



Winter 1-1-2014

Asbestos Wars: In Three Parts

David Partlett

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Litigation Commons](#), and the [Medical Jurisprudence Commons](#)

Recommended Citation

David Partlett, *Asbestos Wars: In Three Parts*, 71 Wash. & Lee L. Rev. 759 (2014).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol71/iss1/18>

This Student Notes Colloquium is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Asbestos Wars: In Three Parts

David Partlett*

Table of Contents

I. Introduction	759
II. Asbestos: Tort As Information Forcing	764
III. The Courts and the Scope of Liability.....	772
IV. Asbestos, the Courts, and Legislatures.....	784
V. Conclusion.....	788

I. Introduction

Asbestos liability has challenged the tort system since it became clear that exposure to asbestos caused serious, often fatal diseases. Professor Fraley in her Comment has, among other trenchant observations, nicely shown how information on the causal link was established.¹ In my Comment, I wish to make three short points that will add some context to Flinn’s fine Note.²

First I make a few general reports from the battlefield on the asbestos litigation wars described in the Note. The term “war” is appropriate. Battles have been waged in the courtrooms and legislatures over decades on behalf of claimants with devastating diseases that are associated with exposure to asbestos fibers. Multiple manufacturers employing the mineral have been sued. In the ensuing imbroglio of asbestos claims, along with other high-impact claims, medical devices, pharmaceuticals, motor

* Professor of Law, Emory University School of Law.

1. See Jill M. Fraley, Comment, *Knowledge Circles and the Duty of Care*, 71 WASH. & LEE L. REV. 789, 792 (2014) (describing the uneven distribution of knowledge regarding the toxicity of asbestos).

2. See generally Meghan E. Flinn, Note, *A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 WASH. & LEE L. REV. 707 (2014).

vehicles, and other toxic substances have formed the rich tapestry of modern torts law.³ These high-impact claims constitute the bulk of actions and most of the damages sought by the persons in the tort system. Tort law would be a quiet backwater except for litigation around these high-impact claims.

Flinn shows us the high incidence of asbestos litigation, its claim frequency, and claim severity.⁴ She demonstrates that after years of battles, settlements, and the establishment of trusts designed to afford compensation, it looked as though the war was coming to an end.⁵ It may have been surmised that asbestos litigation would yield its place in the pantheon of high-impact tort claims. But the energy of the claims had not run its course. Like Napoleon returning from Elba, the war is resumed. Flinn would like to declare a Waterloo through her suggestion for quiet in these claims.⁶ After these decades of litigation, it is perfectly understandable that peace has its value and that claims coming from exposure to asbestos brought to the home need to be brought to a resolution.

Flinn documents that courts, when faced with these claims, have been divided in finding liability.⁷ Some have decided that liability is a step too far; others have determined that the claims are meritorious. Flinn has stepped into the breach. Noting carefully and exhaustively the struggles of the courts in drawing boundaries to liability, she sees that a national legislative response is fraught with problems.⁸ Acutely, she perceives that the states have different problems in different degrees of severity.⁹ Congress too has shown a penchant for logrolling¹⁰ and

3. See STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 152 (1995) (discussing examples of products liability).

4. See Flinn, *supra* note 2, at 709 (providing an introduction of the asbestos litigation crisis).

5. See *id.* at 709–10 (discussing the current state of asbestos litigation).

6. See *id.* at 757 (calling for an “end” to “this legal nightmare”).

7. See *id.* at 711–14 (outlining the courts’ various approaches to take-home asbestos litigation).

8. See *id.* at 752–53 (discussing the ways in which the federal government has attempted to control the mass of litigation brought about by occupational exposure to asbestos).

9. See *id.* at 755 (suggesting that state legislatures should respond to the problem of asbestos litigation in accordance with their connection to it).

10. The term “logrolling” refers to a “mutual exchange of favors, especially

catering to special interests in the high-stakes game of regulating the asbestos claims process.¹¹ A state-by-state solution accounts for regional differences and can measure more accurately the issues of the class of persons who merit recovery. The federal system, which allows states to experiment and test models for recovery that may inspire fellow states, also supports this solution.¹² Removing of claims from state dockets is of public importance in the context of tight public revenues. State courts ought, in a sensitive manner, to be able to weigh claimants' legitimate demands for compensation against the public interest in quieting claims for asbestos-related diseases. Legislatures have an institutional competence to regulate claims. They may cut the Gordian knot of litigation and come to a solution that weighs the interests more broadly. As elegant as Flinn's solution may be, one last gauntlet must be run. I have no doubt that some claimants will be aggrieved and seek to mount a constitutional challenge to the legislation. The challenge may proceed under the United States Constitution or state constitutions.

State tort reform has gathered pace, fueled by concerns about affordability and availability of liability insurance. Accumulating legislation has often been challenged on the basis that it violates state constitutional provisions.¹³ The Kentucky Supreme Court in *Williams v. Wilson*¹⁴ adopted the notion of jural rights derived from the common law to limit reform.¹⁵ Other courts have nullified tort law.¹⁶

among lawmakers." WEBSTER'S NEW POCKET DICTIONARY 189 (Johnathan L. Goldman ed., 2000).

11. See Flinn, *supra* note 2, at 751–53 (discussing the various congressional attempts to handle asbestos litigation).

12. See *State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

13. See, e.g., *Williams v. Wilson*, 972 S.W.2d 260, 260 (Ky. 1998) (considering whether a Kentucky statute that limited punitive damages violated "one or more provisions of the Constitution of Kentucky").

14. 972 S.W.2d 260 (Ky. 1998).

15. See *id.* at 269 (determining that the Kentucky statute on punitive damages violated the jural rights doctrine and was therefore unconstitutional).

16. See, e.g., *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1104 (Ill. 1997) (declaring the Civil Justice Reform Amendments of 1995 unconstitutional under the Illinois constitution); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*,

This may be particularly the case if a court agrees with the reasoning of Professor John Goldberg, who argues from the roots of tort liability a constitutional right in tortious recourse.¹⁷ Part of Flinn's plan is to place claimants in different states on different legal footings.¹⁸ Immediately, equal protection is implicated. I too favor a legislative solution that sets up a tribunal, federal or state, that may deal with these and other claims arising from asbestos exposure. Constitutional attacks will also loom in my suggestions. The maintenance of the claims, although in a different forum, fortifies them more robustly against attack because individual rights are preserved. I do not wish to pursue this point on the constitutionality of Flinn's institutional reform, although, as her ideas percolate, the issue will be salient. Let me proceed to my three points.

In Part II, I stress the role of tort law as a remedial machine that acts to force information about the causes of accidents and diseases. The problem of ignorance is especially acute when the law deals with the etiology of diseases. A person will have little information that tells him or her that the cause of the disease is tortious. Proof of negligence in accidents may sometimes call for judicial innovation, but gaps in proof pertaining to causation are perplexing when the injury claimed is disease. Yet, if the law of torts is to perform its function of correcting wrongful harms and internalizing the costs of harmful products, it is vital that tort doctrine is so empowered. Asbestos liability was a testing ground for judicial innovation as Flinn shows.¹⁹

715 N.E.2d 1062, 1102 (Ohio 1999) (declaring civil justice reform amendments unconstitutional under the Ohio constitution); *Lakin v. Senco Prods. Inc.*, 987 P.2d 463, 475 (Or. 1999) (declaring a cap on noneconomic damages to be an unconstitutional violation of Oregon right to jury trial). *But see* *McDougall v. Schanz*, 597 N.W.2d 148, 150 (Mich. 1999) (upholding statute setting strict requirements concerning qualifications of experts in medical malpractice cases in face of challenge brought under Michigan's constitution).

17. See John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005) ("This Article calls for recognition of a right, grounded in the Fourteenth Amendment's Due Process Clause, to a body of law that empowers individuals to seek redress against persons who have wronged them.")

18. See Flinn, *supra* note 2, at 755 (arguing that state's statutory responses to take-home asbestos litigation should be individualized).

19. See *id.* at 711–28 (discussing state courts' various approaches to take-home asbestos liability).

In Part III, I canvass the scope of liability question that Flinn examines thoroughly and effectively.²⁰ She is concerned with elucidating the role of foreseeability in the duty of care question and compares the Third Restatement's Section 7²¹ articulation of the duty of care.²² The courts have used both lenses to ascertain whether a duty is owed to those exposed to asbestos in the household. The duty issue can become complex and its reasoning circular. The duty problem I submit is a familiar one, and it runs along recognized channels to extend a duty to family members. I agree that the test will depend upon knowledge of the toxicity of asbestos at the time of the exposure.²³ This inevitably leads to discussions relating to extent of warnings required for later acquired knowledge and liability for monitoring for asbestos-related diseases in this new class of plaintiffs.

Part IV brings us back to the courts and legislatures as institutions dealing with the imbrolios of liability and compensation. My point is that given the fact that tort law has played its strong remedial function in uncovering the toxicity of asbestos and has done the spade work in ascribing responsibility, the task is now one of efficient claims administration. Courts are institutionally weak in devising the machinery for claims administration. They may attempt to set up, as in the DES cases,²⁴ rules for settlement, but the extent of claims in size and numbers of claimants beggar the ability of courts. The American court system, without legislative assistance, has struggled mightily to cobble together a claims-making and compensation apparatus through class actions often involving bankruptcy.²⁵

20. See *id.* at 723 (highlighting the problems with extending liability in take-home asbestos exposure cases).

21. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010) (eliminating analysis of foreseeability from duty analysis).

22. See Flinn, *supra* note 2, at 728–30 (discussing the Third Restatement's duty analysis).

23. See *id.* at 715 (explaining that in take-home asbestos cases, the existence of duty frequently depends the date on which the exposure occurred and whether the toxicity of asbestos was known at that time).

24. See *infra* note 62 (listing a few of the many cases on DES litigation).

25. See Francis E. McGovern, *Distribution of Funds in Class Actions-Claims Administration*, 35 J. CORP. L. 123, 129 (2009) (discussing settlement fund distributions in personal injury cases); LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, RAND INST. FOR CIVIL JUSTICE, ASBESTOS BANKRUPTCY TRUSTS:

Courts, however, are ill suited to the task, especially in a federal system. In the best of worlds, the legislature acting for the benefit of claimants and defendants would devise a neutral means of claims resolution. This would mitigate the problems of opportunistic behavior by claimants, vis-à-vis one another and by defendants who are intent on exploiting the barriers to fair and rational resolution in large class actions cases.²⁶ My basic point is that it is entirely appropriate to reward handsomely plaintiffs' lawyers in the arduous and financially risky endeavor of uncovering tortious behavior. Here they act as private attorneys general.²⁷ But it is wasteful to continue to incur the same overlay of expenses generated by rent-seeking lawyers crimping scarce judicial time and resources, when the function is the administration of mature claims that calls for facilitation of compensation and some extension of the class of persons that might be justly compensated.²⁸ Here a positive sum game invites the legislature to set up an efficient resolution apparatus.

II. Asbestos: Tort As Information Forcing

The ancients were cognizant both of the benefits and hazards of asbestos. As Professor Fraley has explained, the knowledge

AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS xi (2010) (reviewing bankruptcy claims of companies with significant liability for asbestos-related injuries).

26. On this point, it is apparent that to devise a mixed system of a compensation scheme against a continuing stream of litigation will be highly wasteful. See David F. Partlett & Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68 WASH. & LEE L. REV. 1341, 1360 (2011) (describing the drawbacks of compensation schemes competing against ongoing litigation).

27. I cannot deny, however, that the rewards carry the risk of corruption of the judicial system. See, e.g., CURTIS WILKIE, *THE FALL OF THE HOUSE OF ZEUS: THE RISE AND RUIN OF AMERICA'S MOST POWERFUL TRIAL ATTORNEY* 5 (2010) (telling the story about Dick Scruggs, a lawyer who struck it rich in tobacco litigation and was later indicted for bribery).

28. But modern scholars remain concerned about the inherent inefficiencies in delivering compensation in large, complex suits. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 320 (2011) ("Of the roughly \$7 billion Merck will have to spend on the Vioxx litigation, approximately \$3.5 billion will have been on attorneys' fees, including roughly \$2 billion for defense litigation fees.").

was lost although it had come to light before the Second World War.²⁹ One may speculate that the fog of the Second World War, with the exigencies of building an arsenal for democracy, blinded industry from attending to occupational health and safety. The exposure during this period was significant and was to manifest itself in disease in these workers in the 1960s when they reported asbestosis and mesothelioma.³⁰ Legal doctrine, with its roots in medieval times, was ill-equipped to cope with the perplexing causation problems and the scope of class of persons suffering from the diseases. Justice Cardozo had formulated his wide concept of the duty of care in *MacPherson v. Buick Motor Co.*,³¹ recognizing that in a modern industrial society, goods were manufactured and distributed on a massive scale.³² Thus, a broad duty was called for to fit the expectations of consumers and the needs of society for reasonably safe products.³³ A duty was to be extended to all those foreseeably physically injured as result of a person's negligent act.³⁴ The law had moved beyond confined relationships, such as occupier–entrant or employer–employee, from liability for inherently dangerous activities and for adulterated food and drugs, and beyond the confines of contractual privity.³⁵ Nevertheless, an accident stemming from a negligent act had a stopping point given the laws of friction. It occurred within a manageable time frame and its causes were observable. In *MacPherson*, the defective wheel in the Buick

29. See Jill M. Fraley, Professor of Law, Washington and Lee University, Commentary at the Washington and Lee Law Review Note Colloquium (Sept. 19, 2013) (describing the historical evolution of knowledge on the dangers of asbestos).

30. See *Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST. (May 1, 2009), <http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos> (last visited Nov. 6, 2013) (describing the nature and the history and use of asbestos) (on file with the Washington and Lee Law Review).

31. 111 N.E. 1050 (N.Y. 1916).

32. See *id.* at 1050 (extending negligence law to machinery that, when used dangerously, can cause injury to others).

33. See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1825, 1846–47 (1998) (explaining the breadth of *MacPherson*'s holding on duty with respect to products liability).

34. See *id.* at 1821 (describing the role of foreseeability in duty determination envisioned by Judge Cardozo in *Macpherson*).

35. See *id.* at 1752–67 (describing the change in duty analysis occurring at the time of *MacPherson*).

would injure an obvious class of persons upon its collapse.³⁶ In the classic English case of *Donoghue v. Stevenson*,³⁷ the snail in the bottle of ginger beer on that warm Scottish summer day would affect a limited class of persons in a predictable way.³⁸ The range of neighbors to whom a duty is owed is controllable. Benjamin Cardozo, recall, confined the scope of liability via duty in *Palsgraf v. Long Island Railroad Co.*³⁹ to that class in the vicinity of the negligent act.⁴⁰ Liability dealing with human interaction had a relational core stemming from ancient torts cases: the squib passed in panic in *Scott v. Shepherd*,⁴¹ the eye put out when the stick is swung back to separate dogs in a fight,⁴² or the farrier applying his skills to the care of a horse.⁴³

Note the manifold challenges of asbestos liability. Whose asbestos caused the disease? When did the disease first occur? When was the disease discovered or discoverable? What if one disease is manifested and another follows?⁴⁴ What knowledge did

36. See *MacPherson*, 111 N.E. at 1051 (“Unless its wheels were sound and strong, injury was almost certain.”).

37. [1932] A.C. 562 (Eng.); see also David Partlett, *Tort Law, Revolution and the Bible*, in OXFORD ENCYCLOPEDIA (forthcoming 2013) (discussing *Donoghue v. Stevenson* and comparing it to modern tort law and Biblical stories).

38. See *Donoghue*, [1932] A.C. at 562–63 (describing the facts of the case).

39. 162 N.E. 99 (1928).

40. See *id.* at 100 (“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”).

41. (1773) 96 Eng. Rep. 525 (K.B.); see also M.J. Prichard, *Scott v. Shepherd* (1773) and the Emergence of the Tort of Negligence, Selden Society Lecture delivered in the Old Hall of Lincoln’s Inn (July 4, 1973) (discussing the *Scott v. Shepherd* case, in which the passing of a squib led to Scott losing his eye) (transcript available in the University of Technology, Sydney, Library).

42. See *Brown v. Kendall*, 60 Mass. 292, 298 (1850) (determining a case in which the defendant swung a stick to separate fighting dogs and accidentally hit the plaintiff).

43. See DAVID F. PARTLETT, PROFESSIONAL NEGLIGENCE 17–18 (1985) (describing negligence hypotheticals).

44. The once-and-for-all rule requires that the damage be actionable, and once an action is brought, further actions are precluded. *Cf. Joyce v. A.C. & S., Inc.*, 785 F.2d 1200, 1205 (4th Cir. 1986) (“Once a cause of action is complete and the statute of limitations begins to run, it runs against all damages resulting from the wrongful act, even damages which may not arise until a future date . . .”); *Gideon v. Johns Manville*, 761 F.2d 1129, 1136 (5th Cir. 1985) (“[A] plaintiff may not split this cause of action by seeking damages for

the manufactures have of the deleterious effects of asbestos? What other life style behaviors could have contributed to claimant's illness? These do not include the problems of dealing with a large class and with severe magnitudes of damage. Moreover, as Flinn now highlights, we are faced with new waves of claimants stemming from the transportation of the fibers to third parties.⁴⁵ Mesothelioma, unlike asbestosis, is not a product of constant of exposure over a long period; the cancer can arise from a minimal exposure.⁴⁶

Tort doctrine often modifies its rules to further the policies of tort law. For example, where plaintiffs face insuperable obstacles in proving the identity of the wrongdoer, courts will shift, in some cases, the burden of proof to the defendants to disprove their involvement and negligence in causing the accident.⁴⁷ Thus, in the well-known case of *Ybarra v. Spangard*,⁴⁸ the court found that the plaintiff's injury arising in surgery could be inferred to have been caused by one of the members of the surgical team.⁴⁹ However, on traditional lines, the plaintiff would have failed, faced with the burden of showing, on the balance of probabilities, who had caused the paralysis. In some medical practice cases, the courts have been willing to allow recovery even though the plaintiff could not establish cause-in-fact. The classic case is

some of his injuries in one suit and for later-developing injuries in another.”). In asbestos cases, a majority of courts have permitted a second action for cancer where the first disease was nonmalignant, like asbestosis. *See, e.g.,* *Marinari v. Asbestos Corp., Ltd.*, 612 A.2d 1021, 1028 (Pa. Super. Ct. 1992) (allowing the action for cancer because the disease was not discovered until 1987); *Sopha v. Owens-Corning Fiberglass Corp.*, 601 N.W.2d 627, 638 (Wis. 1999) (allowing a second suit for newly discovered cancer but emphasizing that the case “presents a special circumstance”).

45. *See* Flinn, *supra* note 2, at 709–10 (explaining the new wave of asbestos litigation).

46. *See Asbestos Exposure and Cancer Risk, supra* note 30 (explaining the causes and development of asbestosis and mesothelioma).

47. *See* *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 775 n.20 (1970) (discussing the possibility of distributing the loss over a class of defendants, specifically, those who benefited from the “cost savings accompanying the nonemployment of a lifeguard”).

48. 154 P.2d 687 (Cal. 1944).

49. *See id.* at 691 (“[W]here a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body . . . may properly be called upon to meet the inference of negligence . . .”).

where the patient is wrongly diagnosed but, if rightly diagnosed, would have died anyway.⁵⁰ To fulfill the deterrence and other policy imperatives of tort law, some courts have been willing to give damages based on the lost chance of recovery, although it was less probable than not.⁵¹

In a line of cases, the English courts have grappled with causation issues, attempting to overcome logical and proof problems in establishing causation. In the early case of *McGhee v. National Coal Board*,⁵² the pursuer, as plaintiffs are called in Scottish cases, contracted a skin disease from exposure to dust from the brickworks in which he worked.⁵³ The defender was in breach of a duty to provide showers so he could wash before striking out for home, but the pursuer could not establish on the balance of probabilities that going home in an unwashed state had caused the skin disease.⁵⁴ The court determined, however, that failure to shower had materially contributed to it and that was enough for the court to find causation.⁵⁵ It was the very risk that the installation of the showers was designed to forestall.⁵⁶

The same causal dilemmas apply to asbestos when a person is exposed to asbestos from several culpable sources. In the English case of *Fairchild v. Glenhaven Funeral Services*

50. See *Herskovits v. Grp. Health Coop. of Puget Sound*, 664 P.2d 474, 479 (Wash. 1983) (“We hold that medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate cause issue to go to the jury.”).

51. Note that wrongful life and wrongful birth cases illustrate strong examples of modifying the assumptions of tort liability to the ends of promoting deterrence and compensation.

52. [1972] 1 W.L.R. 1.

53. See *id.* at 1 (describing the facts of the case).

54. See *id.* at 7–8 (stating that the pursuer “has succeeded in showing that his injury was, more probably than not, caused by . . . the defenders’ failure to provide a shower-bath”).

55. See *id.* at 2 (stating that the defendants’ failure to provide a shower materially contributed to the skin disease).

56. See *id.* at 1 (explaining that the showers were meant to prevent the skin disease); *Reynolds v. Tex. & P. Ry. Co.*, 37 La. Ann. 694, 698 (1885)

[W]here the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury.

Limited,⁵⁷ the plaintiff had contracted mesothelioma and established that asbestos had caused his disease.⁵⁸ But he could not show along traditional lines that one employer rather than any other was responsible.⁵⁹ Accordingly, he would have to fail. Lord Hoffman confirmed that liability should be established where

between the employer in breach of duty and the employee who has lost his life in consequence of a period of exposure to risk to which the employer has contributed . . . it would be both inconsistent with the policy of the law and morally wrong . . . to impose causal requirements which exclude liability.⁶⁰

If some of the exposure were from a nontortious source, the House of Lords, in a later case, found that the liability could be apportioned according to each actor's contribution to the risk of contracting mesothelioma.⁶¹ This was a large step, as were the American DES cases, in changing the rules of causation.⁶² The flexibility of the rules is designed to avoid the obstacles presented in tort doctrine that thwart the objectives of the law. In particular, knowledge gaps are cured. These doctrinal artifices are necessary to bolster the remedial purposes of the law.⁶³

It is notorious that the connection between asbestos and disease was not broadly brought to the attention of the public until the 1960s.⁶⁴ The revelation of that information, as with

57. [2002] UKHL 22.

58. *Id.* at [3]–[5].

59. *See id.* at [20] (discussing the difficulty in determining which of cumulatively operating factors caused the injury).

60. *Id.* at [63].

61. *See Barker v. Corus*, [2006] UKHL 20, [48] (apportioning liability among the defendants).

62. *See Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1071–72 (N.Y. 1989) (reviewing the applicability of the market share theory in a suit against DES manufacturers); *Sindell v. Abbott Labs.*, 607 P.2d 924, 926 (Cal. 1989) (considering claims that defendants are jointly liable “regardless of which particular brand of DES was ingested by plaintiff’s mother”).

63. *See Dan Farber, Recurring Misses*, 19 J. LEGAL STUD. 727, 737 (1990) (explaining that scholarship can “separate” rules of law, resulting in “a barrier of intellectual inertia”).

64. *See Asbestos Exposure and Cancer Risk*, *supra* note 30 (explaining when the danger of asbestos became understood).

similar revelations about tobacco, owed much to tort law, inviting the attention of plaintiffs' lawyers and the rewards of class actions. The law of torts has multiple purposes. An instrumental aim, if second order purpose, is to reveal information about harm producing products.⁶⁵ Liability rules can then impose costs on their production. The externalities that resulted in social costs can then be accounted for or internalized. As with punitive damages, information is often hidden, and the incentives to bring it to light and hold wrongdoers accountable are weak. Thus, we find that the supercompensatory damages awarded incentivize attorneys to act in the public good; they are sometimes described as private attorneys general.⁶⁶ Without such incentives, wrongs would not be unearthed and the purposes of the law to do justice between citizens and inculcate community welfare would be stillborn.⁶⁷ To be sure, other organs of government may function to reveal harm producing information, but in the United States in particular, feckless legislatures rarely function efficiently to do so. Private enforcement in the public interest is a preferred route.

The social benefit of illuminating the recesses of wrongfully caused diseases cannot be denied. The expense of the tort system too cannot be denied. Yet, unless another social institution at less cost could reveal the information, the expense is justified. Moreover, it is a well-established and time-honored role of tort law to bring a measure of justice to the victims of harm-producing products. The information-forcing function of tort law in some cases reveals its inherent limits. The litigation process, powerful in forcing out information, is a poor vehicle for delivering compensation. Flinn points out that many firms have declared bankruptcy.⁶⁸ This has not been because of the enormity of the

65. Note that claimants in medical malpractice actions state that a prime aim in litigation is to determine information about the malpractice event. *See* FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 64–71 (1913) (describing litigation goals in medical malpractice).

66. *See* *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (describing the award of punitive damages as “private” prosecution); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (explaining that the possibility of bringing a treble-damages action is a “weapon of antitrust enforcement”).

67. *See generally* Andrew Robertson, *Rights, Pluralism and the Duty of Care*, in *RIGHTS AND PRIVATE LAW* 435 (Nolan & Robertson eds., 2012).

68. *See* Flinn, *supra* note 2, at 710 (stating that asbestos liability has been a factor in almost 100 companies' declaration of bankruptcy).

damages so much as the absence of effective ways of running class actions with their polyglot claimants and defendants avid for peace. The bankruptcy process provides a framework in which to accommodate the claims, work out priorities, and balance the interests of different classes of claimants and defendants.⁶⁹ No doubt the procedures are clumsy and inefficient. They force courts to act as administrative bodies that corrode judicial independence and impartial distance.⁷⁰ The transaction costs generated mean that the dollars delivered to claimants come at high cost.

In the mid twentieth century, many tort scholars despaired of tort law as a compensation system.⁷¹ The despair prompted them to recommend that tort law be abolished and compensation schemes be substituted. The apogee of this development was the adoption in New Zealand of their compensation scheme.⁷² The schemes would deliver, it was claimed, compensation at less cost. The model, however, was static and did not account for the tort system's power in information forcing. It assumed a frozen state in which the claims cognizable are the run-of-mill running down and simple accidents causing personal injuries. New Zealand did

69. The Dow Corning breast implant litigation illustrates this point. See *Chronology of Breast Implants*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/implants/cron.html> (last visited Jan. 3, 2014) (on file with the Washington and Lee Law Review).

70. See John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2063 (1997) ("Judge Weinstein is of the view that victims [of mass torts] 'deserve help from the government not aid through a suit against private corporations.'" (citing *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1229 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir.1987) (internal brackets omitted))). See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1986).

71. See David Partlett, *Of Law Reform Lions and the Limits of Tort Reform*, 27 SYD. L. REV. 417, 439 (2005) (discussing how mass tort litigation has "forced" courts to administrate compensation systems).

72. See Partlett, *supra* note 26, at 1359 (describing the New Zealand compensation scheme that replaced tort liability in the 1960s); GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* 69–104 (1979) (describing the debate over the Accident Compensation Bill, which set up a government compensation framework to reimburse victims of personal injury). For a later discussion on the evolution and limits of the scheme, see generally Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL'Y REV. 187 (2008), and Stephen Todd, *Treatment Injury in New Zealand*, 86 CHI.-KENT L. REV. 1169 (2011).

not cover diseases, although this was not seen as a failing at the time,⁷³ and when Australia was considering a compensation scheme, it was seriously contemplated. The dynamic aspect of tort liability, sometimes its ugly face, is the one that delivers a public good. But for garden-variety tracks of accidents and when the parameters of liability are well worn, the tort system does not have the same salience.

It follows that tort law in the asbestos imbroglio can claim real success in revelation of information but must admit to a deep impediment in delivering compensation.⁷⁴ And just when we thought that we were emerging from the claims agony, along comes a new class of claimant. Like Macbeth, we see multiple generations before us and like him, we are aghast. Flinn is right to want to move beyond courts acting *ab initio* in adjudicating claims.⁷⁵ A system of compensation should draw on knowledge painfully gained over the decades of asbestos litigation. Unfortunately, the legislatures seem little interested in finding efficient compensation schemes that would benefit victims and defendants alike.

III. The Courts and the Scope of Liability

An admirable and noteworthy aspect of Flinn's Note is her analysis of the scope of liability issue regarding the take-home asbestos claims.⁷⁶ The discussion confirms the confused state of the issue here, and it is consistent with the fraught state of the law as claims on the periphery of tort law are examined. Once the courts declared that the categories of negligence were not

73. The point is well taken if social welfare in a narrow sense is the command. *See generally* THE WELFARE STATE TODAY: SOCIAL WELFARE POLICY IN NEW ZEALAND IN THE SEVENTIES (Geoffrey Palmer ed., 1977).

74. *See* STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 21–68 (2005) (highlighting the inefficiencies of litigation). In the 1980s, the costs of compensation were estimated to be thirty-seven cents in every dollar of compensation. STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION 60 (2002).

75. *See* Flinn, *supra* note 2, at 751 (stressing that the long-term solution to take-home asbestos litigation lies in state legislatures).

76. *See id.* at 723 (highlighting the problems with extending liability in take-home asbestos exposure cases).

“closed,”⁷⁷ the courts throughout the common law world have searched for limiting principles.

We like to ridicule Baron Alderson’s warning in *Winterbottom v. Wright*,⁷⁸ when he endorsed the privity restriction in the duty of care warning that if “one step why not fifty?”⁷⁹ Such pusillanimity was swept aside by bolder spirits and especially in the twentieth century by the powerful rhetoric of the two great common law jurists, Lord Atkin and Benjamin Cardozo. Pandora’s Box was prized open—no longer was liability confined to recognized, carefully defined, relationships. A broad principle of hydraulic force was unleashed. Using the Parable of the Good Samaritan, Lord Atkin said that the duty of care extends to one’s neighbor.⁸⁰ And who is my neighbor? It is that person who will be foreseeably harmed by my act.⁸¹ Cardozo in *MacPherson* was more pragmatic but just as broad.⁸² Modern manufacture and distribution of goods demanded a responsibility to those persons injured by negligently made products. The scope of that duty was articulated in foreseeability terms in *Palsgraf* twelve years later.⁸³

The courts have hopelessly muddled the distinction between duty and proximate cause or scope of duty. Of course, the mess begins in *Palsgraf* itself where we have Cardozo opting for a duty analysis⁸⁴ and Andrews going for a proximate cause framework.⁸⁵

77. *Donoghue v. Stevenson*, [1932] A.C. 562, 619 (H.L.) (“The categories of negligence are never closed.”).

78. (1842) 10 Meeson & Welsby 109 (H.L.).

79. *Id.* at 115 (“The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.”).

80. *See Donoghue*, [1932] A.C. 562 at 580 (“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour . . .”).

81. *See id.* (“The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”).

82. *See MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916) (explaining that the presence of a known danger creates a duty).

83. *See Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (1928) (“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”).

84. *See id.* at 99–101 (applying duty analysis).

85. *See id.* at 101–02 (Andrews, J., dissenting) (applying proximate cause).

Duty played its part, Cardozo said, because before causation becomes relevant we have to ask if Mrs. Palgraf was within that class of persons to whom a duty was owed.⁸⁶ This could only be the case if a sufficient relation existed between her and the Long Island Railroad. That depended in turn on whether the eye of “ordinary vigilance” would perceive the hazard.⁸⁷ Duty cannot exist in the air; it is a term of relation. Andrews, however, started with the opposite idea. A duty is owed simply to the world at large.⁸⁸ The limits to liability are found in proximate cause and that is a question of fact depending upon “practical politics.”⁸⁹ Cardozo won the skirmish in *Palsgraf* but was to lose the war to Andrews. The recently promulgated Section 7 of the Restatement (Third) of Torts is confirmation of this. A duty is owed to exercise reasonable care to all those to whom the conduct creates a risk of physical harm.⁹⁰ The vast majority of run-of-the-mill cases with which negligence law is concerned are covered by the formula. Duty is never argued in a running-down-highway case. But in new areas of expansion, duty does play a vital part as recognized in subsection (b) of Section 7, which allows for limitations of or denial of duty for a countervailing principle or policy.⁹¹ In particular, when the risk created is not physical in threatening person or property or when the defendant has not acted but rather has omitted to act, the question is one of the boundaries of tort liability.⁹²

This is why some courts, as explained by Flinn, have adopted reasoning that the asbestos defendants have not acted but merely

86. See *id.* at 101 (majority opinion) (“The law of causation, remote or proximate, is thus foreign to the case before us.”).

87. *Id.* at 100.

88. See *id.* at 102 (Andrews, J., dissenting) (describing negligence as “an act or omission which unreasonably does or may affect the rights of others”).

89. *Id.* at 103.

90. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”).

91. See *id.* (allowing for a finding of no duty in the face of countervailing policies or principles).

92. One is reminded of Prosser’s analysis of the “borderland of tort and contract.” See W. Prosser, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS 380 (1953) (discussing the overlap between tort and contract).

omitted to act in relation to asbestos brought home from work.⁹³ As she intimates, this is a difficult line to draw. An omission is actionable if a person has a positive duty to act in another's protection. Thus, the employer perceiving the danger of asbestos may have a duty to protect family members who would be subject to constant and deleterious contact with asbestos fibers.

Flinn suggests we accept Professor Zipursky's criticism of Section 7⁹⁴ and keep the concept of foreseeability in the duty formula.⁹⁵ Zipursky's argument is that foreseeability has been long accepted by the courts and that the Restatement's "purge"⁹⁶ of foreseeability does not describe actual court decisions.⁹⁷ As Torts professors know, the term is well ensconced, and students and lawyers are much misled by it, perhaps as Comment j to Section 7 suggests, to blind courts to more transparent explanations of "no duty" findings.⁹⁸ The use of the term may also confuse the jury's and judge's roles in negligence questions.⁹⁹ Many, however, remain faithful to it as Flinn points out.¹⁰⁰ Let us declare that it has no independent function except as a shell in which to bring to bear the factors that the courts regard as material in founding a duty in a particular case. The Supreme Court of California "can on a clear day foresee forever."¹⁰¹ Other courts in the common law world have the same clairvoyance.

93. See Flinn, *supra* note 2, at 725 (describing cases in which the court defined the defendant's conduct as "nonfeasance").

94. See generally Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1257 (2009).

95. See Flinn, *supra* note 2, at 747 (suggesting that foreseeability should remain in duty analysis).

96. See W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 742 (2005).

97. See Zipursky, *supra* note 94, at 1257 (explaining that the rejection of foreseeability in duty analysis contradicts the common practice of most courts).

98. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (2010) (stating that a court must justify a "no-duty" ruling "without obscuring references to foreseeability").

99. See Cardi, *supra* note 96, at 799 (reasoning that foreseeability decisions belong to the jury rather than the judge).

100. See Flinn, *supra* note 2, at 747 ("[M]aintaining foreseeability of harm as a factor in duty analysis conforms to the practice of most states . . .").

101. *Sturgeon v. Curnutt*, 34 Cal. Rptr. 2d 498, 501 (1994) ("On a clear day, you can foresee forever." (citing *Thing v. La Chusa*, 771 P.2d 814, 830 (1989) (attributing the thought to Bernard E. Witkin, Esq.))).

Certainly, in asbestos claims, knowledge of the harm of asbestos exposure is important, if not critical.¹⁰² Foreseeability is not knowledge. Foreseeability is a comfortable word for courts to use to decide if a duty should adhere. Can it be doubted that once employers know of the risks posed by asbestos, it is foreseeable that family members will be within that class of persons who will be harmed in an entirely predictable way? Two ways present themselves in dealing with the issue. First it may be said that policy reasons ought to deny that duty of care extends to family. Or one could find that the damage was not proximate or was outside the scope of the duty. Flinn, for reasons of judicial economy, would want the take-home asbestos actions to be subject to summary judgment.¹⁰³ The latter approach, being one focusing on fact, is therefore the less attractive. Judge Andrews in *Palsgraf* found the jury as the institution that should decide scope in its good sense.¹⁰⁴ Flinn would not want matters to be left in the maw of the jury for well-articulated reasons.¹⁰⁵ Of course, some courts have boldly made an end run around the fact enquiry by declaring, as a matter of law, that the damage is too remote.¹⁰⁶ Alternatively, courts often utilize the duty concept to find no liability in categories of cases for policy reasons. Note the reasoning in *Tarasoff v. Regents of University of California*.¹⁰⁷ A duty was found in *Tarasoff* where the victim was clearly

102. *But see* Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 547 (N.J. 1982) (imposing liability without requiring proof of the defendant's knowledge of the toxic qualities of asbestos). This was quickly repudiated. *See, e.g.,* Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1158 (N.J. 2008) ("Foreseeability in the context of a duty analysis must assess the knowledge of the risk of injury to be apprehended." (citation omitted)).

103. *See* Flinn, *supra* note 2, at 747 (explaining the need for courts to use foreseeability in duty analysis so they can "quickly eliminate factually deficient cases at summary judgment").

104. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 105 (1928) (Andrews, J., dissenting) (stating that the negligence question in the case should have been submitted to the jury).

105. *See* Flinn, *supra* note 2, at 751 (discussing the court's role in take-home asbestos cases).

106. *See* *Petition of Kinsman Transit Co.*, 338 F.2d 708, 725 (2d Cir. 1964) ("Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.").

107. 551 P.2d 334 (Cal. 1976).

identified.¹⁰⁸ But a duty would not be found, later cases emphasized, to extend to a class of persons who are merely foreseeable.¹⁰⁹

Flinn's Note agrees with Kotlarsky that if Section 7 were applied, fewer "no duty" determinations would be found.¹¹⁰ I, in fact, see it the opposite way. The policy grounds are at the center of the judge's role. To rid the analysis of "foreseeability" may lead to clarity in purging factual determinations from the duty issue, thus excluding the jury. Courts may then, in duty determinations, create precedent on policy and principles grounds that allow summary judgments more readily. It may be noted that the English courts have experimented in bringing policy factors to the fore in duty determinations. The test in *Anns v. Merton London Borough Council*¹¹¹ talks in terms of a prima facie duty arising where "a sufficient relationship of proximity or neighborhood" is established and where in "reasonable contemplation . . . carelessness . . . may . . . cause damage."¹¹² Then, it is a matter whether there are considerations "which ought to negative, or to reduce or limit the scope of the duty."¹¹³ The intent, as in Section 7, was to bring to the surface the real reasoning animating the court in determining the scope of the duty. The fate of this test has not been a happy one. Courts have found it too mechanical, and the overt promotion of policy has not suited later English and Commonwealth courts, which are more accustomed to incremental advances in the domain of the law of negligence.¹¹⁴ This experience seems to support Flinn's criticism

108. See *id.* at 341 (stating that the defendant had told his therapist that he was going to kill Tatiana Tarasoff).

109. See Flinn, *supra* note 2, at 737–38 (explaining Zipursky's analysis of *Tarasoff*). The extent of liability and its definition is well observed in a number of cases relating to the liability of landlords for injuries due to criminal actions of third parties on leased premises. See, e.g., *Tan v. Arnel Mgmt. Co.*, 88 Cal Rptr. 3d 754, 765 (2009) (concluding that the risk of violent criminal assaults on the property was foreseeable such that the defendant landlord had a duty to provide minimal security measures to protect tenants). For collected cases and commentary, see VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 532–33 (12th ed. 2010).

110. Flinn, *supra* note 2, at 740.

111. [1978] AC 728.

112. *Id.* at 751–52.

113. *Id.*

114. In *Sutherland Shire Council v. Heyman*, Judge Brennan in the High

of Section 7. I have no doubt that we have just begun the *sturm und drang* on the duty formulation in Section 7. Little would matter if the courts would keep the meaning of foreseeability clear in their mind. It does not mean knowledge of risk. It is an amalgamation of factors that, to be sure, incorporates knowledge along with concerns about the costs of precaution and gravity of the harm that might ensue. Duty determines the scope of responsibility for a wrongful actor. It is a wide concept when the risk pertains to physical harm but is more narrowly confined when the interests stray from the physical, for example, to pure economic risks and emotional distress. It will require the finding of a special relationship where the duty is to take precautions to protect another.¹¹⁵

Flinn gets the test entirely correct in her “Multi-Factored Test.”¹¹⁶ I do not see, however, that Section 7 detracts from such a test. In citing *Chaisson v. Avondale Industries, Inc.*,¹¹⁷ a case from Louisiana, we see immediately how some courts misunderstand ‘foreseeability.’¹¹⁸ Knowledge of the risk will be a central factor that nothing in the Third Restatement revokes. It goes to the relationship that the Supreme Court of Michigan places at the forefront.¹¹⁹ It will remain a critical matter, as a Pennsylvania

Court of Australia said:

It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable “considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.

[1985] 69 A.L.R. 1, 43–44.

115. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 343 (1976) (stating that the relationship between a therapist and his patient “create[s] a duty to exercise reasonable care to protect a potential victim of another’s conduct”).

116. See Flinn, *supra* note 2, at 746 (proposing a multi-factored test for courts to apply to take-home asbestos cases).

117. 947 So. 2d 171 (La. Ct. App. 2006).

118. See *id.* at 183 (explaining that because the asbestos injuries occurred after OSHA revealed the risks of household exposure to asbestos, the defendant had knowledge of the risks).

119. See *In re Certified Question from Fourteenth Dist. Ct. App. of Tex.*, 740 N.W.2d 206, 216 (Mich. 2007) (holding that because the plaintiff did not have a legally significant relationship with the defendant, no duty should be imposed).

court opines, that the consequences of take-home asbestos were little known at the time of exposure.¹²⁰ In policy terms, how could the manufacturers have taken reasonable precautions against such a remote risk? All this as Flinn states, is an application of the common law.¹²¹ The Third Restatement neither adds nor subtracts to the clarity of the test, if we are able to understand the true nature of the duty concept.

Flinn's Note does great service in exploring the options. As I read her analysis, I was reminded of T.S. Eliot's incisive observations about our human experience:

We shall not cease from exploration, and the end of all our exploring will be to arrive where we started and know the place for the first time.¹²²

Along these lines, I offer the sage words of Justice Michael Kirby of the Australian High Court in *Graham Barclay Oysters v. Ryan*.¹²³ In that case, the question was whether the local and state authorities responsible for the upkeep of lakes in which oysters were grown were liable when contaminated oysters caused the plaintiffs harm.¹²⁴ Justice Kirby discussed the "search for methodology for determining a duty."¹²⁵ He goes back to Oliver Wendell Holmes in his famous lectures on his book, *The Common Law*, where he found that the "general foundation of legal liability in blameworthiness, as determined by the existing average standards of the community, should always be kept in mind."¹²⁶ After an examination of English and Australian authorities over seventy years on the duty issue he opined as follows:

120. See *Hudson v. Bethlehem Steel Corp.*, No. 1991-C-2078, 1995 WL 17778064, at *4 (Pa. Ct. C.P. Dec. 12, 1995) ("[N]othing in the record demonstrated that the defendant was on notice, prior to 1960, that an employee's wife was at risk of contracting mesothelioma.").

121. See Flinn, *supra* note 2, at 745 (stating that the duty determination is an application of a state's common law, which varies from state to state).

122. T.S. ELIOT, *FOUR QUARTETS* 59 (2009).

123. (2002) 211 CLR 540.

124. See *id.* at [3] (discussing the plaintiff's claim against the oyster distributors and growers).

125. *Id.* at [230].

126. OLIVER WENDELL HOLMES, *THE COMMON LAW* 125 (1882).

The search for such a simple formula [for determining the existence of a duty of care] may indeed be a “will-o’-the-wisp.” It may send those who pursue it around in never-ending circles that ultimately bring the traveller back to the very point at which the journey began. Thus we seem to have returned to the fundamental test for imposing a duty of care, which arguably explains all the attempts made so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so. That is the test that Gummow J and I adopted in our joint reasons in the recent decision in *Tame v. New South Wales* Even if the approach of the other members of the Court in that case does not do so explicitly, it is obvious that the “touchstone” of reasonableness is fundamental to the way in which they determined the existence or otherwise of a duty of care.¹²⁷

These are words that ought to encourage Flinn. Her analysis is precisely a return to the common law of the duty of care as measured by proportionality and reasonableness. The duty will depend upon the factors she finds. Each court will have its own assessment of the duty here in question. Over time it may be that the duty question as a matter of law will be restricted to allow defendants quiet in the face of these claims.

Before leaving this part of the Comment, I need to comment on a line of cases that Flinn herself finds unconvincing and that is a prime demonstration of how the duty analysis can be obfuscated. This has to do with the line of cases that finds no duty because the take-home asbestos cases are mere omissions and not actions, nonfeasance and not misfeasance.¹²⁸ These “no duty” cases are best understood in terms of the common law stance that there is no duty to rescue. The Priest and the Levite passed the broken man on the road. They acted shamefully but did not breach a duty of care even though they know their nonchalance would cause him harm—they had not caused the plight and continuing suffering of the person in peril.¹²⁹ More generally, there is no duty to protect another from the actions of a third party. To find a duty to take affirmative actions to protect

127. *Ryan* (2002) 211 CLR at [244] (citations omitted).

128. See Flinn, *supra* note 2, at 724 (listing cases based on the distinction between misfeasance and nonfeasance).

129. See *L.S. Ayres & Co. v. Hicks*, 40 N.E.2d 334, 337 (Ind. 1942) (describing the biblical story of the priest and the Levite).

another, one needs to establish a relationship that obliges action. Thus, in *H.R. Moch Co. v. Rensselaer Water Co.*,¹³⁰ an opinion by Cardozo, who had championed the broad duty of care in *MacPherson*, the plaintiffs who suffered loss by fire when the defendant had supplied water at a pressure below that contracted for with the city could not recover.¹³¹ The defendant had simply failed to bestow a benefit.¹³² That contractual failure alone could not establish a relationship.¹³³

In the take-home cases, there is clearly an act: a failure to warn against the risks in distribution of asbestos. The plaintiffs could be said to be in a class of persons that would be imperiled by exposure. The husbands were the mere transporters of the fibers, and if the defendants knew about the consequences of exposure, they could have taken steps to avoid the danger. To take the defective wheel in *MacPherson*¹³⁴ and the scope of liability, it could not be contended that if the breaking of the wheel injured pedestrians they would be outside the zone of legal protection.¹³⁵ Some of the cases referred to by Flinn frame the duty in terms of a duty to warn.¹³⁶ Now this is understandable since to impose strict liability for products that have no design or manufacturing defects, the route to liability is through the failure to warn.¹³⁷ This invites a nonfeasance analysis, but it is a trap.

130. 159 N.E. 896 (N.Y. 1928).

131. See *id.* at 899 (finding in favor of the defendants).

132. See *id.* (“What we are dealing with at this time is a mere negligent omission, unaccompanied by malice or other aggravating elements.”).

133. See *Sutradhar v. Nat’l Env’t Research Council*, [2006] UKHL 33, [2006] 4 All E.R. 490 (Eng.); *Agar v Hyde* (2000) 201 CLR 552 (Austl.).

134. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916) (explaining the case’s facts).

135. Consider the foundational strict liability case, *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963). The defective product was a “shopsmith” that injured the plaintiff when it ejected a piece of wood unexpectedly. *Id.* at 898. The plaintiff had received the product from his wife for Christmas two years before. *Id.* No finding of negligence was necessary. The defendant was strictly liable. *Id.* at 900. The product had a defect. *Id.* at 901. If the wood had hit another, liability would have been extended to that person or to any others. See *id.* at 900 (“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects.”).

136. See, e.g., *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 374 (Tenn. 2008) (stating that the employer, who knew the dangers of take-home asbestos, could have prevented or reduced the harm to the plaintiff).

137. *Anderson v. Owens-Corning Fiberglass*, 810 P.2d 549, 557 (Cal. 1991)

The class of persons in the scope of liability does not depend on showing a special relationship as it does in negligence, where the issue is protection against actions of third parties or natural events.¹³⁸ Rather, those within the scope of liability are all those who will foreseeably be affected by exposure. If the product poses dangers to a class of persons, the defendant will be liable without a showing of negligence if the defendant knew or should have known of the danger.¹³⁹ Just as pedestrians are injured by the breach in building an automobile with a negligently defective wheel, the injured plaintiffs in the take-home asbestos cases are injured by exposure to the fibers. The question may be whether adding new layers of duty would be too burdensome, but it is the act of the defendants in producing or using asbestos that has resulted in the harm.

Lastly, let me suggest that the scope of liability ought to extend to take-home asbestos victims. I recognize that liability must be cut off somewhere, and principle and policy will dictate where the line is to be drawn whether under the rubric of foreseeability or the test embodied in Section 7. Flinn's multifactorial test is precisely on point. The one critical factor in my view is that the class of persons to whom the duty is owed is limited.¹⁴⁰ The injuries arose from the injuries to the mothers and

(discussing strict liability in the context of "failure to warn").

138. A duty to take affirmative steps to protect another from the acts of others requires a showing of "control" with knowledge of particular risks that eventuated. *L.S. Ayres & Co. v. Hicks*, 40 N.E.2d 334, 337 (Ind. 1942). The costs of imposing a duty of affirmative action are critical. See *Hegel v. Langsam*, 273 N.E. 351, 352 (Ohio Ct. C.P. 1971) (refusing to place a duty on a university to "regulate the private lives of students," a duty that would be difficult to meet).

139. See *Anderson*, 810 P.2d at 559 (stating that a defendant in a strict products liability action is liable unless the particular risk was "neither known nor knowable" at the time the product was manufactured).

140. Recall that in *Enright v. Eli Lilly & Co.*, the New York Court of Appeals felt compelled to draw a line as to disentitle third generation claimants from compensation in tort. See *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198, 203 (N.Y. 1991) ("It is our duty to confine liability within manageable limits."). In Chief Justice Wachler's opinion, the class of plaintiffs, the third generation, was neither "exposed to the defendants' dangerous product [n]or negligent conduct." *Id.* at 204. This line also supports the conservative ruling in *Albala v. City of New York*, in which the court rejected that a duty would be owed to a child born with "injuries suffered as a result of a preconception tort against the mother." *Albala v. City of New York*, 429 N.E.2d 786, 787 (N.Y. 1981); see also *State of La. ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170, 1171 (E.D. La. 1981), *aff'd*,

close family members' exposure to the very substance that caused injuries in the primary victims. As a physical substance, the consequences will cease through the natural law of physics. This may be put in terms of the zone of impact. Assuming knowledge of the consequences of asbestos exposure, close family would be "foreseeable" victims.

Moreover, family members of tort victims have often warranted favorable treatment in terms of liability, even where the injuries are of a different kind and where deterrence has been garnered by findings of liability vis-à-vis primary victims.¹⁴¹ The bystander cases in emotional distress are a prime example. It is true that familial relationships no longer immunize actors from tort liability to the extent they did in the past. But the fact of relationship is still central to the determination of the scope of liability as seen in a long line of authority drawing the boundaries to emotional distress in the bystander cases. Close family of primary victims form members of the foreseeable class of persons.¹⁴² They are persons who are particularly vulnerable to the use of a term of relation. Professor Stapleton has emphasized this,¹⁴³ and the High Court of

728 F.2d 748 (5th Cir. 1984) (discussing liability to an open-ended class in the context of economic loss); *Perre v Apand Pty. Ltd.* (1999) 198 CLR 180 (Austl.) (same); cf. *Renslow v. Menonite Hosp.*, 367 N.E.2d 1250, 1255 (Ill. 1977) (finding that the defendant owed a duty in the case of a preconception tort).

141. See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 839 (Cal. 1989) (reviewing a case in which the plaintiff-mother claimed emotional injury because of the stress caused when hearing about a car accident involving her son). The earlier case of *Dillon v. Legg* adopted the familial relationship as an element of proximity to precipitate a duty of care to a bystander. See *Dillon v. Legg*, 441 P.2d 912, 924 (Cal. 1968) (providing recovery to a plaintiff-mother bystander). In some cases the relationship may bring the claimant into a duty relationship as a "direct victim." E.g., *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 816 (Cal. 1980).

142. Cf. *Tame v New South Wales* (2002) 211 CLR 317 (Austl.); *Annetts v Australian Stations Pty Ltd.* (2002) 191 ALR 449, 508 (Austl.) (comparing the husband-wife relationship in *Tame* to the parent-child relationship in *Annetts*).

143. See generally Jane Stapleton, *The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable*, 24 AUSTL. BAR REV. 135 (2003); Jane Stapleton, *Duty of Care Factors: a Selection from the Judicial Menus*, in THE LAW OF OBLIGATIONS: ESSAYS IN HONOUR OF JOHN FLEMING 59, 70-80, 83-87 (1998); Jane Stapleton, *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence*, 111 LQR 301, 303, 305, 331, 342, 345 (1995); Jane Stapleton, *In Restraint of Tort*, in THE FRONTIERS OF LIABILITY 83, 92-93 (1994); Jane Stapleton, *Duty of Care and Economic Loss: a Wider Agenda*, 107 LQR 249,

Australia has adopted it.¹⁴⁴ The protection given to children is a prime example of the treatment of the vulnerable by the law of negligence.¹⁴⁵ Given knowledge on the part of asbestos producers of the consequences of asbestos exposure, to find family members are owed a duty fulfills the deterrence aims of the law and compensates victims who can, without a doubt, establish causation.¹⁴⁶

In any event, if the courts are the institutions to continue to seek to draw liability lines in these new asbestos cases, Flinn's points will be taken as important departure points for judicial endeavors in finding suitable boundaries for the scope of liability. My contribution is to begin to suggest some other lines of analysis that may bring these take-home cases into the category of compensable exposure events. My next Part is again inspired by Flinn's suggestion that state legislatures need to pick up the mantle of reform.

IV. Asbestos, the Courts, and Legislatures

Flinn describes the failures of Congress in promoting a claims and compensation scheme that would tackle the obstacles in the way of administering asbestos claims.¹⁴⁷ Legislatures may

266ff (1991).

144. See *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [27] (discussing the concept of vulnerability); *Harriton v Stephens* (2006) 26 CLR 52 n.156 (same); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [218] (same); *Cole v S. Tweed Heads Rugby League Football Club Ltd.* (2004) 217 CLR 469, [106] (same).

145. See *J.S. v. R.T.H.*, 714 A.2d 924, 934 (N.J. 1998) (imposing a duty on the wife of a child abuser to protect young girls who her husband abused).

146. The development of the elements of foreseeability in these cases into a rigid test as in *Thing v. La Chusa*, 771 P.2d 814, 839 (Cal. 1989), is, however, to be regretted. The flexible use of factors under a general duty rubric as in the English and Australian cases is to be preferred in putting the law on principled foundations. See *Tame v New South Wales* (2002) 211 CLR 317 (Austl.); *Annetts v Australian Stations Pty Ltd.* (2002) 191 ALR 449, 505 (Austl.) (explaining that factors, such as causation or foreseeability, are not "themselves decisive of liability"). It is plain enough that the California Supreme Court in *Thing* was attempting to provide bright line tests to promote administrative efficiency, just as Flinn suggests her bright line test to preclude liability in take-home asbestos cases.

147. See Flinn, *supra* note 2, at 751–53 (discussing Congress's several

be “the better angels”¹⁴⁸ and act in aid of resolution of claims, but, in light of experience, the hope is dim. Most recently, trusts set up to compensate the victims of asbestos diseases faced the Furthering Asbestos Claim Transparency Act 2013 (FACT),¹⁴⁹ which allowed asbestos companies to demand information from funds for any reason.¹⁵⁰ Combating fraud has been put forward as the basis of the legislation. This is the kind of legislative rent-seeking action that leaves little room for responsible Congressional initiatives designed to attack the issue so well described in the Note.¹⁵¹ The hard work will fall again to the courts, and Flinn’s Note will be a superb roadmap for courts tackling the latest instance of the asbestos wars.

Efficiency and fairness favor a workers’ compensation type scheme that would deliver compensation. I have pointed out the waste in running asbestos claims through stressed courts and aggressive plaintiffs’ lawyers.¹⁵² The social benefits of the tort litigation system in information revelation were delivered long ago. Now, in a world of mature claims, the question is how to compensate victims.¹⁵³

attempts to handle asbestos litigation).

148. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

149. H.R. 982, 113th Cong. (2013).

150. See *id.* (requiring trusts to publicly disclose information regarding the receipt and disposition of claims for injuries based on asbestos exposure).

151. For a detailed analysis of the operation of trusts set up as result of bankruptcy and tort claims, see DIXON, ET AL., *supra* note 25.

152. See *supra* notes 26–28 and accompanying text (discussing the judicial waste generated by asbestos litigation).

153. To be sure, compensation schemes have not fared well in the United States. See Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform’s Impact on Businesses, Employment, and Production*, 66 VAND. L. REV. 257, 277–78 (2013) (discussing the failure of comprehensive federal tort reform). For example, nonfault motor vehicle accident schemes found favor in the 1970s despite their efficiency founder. See *id.* at 284 (stating that in the motor vehicle industry, products liability law developments had “no impact on passenger car-death rates between 1950 and 1988”). Nonfault medical accidents schemes have fitful appearances in the legislative agenda. See, e.g., Joanna Shepherd-Bailey, *Patient Injury Act Increases Patient Access to Justice*, THE DAILY REPORT (Sept. 24, 2013), <http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202620381111&slret urn=20131016103555> (last visited Nov. 16, 2013) (discussing the Patient Injury Act, recently introduced to the Georgia Senate, which would “eliminate the state’s medical malpractice system and replace it with a no-blame, administrative model that compensates all patients who have been truly

With respect to mass torts, courts are stretched and pulled to arrive at satisfactory solutions. At one time, we worried that the integrity of the courts would suffer when put to the task of administering these large mass claims.¹⁵⁴ Class actions bring in their wake huge devotion of judicial resources and compromises on the idea of individual justice.¹⁵⁵ What we hope for is a partnership between courts and legislatures that recognizes the limits of courts' institutional competence and willingness of legislatures to aid the task to bring fair and just resolution of claims. But the stakes are large, and public choice theory gives us little hope that the public good is a prime and independent value. Experience here, as Flinn recognizes, does not make one sanguine about the cooperation of the two arms of government. Law reform to cure the limitations of courts is rarely on display. She sees that state legislatures may reflect the policy imperatives of claims experiences in regions in the United States.¹⁵⁶ Each state can act as a laboratory in exploring resolutions driven in part by a sense of the urgency of claims against the embattlement of asbestos producers. However, the stakes are big and the reach of self-interest considerable. The reforms cited by Flinn are often to protect from liability those property owners whose residences contain asbestos. No doubt insurers are intent to limit liability of property owners, particularly if residential owners are often seen

harmed") (on file with the Washington and Lee Law Review). *See also* Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151 (2014) (surveying the costs of defensive medicine).

154. *See* Goldberg, *supra* note 70, at 2034–50 (comparing Judge Jack Weinstein's low damage amounts to tort law and distributive justice); Martha Minow, *The Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2010–25 (1997) (describing Judge Jack Weinstein's activist efforts to include all potentially affected parties in class litigation, calling it the "temporary administrative agency"); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 899–930 (1996) (arguing that the rise of massive tort settlements mimics the development of public administrative agencies).

155. *See* Zipursky, *supra* note 94, at 1270 ("It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable trivial damage the actor should be liable for all consequences, however unforeseeable and however grave . . .").

156. *See* Flinn, *supra* note 2, at 755 (proposing that a state should respond to asbestos in the way that relates to that state's experience with asbestos claims).

as poor loss bearers. The overhang of liability with respect to property is felt to be real if conveyances of property are encumbered.¹⁵⁷ Legislatures certainly may reflect exhaustively on the pros and cons of liability but are subject to blindness towards those interests not well represented in the lobbying market place. As I mentioned above, varying state liability systems bring their own uncertainties.¹⁵⁸ The peace sought may not be easily gained. Instead, I offer a legislative scheme that does not preclude liability and does not attempt to import a compensation scheme.

One modest reform would be along the lines of the Australian State of New South Wales. Under that state's Dust Diseases Act,¹⁵⁹ a tribunal is established to adjudicate claims for these diseases.¹⁶⁰ Such legislation would be difficult to attack and would bring relief to hard-pressed courts. If federal legislation were sought, a constitutional issue might arise, but the impact of asbestos on interstate trade may be sufficient to pass muster under the Commerce Clause. The great advantage of the tribunal would be its expertise in these claims and its ability as a repeat player to do justice across like-placed claimants.¹⁶¹ Flinn's central issue of the extension of liability to take-home claimants would still be a much debated matter that would find its way into the courts. Those courts, however, would have the advantage of growing adjudication within the tribunal that would be a firm guide to courts.

157. This is similar to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which places absolute liability on generators of hazardous substances on land. See 40 C.F.R. § 302.7 (2013). CERCLA's standard of liability imposes significant burdens on land conveyance. See John Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1494 (1994) (describing the standard of liability).

158. See *supra* notes 8–16 and accompanying text (discussing the problems with state-specific solutions).

159. *Dust Diseases Act 2005* (N.S.W.) (Austl.).

160. See *id.* (“An Act to provide more expeditious remedies for those suffering from disabilities resulting from exposure to dust; and for other purposes.”).

161. See Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U. L. REV. 908, 975 (1989) (proposing tort reform that would allow for consistent recovery among plaintiffs).

V. Conclusion

I hope that as policy makers and courts are seized again with the claims that Flinn's Note focuses on, they will absorb the wisdom within her Note. Courts should be informed by her analysis of the duty of care and the scope of duty. It will, I anticipate, yield responses such as mine. Legislatures should visit reform with open eyes, seeking a partnership with courts in solving the problems presented by genuine claimants and hard-pressed defendants. Progress is uncertain where legislation is subject to the slings and arrows of interest groups' influence, and we should not be overly sanguine about progress.¹⁶² But before we succumb to the Slough of Despond,¹⁶³ we should bear in mind the remarkable success of tort's remedial machine.

Allow me to provide one reflection on how far we have come in the "few" years I have been teaching torts. At the Australian National University in the late 1970s, I was teaching a class and mentioned the emerging litigation on asbestos. After the class a student came to me and asked some questions. He had grown up in an asbestos mining town in the west of Australia. As a young boy, with his friends, he had played in the company-provided playground: instead of sand in the play area, the company had laid down blue asbestos.

162. Reform of adjectival law has fared badly in the United States because courts were left with the task of applying tort doctrines of damages as once-and-for-all and limitation periods to the etiology of asbestos diseases. *See, e.g.*, *Gideon v. Johns-Manville Sales*, 761 F.2d 1129, 1137 (5th Cir. 1985) ("Gideon could not split his cause of action and recover damages for asbestosis, then later sue for damages caused by such other pulmonary disease as might develop, then still later sue for cancer should cancer appear."); *Metro-N. Commuter v. Buckley*, 521 U.S. 424, 438 (1997) (denying recovery for medical monitoring for future injuries resulting from asbestos exposure).

Compare this with the active cooperation of the courts and Parliament elsewhere: Where the courts in the United Kingdom have found that the precursors to lung disease caused by asbestos had not blossomed into a cognizable injury, Parliament acted to redefine the conditions—for example, pleural plaques qualify as injuries. The statutes also address the problems in the limitation period caused where a condition remains undiscovered or undiscoverable. *See* Damages (Asbestos-Related Conditions) (No. 2) Bill, 2009-10, H.L. Bill [31] (Eng.) (stating that someone suffering from pleural thickening would not have to prove causation to claim damages); Damages (Asbestos-related Conditions) (Scotland) Act, 2009, (A.S.P. 4) (allowing actionable harm for asbestos-related pleural plaques); Damages (Asbestos-related Conditions) Act (Northern Ireland), 2011, c. 28 (same).

163. *See generally* JOHN BUNYAN, *PILGRIM'S PROGRESS* (1678).