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CORPORATE RESPONSIBILITY IN MASS DISASTER CASES

*Robert L. Rabin**

I. PROLOGUE

The grim reality of life in modern-day society is that harms to person and property—setting aside natural disasters—frequently occur on a scale virtually unknown in pre-modern times.¹ There are notable exceptions, of course. The Great Chicago Fire of 1871 remains a vivid memorial to the risks of fire attributable to human misconduct.² Similarly, the Johnstown Flood of 1889, claiming more than 2,000 lives and imposing millions of dollars in property damage, is prominent in the annals of disaster history.³ But the modern era is singularly notable for raging wildfires (climate change), oil spills (extraction of energy sources), and commercial airline crashes (mass transport)—each of which is illustrative of risks to human safety and resources unknown in earlier times.

The foregoing can be characterized as single event disasters. Side-by-side with these occurrences, modern-day life is marked by mass harm from product-related defects that unfold in serial fashion, case-by-case, rather than from a single cataclysmic event—harms associated with tobacco use, asbestos exposure, and opioid intake, among others.⁴ While these serial mass harms are certainly not of lesser concern from the vantage point of devastating costs to human health and

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1. For present purposes, “modern times” will correspond to the beginning of the twentieth century. This is somewhat later, of course, than the emergence of the Industrial Revolution with its high volume of railroad and industrial injuries. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 443–44 (4th ed. 2019). But this designation is better suited to the phenomenon of mass disasters, which I will be discussing in this Article.

2. The fire claimed about 100 to 300 lives and destroyed some 17,000 structures in leveling a substantial portion of the city. Robert Cormier, *The Story of The Great Chicago Fire, 1871*, N.Y. TIMES (May 2, 1971), <https://www.nytimes.com/1971/05/02/archives/the-story-of-the-great-chicago-fire-1871-by-mary-kay-phelan.html>.

3. See DAVID G. McCULLOUGH, *THE JOHNSTOWN FLOOD* 264, 269 (1968).

4. For discussion of the tobacco and opioids mass harms, see Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285 (2021). For discussion of the origins of the asbestos crisis, see PAUL BRO-

safety, our ordinary mode of discourse conceptualizes them differently: Oil spills and airline crashes are viewed as “disasters,” whereas the loss of life from tobacco use or motor vehicle accidents on the roadways is referred to in less fraught terminology as “high-volume harm.”

This distinction between single-event disasters and unfolding harmful consequences is not always clear-cut (from a bird’s-eye view, for example, raging wildfires can now be viewed as a phenomenon of serial harm). But in fact, tort law—our remedial system for addressing these harms—plays out quite differently for sudden event disasters as distinguished from harms arising in serial fashion.

In this Essay, I will focus exclusively on the responsiveness of the tort system in the single-event disaster scenario. Correspondingly, my focal point will be instances of corporate responsibility.⁵ Analytically, the singular character of these events is evident in at least two prominent ways. First, stand-alone financial loss is often the crux of the harm suffered in single-event disasters. And second, the prospect of unbounded liability—irrespective of whether the harm is purely economic loss or harm to person or property—is frequently a benchmark to reservations about recognizing responsibility in these cases.

My discussion will be guided by these themes. I will begin by discussing the tort system’s treatment of stand-alone economic loss in mass disaster scenarios, and then turn to treatment of personal injury and property damage in mass disaster settings. I will intertwine in this discussion the alternative remedial options to tort of no-fault liability and in-kind administrative relief.

DEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985). More generally, on the evolution and growth of the mass tort phenomenon, consider the following:

Mass torts did not exist as a separate phenomenon until the early 1970s, with the filing of cases involving MER-29, Dalkon Shield, DES, and Agent Orange. What explains their evolution and growth? Many point to the following: the development of more substances that can inflict serious, widespread, and latent injury; the expansion and transformation of tort liability, mostly by reducing barriers to plaintiffs (. . . the development of strict liability for products, the death of privity, the recognition of compensable emotional harm, and the ability to assert claims for incipient injury, such as claims for medical monitoring); the rapidly-rising cost of health care (meaning that damages have become worth pursuing); the development of considerable medical knowledge about causation (which permits scientists to link various diseases to various substances); changes in state law, to relax statutes of limitations (so that statutes start running at the time an illness is “discovered,” not at the time the plaintiff is “exposed” thereto); the growth of attorney advertising (which makes it easier to round up a volume of clients); and the plaintiffs’ bar’s increased sophistication and resources.

Nora Freeman Engstrom, *Legal Ethics: The Plaintiffs’ Lawyer* 280 (2022) (unpublished manuscript) (on file with the author).

5. I will also make reference to various forms of governmental relief, *see* text at note 37.

II. PERSPECTIVES ON TORT IN MASS DISASTER CASES

A. *Stand-Alone Economic Loss*

In the northwestern corner of Los Angeles, a residential community of 30,000 inhabitants of Porter Ranch lies just below a natural gas storage facility, the Aliso Facility, owned and operated by Southern California Gas Company (SoCal Gas). In October 2015, a massive leakage from the facility overwhelmed the surrounding area, causing widespread reports of physical reactions in adult residents of Porter Ranch and schoolchildren—ranging from respiratory problems to headaches, dizziness and vomiting. Reacting with a sense of urgency, the Los Angeles County health department established a relocation program for all residents within a five-mile radius of the leak site. Not long afterwards, the students at two Porter Ranch schools were assigned elsewhere for the remainder of the academic year. In total, some 15,000 people were relocated.⁶

Soon thereafter, a number of local enterprises—a martial arts center, a daycare facility, restaurants, pharmacies, and many others—brought a class action for significant loss of business as a consequence of the relocation. Critically for present purposes, none of these enterprises claimed personal injury or property damage—claims that were settled separately. These plaintiffs claimed *solely* stand-alone economic loss. SoCal Gas’s demurrer in response was rebuffed by the state trial court.⁷ But the Court of Appeal reversed, setting the stage for review by the California Supreme Court, which affirmed the intermediate appellate court’s dismissal.⁸

After stating that “of course” the defendant had a duty to guard against physical injury or property damage, the Court addressed the issue in the case: Whether the defendant had a similar duty to guard against negligently caused purely economic loss.⁹ In its no-duty ruling—citing the Restatement and the dominant view elsewhere¹⁰—the

6. The facts of the subsequent tort suit are succinctly related in *Southern California Gas Co. v. Superior Court of Los Angeles County*, 441 P.3d 881, 883–84 (Cal. 2019) (hereinafter *SoCalGas*).

7. *In re* Coordination Proceedings Special Title Rule (3.550) S. Cal. Gas Leak CA, No. JCCP4861, 2017 WL 2361919, at *3 (Cal. Super., L.A. Cnty. May 8, 2017).

8. *SoCalGas*, *supra* note 6 at 884, 896.

9. *Id.* at 885.

10. RESTATEMENT (THIRD) OF TORTS, LIAB. FOR ECON. HARM § 1 (AM. LAW INST. 2020). The single contrary view, holding stand-alone economic loss recoverable by plaintiffs who are particularly foreseeable, is *People Express Airlines, Inc. v. Consolidated Railway Corp.*, 495 A.2d 107, 116 (N.J. 1985). For general discussion of the dominant view and the *People Express* exception, see generally Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857 (2006).

Court offered a two-pronged explanation for its adherence to the economic loss rule of no recovery.

Initially, the Court noted a “lack [of] clear *spatial* boundaries within which to cabin claims like those asserted here.”¹¹ The five-mile limit embraced by the plaintiffs had no intrinsic merit in the Court’s view—a number of businesses outside the limit similarly experienced business loss. Moreover, looking to future cases, widespread economic losses could easily arise in mass disasters where no formal relocation boundary would be set.

The Court next turned to *temporal* boundaries, which it found similarly illusory.¹² Indeed, at the time of trial, many of the plaintiff businesses continued to claim losses to an unforeseeable future date. In further support, the Court discussed an earlier landmark case decided by the New York Court of Appeals, *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*¹³ There, plaintiffs also sought compensation for stand-alone financial losses, alleging negligence on the part of defendants responsible for the collapse of a high-rise building in downtown Manhattan during construction work, with consequent closure of a hazard zone that embraced plaintiffs’ businesses. The Court denied liability on essentially the same grounds as the *SoCal* court: unbounded, ripple-effect business losses.¹⁴

Interestingly, *532 Madison Ave.* was decided just months before the 9/11 catastrophe. On that score, consider the consequences of departing from the economic loss rule in the face of the monumental city-wide economic losses from the terrorist acts in 9/11—if prospective defendants (the airlines, airline security companies, Twin Towers proprietors) had been found negligent for inadequately safeguarding against the cataclysm.

In still another setting, massive oil spills in recent years have fouled the ocean waters with widespread harm to wildlife as well as commercial interests. Notably, two such occurrences, the Exxon Valdez oil spill in Prince William Sound, Alaska, and the Deepwater Horizon oil spill off the coast in the Gulf of Mexico, triggered mass tort litigation, along with distinctive political responses.¹⁵ Each is worth brief examination, because they shed further light on the economic loss rule in its

11. *SoCalGas supra* note 6 at 892, 894.

12. *Id.* at 894.

13. *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1099–101 (N.Y. 2001).

14. *Id.* at 1103.

15. *See infra* note 21 and accompanying text.

broader institutional setting as a shield from tort responsibility of corporate actors in mass disasters.

On April 20, 2010, the Deepwater Horizon oil rig exploded in the Gulf of Mexico, killing eleven workers and spewing roughly five million barrels of oil.¹⁶ Not long after the explosion, BP agreed to set up a \$20 billion fund to compensate the decedents of those who were killed as well as those injured by its activities.¹⁷ Ultimately, two mass settlements were reached, and, following their resolution, a court-supervised administrator accepted, reviewed, and paid some 400,000 claimants.¹⁸ Claimants included a broad range of individuals and entities, including those seeking to recoup lost hotel and restaurant revenue in Florida (outside the area of the actual oil slick), numerous fishermen from Louisiana and Alabama whose income was directly affected, and, more controversially, others, including an adult escort service, a blueberry farm, and four colorectal surgeons.¹⁹

Virtually all of the claimants sought compensation for stand-alone economic loss. Normally, as per *SoCal Gas*, such compensation is unavailable. Yet, prior oil spills had established a limited exception to the no-duty rule for commercial fishermen, permitting recovery for commercial fishermen for loss of “a resource of the sea, *specifically*, its fish, in the ordinary course of their business,” arising from an oil spill off the Santa Barbara coast in 1969.²⁰

More broadly, in the aftermath of the 1989 Exxon Valdez spill off the coast of Alaska, Congress enacted the Oil Pollution Act of 1990 (OPA), which essentially codified and expanded the *Union Oil Co.* exception.²¹ OPA imposes liability for certain losses arising from an

16. John M. Broder, *BP Shortcuts Led to Gulf Oil Spill, Report Says*, N.Y. TIMES (Sept. 14, 2011), <https://www.nytimes.com/2011/09/15/science/earth/15spill.html>.

17. For discussion of the Deepwater Horizon oil spill and summaries of investigations into its causes, see John M. Broder, *Report Faults BP and Contractors for Rig Explosion and Spill*, N.Y. TIMES (Nov. 17, 2010), <https://www.nytimes.com/2010/11/18/us/18BP.html>. For a description of the Gulf Coast Claims Facility (GCCF) initially administered by Kenneth Feinberg and its procedures for addressing claims, see Alfred R. Light, *The Deepwater Horizon Oil Spill Trust and the Gulf Coast Claims Facility: The “Superfund” Myth and the Law of Unintended Consequences*, 5 GOLDEN GATE U. ENVTL. L.J. 87, 87–88 (2011).

18. See Sarah Kent, *BP’s Deepwater Horizon Bill Grows by \$1.7 Billion; Charge Shows How BP Remains Handicapped by Liabilities Related to the Disaster Even As the Oil Industry Returns to Profitability*, WALL ST. J. (Jan. 16, 2018), <https://www.wsj.com/articles/bp-to-book-1-7-billion-charge-for-deepwater-horizon-claims-1516091386>.

19. See Times Staff Writer, *BP Questioning Oil Spill Payments To Some Tampa Bay Area Businesses*, TAMPA BAY TIMES (Mar. 15, 2014), <https://www.tampabay.com/news/business/bp-questioning-oil-spill-payments-to-some-tampa-bay-area-businesses/2170215/>.

20. See *Union Oil Co. v. Oppen*, 501 F.2d 558, 563, 570 (9th Cir. 1974).

21. 33 U.S.C. § 2702(b)(2), covering certain categories including natural resource damages, damages to property, loss of subsistence use, loss of government revenues, loss of profits or impaired earning capacity, damaged public services, and damage assessment costs.

oil spill into navigable waters on a strict liability basis. Covered losses include the costs of governmental efforts to clean the spill and other public losses, including lost tax revenues, as well as an array of private claims for pure economic loss, as long as they are “due to” an oil spill.²² However, the statute caps liability for private losses at \$75 million, with an exception for “gross negligence,” “willful misconduct,” or violation of an applicable safety statute.²³

In the shadow of a finding that BP had been grossly negligent, it settled all federal, state, and local claims under the OPA for \$18.7 billion.²⁴ Total cost to BP of quelling the leak and paying private and governmental claims was \$66 billion.²⁵

As an especially calamitous phenomenon of modern-day mass risk, consider wildfires, which in a variety of ways reveal distinct characteristics from those discussed above. Wildfires present an increasing threat, building in both size and intensity as the planet warms.²⁶ The magnitude of losses is on par with disastrous oil spills. The 2018 Camp Fire destroyed the towns of Paradise and Concow, taking more than 18,000 structures and claiming at least 85 lives.²⁷ It became the most destructive wildfire in history in regard to insurance losses, with \$12.5 billion in covered losses and \$16.5 billion in total losses.²⁸ When combined with 14 other large California blazes that year alone, including the Carr fire originating in Shasta County, and the Woolsey fire originating in Ventura County, the losses amounted to \$24 billion.²⁹

The growing problem is not exclusively California’s, as the number of square miles that have burned across California, Oregon, and Washington since 2000 is over six times the number burned between

22. *Id.*

23. 33 U.S.C. § 2704(c)(1).

24. Campbell Robertson et al., *BP to Pay \$18.7 Billion for Deepwater Horizon Oil Spill*, N.Y. TIMES (July 2, 2015), <https://www.nytimes.com/2015/07/03/us/bp-to-pay-gulf-coast-states-18-7-billion-for-deepwater-horizon-oil-spill.html>.

25. Steven Mufson, *The Oil Giant That Was ‘Forced to Shrink to Greatness*, WASH. POST (July 15, 2018), <https://www.proquest.com/docview/2069698504/F4CB2B9437814EA9PQ/1?accountid=10477>.

26. See Raymond Zhong, *Climate Scientists Warn of a ‘Global Wildfire Crisis*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/23/climate/climate-change-un-wildfire-report.html> (noting a scientific link between climate change and a 57% increased risk of highly devastating wildfires). See also VERA BRUSENTSEV & WAYNE VROMAN, *DISASTERS IN THE UNITED STATES: FREQUENCY, COSTS, AND COMPENSATION* 153–54 (2017) (discussing increasing trends in acreage burned each year, as a result of both climate change and human development).

27. Sandra Garcia, *Camp Fire Is 100 Percent Contained, California Officials Say*, N.Y. TIMES (Nov. 25, 2018), <https://www.nytimes.com/2018/11/25/us/camp-fire-update-containment.html>.

28. Alejandra Reyes-Velarde, *California’s Camp Fire Was the Costliest Global Disaster Last Year, Insurance Report Shows*, L.A. TIMES (Jan. 11, 2019), <https://www.latimes.com/local/lanow/la-me-ln-camp-fire-insured-losses-20190111-story.html>.

29. *Id.*

1950 and 2000.³⁰ Colorado and Texas also have millions of homes in the “wildland-urban interface,” which are zones where flammable vegetation meet man-made structures and create a particularly risky environment for the community residing there.³¹

In the aftermath of a wildfire, injured parties may seek to hold either the federal government or private actors, such as electric utilities, liable. Opportunities for suits against the government are fairly limited, requiring a cause of action either under the Federal Tort Claims Act (“FTCA”) or the Fifth Amendment. The FTCA provides liability for acts of “negligent or wrongful conduct,” but creates a significant exception for “discretionary functions.”³² The Fifth Amendment, as it regards deprivation of property without due process of law, protects landowners when their property is seized “without just compensation.”³³ These avenues are most readily available for relief in instances where damage results from a loss of control over prescribed burns.

However, there are more paths to relief from private actors, including negligence, nuisance, and trespass claims. California, in fact, has taken a strict liability approach, holding electric utility companies “strictly liable for the wildfire damages that arise from the malfunctioning of their electrical infrastructure.”³⁴ Governments can hold private actors liable not just for property damage but also for costs associated with ecosystem services, rehabilitation of burned areas, damage to wildlife, loss of future access to public land, aesthetic values, erosion, and more.³⁵

Two features in particular stand out. First, wildfires frequently raise the issue of interactive effects with natural causes: lightning strikes may trigger a wildfire, which at the same time is intensified by passive failures on the part of corporate or governmental entities to take precautionary steps that might have limited the damage caused by the

30. Blacki Migliozi et al., *Record Wildfires on the West Coast Are Capping a Disastrous Decade*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/interactive/2020/09/24/climate/fires-worst-year-california-oregon-washington.html>.

31. Nadja Popovich & Brad Plumer, *As Wildfires Grow, Millions of Homes Are Being Built in Harm’s Way*, N.Y. TIMES (Sept. 9, 2022), <https://www.nytimes.com/interactive/2022/09/09/climate/growing-wildfire-risk-homes.html?smid=url-share>.

32. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b); 2680(a).

33. U.S. CONST. amend. V.

34. Jeremy Gradwohl, *Electric Utility-Caused Wildfire Damages: Strict Liability Under Article I, Section 19 of the California Constitution*, 92 TEMP. L. REV. 595, 596 (2020).

35. Press Release, Dep’t of Just., United States Files Lawsuit to Recover Monetary Damages Associated with 2013 Mountain Fire in San Bernardino National Forest (July 14, 2016), <https://www.justice.gov/usao-cdca/pr/united-states-files-lawsuit-recover-monetary-damages-associated-2013-mountain-fire-san>.

conflagration.³⁶ Second, and relatedly, even where inadequate precautions are evident—for example, a failure to secure safe grounding or adequate maintenance abutting electrified structures—there may be a confluence of private property land use and maintenance failures in the immediate area that magnifies the risk of devastating loss.

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The bottom line on these variegated scenarios of catastrophic harm is that tort law is taxed beyond its institutional capacity when asked to address the ripple effect concerns that invariably lead to massive, unbounded stand-alone financial loss. But the matter need not end there. Arguably, this is the place for governmental intervention on a different scale requiring federal and state governmental assistance—loans, loan guarantees, direct assistance (such as the Federal Emergency Management Agency (FEMA) provides)—rather than reliance on tort.³⁷ And correlatively, first-party business interruption insurance may be available in some of these scenarios, with no showing of negligence required as a prerequisite to recovery.³⁸

36. A related, equally pernicious phenomenon triggering massive economic and personal harm is floods. Because flooding is dominantly a feature of natural causes, including climate change—and in some instances, arguably a failure of governmental neglect—rather than corporate responsibility, I put it aside for present purposes. For an especially concerning aspect of flash flooding, see Christopher Flavelle et al., *Mississippi Crisis Highlights Climate Threat to Drinking Water Nationwide*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/01/us/mississippi-water-climate-change.html> (discussing the nationwide concerns generated by the knockout of the water treatment plant in Jackson, Miss., leaving 150,000 people temporarily without drinking water). I similarly put aside for present purposes hurricane-related property damage and personal harm as dominantly a feature of natural (rather than corporate) causes. The hurricane phenomenon also raises collateral issues of private insurance coverage. On this topic generally, see Ian Prasad Philbrick & Ashley Wu, *Population Growth is Making Hurricanes More Expensive*, N.Y. TIMES (Dec. 2, 2022), <https://www.nytimes.com/2022/12/02/briefing/why-hurricanes-cost-more.html>; Christopher Flavelle, *Hurricane Ian's Toll is Severe. Lack of Insurance Will Make It Worse*, N.Y. TIMES (Sept. 29, 2022), <https://www.nytimes.com/2022/09/29/climate/hurricane-ian-flood-insurance.html>.

37. For discussion of the range of options, see ROBERT L. RABIN & SUZANNE A. BRATIS, FINANCIAL COMPENSATION FOR VICTIMS OF CATASTROPHES: UNITED STATES 303, 307, 324–25, 330–59, in MICHAEL FAURE & TON HARTLIEF, FINANCIAL COMPENSATION FOR VICTIMS OF CATASTROPHES: A COMPARATIVE APPROACH (2006). Regrettably, FEMA's performance remains subject to sharp criticism. See Christopher Flavelle, *How the Government Is Failing Americans Uprooted by Calamity*, N.Y. TIMES (July 23, 2022), <https://www.nytimes.com/2022/07/23/climate/climate-disaster-relief-fema.html> (discussing the agency's deficiencies in responding to Hurricane Laura).

38. See generally JAMES R. ROBIE ET AL., 1 INSURING REAL PROPERTY § 3.02 (2022).

B. Property Damage/Personal Injury

Putting aside oil rig cases, where the damage arises dominantly on the high seas, claims for recovery in mass disaster cases almost always feature daunting property damage and loss of life, as well.³⁹ And contrary to the economic loss rule, recovery of these tangible property and personal injury losses is frequently taken for granted—as Justice Cuellar’s dictum in *SoCal Gas* suggests.⁴⁰

Recovery for these mass harms runs as a recurrent theme in other scenarios. Commercial airline crashes invariably lead to mass wrongful death settlements (in the shadow of *res ipsa loquitur* responsibility).⁴¹ In a cluster of wildfire cases, Pacific Gas & Electric settled mass claims for property loss and personal injury for \$13.5 billion after admitting deficient maintenance.⁴² In claims arising out of the 9/11 catastrophe, Congress left open the tort option, along with adopting a landmark no-fault compensation scheme for the massive death and

39. In fact, even in the oil rig cases, loss of life may occur. Eleven workers were killed when the Deepwater Horizon rig exploded, spewing more than 200 million gallons of oil. Broder, *supra* note 16.

40. See *SoCalGas supra* at note 6, at 884–86. The 532 *Madison Ave.* court similarly assumed recovery would be recognized for property damage and personal injury. See also Patricia Mazzei, *Lawsuits Over Tragedies Can Drag On. Not in the Florida Condo Collapse*, N.Y. TIMES (Sept. 3, 2022), <https://www.nytimes.com/2022/09/03/us/surfside-condo-collapse-judge.html> (discussing the \$1 billion settlement of personal injury and property damage claims (98 deaths and 135 claims for dispossession) in the beachfront collapse of the condominium tower in Surfside Florida).

41. See JAMES S. KAKALIK ET AL., COSTS AND COMPENSATION PAID IN AVIATION ACCIDENT LITIGATION ix–x, 12, 20, 93 (RAND 1988). I refer here to domestic airline crashes. Overseas crashes often lead to dismissal in U.S. courts on *forum non conveniens* grounds. See, e.g., *Fortaner v. Boeing Co.*, 504 F. App’x 573, 580 (9th Cir. 2013) (affirming FNC dismissal of 116 consolidated suits where the 204 plaintiffs were non-U.S. citizens seeking damages for those killed in a 2008 airplane accident in Madrid, Spain); *Lleras v. Excelaire Servs. Inc.*, 354 F. App’x 585, 586–87 (2d Cir. 2009) (affirming FNC dismissal of wrongful death claims where decedents, Brazilian citizens and residents, perished aboard Gol Linhas Inteligentes Flight 1907, “which crashed in the Amazon rainforest on September 29, 2006.”); *Clerides v. Boeing Co.*, 534 F.3d 623, 626 (7th Cir. 2008) (affirming FNC dismissal of wrongful death claims where plaintiff’s decedent, a resident of Cyprus, perished on Helios Airways Flight 522, “scheduled to fly from Larnaca, Cyprus to Athens, Greece.”); *Schijndel v. Boeing Co.*, 263 F. App’x 555, 557 (9th Cir. 2008) (affirming FNC dismissal of plaintiffs’ wrongful death claims where decedents, citizens of the Netherlands, were killed in a crash of a Singaporean-owned airplane in Taiwan); *De Aguilar v. Boeing Co.*, 11 F.3d 55, 56 (5th Cir. 1993) (affirming FNC dismissal of wrongful death claims where decedents were killed on March 31, 1986, when a Mexicana Airlines plane crashed in Mexico).

42. This included the enormous property damage and loss of life (84 counts of involuntary manslaughter) in the 2018 wildfire destroying the town of Paradise, California. See Ivan Penn, *PG&E, Troubled California Utility Emerges From Bankruptcy*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/business/energy-environment/pge-bankruptcy-ends.html>.

injury toll.⁴³ Once again, the tort claimants who opted out of the no-fault compensation scheme reached successful settlements.⁴⁴

But the specter of crushing loss is not easily dismissed; exceptions bear mentioning. Long before climate-induced wildfires generated massive property damage, primitive fire-fighting capability available to staunch the inadequate supplies of water works companies animated courts to carve out an immunity from tort extending from conflagrations like the Great Chicago Fire into the modern era.

Most notably in the modern era, Judge Benjamin Cardozo's leading opinion denied tort liability in *H.R. Moch Co. v. Rensselaer Water Co.*,⁴⁵ in which a building caught fire and the flames extended to plaintiff's warehouse, destroying it. To this date, *Moch* stands as a monument to the crushing liability concern in water company cases.⁴⁶

Nor has the crushing liability concern been limited to property damage claims. In a much-noted holding, stemming from the extended New York City power failure of 1978, the New York Court of Appeals revived the privity doctrine to deny the personal injury claim of an apartment dweller seriously injured when descending the darkened stairway in a common area of his residential building.⁴⁷ The court refused to extend personal injury liability beyond those in a contractual relationship with the utility.

Arguably, the New York court is swimming against the tide in imposing contractual limits on liability for potentially mass claims for property damage and personal injury in *Moch* and *Strauss*, respectively. But a cautionary note is in order. It is self-evident that initial allocation of widespread loss to negligent defendants has unavoidable second-order consequences. This is particularly apparent in the utility cases. If these losses are uniformly spread among the rate-payer base, the demographics suggest that those least capable of bearing the fi-

43. Air Transportation Safety and System Stabilization Act, PUB. L. NO. 107-42, tit. IV, § 405(b)(2), 115 Stat. 230, 237 (2001) (reprinted at 49 U.S.C. § 40101 note (Supp. I 2001)). For discussion, see Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 573 (2001).

44. Benjamin Weiser, *Family and United Airlines Settle Last 9/11 Wrongful-Death Lawsuit*, N.Y. TIMES, (Sept. 19, 2011), <https://www.nytimes.com/2011/09/20/nyregion/last-911-wrongful-death-suit-is-settled.html>.

45. *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 899 (N.Y. 1928).

46. A generation later, in *Libbey v. Hampton Water Works Co.*, 389 A.2d 434, 435-36 (N.H., 1978), the court adopted the majority view of *Moch*, noting that only four states had rejected the immunity. In fact, the principal cases rejecting *Moch* are not mass harm scenarios. See, e.g., *Louisville Gas and Electric Co. v. Roberson*, 212 S.W.3d 107, 108, 112 (Ky. 2006) and *Clay Electric Cooperative, Inc., v. Johnson*, 873 So.2d 1182, 1184, 1188, 1191 (Fla. 2003), both involving failure to maintain street lights to protect those in the roadways.

47. *Strauss v. Belle Realty Co.*, 482 N.E. 2d 34, 35-36, 38 (N.Y. 1985).

nancial burden will be most seriously impacted.⁴⁸ Once again, this suggests that a multifaceted institutional approach, spreading the losses most widely through progressive tax-subsidized governmental relief programs may be the most advisable course of action.⁴⁹

III. EPILOGUE

Mass disasters have taken on new meaning in recent years—and claims against corporate defendants have sometimes followed.⁵⁰ On December 14, 2012, Adam Lanza, wielding an AR-15 semiautomatic rifle purchased earlier by his mother, killed 20 first-graders and six adults at the Sandy Hook Elementary School in Newport, Connecticut.⁵¹ Tragically, this horrific event has been repeated in the ensuing years on a number of occasions in schools, churches, and places of public convenience.⁵² Nonetheless, Sandy Hook stands out as emblematic of unspeakable violence against innocent victims.

48. This is particularly evident since homeowners tend to have property insurance coverage whereas renters do not.

49. See RABIN & BRATIS, *supra* note 37, at 356. But there is a trade-off in potential loss of deterrence and educational effects promoted by tort responsibility if the losses are externalized.

50. In this discussion, I will refrain from assigning an arbitrary number of victims as a floor for characterizing an incident as a mass disaster.

51. Rick Rojas & Kristin Hussey, *Newly Released Documents Detail Sandy Hook Shooter's Troubled State of Mind*, N.Y. TIMES, (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/nyregion/documents-sandy-hook-shooter.html>. Earlier in the day, he also killed his mother.

52. There have been hundreds of school shootings in the United States since the Sandy Hook Massacre, as well as a considerable number in other locations, including grocery stores and places of worship. See Jugal Patel, *The Toll Since Sandy Hook, More than 400 People Have Been Shot in Over 200 School Shootings*, N.Y. TIMES, (Feb. 16, 2018), <https://www.nytimes.com/interactive/2018/02/15/us/school-shootings-sandy-hook-parkland.html>. Nineteen-year-old Nikolas Cruz pled guilty to the premeditated murder of fourteen students and three staff members, as well as the attempted murder of seventeen others, following his deadly attack on a Parkland, FL high school in 2018. Patricia Mazzei et al., *What We Know About the Parkland School Shooting Case*, N.Y. TIMES, (July 18, 2022), <https://www.nytimes.com/article/parkland-school-shooting-trial.html>. Eighteen-year-old Salvador Ramos shot his grandmother before killing nineteen children and two teachers with a rifle at a Uvalde, TX elementary school earlier this year. *What to Know About the School Shooting in Uvalde, Texas*, N.Y. TIMES, (May 25, 2022), <https://www.nytimes.com/article/uvalde-texas-school-shooting.html>. Eighteen-year-old Payton Gendron killed ten and wounded three people at a Buffalo, New York supermarket after posting a lengthy document online outlining his plans to target Black people in the area. Zusha Elinson et al., *Accused Buffalo Shooter Visited City in March*, WALL ST. J., (May 16, 2022), https://www.wsj.com/articles/buffalo-shooting-victims-identified-as-biden-plans-trip-to-grieve-with-the-community-11652717540?mod=livecoverage_web. Dylann Roof opened fire and killed nine people at a Charleston, South Carolina church in 2015. Matt Zapposky, *Charleston Church Shooter: 'I Would Like to Make it Crystal Clear, I Do Not Regret What I Did.'* WASH. POST, (Jan. 4, 2017), https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd_story.html. Studies funded by the National Institute of Justice reveal trends in mass shootings becoming both more frequent and deadlier with time, particularly as each shooting “normalizes the process and encourages new participants to join in.” James Densley & Jillian

Sandy Hook stands out on the tort scene, as well. Parents of young Sandy Hook victims filed suit against Bushmaster Firearms International and Remington alleging a negligent entrustment claim in wrongful death actions.⁵³ The Superior Court dismissed the suit⁵⁴ on the grounds that it failed to meet the requirements of a negligent entrustment claim,⁵⁵ and more importantly, that it was subject to the immunity that gun manufacturers claim under the Protection of Lawful Commerce in Arms Act of 2005 (PLCAA), enacted at the behest of the gun lobby after a succession of tort cases brought against firms in the industry.⁵⁶

But the Sandy Hook litigation did not end there. In March 2019, the plaintiffs successfully reinstated the suit on novel grounds: That the defendant had engaged in wrongful marketing in violation of the Connecticut Unfair Trade Practices Act⁵⁷—a pathway left open by the PLCAA.⁵⁸ Eventually, after much legal maneuvering, a superior court judge denied the defendant's request to dismiss the suit, and the case settled for \$73 million—an unprecedented successful effort to establish responsibility through settlement for mass harm against Remington, a gun manufacturer.⁵⁹

Tragically, the Sandy Hook assault on innocent victims in a school setting has been repeated many times over.⁶⁰ But in seemingly ran-

Peterson, *Opinion: We Analyzed 53 Years of Mass Shooting Data. Attacks Aren't Just Increasing, They're Getting Deadlier*, L.A. TIMES, (Sept. 1, 2019), <https://www.latimes.com/opinion/story/2019-09-01/mass-shooting-data-odessa-midland-increase>.

53. Rick Rojas, *Suit Against Maker of Gun in Newtown Massacre Can Proceed, Judge Rules*, N.Y. TIMES, (Apr. 15, 2016), <https://www.nytimes.com/2016/04/15/nyregion/suit-against-maker-of-gun-in-newtown-massacre-can-proceed-court-rules.html?smid=url-share>.

54. *Soto v. Bushmaster Firearms Int'l, LLC*, No. FBTCV156048103S, 2016 WL 8115354, at *24 (Conn. Super. Ct. Oct. 14, 2016).

55. The rifle was purchased by the mother of the shooter, Adam Lanza, and there was “no allegation in this case that there was any reason to expect that Lanza’s mother was likely to use the rifle in an unsafe manner.” *Soto v. Bushmaster Firearms International, LLC*, 202 A.3d 262, 272, 281 (Conn. Super. Ct. 2019). The court accordingly rejected plaintiffs’ claims that defendant had negligently entrusted the assault rifle that Adam Lanza used. *Id.* at 282–83.

56. PUB. L. NO. 109–92, 109 Stat. 2005 (codified at 15 U.S.C. § 7901 et seq.). For discussion of the issues raised by the statute, see generally Stephen D. Sugarman, *Torts and Guns*, 10 J. TORT L. 1 (2017).

57. *Soto v. Bushmaster Firearms International, LLC*, 202 A.3d 262, 272 (Conn. 2019).

58. 15 U.S.C. § 7903(5)(A)(iii).

59. See Rick Rojas et al., *Sandy Hook Families Settle with Gunmaker for \$73 Million Over Massacre*, N.Y. TIMES, (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html>. The settlement agreement also compelled Remington to release thousands of pages of internal documents including its plans for marketing the weapon. *Id.*

60. See Patel, *supra* note 52. See also Weiyi Cai & Jugal Patel, *A Half-Century of School Shootings*, N.Y. TIMES, (May 11, 2019), <https://www.nytimes.com/interactive/2019/05/11/us/school-shootings-united-states.html> (discussing lives lost to shooting attacks in additional schools, including in Santa Fe, TX and Benton, KY).

dom fashion, similar gun-related mass harms have occurred in other settings as well—and correspondingly, gun manufacturers do not stand as the sole targets of corporate responsibility. Standing out, in an unprecedented act of gun-related violence, on October 1, 2017, a mass shooter on the roof of the Las Vegas MGM Grand opened fire from a stock of automatic weapons into a crowd attending a music festival, killing 60 people and injuring hundreds of others. Claims by the victims against MGM Resorts for inadequate security led to an \$800 million settlement.⁶¹

Tort settlements notwithstanding, the trajectory of violence goes on and on. As indicated, schools, churches, and grocery stores. No site is a safe haven.

IV. CONCLUDING NOTE

Taking an overview of these tragic occurrences, one can ask: Is mass disaster-related harm an inevitable byproduct of the technological developments and cultural norms in our modern-day society? One would hope not, of course. But even the most proactive measures in addressing climate change, gun control, and terrorist activity would seem almost certain to leave a residue of risk-related mass harm for the foreseeable future (entirely apart from natural disasters).

From a deterrence perspective, tort law can only play a modest part in reducing these risks. And similarly, tort has only limited efficacy in securing restorative compensation. Nonetheless, understanding the institutional contribution that tort can offer, as well as recognizing its limits, is essential in the overall effort to best protect human health and safety in this enervating era.

61. See Richard A. Opiel, Jr., *MGM Agrees to Pay Las Vegas Shooting Victims Up to \$800 Million*, N.Y. TIMES, (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/mgm-las-vegas-shooting-settlement.html>.

