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Introduction: Symposium 2001: Toxic Torts: Issues of Mass Litigation, Case Management, and Ethics

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Introduction

SYMPOSIUM 2001

TOXIC TORTS: ISSUES OF MASS LITIGATION, CASE MANAGEMENT, AND ETHICS

In recent years, movies such as *A Civil Action*¹ and *Erin Brockovich*² have made the public aware of the use of litigation to compensate people injured by various toxic substances. Although these movies portray some of the problems involved in such litigation, they are Hollywood stories, and therefore must have happy endings. In reality, plaintiffs face many challenges in litigating a toxic tort claim.

As in any tort lawsuit, plaintiffs must prove the basic elements of duty, breach, causation, and damages. The first toxic tort lawsuits were largely unsuccessful, due to the inability of plaintiffs to prove the basic elements of the case, in part because of the lack of tough environmental regulations at the state and federal level.³ In the 1970s and 1980s, the federal government passed several laws intended to prevent pollution and to force polluters to take responsibility for the damage they caused, including the Clean Water Act⁴ and the Comprehensive Environmental Response, Compensation, and Liability Act.⁵ These and other statutes have helped plaintiffs to establish the duty and breach elements, by defining hazardous substances and establishing threshold danger levels for these substances. The law of toxic torts has evolved over the past several decades to cover actions relating to a variety of substances, from hazardous workplace chemicals and byproducts covered by these statutes, to cigarettes and breast implants. Plaintiffs' attorneys are beginning to learn from successful mass tort litigation, such as the recent tobacco cases,

¹ A CIVIL ACTION (Touchstone Pictures 1999).

² ERIN BROCKOVICH (Universal Studios 2000).

³ See Margaret Graham Tebo, *Fertile Waters*, ABA J., Feb. 2001, at 36.

⁴ 38 U.S.C. §§ 1251-87 (1998).

⁵ 42 U.S.C. §§ 9601-75 (1998).

and to apply the tactics used in these cases to new litigation involving environmental torts.⁶

Despite the improvements in environmental regulation over the past twenty years and recent successes in the tobacco cases and other mass tort actions, plaintiffs in toxic tort lawsuits still face many challenges in mounting successful litigation. Due to the nature of the injury sustained from exposure to toxins, the need to rely on statistical proof, and a latency period of several months to many years between exposure and actual injury, plaintiffs' attorneys face difficulty in proving causation. In addition, plaintiff and defense attorneys face issues of case management, particularly in cases involving large numbers of plaintiffs. Finally, toxic tort actions involve a variety of ethical issues, ranging from client solicitation to issues of settlement and contingency fees.

With an eye to these challenges and the potentially burgeoning field of environmental tort lawsuits,⁷ the *William and Mary Environmental Law and Policy Review* invited leading scholars in the fields of tort law, mass litigation, and ethics to take part in a symposium that took place on March 23 and 24, 2001. *Toxic Torts: Issues of Mass Litigation, Case Management, and Ethics*, brought together tort law attorneys, academicians, students, and policymakers to focus on the future of environmental toxic tort litigation by examining the challenges of proving causation, the utility of the tobacco litigation lessons, and the ethics issues faced by attorneys in mass litigation settings.

The first panel, moderated by Professor John Duffy of William and Mary School of Law, was comprised of Professor Lisa Heinzerling of Georgetown University Law Center; Joe Kearfott, a partner at the law firm of Hunton & Williams; Professor Tom McGarity of University of Texas Law School; the Honorable Robert R. Merhige, Jr., Counsel at Hunton & Williams and retired District Court Judge; and Professor Joseph Sanders of University of Houston School of Law. This panel discussed issues of proving causation, including the use of expert testimony, the practical realities of prosecuting and defending a medical claim based on a toxic tort, and the use of burden shifting in proving causation. The second panel, moderated by Professor Ronald Rosenberg of William and Mary School of Law, featured Professor Richard Daynard, Chair, Tobacco

⁶ See Tebo, *supra* note 3. For example, the new MTBE lawsuits rely on the tobacco litigation theory of a conspiracy by companies to hide known dangers and harmful effects of their products on the environment and humans from the government. *See id.*

⁷ *See id.* The ABA litigation section held a conference on the trends in such litigation, and several environmental trade publications have been tracking these trends in recent months. *Id.*

Products Liability Project at Northeastern University School of Law; Professor Howard Erichson of Seton Hall University School of Law; Professor Anthony Sebok of Brooklyn School of Law; and Professor Mark Weber of DePaul University College of Law. This panel featured a discussion of the tobacco litigation and the possibility of using the lessons learned in future environmental tort litigation. The third panel, moderated by Professor James Moliterno of William and Mary School of Law, consisted of Professor Richard Nagareda, University of Georgia School of Law; Professor Lester Brickman, Cardozo School of Law; and Professor Charles Silver, University of Texas School of Law. This final panel discussed case management issues involved in mass tort litigation, and analyzed some of the ethical issues faced by attorneys who litigate mass tort cases.

Issues 26:1 and 26:2 consist of the insights and articles of seven of our twelve speakers.

Professor McGarity proposes a system that would link causation and culpability in mass tort, in order to prevent corporate defendants from pushing the limits of corporate irresponsibility in pursuit of profits.⁸ He first examines the challenges facing all toxic tort plaintiffs in proving causation, an essential element for any tort case, including various standards for admitting scientific evidence that have been developed by the Supreme Court.⁹ Professor McGarity asserts that trial courts have allowed corporate defendants to use these standards to exclude much of the plaintiff's evidence, even evidence that is generally supported by the scientific community.¹⁰ This fact seems especially egregious to Professor McGarity because these corporate defendants often knew of the risks involved in their products or actions and either took no precautions to protect the public from the risks or hid the risks from regulating agencies, all for economic reasons.¹¹ He then examines other solutions, and proposes a system that would allow the plaintiff to use various presumptions at trial, based on a federal agency's determination of the strength of the causal link between the plaintiff's exposure and injury and a determination of the defendant's evil intent.¹²

⁸Thomas O. McGarity, *A Proposal for Linking Culpability to Causation to Ensure Corporate Accountability for Toxic Risks*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 1 (2001).

⁹*Id.* at 5-35.

¹⁰*Id.* at 35-38.

¹¹*Id.*

¹²*Id.* at 38-66.

Professor Erichson examines the effect of the tobacco litigation on the “defendant advantage” in mass tort litigation.¹³ He explains that, in traditional personal injury lawsuits, an injured individual with limited resources is pitted against a large, wealthy corporation.¹⁴ Traditionally, this disparity in resources, information, organization, and experience has given the defendant corporation a substantial advantage in the litigation; a defendant victory was not guaranteed, but plaintiffs had to overcome significant obstacles to achieve victory.¹⁵ According to Professor Erichson, the history of the tobacco litigation provides a perfect example of this advantage.¹⁶ Professor Erichson examines the elements leading to the recent plaintiff victories in tobacco lawsuits, and concludes that future mass tort plaintiffs would be wise to follow these strategies to end the usual defendant advantage in other mass tort litigation.¹⁷

Professor Daynard and attorney Mark Gottlieb of the Tobacco Products Liability Project discuss the possibility of tobacco companies filing for Chapter 11 protection under the Bankruptcy Code in an effort to avoid the verdict recently imposed by the court in *Engle v. R.J. Reynolds Tobacco Co.*¹⁸ and any future verdicts.¹⁹ The two discuss the recent verdict in *Engle*, in which a jury imposed a \$145 billion punitive damages award against the tobacco industry.²⁰ They then examine the various possibilities for the future of the verdict in *Engle*, and conclude that, absent the class being decertified or the verdict being reduced, the tobacco companies will be liable for the entire amount, in addition to any compensatory damages awarded in the next phase of the trial.²¹ Tobacco companies could raise this money by raising cigarette prices, but the authors conclude that one or more tobacco companies may be forced to file for bankruptcy protection, and examine the potential drawbacks the companies may face in this solution.²²

¹³ Howard Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 123 (2001).

¹⁴ *Id.*

¹⁵ *Id.* at 124-29.

¹⁶ *Id.* at 127-29

¹⁷ *Id.* at 140-43.

¹⁸ No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. 2000).

¹⁹ Mark Gottlieb & Richard A. Daynard, *Will Big Tobacco Seek Bankruptcy Protection? A \$145 Billion Verdict Poses the Question*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 359 (2001).

²⁰ *Id.* at 360.

²¹ *Id.* at 360-62.

²² *Id.* at 364

Professor Weber examines the roles of state and federal courts in toxic tort litigation in light of the tobacco litigation and other recent developments.²³ He details the trend toward the use of state courts, rather than federal courts, as the forum for toxic tort litigation, concluding that this trend is proper.²⁴ He then develops five proposals that state courts should use to handle the influx of litigation.²⁵ Finally, Professor Weber concludes that federal courts still have an important role to play in mass tort litigation, as a backstop to due process violations that may take place in state court proceedings.²⁶

Professor Heinzerling and Cameron Powers Hoffman suggest the creation of a new tort for toxic exposure.²⁷ In establishing the need for this new tort, Professor Heinzerling examines the inadequacies of the traditional tort system in dealing with injuries arising from exposure to toxic substances.²⁸ She then discusses the special sociological and psychological problems inherent in exposure to toxic substances and asserts that these special problems support the creation of the new tort.²⁹ Professor Heinzerling concludes that, rather than looking merely to the statistical probability of disease caused by the toxic exposure, courts should recognize that, because of the fear and stress that accompanies the risk of disease, the exposure itself is the injury.³⁰

Professor Silver examines the conflict over fees involved in the Texas tobacco case, in light of a recent Texas Supreme Court fee forfeiture case.³¹ Although the tobacco fee dispute initially seemed to be a partisan attack, Professor Silver argues that the fee forfeiture case, allowing tort claimants to seek fee forfeiture without demonstrating any harm, gives the dispute greater import.³² Professor Silver asserts that the fee forfeiture case was a bad decision, based on a misinterpretation of the

²³ Mark Weber, *Forum Allocation in Toxic Tort Cases: Lessons Learned from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 93 (2001).

²⁴ *Id.* at 95-104.

²⁵ *Id.* at 104-10.

²⁶ *Id.* at 110-21.

²⁷ Lisa Heinzerling & Cameron Powers Hoffman, *Tortious Toxics*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 67, 68-69 (2001).

²⁸ *Id.* at 69-76.

²⁹ *Id.* at 76-90.

³⁰ *Id.* at 90-91.

³¹ Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 323 (2001).

³² *Id.* at 326-31.

Restatement (Second) of Agency and the Justices' decision to ignore precedent.³³ He concludes by acknowledging that conflicts of interest do exist for attorneys dealing with mass torts, but that the common law, rather than tort reform, is sufficient to deal with these conflicts.³⁴

Professor Brickman examines the fiduciary duties of mass tort attorneys.³⁵ He first examines the various ethical dilemmas faced by attorneys in aggregate litigation, with an emphasis on the coercive effects of aggregation on individual plaintiffs.³⁶ In addition, Professor Brickman details a new class of client abuses that have arisen as a result of burgeoning mass tort litigation, which, he asserts, the current rules of ethics are unable to handle.³⁷ He uses the asbestos settlements to demonstrate the negative effects these abuses can have on litigation in the future, concluding that the settlements were wrongly decided.³⁸ In contrast to Professor Silver, Professor Brickman approves of the Texas Supreme Court's fee forfeiture decision and others like it, but concludes that these decisions do not go far enough in correcting the abuses created by aggregate litigation.³⁹

Despite tough environmental laws designed to prevent the release of toxic substances into the environment, injuries caused by exposure to toxic substances will be the source of litigation for the foreseeable future. With this in mind, the Symposium sought to provide a forum for discussion about the problems inherent in such litigation and lessons to be learned from past litigation. The publication of these articles is intended to further the debate begun in March at the Symposium.

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2001 SYMPOSIUM EDITORS

³³ *Id.* at 331-38.

³⁴ *Id.* at 339-51.

³⁵ Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243 (2001).

³⁶ *Id.* at 243-52.

³⁷ *Id.* at 252-98.

³⁸ *Id.* at 298-308.

³⁹ *Id.* at 308-09.