverse tort law that now exists in the United States accurately reflects regional differences in culture and group preferences. For example, Vermonters are more comfortable with a duty to rescue than are New Yorkers.⁵⁹ Tort law is an important means of expressing the values of the citizens of both those states.

Letting many tort law flowers bloom produces real difficulties for mass trials, however, for the applicable law may well differ significantly in the various consolidated cases. As noted above, efficiency diminishes when the judge needs to admit or to bar the same items of evidence based on relevance to differing rules of law.⁶⁰ Devising a scorecard of applicable jury instructions for each plaintiff's case is a challenging task.

Nevertheless, the benefits may outweigh the drawbacks in some instances, and there may be mechanisms to solve some of the worst problems. One solution is to have several consolidated trials based on which law applies to which parties.⁶¹ Some duplication of evidence and risk of inconsistency would be present, but inconsistency based on the differing law would, of course, be appropriate. Another approach draws from criminal procedure. In criminal cases, courts have had several juries sit in the same courtroom, each assigned to the case against a particular defendant. All juries hear the common evidence and instructions pertaining to all the defendants, but each leaves the room when particular evidence or instructions pertain only to a defendant other than the defendant to which the jury is assigned.⁶² A similar procedure might be used in a mass tort trial with regard to

56. See, e.g., Richard Michaels, *Joint Liability: Should It Be Reformed or Abolished?—The Illinois Experience*, 27 *LOY. U. CHI. L.J.* 867 (1996) (criticizing abolition of joint and several liability in Illinois tort reform statute).

57. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

58. See Robert Pear, *Clinton May Seek Lid on Doctor Fees and Liability Suits*, *N.Y. TIMES*, Mar. 9, 1993, at A1 (discussing use of California experience in restricting malpractice liability by proponents and opponents of similar federal action).

59. See *Vt. STAT. ANN.* tit. 12, § 519 (1973) (imposing duty to rescue). See generally Robert Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 *WAKE FOREST L. REV.* 649, 660 (1995) (discussing duty to rescue imposed by some states).

60. See *supra* text accompanying note 40.

61. I have proposed that these actions should take place in interested forum states with differing law, and should embrace those actions bound by the particular laws. See Weber, *supra* note 36, at 265.

62. See *People v. Johnson*, 594 N.E.2d 253 (Ill. 1992) (upholding procedure against Sixth Amendment challenge).

various groupings of plaintiffs and defendants whose cases will be governed by different laws.

Some authorities have proposed a general federal law of tort, so that there is a single law to be applied to all mass tort proceedings.⁶³ In my view, these proposals are ill-advised. It is letting a very small tail wag a very large dog to establish a new tort law merely to facilitate mass trials, which may themselves be a dubious advantage. Moreover, divergent state tort law is a good thing, a valid expression of local values and state regulatory interests.⁶⁴ Principles of federalism should protect the states' ability to develop and enforce their own laws of tort, using their own court systems and legislatures.⁶⁵

All these considerations leave the desirability of large-scale trial consolidation uncertain. The balance may well shift from case to case, as concerns over trial delay may be overriding in some situations, and manageability, fairness, and other considerations less pressing. The mix may work out differently in other cases.

B. Authority of Courts to Consolidate for Trial

To reach the point of considering the desirability of consolidated proceedings, courts need the authority to put the case into a consolidated form. Recent caselaw developments cast some doubt on the likelihood of courts having the authority. These developments include, at the federal level, the recent decisions *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*⁶⁶ and *Amchem Products, Inc. v. Windsor*.⁶⁷ At the state level, they include the persistence of territorial limits on state court jurisdiction. None of the developments entirely eliminates the possibility of large-scale trial consolidations, however.

1. *Lexecon*

In the *Lexecon* case, the Supreme Court held that a court that receives cases transferred to it for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407(a) lacks the power to assign the

63. See Mullenix, *supra* note 6, at 1077-79; Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 443-45 (1986); Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, Or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167 (1985); see also Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 842 (1989) (arguing the legitimacy of broad federal common law).

64. See Weber, *supra* note 36, at 237-45.

65. See *id.* For a response, see Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755 (1995).

66. 118 S. Ct. 956 (1998).

67. 117 S. Ct. 2231 (1997).

consolidated proceeding to itself for trial.⁶⁸ The Court noted that the statute provides explicitly that at the conclusion of pretrial proceedings, the actions are to be remanded to the districts from which they were transferred.⁶⁹ The decision would appear to permit consolidations of federal cases only within the districts in which they were filed, but the operation of a different statute, 28 U.S.C. § 1404(a), opens the door somewhat wider.

Under section 1404(a), a federal court may transfer a case to another district for the convenience of the parties and witnesses, as long as the transferee court is one where the action might have been filed.⁷⁰ Nevertheless, since the action must be able to have been brought in the transferee district, federal limits on venue⁷¹ and state limits on territorial jurisdiction incorporated in Federal Rule 4⁷² greatly restrict the freedom to transfer. Moreover, under section 1407(a), the Judicial Panel on Multidistrict Litigation makes the decision to transfer; under section 1404(a), the matter is up to every federal judge in whose court each action was originally filed. The legal limits and the necessity of individual decisions make global transfer and consolidation of a mass tort case to a single federal forum highly unlikely. Legislative change might alter this state of affairs, but Congress has been unenthusiastic about past federal transfer and consolidation proposals.⁷³

2. *Amchem*

In *Amchem*, the Supreme Court affirmed the reversal of a class action settlement in a mass asbestos case, ruling that the common issues did not predominate,⁷⁴ and that the case did not meet standards for representative adequacy.⁷⁵ The Court also questioned whether it was possible to give effective notice to the class, which consisted of all persons exposed to the defendants' asbestos who had not yet filed suit, irrespective of whether the persons had manifested injury or other harm, and all persons with derivative claims.⁷⁶

68. *Lexecon*, 118 S. Ct. at 964.

69. *Id.* at 962.

70. 28 U.S.C. § 1404(a) (1997).

71. *Id.* § 1391 (general federal venue provisions).

72. FED. R. CIV. P. 4(k).

73. See *Weber*, *supra* note 36, at 258 (giving history of proposals).

74. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2249-50 (1997).

75. *Id.* at 2250-51.

76. *Id.* at 2252.

Authorities disagree on the effect *Amchem* will have on class action practice.⁷⁷ Though the Court approved the idea that a settled class action is exempt from the standards of manageability that one going to trial must satisfy,⁷⁸ it established that tort claimants in a class action should be divided into subclasses, with separate representatives, based on common factual characteristics and interests. Those who are currently ill must be in a separate group from those who have yet to manifest disease, and perhaps further subclassing is required based on the nature of the injury and the law that governs the recovery.⁷⁹

In light of *Lexecon*, a class action may be the only viable means to consolidate a mass tort in a single federal forum for a mass trial. The predominance and representative adequacy holdings of *Amchem* do not eliminate the viability of that option; they merely require that clear subclasses participate in the trial, each with their own representative. The Court's comments about notice, however, raise the question whether such an action could ever include persons who have not yet become ill. The Court doubted whether any form of notice could effectively convey the importance of the choice to participate or opt out of the class to persons who do not yet have the motivation that disease supplies.⁸⁰ Moreover, the Court recognized that it is impossible to give notice to future holders of derivative claims, such as future spouses who may eventually accrue the right to sue for loss of consortium.⁸¹ Individuals who cannot be given effective notice must be excluded from the proceeding. The upshot of the holding is that federal mass trials will be somewhat less likely, and much less comprehensive in scope, than would have been the case had the decision come down differently. Nevertheless, the ruling does not bar mass trial proceedings, and mass tort class actions encompassing claims of persons who currently are injured remain permissible.

3. *Limits on State Court Jurisdiction*

If emerging caselaw makes global consolidation in the federal courts more difficult, the option of consolidation in the state courts

77. Compare Eric D. Green, *A Post-Georgine Note*, 30 U.C. DAVIS L. REV. 873 (1997) (stating that mass tort class actions will not be viable after *Amchem*) with Linda S. Mullenix, *Court Settles Settlement Class Issue*, NAT'L L.J., Aug. 11, 1997, at B12 (stating that the actions will continue to be viable). See generally Weber, *supra* note 14 (criticizing approach to class action settlement taken by *Amchem* Court, but noting that mass tort class actions are likely to continue to be brought).

78. *Amchem*, 117 S. Ct. at 2248.

79. *Id.* at 2249-51.

80. *Id.* at 2252.

81. *Id.*

becomes more appealing. Though *Amchem* will certainly influence state courts' interpretations of their own class action rules, states may ultimately prove more adventurous than federal courts in permitting innovative groupings of tort claims. Moreover, Article III of the United States Constitution may present federal courts with difficulties in adopting some advantageous case-handling techniques, such as deferral registries and the use of sampling and statistical inference. State courts, not bound by the same restrictions, have the freedom to use these mechanisms.⁸²

Limits on territorial jurisdiction may still prevent the full use of state courts for consolidation of mass torts, however.⁸³ For state courts to reach their potential as magnet forums, the existing trend towards expansion of state territorial jurisdiction needs to continue.⁸⁴ Moreover, state and federal courts that receive later-filed actions that could be consolidated into an existing consolidation in another state will need to develop door-closing doctrines, such as forum non conveniens and abatement on the ground of prior pending claims, to encourage litigants to join the consolidation.⁸⁵ Interstate compacts or adoption of the Uniform Transfer of Litigation Act would aid these efforts.⁸⁶

CONCLUSION

To the extent that the considerations discussed above counsel against consolidated trials, limits on legal authority to consolidate are a good thing, keeping judges from being tempted to package disputes inappropriately. In my view, consolidation of mass torts in the federal courts is particularly undesirable. On a balance of efficiencies and other interests, particularly federalism's protection of states' choices of underlying legal principles, I prefer consolidated pretrial proceedings in the state courts—either one proceeding or several, depending on jurisdictional limits—and I believe that some consolidated trials are appropriate if conducted in the state courts in groupings that recognize diverse applicable law.

82. See Weber, *supra* note 36, at 252-53.

83. See *id.* at 259 (citing, *inter alia*, Robert W. Kastenmeier & Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535, 539 (1990)).

84. See *id.* at 260-61.

85. See *id.* at 261.

86. See *id.* at 266-70. Other potential objections to interstate consolidation are raised and answered in the same source. *Id.* at 253-74. For a comprehensive discussion of the Uniform Transfer of Litigation Act, 14 U.L.A. §§ 101-305 (1991), see Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994).

