School of Law, Boalt Hall

Program
In
Law and Economics

Working Paper Series

Working Paper 99-18

LONG SHOT CLASS ACTIONS

Warren F. Schwartz

School of Law
Center for the Study of Law and Society
University of California
Berkeley, California 94720

LONG SHOT CLASS ACTIONS

Warren F. Schwartz

Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Telephone: 202-662-9101
Fax: 202-662-9411
e-mail: Schwartz@law.georgetown.edu

Abstract

This paper considers the question whether plaintiffs, whose claims pose an important common issue, and are thought to be unlikely to prevail on this issue, should be permitted to maintain a class action in which this issue will be resolved or be required to litigate their claims in individual suits. The paper takes as its point of departure an opinion of Judge Richard Posner offering a novel and complex theoretical justification for requiring plaintiffs to proceed individually. This justification rests on ideas with respect to how claims thought to be unlikely to prevail should be viewed, how the risks created by legal uncertainty should be distributed and how decisionmaking should be structured to take account of the different verdicts various juries might render with respect to identical cases. These ideas have very general and important implications. The paper concludes that Judge Posner's opinion suppresses important issues implicated by his analysis and that consideration of these issues leads to a view much more inclined to permit the class action to go forward than the one advanced by Judge Posner.

LONG SHOT CLASS ACTIONS

Warren F. Schwartz*

I.

INTRODUCTION

Many judges and legal scholars are extremely hostile to class actions in which plaintiffs, despite the fact that they would be unlikely to prevail, if the case were litigated to a conclusion, nevertheless obtain a large settlement of their claims. For example, Judge Richard Posner has cited with approval Judge Henry Friendly's characterization of "settlements induced by a small probability of an immense judgment in a class action" as "blackmail settlements."' Professor George Priest, himself intensely critical of the rules governing class actions because they permit plaintiffs in class actions to secure substantial settlements, even though they have little chance of prevailing, believes that there are judicial decisions refusing to certify class actions, purportedly because the requirements of the controlling rule have not been met, which are really explained by the court's desire to prevent plaintiffs with a small chance of winning from securing large settlements. (Priest 522)

Persons who disapprove of plaintiffs with a small chance of prevailing securing a substantial settlement do not argue that a plaintiff who has only a small chance of prevailing should be precluded from litigating her claim. Indeed, I am unaware of any judge, or legal scholar, who has advocated such a rule.' Moreover, the current legal regime governing summary disposition certainly does not offer a defendant the possibility of having a plaintiffs claim dismissed because a judge believes it is unlikely to succeed.

What is urged, however, is that plaintiffs who have claims which depend on the resolution of issues common to all their cases should not be permitted to maintain a class action if they are unlikely to prevail on these issues. The heart of this argument, then, is that the class action provides a setting which is "too favorable" for plaintiffs with a small chance of prevailing. It is, moreover, clear that the respect in which the class action is regarded as "too favorable" is that it enables plaintiffs to secure a larger total settlement than they could obtain by maintaining and settling individual actions.

Those judges and scholars who believe that plaintiff should be required to proceed individually do not explain why the smaller total settlement which would be produced by individual actions is socially more desirable than the larger settlement which would be obtained in a class action. The purpose of this article is to address this unanswered question. I believe it implicates difficult and subtle issues. Moreover, my own analysis of these issues leads me to great doubt as to the soundness of the conclusion that plaintiffs with a small chance of prevailing should be denied the opportunity to maintain a class action and be required, instead, to maintain individual actions.

I take as my point of departure Judge Richard Posner's opinion in the *Rhone-Poulenc, Rorer, Inc.* case. This opinion represents the most carefully reasoned justification for refusing plaintiffs believed to have a small chance of prevailing the opportunity to maintain a class action of which I am aware.' It is also clear that Judge Posner views the possibility that plaintiffs, if they were permitted to maintain a class action, would be able to secure a favorable settlement, with intense disapproval. As a result, he aggressively intervened to preclude this outcome (Dissenting Opinion 1306).

The Court of Appeals, with one judge dissenting, issued an order of mandamus directing the district judge to decertify a class of plaintiffs he had previously certified. The grounds for this action were not advanced by the defendants but, rather, were introduced by Judge Posner. Indeed it would have been extremely awkward for defendants to make the essential point which motivated Judge Posner to reverse the lower court: that defendants would be under (in Judge Posner's words) "intense pressure" to offer a generous sum in settlement if the class action had gone forward. As Judge Posner puts it "For obvious reasons [defendants] did not point out ... that if mandamus is denied they will be forced to settle-for such an acknowledgment would greatly weaken them in any settlement negotiations (1296)."

Judge Posner's opinion, not surprisingly, is filled with interesting and important theoretical ideas. It is, however, very difficult to determine exactly why Judge Posner thought it essential that plaintiffs proceed individually, rather than in a class action. Three theories may be discerned in the opinion: 1) Plaintiffs who obtain "settlements induced by a small probability of an immense judgment in a class action" are engaging in socially undesirable "blackmail." 2) If plaintiffs sue as a class, and they have some chance of succeeding, defendants face the all or nothing risk of losing or winning all the cases. In Judge Posner's own colorful words: "They may not wish to roll these dice ... They will be under intense pressure to settle. "(1298) 3) When prior juries have reached different conclusions with respect to the issue which will be resolved in the class action, particularly when a large majority of them have rendered verdicts favorable to defendants, it is undesirable to have (once again it is impossible to resist quoting Judge Posner's own words) "One jury, consisting of six persons ... hold the fate of an industry in the palm of its hand." (1300)

I begin by analyzing this opinion with the objective of capturing exactly how these theories are used by Judge Posner to overcome the doctrinal obstacles to interlocutory reversal of a lower court's certification of a class of plaintiffs. In brief, I conclude that the opinion suppresses many of the complexities which are implicated by Judge Posner's effort to justify reversal of the lower court. I then offer my own analysis of the theories. This analysis implicates difficult, interrelated issues: 1) how to treat claims with "small ' chances of succeeding, 2) how to distribute the risk created by legal uncertainty; 3) how to relate procedural features of the legal system to the substantive ends which are sought to be achieved and 4) how to assign appropriate weight to various segments of opinion in the population when there is disagreement as to the "right" answer to a legal question.

I am confident that I demonstrate that the question whether the plaintiffs should be permitted to maintain a class action, or be required to proceed individually, is a far harder one than Judge Posner portrays it to be. I also conclude that plaintiffs like those in the Rhone Poulenc case should be permitted to maintain a class action.

II.

The Opinion

A. Plaintiffs' Claims

Defendants are drug companies who manufacture blood solids used to treat hemophilia. The class certified by the district judge consists of all hemophiliacs infected by the A-EDS virus as a consequence of using defendants' products. Plaintiff advance two principal theories of liability: (1296) 1) With respect to all plaintiffs, including those who were infected prior to the time that the HIV virus had been discovered and it was understood that the virus could be transmitted by

exposure to products like those manufactured by defendants, plaintiffs claim that it was already known that Hepatitis B, another lethal disease, could be transmitted in this way. Plaintiffs allege that if defendants had taken reasonable precautions to prevent users of their drugs contracting Hepatitis B, infection with the I-HV virus would also have been prevented. 2) When the MV virus was discovered, and the means of transmitting it understood, defendants did not act quickly enough to take steps to prevent infection by the HIV virus of users of its products.

B. The Certification of the Class and the Plan for Resolving All Claims Although the class certified by the district judge consists of all hemophiliacs who contracted the HIV virus as a result of using defendants' products, the District Judge did not contemplate that the class action would be the means for finally resolving the claims of all members of the class. The process envisioned by the district judge through which the claims would be resolved is described as follows in Judge Posner's opinion: (1296-1297)

> The district judge did not think it feasible to certify Wadleigh as a class action for the adjudication of the entire controversy between the plaintiffs and the defendants .... The differences in the date of infection alone of the thousands of potential class members would make such a procedure infeasible. Hemophiliacs infected before anyone knew about the contamination of blood solids by HIV could not rely on the second theory of liability, while hemophiliacs infected after the blood supply became safe (not perfectly safe, but nearly so) probably were not infected by any of the defendants' products. Instead the judge certified the suit "as a class action with respect to particular issues" only .... He explained this decision in an opinion which implied that he did not envisage the entry of a final judgment but rather the rendition by a jury of a special verdict that would answer a number of questions bearing, perhaps decisively, on whether the defendants are negligent under either of the theories sketched above. If the special verdict found no negligence under either theory, that presumably would be the end of all the cases unless other theories of liability proved viable. If the special verdict found negligence, individual members of the class would then file individual tort suits in state and federal district courts around the nation and would use the special verdict, in conjunction with the doctrine of collateral estoppel, to block relitigation of the issue of negligence.

-5-

C. Irreparable Harm

Judge Posner acknowledges the tension between the rule that orders certifying a class are not appealable and the grant of mandamus providing identical interlocutory relief As he puts its: "For obvious reasons . . ., mandamus is issued only in extraordinary cases. Otherwise, interlocutory orders would be appealable routinely but with 'appeal' renamed mandamus" (1294)'

The first of the two requirements which Judge Posner believes are necessary to cabin this too powerful writ which if uncabined threatens to unravel the final decision rule" (1295) is that "something about the order, or its circumstances, would make an end of case appeal ineffectual or leave legitimate interests unduly at risk."(] 295) What then is the "something" which makes. interlocutory appeal appropriate in this case? According to Judge Posner: (1297 1298)

> "The reason that an appeal will come too late to provide effective relief for these defendants is the sheer magnitude of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them. Consider the situation that would obtain if the class had not been certified. The defendants would be facing 300 suits. More might be filed, but probably only a few more, because the statutes of limitations in the various states are rapidly expiring for potential plaintiffs. The blood supply has been safe since 1985. That is ten years ago. The risk to hemophiliacs of having become infected with HIV has been widely publicized; it is unlikely that many hemophiliacs are unaware of it. Under the usual discovery statute of limitations, they would have to have taken steps years ago to determine their infection status, and having found out file suit within the limitations periods running from the date of discovery, in order to preserve their rights.
>
> Three hundred is not a trivial number of lawsuits. The potential damages in each one are great. But the defendants have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well. Perhaps in the end, if class-action treatment is denied (it has been denied in all the other hemophiliac HIV suits in which class certification has been sought), they will be compelled to pay damages in only 25 cases, involving a potential liability of perhaps no more than $125 million altogether. These are guesses, of course, but they are at once conservative

-6-

> and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands. All of a sudden they will face thousands of plaintiffs. Many may already be barred by the statute of limitations as we have suggested, though its further running was tolled by the filing of Wadleigh as a class action....
>
> Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations. And suppose the named plaintiffs in Wadleigh win the class portion of this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."

Judge Posner's justification for granting interlocutory relief seems to rest on two premises. The first of these is, however, not clearly stated in the opinion and I am unsure whether Judge Posner intends to rely on it. He asserts that if the actions proceed individually there will be slightly more"than three hundred claims against defendants. If, however, the class action contemplated by the District Judge goes forward, and plaintiffs prevail, five thousand claimants will use the favorable judgment to press their claims against defendants. The difference is apparently accounted for by the fact that there are a large number of claimants who, if required to sue individually, would not do so before the statute of limitations expires. By contrast, defendants would anticipate that if they did not settle these claimants would file timely actions, and be likely to prevail, if plaintiffs position is sustained in the class action.

I am unsure whether Judge Posner believes that the increase in the number of plaintiffs who are able to sue, and the associated increase in the total liability to which defendants may be subjected, constitutes "irreparable harm" because of its impact on defendant's decision as to how much they would be prepared to pay to settle the class action. An increase in the number of

claimants who can obtain relief is perhaps, the principal objective of the class action. I doubt that Judge Posner really means to suggest that such an increase constitutes "irreparable harm warranting interlocutory relief

There is one possible basis on which he might. As noted above, Judge Posner cites with approval Judge Friendly's characterization of "settlements induced by a small probability of an immense judgment in a class action" as 'blackmail settlements'. " If relief by way of settlement to plaintiffs who have a 'small chance of winning a large judgment is thought to constitute "blackmail", presumably, then, the fewer such claims that are maintained the better.

The second respect in which certification of the class impairs defendants' settlement position clearly does constitute an important basis for Judge Posner concluding that defendants will suffer "irreparable harm". In Judge Posner's colorful words, if the class is certified so that defendants are likely to either win or lose all cases "they may not wish to roll these dice."

I understand him to be making the following argument: Certification of the class results in a fundamental change in the risk defendants must bear. Assume, for example, that there are 5,000 claims, each of which is for one million dollars. If the 5,000 claims are brought individually each has a ten percent chance of prevailing. There is a key issue which, if decided favorably for plaintiffs, will virtually assure that all of them will prevail. There is also a ten percent chance that a class action brought on behalf of all claimants will result in a determination favorable to plaintiffs on this key issue.

The essential premise underlying Judge Posner's conclusion that certification of the class causes defendants irreparable harm is that in the circumstances described above plaintiffs will obtain a much larger total in settlement if the class action goes forward than if plaintiffs must

-8-

proceed individually. The reason for this is the great variance of the possible outcomes if there is a class action. Nine out of ten times defendants will be expected to escape liability entirely but in one out of ten times they will be liable for 500 million dollars. As the amount for which the defendant may be held liable grows very large, threatening defendants with bankruptcy, they become willing to pay a very large sum in settlement to eliminate even a small possibility of having "ruinous" liability imposed upon them.

By contrast, if the claimants are obliged to proceed individually defendants are provided with a means essentially equivalent to insurance, for pooling the individual risks and vi~lually eliminating the possibility of being subject to "ruinous" liability. For if there are 5,000 claims, each with a 10% chance of prevailing, defendants will anticipate that only 500 of them will succeed and their total liability will not exceed fifty million dollars, the expected value of their total liability. As a result they will be much less risk averse (perhaps, risk neutral) and, consequently, be prepared to offer less to settle the claims.

D. Why the District Judge's Certification of the Class Was An Abuse of Discretion Judge Posner cites three "concerns" which lead him to conclude that the District Court's certification of the class constituted an abuse of discretion. He formulates the one which I consider in this article as follows: (1299-1300)

> The first is a concern with-forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions; and when, in addition, the preliminary indications are that the defendants are not liable for the grievous harm that has befallen the members of the class. These qualifications are important. In most class actions-and those the ones in which the rationale for the procedure is most

compelling-individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation. That plainly is not the situation here. A notable feature of this case, and one that has not been remarked upon or encountered, so far as we are aware, in previous cases, is the demonstrated great likelihood that the plaintiffs' claims, despite their human appeal, lack legal merit. This is the inference from the defendants' having won 92.3 percent (12/ 13) of the cases to have gone to judgment. Granted, thirteen is a small sample and further trials, if they are held, may alter the pattern that the sample reveals. But whether they do or not, the result will be robust if these further trials are permitted to go forward because the pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals.

For this consensus or maturing of judgment the district judge proposes to substitute a single trial before a single jury instructed in accordance with no actual law of any jurisdiction-a jury that will receive a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia. One jury, consisting of six persons (the standard federal civil jury nowadays consists of six regular jurors and two alternates), will hold the fate of an industry in the palm of its hand. This jury, jury number fourteen, may disagree with twelve of the previous thirteen juries-and hurl the industry into bankruptcy. That kind of thing can happen in our system of civil justice (it is not likely to happen, because the industry is likely to settle-whether or not it really is liable) without violating anyone's legal rights. But it need not be tolerated when the alternative exists"of submitting an issue to multiple juries constituting in the aggregate of a much larger and more diverse sample of decision-makers. That would not be a feasible option if the stakes to each class member were too slight to repay the cost of suit, even though the aggregate stakes were very large and would repay the costs of a consolidated proceeding. But this is not the case with regard to the HIV-hemophilia litigation. Each plaintiff if successful is apt to receive a judgment in the millions. With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11.

This passage is so densely packed with interesting and important, but largely undeveloped, theoretical ideas that it is a formidable task to capture exactly how Judge Posner reaches the conclusion that certification of the class constituted an abuse of discretion. The most basic ambiguity in the opinion is how Judge Posner views the situation that juries have disagreed as to defendants' negligence in the past and that a majority of juries in the

future are likely to find that the defendants were not negligent but, at the same time, a minority of juries are likely to find that defendants were negligent.

As I have discussed in a previous article, (Schwartz and Beckner) there are two fundamentally different ways to view such a situation. The conventional view is that there is one "right" answer and that the answer reached by a large majority of juries is the "right" answer. If that view is accepted the minority juries are reaching the "wrong" answer. As a corollary to this conception, plaintiffs who obtain a settlement because a defendant fears that a minority jury may hear its case are wrongfully benefitting from the possibility of a jury reaching an erroneous decision.

The contrary view, to which I am inclined, is that there often is no single "right" answer to the question of whether a defendant was negligent. Juries, depending on the priors which its members bring to the process of deciding the case, can reasonably reach either result. In support of this conception it can be pointed out that there are certainly many cases in which jury verdicts either imposing or not imposing liability would be sustained on appeal. From this perspective the issue is one of structuring decision making so that the range of "reasonable" views in the community, which are influential in determining whether a juror will find a defendant negligent, are assigned appropriate importance in the decision making process.

Judge Posner does not explicitly embrace either of these positions. Moreover, I detect in the opinion substantial ambivalence as to which approach he regards as the proper one. On the one hand he refers to the "demonstrated great likelihood that the plaintiffs' claims, despite their human appeal, lack legal merit". (1299) This seems to mean that there is one correct answer and it is the one reached by the majority of juries. But, on the other hand, however, he emphasizes

that if the class action goes forward "one jury, consisting of six persons . , . will hold the fate of an industry in the palm of its hand." He points out that, by contrast, if plaintiffs proceed individually, the issue of negligence will be resolved by "multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers."

This passage plainly employs a social choice analysis of the difference between a class action and individual suits. At bottom, the question is how influence on the overall outcome will be assigned to minority sentiment. Here Judge Posner does not seem to be saying that because a particular outcome only enjoys minority support that it is "wrong" and should never be reached. Rather, he assumes that minority sentiment should have some influence but the question is how much. If the class action goes forward the minority will have some chance to prevail with respect to all claims. If plaintiffs proceed individually the minority will prevail in the minority of individual cases in which minority sentiment is dominant within the jury. For reasons which are not specified in the opinion, Judge Posner seems to prefer that the minority win a small number of cases rather than have a small chance of winning all cases.

Judge Posner's ambivalence is further manifested in his conclusion that individual suits will be feasible. He emphasizes the large damages each individual plaintiff will be seeking. However, the expected value of a case is, of course, determined not only by the damages sought but also by the likelihood of prevailing. Consequently, the conclusion that the individual suits will have sufficient value to justify the expenditures which must be made to maintain them must rest on the judgment that plaintiffs will have a significant chance of prevailing. For this to be so minority sentiment will have to continue to be influential in offering plaintiffs enough hope of victory to warrant the expenditures necessary to maintain the action. If, however, minority sentiment is

thought to favor the "wrong" answer then, conceivably, it is appropriate after all to characterize all recovery, either through decision or settlement induced by the possibility of the jury reaching the "wrong" answer as "blackmail." If this is so then the "right" outcome is for plaintiffs never to prevail or achieve a payment in settlement. But if it were somehow possible to prevent plaintiffs with a small chance of prevailing from suing, the result, of course, would be that individual suits would not be a possibility.

The answer to these troubling questions depends at bottom on the view taken of cases with a small, but non-trivial, chance of succeeding. For present purposes it is sufficient for me to conclude that the opinion does not offer a reasoned answer to this question.

The absence of such an answer makes it difficult to capture what Judge Posner means to prescribe as the test for deciding whether the class action should go forward or plaintiffs proceed individually.

Judge Posner plainly acknowledges that the class action is the less costly way to proceed. But he nevertheless believes that "it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter I L" He does not, however, explain why it is not a "waste of judicial resources" to have multiple cases maintained. Put more directly, what are the benefits which justify the greater costliness of individual actions?

In the end, the answer to this question must depend upon the superiority from the social point of view of the lesser total amount which plaintiffs will recover through litigation and settlement of individual suits to the larger amount they will recover in settlement of a class action.

As noted above, this superiority is justified on three theoretical grounds. The opinion, however, offers little guidance as to precisely what benefits are realized by an outcome which satisfies these theories or how these benefits are to be weighed against the greater costliness of individual suits. The opinion is also silent about the proper weight to be assigned to the deleterious consequences to plaintiffs resulting from the decertification of the class.

I now offer my own analysis of these issues with a view to making clear exactly what is at stake in the decision to proceed by class or individual action and more precise the normative and positive issues which underlie the decision.

III

Analyzing the Relevant Theories

A. Claims With a "Small" Chance of Succeeding

1) Conceptualizing legal error and legal uncertainty.

Judge Posner, in his academic writings, pioneered what has become the dominant approach for analyzing the impact of erroneous determinations (Posner 1973). Under this approach, the key issue is how the incentives of person subject to a legal regime will be impaired if they anticipate the possibility that judges or juries may err by imposing or failing to impose liability. This idea is, however, never mentioned in Judge Posner's opinion. I find this very surprising. I certainly expected that Judge Posner, perhaps the leading exponent of the ex ante, incentive oriented, approach to legal analysis would have taken as his central question whether defendants' incentives to take care to avoid causing harm would be better if they anticipated that persons claiming to have been harmed by them could maintain a class action or be required to bring individual suits. Even more pointedly, I would expect that his concern would be that

and require excessive care, they will respond by increasing care to an excessive level in order to reduce the probability of being held liable. The academic writing analyzing the effect on incentives of legal error and uncertainty assumes that the range of views by judges and juries as to what constituted optimal care is normally distributed and centered on the correct view of optimal care. As a result, if a defendant will be held liable in only a small proportion of instances it is because liability will be imposed only by a small minority of judges or juries, holding extremely demanding views of what constitutes optimal care. Moreover, the smaller the percentage of judges or juries who would impose liability the further from the "correct" view of optimal care are the views which they would apply in deciding whether to impose liability. It, thus, follows that any influence which the possibility of such an extremely demanding judge or jury being assigned the case might have on the incentives of persons subject to the legal regime can only be socially undesirable because it will lead to excessive care being taken. Under this conception anything which can be done to diminish the influence of these extremely demanding views will represent an improvement in the incentives of persons subject to the legal regime. 2) Denying plaintiffs an opportunity to maintain a class action as a response to the influence of legal error on incentives a) Doctrinal Restraints There is an initial doctrinal obstacle to Judge Posner reversing the lower court in order to reduce the influence on incentives of judges or juries taking a demanding view of what defendants had to do to avoid having liability imposed. As a doctrinal matter, a judge taking such action is

doing what the Supreme Court has expressly forbidden her to do: pass on the merits of plaintiff's claims in deciding whether the class should be certified.[4]

It is true that Judge Posner does not himself consider plaintiffs' claims and conclude that they are not meritorious. He does, however, explicitly take as a premise of his action "the demonstrated great likelihood that the plaintiffs' claims, despite their human appeal, lack legal merit." The basis of this crucial "great likelihood" is the inference from the "defendants having won 92.3 percent (12/13) of the cases to have gone to judgment." It thus seems inescapable that Judge Posner's view that plaintiffs claims are probably without merit is an essential preinise of his action.

b) The Theory Justifying Decertification of the Class

1. Introduction

If it is believed that a view of what constituted optimal care that is so demanding that only a small minority of juries would adopt it must be an erroneous one then it seems reasonable to take steps to reduce the influence such a view will have on the outcome. Perhaps, indeed, the objective should be to have such extreme views have no influence. When, however, a plaintiff with a small chance of winning secures a settlement because the defendant fears that the severe minority view may control, then the erroneous conception requiring excessive care has clearly influenced the outcome.

The troublesome question, however, is whether refusing to allow plaintiffs believed to have a small chance of succeeding the opportunity to maintain a class action is an appropriate response to this perceived danger. Essentially, for three reasons I believe it is not: 1) Assuming the soundness of the basic theory, a) proper formulation and implementation of the rule with

respect to the causal relationship which must obtain between defendant's negligence and a plaintiff s injury will eliminate much, if not all, impairment of incentives resulting from a minority of judges or juries adopting a legal standard requiring excessive care to avoid liability and b) systematic generalization and implementation of the theory through the decision whether to certify a class is not possible. 2) The theory, in principle, is wrong. It proceeds from the premise that there is one "right" answer to the question whether defendant was negligent and that majority sentiment among juries determines that 'right" answer. This premise is inconsistent with actual practice in which the characterization of an issue as one "for the jury" means that a decision either way will not be overturned by the presiding judge or appellate court. More fundamentally, the question of whether a defendant was negligent (and many other questions) turn on normative and positive issues about which reasonable people can disagree. Consequently, minority sentiment cannot simply be dismissed as "wrong."

I consider these questions in turn.,

2) Implementing the Theory

a) Causality

I know of no better way to capture the influence of the controlling causality rule on the behavior of potential injurers anticipating that the negligence rule will be erroneously applied to require that they take excessive care than the one employed by Professor Marcel Kahan in his important article considering the question (Kahan). Imagine that the owners of a baseball stadium must decide how high a fence to build to protect persons outside the stadium from being injured by balls hit by players in the game. The optimal fence is ten feet tall but the owners anticipate that the legal determination will be that an eleven foot fence is required. The crucial

determinant as to whether the owners will choose to build a ten foot fence or an eleven foot fence is whether, if they build the ten foot fence, and consequently, are adjudged negligent, they will be liable for harm resulting from balls which would have gone over the eleven foot fence if it had been built.

The analysis which concludes that a potential injurer may take excessive care if it is anticipated that it may be necessary to do so in order to avoid liability proceeds on the assumption that liability will be imposed for harm caused by balls which would have gone over the legally mandated fence if it had been built. By contrast, if it is assumed that liability will be imposed only for those balls which would have been blocked by the required eleven foot fence, the optimal ten foot fence will be built. The reasoning underlying this choice is straightforward. If the optimal ten foot fence is built it will prevent injury from balls flying no higher. The additional foot of fence will reduce liability only by blocking those balls which would go over a ten foot fence but not an eleven foot fence. The question, then, for the owners of the stadium is whether this reduction in liability justifies incurring the cost of the extra foot of fence. Since a ten foot fence is the optimal one, by definition, the cost of the extra foot exceeds the associated reduction in liability. Consequently, the ten foot fence will be built.

The great difficulty with this causality rule, however, is separating that harm which would occur even if required care is taken from that which would be prevented. The fence example makes it easy to draw this distinction. Balls flying higher than eleven feet will not be blocked by an eleven foot fence.

The example may be conceptualized as permitting the drawing of the necessary distinction in the spatial dimension. In the case considered in this article the distinction can also be made, but

in the temporal dimension. Under either of plaintiffs' theories there came a time when defendant should have begun screening blood donors or applying heat to the blood solids in order to prevent infection of users of its products. The jury will determine what that time was. Consequently, this is like deciding how high a fence should have been built. Those persons infected before this time are like those injured by the balls flying higher than eleven feet. They can not recover because even though defendants are adjudged negligent, their negligence has not caused plaintiffs' injury.

If this distinction can, indeed, be drawn, defendants, even if they anticipate that all juries would require excessive care in response to their growing awareness of the possibility of infection would only take optimal care in detecting and responding to the danger of infection. Only if they were required to take excessive care and damages exceeding the harm actually caused imposed might they be induced to take excessive care. Anticipated liability through litigation or settlement in only a minority of cases, if plaintiffs are required to proceed individually, or for the expected value of a class action which is unlikely to succeed, will not induce defendants to take excessive care.

The imposition of liability, even though optimal care is taken, will have one incentive effect. It will shift the cost of that harm which would not occur if mandated excessive care were taken but would occur if optimal care were taken from plaintiffs to defendants. In the case under consideration this means that defendants will be liable to those persons infected before they should reasonably have taken steps to prevent infection but after some juries believe they should have taken such steps. Defendants are, in effect, strictly liable for this harm. The issue consequently, is whether it is better to impose this cost on plaintiffs or defendants. If the cost is placed on

defendants they will be warned that if the possibility of originally unanticipated harm arises as the product is used, and they respond to the danger in a reasonable manner, they will, nevertheless, be held liable for that harm occurring prior to the time that it would have been reasonable to take preventative measures, but after the earlier time that the jury determines that such measures should have been taken. They must decide whether it is worthwhile to introduce the product if they must bear these costs. By contrast, if these costs are placed on plaintiffs, they will be induced to decide whether it is worthwhile to use the product if they will bear the costs of initially unanticipated harm caused prior to the time when it would be reasonable to adopt preventive measures, but after the date it is determined that such measures should have been taken. This is unlikely to be an important difference. However, to the extent that it does matter it would seem that the efficient solution is to place the cost on defendants.

I am unable to resist engaging in an exercise for which Judge Posner and his frequent collaborator William Landes, are justly famous. They display extraordinary ingenuity in arguing that common law judges often render efficient decisions even when their opinions display no awareness of the reasoning which makes the chosen rule efficient.

It could similarly be argued that those juries which adopt a standard requiring defendants to take excessive care, and hold them liable for failing to do, are really moved by an unconscious urge to achieve an efficient outcome. At some subliminal level they realize that if they adopt such an erroneously demanding standard, but the appropriate causality rule is applied, they, if you will, can have their cake and eat it too. Defendants will respond reasonably to the danger of infection as they become aware of it but will also be induced to make a more efficient choice as to the

initial introduction of the product by being required to take into account more of the costs which may result from harm of which they were unaware at the time of introduction.

b) Does the Theory Really Apply?

The writings articulating the theory of how the anticipation of erroneous decisions may lead to excessive care being taken assumes that in all instances the same evidence and argumentation are presented in support of plaintifr claims so that the difference in outcome is wholly the result of the varying views as to what constitutes optimal care applied by the judges or juries deciding the cases. This need not be true. Indeed, it is doubtful that it is true ir~ the case under consideration. It is quite possible that as a result of the learning process associated with prior litigation, and the commitment of greater resources to support plaintiffs' claims in the class action, that plaintiffs will present a much more powerful case, and have a much greater chance of prevailing, than the prior record of twelve plaintiffs' losses in thirteen cases would indicate. Put somewhat differently, some of the juries who exonerated defendants might, instead, impose liability if confronted with the evidence which would be presented in the class action.

To a limited extent, Judge Posner does acknowledge the possibility that plaintiffs chances in the future may be better than one in thirteen by conceding that thirteen is a small sample and further trials, if they are held, may alter the pattern that the sample reveals. However, this concession is limited to the possibility that the juries who decided the prior cases may not be representative of the universe ofjuries who will decide future cases. He is thus concerned about sampling error because of the small sample of all juries who might hear a case who have already decided one. To correct the possibility of such sampling error he, in effect, envisions greatly increasing the sample size by having many individual cases maintained. In his words: "the result

will be robust if these further trials are permitted to go forward, because the pattern that results will reflect a consensus, or at least a pooling of judgment of many different tribunals."

This correction by extending the sample size, however, does not solve the sampling problem. If the choice of individual or class litigation is to have the desired effect it must be made before plaintiffs' claims are determined. For what is at stake is how the cases whose outcome will make the inference more robust will be litigated. For the choice of class or individual litigation to matter it must be made, as in the instant case, when few cases are determined and many remain pending. Further individual litigation may reveal that the estimate which underlay the decision to decertify the class was wrong, it cannot, however, help in making that estimate correctly in the first place.

In any event, however, Judge Posner addresses only part of the problem. His concern is that prior juries may not be representative of the universe of juries. It is, however, also possible, as suggested above, that the evidence and argumentation offered in support of plaintiffs claims in the thirteen cases is not representative of what will be offered in future cases. Most critically, both the possibility of learning and greater commitment of resources suggest that plaintiffs' chances of success might be far greater in a class action.[5]

At the least, it would seem that plaintiffs should be provided an opportunity to demonstrate that this is so. In the instant case they had no such opportunity since the theory relied upon by judge Posner was not advanced in defendants' brief or oral argument but was introduced by Judge Posner himself during oral argument. In future cases it would seem difficult to deny plaintiffs a chance to demonstrate that an inference that because of prior failure by other plaintiffs that they had little chance to succeed was wrong. If such an opportunity is afforded,

however, the result will be extensive, and I fear often inconclusive, controversy about whether the plaintiffs will present a much more persuasive case than their predecessors.

c) Is the theory applied by Judge Posner to cases with a "small" chance of succeeding the correct one?

The standard economic analysis of situations in which judges or juries will sometimes impose liability, and other times, not, assumes that there is one correct view of what constituted optimal care in the circumstances which obtained when defendant injured plaintiff. Judges or juries will take that view or other views which vary in their departure from the correct view. A judge or jury taking an incorrect view will not necessarily render an erroneous decision. Defendant's conduct may fall so short of optimal care that a judge or jury requiring much less than optimal.care will still impose liability. Similarly defendant may take so much more than optimal care that judge or juries applying a very demanding standard may, nevertheless, impose liability. Erroneous decisions occur only when the choice of standard leads to a defendant taking less than optimal care being exonerated or a defendant taking more than optimal care being held liable.

The essential foundation of this approach is that there is only one "correct" conception of what constituted optimal care. The writings taking this approach are, however, silent as to the process which is to be employed to determine the "correct" conception. They also ignore the possibility that some of the issues upon which the determination of optimal care depends are not susceptible to indisputable, objective resolution but rather depend on normative and positive priors about which reasonable persons could disagree. That this is so can, perhaps, most saliently be demonstrated by considering the facts of the instant case.

The most pristine manifestation of the belief that there is one, objectively determinable, conception of optimal care is the famous Carrol Towing[6] formulation by Learned Hand which has brought so much joy and comfort to law and economics scholars. After all, if the question is whether B, the cost of a precaution, is more or less than P x L, the probability and magnitude of harm, which will be prevented, how can there fail to be a single answer which nicely separates those who should be held liable from those who shouldn't?

Consider, however, what is really involved in determining B, P, and L.[7] B requires an assessment of what it would have cost defendants to figure out the harm being caused by their products, and take appropriate preventive steps, at an earlier time than the one at which they actually did so. To do this requires, at the least, a recreation of the expenditures which defendants would have had to have made at various times to more quickly determine the cause of the harm that was being caused and institute appropriate corrective measures. Beyond this, however, this process might have required lesser usage of defendants' products until the problem was solved and corrected. This would have reduced defendants' profits but also deprived potential purchasers of the consumer surplus they would derive from use of the product. Since this consumer surplus depends on the greater utility derived from defendants products than the substitutes to which hemophiliacs would have to turn, assessing its magnitude implicates subtle and unresolved issues about how exactly to quantify the benefits of improved quality of life or greater longevity.

Determining P is somewhat less problematic but, nevertheless, not without its complexity. What must be known is the likelihood of every possible kind of harm to each user of the product which would exist if no precautions were taken. Then it must be determined how much each

precaution which it is claimed defendants should have taken would reduce the likelihood of every possible harm to every user. This inquiry is made somewhat more manageable in the instant case to the extent that the preventive measures would not reduce the likelihood of infection of users by varying amounts but, rather, eliminate all possibility of infection by all users. Nevertheless, the determination of the relevant P and reduction in P is a formidable task.

L is the most difficult of the Learned Hand trio of variables to determine. What must be done is to place a value on the alleviation of suffering and saving of lives which would have been achieved if defendants had acted earlier to prevent infection of users of their product.

I do not believe it is necessary to identify and discuss the host of positive and normative issues which underlie the questic of placing a value on the improvement and extension of the lives of a large population of diverse individuals. It seems to be enough to say that reasonable persons, confronted with the same evidence, could reach materially different conclusions as to the value of these positive effects of earlier intervention. Such disagreement would support different conclusions as to how much cost should have been incurred to achieve earlier intervention. This, in turn, would provide the foundation for different answers to the ultimate question of whether defendants were negligent.

I, thus, conclude that the idea that in all cases there is a single "correct," objectively determinable, answer to the question of whether defendants were negligent is simply wrong even if one assumes that the incentive oriented economic approach should control. If the possibility of other approaches, focusing on appropriate compensation for 'wrongfully" injured persons is acknowledged then there is even more reason to reject the notion of a single correct answer to the question of whether a defendant has acted negligently. I confess to not having a clear

understanding of exactly how adherents of theories of corrective justice define the term “reasonable care" or its equivalents[8] It does, however, seem inescapable, that if the definition varies from the one employed by those using economic analysis and jury instructions do not assign a precise meaning to the term (perhaps even if they do) that jurors committed (consciously or unconsciously) to one view or the other may resolve the negligence issue differently.

I now find myself in considerable danger of doing what I have often criticized others for doing. I have revealed what I believe to be important defects in the notion that there is a single correct answer to the question whether a defendant was negligent. However, picking holes in someone else's analysis is very easy. The more difficult and important question is whether you can offer something better.

The best I can offer is another approach to the problem which is responsive to the defects I have identified but, which, sadly, has serious problems of its own. A social choice theorist would not focus on the question whether a given determination is "correct" in some objectively determinable sense. Instead, the possible outcomes would be viewed as legitimate and the crucial question would be to design a decision making mechanism which assigns appropriate weight to the views of the members of the relevant population.

At bottom, my difficulty with this approach is a simple one. I remain bothered by the permissive premise that people are entitled to prefer anything for any reason which they find sufficient. I continue to hope, if not necessarily believe, that there is more to the design of legal institutions than assigning appropriate influence to conflicting views. In other terms, the search for a "right" answer has not lost all its appeal for me.

It does seem clear, however, that taking the social choice approach does offer the possibility of a much better understanding of the problem of institutional design. In the final section I analyze the choice of a class action or individual actions from the social choice perspective. Before doing so, however, I must address one more important question which is relevant under the more conventional approach.

B. Distributing the Risk Created by Legal Uncertainty

As I noted above, there is something very puzzling about the theory advanced by Judge Posner. You would expect the focus of his opinion to be on the effect of his decision on defendants' incentives to take care to avoid causing harm. However, his opinion is silent on this question. Moreover, the theory upon which he does rely explicitly proceeds entirely from an ex post, rather than an ex ante, perspective. Indeed, it is not even clear whether he is moved by considerations of efficiency or a conception of fairness suggested by the opinion but never systematically formulated and articulated.

At the outset, I note the fundamental difficulty encountered both in interpreting the opinion and formulating my own views. The ultimate question is whether the outcome achieved by settlement of a class action is, from a social perspective, better than the one achieved through the settlement of individual actions. So what one must search for are the right reasons for preferring either the larger amount realized by plaintiffs in a class action or the smaller amount realized in individual actions.

Finding such ex post reasons when the issue is one outcome achieved by settlement, as compared to another, also achieved by settlement, implicates a threshold difficulty in properly conceptualizing the problem. If a case is settled there is a transfer of money from defendant to

plaintiff. Whether more or less is transferred seems, on first impression, to be a purely distributive question. Judge Posner seems, however to believe that he has found a good way to answer this question, at least for the purpose of deciding whether plaintiffs should be permitted to maintain a class action. Settlement outcomes, at bottom, are determined by the parties beliefs as to what the outcome will be, their anticipated costs and their attitudes towards the uncertainty as to what the outcome will be if the case is litigated. Judge Posner, seems to be suggesting that to the extent that a favorable settlement is the result of strategic exploitation by one party of the risk aversion of the other party it is an "unjust" result which should be avoided.

A theory of this kind can be given an efficiency interpretation. If transfers achieved by exploiting risk aversion are unjust, or, indeed, are neither just nor unjust, then expenditures made to achieve therm are wasteful. In conventional terms, litigation whose success depends on exploitation of the risk aversion of the other party is a form of rent seeking which should be prevented.

This is a novel theory. There has been extensive writing on strategic exploitation of the costliness of litigation to the other party. However, while it is well understood that the attitude toward risk is an important determinant of the settlement outcome, no one, as far as I am aware, has argued that it is either wrong, or the cause of wasteful expenditures, for one party to take account of the attitude toward risk of the other in determining the terms on which it is prepared to settle.

Judge Posner thus breaks new ground. It is clear that a different amount maybe realized through settlement in a class action, as compared to individual actions, because of the difference in risk aversion of defendants in the two settings. Judge Posner goes further, however, in arguing

that individual actions provide the better setting because class actions permit plaintiffs to exploit defendants' risk aversion to a greater extent.

I believe that he is wrong. On first impression, what is striking is how one-sided his discussion is. Most obviously, if the defendants end up paying less in total then the plaintiffs recover less in total. More subtly, the factors which may make a defendant risk averse, and thus willing to pay in settlement more than the expected value of a claim, operate in a functionally identical way to make a plaintiff risk averse and willing to accept less than the expected value of a claim. Moreover, these factors are linked. If you reduce the influence of risk aversion on defendants by denying plaintiffs the opportunity to maintain a class action you increase the impact of risk aversion on the plaintiffs by requiring them to sue individually.

This becomes clear if it is realized that settlement is a means through which plaintiffs and defendants sell each other insurance against the risk of an adverse outcome. Settlement is a better means of providing insurance than the parties buying insurance from a third person. This is so, essentially, because a party who settles a case both acquires insurance against an adverse outcome and provides insurance to the other party against an adverse outcome. The benefit acquired as a purchaser of insurance leads the party to be willing to supply insurance to the other party at a lower price.

Settlement, then, is the likely outcome both of the class action and of individual suits. In either event, insurance will be provided by the efficient supplier, the adverse party. There will, consequently, be no risk to bear. The only difference will be the premium paid for the insurance. If the class action goes forward, defendants will, in effect, demand less for providing the insurance because they will gain more from the insurance provided by the plaintiffs. The net effect then will

-30-

be that if the class action goes forward it will be settled and plaintiff will realize more than they would for the total of settlements of class actions.

if this is true all that is at stake is fixing the premium for the purchase of insurance. I see no reason to favor the defendants in setting the price. Moreover, if one posits that one of the purposes of the litigation is to compensate plaintiffs for the harm they have suffered, larger recovery might be regarded as preferable because it brings recovery closer to a fully compensatory total. Even if, as Judge Posner claims, the expected returns to plaintiffs will still be sufficient so that many individual suits will be brought, three undesirable effects may, ~ nevertheless, result. First, the additional costs of individual suits will have to be incurred. Second, plaintiffs' probability of success depends not only on the views of the members of the jury who decide the case but also on the strength of their evidentiary presentation. Since each has less to gain in an individual action than the group has to gain in a class action, they may commit fewer resources and, as a result, be less likely to prevail. Finally, if Judge Posner is relying not only on the difference in risk aversion but also on the additional claims which would be pressed if the class action goes forward, as determinants of how much defendants will be willing to pay in settlement, I cannot resist the conclusion that it is simply wrong for him to do so. The increase in the number of victims who are able to secure relief is the central justification for class actions. Moreover, I see no ground for considering this increase to be socially undesirable.

Judge Posner's reasoning can be interpreted in a somewhat different way. There may be social costs resulting from defendants having to pay a very large judgment. In particular, Judge Posner invokes the possibility of bankruptcy so that the defendant firms will cease to exist and their assets, consequently, become less valuable. This argument, although advanced almost

casually, is actually quite radical. For it suggests that, without regard to the question of whether defendants should be held liable, it is undesirable to threaten them with a judgment of such magnitude as to force then into bankruptcy.

There are three basic flaws in this argument. First, as Judge Posner acknowledges, the likely result will be not that defendants will become bankrupt but that they will settle to avoid bankruptcy. Indeed the settlement process will be performing the useful function of permitting defendants to acquire insurance against the possibility of an adverse outcome. Second, Judge Posner simply assumes that defendants will be willing to settle a class action at an amount greatly in excess of the expected value of the suit and their anticipated litigation costs. There are reasons to believe that this may not be true. The bankruptcy laws seek to minimize the loss in the value of the assets of insolvent firms. Shareholders may have diversified their holdings to minimize the net consequences of a bad outcome with respect to one of their holdings. Defendant's counsel may have a number of cases they are litigating and be willing, consequently to assume, on terms favorable to defendants, some of the risk of an unfavorable outcome in one case.

The final objection to Judge Posner's position is, I believe, the most telling one. The vulnerability of defendants from which Judge Posner seeks to protect them is a result of the serious consequences which may result if a large judgment is entered against them. Even more pointedly, he believes there is a discontinuity when the judgment becomes so large that it may lead to bankruptcy . He fears that plaintiffs can exploit this vulnerability in the all or nothing context of the class action.

What Judge Posner fails to address, however, is the fact that each plaintiff faces an all or nothing risk whether a class action is maintained, or plaintiffs must proceed individually. The risk

of receiving no recovery may be as serious to a plaintiff as the risk of bankruptcy is to a defendant. Defendants can, of course, exploit this vulnerability in their settlement strategy just as plaintiffs can exploit defendants vulnerability. One can easily turn Judge Posner's reasoning on its head. A class action reduces the ability of defendants to exploit plaintiffs' risk aversion just as individual actions reduce plaintiffs' ability to exploit defendants' risk aversion.

There are, moreover, good reasons to believe that risk aversion may play a more powerful role in plaintiffs' settlement decisions than defendants. Judge Posner actually gives some indication that this may be so. He refers to the "human appeal" of plaintiffs claims. I interpret this to mean that as people who have AIDs the plaintiffs have great need for money to secure medical treatment and otherwise alleviate their sufferings. An outcome in which they recover nothing seem easily as bad for them as the corresponding outcome for defendants that all plaintiffs recover. There is, moreover, an equivalent social cost if the defendants become bankrupt which may result if plaintiffs recover nothing. Presumably, plaintiffs meet their needs, as best they can, using their own resources and whatever public assistance is available. The more they are required to turn to public assistance the greater will be the cost of public officials determining their entitlements and providing whatever assistance is authorized.

It should also be noted that if Judge Posner is correct his objection extends to all clkass actions. He seems to acknowledge this but offers an uncharacteristically obscure response:

"We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts" (1299).

It is difficult to determine what it is Judge Posner contemplates putting on the scales to decide whether the impairment of defendants' settlement position outweighs or is outweighed by the improvement in plaintiffs" settlement position and more efficient process achieved by allowing plaintiffs to proceed as a class. AJ1 or nothing outcomes with their attendant risks are pervasive in the legal system. A plaintiff faces such a risk in every action she maintains against a particular defendant. Defendants face such risks when non-mutual collateral estoppel is allowed. I am unaware of any theory that supports a characterization of one party exploiting such risk come by the other as exploitative. I certainty can find no reason why a class action which can be justified as the most efficient way to litigate a group of claims should be barred because of its impact on the role of risk bearing in determining the result reached through settlement.

C. Social Choice

Judge Posner expresses the reasons, based on social choice theory, which move him to reverse the lower court with characteristic vigor and clarity: (1300)

> , "One jury, consisting of six persons ... will hold the fate of an industry in the palm of its hand. This jury, jury number fourteen, may disagree with twelve of the previous thirteen juries and hurl the industry into bankruptcy. That kind of thing can happen in our system of civil justice (it is not likely to happen, because the industry is likely to settle, whether or not it is really liable) without violating anyone's legal rights. But it need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and diverse sample of decision-makers."

The inference that there is a "demonstrated great likelihood that the plaintiff s claims ... lack legal merit" (1299), which he draws from the fact that defendants won twelve of the previous thirteen cases brought by hemophiliacs, provides the essential foundation for the position Judge Posner takes in the portion of the opinion quoted above. As I understand it, if the jury which

would impose liability and "hurl the industry into bankruptcy" were rendering a correct decision Judge Posner would have no quarrel with its verdict. Morever, as Judge Posner points out, such a jury would, in any event, never get to render a verdict. The fear that it might impose liability will lead to a settlement which permits the defendant firms to continue to exist.

I believe, however, that the reasoning which supports the critical inference that there is "a demonstrated great likelihood that the plaintiffs' claims ... lacked legal merit" is fatally flawed. What I take him to be saying is that in all of the previous thirteen cases and, most critically, the case under consideration, the evidence as to liability will be substantially identical. The difference in outcome, consequently, is explained by the variations among juries in their willingness to impose liability. (In the terms employed above, they are more or less demanding in defining optimal care.) The danger which is to be avoided is that an outlier jury, strongly inclined to impose liability, will hear the class action. The fear that this may happen will induce defendants to pay a large amount in settlement.

What Judge Posner fails to take into account in his reasoning is the decision rule governing jury verdicts in federal courts. The jury must be unanimous to render a verdict.' Consequently, the data from which an inference must be drawn is that twelve juries unanimously exonerated defendants and one jury unanimously imposed liability. If each jury had been representative of the population from which it was chosen, and the populations of the various districts did not vary substantially in their willingness to impose liability, this could not happen. The more pointed question, however, is how great would the sampling error have to be to yield juries which are unanimous (or nearly so in cases when the minority accedes to the majority) for both outcomes.

I acknowledge that a sample of six is a small one. I am, moreover, incapable of calculating with what frequency such a sample would yield a jury unanimously inclined to a view contrary to the one taken by the great majority of the population from which the jury is drawn, on various assumptions as to the distribution of views within the population. My modest conclusion is that sampling error might conceivably explain the difference in outcome but is very unlikely to do so.

This suggests that other hypotheses might provide a better explanation. The most obvious and plausible one is that the thirteen cases were not identical and the difference in outcome is explained by the strength of the evidence presented. And, most critically, perhaps, the evidence which would be presented in the class action is likely to be stronger than in the cases in which defendants were exonerated. After all, what Judge Posner must believe, to draw the inference he does, is that the twelve juries which exonerated defendants would also exonerate them if confronted with the evidence which would be presented in the class action. How can he really know this?

This difficulty will be encountered in any case in which a judge tries to predicate denial of the opportunity to maintain a class action on the belief that plaintiffs can only succeed if the case is heard by an outlier jury strongly inclined to impose liability. The issue of whether the evidence which will be presented in the class action will be stronger than in previous cases will always lurk. If it is addressed seriously the result will be a protracted, and very likely inconclusive, dispute as to how strong the presentation in the class action will be.

However, even if Judge Posner draws the correct inference from the history of prior litigation, and judges can, at tolerable cost, similarly draw the correct inference in future cases,

denying the opportunity to maintain a class action will not remedy the sampling error, if indeed it exists.

The source of the difficulty which Judge Posner has identified is the six person jury, not the class action. If the small sample can yield outlier juries strongly inclined to impose liability, this danger exists in a class action and in each of the individual actions which would be brought if plaintiffs are not permitted to sue as a class. The impact of this danger on settlement will occur in all cases. Consequently, there will be no difference in the total amount paid in settlement of a class action or individual actions.

The appropriate remedy for the sampling error is to increase the size of the jury. Indeed, what is suggested is that if, for reasons of judicial economy, it is better to have a single class action, then a very large jury should hear the case so that the risk of sampling error is greatly reduced.

The second possible explanation for the difference in outcome is that the populations of different districts vary substantially in their willingness to impose liability. If you will, the problem is an outlier population not an outlier jury drawn from a population taking the view which is dominant in the national population. To test this hypothesis it would be necessary to have many cases decided in each district and determine if there are systematic differences in the patterns of decisions. There are nowhere near a sufficient number of cases to do this. The most that can be said, consequently, is that we do not know whether there are systematic variations in the tendency to impose liability among the populations of the various districts.

If such differences do exist the interesting question which emerges is what implication do they have for the question of whether it is better to have a class action or individual cases. One

can find in Judge Posner's opinion what can be fairly described as nascent awareness of this issue. He cites as one of the reasons why individual actions are to be preferred that the negligence issue would be resolved by a "a much larger and more diverse sample of decision makers." The use of the term "diverse" suggests the possibility that there are sub-populations within the national population who have "extreme" tendencies to exonerate or impose liability on defendants. Conceivably, he is suggesting that the views of these sub-populations should sometimes prevail. One important possibility is that populations strongly inclined to impose liability are concentrated in particular districts. If this is so, it will make a great deal of difference where the case is heard.

Judge Posner's opinion can be read as implying that the diversity of inclination to impose liability among locations should be reflected in the outcome. In a portion of his opinion upon which I have not focused, he objects to the class action because the jury will decide the negligence issue pursuant to an instruction which would purport to distill the essence of the conception of negligence common to all jurisdictions. Judge Posner believes that this should not be done because there Are important differences in the laws of the various states which should be taken into account in deciding whether liability should be imposed.

It is only a small extension of this view to believe that not only differences in the legal rules in various localities but also the differences in predisposition to impose liability among populations of various areas should be influential in determining the outcome. Perhaps, if you will, considerations of federalism properly extend not only to courts and

legislatures laying down rules but also to juries exercising the discretion required to apply the rules to particular cases.

Once again, although Judge Posner's opinion may be interpreted to raise an interesting and novel issue, the response to that issue does not lie in either permitting or prohibiting plaintiffs

to maintain a class action. If it is, indeed, true that there are systematic differences in the willingness of juries in various locations to impose liability, plaintiffs will choose what they believe to be the most favorable district, whether they are maintaining a class action or individual actions. The only difference will be whether one or many actions are brought in the same district. What is really at stake is what influence on the overall outcome will be assigned to a sub-population in a particular district strongly inclined to impose liability. The problem is analogous to devising a choice of law rule. If juries in various districts differ in their inclinations to impose liability, plaintiffs will search for the most favorable district. If their choice prevails it will be expected that all cases, whether individual or class action, will be brought in the same district. If we both wish to have the differences in view among populations as to their tendency to impose liability reflected in the outcome and partition the cases so that they are distributed among locations with different populations, we need to find some theoretical basis and feasible means for doing so. The important point, however, is that the choice of a class action or individual actions is not responsive to the problem of possible diversity of view among various local populations.

The choice of the particular type of class action contemplated by the district court does have important consequences with respect to another aspect of division of opinion as to the tendency to impose liability. Opinion may be divided within the population from which the jury is selected.

If such division of opinion does exist how it is resolved will depend on the decision rule which controls. For present purposes, the important consequence of the choice of decision rule is that if it requires greater consensus than exists in the population from which it is chosen the jury may be divided so that no verdict can be rendered if all jurors vote sincerely. This is very likely to

occur in the federal courts where the decision rule is unanimity." If it does a compromise must be struck to which those jurors favoring imposition of liability and those opposing imposition of liability will unanimously accede. A leading candidate for such a compromise is the imposition of liability but the award of small damages. Quite possibly, this will be unanimously preferred to a hung jury.

Under the procedure envisioned by the district judge, different juries will decide the liability and damage issues. Consequently, a segment of opinion, favoring the imposition of liability, cannot exercise influence by inducing the majority opposed to imposing liability to vote to impose liability in exchange for the minority agreeing to the award of small damages.

Once again, however, the critical issue is not whether there will be individual actions or a class action but rather whether the same jury will determine both liability and damages. If an unavoidable consequence of having a class action is that different juries will determine the two issues the class action is actually worse for plaintiffs than individual actions.

Consideration of various institutional possibilities leads inexorably to the fundamental question which must be resolved: Should minority sentiment have any influence and, if so, how much?

There is no satisfactory answer to this question. As the minority portion of the population which would, if sitting as a juror, vote to impose liability in a particular case is posited as being larger and larger, the inclination to believe that the majority should always prevail becomes correspondingly weaker. This tendency also reveals a basic ambiguity in Judge Posner's position. How unlikely must it be that plaintiffs will prevail for it to be appropriate to deny plaintiffs the opportunity to maintain a class action? Suppose, for example, plaintiffs had prevailed not in one

but in two of the previous cases. Or to put the extreme case, they had won six and lost seven? Judge Posner offers no indication of a theory which provides a basis for drawing the line.

If it were decided to assign some influence to minority sentiment it would be very difficult to arrive at a means of doing so for essentially two reasons: 1) The choice between imposing liability and exonerating a defendant is a binary one 2) We would be extremely unlikely to adopt a decision rule which would empower a minority to prevail with respect to this binary choice.

What is required then is some continuous dimension upon which minority sentiment will be allowed to exercise influence. Again however, it would not seem desirable to empower the minority to prevail on any relevant aspect of the decision.

We do, however, have a formally unacknowledged way to solve the problem. As noted above, a single jury deciding both liability and damages can effect a log roll where one side imposes liability, when it would prefer not to, in exchange for. the other side agreeing to smaller damages than they would prefer.

This means of assigning influence to minority sentiment is, of course, fundamentally flawed. To employ it we must adopt an excessively demanding rule so that a minority can use its power to hang the jury to induce the majority to impose liability, albeit of a lower amount. It also requires jurors to vote insincerely in violation of what they are instructed to do. Finally, the compromise outcome is largely determined by skill in behaving strategically rather than the merit of the claim, however defined.

The only other way that a minority can be assigned influence is by consciously introducing sampling error so that a minority segment in the population can sometimes constitute a sufficient majority on a jury to satisfy the controlling decision rule. The fundamental objection to this

method is that if it is desired to have the minority sometimes prevail it would seem better consciously to select a minority of juries dominated by minority sentiment. This is, in effect, what we do when we construct minority - majority voting districts so that a minority can elect its preferred candidate. Such a method, if it were employed to select juries, would, however, involve such practical difficulties that, even if it were embraced in principle, there would be no feasible means for employing it. It would seem then that the only two means for assigning influence to minority sentiment are (1) to have an unreasonably demanding decision rule and an agenda for the jury which permits log rolling or (2) a sample size so small that minority sentiment in the population sometimes constitutes a sufficiently large majority of the jury to satisfy the decision rule.

This reasoning leads to an interesting, and I must add, surprising, conclusion. the small size of juries and extremely demanding unanimity requirement seem both unwise and unrelated. From the perspective of assigning influence to minority sentiment, however, they constitute a coherent regime. The small number of people on a jury increases the likelihood that minority sentiment will be over-represented on a particular jury. The unanimity rule gives what minority sentiment is present on a given jury a hold out threat to hang the jury. And the practice of having the same jury decide liability and damages completes the picture by providing an agenda which permits log rolling across the liability and damage determination. Can we go so far in reverse engineering social decisions to conclude that this scheme is in place because it affords the best, although very imperfect, means of assigning influence to minority sentiment?

Less radically, what can be concluded is that a class action, in which the jury decides only liability makes it impossible to have the log rolling which permits a minority of jurors favoring the

imposition of liability to exert influence. Thus, from this point of view, if Judge Posner wished to limit the influence of minority sentiment, his decision has the opposite effect. This conclusion must, however, be qualified. By having a jury decide both liability and damage the chances that plaintiffs will sometimes prevail are increased but the average damages awarded will be expected to be relatively modest. Judge Posner may find an outcome of many modest compromise recoveries appealing. Such an outcome does seem consistent with his expectation that individual actions will be feasible but lead to a lesser total recovery than a class action. If Judge Posner does really favor plaintiffs achieving modest compromise outcomes, he has, in effect, embraced our unacknowledged means of assigning influence to minority sentiment.

Conclusion

From the perspective of providing appropriate incentives for manufactures to take reasonable precautions to prevent injury to persons using their products, or the perspective of achieving optimal distribution of the risks created by legal uncertainty, I see no reason to prefer individual actions to a class action.

Social choice theory does reveal the critical issue, which must be resolved in devising the appropriate institution for resolving plaintiffs claims. Three features of institutional design are important: 1) the size of the jury: 2) the controlling decision rule and 3) whether the jury decides only the liability issue or both liability and damages.

The first two of these features can be selected and implemented without regard to whether the action is an individual one or a class action. The size of the jury can be enlarged or the decision rule relaxed in either individual actions or class actions.

The important question then is whether having a class action is necessarily linked to the jury deciding only liability. If, as appears to be so in the instant case, these two features are linked the question becomes whether the possibility of having compromise verdicts in individual actions, where the jury decides both the liability and the damage issue is regarded as sufficiently important to outweigh the benefits of a class action. It is by no means clear what value, if any, should be placed on these compromise verdicts. Moreover, we know virtually nothing about the frequency or importance of the process of compromise or the determinants of the compromise outcome. I am, nevertheless, strongly inclined to believe that the possibility of compromise verdicts is not sufficiently important to outweigh the benefits realized by permitting plaintiffs to maintain a class action. In any event, neither Judge Posner nor any other judge, has sought to justify requiring plaintiffs to maintain individual actions on the ground that it is desirable to permit juries to log roll across liability and damage issues.

References

Adler, Matthew D. and Posner, Eric A, 1999: "Rethinking Cost-Benefit Analysis" Chicago John M. Olin Law and Economics Working Paper No. 72 (2d series).

Coleman, Jules L. 1992: Risks and Wrongs (Cambridge University Press).

Craswell, Richard and Calfee, John, 1986. "Deterrence and Uncertain Legal Standards," 2 JOURNAL OF LAW, ECONOICS" AND ORGANIZATION, 279-303.

Goetz, Charles J., 1984, "Cases and Materials on Law and Economics" (St. Paul, Minnesota: West Publishing Company).

Kahan, Marcel, 1989: "Causation and Incentives to Take Care Under the Negligence Rule," 18 JOURNAL OF LEGAL STUDIES 421-47,

Posner, Richard, 1982: Tort Law; Cases and Economic Analysis (Little Brown and Company).

Posner, Richard, 1973: "An Economic Approach to Legal Procedure and Judicial Administration," 2 JOURNAL OF LEGAL STUDIES 3 99-45 8.

Priest, George, 1997: Procedural Versus Substantive Controls of Mass Torts Class Actions," 26 JOURNAL OF LEGAL STUDIES 52 L.

Schwartz, Warren F. and Beckner, C. Frederick, 111, 1998: "Toward a Theory of the 'Meritorious Case': Legal Uncertainty as Social Choice Problem," 6 GEORGE MASON LAW REVIEW, 801-820.

Schwartz, Edward P. and Schwartz, Warren F., 1999: "And So Say Some of Us: When Jurors Disagree," forthcoming SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL.

ENDNOTES

*.Professor of Law, Georgetown University Law Center. I would like to thank Avery Katz, Wendy Perdue, Edward Schwartz and Igor Tsibeh-nan for their valuable suggestions and Erica Niezgoda for her excellent research assistance.

1. In re Rhone-Poulenc, 51 F.3d 1293, 1298 (7"' Cir. 1995) References to the majority opinion by Judge Richard Posner will be made in the text in parenthesis to pages of the opinion. References to the dissenting opinion will similarly be made in the text as Dissenting Opinion and the relevant page in the Federal Reporter.

2. Somewhat ironically, an article which I co-authored may come closest to doing so. We concluded that, in principle, it might be desirable that a plaintiff with less than a 50% chance of prevailing not be able to maintain an action. (Schwartz and Beckner). We do not, however, suggest any feasible means for implementing such a principle. In any event it has not been embraced by any court or other legal scholar. Finally, the theoretical foundation of the suggestion extends only to cases in which damages are not limited to the harm which would have been prevented by taking the legally mandated precautions. This issue is discussed, infta

3. Judge Posner's opinion has received mixed reviews from other federal courts. Compare Costano V. The American Tobacco Company, 84 F.3d 743, 746, 752 (5'h Circuit, 1996), (citing Judge Posner's opinion with approval and concluding its lengthy opinion by stating: "the collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed the fate of a class of millions, to a single jury") with Valentino v. Carter Wallace, 97 F.3 1227, 1232 (9h Cir. 1996) ("We ... do not accept [defendant's] invitation ... to adopt the principles of Rhone-Poulenc as the law of this circuit) and In re Telectronics Pacing Systems, 168 F.R.D. 203, 209-10 (S.D. Ohio, 1996) (While Judge Posner's economic theories and distrust of juries may carry weight in the Seventh Circuit, we are still **bound by the Federal** Rules of Civil Procedure ... It causes this Court pause that one of this nation's most respected jurists has lost faith in the very system in which he participates".)

4. Eisen v. Carlisle and Jaquelin, 417 U.S. 156 (1974).

5. Judge Posner does not identify the thirteen cases from which he draws the inference that plaintiffs are unlikely to succeed in the class action. Nor does he, (nor, I confess, do I) claim that he has examined the records of the thirteen cases to see how effectively the claim of negligence was presented. I have located the one case in which a plaintiff did prevail. Walls v. Armons Pharmaceutical Company, 832 F. Supp. 1467 (M. Dist. Florida 1993). In denying a motion to set aside a jury verdict favorable to plaintiff, and order a retrial, the District Judge said: (832 F. Supp. at 1482):

> "First, the jury found and the court agrees that in 1982-1983 [defendant] was or should have been aware from reasonable and available evidence of a potential risk of acquiring AIDS from contaminated blood or blood products. Plaintiff presented

> considerable expert testimony in support of her claim that [defendant's] duty to warn of the AIDS risk ... arose at an earlier time than [defendant] acted."

Examination of this opinion strengthens my belief as to how difficult it is to predict the outcome of a case based on the results reached in prior cases. On the one hand, the theory advanced in this case, failure to warn, is somewhat different than the theory which would be relied on in the class action. On the other hand, the earlier case did involve an issue common to both theories, when a producer should have become aware of the danger of infection. The court's opinion suggests that a very good presentation on this issue was made by plaintiff's counsel.

6. 159 F.2d 169 (2 Ind Cir. 1947). Judge Posner discusses this formula in "The Learned Hand Formula for Determining Liability" (Posner 1982 at 1-9).

7. A negligence determination is the equivalent of doing an ex post cost benefit analysis of what precautions would have been optimal. The difficulties I discuss in the texts have been extensively discussed with respect to the feasibility of doing cost benefit analysis. For an interesting recent discussion of these difficulties and possible responses to them, see Matthew D. Adler and Eric A. Posner.

8. To anyone interested in better understanding either my difficulties figuring out what is meant, or determining for herself what is meant, I recommend a reading of Chapter 16 through 18 of Coleman.

9. Rule 48 of the Federal Rules of Civil Procedure provides: "Unless the parties otherwise stipulate (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members."

10. The desirability of a unanimity rule is discussed in Edward Schwartz and Warren. Schwartz.