South Carolina Law Review

Volume 38 | Issue 3 Article 10

Winter 1987

Commentaries II

COMMENTARIES II

REMARKS OF THE HONORABLE ROBERT E. KEETON*

Professor Cooper's excellent and thoughtful paper suggests avenues of speculation about the future that are both numerous and significant. I am torn between barely noting many and selecting just one or two for closer (although I will not say strict) scrutiny. The following are some of the issues and controversies arising from mass litigation that we will be forced to address sooner or later.

First, are our current substantive and procedural laws capable of dealing with claims arising from these kinds of human events? As illustrations, consider just three subquestions:

(1) Can current law deal adequately with claims of cause in fact relation between wrongful conduct and claimed harm? Is the drug, or the product, or the activity—whatever kind of activity it is and whether we think of the action as a tort case or a commercial case or a price fixing case—capable of causing the kind of harm that the claim asserts? If so, did it actually cause the kind of harm to each of the many plaintiffs who are parties to this action or who are members of a plaintiff class that is sought to be certified? To what extent in determining answers to these so-called questions of fact may the fact finder, whether jury or court, base inferences on, for example, epidemiological evidence showing significant correlation between allegedly tortious conduct and the incidence of disease in the population of the allegedly affected community? In dealing with those questions, the impartial mind is attracted to alternatives to all-or-nothing joint-and-several liability rules, where everything turns on a single, more-probable-than-not finding. We are currently developing exotic variations on alternative and proportional liability and proportional contribution. We are doing so in an effort to deal with some of the relatively less complex litigation currently being presented to our courts, in the search for more re-

* Judge, United States District Court for the District of Masschusetts. B.B.A., 1940; LL.B., 1941, University of Texas; S.J.D., 1956, Harvard University.

fined justice. Are our present interdependent rules of substantive and procedural law well designed for use in answering these kinds of questions in more massive litigation? If not, who should be doing what to improve them?

(2) Are our current substantive and procedural laws capable of dealing with claims of entitlement to a remedy for increasing one's susceptibility to disease or other harm, or, conversely stated, reducing one's likelihood of escaping harm within a given time period or a given context? A bare handful of decisions in recent years have begun to address this kind of question. For example, an expert witness testifies in the trial court that before the patient was exposed to an unreasonably hazardous drug, the patient had no better than a forty percent chance of living longer than three years and that the exposure to the drug reduced the chance of living at least three years to twenty-five percent. When the patient dies two years later, what are the applicable substantive and procedural rules? Do we accept the defendant's contention that the claim fails because it cannot be proved that, more probably than not, the patient would have been alive three years hence but for use of the drug or do we fashion some modification of law, of procedure, or both? Do we allow recovery, and, if so, in what amount? For example, do we allow recovery for the full measure of damages in wrongful death actions or for fifteen percent of that amount as compensation for the fifteen percent reduction of the chance of survival, or do we adopt some other measure taking into account that death was always certain and only the time of death was in doubt? What rules can we fashion that will deal adequately, and at reasonable adjudication costs, with all the many patients who used that hazardous drug before it was ultimately removed from the market for the stated reason by the manufacturer that projected liability insurance costs had become prohibitive?

(3) How shall we make use of and avoid abuse of expert testimony? I have been deeply troubled by abuses with respect to expert testimony in today's ordinary litigation where the opportunities for detecting and deterring abuse call for less sophistication on the part of lawyers and judges than will be required in more massive litigation of all types—including securities frauds, price fixing conspiracies, and other complex commercial cases, as well as disasters more massive than plane crashes and dangerous prescriptions. How will we control abuses in these more complex

cases and at what cost and sacrifices of other valued interests? How did that expert in the hypothetical arrive at the rather precise estimate of forty percent chance of survival before, twenty-five percent after, and, therefore, fifteen percent reduction of chance of survival for the stated length of time? Why three years rather than two or five or ten? Should the trial judge have allowed the jury to hear such expert testimony? These are questions being presented in trial courts today. How much more difficult will be the questions in the year 2011, 2036, and 2086?

I have been puzzled about something else on this program: the progressing willingness, as the conference has proceeded, to project into the future. A moment ago, I think I got the clue to the reason: The group of commentators that are younger are more willing to project into the future. Before I conclude, I will go further than anybody else so far. The subquestions I have stated are just a few illustrations of subquestions related to specific areas of the law.

Let us consider a second major question: Will controversies arising from mass disasters produce such stress on our legal system as to force attention not only to the problems of substantive and procedural law Professor Cooper noted,[1] but also attention to proposals for intrusive and rigorous regulations of adversary presentation if, indeed, we succeed in preserving adversary trial? We already have rules and practices as to whether multiple parties, some of whom appeal the result of a six-month trial, may have more than fifteen minutes each to argue on appeal. Must we, for example, also develop rules, practices, and standards under which trial courts decide whether the parties will be allowed only six weeks or six days, instead of six months? Those questions will be decided by the courts, not the parties.

This kind of question calls attention to a deeper truth. Neither substantive nor procedural law, as taught in law schools and treated in statutes and court opinions, nor the two combined, tell us the whole story about the law in action—the law as it comes to bear in the actual resolution of controversies. These rules, in aggregate, do not even tell us the whole story about the small percentage of the controversies resolved by authoritative decisions, much less the ninety percent (and this percentage is

1. *See, e.g.*, Cooper, *supra* pp. 491-93.

increasing, I think, because of lack of resources for dispute resolution) that are resolved by settlement or other nondecisional disposition.

The dramatically higher costs of administering increasingly refined rules of substantive and procedural law will underscore the contrast between law in theory and law in action. The contrast may be so stark, so compelling, that it persuades law teachers to pay more attention to it as they try to help even first year students understand the law.

Now, a third major question: To what extent do the pressures toward what Professor Cooper has aptly called "unitary consideration to avoid repetitive litigation"[2] also push toward one national law and one national system of dispute resolution? Will one national substantive law replace multistate substantive law in mass disaster cases? Will one national procedural law replace multistate procedural law for truly national or even international disasters to person and property? On the other hand, how forceful will be the very clear pressures to serve interests in local autonomy as to governing law and interests in hometown dispute resolution?

A fourth major question: How will we adjust our fact-finding functions to adjudicate claims arising from mass disasters? Professor Cooper calls attention to the interdependence of procedural rules and rules of claim preclusion and issue preclusion.[3] There is also a further interdependence with rules regarding who makes the fact findings, and how these findings are made. Will fact findings bearing upon legal responsibility for mass disasters be treated as adjudicative and thus binding only under rules of res judicata, or, if you prefer, issue preclusion and claim preclusion, or instead treated as not adjudicative and thus as binding precedents under the doctrine of stare decisis? For example, is a finding in a particular case that Product X is or is not carcinogenic a nonadjudicative finding and binding under stare decisis, or is it instead an adjudicative finding binding only to the extent determined by the law of claim preclusion and issue preclusion? Will judges and juries make these kinds of findings in the same manner they make findings on adjudicative fact questions by considering and weighing evidence offered in the trial court, in-

2. *See generally id.* at pp. 503-06.
3. *Id.* at p. 493.

cluding expert opinions, or will courts, both trial and appellate, determine that a product is or is not carcinogenic on the basis of library research rather than being confined to the record of evidence offered by the particular adversaries in the trial court?

Consider a final major question that cuts across all the other questions and subquestions of which I have spoken. It is a question about law reform, law revision, evaluation, or improvement, however you want to express it. Must current allocations of power and responsibility, both authorizations and constraints with respect to what institutions and what individuals shall or may participate in law reform activities and lawmaking, be reconsidered to forestall utter failure of the present legal system? Will it be necessary not only that the law change, but that we change our views about how changes in the law may properly be accomplished? Will changes in this respect be ultimately necessary to forestall what might be termed, not in a pejorative but in an institutional sense, a political decision to substitute a totally different set of institutions and procedures for dealing with mass disaster claims, thus rendering obsolete all our concerns about procedural and substantive niceties?

Professor Cooper emphasized the interdependence of substantive and procedural law.[4] His point may be extended to an interdependence of both substantive and procedural law reform with institutional issues regarding all law reform. We have long had codes of professional conduct for lawyers. More recently, we have developed codes of judicial conduct for judges with some being very restrictive about judges' participation in law reform activities. We have no code of professional responsibility for statutory drafting. We do not even have a tradition comparable to that developed in the American Law Institute and the National Conference of Commissioners on Uniform State Laws to apply to the people who do most of our statutory drafting. Indeed, much, if not most of it, is done by distinctly partisan drafters whose aim is to serve the special interest group they represent. We must develop wiser and better rules and traditions of professionalism in law reform if we are to meet the challenges of the next hundred years. This, I submit, is, if not the most important issue addressed in this conference, at least the

4. *Id.* at p. 491.

issue to be primarily addressed.

As a postlude to my comments on Professor Cooper's thoughtful and suggestive paper, I shall yield just a little more to the impulse to predict. I now propose to cast myself in the role of law clerk preparing a draft opinion for use by a trial judge sometime in that future about which Professor Cooper stimulates us to speculate. I ask you to imagine yourself to be my fellow law clerk. Casting ourselves in these roles will free us to be a little bolder, if not reckless, about seeing into the future. Even so, thinking a whole century ahead is so daunting as to be unnerving, if not causing us to act unwittingly. Therefore, let us imagine we are just halfway there—it is the year 2036.

The trial judge for whom we are writing a draft is a senior district judge designated to sit on the newly created national tribunal for mass dispute resolution. The only judges who sit on this court are senior district judges and senior circuit judges with trial experience. The reason for this seemingly odd arrangement is that even after the compelling need for creation of such a central national court to resolve disputes arising from massive cases that are national in scope came to be recognized, it remained politically impractical to create a new court of perhaps as many as fifteen to twenty-five judges and allow all those appointments to be made by just one President. Eventually, in the year 2025, a compromise bill was passed that authorized the chief judge of each circuit to designate two judges of senior status whose names would go into a panel from which a computer would pick at random the judge to whom a newly filed mass disaster case would be assigned, or, of course, to whom a previously filed case would be reassigned whenever a case outlived a judge.

The first problem that this draft opinion addresses is how to define the plaintiff class and how to define the defendant class. We imagine that we work for a very pragmatic, down-to-earth trial judge who always looks for a practical solution to his cases. He wants to be sure to do justice, but also to be sure to do it within his lifetime. Here is the draft opinion:

In this action the plaintiffs ask the court to certify them as representatives of a class consisting of every person, any of whose parents or grandparents were alive from on or about November 1986 to on or about November 2006. This is a twenty-year period during which, plaintiffs allege, it has later been scientifically determined that the seeds of a national disaster were

sown by activities that so depleted the ozone that in time it ceased to shield the parents and grandparents of the plaintiff class from genetic damage caused by solar radiation. It is alleged these activities proximately caused every member of the plaintiff class to be in some respect, to put the point bluntly, defective.

The plaintiffs name as defendants the United States of America and each of its sovereign states in existence within the relevant time period, the number having reached sixty-four by the year 2006. Plaintiffs further pray that the court certify a class of additional defendants, all public and private corporations, all individuals and other legal entities, if any, who were during any part of those fateful years 1986 through 2006 in any way engaged in the manufacture or marketing of the products that contributed to the depletion of the ozone. Plaintiffs also pray that the court include in the class of defendants all persons and entities who were during that period in any way engaged in the use of any of those products. This prayer is supported by the allegation that users aided and abetted manufacturers and marketers in causing this mass tort by providing a market that induced them to commit the wrong.

Finally, plaintiffs pray that in recognition of and by analogy to the recently expanded concepts of successor liability, spawned to deal with efforts of defendants to escape liability through bankruptcies, takeovers, and mergers, the court should also include in the defendant class all entities and individuals who have succeeded to the interest of each manufacturer, marketer, or user of any of the injury-causing products.

That, briefly stated, is the essence of the complaint. How shall this court respond to it?

It is, of course, the first obligation of this court to determine whether the claim stated is one within the limited jurisdiction of this recently created court, which extends only to cases that are too massive and complex for adjudication by ordinary processes, including those processes elucidated in the now ten-volume manual for complex multidistrict litigation.

As any observer can readily appreciate, this case has the potential for being far too complex for ordinary processes. Therefore, in this instance, subject matter jurisdiction cannot be doubted.

A second question that arises is whether the proposed plaintiff and defendant classes are sufficiently defined to be identifi-

able with reasonable certitude. Defendants object that it would take years for the court to determine who among all of the natural persons in existence in the United States had at least one parent or grandparent alive during the twenty year period in question and whose genetic damage might be found to be a proximate cause of the putative class members' present condition. I conclude, however, that as a practical matter, this is no problem.

First, guided by precedents regarding successor liability and their bearing upon membership in the *defendant* class, I conclude that the defendant class of users and successors to users includes every individual and entity in existence. Thus, the defendant class is universal.

It has been suggested in argument that jurisdiction over a class so broad is defeated by the absence of indispensable parties who are all other persons in existence, or at least all those existing on this planet Earth. For reasons stated below, I happily conclude that I need not address this troubling question.

At first blush, it might be thought that a difficulty remains in identifying members of the *plaintiff* class. On deeper reflection, however, I conclude that this, too, is no problem in this practical matter. The reason is that before enough years have passed to complete this litigation and enter judgment on the merits, all persons born too soon to be in the plaintiff class will have died. Borrowing a maxim from ancient equity doctrine and translating it into modern terms, equity will not engage in futility. By the time this case could reach judgment, it might better be restyled as the case of *Everybody v. Everybody*, a case that makes *Jarndyce v. Jarndyce*[5] seem child's play for a day. For this federal court to exercise jurisdiction over such a case would be even worse, as an extension of jurisdiction beyond that conferred by Constitution and statute, than, for example, resolving family law disputes that are reserved to state and local tribunals.

Whether the inevitable legal results should be reasoned on grounds of lack of subject matter jurisdiction, lack of a case or controversy, or mootness, I leave to those who are wiser, better-informed, and more authoritative as to what trial judges should

5. *See* C. DICKENS, BLEAK HOUSE (Penguin 1971) (London 1853).

do. Whatever the correct legal theory may be, the result clearly must be:
Case dismissed. So ordered.

REMARKS OF THE HONORABLE CONSTANCE B. MOTLEY*

As you all know, a comedian is a hard act to follow. I feel quite at home as the last speaker. As you probably realize, I have a job that requires me to listen to men talk all day long, and then I have the last word. I want to first congratulate Dean Cooper on his excellent paper, which delineated the problems in this area. As he suggested, none of us can really foresee what is going to happen ten years from now, let alone a hundred years from now. Personally, I feel confident that the corps of lawyers we now have in the country will be able to devise ways and means for us to deal with the present crisis in our courts.

In addition to the general increase in litigation that we have experienced in the federal courts in the last twenty-five years, there now appears to be an increasing number of complex cases. By that I mean multiparty, multi-issue litigation, such as the asbestos cases in our bankruptcy court,[6] the Agent Orange cases in the Eastern District of New York,[7] Union Carbide's India toxic tort case,[8] which was initially filed in our court, and cases such as the LTV bankruptcy,[9] which is the largest bankruptcy in the history of the United States.

One unexpected development, at least from my point of view, is that no one expected the Johns Manville Company to file bankruptcy in our court and, of course, the bankruptcy courts simply are not equipped to deal with many more massive cases of this kind. We only have six bankruptcy judges in New York, and the bankruptcy judge has even less supporting personnel than does the district court judge. These cases force the bankruptcy judge to consider future claims—a brand new type of claim in our jurisprudence, and one that arises out of toxic tort cases. This type of claim is made, for example, by people

---

* Chief Judge, United States District Court for the Southern District of New York. A.B., 1943, New York University; LL.B., 1946, Columbia University.

6. *In re* Johns-Manville Corp., Nos. 82B 11,656 to 82B 11,676 (Bankr. S.D.N.Y., filed Aug. 26, 1982).

7. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984) (proposed settlement of $180 million tentatively approved).

8. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986) (consolidated case dismissed on grounds of *forum non conveniens*).

9. *See, e.g., In re* Chateaugay Corp., 64 Bankr. 990 (S.D.N.Y. 1986).

who are now working in the asbestos industry and whose asbestosis has not yet developed, but will twenty or thirty years from now. The bankruptcy judge in our court who has the *Johns Manville* case before him has had to devise a plan to try to reorganize Johns Manville and settle this litigation by setting up a fund that takes into account claims unrealized at this time.

In my view, the solution should lie more with Congress and the state legislatures. For example, Congress could establish a national fund, which can be built by taxing toxic tort industries. A system resembling workers' compensation or no-fault insurance can be devised; hopefully, such a system would take this problem out of the courts altogether. Since these disputes are largely about money and who is going to get how much and when, any national legislative program of that kind will have to take into consideration how much the lawyers are going to get. Unless lawyers are eliminated altogether by the system that is devised, this certainly is one consideration.

My counterpart in the Eastern District, Jack Weinstein, recently settled the Agent Orange cases. If I remember the figures correctly, the lawyers involved in those cases wanted ninety million dollars. He gave them nine million dollars. Everyone thought the case was settled, but I understand that some lawyers were not satisfied with the settlement and have now asked the Court of Appeals for the Second Circuit to review the case. One would have thought that the Second Circuit would never want to see the case, but there it is in the court of appeals after years in the district court. The case was so massive that Chief Judge Weinstein had to assign a magistrate in that court to work on it full-time. I understand that that magistrate recently left and has gone to Wall Street, where she can make ten times what a federal magistrate makes.

At the state level, of course, state legislatures can take action, and it appears that they already have. The latest information that I have indicates thirty-four states have now enacted laws to help solve the liability crisis, which exists in the country as a result of these cases. Let me read the latest information on this from a publication called *Business Insurance*: "Galvanized by the liability insurance crisis, an unprecedented drive to reform the nation's civil justice system is sweeping state legislatures. Thirty-four states have enacted tort reform measures to reduce liability exposure and make insurance more available and

affordable for businesses, professionals, governmental entities and nonprofit organizations."[10] In all, thirty-six states have passed tort reform measures; but in Arizona the governor has vetoed at least a portion of the package, and the governor of Illinois has yet to sign the law. The article points out that only nine states have passed what experts say is significant reform legislation; in one of those states, Florida, insurers are protesting the linking of reforms to insurance rate rollbacks, and the legislation appears to be decreasing rather than increasing the availability of insurance. Caps have been put on damage awards, but the amount of the caps varies greatly. In Michigan, for example, they put a cap as low as $225,000 for noneconomic damages in medical malpractice cases. In Kansas, they put a cap of $1,000,000 in the same area. State legislatures have already begun to grapple with the situation, and, I suspect, within the next decade or so, significant legislation dealing with this problem will be firmly in place.

In the interim, however, the burden is on the courts. In the federal courts, as you probably know, we have had the multidistrict panel for a number of years. This is a panel of judges that meets periodically to decide which federal judge before whom one of these mass cases has been filed will supervise all of the pretrial discovery. All of the cases in other districts are stayed while that pretrial discovery process moves forward. It is, of course, expected that pretrial discovery conducted in that manner will cut down on expenses and delays and will be of benefit to everyone who is making a similar claim. That device is already in place and, as far as I know, it has been successful.

As a way of dealing with commercial cases, some courts have adopted compulsory arbitration requirements, at least as a prerequisite to proceeding any further with the trial. In our court, we have a coercive rule. It is not compulsory. In cases involving less than $50,000, the judge has the duty to suggest to lawyers that they proceed to arbitration before a panel set up by the American Arbitration Association. If the arbitration is not successful, they can come back. I understand that in Michigan there is a similar plan, which is compulsory. This is another device that courts have had to implement to try to deal with the

10. Geisel & Taravella, *Tort Reform Explodes*, BUS. INS., Aug. 18, 1986, at 22.

existing caseload they have.

In addition, we now have a new civil rule in the federal court, rule 16, adopted a couple of years ago, which requires the judge to hold a pretrial conference within four months of the filing of a lawsuit and set a pretrial discovery schedule.[11] I think that that has been a very significant development because it forces the lawyers, at a very early stage in the case, to get down to business and decide whether this is a case in which time and money ought to be invested. That rule, together with new civil rule 11, which imposes sanctions on lawyers for frivolous litigation,[12] will go a long way toward getting rid of a lot of cases in the federal court.

As I indicated previously, one of the things that is needed is more staff support on the district court level. I expect that in time we will get some help in that area. If we had more help by way of an additional law clerk and a courtroom deputy whose job it is to keep up with the judge's calendar and to calendar things for the judges, we would be able to handle more expeditiously a lot of the cases that currently crowd our dockets. I think that a number of the appeals that are taken in civil cases result from the fact that the judge has not had the time to devote to ferreting out carefully the issues and writing an explanatory opinion. The days when we could do that seem to be gone forever.

If we are to deal with these problems, a look has to be taken at the lack of supporting personnel in the district court. In the Second Circuit (I do not know about other circuits), the judges long ago devised a method for decreasing the number of appeals that they actually have to hear. A court officer was appointed so that every appeal that is filed is subject to a kind of preargument settlement conference; that has done much to cut down on the number of appeals that the court of appeals actually has to hear because, as you know, many appeals are frivolous and this is the stage at which those appeals should be handled.

We have done some other things in our court in an attempt to deal with our increasing caseload. We have about 2000 *pro se* cases a year, many of which come from prisoners. Everyone in New York is "street wise" in that they know they can go into the

11. FED. R. CIV. P. 16.
12. FED. R. CIV. P. 11.

federal court, and Judge Motley or some other judge will hear this *pro se* complaint of theirs. We have a *pro se* clerk who helps them to write the complaint out so we can read it and make some sense out of it. At times, the *pro se* clerk will send a document back to a prisoner and ask him: "Would you tell us whether you have exhausted your state remedies as to this, that, or the other?" We find that having the *pro se* clerk in those instances has helped considerably. The *pro se* clerk also ferrets out totally meritless claims and writes a memorandum on such claims that I, as the Chief Judge, must sign. After the *pro se* clerk has written the memo, it is reviewed by a magistrate and then it comes to me. My law clerks look at it, and then I sign my name. Of course, if it is reversed, it is Judge Motley who is reversed, but we have not had any reversals thus far. We have been dismissing outright totally frivolous claims through that device and, after much begging of the administrative office, we now have two *pro se* clerks. Of course, we are begging for a third clerk. But these are the kinds of things that the courts have to do on their own while they await some legislative action by the Congress or by state legislators to help out with this problem.

We have also established a panel of lawyers that can be assigned to *pro se* civil litigants. This is in addition to a panel of lawyers who are assigned under the Criminal Justice Act to represent indigent defendants.[13] The lawyers on the civil litigation panel are largely volunteers from the Wall Street firms; they are young, enthusiastic, idealistic new associates who have not yet become jaded by the system, and who still have their idealism intact. These lawyers on the panel are assigned to a case after a judge has looked at the *pro se* complaint and decided that it may have merit, and that the way to get this case moving is to have a lawyer assigned for that purpose. That is something we have also developed in the Southern District, which I think has been tremendously helpful in helping us dispose of our caseload.

We also have another program in the nature of continuing legal education. We have seven law schools in the New York City area alone, so we have plenty of legal talent. We have law professors who volunteer to teach lawyers who are going to handle Social Security disability cases and cases in other areas of

13. *See* Criminal Justice Act of 1964, 18 U.S.C. § 3006A(a)-(c) (1982).

the law that are repetitive but take some time to handle unless one specializes in that area. I think our population is getting older so we have more age discrimination cases than we have race discrimination cases. In any event, these are specialized areas and require specialization. So, we have law professors who work with the lawyers in making sure that the lawyers who are going to represent these people are competent to do so by teaching them the basic substantive law in the area.

To close, I would like to repeat what I said earlier in this Symposium. I have every confidence that with the legal resources and institutions now in place, we can devise whatever methods, techniques, or strategies may be required to enable us to deal with this problem until we get some higher authority, such as the Congress, to rescue us.