

## Toxic Tort Litigation in a Regulatory World\*

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### I. INTRODUCTION

Times change and problems change, and the question for us is to define the respective roles of public and private law in dealing with our environmental problems. Private law, and especially the law of torts, has developed to meet the relatively novel brute facts and challenges of the modern petrochemical age.<sup>1</sup> As we moved from a world filled with sticks and stones to one with processed hydrocarbons and enhanced radiation, our responsibilities to our neighbors, workers and trading partners likewise shifted.<sup>2</sup> These developments tracked changes seen and documented in private law and torts at analogous historic moments when the law has moved, albeit slowly, to meet new challenges,<sup>3</sup> such as the advent of industrialization,<sup>4</sup> the automobile,<sup>5</sup> franchising,<sup>6</sup> and mass marketing.<sup>7</sup>

That tort law develops in incremental ways in response to a changing world is not news.<sup>8</sup> Nor is it much debated that, under appropriate circumstances, such developments, including those involving environmental and toxic torts,<sup>9</sup> have been consistent with the common

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\* This article is a partial adaptation of Allan Kanner, *The Politics of Toxic Tort Law*, 2 WIDENER L. SYMP. J. 163 (1997); copyright 1997, Widener Law Symposium Journal & Allan Kanner. In that article, I sought to elaborate on the forces animating doctrinal battles in toxic tort law. Here my desire is to compare the relative efficacy of toxic tort law to that of public law solutions.

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1. Allan Kanner, *Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation*, 18 RUTGERS L.J. 343 (1987). [hereinafter *Emerging Conceptions*].

2. See, e.g., *Six Case Studies of Compensation for Toxic Substance Pollution*, REPORT PREPARED FOR THE LIBRARY OF CONG. & THE SENATE COMM. ON THE ENV'T & PUB. WORKS (Env'tl. Law Institute 1980); Samuel D. Estep, *Radiation Injuries and Statistics: The Need for a New Approach to Injury Litigation*, 59 MICH. L. REV. 259 (1960); see also, *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

3. See, e.g., Peter H. Schuck, *Introduction to TORT LAW AND THE PUBLIC INTEREST* 17 (Peter H. Schuck ed., 1991).

4. See, e.g., Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974).

5. See, e.g., Thomas F. Lambert, Jr., *The Common Law: Steadfast and Changing*, 25 NACCA L.J. 25, 30 (1960) (referring to *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)).

6. STEWART MACAULAY, *LAW AND THE BALANCE OF POWER* (1966) (auto manufacturers and dealers).

7. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 18 J. LEGAL STUD. 461 (1985).

8. See Schuck, *supra* note 3; Lambert, *supra* note 5.

9. See ALLAN KANNER, *ENVIRONMENTAL & TOXIC TORT TRIALS* § 1.00 (1991 & Supp. 1997). For our purposes here, toxic torts include pollution torts, product torts, and mass disaster torts. While no single definition of "toxic torts" would meet with universal acceptance, it is generally agreed that toxic tort litigation deals with those special kinds of injuries that are gener-

law tradition.<sup>10</sup> Nor is it disputed that tort law works.<sup>11</sup> As the Supreme Court said,

Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy . . . . That our citizens have access to their civil courts is not an evil to be regretted; rather it is an attribute of our system of justice in which we ought to take pride.<sup>12</sup>

What is significant for our purposes is that what has animated these changes in tort law, and toxic tort law especially, is both different from what drives public law regulation of the environment,<sup>13</sup> and instructive as to the importance of a continuing role for toxic tort litigation in a world increasingly dominated by public law. Indeed, it may well be that the processes and value of private law are superior in certain respects to public law as it relates to environmental regulations. Specifically, the tort litigation process embodies certain ideals and methods that we associate with better decisions of a certain type than the ideals and instrumentalities of the regulatory process would allow.

The types of decision best left to tort certainly concern the one-on-one relations of everyday living. For example, a landowner should be allowed to sue an oil and gas operator for damages done to his or her property.<sup>14</sup> In some instances, mass tort class actions may also be appropriate, such as where the polluted site sits under a discrete neighborhood.<sup>15</sup> Subject always to the requirement of fairness and

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ally new to the law since the World War II period - for example, the injuries resulting from asbestos, dioxin, DES, rezulin, propulsid, and toxic waste disposal. The broad range of substances that can be considered hazardous is suggested by the definition of "hazardous waste" in the Resource Conservation and Recovery Act of 1976, § 1004(5), 42 U.S.C. § 6903(5) (1995):

[A] solid waste, or a combination of solid wastes, which because of its quantity, concentration, or physical chemical, or infectious characteristics may - (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

10. Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 488 n.62 (1962).

11. See, e.g., Marshall S. Shapo, *Tort Law and Environmental Risk*, 14 PACE ENVTL. L. REV. 531, 531 (1997) ("It is plain that tort law cleans up messes.")

12. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 643 (1985).

13. The issue here is, of course, different than merely using public law to codify common law standards. See, e.g., Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

14. See, e.g., *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475 (La. 1991).

15. *E.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140 (8th Cir. 1999); *Wehner v. Syntex Corp.*, 117 F.R.D. 641 (N.D. Cal. 1987).

efficiency, the same result may be true when someone sells a dangerous substance to numerous public schools.<sup>16</sup>

These examples, and others discussed below, in each case produce a result that seems satisfactorily linked to the strengths of the tort process. Of course, an examination of the connection between a process, such as the tort system, and the legitimacy of its results is by no means novel.<sup>17</sup> Much can and has been said about the relative merits of the civil justice process and public law administration in resolving various types of problems.<sup>18</sup> Whether certain modes of mass tort adjudication, and extant case management problems, may undermine this superiority of tort is hotly debated and must be considered carefully.<sup>19</sup> What we find is that much of this debate, about the forms and limits of tort, is being ignored in decisions about implied preemption and requested stays of civil law suits in favor of administrative forums. More important, few legislators or regulators take seriously enough the option of doing nothing or less in response to a problem that can be dealt with satisfactorily at common law. These shortcomings stem often from a lack of understanding about tort.

## II. NEW BRUTE FACTS

Toxic torts are not new,<sup>20</sup> and neither is governmental regulation.<sup>21</sup> However, the magnitude and severity of the underlying problem changed during the past century, especially in the period following World War II.<sup>22</sup> This idea is best captured by Justice Jackson:

This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and

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16. *E.g.*, In re Asbestos Sch. Litigation, 104 F.R.D. 422 (E.D. Pa. 1984).

17. *E.g.*, HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN MAKING AND APPLICATION OF LAW* (Tent. ed., 1958).

18. There is a lot to be said about whether administration process is even a defined process. See generally KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* (1976); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

19. Glen D. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481 (1992).

20. For example, the prospect that one's present medical condition will worsen has long been compensable, even if that possible future harm is cancer. *E.g.*, *Alley v. Charlotte Pipe & Foundry Co.*, 74 S.E. 885, 886 (N.C. 1912) (plaintiff burned by molten iron as a result of defendant-employer's negligence and the physician testified cancer was likely to develop, holding that the probability of developing cancer "must necessarily have a most depressing effect upon the injured person" and is a compensable component of mental distress). On current medical monitoring law in toxic tort cases, see Allan Kanner, *How To Justify Claims For Medical Monitoring*, 8 HAZARDOUS WASTE & TOXIC TORTS 1 (1993); Allan Kanner, *Medical Monitoring: State and Federal Perspectives*, 2 TUL. ENVTL. L.J. 1 (1989).

21. *E.g.*, WILLIAM H. RODGERS, JR., *HANDBOOK OF ENVIRONMENTAL LAW* 201 (1977) (In 1306, King Edward issued a decree "compelling all but Smiths to eschew the obnoxious material (coal) and return to the fuel of old.")

22. *E.g.*, Wolfgang von Oettingen, *The Halogenated Aliphatic, Olefinic, Cyclic, Aromatic, and Aliphatic-Aromatic Hydrocarbons: Including the Halogenated Insecticides, Their Toxicity and Potential Dangers*, U.S. Dept. of Health, Educ. & Welfare, Pub. Health Serv. Pub. L. No. 414, 341-42 (1955); W. C. HUEPER, *OCCUPATIONAL TUMORS AND ALLIED DISEASES* (1942).

drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.<sup>23</sup>

By the late 1960's the United States began to focus unprecedented attention on the environmental problems associated with modern technology.<sup>24</sup> This dynamic led to the promulgation of various environmental laws during President Nixon's first term, and the eventual creation of the Environmental Protection Agency.<sup>25</sup> Most of these rules dealt with monitoring industry by means of new record-keeping and reporting requirements.<sup>26</sup> Some rules eventually came to address operational conduct, including cleanup and technology choices, although the effectiveness and efficiency of such rules are often challenged.

More important, during this process, public perceptions about the handling of pollution and reality of modern technology appeared to have begun to change, especially in the politically important suburbs.<sup>27</sup> This process accelerated following certain highly publicized

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23. *Dalehite v. United States*, 346 U.S. 15, 51-52 (1953) (Jackson, J., dissenting). In *McDonald v. Mianeki*, 398 A.2d 1283 (N.J. 1979), Justice Pashman discussed in great detail the history and viability of the doctrine of *caveat emptor*. Quoting with approval an earlier decision of the court, he stated:

We noted that *Caveat emptor* was an established doctrine in real estate law but emphasized that:

[t]he law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. \* \* \*

*Id.* at 1291 (quoting *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965)).

24. *E.g.*, *Report on Environmental Health Problems: Hearings Before the Subcomm. of Comm. on Appropriations*, 86th Cong. 170 (1960); RACHEL CARSON, *SILENT SPRING* (1962); FRANK GRAHAM, JR., *SINCE SILENT SPRING* (1970).

25. *E.g.*, MARC KARNIS LANDY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON* 22 (1994).

26. Allan Kanner, *Future Trends in Toxic Tort Litigation*, 20 *RUTGERS L.J.* 667, 673-77 (1989).

27. *E.g.*, Robert Cameron Mitchell, *Public Opinion and Environmental Politics in the 1970's and 1980's*, in *ENVIRONMENTAL POLICY IN THE 1980S: REAGAN'S NEW AGENDA* 51-74 (Norman J. Vig & Michael E. Kraft eds., 1984).

events,<sup>28</sup> such as the incident at Three Mile Island,<sup>29</sup> and the discovery of buried toxins at Love Canal.<sup>30</sup> At that moment, the primary public concern was to clean up our country.

For a moment in time, these events and the publicity that ensued, galvanized public opinion enough to develop a political consensus to “solve the problem,” even to the extent that other public goals and important values were temporarily trumped or trampled. The solution was Superfund, which was, with limited exceptions, a poorly articulated law<sup>31</sup> that wasted billions of dollars without achieving much real cleanup.<sup>32</sup> Indeed, the current thinking now in Washington is to support “Brownfield Redevelopment,” which attempts to liberate environmental cleanup from Superfund and return it to an economically incentivized private sector which is pretty much where we were before Superfund.<sup>33</sup>

What is interesting about Superfund for our purposes is how the academic community immediately and almost unanimously concluded that tort law could not meet the challenges of modern pollution.<sup>34</sup> Most scholars felt tort law was inadequate to deal with pollution torts.<sup>35</sup> Admittedly, toxic tort litigation did raise serious problems for plaintiffs.<sup>36</sup> However, the initial, near consensus supported the crea-

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28. Technology has not only produced new risks that require accounting by the tort system, but technology has magnified the danger of behavior which previously had posed relatively few risks and the losses have been emphasized because of the injuries and losses “arising out of a complex, technological, and ever more mechanized society.” *Williams v. City of Detroit*, 111 N.W.2d 1, 23 (Mich. 1961).

29. The author was co-counsel for plaintiffs in *In re Three Mile Island Litigation*, 605 F. Supp. 778 (M.D. Pa. 1985) (class action for medical monitoring and economic loss).

30. The author was co-counsel for plaintiff in the adjacent Hyde Park-Bloody Run Litigation, *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 247 (1984). For background on Love Canal, see ADELINE GORDON LEVINE, *LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE* (1982).

31. On the political advantages of statutory imprecision and ambiguity, see BRUCE A. ACKERMAN & WILLIAM T. HASTER, *CLEAN COAL/DIRTY AIR* 35-38 (1981); Angus MacIntyre, *Administrative Initiative and Theories of Implementation: Federal Pesticide Policy*, in *PUBLIC POLICY AND THE NATURAL ENVIRONMENT* 231-32 (Helen Ingram & Kenneth Godwin eds., 1985).

32. The author was lead counsel for plaintiff in the first successful private party action for cleanup under Superfund, *Walls v. Waste Res. Corp.*, 761 F.2d 311 (6th Cir. 1985). See Diane M. Connolly, Comment, *Successor Landowner Suits for Recovery of Hazardous Waste Cleanup Costs: CERCLA Section 107(a)(4)*, 33 *UCLA L. REV.* 1737, 1748 n.72 (1986); see also *Walls v. Waste Res. Corp.*, 823 F.2d 977 (6th Cir. 1987).

33. Allan Kanner, *Rebuilding America*, 20 *NAT'L ASS'N ENVTL. PROF'LS NEWS* 17 (Nov.-Dec. 1995); Allan Kanner, *Rethinking Superfund*, 20 *NAT'L ASS'N ENVTL. PROF'LS NEWS* 19 (May-June 1995).

34. See, e.g., Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 *HOFSTRA L. REV.* 859 (1981); Warren J. Hurwitz, Note, *Environmental Health: An Analysis of Available and Proposed Remedies for Victims of Toxic Waste Contamination*, 7 *AM. J.L. & MED.* 61 (1981); Note, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 *RUTGERS L. REV.* 117 (1980); Martin H. Sokolow, Jr., Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions*, 14 *CONN. L. REV.* 307 (1982).

35. See, e.g., Joel Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 *HARV. L. REV.* 489 (1981).

36. On the problems facing potential plaintiffs seeking tort recovery for exposure to carcinogens, see SUPERFUND § 301(E) STUDY GROUP, *Injuries and Damages From Hazardous Waste - Analysis and Improvement of Legal Remedies - A Report to Congress in Compliance with*

tion of a federal private right of action for toxic tort damages or specialized agencies to adjudicate these claims.<sup>37</sup> This result was fortunately avoided because Professor Grad took a different approach on the need for a private cause of action with Superfund. Congress likewise determined that generally these problems were not insurmountable, even though they had not generally been surmounted at that point in time.<sup>38</sup> The notable exception was with the problem of a discovery rule for the running of state statute of limitations, which resulted in legislation creating a federal discovery date.<sup>39</sup>

In short, as the world was seen to change after Love Canal, there was a concern that private law was neither enough nor up to the task of remedying the new problems such as pollution, and latent injuries or the volume of otherwise manageable problems arising from mass torts.

### III. DOCTRINAL CHANGE

Tort law has in fact developed to meet these challenges in many ways. Problems of statute of limitations,<sup>40</sup> causation,<sup>41</sup> multiple defendants,<sup>42</sup> expert proof,<sup>43</sup> novel injuries<sup>44</sup> and case management<sup>45</sup> have all been addressed individually and collectively. Although some law reformers complain about the need for legislative or administrative solutions, common law courts are responding to concrete

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§ 301(E) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, pt. 1, at 55-56, 116-17, 196 [hereinafter SUPERFUND STUDY GROUP].

37. Of course, some scholars went the other direction. *E.g.*, Julian Conrad Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126; William C. Porter, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968).

38. SUPERFUND STUDY GROUP, *supra* note 36.

39. Allan Kanner & Eunice Trevor, *Federal Expansion of State Statute of Limitations In Hazardous Materials Cases*, 29 THE BARRISTER 34 (Winter 1988-89) [hereinafter *Statute of Limitations*].

40. *Id.*

41. *E.g.*, Allan Kanner, *Ruminations On Trial By Jury: An Essay In Honor of Judge Robert S. Vance*, 5 TOXIC L. REP. (BNA), No. 12, pt. I, 415 (Aug. 22, 1990); No. 13, pt. II, 448 (Aug. 29, 1990).

42. *E.g.*, George A. LaMarca, *Market Share Liability, Industry-Wide Liability, Alternative Liability and Concert of Action: Modern Legal Concepts Preserving Liability for Defective But Unidentifiable Products*, 31 DRAKE L. REV. 61 (1981-82) (various product identification theories); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 462 (1985).

43. *E.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

44. On new theories of compensable injuries, see JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 152 (1995).

45. *E.g.*, *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (D.C.N.Y. 1984). Public law models have begun to impact on private law toxic tort cases, especially civil procedure and evidence law. A greater variety of toxic tort claims are being handled as class actions, and mass torts. *E.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140 (8th Cir. 1999) (affirming post-*Amchem* environmental and toxic tort class action settlement); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988). Indeed, some remedies such as medical monitoring may be better suited for class action treatment. See *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987).

problems<sup>46</sup> by developing jurisprudence to deal with the unique features of toxic tort litigation.<sup>47</sup> For example, common law courts have allowed recovery for a greater variety of injuries,<sup>48</sup> eliminated many product identification problems associated with mass marketing,<sup>49</sup> and ameliorated statute of limitations problems associated with multiple and time-delayed harms.<sup>50</sup>

For example, taking the brute fact of latency, common law courts have recognized the possibility of two diseases: one an acute manifestation, the other chronic. Rather than forcing one law suit for all claims early, which would necessitate present suits for “increased risk” of future harms under a rigid statute of limitations,<sup>51</sup> the courts have recognized a two disease rule<sup>52</sup> allowing a more orderly and concrete litigation process.<sup>53</sup> To the extent current actions could mitigate that possible future harm, actions for medical monitoring were allowed at common law.<sup>54</sup>

Another example is the growing importance of restoration damages in toxic tort litigation.<sup>55</sup> The old idea was to limit property damages to fair market value, except where restoration was less costly or necessitated by some special need of the victim.<sup>56</sup> Now, more courts are asking if the old damages equation allows polluters the unilateral right to condemn property (with no showing of public necessity)

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46. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102:

It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation [and, by analogy, the common law] is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis for a prosecution.

47. *E.g.*, R. Lisle Baker & Michael J. Markoff, *By-Products Liability: Using Common Law Private Actions To Clean Up Hazardous Waste Sites*, 10 HARV. ENVTL. L. REV. 99, 100 (1986) (reviewing common law doctrine applicable to hazardous waste remediation); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972).

48. ALLAN KANNER, *ENVIRONMENTAL & TOXIC TORT TRIALS* 1-13 (Supp. 1997).

49. *Id.*

50. *See, e.g., id.*; *Emerging Conceptions*, *supra* note 1 (variety of harms compensable); *Statute of Limitations*, *supra* note 39. Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983) (statute of limitations).

51. This was the situation in New York State at the time of *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242 (1984). This situation was subsequently changed by legislation creating a discovery rule that had the effect of mooted the issue of an increased risk claim. *See Snyder v. Town Insulation, Inc.*, 615 N.E.2d 999 (N.Y. 1993).

52. *Mauro v. Raymark Indus. Inc.*, 561 A.2d 257 (N.J. 1989).

53. *Vispiano v. Ashland Chem. Co.*, 527 A.2d 66 (N.J. 1987).

54. *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987); *In re Three Mile Island Litig.*, 557 F. Supp. 96 (M.D. Pa. 1982); *see also* Amy B. Blumberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 703-04, 713 (1992). Other examples are discussed in KANNER, *supra* note 9, at § 1.00.

55. *See* KANNER, *supra* note 9, at § 12.14.

56. RESTATEMENT (SECOND) OF TORTS § 929 (1977).

whenever it is cheaper to do so than to cleanup its mess.<sup>57</sup> This old formula is arguably bad policy because it cheapens the victim's property rights and creates no incentive for the polluter to internalize the true cost of its polluting conduct. The common law appears to be moving in that direction.<sup>58</sup>

#### IV. TORT AND PUBLIC LAW

##### A. *Case Specific Adjudication vs. Abstract (And Often Misguided) Policy Statements by Bureaucrats*

A core difference between tort and public law is focus. Tort proceeds traditionally on a case-by-case basis that looks backwards at an historic event in which someone or something was damaged.<sup>59</sup> The goals of compensation and deterrence are generally the concrete focus of the litigation. Case-specific adjudication provides for a good balance between the rights and responsibilities of modern society.<sup>60</sup> This balance for many issues, especially relational issues, is superior to public law and bureaucracy.<sup>61</sup> Public law looks forward at relatively abstract issues and uses elite approaches to problem definition and resolution such as the cost-benefit analysis.<sup>62</sup> Although this methodology is not without its critics,<sup>63</sup> this is the general approach of public regulatory law.<sup>64</sup>

57. *E.g.*, *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475 (La. 1991); *Mailman's Steam Carpet Cleaning Corp. v. Lizotte*, 616 N.E.2d 85 (Mass. 1993); *Escamilla v. Asarco*, No. 91-CU-5716 (D.Ct. Denver, Apr. 23, 1993); KANNER, *supra* note 9, at § 12.14.

58. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

59. A different analysis may apply in a mass tort for medical monitoring, or in the case of mature torts.

60. Kenneth S. Abraham, Essay, *What Is A Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172 (1992).

61. Donald E. Elliott, *The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems*, 25 HOUS. L. REV. 781, 783-86 (1988) (trial as morality play).

62. See Richard D. Morgenstern, *Economic Analysis: Benefits, Costs, Implications*, in ECONOMIC ANALYSIS AT EPA: ASSESSING REGULATORY IMPACT 455 (Richard D. Morgenstern ed., 1997). *But see* Exercise of Federal Oversight Within Scope of Statutory Authority: Planned Introductions of Biotechnology Products into the Environment, 57 Fed. Reg. 6753-01, 6762 (quoting President's Council on Competitiveness, Fact Sheet on Critical Technologies (Apr. 1991), stating that "[r]egulations . . . should address risks that are real and significant rather than hypothetical or remote"). The "risk-based approach" to regulatory oversight endorsed by and described in the Scope document is viewed as critical if the "heavy costs" associated with regulation are to be avoided. *Id.* at 6760.

63. DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (1999) (assessing arguments on both sides of the debate).

64. This may be changing, given what we are seeing from the current Supreme Court, especially Justice Scalia. On that view, the review of agency actions often turns on a finding of individual rights violations in concrete situations as opposed to more abstract debate about regulatory process. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992) ("The province of the court, [according to *Marbury*] 'is, solely, to decide on the rights of individuals.' Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

Judge Weinstein makes the case against exclusive reliance on cost benefit analysis as follows:

That the tort system is still needed for some deterrent functions — however crude — is illustrated by *Corrosion Proof Fittings v. E.P.A.* After all the adverse information about asbestos revealed by litigation, OSHA, and the Consumer Products Safety Commission, EPA adopted a final rule banning the use and sale of most products containing asbestos. The Court of Appeals reversed the EPA's decision in 1991 because all the regulatory "t"s had not been crossed. Saving 148-202 lives at a cost of \$450-\$800 million was not, it held, justified by the statute.<sup>65</sup>

Yet, as we have seen in the recent property rights attack on certain forms of environmental regulations, abstract public policy often improperly ignores real rights. These same property rights allow a landowner to seek tort damages against a polluter who has created a nuisance, despite a permit;<sup>66</sup> or, who has allowed pollution to trespass onto or under the landowner's land, consistent with a government-approved cleanup plan.<sup>67</sup> Group wrongs of a certain type may be different as they invite abstraction. Even then, the question is how to decide the question.<sup>68</sup> Because many of the underlying problems are systemic, the involvement of political bureaucrats or mass tort adjudication, or some combination of the two appears inevitable.

Juries focus best on the actual consequences of actions in the past. It is retrospective, not prospective. This is why the injury requirement is so important to tort. Real problems, as opposed to expert speculations, seem a more appropriate focus for environmental dispute resolution so long as private entities are free to fairly contract about the resolution of future problems.<sup>69</sup>

## B. *Democratic Decisions*

Agencies are assumed to be expert and non-partisan. The idea is that public policy requires the management and technical abilities of a policy elite. Their job in the environmental area is to eliminate conflicts or strike balance, where possible, between economic growth and the environment. This view ignores the individual and institutional

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65. WEINSTEIN, *supra* note 44, at 6.

66. *E.g.*, *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475 (La. 1991).

67. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140 (8th Cir. 1999).

68. Elliott, *supra* note 61.

69. *Magnolia Coal Terminal*, 576 So.2d 475 (contractual duty to restore property trumps subsequent efforts to avoid cleanup by seeking agency concurrence).

interests and biases of agencies.<sup>70</sup> Individuals are subject to capture.<sup>71</sup> The agency often is both regulator *and* promoter.<sup>72</sup> The agency may also be concerned with developing itself as a legitimate institution at the expense of the quality of its decision.<sup>73</sup>

Democratic decisions are sometimes wrong. Yet they are in some sense more legitimate than elite or expert decisions, which, while purportedly non-partisan,<sup>74</sup> are generally abstract<sup>75</sup> and are likewise sometimes wrong.<sup>76</sup> Take the Food and Drug Administration (FDA), which is particularly susceptible to criticism from both sides of the regulatory aisle. On the one hand, the agency may be viewed as being composed of "slow, unimaginative bureaucrats who are intent on disapproving drugs so as to avoid criticism by Congressional committees," while on the other hand, the agency may be criticized for its "personal allegiance to the medical profession and the drug industry . . . quick to approve new drugs without adequate evidence for safety . . . slow and inept in withdrawing drugs from the market."<sup>77</sup>

The traditional idea in tort was to have a jury decide all facts needed to resolve a one-on-one dispute. This reflects a high level of democratic faith. However, there is growing concern in some segments that judges should take a more active role in the tort process.

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70. See Barry Commoner, *The Hazards of Risk Assessment*, 14 COLUM. J. ENVTL. L. 365, 365-66 (1989), explaining that "the new technology is chosen in advance of the risk assessment . . . [which] is not used to decide which technology to use, but rather how to best defend the choice already made." See also Elliott, *supra* note 61, at 795 (stating that "[a]dministrators reach their decision on political grounds, then instruct their lawyers to write opinions rationalizing them in terms of the relevant scientific and technical facts.>").

71. See Allan Kanner, *Environmental and Toxic Tort Issues*, C127 ALI-ABA 775, 797, n.50 (1995) (citing Ziem & Castleman, *Threshold Limit Values: Historical Perspectives and Current Practice*, J. OCCUP. MED. Nov. 1989, at 910 (referring to Occupational Safety and Health Act (OSHA))).

72. See *Marshall v. Consumers Power Co.*, 237 N.W.2d 266, 279-80 (Mich. Ct. App. 1975) (referring to the Atomic Energy Commission as being formed to "fulfill the often conflicting goals of both regulating and promoting nuclear energy"); see also Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 978 (1988) ("empirical worries arise about the susceptibility of various agencies to influence by powerful private groups").

73. Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972) (agencies interest in settling cases for use as precedent).

74. Partisan is not always bad. *Red Lion Broad. Co. v. Fed. Communications Comm'n*, 395 U.S. 367, 392, n.18, (1969). "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." *Id.* (quoting JOHN STUART MILLS, ON LIBERTY 32 (R. McCallum ed., 1947) (1859)).

75. See, JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976) (criticizing *Palsgraf* decision for ignoring detailed facts in favor of abstractions); DAVID A. RICHARD, *THE MORAL CRITICISM OF LAW* 5 (1977) ("Serious moral thought about Social Questions of any complexity obviously requires close attention to matters of empirical fact.>").

76. The civil justice system is a unique forum for adversarial conflict. What is most unique is the strategic judicial use of doctrinal characterization for allocation of power purposes. LEON GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927); LEON GREEN, *JUDGE AND JURY* (1930).

77. Richard Crant, *The Nature of Regulatory Choices*, 33 FOOD DRUG COSM. L.J. 413 (1978).

To some extent these concerns are relatively procedural such as the idea that in mass tort cases, the court should assume a more managerial role.<sup>78</sup> In other respects, the idea is that judges should pre-screen evidence for the jury.<sup>79</sup> The concern is that science is too complex and cutting edge. Others believe that this is all the more reason to rely on democratic morality<sup>80</sup> while these novel torts mature. The issue remains whether the solution to environmental disputes should turn on common judgments or be left to expert elites,<sup>81</sup> and whether such disputes should be approached on the fact intensive, case-by-case basis of the common law.

The civil justice system and tort, when operating properly, strike an appropriate balance between democratic control and expertise. This is to be contrasted with political and bureaucratic alternatives that rarely succeed in restraining the undue influence of narrow interest groups.

### C. *Market Failure*

Public law is designed to deal with market failure and externalities.<sup>82</sup> One explanation for public law and the need for regulatory agencies is that they address the failure of market exchange mechanisms. The classic example is the pollution externality, a social cost that common law and the free market arguably fail to force a firm to internalize. Regulations deal with both eliminating costs and promoting certain goods for which the market fails to provide. This makes sense with damages to public goods, such as natural resources. This often makes less sense with people and their property for a number of reasons. For example, national or federal guidelines can be overly rigid and insensitive to differing local and individual conditions.

Yet, common law can and does regulate. Although tort focuses on compensation and deterrence, certain remedies like medical monitoring certainly satisfy that focus, but as applied in class actions, begin to look like regulation. However, tort law, to the extent it includes punitive damages, inescapably regulates. The Supreme Court has been comfortable with this function, and found tort not to be preempted even in highly regulated fields.<sup>83</sup> The incremental approach of the common law is one of its strengths. Looking at a prior conflict

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78. *E.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

79. *E.g.*, KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* (1997).

80. Elliott, *supra* note 61, at 783-86 (trial as morality play).

81. Allan Kanner, *The Politics of Toxic Tort Law*, 2 WIDENER L. SYMP. J. 163 (1997).

82. Denis J. Brion, *An Essay on LULU, NIMBY and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 443, 456 (1988) (pollution as an externality for companies seeking to maximize profits).

83. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

on a case-by-case basis necessitates focused judgments, which provide guidance to future cases. Certainly, mass torts challenge this approach.

#### D. *Some Examples*

In *Magnolia Coal Terminal v. Phillips Oil Co.*,<sup>84</sup> a surface owner sued Phillips, the sub-surface mineral owner, for restoration damages arising from a closed, but allegedly leaking, oil well. Phillips asked for a stay of civil proceedings in favor of a regulatory determination about whether the well was leaking. The trial court refused, but Phillips went ahead, presented expert proof and received an administrative finding that the well was not leaking. The trial court refused to accept this finding as binding on plaintiffs. During discovery, a small army of internal company documents (none of which were shown to its testifying experts or the regulators) revealed Phillips' knowledge of the leak and its decision to cover it up. The case reveals a great deal about the superiority of a process that insists on grounding expert proof and a single property dispute on hard facts, and the importance of discovery rights in exposing all relevant circumstances.

Restoration damages, such as those recognized in *Magnolia* are important for a number of reasons. First, polluters should not be allowed to condemn property, say that of a neighboring landowner where one's pollution has migrated to that property, with a liability only for a fair market value measure of damages might allow. Even government is not allowed to do this. Second, fair market value is inadequate because in addition to the loss of value of land, there is the residual risk to the neighbor of liability to third parties.

The leading Supreme Court case on common law restitution in the environmental context is *Wyandotte Transportation Co. v. United States*,<sup>85</sup> in which the federal government successfully sought restitution from a garage owner who had refused, after notice, to remove a sunken barge containing liquid chlorine from the Mississippi River. In applying the restitution principle, the Supreme Court noted that denial of the removal costs would "permit the result . . . of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim."<sup>86</sup>

In *Petrovic v. Amoco Oil Co.*,<sup>87</sup> a government-approved cleanup plan allowed Amoco to leave pollution on its property and in the aquifer below it and below neighboring homes. The plan was one of a

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84. Thayer, *supra* note 13. The author was lead counsel for plaintiffs in *Magnolia Coal*.

85. 389 U.S. 191 (1967).

86. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204 (1967).

87. 200 F.3d 1140 (8th Cir. 1999) The author was lead counsel for plaintiffs in *Petrovic*.

number of options considered during the Remedial Investigation/Feasibility Study (ARI/FS) and was supported in the Record of Decision (AROD), in part, on cost-benefit grounds. Real estate property values were booming in the area except at this locale. Plaintiff sued and, at first, Amoco tried to use the government-approved cleanup plan as a complete defense. Yet, this ultimately failed because the government did not (and could not) condemn the neighboring homes. In essence, all Amoco could say (leaving aside numerous documents found in discovery) was that a pollution easement would be economically beneficial to it at the expense of its neighbors.<sup>88</sup> The lesson here is that government oversight of certain cleanup activities may not be a good check on inadequate cleanups. However, despite the requirement of a community relations program in a cleanup context, government is not in the business of adjudicating comprehensive cleanup solutions that trample on important individual property rights of non-polluting neighbors.

*Petrovic* also underscores an important trend in pollution cases to plead fraud where the polluter has manipulated its system to the detriment of its neighbors who or which have been waiting for cleanup.<sup>89</sup> Fraud allows private law to scrutinize the allegedly law-abiding conduct of defendant.<sup>90</sup>

In *Ren-Dan Farms, Inc. v. Monsanto Co.*,<sup>91</sup> a national class of farmers successfully sued Monsanto for damages arising from genetically altered cotton. Generally speaking, there are many examples of the potential unknown dangers of releasing certain organisms into the environment without understanding or appreciating the possible long term implications and consequences of such releases. For instance, by cross-pollinating certain strains of corn, agriculturalists created a hybrid seed that produced a greater yield, but that was less resistant to a certain type of fungus, which wiped out fifteen percent of the American corn crop in 1970 causing an estimated \$1 billion in losses.<sup>92</sup> The lesson again is that the adverse economic impact of such regulatorily approved experiments can be handled by the tort system. Moreover, implied preemption (as opposed to a clear legislative choice to free an

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88. As one author put it, "when given a choice between property with no history of contamination and one with prior environmental problems (even after an effective cleanup program), a knowledgeable and prudent user or investor would choose the property with no prior environmental problems." J. MCGEE, REAL ESTATE GUIDE APPRAISAL OF AN ENVIRONMENTALLY CONTAMINATED PROPERTY (1992).

89. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140 (8th Cir. 1999).

90. Obviously, this sort of thing occurs in negligence, negligence per se and regulated industry defenses.

91. 952 F. Supp. 370 (W.D. La. 1997) (no preemption under Federal Seed Act; remanding case). The author was lead counsel for plaintiffs in *Ren-Dan*.

92. See Stuart Auchincloss, *Does Genetic Engineering Need Genetic Engineers?: Should the Regulation of Genetic Engineering Include a New Professional Discipline?*, 20 B.C. ENVTL. AFF. L. REV. 37, 42-44 (1993).

actor of responsibility for damages and to place the cost of experiments on a sub-class of the public) does not appear to be appropriate.

What I remember most about the *In re Three Mile Island Litigation*<sup>93</sup> were the pre-accident studies by industry and Nuclear Regulatory Commission (NRC) experts about the billions-to-one risk of there being an accident.<sup>94</sup> I cite this not to belittle the foresight of that expert, but rather to suggest that while experts properly look forward, we have a long tradition of juries successfully looking backwards at what happened and trying to make it right.

## V. CONCLUSION

John Maynard Keynes once said, “the important thing for government is not to do things which individuals are doing already, and to do them a little better or a little worse; but to do those things which at present are not done at all.”<sup>95</sup> With the addition to the notion “and that need to be done,” this point of view should guide our thinking in determining when more government regulation is truly needed in the environmental and toxic tort area.

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93. 557 F. Supp. 96 (M.D. Pa. 1982).

94. In August 1974, the Atomic Energy Commission (AEC) released a draft version of a report entitled REACTOR SAFETY STUDY (RSS), sometimes called the Rasmussen Report after Norman C. Rasmussen of MIT, the nuclear engineer who directed it. The RSS attempted to determine probabilities and consequences of major reactor accidents. The worst accident was predicted to occur once every billion years. On October 30, 1975, the NRC, the AEC's successor, released its final version of the RSS.

95. Morris K. Udell, *Forward* to MARC K. LANDY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS*, at ix (1990).