The Risks of and Reactions to Underdeterrence in Torts

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As the 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, over-deter beneficial activity or conduct, it also may underdeter dangerous activity or conduct, especially in mass tort cases. 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.² Judges and scholars regularly state that deterrence - the prospect that liability can influence behavior - is one of the purposes of tort law.³ The legal economist recognizes that liability or the possibility of liability forces people to internalize accident costs by making them consider the costs of the injuries their activities may cause to others.⁴ 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.

This 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 actions, 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 by both expanding and extending the scholarly commentary. It presents both a vision and a theoretical view of mass torts that is too often ignored in today’s debate about tort reform.

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³. Id.
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. The chiaroscurist uses color and contrast to create the appearance of depth on the canvas. That appearance, however, is just an illusion created to show the real depth in the scene portrayed. In the debate about tort reform, 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 rather a seemingly irresolvable conflict. As a result, what really may be needed is an examination of why the tort reform discussion to date has been more of a rhetorical battle between plaintiff and defense interests over the proper role and form of tort law than an attempt to paint or repaint the canvas of American accident law.

Tort reformers frequently complain 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. 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. The goal of this article is to identify some of the areas in which current tort law underdeters and to discuss several possible solutions. Furthermore, the 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.


8. Of course, the tort reformer may claim that this article is 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.
One of the underlying notions of "tort reform" is that tort law today has produced liability where there should not be any, thereby resulting in underdeterrence, over-investments in safety, and frustrated development of life improving products and processes. As noted, the goal of this article is not to attempt to refute the notion that tort law can, and perhaps has overdeterred. Instead, the article will consider the possibility that although some aspects of tort law may overdeter, there may well be many areas where current tort law underdeters. That is, there may be multiple 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 these cases the underdeterrence is caused by the fact that not all who are injured choose to sue. 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.

This article seeks to identify some of the reasons for possible underdeterrence through discussion of 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 to apply each of these models in contexts where tort law currently underdeters. Not surprisingly, the one-on-one model holds the least promise for achieving efficient deterrence in mass tort cases because many of the underdeterrence problems arise as a result of this model. 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. However, this model may be somewhat limited by its punitive damages lineage, as well as

9. Tolerance 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. 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 basic equality and the concomitant notion of 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.

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 models have their own individual strengths and weaknesses with different models preferable in different situations.

Part II of this article will explain the deterrence problem in more detail and describe the four models for prosecuting and deciding tort cases. Part III will analyze underdeterrence and the strengths and weaknesses of each model in reference to particular aspects of underdeterrence in mass tort cases. The article will examine cases where all those 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 will set forth a brief conclusion.

II. DETERRENCE AND THE MODELS

Do tort rules efficiently deter? Or do some 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 others without having to compensate them or without having to consider possible liability, then those injury causing (or threatening) agents never need to take into account injury costs in deciding what to do, how to do it, and how to value their activities and the products, processes or services that result from those activities.11 Thus the relevant legal rules may 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.12 And consequently those who face less than all the costs of their activities are treated too well because they are effectively subsidized.13

In deciding tort cases, courts consider a wide variety of policies and goals: fairness, deterrence, compensation, adherence to precedent, consistency with legislative will, costs of judicial administration of various rules, punishment, risk spending, and more.14 The focus here is on deterrence;

12. Id. at 12.
13. See id.

https://scholarship.law.missouri.edu/mlr/vol70/iss3/2
what Judge Guido Calabresi calls "general deterrence."\textsuperscript{16} The notion, as alluded to above, is that effective deterrence works hand-in-hand with microeconomic principles of market behavior.\textsuperscript{17} When deciding what to do, how to do it, and how to price it, a person must face and consider accurate costs.\textsuperscript{18} If a person does not face accurate costs when acting rationally, she will behave in ways that are not optimal from a microeconomic perspective.\textsuperscript{19} She will not face an accurate marginal cost curve, which will result in overproduction, possible underpricing, and excessive injuries.\textsuperscript{20} 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.\textsuperscript{21} If the activity creates a risk of injury to others that the person engaging in the activity does not have to pay (or consider), a problem exists.\textsuperscript{22} More people will be hurt than would be hurt if the actor faced or considered all of the costs of her activity. Contrariwise, legal rules that force actors to take account of all the costs of their activities would encourage efficient investments in safety\textsuperscript{23} and would optimally deter dangerous behavior.

To the extent legal rules allow or result in "inefficient" injuries, society faces several serious problems. First, society faces a misallocation of resources.\textsuperscript{24} Second, some people are allowed to engage in activities without having to face accurate costs or accurate marginal cost curves.\textsuperscript{25} This threatens free competition, has wealth distribution effects, and causes unequal profit opportunities.\textsuperscript{26} Third, because the underdeterred are able to injure others at inefficiently high levels, they impact injured people's freedom in a way that is not only inefficient but also morally disturbing.\textsuperscript{27}

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15. 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.


17. Id.

18. See Galligan, Augmented Awards, supra note 11, at 10 n.10 (citing CALABRESI, supra note 14, at 70).


20. See id.

21. Id.

22. Id. at 887-89.

23. Id. at 889.

24. Id. at 879-80, 899-900.

25. Id. at 888-89. Of course, if legal rules overdeter, costs for the overdeterred would be too high.

26. See id. at 946-47.

27. Id. at 913-14. As part of a free society, individuals 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 society functions. Those rules appear in (1) constitutions, see generally U.S. CONST. amends. V and XIV (containing the two due process clauses), (2) statutes, see 42 U.S.C. § 1983 (2000) (providing civil recovery against any person who, under color of authority, deprives another of rights) and (3) regulations, see 8 C.F.R. § 264.1 (2004) (outlining

Consequently, to the extent tort law and the processes of deciding tort cases underdeter, society faces issues of grave concern, relating to the efficient use of resources, safety, freedom and equality.\textsuperscript{28} Thus, finding areas

that are necessary registration procedures for resident aliens. Key parts of that collection of rules are judicial decisions interpreting constitutions, statutes, and regulations or providing gap filling rules in the absence of direction from these rule sources. Except as otherwise "agreed," individuals are free to do as they choose.

Naturally, an issue society faces continuously is where one person's freedom to do as she pleases ends and another's begins? Some individual freedoms are so basic that society protects them from governmental intrusion in constitutions. Some freedom boundaries are governed by criminal law. Others are defined by non-criminal statutes. Still other freedoms are less clearly articulated. These are often left to the common law, including the law of torts. The law of torts - civil wrongs other than breaches of contract, see Victor E. Schwartz et al., Prosser, Wade, and Schwartz's Torts 1 (10th ed. 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 freedom.

From a torts perspective, individual freedom stops when one intentionally injures another under the general prohibition against battery. See Restatement (Second) of Torts § 13 (1965). Of more general application, one's freedom to do what he pleases is limited by what society may facilely call a general duty to exercise reasonable care to avoid affirmatively doing harm to others, i.e., the law of negligence. See id. §§ 282-83.

The freedom to behave as one chooses in the market is limited by (1) the duty not to manufacture unreasonably dangerous products, see Restatement (Third) of Torts: Prods. Liab. §§ 1-2 (1998); Restatement (Second) of Torts § 402A (1965), (2) the duty not to misrepresent facts upon which others rely to their detriment, see, e.g., Restatement (Third) of Torts: Prods. Liab. § 9 (1998), (3) the duty not to make false and defamatory statements about others, see Restatement (Second) of Torts § 558 (1965), and more. See Restatement (Third) of Torts: Prods. Liab. § 10 (1998) (imposing liability 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) (imposing liability for failure to recall a defective product in certain situations).

Obviously, this is a drastic oversimplification that ignores many hard issues. But the general point is that tort law is one of the legal places where society deals with the boundaries between people and the ultimate definition of freedom.

28. Like freedom, see supra note 27, equality is an important American value. 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 § 1 (the state equal protection clause). Many of the significant battles and legal battles in American history have dealt with equality and its meaning, such as the Civil War, the Suffrage movement, and the Civil Rights movement.

Where does equality fit with freedom? A part of the fit relates to the idea of equal opportunity. Ideally, the broad opportunities society promises should be equally available to all. At least those opportunities should only be denied by the government
where tort law may underdeter and considering how one might cure the problem merits continued consideration, as does the problem of overdeterrence.

Arguably, a primary source of underdeterrence in mass torts is the application of tort rules devised for one-on-one (bipolar) controversies to situations where the interests of many are at stake, i.e., mass torts. The modern reality that allegedly tortious conduct can impact numerous parties demands a reexamination of current models of tort decision-making and goals. To further the discussion, this section will turn to the one-on-one model and move from there to the other three models: the class action, the augmented award, and the governmental or public 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 the court focuses basically and primarily upon their interests.

In the most common form of class action, a group of plaintiffs comes together in a suit against the defendant(s). What makes the suit different is that the group of plaintiffs prosecutes its members' individual claims as a single group with a representative plaintiff handling the litigation for the

for good reason. What constitutes a good reason depends upon classifications, interests and varying levels of scrutiny and is beyond the scope of this paper. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1438-39 (2d ed. 1988). As a society, America is committed to a principle of equality.

This idea of equality also fits in with America's economic devotion to capitalism. Although some have questioned whether a capitalistic society can truly be one devoted to equality, others 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. See BLACK'S LAW DICTIONARY 2223, 989 (8th ed. 2004). While the end result in capitalism is not necessarily equality, the idea that people compete on a relatively even playing field is at its core. In the American economic system, economic agents compete for market share and profits. Profit is sales price minus cost. Id. at 1246. 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, generally, be able to sell more of the product. Those who are allowed to pay less than real cost effectively have a subsidy. Hidden subsidies raise concerns about transparency and open participation in government processes. They result in what may appear to be unequal treatment and may deprive those without the subsidy of an 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 society views the intersection of various agents' voluntary acts and their regulation. Are American rules relating to certain mass torts and their application consistent with notions of freedom and equality? In particular, do these rules encourage a rational system whereby freedom is adequately respected and people are treated equally?

30. Id.
32. See id.
group. Critically though, the class is a conglomeration of individual claims.

In the augmented award case, one plaintiff suing on her own behalf also seeks to recover an increased or augmented award in order to achieve optimal deterrence. In that capacity the augmented award plaintiff sues as a proxy for other injured victims who are not before the court. Today, augmented award claims may be more theoretical than real but they arguably exist as part of the broader realm of punitive damages.

Finally, the public tort suit involves a governmental entity filing suit. 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. Examples of public tort suits include tobacco suits, firearm suits, and lead paint suits.

III. UNDERDETERRENCE AND THE MODELS

Underdeterrence calling for this analysis of the different ways to handle tort cases exists for numerous reasons which create situations where some injured parties might not sue. Costs of suit, attitudes about justice and its accessibility, and difficulty of detection are just a few of the reasons. Alternatively, legal rules themselves may frustrate effective deterrence, particularly when rules based on values or notions appropriate to the one-on-one model of tort law are applied to activities that injure many.

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

As noted, the one-on-one model involves one person who does something to cause injury to a second person. In this model both the injurer and the injured are individuals. Examples include cases where a person hits another

33. Id. Somewhere 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. Fed. R. Civ. P. 19, 20(a) (2004).


35. See Galligan, Augmented Awards, supra note 11, at 12-13, 49.


38. Id. 1027. This action is known as a parens patriae action. Id.

39. Polinsky & Shavell, supra note 19, at 888.

40. Galligan, Augmented Awards, supra note 11, at 36-40; Galligan, Public Tort, supra note 14, at 1036-37; Rosenberg, supra note 31.
person or a person runs down another with his cart or car. In deciding whether or not the injuring person ought to pay the injured person, the court does not deal with the issue of insurance. That is, there is no insurance to think about - or if there is insurance, the decision-maker is not allowed to take that fact into account but instead evidence of insurance coverage is treated as irrelevant. Moreover, in this one-on-one case, if the defendant is a corporate entity, that fact is ignored even though the corporation has already received a liability limiting benefit from the state. Of course, the “owners” of a corporation have been allowed to limit their liability to the value of their investment in the enterprise. 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. The focus in the one-on-one case is deontological - it is on the parties and their moral relationship to one another and not on some other goal or end.

Traditionally under this one-on-one model, while there could be a case specific analysis of the defendant’s duty to the plaintiff, there is a case specific analysis of the defendant’s conduct. The conduct or breach question asks whether the defendant behaved as a reasonable person under the circumstances. This inquiry is a value based analysis whereby the defendant’s

41. See Restatement (Second) of Torts § 13 (1965).
42. See, e.g., Li v. Yellow Cab Co., 532 P.2d 1226, 1229 (Cal. 1975).
43. 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. Restatement (Second) of Torts § 920A cmt. c (1979). Of course, in states with direct action statutes, such as Louisiana, the fact that the defendant is insured is effectively made known to the jury as decision maker. See La. Rev. Stat. § 22:655 (2004).
44. Restatement (Second) of Torts § 920A cmt. c (1979).
45. See Franklin A. Gevurtz, Corporation Law § 1.1.1, at 4-5 (2000) (explaining limited liability companies and partnerships).
46. Id. at 4.
49. One of the first cases to use this analysis was the British case Vaughan v. Menlove. 132 Eng. Rep. 490 (1837).
50. 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.
particular behavior 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. It demanded that "but for" the defendant's particular alleged wrong, the plaintiff would not have suffered the particular injuries that he suffered. The law of torts has also 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. The effects of those traditional one-on-one legal rules will be addressed later.

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 such influence would not be admitted). The one-on-one model would still treat the case as an individual versus another individual and would apply the same rules as determinative of the case's outcome - duty/breach/cause-in-fact/proximate cause, etc.

The availability of insurance and the possibility of risk spreading drove the reasonable care revolution of the 1950s, 60s, and 70s. The "reasonable care revolution" was a distinct trend toward abrogating immunities and limited duties in certain contexts and analyzing defendants' conduct under the general reasonable care standard. In retrospect, it seems clear that the

51. Oliver Wendell Homes, The Common Law 96 (1881) (noting that the courts disfavor using the "cumbersome and expensive machinery" of the courts). The value, to steal a phrase from Holmes, is that society wants to be confident that, before it transfers assets from one person to another in a tort case, the transferor really did commit some wrong, i.e., breached some duty. See id.


54. Leon Green, Judge and Jury 74-77 (1930). Some have treated the proximate or legal cause problem as an issue of scope of duty. Id.

55. A most useful summary of the history of products liability under Restatement (Second) of Torts § 402A (1965), 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).

56. Gash, supra note 55, at 84.

57. 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).

58. Justice Peters, writing for the majority in Rowland (Justice Traynor concurred in the judgment) wrote that:
availability of insurance and post-World War II notions of risk spreading played a key role in developing this trend.\textquotesingle{} Likewise, the availability of insurance and risk spreading through increased prices greatly influenced the comparative fault explosion and impacted the development of product liability law.\textquotesingle{} For instance, strict product liability raised the possibility that more people would be compensated and risks spread broadly through increased prices and liability insurance.\textquotesingle{}

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 future premiums would, theoretically, reflect the costs of the injuries the entity caused. The entity “passed” on its accident costs through higher priced goods, those who used the goods either paid the price or did not buy the good, thereby leading to more limited production. But that limited production would be consistent with notions of capitalism that some economic agents ought not have special protections or liability limitations that are not available to others. This was the theoretical promise of the reasonable care revolution and strict products liability.\textquotesingle{} To the extent that the availability of insurance or the possibility of risk-spreading played a part in the development of legal

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.

59. 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).

60. One of the most famous early formulations of the strict liability rule was issued by Justice Traynor in Greenman v. Yuba Power Prods., Inc.: 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.


62. See supra note 57.
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.\textsuperscript{63}

\textbf{B. Multiple Injured Plaintiffs}

Today, the postmodern reality is that many actions give rise to not just one injury to one person but rather many injuries to many people. This factual reality creates complications. For example, think of the product liability design,\textsuperscript{64} warning,\textsuperscript{65} or misrepresentation case,\textsuperscript{66} or the toxic tort case.\textsuperscript{67} 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 societal notions of optimal deterrence?

\textbf{1. Enter the Class Action}

One procedural vehicle often employed in multiple injury cases is the Rule 23(b)(3) class action.\textsuperscript{68} The class action is a way to conglomerate individual claims, but for the class action to proceed, the similarities between the cases must be such that the cases can be joined as a class.\textsuperscript{69} Common issues of fact and law must predominate and the class action must be a superior device for resolution of the dispute.\textsuperscript{70} Federal Rule of Civil Procedure 23(b)(3) provides that “questions of law or fact common to the members of the class

\textsuperscript{63} See generally Ernest J. Weinrib, Deterrence and Corrective Justice, 50 UCLA L. REV. 621 (2002).

\textsuperscript{64} See Restatement (Third) of Torts: Prods. Liab. §§ 1-2 (b) (1998); Restatement (Second) of Torts § 402A (1965).

\textsuperscript{65} See Restatement (Third) of Torts: Prods. Liab. §§ 1, 2(c) (1998).


\textsuperscript{67} See In re “Agent Orange” Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980).

\textsuperscript{68} See Fed. R. Civ. P. 23 (2004). Of 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 Mesum, Note, Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma With Class, 104 Colum. L. Rev. 1114 (2004). But see Simon II Litigation v. Philip Morris USA Inc. (In re Simon II Litigation), 407 F.3d 125 (2d Cir. 2005) (rejecting a nationwide limited fund class action for punitive damages in tobacco cases). However, the 23(b)(3) “common questions” class is perhaps the most familiar, relevant, and common.

\textsuperscript{69} Fed. R. Civ. P. 23(a)-(b) (2004).

\textsuperscript{70} Id.
[must] predominate over any questions affecting only individual members.\textsuperscript{71} Where those common issues are not predominant, the 23(b)(3) class is inappropriate and the cases proceed as individual cases under the traditional model.\textsuperscript{72} In what contexts might the Rule 23(b)(3) class action be preferable to a series of one-on-one suits?\textsuperscript{73} One example is where all injured persons might not otherwise pursue claims in traditional individual suits.

2. Failure of All Injured Persons to Sue

Why might some injured persons choose not to sue?\textsuperscript{74} One reason might be because the costs of suit vis-a-vis the injuries suffered are so high that it is not worth the expense and effort for all individuals to bring a suit.\textsuperscript{75} Alternatively, and quite simply, some people may prefer to do other things than sue, such as go to the movies, watch TV, or play video games.

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

Under the traditional one-on-one model, if all injured parties 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, therefore, they 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, as a result, people will over consume the good or product. These defendants would be getting an advantage which could be characterized as effectively receiving a subsidy.


\textsuperscript{72} Even if there is no class there may be consolidated cases where the borders between individual cases, class actions, and joined claims blur.

\textsuperscript{73} 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.

\textsuperscript{74} If all injured individuals 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 Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 5, 119 Stat. 4, 12-13.

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 fail to pursue a claim, the class action would work to achieve optimal deterrence if there is sufficient commonality to the claims. The class would provide a mechanism to conglomorate all the claims into one suit and achieve efficient deterrence, assuming the transaction costs associated with the 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 A can ignore $100,000 in injury costs that he has imposed on others. Alternatively, if for personal reasons, only 40 injured people sue in one-on-one suits and recover a total of $40,000, 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. In such an instance there would be no liability and A would face less than the total costs in decision-making. In the previous example, 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.

c. The Augmented Award

There are 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. One could allow those who do file suit to recover augmented awards, or what Professor Sharkey aptly calls societal compensatory

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76. Relaxing 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.


78. As one insightful recent commentator has noted, class actions may have another benefit. See Note, Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Claim, 117 HARV. L. REV. 2665 (2004). 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. See id. The individual plaintiff cannot. See id. Conglomerating claims in a class action may offset some of this litigation investment asymmetry.
damages,\textsuperscript{79} equal in amount to the value of the claims not filed. This may be called the augmented award approach.\textsuperscript{80} The strength of this approach is that it leads to efficient deterrence and avoids the transaction costs inherent in class certification, communications, and distributions.\textsuperscript{81} 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.

As noted, the augmented award may add the possibility of efficient deterrence when the class action would not. 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 provide a more cost effective way to achieve efficient deterrence. Continuing with the same example, if the transaction costs of prosecuting the augmented award suit are less than $60,000, it should lead to optimal deterrence where the class action would not. This is because when the transaction costs are less than the expected recovery, a rational person would proceed because recovery will result in a net gain.

Not surprisingly, there are several potential downsides to augmented award suits. First, they may result in a windfall to the plaintiff.\textsuperscript{82} That windfall may be irrelevant for purposes of deterrence but it may offend notions about just rewards,\textsuperscript{83} the desirability of rent seeking behavior in lawsuits,\textsuperscript{84} and the lottery effect of judicial proceedings. Moreover, the 60 hypothetical victims who did not sue but whose damages were awarded to the augmented award plaintiff are not compensated for their loss. If those 60 victims have simply decided not to sue because on some level it is not worthwhile to them, so be it. But what if their decision has led to dependence upon public programs or private largesse? Should it bother society that an augmented award plaintiff has recovered the victim’s loss and others are “supporting” the vic-


\textsuperscript{80} Arguably, a limited fund class action seeking punitive damages 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. See Semra Mesulam, Note, \textit{Collective Awards and Limited Punishment: Solving the Punitive Damages Dilemma With Class}, 104 COLUM. L. REV. 1114 (2004). \textit{But see} Simon II Litig. v. Philip Morris USA Inc. \textit{(In re Simon II Litig.)}, 407 F.3d 125 (2d Cir. 2005) (rejecting a nationwide limited fund class action for punitive damages in tobacco cases).

\textsuperscript{81} \textit{See} Galligan, \textit{Augmented Awards}, supra note 11, at 40.

\textsuperscript{82} \textit{See} Galligan, \textit{Augmented Awards}, supra note 11, at 58.

\textsuperscript{83} \textit{Id.; see also} DAN B. DOBBS, \textit{LAW OF REMEDIES: DAMAGES - EQUITY - RESTITUTION} §§ 3.9, 4.1, at 270-76, 365-82 (2d ed. 1993).

\textsuperscript{84} Galligan, \textit{Augmented Awards}, supra note 11, at 73.
tim(s)? Professor Sharkey’s proposals regarding what she calls societal compensatory damages solve some of these problems as she argues for the viability of a back end class action to provide compensation.\(^8\) One area of inquiry here is the transaction costs of the back end class action device designed to achieve some compensatory effect. In other words, will the “back end” costs of identifying and compensating victims of defendants’ conduct be so excessive as to stop plaintiffs from proceeding in the first place?

Another arguable problem with augmented awards relates to the traditional requirements for recovery of punitive damages. Recall, as mentioned earlier,\(^6\) that the deterrence aspect of the augmented award suit may be falling under the doctrinal umbrella of punitive damages. Usually, in punitive damages cases, the law requires that the plaintiff establish the defendant acted willfully, recklessly, or wantonly.\(^7\) That standard arguably is too high if the primary concern is whether the plaintiff is recovering sufficient amounts to lead to efficient deterrence.\(^8\) Here, the deterrence problem is not with the defendant’s particularly egregious behavior,\(^9\) but arises from the fact that many plaintiffs choose not to file suit. 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.\(^\) Objections may be made to this heightened burden of proof in the efficient deterrence context.\(^\) One obvious solution would be to disaggregate the punitive aspect from the deterrence-based aspect of the increased award. Augmented awards or societal compensatory damages conceivably could lead to more efficient deterrence and, consequently, fairer treatment for both defendants and plaintiffs. Defendants would be forced to

85. See Sharkey, supra note 76, at 409 & n.224. Professor Sharkey defines a back end class action entailing “a bifurcated trial procedure, whereby Rule 23-like protections would attach in the second phase, following the first individual compensatory and damages phase, when societal damages would be assessed and distributed.” Id. at 354.

86. See supra notes 35-37 and accompanying text.

87. See Dobbs, supra note 6, § 381, at 1064-66.

88. See Galligan, Augmented Awards, supra note 11, at 62-63 (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.”).

89. Id.

90. John 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).

91. See Galligan, Disaggregating, supra note 36, at 150-151.
take account of all the costs of their activities. And plaintiffs would not have the freedom to act and live their lives unduly impacted by a rational, profit-maximizing defendant who is allowed to injure the plaintiff without financial concern for the injury.92 Moreover, the augmented award has procedural cost saving possibilities vis-à-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 as compared to those that are involved in the class action.93

The augmented award suit is a much different looking beast than the traditional tort suit with which this discussion began. As such, it may threaten traditional values and its development might be predictably slow. Avoiding overdeterrence is another concern with the augmented award suit.94 The previous hypothetical 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 after the augmented award plaintiff recovers the $60,000, 15 plaintiffs whom it was assumed would not sue file suit and recover $1,000 each, then $115,000 in liability has been imposed on A for causing $100,000 in losses.95 That $115,000 would inefficiently overdeter A for creating such injuries and would force A to pay $15,000 more in damages than the value of the injuries that A actually caused. One way to avoid overdeterrence would be to hold the augmented award suit in abeyance or hold the recovery in escrow until the statute of limitations has run on individual claims. Of course, this becomes a problematic solution with the possibility of tolling of the statute pursuant to the “discovery” doctrine.96 This problem could be severe in the context of the long latency disease claim.

92. Externalities have been defined as “[a]ccident 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, 1-7 (1980).
93. See FED. R. CIV. P. 23(c) (2005).
95. This breaks down to $40,000 to those who sued and recovered; $60,000 to the augmented awards plaintiff; and $15,000 to the later filing plaintiffs.
96. Dobbs 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
d. The Public Tort Suit

The public tort suit is another device whereby efficient deterrence could be achieved in multiple victim cases where all who are injured do not sue. Here a governmental entity files suit to recover otherwise unsought or unrecovered damages as a surrogate plaintiff. The public tort suit avoids not only the individual windfall problem associated with augmented awards but also the standard of care and standard of proof problems inherent in current punitive damages cases. The governmental tort suit may, however, be subject to the broader objection that the government should not be allowed to recover as surrogate for injured individuals and should not be able to recover absent some legislative action. That is, defendants might object to what they perceive as taxation by lawsuit, but the objections are insufficient to justify denying these claims across the board. At the same time 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. To allow the suit potentially disallows the subsidy and causes an efficient allocation of resources. However, as with the augmented award suit, the vehicle is new (at least in this context) and threatens tradition. If that threat to tradition can improve the deterrent effect of the tort system, then change seems desirable. The public tort suit’s promise is optimal deterrence with somewhat reduced litigation costs.

It may be worthwhile to digress for a moment to say a word about some of the recent high profile public tort suits. The federal and state tobacco

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was connected with the injury to require further investigation that in turn would have revealed the defendant’s connection.

DOBBS, supra note 6, § 218, at 554.

97. See Galligan, Public Tort, supra note 14, at 1022-23.
98. Id.
99. See supra notes 82-91 and accompanying text.
100. Id. at 1050.
101. Id. ("The separation of powers doctrine does not seem to require legislative authorization for the public tort suit.").
suits are examples of public tort suits,104 as are the lead paint abatement suits105 and the municipal suits against firearm manufacturers.106

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.107 In these suits the governmental plaintiffs seek to recover costs allegedly incurred as a result of firearm related crime.108 Some of the suits survived motions to dismiss109 while others did not.110 Several of the courts refusing to allow claims to proceed relied upon the notion that other branches of government were more appropriately conceived, formed and staffed to regulate the distribution and sale of firearms.111 Courts that have dismissed the public tort firearms suits112 and municipal claims in other cases113 rely upon the notion that the government's 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. Some may object that the last two sentences ignore the reality that criminal misuse of firearms is foreseeable, but 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 leading to a lack of liability in the municipal firearms cases is that the municipalities' claims are derivative. In other words, the governmental

106. See Galligan, Public Tort, supra note 14, at 1025-27.
107. See id. at 1024-27.
108. See id. at 1025.
111. Sturm, Ruger & Co., 309 A.2d at 105-06.
112. See supra note 118 and accompanying text.
entity's claim derives from the injuries that the physical victim of gun violence suffers.\footnote{City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 424-25 (3d Cir. 2002).} As one court has put it, "[t]hose immediately and directly injured by gun violence - such as gunshot wound victims - are more appropriate plaintiffs than the City or the organizational plaintiffs whose injuries are more indirect."\footnote{Id. at 425.} 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 both 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?\footnote{Of 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. \textit{See id.}} This deterrence loss may be caused by direct plaintiffs not suing, or by legal rules that deny recovery. Put differently, the better plaintiff aspect of the remoteness argument seems to say that if there is a better plaintiff who \textit{can} sue, \textit{will} sue, and \textit{can} recover, he or she is a better, more interested, and more compelling plaintiff. It does \textit{not} say that if there is no such plaintiff, the municipality may \textit{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 award 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 award suit, there would be a deterrence loss. Thus, where the government did not act, the augmented award suit potentially is an attractive and desirable option for purposes of achieving optimal deterrence.

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

e. Limited Access to Justice Under the Models

Up to now, it has been assumed that the reason some injured parties do not sue is because they have decided filing suit individually is simply not worth while. Alternatively, as Judge Calabresi pointed out in his concurring opinion in \textit{Ciraolo v. City of New York},\footnote{Ciraolo v. City of New York, 216 F.3d 236, 242-50 (2d Cir. 2000) (Calabresi, J., concurring).} people may not sue because...
they are unaccustomed to or uncomfortable with legal institutions. 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. For instance, assume the claim is that the defendant’s conduct causes injury to people outside and on the street in Bad City after ten p.m. Further, assume that many of those injured are homeless people used to being mistreated by those in authority. It is likely many injured people might not sue because of a concern with being identified or suffering disadvantageous publicity. Of course, if one sued on behalf of a class which could be identified, the class action might be an effective device to achieve optimal deterrence. Alternatively, if one injured victim sued and sought an augmented award, that claim might achieve optimal deterrence. Of course, if a public entity filed suit “on behalf” of those injured, efficient deterrence might also be achieved.

But there also may be problems in employing one of these suits. 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. Or, they may be “relatively poor and unsophisticated.” Thus, as a practical result, the class action or augmented awards claim may be more effective in achieving optimal deterrence than other models.

3. Difficulty of Detection and the Models

Building on Polinsky and Shavell’s groundbreaking work, assume that the reason why all injured parties 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 this case the wrongdoer can often expect to escape liability. Here, pursuing a 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 and aggregation of unprovable claims help? It appears that linking the defendant to individual plaintiff 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

118. See id. at 244 (Calabresi, J., concurring) (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.”).


120. Ciraolo, 216 F.3d at 244 (Calabresi, J., concurring).

121. See Polinsky & Shavell, supra note 19.
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. Additionally, a governmental tort suit might also provide an efficient device for achieving deterrence in the difficulty of detection content.

C. Tort Rules and Underdeterrence

Now, assume that all those who are injured will file suit. Traditional tort rules may still frustrate deterrence because tort rules created in and for the one-on-one model may themselves result in underdeterrence when applied to multiple injury cases. That is, traditional tort rules concerning cause-in-fact and proximate cause as articulated and applied in one-on-one cases may actually be the source of underdeterrence. The following subsections will examine some of these rules and problems.

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 also assume that there are background risks of developing that same adverse health consequence. Thus, assume that 100 plaintiffs have the disease and all file suit. Further assume that there is a 50 percent chance each of those 100 sick people developed the adverse health consequence because of the background risks and that there is a 50 percent chance each developed the condition or disease because of the exposure.

Under the traditional one-on-one model none of the plaintiffs will recover from the defendant because none will be able to establish by a preponderance of the evidence that the defendant's actions caused them to develop the condition. The plaintiffs cannot prove cause-in-fact under the traditional approach nor can they prove by a preponderance of the evidence that but-for

122. See Polinsky & Shavell, supra note 19, at 887-96 (see especially 895 n.66, where Polinsky and Shavell comment on the connection between damages and the probability of suit).

123. See Galligan, Augmented Awards, supra note 11, at 29-30.

124. See Galligan, Disaggregating, supra note 36, 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 Galligan, Public Tort, supra note 14, at 1036-37.
the defendant’s conduct they would not have suffered the disease. Making the claim a class action does not help because the class cannot prove cause-in-fact either. Of course, this result is logical because the class is only a conglomeration of individual claims.

Moreover, augmented awards will not work because under traditional cause-in-fact standards, no one plaintiff will be successful. Thus, no one’s recovery can be augmented. The governmental public suit might pose the best potential for fixing the deterrence deficit because the suit might result in a governmental entity recovering from the defendant 50 percent of the total “condition” costs for the population of 100 individuals. After all it is known that the defendant caused 50 percent of the total “dismissed condition” costs. The only unknown fact is which individuals have the condition because of the tortfeasor.

Changing the rules regarding causation or duty is another way to reach the same result. That is, if each person exposed could recover for the possibility that the defendant caused their injury, each individual might recover 50 percent of his total damages. There is a resemblance here to the lost chance of survival theory of recovery in medical malpractice cases. If the underlying law were to change, then individual suits, provided everyone chooses to sue, would achieve efficient deterrence and cost internalization. Class actions would also 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 person representing otherwise unrecovered losses would be effective if everyone did not sue and the risks of overdeterrence could be avoided. Recovery would have to be limited to the

125. In 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, Anderson v. Minneapolis, St. Paul & S.S.M. Ry., involved two fires (causes), either of which alone would have caused plaintiff’s injuries. 179 N.W. 45 (Minn. 1920). While Anderson itself was overruled in part by Borsheim v. Great Northern Railroad Co., 183 N.W. 519 (Minn. 1921), it is cited here as much for the famous fact pattern it discusses as for its actual holding. 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., Acosta v. Babcock & Wilcox (In re Manguno), 961 F.2d 533 (5th Cir. 1992).

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 award, and class action provide no help.

What about a case where it is known that the plaintiff’s condition was caused by exposure to a particular product and no background risk problem exists? All four models could work to provide optimal deterrence. For the individual suits to achieve efficient deterrence all plaintiffs must sue. The class action would be efficient, as would an augmented award or public tort suit, assuming there is no overdeterrence. Now consider a complicating factor. Suppose that while the plaintiff knows a particular product caused her particular condition, she cannot say which of the several identical products she used caused the condition. This is the DES problem.\footnote{127} In the DES cases, women took a generic drug designed to limit miscarriages. The drug was manufactured by a number of different manufacturers.\footnote{128} Later, the women’s daughters developed cancer attributable to the DES.\footnote{129} But because the drugs were generic, the women often could not identify the manufacturers of the particular DES that they ingested.\footnote{130} 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.\footnote{131} 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, however, the traditional one-on-one model is strained.

The solution that some courts have adopted in the absence of identification is “market share” liability.\footnote{132} Under one form of market share liability, the defendant is liable to the individual plaintiff for a portion of the individual plaintiff’s damages, proportional to the defendant’s share of the market.\footnote{133} This is a radical oversimplification of the theory. Under some variants of the theory there are complex shifting burdens of proof.\footnote{134} Under others, a defen-

\footnotesize{127. Perhaps the two most famous DES cases are \textit{Hymovitz v. Eli Lilly & Co.}, 539 N.E.2d 1069 (N.Y. 1989), and \textit{Sindell v. Abbott Labs.}, 607 P.2d 924 (Cal. 1980).
130. \textit{Hymovitz}, 539 N.E.2d at 1072.
133. See Dobbs, \textit{supra} note 2, §176 at 431.}

\footnotesize{134. See Martin v. Abbott Labs., Inc., 689 P.2d 368, 375 (Wash. 1984). There, the court said:

[1]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 defen-
Dant is not liable if it proved that it definitely did not produce the particular DES that the plaintiff or her mother ingested.135

The market share theory represents a change in traditional legal rules about responsibility and causation because it changed one of the core rules formerly depended upon to keep things honest: cause-in-fact. Market share is also different because while there might only be one plaintiff in a particular suit, there are multiple possible responsible defendants who might be liable. In some states that have adopted some version of market share liability, application of the market share theory of causation or liability depends upon the plaintiff joining a substantial share of the market as defendants.136

However, nothing about market share necessarily affects the numbers on the plaintiff’s side of the "v." That is, market share effectively functions as a theory of recovery regardless of the number of plaintiffs. It does seem, however, that the theory is more persuasive when there is a class or group of plaintiffs 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.

A major problem with the class vehicle in DES-type cases is that there may be no commonality in reference to the injuries suffered by the individual plaintiffs.137 Thus, a class for purposes of liability 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 award vehicle is another possibility in DES-type cases. The public tort suit also holds promise but tends to upset many people who think the government should not interfere.138

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Dant. Defendants unable to meet the burden of proof are found jointly and severally liable.

*Id.*

135. 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 Black v. Abex Co., 603 N.W.2d 182, 190 (N.D. 1999); Bowe v. Abbott Labs., Inc., 608 N.E.2d 223, 225 n.1 (Ill. Ct. App. 1992). One 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.


137. See *Fed. R. Civ. P. 23(a) (2004)* (requiring that there be "questions of law or 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").

138. One last cautionary word on cause-in-fact (although there is much more to say). The common belief that plaintiffs’ lawyers should always prefer a "relaxed" rule as to cause-in-fact and that the "but for" rule is always the friend of the defendant is not always correct. In one case, *Perkins v. Entergy*, the Louisiana Supreme Court was faced with a complex case involving power outages, negligent maintenance of electric utilities and connections, death, and personal injury. 782 So. 2d 606 (La. 2001). The plaintiffs had gotten a judgment relying, in part, on the "but for" test for cause-in-fact. *Id.* at 609, 613. The lawyers had used a chain of proof relating various events to the
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 connection between the defendant's conduct and the plaintiff's injuries. The most famous articulation of this required connection is Judge Cardozo's majority opinion in *Palsgraf v. Long Island Railroad*. 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." Of course, Judge Cardozo actually decided the case as a matter of lack of 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 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/causeation 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. In some cases the battle over the law is real: Is there a duty to protect against negligently inflicting emotional distress? Is there a duty to provide medical monitoring? But in

death and underlying negligence through a series of "but fors." *Id.* at 613-14. 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. *Id.* at 613, 619. 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 she proved defendant's fault was a substantial factor in bringing about the plaintiff's injuries. *Id.* at 611-12. The Perkins analysis turns what was a plaintiff-friendly test (the substantial factor test) on its head, because under its analysis, what satisfies the "but for" test (this event would not have happened if another event had not happened first) still might not satisfy some decision makers' notion of what constitutes a "substantial factor."

140. *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.").
141. *Id.* at 100-01.
142. See Dobbs, supra note 6, § 312, at 848-51. 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.*
143. *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
many cases, the law is putty. The tests are even putty in the hands of able judges and lawyers and savvy jurors. Were the plaintiff's injuries direct?144 Remote?145 Foreseeable?146 A natural and probable result of the defendant's actions?147

a. The One-on-One Model

A narrow focus utilizing the one-on-one model may demand that an injured party receive no recovery. Consider the example of the third party criminal act.148 Does a person (merchant, manufacturer, lessor) have an obligation to protect against a third party criminal act? Looking at the facts of particular 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 from such inherently base, anti-social action.149 But in pulling back and fo-

for diagnostic expenses and also with the rule that permits recovery of expenses incurred to minimize damages.”).

144. Id. §§ 184-85, at 453-60 (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.

145. 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.”).

146. 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.”).


148. 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 Saelzler v. Advanced Group 400, 40 CAL. W. L. REV. 79, 80 (2003). In Saelzler, 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 assaulted. Id. at 81. Of course, there are legislative proposals to limit liability in firearm suits and other “mass consumer” suits, such as fast food suits. See, e.g., T.R. Goldman, Tort Lobby Sharpen Its Aim on Hill, LEGAL TIMES, June 23, 2005. For a discussion of fast food litigation, see Donald R. Richardson, "Want Fries with That?" A Critical Analysis of Fast Food Litigation, 107 W. VA. L. REV. 575 (2005).

149. A good example of this principle can be found in Lopez v. McDonald's Corp., 238 Cal. Rptr. 436 (Cal. Ct. App. 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
cusing more generally, what might not be foreseeable in an individual case may appear downright inevitable when one focuses upon broader classes of plaintiffs. Thus in a one-on-one case, the decision might be no recovery and that decision might be correct. 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 therefore not take account of that category of accident costs in the decision making calculus. 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 do not find commonality of causation issues. That is, if the judicial perspective on the class action is that it is solely a collection of traditional one-on-one cases, certification will be denied and individual cases will proceed. In those cases the particularities of individual fact patterns will probably 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.

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 manicidal, 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).

150. See Galligan, Public Tort, supra note 14, at 1038-40.
151. Id. at 1040.
152. Id. at 1039.
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 suit seems a likely possibility for efficient deterrence. But the issues of improper governmental action are, of course, still prevalent. Up to now, discussion about the public tort suit has proceeded as if the government acted as a collector or proxy in these cases or, in other words, as if governmental recovery related to the government collecting damages suffered by others. The public suit works because it could be an efficient tool for recovery where for some reason those others do not sue or 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. These are costs that the governmental entity incurs as a result of the defendants' actions and because of injury caused to individual citizens. If the defendant involved is never liable for the costs it imposed upon the state then it will never take such costs 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 underdeter by effectively absolving the entity from 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 is perfectly acceptable if that is the decision society wants to make, but it should be aware of the consequences of that decision.

3. Medical Monitoring

Now consider another type of case where individual claims might not achieve efficient deterrence – the medical monitoring claim. Traditionally, outside of the intentional tort context, the law required the "at fault" defendant to have caused-in-fact some injury. Can the plaintiff recover, how-

155. See, e.g., Dobbs, supra note 2, section 110 at 258.
ever, where the defendant's conduct has not yet caused injury, but may lead to injury in the future? Should a defendant be liable to a plaintiff or a class of plaintiffs for the costs of medical monitoring? The medical monitoring claim is in some ways at the crossroads of the traditional cause-in-fact, duty, and damages requirements. In some ways the monitoring 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. Even in the traditional suit the plaintiff is allowed to recover for the future anticipated effects of the injury suffered. In those traditional cases, however, some real injury already has occurred; that is not the case in the medical monitoring claim. Contrariwise, at least in certain types of tort cases, plaintiffs have been allowed 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 much more sense. 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 which, if detected early could be treated more effectively, becomes particularly compelling. Augmented awards arguably have less applicability here. The idea is not to pay someone off to encourage efficient deterrence but to try and encourage monitoring that could efficiently minimize total damages. Perhaps the most compelling case of all for medical monitoring would be a public tort suit where the plaintiff sues 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. Nevertheless, most courts that have dealt with the issue have held that insurers cannot recover from tobacco companies for health related costs attributed to tobacco.

156. For a related explanation and discussion of medical monitoring, see Galligan, Disaggregating, supra note 34, at 124-25.
157. See id.
158. See generally, Dobbs, supra note 2 at § 468 at 1338-39 (discussing remedies for nuisance, including injunction.
IV. 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 who has been 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 tort cases, courts decide where one person’s freedom ends and another person’s freedom begins. In a capitalist society, allowing someone to act without having to take full account of the costs of his or her actions is to give excessive protection to that person’s freedom. In the accident arena, that excessive freedom is obtained at the expense of both injured citizens and 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,” it should not ignore the very real 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.