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EXPANSION OF BANKRUPTCY COURT JURISDICTION AS A MEANS TO PROVIDE MORE ADEQUATE REMEDIES TO VICTIMS OF MASS TORTS

CARL L. BUCKI*

With each technological advance, humankind encounters new risks of injury and harm. Although the benefits of these advances may fully justify the risks, and may even create a higher overall level of safety, the world nonetheless faces specific dangers whose potential scope and severity are unparalleled. A single tortious act may cause death for thousands, as when lethal chemicals were released from a factory at Bhopal, India in December 1984.\(^1\) Contaminants from nuclear and chemical sources may produce long-term environmental dangers whose impact is broad and severe, but unpredictable. Even such innocent conduct as the distribution of an FDA-approved drug may create a DES horror which continues to grow after 25 years.\(^2\) For victims and tortfeasors alike, unique challenges arise from the sheer magnitude of damages that derive from mass torts. The purpose of this essay is to examine the remedies which should be available to these victims, and to suggest a solution to the inadequacies that are inherent in the current system of remedies.

Mass torts impact not only upon tort victims and tortfeasors, but also upon society in general. From all three of these perspectives, currently available remedies are grossly inadequate.

From the perspective of an injured party, legal remedies are adequate only if they permit both the procurement of a fair judgment and the collection of that judgment. After some mass torts, plaintiffs can easily identify the party who is proximately responsible for their injuries. For example, when an airplane crashes, one can prepare a complaint that adequately recites the cause of action against known defendants and discovery techniques will verify whether the list of de-

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fendants is sufficiently comprehensive. However, in many circumstances, the only certainty is that the plaintiff has been injured. Although chemical or other contamination may pose identifiable health risks, it is far more difficult to prove that one’s exposure is proximately responsible for a particular health problem. Even if one can show proximate cause, he or she may be unable to identify the tortfeasor. For instance, in the case of DES, existing medical records may fail to disclose the manufacturer of the drug which was actually ingested. Moreover, when the injury is ultimately discovered, the statute of limitations may bar recovery.

In short, modern torts frequently entail problems in establishing certain traditional requirements for tort liability. Particularly burdensome are proof of proximate cause and restrictions on the tolling of the statute of limitations. Although certain jurisdictions have found solutions favorable to tort victims, any inconsistency of approach will promote forum shopping and the expensive litigation of conflict of law issues.

However, the primary impediment to the realization of an adequate remedy for mass torts is not the ability to obtain a judgment, but rather, the inability to satisfy that judgment. When a single defendant is responsible for thousands of severe injuries, a meaningful recovery may easily exceed the most generous insurance coverage, as well as any equity of a highly solvent tortfeasor. Moreover, many mass tortfeasors may have maintained minimal or no insurance coverage, or have minimal net worth, or may have even ceased doing business. Astute business people who can identify ventures that entail a high risk of mass injury, will either segregate those activities into poorly funded corporations, or abandon such activity to others who have minimal financial responsibility. Thus, inevitably, the perpetrators of mass torts will tend to be entities that lack the means to provide adequate recovery for claimants.

The current tort system is also inadequate from the perspective of defendants of mass claims. Generally, American courts have adopted

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3. See, e.g., Sindell, 607 P.2d at 925. The plaintiff in this case knew she had been injured as a result of DES ingested by her mother during her pregnancy, but did not know which of several manufacturers had caused her injury.

4. For example, in Sindell, the California high court developed the theory of market share allocation to compensate victims when the tortfeasor cannot be identified. Sindell, 607 P.2d at 937-38. Another reform has been the advent of the “discovery rule” in professional malpractice cases, whereby the statute of limitations is tolled until the plaintiff has discovered that he or she has been tortiously injured. See, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 166-67 (5th ed. 1984).
the view stated in 1681 by the English court in *Lambert v. Bessey*,⁵ that "the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering."⁶ Thus, the degree of moral culpability will not normally affect the defendant's financial exposure. Absent the imposition of punitive damages, defendants exhibiting a history of consistent recklessness will encounter liability only for the damages inflicted. These damages may be limited due either to sheer luck or to the timely intervention of policing agencies. By contrast, a responsible and conscientious entity may face damages having no relationship to the character of its conduct. Negligence of a subcontractor or parts supplier may be imputed to an otherwise innocent manufacturer or servicer.⁷ Even in this era of comparative liability, defendants generally remain jointly and severally liable for all damages, and enjoy only a right of contribution from other tortfeasors.⁸ Accordingly, a tortfeasor who is only five percent responsible for an injury, must satisfy the entire claim, including whatever portion may be attributable to insolvent co-defendants.⁹

Even if an entity is never named as a defendant in a mass tort claim, it will nonetheless encounter the burden of insurance premiums that are inflated by reason of such exposure. Admittedly, the risk of mass tort liability does not supply a complete explanation for the explosion in liability premiums. Also, from the victims' perspective, such insurance coverage may be inadequate. The potential for mass tort liability, however, does create a threshold risk with respect to the amount of coverage that does exist. Accordingly, that threshold risk must be accounted for in any calculation of appropriate premium levels.

Responsible suppliers and manufacturers can potentially incur liabilities that bear no relationship either to any specific conduct or to their general level of compliance with standards of safety. The prospect of mass tort liability, therefore, creates a drain on business profits. Unfortunately for victims, businesses frequently avoid this burden by

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6. Id. at 221.
7. See Keeton, supra note 4 § 71 at 570.
9. This result occurs due to the common-law principle of joint and several liability. Under this principle, a tort victim injured by more than one tortfeasor can recover all damages incurred from a single defendant, even if that tortfeasor is only minimally responsible for the injury. See Note, Nancy L. Manzer, 1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 Cornell L. Rev. 628, 635 (1988). The trend in tort reform is to limit joint and several liability, especially in comparative negligence states. Id. at 636-37.
failing to maintain either insurance or an adequate level of capitalization.

Finally, and most importantly, the current system of remedies for victims of mass torts is inadequate from the perspective of society at large. With few exceptions, mass torts arise from activities which are both beneficial to, and desired by society. Even when risks are avoidable, society sometimes prefers not to incur the cost of eliminating that risk. For example, airplane disasters occur either because society prefers air transportation over the elimination of unavoidable risks in flying, or because society is unwilling to incur the cost of enforcing absolute compliance with safety standards. Consciously or not, society has chosen to enjoy the benefits of products and services that are associated with significant risk, such as the products of hazardous wastes. Meanwhile, society assumes that a free market will ultimately satisfy market demand for products that entail risk from either their use or production. This assumption is not necessarily accurate, as the risk of tort liability may force a manufacturer to avoid production of a dangerous product. When that production entails sophisticated processes, the market place may be unable to offer alternative sources. From the perspective of society, therefore, the status quo may threaten the regular procurement of the benefits that society desires, while permitting a haphazard and undesirable distribution of the resulting burden.

Ultimately, mass torts represent a burden that is imposed, in whole or in part, upon the tort victim, the tortfeasor, or society. To the extent that adequate tort compensation is either unavailable or not recoverable, individual victims will assume first hand the burden of those underlying risks which society has allowed. The imposition of tort liability merely shifts that burden from victim to tortfeasor.

Whether or not liability can be imposed upon a tortfeasor, society usually assumes at least some portion of the tort burden. When contamination was discovered in the Love Canal area of Niagara Falls, for example, the State of New York provided direct relief to the tort victims by agreeing to purchase the affected properties. As prospective tortfeasors, drug companies obtained federal relief from potential liabilities arising from the distribution of a swine flu vaccine during the mid-1970s. Such complete transfers of liability are unusual, however. More typical is a partial, de facto transfer of cost. Uncompensated tort victims will frequently turn to the state for medical and other

When indigency results, society will bear the cost of public assistance. Ultimately, tortfeasors will also recover from society at least part of any assumed liability. This assumption may be built directly into the cost of a tortfeasor’s product, or more indirectly, into price adjustments that reflect higher premiums for liability insurance.

Under the status quo, society does not follow any consistent or logical path in its assumption of some or all of the cost and burden of every mass tort. One might hope that in most cases, disaster compensation would become a cost of doing business, one which is disbursed to society through liability insurance premiums that are ultimately reflected in prices for all goods and services. Unfortunately, this ideal is frequently not achieved. At times, government will directly assume financial responsibility on behalf of society. In many instances, however, such burdens are spread, helter skelter, to innocent victims and their families. Victims may be rendered insolvent, thereby forcing society to assume the expense of assuring their minimal welfare. Certainly, society has not accepted any consistent approach that will guarantee a just distribution of the burdens created by mass torts. Such random inconsistency necessarily means that society fails to attain the ideal result in all circumstances.

The imposition of a burden is justified only by the attainment of some greater benefit. One may accept mass torts as an unfortunate product of technological advances. The status quo, however, fails to assure those benefits, and may even place them in jeopardy. The potential liability arising from a mass disaster may easily exceed the policy limits of any insurance coverage, and force an otherwise solvent tortfeasor into insolvency. For example, the fear of such a result caused a severe decline in the price of Union Carbide's stock immediately after the Bhopal chemical leak.12 If society values a particular enterprise, it should not allow that enterprise to be destroyed by an unaffordable tort recovery. Of course, a disastrous incident may in itself reveal a previously unrecognized risk which society is not willing to accept knowingly. But if the risk was previously justifiable, it may continue to be justified even after a tragic incident. At present, a tort suit seeks to establish liability and damages, and does not purport to determine whether the benefit of that enterprise will justify its continued operation. It is illogical for a society to accept the risk of a particular enterprise, and thereafter, to allow the destruction of that

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enterprise without performing a critical analysis of whether those risks warrant continued operation in light of desired benefits.

In summary, the remedies available for mass torts are inadequate, not only from a victim’s perspective, but also from that of the tortfeasor and society in general. To the extent that risks exist, society should choose either to eliminate those risks, or to assure fair compensation to innocent victims. Although society should critically analyze its continued acceptance of all risks in the context of any new disastrous event, it is logically inconsistent to permit an enterprise to be destroyed in the event that an acceptable risk ultimately results in harm.

One begins to develop a proposal for reform by identifying the principles and objectives of an ideal system of remedies. I suggest that any comprehensive reform should encompass the following considerations:

1. **Society should provide fair compensation to victims of mass torts.** Since society benefits from the activities associated with disasters, society should assure an appropriate assumption of any resulting burdens. Tort law is premised on the theory that victims are entitled to compensation for injuries received.\(^{13}\) If one accepts this premise, then it is contradictory for society to allow a theoretical basis for recovery without also providing access to resources sufficient to satisfy that right of recovery. Innocent victims should obtain a recovery that is based on the wrongfulness of the tortfeasor’s conduct, rather than on the depth of that tortfeasor’s pocketbook. Adequate compensation satisfies our concepts of justice and fair play, and is consistent with the objective of preventing indigency.

   An underlying principle of fair compensation should be to eliminate artificial barriers that preclude recovery for reasons beyond the victim’s control. For this reason, the statute of limitations should be tolled pending discovery of a wrongful injury. Some source of recovery should be available even when one cannot locate a solvent defendant, or when a victim is unable to isolate the responsible party from among a number of possible tortfeasors.

2. **Society should hold tortfeasors accountable for their conduct.** By holding tortfeasors accountable for their reckless or negligent acts, one creates an incentive for achieving safety and for minimizing risks. The degree of accountability, however, must bear a reasonable relationship to the degree of culpability. Thus, it seems inappropriate to impose joint and several liability upon an entity that has only remote

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responsibility for the injury. Furthermore, although a statute of limitations should not operate to the detriment of one suffering a still undiscovered injury, society may still desire to give tortfeasors an opportunity to put their pasts behind them. This is particularly appropriate in the corporate context, where the current management may have no relationship to those in charge at the time of events that occurred far beyond the normal statute of limitations, absent tolling.

3. The imposition of damages should not be allowed to destroy those enterprises which entail risks that society needs or desires to assume. For a particular defendant, large judgments in excess of insurance coverage may result in liquidation. Meanwhile, the potential for such liability will force other reputable businessmen to abandon certain endeavors. When risky endeavors are desirable, society should structure remedies that recognize and accommodate a need for the continued performance of the task at hand.

4. To maximize benefits available to victims of mass torts, an ideal system should minimize transactional costs. In tort litigation, a substantial portion of any recovery is usually consumed by insurance overhead, attorneys' fees and other expenses associated with proving liability and damages. Such expenses may well be justified by the risk of litigation and by requirements for proof of a unique cause of action. But with certain mass torts, liability may not be at issue. In fact, the principle of collateral estoppel can operate to extend a finding of liability to factually similar cases. In such instances, circumstances may warrant steps to reduce transactional costs that would otherwise be incurred.

5. Any program must prioritize the application of limited resources. Amidst budgetary pressures at all levels of government, it is certainly unrealistic to propose any comprehensive governmental guarantee of indemnification. Nor should we resort to a pro-rata distribution among all creditors. Rather, I submit that society has sufficient ability to set priorities. For example, society may appropriately adopt a scheme that reimburses medical expenses and the cost to repair property damage; that sets a schedule for reimbursement of personal injury claims; and that prioritizes those scheduled amounts over

14. See Jack Ratliff, Offensive Collateral Estoppel and the Option Effect, 67 TEX. L. REV. 63 (1988). Professor Ratliff explains the effect of collateral estoppel in tort cases in this way: “If a plaintiff establishes in Case 1 that the roll bar on a four-wheel drive Blaster is defective, subsequent plaintiffs who were not parties to Case 1 can hold Blaster Company to that finding.” Id. at 65. Professor Ratliff goes on to discuss the limitations of collateral estoppel in reducing tort litigation, since, although the defendant is bound by a finding of liability, the plaintiff has a due process right to try the issue. Id.
claims for pain and suffering. The wrongful death claims of certain dependents may be accorded priority over all other claims.

Any proposal for mass tort remedies must withstand critical analysis from the perspectives of effectiveness and workability. First, to be effective, a proposal must foster assumed goals and principles, such as the five identified above. As with any set of competing objectives, some trade-offs are inevitable. When one accords more value to the survival of beneficial enterprises, he or she inevitably diminishes the extent to which that enterprise is held accountable for its culpable conduct.

Second, the proposal must be workable, and to be workable it must be affordable. To achieve a workable program, it may be necessary to compromise the perfect attainment of certain desired objectives. Let us assume that the government cannot afford to guarantee all compensation normally awarded to tort victims. Proposals for the payment of compensation must not impose excessive burdens upon either governmental budgets or upon the contributors to any special public fund. At least initially, fiscal considerations will probably require that any proposal limit its focus only to remedies for mass torts.

Scholars and commentators have offered many proposals for reform of the tort system.\(^{15}\) Most of these proposals are steeped in controversy, in that they contemplate a change either in the linkage between fault and recovery, or in the traditional methods for establishing liability. Pending resolution of these philosophical issues, many tort victims can look only to potentially insolvent or underinsured tortfeasors for recovery. Meanwhile, for manufacturers, suppliers, and other potential tortfeasors, an inadvertent or unavoidable event leading to mass injury may create liability so far in excess of resources that the inevitable result is either liquidation or a petition for relief under the Bankruptcy Code.\(^{16}\)

At the present time, bankruptcy provides not only less than complete remedies for tort victims, but also generally inadequate relief for tortfeasors. For victims, a bankruptcy trustee or debtor in possession can only distribute those assets of the estate that are available after administrative expenses are deducted. Although the automatic stay

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provided by the Bankruptcy Code will halt the havoc of a race to the courthouse by multiple plaintiffs, it is unlikely to enhance their collective recovery. Typically, the liquidation of assets in chapter 7 bankruptcy nets significantly less than the value of those assets to a going concern. Similarly, a chapter 11 proceeding mandates only that tort victims receive a distribution at least as great as they would have received under chapter 7.

For the business debtor, present bankruptcy alternatives are also inadequate. Tortfeasors must choose either to liquidate under chapter 7, or to reorganize under chapter 11. Chapter 7 liquidation will generally result in cessation of business activity, and will result in the forfeiture of all business assets to the trustee for liquidation for the benefit of creditors. As presently structured, chapter 11 imposes undesirable burdens upon business operations, and offers only limited long-term relief against tort claims.

The filing of a chapter 11 petition will immediately restrain the collection and use of cash collateral, which is defined to include cash, deposits, accounts and receivables, in which a secured creditor may have an interest. A chapter 11 debtor generally may not sell real estate, borrow money, or perform any activity outside the ordinary course of its business, without permission of the bankruptcy court, and then only after notice is given to some or all of the creditors. Management may receive only a reasonable level of compensation, usually as approved by court order. The debtor must file monthly financial reports, which become public records and which are subject to scrutiny from the office of the United States Trustee and from creditors. Furthermore, the debtor's officers must submit to periodic examination from any party in interest. To assist with their review of the debtor's operations, creditors may form committees, which may in turn petition the court for appointment of counsel. Counsel for a creditor's committee are entitled to compensation from the debtor's

18. Id. §§ 701-66.
19. Id. §§ 1101-74.
20. Id. § 1129(a)(7).
21. Id. § 704.
22. Id. § 363.
23. Id. §§ 363-64.
24. Id. § 330.
25. Id. §§ 704(8), 1106(a)(1); Fed. R. Bank P. 2015.
28. Id. § 1103.
Thus, the debtor must not only account to creditors for its actions, but must also pay for the privilege of being scrutinized.

In a proper case, chapter 11 is an effective tool to restructure a business having financial problems. The benefits of chapter 11, however, also entail burdens, such as those outlined above. For a business that would be in a sound financial condition but for the prospect of mass tort liability, these burdens will represent a very bitter pill. Although chapter 11 contains counterbalancing benefits, these advantages are not particularly useful with respect to tort liabilities. In a typical case, bankruptcy will stay most outstanding litigation, so that disputed matters might be subject to resolution in the context of bankruptcy administration. However, the judicial code specifies that bankruptcy court jurisdiction excludes personal injury tort and wrongful death claims, and that such matters must be tried in district court. Thus, chapter 11 will not preclude the cost and expense of tort litigation.

In my view, a solution to inadequate mass tort remedies can be found in an expanded application of bankruptcy jurisdiction. The purpose of this essay is not to describe all elements of such a program, but rather, to provide a broad outline of those reforms which a viable program must ultimately incorporate. Specifically, I would recommend legislation that adopts the following principles:

1. A new bankruptcy chapter should be created for debtors having potential mass tort liability. A petition under this chapter would be filed either voluntarily by the tortfeasor, or involuntarily by tort victims having claims sufficient in dollar amount and quantity.

2. A filing under this new bankruptcy chapter would impose no restraints on the normal business operation of the tortfeasor. Unless the case were converted to another bankruptcy chapter, the bankruptcy court would lack authority to appoint either a trustee or a creditor's committee. The debtor would not be subject to restrictions applicable under other chapters with respect to the use of cash collateral, the enforcement of executory contracts, the lease or sale of property, or any other regular activity that would be permissible but for the filing of a bankruptcy petition. Activities outside the ordinary course of business, such as a disposition of assets without consideration, would be prohibited, however, pending confirmation of a reorganization plan.

3. The bankruptcy court would receive sole jurisdiction to de-
termine tort liabilities. Thus, an automatic stay would apply with re-
spect to tort litigation in any other forum. The legislation might also
limit various defenses, such as, for example, through a broader provi-
sion for tolling statutes of limitations. In exchange for the protection
of the Bankruptcy Code, the debtor would accept a determination of
liability in some expedited fashion, perhaps in a way similar to proce-
dures now employed to resolve workers' compensation claims.

4. The proposal would require that specific assets of the
tortfeasor be dedicated to a fund created for the satisfaction of tort
liabilities. At a minimum, this fund would include: the proceeds of
any liability insurance, a sum that fairly represents the legal expenses
which the insurance carrier would have otherwise incurred, all net
profits that are received during a pre-determined statutory period, and
possibly a portion of the debtor's net assets. Reasonable limits on the
total contribution could be calculated as a multiple or fraction of the
total net equity of the business. The contributions also would not ex-
ceed those damages for which the debtor is fairly responsible. Thus,
legislation might limit a business' contribution to that payment which
would have been due if the business had been able to obtain contribu-
tion from all joint tortfeasors, or if the tolling of the statute of limita-
tions had been limited to some more reasonable period of time.

5. Tort claims would be satisfied from the special fund, in ac-
cord only with statutory priorities for payment. Although entitled to
a priority, legal expenses would be paid only upon approval by the
court, or pursuant to reasonable schedules.

6. The court would retain equitable powers to fashion an appro-
priate plan for the collection of assets and a distribution of proceeds.
If one expects adverse medical consequences to appear over many
years, for example, the court could fashion a long term arrangement
for payment of a percentage of future profits into the tort fund. Simi-
larly, disbursements might be made in anticipation of future payments
into the account.

7. The various priorities would be divided into first and second
tiers. Those funds that exist in the bankrupt's special tort account
would satisfy as many priorities as possible. In the event that such
funds were inadequate, the first tier claimants would also have re-
course to a national mass tort claim account. Funding for such an
account would necessarily derive either from a tax on business enter-
prises, or from general revenues. The cut-off between the first and
second tier would depend upon the level of funding that is adopted. If
the legislature were to allow only for limited funding, then the first tier of claimants would unfortunately include only a few areas of liability.

The above proposal would fulfill all of the goals set forth earlier in this Article. First, the structure has the capacity to assure fair compensation to victims of mass torts. The degree of fairness, however, is a judgment that will depend upon placement of the division between first and second tier priorities. In all events, the proposal is fair in that it assumes a rational distribution of limited assets in accord with priorities that are theoretically consistent with concepts of need.

Second, tortfeasors are obligated to pay into a fund on account of their own conduct. A formula for payment can be set to provide contributions which over time will accumulate to the liquidated value of the business at the time of bankruptcy.

Third, payment of damages will not result in destruction of the business enterprise. Indeed, the business operations should continue in virtually the same fashion as if a tortious incident had not occurred. Holders of an equity interest in the business may forfeit profits, but from the perspective of society, the benefits of continued business activity will survive. From the business' perspective, payment will be limited to a sum which fairly reflects that business' degree of culpability.

Fourth, the proposal will minimize transactional costs. From the outset, it will reduce expenses paid for defending massive claims, possibly spread throughout a number of jurisdictions. The proposal contemplates accelerated methods for determining liability, thereby reducing the cost of proving a victim's claim. Moreover, for all transactional expenses, court review should reduce the potential for payments in excess of actual costs. Finally, my proposal would explicitly prioritize the application of limited resources for the satisfaction of preferred claims.

Mass torts present unique problems that society is likely to encounter with ever growing frequency. The potential magnitude of injuries will surely test the adequacy of any sources of tort compensation. It is imperative, therefore, that society adopt a plan that intelligently marshals available assets for the benefit both of tort victims and of society itself. In my judgment, such a plan can effect a maximum recovery to the most deserving plaintiffs while still promoting the survival of affected business enterprises. In contrast, the status quo invites victims to pursue remedies without regard to any overall scheme, and at great transactional cost. Although society may be able to afford that approach with respect to claims of limited nature, it is
unacceptable when there are perils that are certain to leave many unsatisfied claims. I propose that society reorganize culpable enterprises for the benefit of both society and the innocent parties who stand to absorb the losses under the current system.