

The Risks of and Reactions to Underdeterrence in Torts

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As our nation considers tort reform at both the state and federal levels, it should not be blinded to the fact that, while tort law may, in some cases, overdeter, it also may underdeter, especially in mass tort cases. The piece contends that the traditional (one-on-one) model of tort law may *both* cause and exacerbate the underdeterrence problems and, consequently, alternative models (class action, augmented awards, and public tort suits) must be considered and analyzed. The piece proceeds to compare and contrast the strengths and weaknesses of each of the various approaches for different types of cases. The article builds upon earlier works on augmented awards and public torts, and this piece both expands upon that work and extends it. It presents both a vision and a theoretical view of mass torts that is too often ignored in today's debate about tort reform.

I. Introduction

In art, the term “chiaroscuro” means the strengthening of an “illusion” of depth on a canvas by boldly contrasting light and dark shades of color.² The chiaroscurist uses color and contrast to create the appearance of depth on the canvas. That appearance is an illusion created to show the *real* depth in the scene portrayed. In the debate about tort reform, the opposing participants use words and sharply contrasting views of the world to communicate their positions. What is often left is not an illusion of depth but a seemingly irresolvable conflict. As

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²Artlex, Art Dictionary, www.artlex.com/Artl.ex/c/chiaroscuro.html. See also, wsmith@wordsmith.org, 2/7/2005.

a result, what really may be needed is an examination of why the discussion to date has been more of a battle than an attempt to paint or repaint the canvas of American accident law. One of the cries of the tort reformer³ is that modern tort law overdeters beneficial conduct. The contrary assertion is that tort law does and has deterred much dangerous conduct resulting in a safer world.⁴ Who is right? What is the solution? The reality may be that tort law both over and underdeters in different areas for different reasons. Underdeterrence may arise out of the fact that in many cases, particularly mass tort cases, the traditional model of the one-on-one tort case creates pressures and rules that lead to underdeterrence in a vast array of multiple injury cases. My goal here is to identify some of the areas in which current tort law underdeters and to discuss several possible solutions. My goal in this essay is *not* to inflame the debate but rather to provide some contrast to the overdeterrence claims—a contrast necessary to portray the true depth of the issue.⁵

The idea that liability or the prospect of liability can shape human behavior through deterrence has become one of the practical and theoretical foundations of tort law.⁶ Judges and scholars regularly state that deterrence - the prospect that liability can influence behavior - is one

³*See, e.g.*, State of the Union: Bush Reiterates Support for Tort Reform, Tax Credits, <http://bcbshealthissues.com/proactive/newsroom/release.vtml?id=144867>; Tort Reform: Needed or Hyped? http://uspolitics.about.com/od/electionissues/a/tort_reform.htm.

⁴*See, e.g.*, CJA - The Committee for Justice for All, <http://www.saynotocaps.org/>.

⁵Of course, the tort reformer may claim I am only showing an illusion of depth. The artist might respond that the depicted depth is real but that on the canvas or page only the illusion of depth is possible.

⁶Dan B. Dobbs, *The Law of Torts*, § 11 at 19 (2000) [hereinafter DOBBS].

of the purposes of tort law.⁷ The legal economist recognizes that liability or the possibility of liability forces people to internalize accident costs; it forces them to consider the costs of the injuries that their activities may cause to others. To the extent tort law does *not* force people to take account of all *their* activities' accident costs, tort law inefficiently underdeters.

Concomitantly, to the extent that tort law imposes liability in excess of an actor's activity costs, tort law inefficiently overdeters.

One of the underlying notions of much "tort reform"⁸ is that tort law today has produced liability where there should not be liability, thereby resulting in overdeterrence, over investments in safety, and frustrated development of life improving products and processes. As noted, my goal here is not to attempt to refute the notion that tort law can, and perhaps, has overdeterred. Instead, I will consider the possibility that although some aspects of tort law may overdeteter, there may well be many areas where current tort law underdeters. That is, there may well be many

⁷*Id.*

⁸Tolerance of underdeterrence for certain injury causing activities not only undermines optimal investments in safety, it also impacts upon the freedom of the involved individuals and it results in inequality. Freedom is at stake because underdeterrence will lead to more than the optimal number of injury causing accidents. These accidents infringe upon the freedom of those who are injured in the accidents. No liability or no threat of liability essentially allows one person to limit another's freedom at no cost.

Equality is at stake because the person engaged in the underdeterred activity has an advantage over the person engaged in an optimally deterred activity. Thus the person engaged in an underdeterred activity does not have to take account of all their activity costs - the accident costs. This means the advantaged actor has an advantage, akin to a judicially provided subsidy, that seems inconsistent with our society's commitment to equality and equality of economic opportunity. Contrariwise, where tort law overdeters freedom and equality are impacted because someone who is forced to pay more than the accident costs their activity has caused is being "taxed" at a rate in excess of what efficiency concerns would demand. And, the person who over-recovers has a windfall, or undeserved recovery. Of course, if a windfall results in a more efficient allocation of resources, the windfall might be more tolerable.

areas where tort law, as it exists today, does *not* adequately encourage efficient investments in safety. Many of these areas occur in mass tort cases where more than one person is injured. In some of those cases the underdeterrence is caused by the fact that all who are injured do not sue. But, another critical reason for underdeterrence is that rules developed for one-on-one garden variety tort cases do not effectively deter in multi-plaintiff or mass injury situations.

Herein, I seek to identify some of the reasons for possible underdeterrence. I also discuss different models for the prosecution of tort suits: the one-on-one model, the class action, the augmented award, and the public tort suit, and then apply each of these models in served contexts where tort law currently underdeters. Not surprisingly, since many of the underdeterrence problems arise in or from the one-on-one model, the one on-one model holds the least promise for achieving efficient deterrence in mass tort cases. The class action, as a conglomeration or aggregation of one-on-one cases holds some limited promise for improved deterrence. The augmented (or increased award) where one person recovers as a proxy for those who have not sued holds increased promise for achieving efficient deterrence but is somewhat limited by its punitive damages lineage as well as its potential windfall effect and the risk of overdeterrence. The public tort suit, in which the governmental entity seeks to recover as proxy for the injured who do not sue has great promise as a device to achieve efficient deterrence but raises concerns about the proper role of government and separation of powers. Not surprisingly, the different devices or models have their own individual strengths and weaknesses with different models preferable in different situations.

In Part II, I shall explain the deterrence problem in more detail and then describe the four models for prosecuting and deciding tort cases. Then, in Part III, I will undertake to analyze

underdeterrence and the strengths and weaknesses of each model in reference to particular aspects of underdeterrence in mass tort cases. I will analyze cases where all who are injured do not sue for various reasons; underdeterrence and cause-in-fact; underdeterrence and proximate or legal cause; and medical monitoring. Part IV sets forth a brief conclusion.

II. Deterrence and the Models

A. A Simplified Theory of Deterrence

Do tort rules efficiently deter? Or, do some of tort rules result in situations where people are effectively allowed to cause *or* threaten injury to many without having to provide compensation? If people may injure without compensating, then those injury causing (or threatening) agents never need to take account of those injury costs in deciding what to do, how to do it, and how to value or price their activities and those activities' resulting products, processes or services.⁹ If so, then the relevant legal rules encourage rational, profit-maximizing agents to behave in ways which are different from how they would behave if they were forced to take account of all relevant costs?¹⁰ And, consequently those who face less than all the costs of their activities are treated too well, i.e., they are effectively subsidized.¹¹

In deciding tort cases, courts consider a wide variety of policies or goals: morality or fairness, deterrence, compensation, adherence to precedent, consistency with legislative will,

⁹Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 20 nn.56 & 59 (1990) (footnotes omitted), [hereinafter cited as *Augmented Awards*].

¹⁰*Id.* at 12-13.

¹¹*Id.* at 12.

costs of judicial administration of various rules, punishment, risk spending, and more.¹² My focus here is on deterrence;¹³ it is on what Judge Guido Calabresi calls “general deterrence.”¹⁴ The notion, as alluded to above, is that effective deterrence works hand-in-hand with microeconomic principles of market behavior.¹⁵ When deciding what to do, how to do it, and how to price it, a person must face and consider accurate costs.¹⁶ If the person does not face accurate costs, he or she, when acting rationally, will behave in ways that are not optimal.¹⁷ He or she will over or under engage in the activity or will over or under price goods or services arising out of that activity.¹⁸ If a person faces less than accurate costs, she will over engage in the activity and charge too little for the results of that activity.¹⁹ If the activity creates a risk of injury for others that the person engaging in the activity does *not* have to pay (or consider), then

¹²Thomas C. Galligan, Jr., Deterrence: The Legitimate Function of the Public Tort, 58 WASH. & LEE L. REV. 1019, 1021 (2001) (citing William L. Crowe, Sr., The Anatomy of a Tort: Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone: A Primer, 22 LOY. L. REV. 903, 906-09 (1976))[hereinafter cited as *Public Tort*].

¹³I realize focusing on only one goal or purpose of tort law may be both unrealistic and potentially myopic. However, ignoring or minimizing that goal may be equally dangerous.

¹⁴GUIDO CALABRESI, THE LAW OF ACCIDENTS 69-70 (1970), [hereinafter cited as CALABRESI].

¹⁵*Id.*

¹⁶*Augmented Awards* note 9, at 10, n.10 (citing CALABRESI, *supra* note 14, at 70).

¹⁷A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 HARV. L. REV. 869, 873 (1998), [hereinafter cited as “Polinsky & Shavell”].

¹⁸*Id.* at 882, 885

¹⁹*Id.*

we have a problem.²⁰ More people will be hurt than should be hurt from the economist's perspective. Contrariwise, legal rules that forced actors to take account of all the costs of their activities would encourage efficient investments in safety.²¹ Put differently, those efficiency gauged legal rules would optimally (efficiently) deter dangerous behavior.

To the extent legal rules allow or result in "inefficient" injuries, society faces several serious problems. First, the society faces a misallocation of resources.²² Second, some people are allowed to engage in some activities *without* having to face accurate costs or accurate marginal cost curves.²³ This threatens free competition, arguably has wealth distribution effects, and causes unequal opportunities for and to profit.²⁴ Third, because the underdeterred are able to injure others at inefficiently high levels, the underdeterred impact upon the freedom of the injured in a way that is not only inefficient but morally disturbing.²⁵

²⁰*Id.* at 887-89

²¹*Id.* at 889

²²*Id.* at 889, 899-900

²³*Id.* at 889. Of course, if legal rules overdeter, costs for the overdeterred would be too high.

²⁴*Id.* at 946-47

²⁵*Id.* at 913-14. As part of a free society, we have entered into a social contract, JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 23 (G.D.H. Cole trans., 1988) (1761), that expressly and impliedly articulates the rules by which we live. Those rules appear in Constitutions, *see generally* U.S. CONST. amends. V and XIV (containing the two due process clauses), statutes, For instance, 28 U.S.C. § 1983 (2004) provides that any person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . , and regulations, *see* 8 C.F.R. § 264.1 (2004)

(outlining the necessary registration and fingerprinting procedures for resident aliens). Key parts of that collection of rules are judicial decisions which either interpret Constitutions, statutes, and regulations or which provide gap filling rules in the absence of Constitutional provisions, statutes, or applicable administrative regulations. Except as otherwise “agreed,” we are free to do as we choose.

Naturally an issue we face all the time is: where does my freedom to do as I please end and where does another’s begin? Some individual freedoms are so basic that we protect them from governmental intrusion in our Constitutions. Some freedom boundaries are set and governed by criminal law. Some boundaries are defined by non-criminal statutes.

Other freedoms are less clearly articulated. These we often leave to the common law,

including the law of torts. The law of torts—civil wrongs other than breaches of contract, VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ’S TORTS 1 (2000)—is where a lot of “freedom” line drawing occurs. This judicial line drawing is done after the fact in deciding particular controversies. But the articulated rules in those decisions and their applications then become a critical part of the regulation of, or line drawing about, freedom.

Critically, from a torts perspective, my freedom to act stops when I intentionally hit you in the face. I am generally not allowed to batter you, *see* RESTATEMENT (SECOND) OF TORTS § 13 (1965). Of more general application, my freedom to do what I please is limited by what we may facetiously call a general duty to exercise reasonable care to avoid affirmatively doing harm to others, i.e., the law of negligence, *see* RESTATEMENT (SECOND) OF TORTS § 13 (1965).

My freedom to behave as I choose in the market is limited by my duty not to manufacture unreasonably dangerous products, *see* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 1-2 (1998); RESTATEMENT (SECOND) OF TORTS § 402A (1965), my duty not to misrepresent facts upon which those with whom I deal rely to their detriment, *see e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 9 (1998), my duty not to make false and defamatory statements about others, *see* RESTATEMENT (SECOND) OF TORTS § 558 (1977), and more. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (1998) (one may be liable for “failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller’s position would provide such a warning.”); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 11 (1998) (in certain circumstances, a seller may be held liable for failure to recall a defective product).

Obviously, I have drastically oversimplified. I have ignored all sorts of hard issues. But the general point is that tort law is one of the legal places where we deal with the boundaries between people and the ultimate definition of freedom.

To reiterate the basic point, we are a free society. Freedom is an important value to us. Another important value, at least one we articulate, is equality, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The value of equal treatment is made manifest in federal and state equal protection clauses, U.S. CONST. amend. V (the federal due process clause, which the courts have used to provide equal protection principles in federal cases); U.S. CONST. amend. XIV (the state equal protection clause). Many of the significant battles and legal battles in our nation’s history have dealt with equality and its meaning: The Civil War, The Suffrage

Consequently, to the extent tort law and the processes of deciding tort cases underdeter, society faces issues of grave concern. Thus, finding areas where tort law may underdeter and considering how one might cure the problem merits the continued consideration of the scholar, as, of course, does the problem of overdeterrence.

Movement, The Civil Rights Movement, and more.

Where does equality fit with freedom? A part of the fit relates to the idea of equal opportunity. Ideally, the broad opportunities our society promises should be equally available to all. At least those opportunities should not be denied by the government, unless the government has a good reason to do so. How good? That depends upon classifications and interests involved and the accompanying level of scrutiny and that topic is beyond the scope of this paper, *see generally* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1438-39 (2d ed. 1988). However, as a society we are committed to a principle of equality.

This idea of equality also fits in with our economic devotion to capitalism, although some in recent years have questioned whether a capitalistic society can truly be one devoted to equality, others still believe that equality and capitalism can coexist. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 265-74 (1971). Rawls notes: “A . . . significant advantage of a market system is that, given the requisite background institutions, it is consistent with equal liberties and fair equality of opportunity.” *Id.* at 272. Capitalism implies a free market system, *BLACK’S LAW DICTIONARY* 85, 295 (7th ed. 1999). While the end result in capitalism is not necessarily equality, the idea that people are encouraged to compete on a relatively even playing field is at its core. In our economic system, economic agents compete for market share and profits. Profit is sales price minus cost, *BLACK’S LAW DICTIONARY* 560 (7th ed. 1999). For the system to work cost should be accurate. If someone does not pay all their costs, they have an advantage. They can sell for less which means they should, absent other market imperfections, be able to sell more of the product. Those who are allowed to pay less than real cost have what we might call a subsidy. Hidden subsidies raise concerns about transparency and about open participation in government processes. They result in what may appear to be unequal treatment and they may deprive those without the subsidy to equal opportunity to succeed in the market.

So, what does all this have to do with torts and mass torts? It all relates to how we view the intersection of various agents’ voluntary acts and their regulation. Are our rules relating to certain mass torts and their application consistent with notions of freedom and equality? In particular, do our rules encourage a rational system whereby freedom is adequately respected and people are treated equally?

Much of the tension arises from the application of tort rules devised for one-on-one (bipolar) controversies,²⁶ to situations where the interests of many are at stake, i.e., mass torts. The modern reality that much allegedly tortious conduct can impact many (not just one plaintiff and one defendant) demands a reexamination of our models of tort decision-making and what we are attempting to achieve. To further the discussion, I will begin with the one-on-one model and move from there to the other three models: the class action, the augmented award, and the governmental tort suit. The one-on-one bipolar tort suit involves one person, A, who hurts another person, B. B sues A. A and B are the only people before the court and their interests are the ones upon which the court focuses.²⁷

In the most common form of class action, a group of plaintiffs come together in a suit against the defendant or defendants.²⁸ What makes the suit different is the group of plaintiffs.²⁹ They prosecute their individual claims as one group. A representative plaintiff heads or handles the litigation but they head or handle it for all.³⁰ Critically though, the class is a *conglomeration of individual claims*.³¹

²⁶ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 63-66 (1995).

²⁷*Id.*

²⁸See FED. R. CIV. P. 23(a) (2004)

²⁹*Id.*

³⁰Somewhere between the one-on-one model and the class action is the joinder of actions. There, many or several individual suits are joined but no one representative plaintiff or plaintiffs is appointed.

³¹*Cf.* David Rosenberg, *The Caused Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 *Harv. L. Rev.* 849 (1984) (calling for a relaxed burden of proof, proportional liability, and class treatment in mass tort cases).

In the augmented award case, about which I have written before,³² one plaintiff suing on his or her behalf individually also seeks to recover an increased or augmented award in order to achieve optimal deterrence.³³ In that capacity the augmented award plaintiff sues as a proxy for other injured victims who are not before the court.³⁴ Today, augmented award claims may be more theoretical than real. Now, it arguably exists as part of the broader legal realm of punitive damages.

Finally, for present purposes, the public tort suit involves a governmental entity filing suit.³⁵ The governmental suit may seek damages for particular tangible traditional injuries or the entity may sue to achieve deterrence. The government sues as the peoples' representative.³⁶ Examples include tobacco suits, firearm suits, and lead paint suits.

III. Underdeterrence and the Models

But, why might there be underdeterrence calling for this analysis of the different ways to handle tort cases? All who are injured might not sue for various reasons. Costs of suit, attitudes about justice and its accessibility, and difficulty of detection are just a few of the reasons.³⁷ Alternatively, legal rules themselves may frustrate effective deterrence, particularly when rules

³²See *Augmented Awards*, *supra* note 9, at 40-85.

³³See *Augmented Awards*, *supra* note 9, at 12-13, 49.

³⁴Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Personal Injury Law*, 71 TENN. L. REV. 117, 131 (2003) (citing *Augmented Awards*, *supra* note 9, at 49) [hereinafter cited as *Disaggregated*].

³⁵*Public Tort*, *supra* note 12, at 1022-23.

³⁶*Id.* 1027. This action is known as a *parens patriae* action.

³⁷Polinsky & Shavell, *supra* note 17, at 888.

based on values or notions appropriate to the one-on-one model of tort law are applied to activities that injure many.³⁸ Let me turn first to the one-on-one model of decision making in tort cases and focus on its nature and potential deterrence weak points.

A. *The One-on-One Model: Some More Detail*

As noted, the one-on-one model involves one person who does something to another person that causes injury to that second person. In this model, probably the one with which most of us started (and continue to start) our study of torts, both the injurer and the injured are individuals. A person hits another person.³⁹ A person runs down another with his cart or car.⁴⁰ In deciding whether or not the injuring person ought to pay the injured person, we do *not* deal with the issue of insurance. That is, there is no insurance to think about—or if there is insurance, we do not let the decision-maker take that fact into account.⁴¹ We treat it as irrelevant.⁴² Moreover, in this one-on-one case the defendant is *not* a corporate entity or if the defendant is a corporate (or other juridical) entity we ignore that fact even though the corporation has already

³⁸*Augmented Awards*, *supra* note 9, at 136-39 (footnotes omitted); *Public Tort*, *supra* note 12, at 1036-37; Rosenberg, *supra* note 31.

³⁹*See* RESTATEMENT (SECOND) OF TORTS § 13 (1965)

⁴⁰*See, e.g.,* *Li. v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975).

⁴¹*See also*, RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979) (“Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable”). Comment “c” to this section specifically states that this “collateral source rule” applies to insurance policies. Of course, in states, such as Louisiana with direct action statutes, the fact that the defendant is insured is effectively made known to the jury as decision maker. *See* La. R.S. § 22:655.

⁴²RESTATEMENT (SECOND) OF TORTS § 920 (A), at cmt. c.

received a liability limiting benefit from the state.⁴³ Of course, the “owners” of a corporation have been allowed to limit their liability to the value of their investment in the enterprise.⁴⁴ But, as noted, that fact is ignored in the first model.

In this one-on-one model, the focus is upon the injurer’s act and not some bigger social issue, like risk spreading, compensation, or economic efficiency. We might say that the focus in the one-on-one case is deontological—on the parties and their moral relationship to one another and not on some other goal or end.⁴⁵

Traditionally under this one-on-one model, there could be a *case specific* analysis of the defendant’s duty to the plaintiff⁴⁶ and there *is* a *case specific* analysis of the defendant’s conduct (breach).⁴⁷ The conduct or breach question asks: did the defendant behave as a reasonable person under the circumstances?⁴⁸ This inquiry is a value based analysis⁴⁹ whereby the

⁴³FRANKLIN A. GEVURTZ, CORPORATION LAW § 1.1.1, at 4-5 (2000)

⁴⁴*Id.* at 4.

⁴⁵Kenneth W. Simons, Deontology, Negligence, Tort, and Crime, 76 B.U. L. REV. 273, 276-77 (1996).

⁴⁶*Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99-101 (N.Y. 1928). *But see* RESTATEMENT OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 37 (Tentative Draft) [hereinafter RESTATEMENT OF TORTS: PHYSICAL HARM].

⁴⁷One of the first cases to use this analysis was the British case *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

⁴⁸*Id.*; *Vaughan* was the first case to develop the “reasonable man of ordinary prudence” standard that courts—and torts professors—have been using ever since.

⁴⁹OLIVER WENDELL HOMES, THE COMMON LAW 96 (1881) (noting that the courts disfavor using the “cumbrous and expensive machinery” of the courts); the value, to steal a phrase from Holmes, is that we want to be confident that before we transfer assets from one person to another in a tort case the transferor really did commit some wrong, i.e., breached some

particular behavior of the defendant is compared to the conduct of a hypothetical reasonable person under the circumstances. Traditionally, tort law also required a case specific factual connection between what the defendant did and what happened to the plaintiff--cause-in-fact.⁵⁰ It demanded that “but for” the defendant’s particular alleged wrong, the plaintiff would not have suffered the particular injuries that the plaintiff suffered.⁵¹ And, the law of torts also has required a case specific examination of whether the defendant *ought* to be held liable to the plaintiff for the particular injuries which occurred in the particular manner in which they occurred--proximate or legal cause.⁵² We will return to the effects of those traditional one-on-one legal rules later.

1. A Variant of the One-on-One Model and Page of Legal History

As a variant of the first model, one, of course *might* add in the fact that the defendant *was* insured or that it *was* a corporation. But, as noted above, the one-on-one model would not allow that fact to change the outcome (at least we would not admit it). The one-on-one model would still treat the case as individual versus individual. The one-on-one model would apply the same rules as determinative of the case’s outcome— duty/breach/cause in-fact/proximate cause, etc.

Of course, the reasonable care explosion (revolution) of the 1950s, 60s, and 70s was driven by the availability of insurance and the possibility of risk spreading.⁵³ That “reasonable

duty. *Id.*

⁵⁰Wex S. Malone, Ruminations on Cause-in-Fact, 9 STAN. L. REV. 60, 60-61 (1956)

⁵¹David W. Robertson, The Common Sense of Cause-in-Fact, 75 TEX. L. REV. 1765, 1775 (1997). See RESTATEMENT OF TORTS: PHYSICAL HARM, § 26.

⁵²Some have treated the proximate or legal cause problem as an issue of scope of duty. LEON GREEN, JUDGE AND JURY 76 (1930).

⁵³A most useful summary of the history of Products Liability under Restatement § 402A,

care revolution” was a distinct trend toward abrogating immunities⁵⁴ and limited duties⁵⁵ in certain contexts and analyzing defendants’ conduct under the general reasonable care standard.⁵⁶ In retrospect, it seems clear that the availability of insurance and post-World War II notions of risk spreading played a key role.⁵⁷ The comparative fault explosion of the same period also was heavily influenced by insurance and risk spreading.⁵⁸ Likewise, the availability of insurance and risk spreading through increased prices greatly impacted the development of product liability law. Risk spreading through increased prices and insurance influenced courts when they shaped

including the theories of Justice Traynor and Dean Prosser that gave birth to the reasonable care revolution, can be found in Jim Gash, *Beyond Erin Brockovich and a Civil Action: Should Strict Products Liability Be the Next Frontier for Water Contamination Lawsuits?*, 80 WASH. U. L.Q. 51, 85-90 (2002).

⁵⁴*Id.*

⁵⁵*Rowland v. Christian*, 443 P.2d 561, 565-68 (Cal. 1968) (outlining several instances in which a possessor of land has limited duties—and thus lessened liability—when a person is injured on his land).

⁵⁶Justice Peters, writing for the majority in *Rowland* (Justice Traynor concurred in the judgment) wrote that:

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 564.

⁵⁷*See* Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 551-56 (1948); *see also* Fleming James, Jr., *General Products—Should Manufacturers be Liable Without Negligence?*, 24 TENN. L. REV. 923, 923-24 (1957).

⁵⁸VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1.01, at 2-3 (4th ed. 2002).

liability rules.⁵⁹ Strict product liability promised that people could be compensated and risks spread broadly.

Of course, theoretically, the imposition of liability, even if influenced by the availability of insurance and risk spreading concerns, *also* had another effect. It imposed liability upon the entity that caused the injury. Thus, the cost of the accidents that the entity caused were paid by, or at least allocated to, the entity. If the entity “passed” the cost on to insurers, the entity’s premium hopefully would, in the future, reflect the costs of the injuries it caused. If the entity “passed” on its accident costs through higher priced goods, those who used the goods paid the price—or did not buy the good, thereby leading to more limited production. But that was reality. It was a reality consistent with our notions of capitalism—pay your own way and compete—and equality—some economic agents ought not have special protections or liability limitations not available to others. However, to the extent the availability of insurance or the possibility of risk-spreading played a part in the development of legal rules, that role would be inconsistent with the pure one-on-one model. Under the pure one-on-one model, one could persuasively argue that broader deterrence goals were inappropriate to the particular case before the court.⁶⁰

B. Multiple Injured Plaintiffs

⁵⁹One of the most famous early formulations of the strict liability rule was issued by Justice Traynor in *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963) (citations omitted):

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective.

⁶⁰*See generally*, Ernest Weinrib, *Deterrence and Corrective Justice*, 50 *UCLA L. Rev.*

Today, the postmodern reality is that many actions give rise to not one injury to one person but rather many injuries to many people. This factual reality may complicate things. To concretize these cases, one might think of the product liability design,⁶¹ warning,⁶² or misrepresentation case⁶³ or the toxic tort case.⁶⁴ Factually, these “cases” involve many injuries; however, under the traditional one-on-one tort model, these “many” cases are still treated no differently than the traditional tort case involving one plaintiff and one defendant. The same sets of rules still would apply. But is that realistic? Might there be benefits or efficiencies to be gained by applying different rules or models? And, are the traditional rules consistent with our notions of optimal deterrence?

1. Enter the Class Action

One procedural vehicle often employed in multiple injury cases is the Rule 23(b)(3) class action.⁶⁵ Where or how does the class action fit in? It is a way to conglomerate individual claims; that’s it. It is merely a collection of individual claims. But for the class action to go

621 (2002).

⁶¹See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 1-2 (b) (1998); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁶²See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 1, 2 (c) (1998).

⁶³See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 9 (1998).

⁶⁴See *In re “Agent Orange” Prods. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980).

⁶⁵Of course, there are other types of class actions. Indeed one recent commentator has argued that the limited fund class action may be the preferred and perfect way to prosecute damages suits in multiple injury contexts. See, Semra Mesulam - Note ____ *Collective Awards and Limited Punishment: Solving the Punitive Damages Dilemma With Class*, 104 Columbia L. Rev. 1114 (2004). However, the 23(b)(3) common questions class is perhaps the most familiar, relevant, and common.

forward under the traditional model the similarities between the cases must be such that the cases can be joined as a class.⁶⁶ Common issues of fact and law must predominate and the class action must be a superior device for resolution of the dispute.⁶⁷ Federal Rule of Civil Procedure 23(b)(3) provides that “questions of law and fact common to members of the class must predominate over any questions affecting only individual members.”⁶⁸ Where those common issues are not predominant, the 23(b)(3) class is inappropriate and the cases go forward as individual cases under the traditional model.⁶⁹ In what contexts might the Rule 23(b)(3) class action be preferable to a series of one versus one suits?⁷⁰ One is where all who are injured might not otherwise sue (on their own in one-on-one suits).

2. *All Who Are Injured Do Not Sue*

Why might all those who are hurt not sue?⁷¹ One reason might be because the costs of

⁶⁶FED. R. CIV. P. 23(a)-(b) (2004).

⁶⁷*Id.*

⁶⁸FED. R. CIV. P. 23(b)(3) (2004).

⁶⁹Of course, even if there is no class there may be consolidated cases where the borders between individual cases, class actions, and joined claims blur.

⁷⁰Of course, the class may produce procedural efficiencies if resolution of all claims in a class was less expensive than resolution of *all* those claims through a series of one versus one suits. The existence of class resolution savings would seem to be empirical and may depend upon the particular suit or suits. Herein, I assume there are no procedural efficiencies. This is a critical simplifying assumption.

⁷¹Of course, if all injured sue and seek to recover more than once for the same injury, there would be a serious overdeterrence problem. Likewise, proposed federal legislation making it easier to file class actions in federal court or remove class actions to federal court may have huge practical effects but do not impact upon the substantive aspects of what is said here. *See* § 5, Class Action Fairness Act of 2005.

suit vis-a-vis the injuries suffered are so high that it is not worth it for all individuals to bring a suit.⁷² Alternatively, and quite simply, some people may prefer to do things other than sue.

a. The One-on-One Model: When All Injured Do Not Sue

Under the traditional one-on-one model, if all who are injured do not sue (or otherwise prosecute their claims), defendants face less than full liability. Defendants face less than all of the costs of their activities and they therefore would face a marginal cost curve that is lower than it ought to be; their goods or products consequently would cost less than they should cost and people will over consume the good or product because it costs less than it should. To restate, producers *and* consumers would not be paying all the costs of production. They would be getting an advantage. One might even say they were effectively receiving a subsidy.

b. The Class Action When All Do Not Sue

Would the class action solve this problem? In certain cases, the answer is undoubtedly yes. If all individuals affected *are* entitled to recover under traditional (one-on-one) tort rules but simply do not sue, the class action would work to achieve optimal deterrence if there is sufficient commonality⁷³ between the claims. The class would allow *all* claims to be prosecuted. The class would provide a mechanism to conglomerate or collect (aggregate)⁷⁴ all the claims in one suit and achieve efficient deterrence, assuming that the transaction costs associated with the

⁷²See *Disaggregating*, *supra* note 34 at 131 (citing *Public Tort*, *supra* note 12 at 1033).

⁷³Relaxing the commonality rule might allow joinder where to do so would lead to greater, i.e., more efficient, deterrence. But would that do violence to the traditional model? At some level the answer is yes because the focus would be on the common issues rather than on the uncommon, individual to individual, differences.

class do not exceed the value of the injuries caused. That is, assume A causes \$1,000 worth of damage to 100 people. If there is no liability (or no potential) liability A could ignore \$100,000 in injury costs that it has imposed on others. Alternatively, if for personal reasons, only 40 injured people sued in one versus one (A) suits and recovered (\$40,000 in recoveries) then A could effectively ignore \$60,000 (60 unfiled claims) in costs. However, if the 60 unfiled claims could proceed as a class (or part of a class) then liability (of \$60,000) would result in efficient deterrence ($\$40,000 + \$60,000 = \$100,000$).

Of course, life may not be so simple. For instance, assume that the costs of proceeding as a class in any hypothetical case, exceeded net recoveries or benefits so that plaintiffs or their lawyers would not proceed. Then, there would be no liability and A would face less than the total costs in decision-making. Put numerically, if the cost of notifying all class members and keeping them informed was \$61,000; then, suit would not proceed and efficient deterrence would not be obtained.⁷⁵

c. The Augmented Award

Are there alternative legal devices to the one-on-one suit and the class action that might lead to efficient deterrence when everyone does not file suit and the 23(b)(3) class action does not adequately promise to force optimal cost internalization? There are. As I have previously

⁷⁴See generally, Lawrence Solon, Procedural Justice, 78 S. Cal. L. Rev. 181 (2004).

⁷⁵As one insightful recent commentator has noted class actions may have another benefit. When a defendant's action harms many, the defendant enjoys a comparative advantage over individual plaintiffs because it (the defendant) can spread the costs of litigation over the universe of cases. The individual plaintiff cannot. Conglomerating claims in a class action may offset some of this litigation investment asymmetry. Note, Locating Investment Asymmetries and

written, one could allow those who *do* file suit to recover augmented awards or what Professor Sharkey aptly calls social compensatory damages⁷⁶ equal in amount to the value of the claims not filed. This is the augmented awards approach.⁷⁷ The strength of this approach is that it leads to efficient deterrence and that it avoids the transaction costs inherent in class certification, communications, and distributions. For instance, if 60 of the 100 persons injured in the above hypothetical do *not* sue, a class action might (depending upon transaction costs) achieve efficient deterrence by conglomerating individual claims *but* so could an augmented award suit. In that suit, one person would recover the damages suffered by the 60. But, what does the augmented awards suit add?

As noted, it may add the possibility of efficient deterrence when the class action would not provide it. That is, in the situation hypothesized above, the class action involved excessive process associated transaction costs (\$61,000). The augmented award suit might strip some of those class action associated transaction costs and might provide a more cost effective (cheaper) way to achieve efficient deterrence. If the transaction costs of prosecuting the augmented awards suit are less than \$60,000 it should lead to optimal deterrence where the class action would not.

Not surprisingly, there are several potential down sides to augmented awards suits. First,

Optimal Deterrence in the Mass Tort Claim, 117 Harv. L. Rev. 2665 (2004).

⁷⁶Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347, 389-90 (2003), [hereinafter cited as “Sharkey.”].

⁷⁷Arguably, a limited fund class action seeking punitive damages, *see* Semra Mesulam - Note, Collective Awards and Limited Punishment: Solving the Punitive Damages Dilemma With Class, 104 Columbia L. Rev. 1114 (2004), may be viewed as a type of augmented awards suit where the punitives are sought in order to achieve deterrence as opposed to punishment or retribution.

they may result in a windfall to the plaintiff.⁷⁸ That windfall may be neither here nor there for purposes of deterrence but it may offend other notions about just rewards,⁷⁹ the desirability of rent seeking behavior in lawsuits,⁸⁰ and the lottery effect of judicial proceedings. Moreover, the 60 hypothetical victims who did not sue but whose damages were awarded to (“recovered by?”) the augmented awards plaintiff are *not* compensated for their loss. If those 60 victims have simply decided not to sue because on some level it is not worth it to them, so be it. But, what if their decision has led to dependence upon public programs or private largesse? Should it bother us that our augmented awards plaintiff has recovered the victim’s loss and others are “supporting” the victim(s)? Professor Sharkey’s proposals regarding what she calls social compensatory damages solve some of these problems in that she argues for the viability of a back end class action to provide compensation.⁸¹ One obvious area of inquiry here is the transaction costs of the back end class action device designed to achieve some compensation (windfall avoiding) effect.

Another arguable problem with augmented awards relates to the traditional requirements for recovery of punitive damages. Recall, as I said earlier, that today the deterrence aspect of the augmented awards suit may be falling under the doctrinal umbrella of punitive damages. Usually, in punitive damages cases, the law requires the plaintiff to establish that the defendant

⁷⁸*See Augmented Awards, supra* note 19, at 58 (footnotes omitted).

⁷⁹*Id.*; *see also* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION §§ 3.9, 4.1 (2d ed. 1993).

⁸⁰*Id.* at 73 (footnotes omitted).

⁸¹*See Sharkey, supra* note 76 at 409, 409 n. 224.

acted willfully, recklessly, or wantonly.⁸² That standard arguably is too high if what we are worried about is the plaintiff recovering sufficient amounts to lead to efficient deterrence.⁸³ Here, the deterrence problem arises from the fact that many plaintiffs choose not to file suit. The problem is not with the particularly egregious behavior of the defendant.⁸⁴ Normal standards of behavior might be applicable—negligence, strict liability, etc. Relatedly, in some states a plaintiff must establish his or her right to recover punitive damages by more than a preponderance of the evidence.⁸⁵ Objections may be made to this heightened burden of proof in the efficient deterrence context.⁸⁶ One obvious solution, as I have argued before,⁸⁷ would be to disaggregate the punitive or punishment aspect of an increased award from the deterrence-based aspect of the award. As noted, I call the deterrence-based award the augmented awards. As

⁸²See DAN B. DOBBS, *THE LAW OF TORTS* § 381, at 1064 (2000).

⁸³See *Public Tort*, *supra* note ____, at 63-64, stating:

This focus on the evil defendant is consistent with the punishment rationale for punitive damages; however, it is not consistent with the deterrence justification for augmented awards. Augmented awards are not intended to punish but to deter . . . in augmented damages cases the court should not focus on the reprehensibility of the defendant's conduct, but on whether compensatory damages are too low.

⁸⁴*Id.*

⁸⁵JOHN J. KIRCHER & CHRISTINE M. WISEMAN, *PUNITIVE DAMAGES: LAW AND PRACTICE* § 21.14 (2d ed. 2000) (citing Alaska, Florida, Georgia, Indiana, Montana, South Carolina, Alabama, Oregon, Kentucky, Ohio, Minnesota, California, Nevada, North Dakota, Iowa, Kansas, Utah, and Oklahoma as states requiring clear and convincing evidence for punitive damages; in Colorado, the burden of proof is beyond a reasonable doubt).

⁸⁶See *Disaggregating*, *supra* note 34, at 150-151 (footnotes omitted).

⁸⁷*Id.* at 128; *see also* *Ciraolo v. City of New York*, 216 F.3d 236, 245-46 (2d Cir. 2000) (Calabresi, J., concurring) (footnotes omitted).

noted, Professor Sharkey calls these increased awards social compensatory damages.⁸⁸

Augmented awards or social compensatory damages conceivably could lead to more efficient deterrence and, consequently, fairer treatment for both defendants and plaintiffs. Defendants would be forced to take account of *all* the costs of their activities. And, plaintiffs would not have their freedom to act and their lives unduly impacted by a rational, profit-maximizing defendant who was allowed to injure the plaintiff without financial concern for the injury thanks to a tort law created externality.⁸⁹ Moreover, the augmented award has procedural cost saving possibilities vis-a-vis the class action that might make it preferable in certain cases. There is no certification, notice, or other costly procedural requirements associated with the augmented awards suit but which are involved in the class action.

Of course, the augmented award suit is a much different looking beast than the traditional tort suit with which we began our discussion. As such, it may threaten traditional values and its development might be predictably slow. Another concern is avoiding overdeterrence.⁹⁰ Above I posed a hypothetical that assumed that 60 (of 100) injured people would not file suit and then showed how the augmented award might be a way to achieve optimal deterrence. However, if

⁸⁸See Sharkey, *supra* note 76, at 389-90.

⁸⁹Externalities have been defined as “accident costs that the manufacturer does not take into account in its pricing calculus . . . These accident cost externalities allow the manufacturer to charge less than it should, thus selling and producing more than it should.” Thomas C. Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of it All*, 49 LA. L. REV. 629, 642 (1989) (footnotes omitted); for an additional discussion of externalities, see Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1, 68-94 (1980).

⁹⁰For a discussion of overdeterrence and its implications in tort law, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 214-19, 220-24 (5th ed. 1998); see also, *Augmented*

after the augmented award plaintiff recovers the \$60,000, fifteen plaintiffs, whom we had assumed would not sue, file suit and recover \$1,000 each, we have then imposed \$115,000 in liability on A for causing \$100,000 in losses.⁹¹ That \$115,000 would inefficiently overdeter A. Liability of \$115,000 would force A to pay \$15,000 more in damages than the value of the injuries that it actually caused. Consequently, when considering augmented awards, one must be vigilant to avoid overdeterrence. One route to avoiding overdeterrence would be to hold the augmented award suit in abeyance until the statute of limitations has run on individual claims or to hold the recovery in escrow until the statute had run. Of course, this becomes a problematic solution with the possibility of tolling of the statute pursuant to the “discovery” doctrine.⁹² This problem could be severe in the context of the long latency disease claim.

d. The Public Tort Suit

Another device whereby efficient deterrence could be achieved in multiple victim cases where all who are injured do *not* sue is the public tort suit.⁹³ Here, as noted, a governmental

Awards, supra note 19, at 42-43, 53-58.

⁹¹\$40,000 to those who sued and recovered; \$60,000 to the augmented awards plaintiff; and \$15,000 to the later filing plaintiffs.

⁹²Dobbs notes that a statute of limitations will not begin to run until:

(a) all the elements of the tort are present *and*

(b) the plaintiff discovers, or as a reasonable person should have discovered,

(I) that she is injured and

(ii) that the defendant, or the defendant’s product or instrumentality, had a causal role in the injury, or that there was enough chance that defendant was connected with the injury to require further investigation that in turn would have revealed the defendant’s connection

DOBBS, *supra* note 6, at §218.

⁹³*See Public Tort, supra* note 12, at 1022-23.

entity files suit to recover otherwise unsought or unrecovered damages as surrogate plaintiff.⁹⁴

The public tort suit avoids the individual windfall problem associated with augmented awards. It also avoids standard of care and standard of proof problems inherent in current punitive damages cases. But the governmental tort suit may be subject to the broader objection that the government should not be allowed to recover as surrogate and should not be able to recover absent some legislative action.⁹⁵ That is, defendants might object to what they perceive as taxation by lawsuit. I have talked about and written about these objections elsewhere and I do not think the objections are sufficient to justify denying these claims across the board.⁹⁶ However, at the same time I do believe that injured individuals ought to be compensated first, where injured individuals can be identified at reasonable cost and where the costs of distribution do not exceed the benefits to be gained from the distribution. Returning to the basic question, why allow the public tort suit at all? To deny the government the ability to sue absent specific authorization is to allow the subsidy absent authorization. Why is the suit worse than the subsidy? However, as with the augmented awards suit, the vehicle is new (at least in this context) and threatens tradition.

Here it may be profitable to digress for a moment to say a word about some of the recent high profile government or public tort suits.⁹⁷ Of course, the state tobacco settlements were

⁹⁴*Id.*

⁹⁵*Id.* at 1050 (footnotes omitted).

⁹⁶*Id.* (footnote omitted) (“The separation of powers doctrine does not seem to require legislative authorization for the public tort suit.”).

⁹⁷*See generally*, David G. Owen, *Products Liability Law*, 657-71 (2005). *See also*,

examples of public tort suits,⁹⁸ as is the federal suit against tobacco.⁹⁹ Other publicized public tort suits include lead paint abatement suits.¹⁰⁰ And, so are the municipal suits against firearm manufacturers.¹⁰¹

The firearm suits allege various causes of action arising out of the distribution and sale of guns used in illegal criminal activity. The claims range from negligence to public nuisance. In those suits the governmental plaintiffs seek to recover costs allegedly incurred as a result of firearm related crime. Some of the suits survived motions to dismiss.¹⁰² Others did not.¹⁰³ Some of the courts which refused to allow claims to go forward relied upon the notion that other branches of government were more appropriately conceived, formed and staffed to regulate

Timothy D. Lytton, Should Government be Allowed to Recover the Costs of Public Services from Tortfeasors? Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine, 76 Tulane L. Rev. 727 (2002).

⁹⁸Seth M. Wood - Note, The Master Settlement Agreement as Class Action: An Evaluative Framework for Settlements of Publicly Initiated Litigation, 89 Va. L. Rev. 597 (2003).

⁹⁹The National Law Journal, 9/20/04, Pg. 10.

¹⁰⁰*See, e.g.*, Milwaukee v. N L Industries, ____ N. E. 2d ____ (Wis. App. 2004) (allowing claim to go forward). *But see* City of Chicago v. American Cyanamid Co., 2003 WL 23315567 ____ N. E. 2d ____ (Ill. App. 2005).

¹⁰¹*See, Public Tort, supra*, note 12.

¹⁰²*See, e.g.*, City of Gary v. Smith & Wesson Corp., 801 N.E. 2d 1222 (Ind. 2003); James v. Arms Technology, Inc., 820 A. 2d 27 (N.J. Super. 2003); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E. 2d 1136 (Ohio 2002).

¹⁰³*See, e.g.*, Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F. 3d 536 (3d Cir. 2001); City of Chicago v. Beretta U.S.A. Corp., ____ N.E. 2d ____ (Ill. 2004); The People of the State of New York, by Elliot Spitzer, as Attorney General v. Sturm, Ruger & Co., Inc., 309 A.D. 2d 91 (A.D. N.Y. 2003).

behavior, such as the distribution and sale of firearms.¹⁰⁴ This is a separation of powers argument. One wonders how separation of powers arguments “cut” when one of the supposedly more appropriate branches seeks redress in court. Be that as it may, courts which have dismissed the public tort firearms suits¹⁰⁵ and municipal claims in other cases¹⁰⁶ rely upon the notion that the governments injury is too remote from the defendant’s act. Legally, this notion of remoteness might be restated to say either the defendant had no duty to protect the governmental plaintiffs from their loss *or* that the defendant’s act was not the proximate or legal cause of the plaintiff’s economic loss. One might shift the descriptive prism slightly and say that the time and space between the distribution or initial sale and the government’s injury cuts off any potential manufacturer liability. Or, one might say that the misconduct of the actor using the firearm, cuts off any potential liability. One might object that the last two sentences ignore the reality that criminal misuse of firearms *is* foreseeable. However, foreseeability can be offset if the foreseeable risk is deemed remote on some moral or policy level. One deterrence based policy argument made to support findings of remoteness (*ergo* no liability) in the municipal firearms cases is that the municipalities’ claims are derivative. That is, the governmental entity’s claim derives from the injuries that the physical victim of gun violence suffers.¹⁰⁷ As one court has put it “[t]hose immediately and directly injured by gun violence—such as gunshot wound

¹⁰⁴*Spitzer* 309 A. 2d at 105 -06.

¹⁰⁵*See* cases cited in note _____, *supra*.

¹⁰⁶*See, e.g.,* County of Cook v. Phillip Morris, Inc., ____ N.E. 2d ____ (2004) (municipal tobacco case).

¹⁰⁷*City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F. 3d 415, 424-25 (3d Cir. 2002).

victims—are more appropriate plaintiffs than the City or organizational plaintiffs whose injuries are more indirect.”¹⁰⁸ And, naturally, if those direct victims sue *and* recover, they will be compensated for their loss. In that regard the deterrence and compensation goals of tort law are served. But, what if the “direct” victim does not sue? Is it better to allow the defendant to avoid liability with a consequent loss of optimal deterrence, or is it better to allow the less direct plaintiff to recover.¹⁰⁹ This deterrence loss may be caused by direct plaintiffs *not* suing or by legal rules that deny recovery. The legal rules problem is discussed below. Put differently, the better plaintiff aspect of the remoteness argument seems to say if there *is* a better plaintiff who *can* sue, *will* sue, and *can* recover (under current legal rules) he *or* she is a better, more interested, more compelling plaintiff. It does *not* say, if there is no such plaintiff, the municipality may *not* recover because of the possibility such a better plaintiff might have existed.

If the governmental tort suit might be an effective deterrence device, why allow the augmented awards suit? The simple answer may be politics. There may be reasons extraneous to the merits of the case(s) that lead to a governmental decision not to sue. If the decision not to sue precluded private action in the form of the augmented awards suit, there would be a deterrence loss. Thus, where the government did not act, the augmented award (private attorney general) suit potentially is an attractive and desirable option for purposes of achieving optimal

¹⁰⁸*Id.* at 425.

¹⁰⁹Of course, there may be other reasons to deny recovery. If the less direct victim’s claim is at best only a guess at what the loss is, one would be concerned with basic fairness and overdeterrence. *See id.*

deterrence.

Alternatively, there may be cases where even if the governmental entity was willing to file suit, it would face costs of mobilizing litigation (transaction costs) that were greater than the augmented awards plaintiff. In that case the augmented awards device could be a more efficient vehicle to achieve optimal deterrence.

e. Limited Access to Justice Under the Models

Up to now, I have assumed that the reason all who are injured do not sue is because they have decided filing suit individually is simply not worth their while. Alternatively, as Judge Calabresi pointed out in his concurring opinion in *Ciraolo v. City of New York*,¹¹⁰ people may not sue because they are unaccustomed to or uncomfortable with legal institutions.¹¹¹ Put differently, some or even many plaintiffs may have limited access to justice. Depending upon the circumstances, class actions, augmented awards, or public tort suits might provide efficient deterrence in this limited access to justice context. But there also may be problems. Notably, the public tort suit might not work for several reasons. First, the governmental entity may be the tortfeasor. Second, the injured group may be politically weak and unable to mobilize governmental decision makers.¹¹² Thus as, a practical result, the class action or augmented

¹¹⁰*Ciraolo v. City of New York*, 216 F.3d 236, 243-50 (2d Cir. 2000) (Calabresi, J., concurring) (footnotes omitted).

¹¹¹*Id.* at 244 (Judge Calabresi noted: “Victims will differ greatly in their knowledge of and access to the legal process, and those who are relatively poor and unsophisticated, as a practical matter, are frequently unable to bring suit to redress their injuries even if those injuries are grave.”).

¹¹²*Id.*

awards claim may be preferable and more effective. Of course all that is said above regarding the transaction costs associated with class actions is true here as well.

3. Difficulty of Detection and the Models

Now, building on Polinsky and Shavell's groundbreaking work let us assume that the reason why all do not sue is difficulty of detection. That is, the problem is that it is difficult for plaintiffs to detect the wrongdoer's identity *or* the wrongdoer's connection to the injury. In that case the wrongdoer can expect to escape liability in many cases of injury causing conduct. Here, the class action might be problematic. If detection in individual suits is an issue, how does conglomerating those suits solve the problem? If individuals cannot prove their claims, how does the class, i.e. aggregation of unprovable claims help? It still seems that linking the defendant to individual plaintiffs class members might frustrate efficient deterrence.

Alternatively, at the end of the class action, there may be substantial undistributed funds. In reality then the class action becomes, in part, a collection/deterrence device rather than a precisely tailored way to achieve individual compensation. As a collection device, the case may look more like an augmented award case. And in difficulty of detection cases, augmented awards could lead to optimal deterrence as Professors Polinsky and Shavell have pointed out.¹¹³ Additionally, a governmental tort suit also might provide an efficient device for achieving deterrence in the difficulty of detection content.

C. Tort Rules and Underdeterrence

Now, let us switch gears and assume that all those who are injured will file suit.

¹¹³See Polinsky & Shavell, *supra* note 17, at 887-96 (see especially 894 n.66, where

However, traditional tort rules may still frustrate deterrence¹¹⁴ because tort rules created in and for the one-on-one model may themselves result in underdeterrence¹¹⁵ when applied to multiple injury cases.

1. Cause -In-Fact and Underdeterrence

One major underdeterrence problem relates to the application of traditional cause-in-fact requirements. Assume that the injurer exposed the injured to some substance and that exposure increased the chances that those exposed would develop some adverse health consequence. However let us also assume that there are background risks of developing that same adverse health consequence. That is, assume that 100 plaintiffs have the disease (or injury) and *all* filed suit. Further assume that there is a 50% chance each one of those 100 sick (or injured) people developed the adverse health consequence because of the background risks and that there is a 50% chance each developed the condition or disease because of the exposure.

Under the traditional one-on-one model not one of the plaintiffs will recover from the defendant because none of them will be able to establish that the defendant caused them to develop the condition. They will all lose. The plaintiffs cannot prove cause-in-fact under the traditional approach. They cannot prove by a preponderance of the evidence that but-for the

Polinsky and Shavell comment on the connection between damages and the probability of suit).

¹¹⁴See *Augmented Awards*, *supra* note 9, at 29-30 (footnote omitted).

¹¹⁵See *Disaggregating*, *supra* note 34, at 139 (noting that such rules as cause-in-fact, proximate cause, and contributory negligence may result in underdeterrence when multiple plaintiffs file suit); see also *Public Tort*, *supra* note 22, at 1036-37.

defendant's conduct they would not have suffered the disease or condition.¹¹⁶ Making the claim a class action does not help. The class cannot prove cause-in-fact because individual members of the class cannot prove cause-in-fact. Of course, this result is logical because the class is only a conglomeration of individual claims.

Moreover, augmented awards for those who are successful in order to make up for shortfalls in recovery will not work because, under traditional cause-in-fact standards, no one plaintiff will be successful. Thus, there is no one whose recovery can be augmented. The governmental public suit might pose some potential for fixing the deterrence deficit. This is because the suit might result in a governmental entity recovering 50% of the total "condition" costs for our population of 100 from the defendant. After all we *know* the defendant caused 50% of the total "dismissed condition" costs; we just don't know which individuals have the condition because of the tortfeasor.

Another way to reach the same result would be to change the rules regarding causation or duty. That is, if we said that each person exposed could recover for the possibility that the defendant caused their injury, each might recover 50% of their total damages. There is a

¹¹⁶In certain cases, courts have relaxed the "but for" test for cause-in-fact and allowed recovery where the defendant's conduct was a "substantial factor" in causing the plaintiff's injuries. The paradigmatic case, as described in *Anderson v. Minneapolis, St. P. & S.S.M. Ry.*, 146 Minn. 430, 179 N. W. 45 (1920), involved two fires (causes) either of which alone would have caused plaintiff's injuries. Here, if either cause alone would have caused the injury the "substantial factor" test might apply. However, if either alone would not have caused the injury, the "substantial factor" test becomes more problematic. For instance, if some unidentifiable portion of the diseased population (for reasons that are medically unknown today) are resistant to the toxin but not the background risk, then either cause alone would *not* have caused the injury. Despite these potential problems, several courts have applied the "substantial factor" test in toxic exposure cases. *See, e.g., In Re Manguno*, 961 F. 2d 533 (5th Cir. 1992).

resemblance here to the lost chance of survival theory of recovery in medical malpractice cases.¹¹⁷ If the underlying law were to change then individual suits, if everyone sued, would achieve efficient deterrence and cost internalization. If the law changed, class actions also would be effective, with potential administrative efficiencies if the cost of prosecuting one class action was less than the cost of prosecuting *all* the individual claims. An augmented award to one representing otherwise unrecovered losses would be effective if all did not sue and the risks of overdeterrence could be avoided. Recovery would have to be limited to the value of otherwise unrecovered condition costs. Finally, the state suit still would be efficient; however, overdeterrence would remain a concern.

Recall the important point that absent a change in the law, only the public tort suit provides the possibility of dealing with the potential deterrence lost from not allowing recovery in individual cases. The one-on-one model, augmented awards, and class actions provide no help.

What about a case where we know that plaintiff's condition was caused by exposure to a particular product; that is, what about the case where there is a signature condition or disease and no background risk problem? All four models could work to provide optimal deterrence. For the individual suits to achieve efficient deterrence all plaintiffs must sue. The class action (including all class members) would be efficient and so would an augmented award or public tort

¹¹⁷See Joseph H. King, Jr., Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 YALE L.J. 1353, 1364-70 (1981) (explaining the "loss of a chance of complete loss avoidance" doctrine); *see also*, Joseph H. King, Jr., "Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. Mem. L. Rev. 491, 508-09 (1998) (an abbreviated explanation of the

suit, assuming there is *no* overdeterrence. Now, let us add a complicating factor. Suppose that while the plaintiff knows a particular product caused her particular condition, she cannot say which of several identical products that she used caused that condition. This is the DES problem.¹¹⁸ Many manufacturers made exactly or substantially similar products that caused injuries to many people *but* the injured often could not identify which particular manufacturers caused their injuries.¹¹⁹ When identification is possible the case becomes a one-on-one product liability case with no significant cause-in-fact issues. When identification is impossible the traditional one-on-one model is strained.

The solution that some courts adopted in the absence of identification was “market share” liability. Under one form of market share liability, the defendant was liable to the individual plaintiff for a portion of the individual plaintiff’s damages, proportional to the defendant’s share of the market. I have radically oversimplified the theory. Under some variants of the theory there were complex shifting burdens of proof.¹²⁰ Under others,¹²¹ a defendant was not liable if it

doctrine).

¹¹⁸The two most famous DES cases are *Hymovitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), and *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

¹¹⁹*Hymovitz*, 539 N.E.2d at 1072; *Sindell*, 607 P.2d at 925-26.

¹²⁰*See* *Martin v. Abbott Labs., Inc.*, 689 P.2d 368, 375 (1984). There, the court said: “in cases where all defendants are equally culpable, and their negligence precludes an innocent plaintiff from identifying them, basic considerations of fairness demand that the burden of proof shift from plaintiff to defendant. Defendants unable to meet the burden of proof are found jointly and severally liable.

¹²¹*See* *Sindell*, 607 P.2d at 937 (“Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff’s injuries,” in which case the defendant would escape liability); *see also*, *Bowe v. Abbott Labs., Inc.*, 608 N.E.2d 223, 225 n.1 (Ill. Ct. App. 1992);

proved that it definitely did not produce the particular DES that the plaintiff or her mother ingested.¹²²

The market share theory represented a change in traditional legal rules about responsibility and causation. It is different from the traditional rules because it changed one of the core rules we used to depend upon to supposedly keep us honest: cause-in-fact. Market share also was different because while there might only be one plaintiff in a particular suit, there were multiple possible responsible defendants who might have been liable. In most states application of a market share theory of causation or liability depended upon the plaintiff joining a substantial share of the market as defendants.

However, nothing about market share necessarily effected the numbers on the plaintiff's side of the "v." That is, market share effectively functioned as a theory of recovery whether there was one plaintiff or many. It does seem however that the theory is more persuasive when there is a class or group of plaintiffs. I say this because with a group of plaintiffs the likelihood that the payments being made by the various defendants in proportion to their market shares actually may approach an accurate reflection of their responsibility. When only one plaintiff sued it seems like sticking needles in proportional haystacks but when groups sued the chances of coming up with something close to the right answer for the group would appear to be higher.

But a huge problem with the class vehicle in DES-type cases is that there may be no

Black v. Abex Co., 603 N.W.2d 182, 190 (N.D. 1999).

¹²²One might view this "proof out" as a sort of shift of the burden of proof to the defendant to prove that under a one-on-one model it could *not* be liable.

commonality in reference to the injuries suffered by the individual plaintiffs.¹²³ So, a class for liability purposes but not quantum may be a sound solution. Of course, there is still a huge administrative cost associated with the individual damage trials.

The augmented awards vehicle is another possibility in DES-type cases. That is, one plaintiff could recover the damages for all but overdeterrence would have to be avoided. As per the earlier discussion, the public tort suit also holds promise but it still tends to upset a lot of folks, i.e., government should not be doing that.¹²⁴

2. *Proximate or Legal Cause and Underdeterrence*

Let us now move on to proximate cause. The traditional one-on-one case requires a close legal (or proximate) or policy (or fairness) connection between the defendant's conduct and the

¹²³See FED. R. CIV. P. 23(a) (2004) (requiring that there be “questions of law and fact common to the class” and that the “claims or defenses of the representative parties” be “typical of the claims or defenses of the class.”).

¹²⁴One last cautionary word on cause-in-fact although I am sure there is much more to say. I have made it sound like the plaintiff's or plaintiffs' lawyers always like a “relaxed” rule as to cause-in-fact. I have made it sound like “but for” is always the friend of the defendant, not the plaintiff, but that is not always so. In one case, *Perkins v. Entergy* 782 So.2d 606 (La 2001)., the Louisiana Supreme Court was faced with a complex case involving power outages, negligent maintenance of electric utilities and connections, death, and personal injury. The plaintiffs had gotten a judgment relying, in part, on the “but for” test for cause-in-fact. The lawyers had used a chain of proof relating various events to the death and underlying negligence through a series of but fors. On appeal, the Court of Appeal reversed, and the Supreme Court affirmed the appellate court, stating that in complex cases where there are multiple causes of injury the decision maker should employ the “substantial factor” test. Under the traditional “substantial factor” test for cause-in-fact a plaintiff who could not establish cause-in-fact under the “but for” test still might prevail if he or she proved defendant's fault was a substantial factor in bringing about the plaintiff's injuries. The *Perkins* analysis turns what was a plaintiff friendly test (substantial factor) on its head because under its analysis what satisfies the “but for” test (it wouldn't have happened if this hadn't happened first) still might not satisfy some decision maker's notion of what constitutes a substantial factor.

plaintiff's injuries. The most famous articulation of this required connection probably is Judge Cardozo's majority opinion in *Palsgraf v. Long Island Railroad*.¹²⁵ There, the court required a foreseeable plaintiff which necessarily meant that the risk that arose had to be foreseeable as well, because, as Cardozo said: "risk imports relation...".¹²⁶ Of course, Judge Cardozo actually decided the case as a matter of *no duty* but that was simply judicial sleight of hand. The point is that whether you say *no duty* as Cardozo did or you say no legal or proximate cause as so many others do, the traditional rule is that you need that close connection in the particular case. The difference of course is who decides? Judge (duty) or Jury (proximate or legal cause).

While "who" decides is not critical to the current discussion, the inherent tension between different methods of articulating, if not analyzing, the "connection" requirement is at the core of the current discussion. The crux of many risk/causation cases is how broadly or narrowly one articulates the issue. Does one focus on the particular facts of the particular case before the particular court—very one-on-one? Or, does one step back and focus on the broader issue?

In articulating the question, lawyers do battle. Of course they also fight about law. In some cases the law battle is real: Is there a duty to protect against negligently inflicting emotional distress?¹²⁷ Is there a duty to provide medical monitoring?¹²⁸ But in many cases, the

¹²⁵162 N.E. 99, 99-101 (N.Y. 1928)

¹²⁶*Id.* at 100 ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.").

¹²⁷*See* DOBBS, *supra* note 4, § 312. Generally, the duty to protect against negligently inflicting emotional distress exists only when a "special relationship" exists; however, certain states have abolished these restrictive rules. *Id.* For instance, Montana and Tennessee have established "foreseeability" rules when determining emotional distress cases. *Id.*

law is putty. Even the tests are putty in the hands of able judges and lawyers and savvy jurors.

Were the plaintiff's injuries direct?¹²⁹ Remote?¹³⁰ Foreseeable?¹³¹ A natural and probable result of the defendant's actions?¹³²

a.) The One-on-One Model

Focusing narrowly under the one-on-one model may demand no recovery. I take the example of the third party criminal act.¹³³ Does a person (merchant, manufacturer, lessor) have an obligation to protect against a third party criminal act? Looking at the facts of particular

¹²⁸ *Id.* § 377, at 1050 (“Recovery of monitoring expense, once a tort has been established, appears to be in accord with the usual rules of personal injury damages for diagnostic expenses and also with the rule that permits recovery of expenses incurred to minimize damages).

¹²⁹ *Id.* §§ 184-85 (noting that most courts will only impose liability for direct harms that are foreseeable.). In the past, courts were willing to impose liability for unforeseeable harms, but Dobbs notes that “[i]t is very doubtful that liability unlimited by foreseeability has much contemporary support.” *Id.* § 185, at 458.

¹³⁰ *Id.* § 180, at 445 (Dobbs notes that the word proximate “suggests that only the most immediate trigger of harm can be the proximate cause. That simply is not the law.”).

¹³¹ *Id.* § 143, at 334 (Stating the universal principle, “An actor is negligent only if his conduct created an unreasonable risk of harm to others and the actor recognized, or as a reasonable person should have recognized that risk.”).

¹³² *See generally* W. PAGE KEETON ET. AL., PROSSER AND KEETON ON TORTS §§ 41-45 (5th ed. 1984).

¹³³ *See generally* Dennis T. Yokoyama, The Law of Causation in Actions Involving Third-Party Assaults When the Landowner Negligently Fails to Hire Security Guards: A Critical Examination of *Saelzer v. Advanced Group 400*, 40 CAL. W. L. REV. 79, 80 (2003). In *Saelzer*, a California case, a Federal Express delivery worker sued an apartment complex owner after she was assaulted at the apartment while making a delivery. *Id.* The California Supreme Court affirmed the trial court's grant of summary judgment for the apartment complex, noting that the while the apartment complex had a duty to safeguard against foreseeable crime on its premises, the plaintiff could not prove that the presence of extra security would have prevented her being

cases, one might conclude that the defendant ought not to be held liable to the plaintiff. The heinous actions of a particular criminal act may be so bizarre that it seems wrong to expect one individual to protect another individual from such inherently base, anti-social action.¹³⁴ But, pulling back and focusing more generally, what might not be foreseeable in an individual case may appear downright inevitable when one focuses upon broader classes of plaintiffs.¹³⁵ Thus in a one-on-one focused case, the decision might be no recovery and that decision might be correct.¹³⁶ However that decision also might result in a net deterrence loss because defendants across the board or a defendant across a large board of plaintiffs would escape liability and

assaulted.

¹³⁴A good example of this principle can be found in *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436 (1987). The *Lopez* case focused on a 1984 incident where a man armed with several different types of firearms entered a McDonald's and, without attempting to rob the store, killed twenty-one patrons and employees and wounded eleven others. *Id.* at 438. Survivors of the shooting and families of the murder victims filed suit against McDonald's, alleging the restaurant failed to provide adequate security measures to prevent against dangerous and known risks. *Id.* The appellate court upheld the trial court's grant of the restaurant's motion for summary judgment, holding that although the restaurant was in a high-crime neighborhood, the restaurant was not liable for the incident:

[T]he risk of a maniacal, mass murderous assault is not a hazard the likelihood of which makes McDonald's conduct unreasonably dangerous. Rather, the likelihood of this unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of McDonald's nonfeasance did not facilitate its happening. [The assailant's] deranged and motiveless attack, apparently the worst mass killing by a single assailant in recent American history, is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct.

Id. at 445 (footnote omitted).

¹³⁵*See Public Tort, supra* note 12, at 1038-40

¹³⁶*Id.* at 1040.

therefore not take account of that category of accident costs in the decision making calculus.¹³⁷

That failure to impose the cost reraises the subsidy theme. Are those who escape liability receiving a liability “break” that results in both unequal treatment and underdeterrence?

b.) The Class Action

Does the class action vehicle solve this deterrence loss problem? Not if class certification (or recovery) is denied because courts think that causation issues are not common but individual. That is, if the judicial perspective on the class action is that it is a collection of traditional one-on-one cases and that’s all, certification will be denied and individual cases will go forward. In those cases the particularities of individual fact patterns probably will result in some recovery and some non-recovery. Will the recoveries overall be equal to the expected injuries from some clearly foreseeable class of third party criminal acts resulting from particular misconduct? The answer is unclear.

c.) The Augmented Award

How about augmented awards? Augmented awards would provide efficient deterrence although *one* plaintiff, at least, would have to successfully prosecute a tort suit. And, of course, the courts would have to be attuned to the risks of overdeterrence from duplicative awards.

d.) The Public Tort Suit

What about the public tort? Again the public tort seems a likely possibility for efficient deterrence. But the issues of improper governmental action are, of course, still prevalent. Now,

¹³⁷*Id.* at 1039

also would be a good time to mention some other peculiarities or problems with the governmental tort suit. Up to now, I have been talking about it as if the government acted as a collector or proxy in these cases. What I mean is that I have discussed governmental recovery as if it related to the government collecting damages suffered by others. That works—it could be efficient where for some reason or other those others do not sue or do not recover because of the particularized focus of the analysis of their claims under the one-on-one model. However, the governmental entity also may seek to recover in its own right for its own damages—increased social welfare costs, increased medical costs, etc.¹³⁸ These are costs that the governmental entity incurs as a result of the defendants’ actions.¹³⁹ They are costs that the government itself incurs because of injury to individual citizens. If the defendant involved is never liable for the costs that it causes to be imposed upon the state then it will never take them into account when it decides what to do, how to do it , and how much to charge for what it does. Not allowing recovery will under deter. It will effectively absolve the entity for some of the injury it causes. It will allow the entity to impose its will on the “freedom” or autonomy of others. It will arguably subsidize. That’s perfectly acceptable if that is the decision we want to make but we should be aware of the consequences of that decision.

¹³⁸*Id.* at 1023, 1031. For cases illustrating the idea, *see* *City of Flagstaff v. Atchison, Topeka, & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983); *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000); *City of Philadelphia v. Beretta, U.S.A.*, 126 F. Supp. 2d 882, 894-95 (E.D. Pa. 2000). *See generally*, Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 *Tulane L. Rev.* 727 (2002).

¹³⁹*Public Tort, supra* note12, at 1050-51.

3. Medical Monitoring

Now, let us turn to another example of a type of case where individual claims might not achieve efficient deterrence. Should a defendant or defendants be liable to a plaintiff or a class of plaintiffs for the costs of medical monitoring?¹⁴⁰ In some ways the claim is radical when viewed through the lens of the one-on-one suit. In the traditional tort suit injury has occurred and the plaintiff is seeking to recover for that injury. But even in that traditional suit we allow the plaintiff to recover for the future anticipated effects of the injury suffered.¹⁴¹ And, at least in certain types of cases we have allowed plaintiffs to obtain injunctions against threatened future wrong. Couple that fact with the reality that medical monitoring is a type of mitigation behavior—striving for early detection to minimize the future consequences of the defendant’s behavior and the medical monitoring claim makes imminent sense.¹⁴² It is a mandatory injunction in the context of allowing the plaintiff to recover for mitigation related behavior.

But should the award be made in a lump sum to an individual plaintiff? While there is nothing to suggest that such an award would be improper in itself, such an award to a class of un- or underinsured people exposed to some substance that could lead to a future illness that can be more effectively treated if detected early becomes particularly compelling. Augmented awards arguably have less applicability here. The idea is not to pay someone off here to encourage efficient deterrence. The idea is to try and encourage monitoring that could efficiently minimize

¹⁴⁰For a related explanation and discussion of medical monitoring, see *Disaggregating*, *supra* note 34, at 124-25.

¹⁴¹*Id.*

total damages. Perhaps the most compelling case of all for medical monitoring would be a public tort suit where the plaintiff sued for expenditures the governmental entity had made to monitor citizens for the feared adverse health consequence. Ironically, recovery should not logically be limited to a governmental entity. An insurer would seem to be in just as good a position to recover. But most courts that have dealt with the issue have held that insurers cannot recover from tobacco companies for health related costs attributed to tobacco.

IV. Conclusions

In conclusion, class actions, augmented awards, and public tort suits may provide deterrence gains in certain types of cases where the one-on-one model results in underdeterrence. These devices or models may force defendants to take account of costs that their activities pose but that would not be recovered under the traditional one-on-one tort model. This failure of the traditional model might be because everyone injured does not sue. Or, it might be because traditional tort law focuses too narrowly on the parties before the court thereby resulting in underdeterrence. A broader focus provided by one of the other models might result in efficient deterrence. Ironically, if a class action is viewed as a collection of individual claims subject to all the same substantive rules as the one-on-one case, then the class action's promise for efficient deterrence may be limited in comparison to the augmented award or the public tort suit.

Critically, tort law is a legal place where key determinations about freedom are made. In torts cases, courts decide where my freedom ends and where your freedom begins. In a capitalist

¹⁴²DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES.

society, allowing someone to act without having to take full account of the costs of his or her activities is to give excessive protection to that person's freedom. In the accident arena, that excessive freedom is obtained at the expense of injured citizens and at the expense of competitors who face full costs. As a result, one might conclude that values of efficiency, freedom and equality are frustrated when a society tolerates underdeterrence. In that regard, as the nation focuses on the possibility of overdeterrence and the need for tort "reform," we should not ignore the very real possibility or impact of underdeterrence. The depth of any meaningful reform depends upon providing the ultimate decision makers with the contrasting perspectives from which that depth may appear. Any possible syncretic solution requires a vibrant political and intellectual consideration of the whole and not just one side's views.