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ASBESTOS AND THE DALKON SHIELD: CORPORATE AMERICA ON TRIAL

Joseph A. Page*

AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD. By *Morton Mintz*. New York: Pantheon Books. 1985. Pp. xvii, 308. \$17.95.

OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL. By *Paul Brodeur*. New York: Pantheon Books. 1985. Pp. viii, 374. \$19.95.

Asbestos and the Dalkon Shield intrauterine device share a number of unhappy distinctions. Both products have exacted a terrible human toll.¹ Damage suits seeking recovery for harm linked to both have put considerable strain on the judicial system.² Corporate decisions made in the course of marketing both have been deemed reprehensible.³ Manufacturers of both have sought refuge in bank-

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1. [W]e estimate that 8,800 asbestos-related cancer deaths are occurring this year. The toll will rise to about 10,000 annually by the year 2000, and will continue until the year 2030, all from exposures that took place prior to 1980. Overall, it is estimated that 350,000 deaths will occur before the toll from these exposures is ended unless some intervention is developed to prevent the inevitable mortality.

... One can estimate, and here the estimates are much more uncertain, that there will be 200,000 or 300,000 individuals, perhaps even more that will suffer significant impairment or disability from the consequences of asbestos exposure.

Investigation as to Whether or Not There is a National Asbestos Crisis; and if so, What Should Be Done About It: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 98th Cong., 2d Sess. 4 (1984) (statement of William J. Nicholson, Ph.D., Environmental Sciences Laboratory, Mount Sinai School of Medicine, City University of New York). A more conservative projection foresees from 74,000 to 265,000 deaths over the next thirty years. J. KAKALIK, P. EBENER, W. FELSTINER & M. SHANLEY, COSTS OF ASBESTOS LITIGATION 3 (Rand Institute of Civil Justice Pub. No. R-3042-ICJ, 1983).

In *At Any Cost*, Mintz estimates that tens of thousands of women have been seriously injured by the Dalkon Shield: 66,000 women who conceived while wearing the Shield miscarried, while 248 endured septic spontaneous abortions, of which 15 were fatal. Pp. 3-4. No one knows the extent of the damage inflicted by the 800,000 to one million Shields distributed and implanted abroad. P. 4.

2. See generally Bruck, *The Armies of Asbestos*, AM. LAW., Nov. 1979, at 19; Chen, *Asbestos Litigation is a Growth Industry*, ATLANTIC, July 1984, at 24; Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375 (1984-1985); Masters, *Asbestos Liability Suits Strain Manufacturers, Court System*, Legal Times, Mar. 30, 1981, at 1, col. 2.

On the Dalkon Shield, see Bamford, *Dalkon Shield Starts Losing in Court*, AM. LAW., July 1980, at 31; Couric, *The A.H. Robins Saga*, A.B.A. J., July 1, 1986, at 56; Middleton, *Robins Mounts Drive to Settle Dalkon Suits*, Natl. L.J., Dec. 24, 1984, at 1, col. 3.

3. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir.), cert. denied, 106

ruptcy.⁴ And both have provided the grist for hard-hitting books by veteran investigative journalists.

Paul Brodeur's *Outrageous Misconduct: The Asbestos Industry on Trial* returns a harsh verdict against the Manville Corporation and others directly and indirectly involved in the production of what was once called the "magic mineral."⁵ Morton Mintz makes a similar finding with respect to the A.H. Robins Company in *At Any Cost: Corporate Greed, Women, and the Dalkon Shield*.⁶

Both men are thoroughly familiar with their subjects. Brodeur, a staff writer for *The New Yorker*, has published several books on asbestos.⁷ As an investigative reporter for *The Washington Post*, Mintz has long prowled the pharmaceutical industry beat.⁸

This review will first briefly evaluate the books on their own terms and then comment upon their contributions to an understanding of tort law and the torts process. Their relevance to the current "liability crisis" will receive special attention.

I

Effective muckraking dramatizes the existence of a serious social problem and casts light upon those responsible for causing it. The muckraker characteristically tends to be compassionate, identifying with the friendless and voiceless victims of society's indifference or worse.⁹ Thus, by definition this genre of writing is tendentious. But if factually honest, skillfully crafted, and as persuasive as fervent in its denunciations of malfeasance and nonfeasance, it serves a noble purpose in bringing to the public agenda injustices which cry out for redress.

Brodeur and Mintz are contemporary practitioners of the muckraker's art.¹⁰ Although the perils of asbestos and the Dalkon Shield

S. Ct. 3339 (1986) (jury had adequate basis for concluding that defendant demonstrated gross disregard for safety of shipyard worker); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (jury could find beyond reasonable doubt that defendant's conduct evidenced wanton and reckless disregard for plaintiff's rights).

4. On the asbestos bankruptcy, see Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 814-30 (1983) [hereinafter Special Project]. Mintz discusses the Robins bankruptcy in *At Any Cost* at pp. 245-46.

5. See Brodeur, *The Magic Mineral*, NEW YORKER, Oct. 12, 1968, at 117.

6. For another recent book covering much of the same ground, see S. PERRY & J. DAWSON, *NIGHTMARE: WOMEN AND THE DALKON SHIELD* (1985).

7. See P. BRODEUR, *ASBESTOS AND ENZYMES* (1972); P. BRODEUR, *EXPENDABLE AMERICANS* (1974). Brodeur has also written several novels, the most noteworthy of which, *The Stunt Man*, was made into a memorable motion picture starring Peter O'Toole.

8. See M. MINTZ, *THE THERAPEUTIC NIGHTMARE* (1965) (revised and republished as *BY PRESCRIPTION ONLY* (1967)); M. MINTZ, "THE PILL": AN ALARMING REPORT (1969).

9. See Swados, *Introduction to YEARS OF CONSCIENCE: THE MUCKRAKERS* at 9, 9-10 (H. Swados ed. 1962).

10. See L. DOWNIE, *THE NEW MUCKRAKERS* 225, 240 (1976).

have generated ample publicity in recent years,¹¹ information suggesting how these products were able to cause such havoc has emerged gradually over a period of time. Brodeur and Mintz piece this data together and then draw harsh conclusions from it.

Outrageous Misconduct takes as its subject a public health hazard of mind-boggling proportions.¹² The inhalation of dust from raw asbestos and products containing the substance (most notably textiles and insulation materials) can cause a serious and unique lung disease called asbestosis as well as cancers of the lung and chest cavity. It was not until Dr. Irving J. Selikoff released the results of his studies of the incidence of cancer among asbestos insulation workers in 1964 (p. 31) that the potential reach of the asbestos tragedy first came to public light. Brodeur's principal thesis is that the Manville Corporation,¹³ the world's largest producer of asbestos, and other asbestos marketers had reason to know long before 1964 that their products posed serious risks to those exposed to them, yet engaged in a massive cover-up which kept potential victims behind a veil of ignorance. He also argues vigorously against any curtailment of the rights of individuals harmed by asbestos to recover full tort damages, and hence opposes the Manville bankruptcy, proposals for no-fault compensation schemes, and federal product-liability legislation favoring corporate interests.

At Any Cost traces the history of a contraceptive device which subjected users to the risk of extensive harm to their reproductive systems as well as spontaneous abortions, and is associated with serious birth defects in children born to mothers who conceived while wearing it. Mintz bases his case study of corporate wrongdoing upon the actions of the A.H. Robins Company in purchasing the Dalkon Shield from a small firm which had developed it under dubious circumstances,¹⁴ and then aggressively marketing it without testing for safety or efficacy;¹⁵

11. On asbestos, see, e.g., S. EPSTEIN, *THE POLITICS OF CANCER*, 83-93 (1978); J. PAGE & M. O'BRIEN, *BITTER WAGES*, 20-24 (1972); J. STELLMAN & S. DAUM, *WORK IS DANGEROUS TO YOUR HEALTH*, 171-79 (1973).

On the Dalkon Shield, see *Hearings on Regulation of Medical Devices (Intrauterine Contraceptive Devices) Before the Intergovernmental Relations Subcomm. of the House Comm. on Government Operations*, 93d Cong., 1st Sess. (1973) [hereinafter *IUD Hearings*]; *Doubts About IUDs*, *TIME*, July 15, 1974, at 81; Dowie & Johnston, *Case of Corporate Malpractice*, *MOTHER JONES*, Nov. 1976, at 36; see also Ehrenreich, Dowie & Minkin, *The Charge: Genocide*, *MOTHER JONES*, Nov. 1979, at 26, 28-30 (export of Dalkon Shields).

12. See note 1 *supra*.

13. In 1901 the Manville Covering Company merged with the H.W. Johns Manufacturing Company to become the H.W. Johns-Manville Company. P. 13. The company subsequently changed its name to the Manville Corporation. P. 249.

14. The physician who first touted the Shield in the medical literature did not disclose to readers that he was part owner of the corporation which held the rights to distribute the device. P. 31. Moreover, the substantive claims made by this physician with respect to the Shield were dubious. Pp. 31-37.

15. At that time the Food, Drug, and Cosmetic Act did not require approval by the Food and Drug Administration (FDA) before a medical device could be marketed; the FDA could

in struggling to conceal or downplay reports of adverse reactions as they began to surface; in using questionable tactics in defending product liability suits brought by women injured by the Shield;¹⁶ and in delaying a recall of the product for ten years.

Both books go beyond finger-pointing. Mintz sees the Dalkon Shield disaster as illustrative of the larger problem of corporate criminality. Deploring the double standard which permits large companies to escape responsibility for conduct which would subject individuals to severe criminal sanctions, he suggests strengthening the criminal law as a deterrent to behavior such as Robins'. Mintz cites as a positive development the conviction of three corporate executives for permitting non-English-speaking employees to work with cyanide to recover silver from used X-ray film without warning them of the lethal nature of the substance (pp. 253-54).

Brodeur, like Mintz, mentions the cyanide prosecution in his conclusion (p. 349). Yet he discounts its importance, since he sees the epidemic of asbestos-related disease as symptomatic of the destructive tendencies of the private enterprise system. Ironically, he goes on to argue that the best defense against the type of misconduct which produced the disaster is the private tort suit, which depends upon investments of time, money, and talent by entrepreneur-lawyers.¹⁷

Neither author hides his indignation. Mintz exercises more restraint, although the insensitivity of Robins officials to the suffering of Dalkon Shield victims severely tests him. He is able to express strong feelings vicariously by making extensive use of the impassioned reprimand of three executive officers of Robins delivered in open court by Chief Judge Miles W. Lord of the United States District Court for

initiate enforcement action against a device only if it could be established that the device was adulterated or misbranded. 21 U.S.C. §§ 331(a)-(c), 351, 352 (1970). See generally Davidson, *Preventative "Medicine" for Medical Devices: Is Further Regulation Required?*, 55 MARQ. L. REV. 405 (1972).

In 1976 Congress enacted medical device amendments which require premarket approval for devices such as the Dalkon Shield. Pub. L. No. 94-295, 90 Stat. 539 (codified at 21 U.S.C. §§ 360-360K (1976)). Both the Senate and House Committee Reports specifically mentioned the Shield as a product which had caused harm that could have been prevented if the new law had been in effect when it was first marketed. See S. REP. NO. 33, 94th Cong., 1st Sess. 1 (1975); H.R. REP. NO. 853, 94th Cong., 2d Sess. 8 (1976).

16. Mintz scores Robins for making unreasonable and irrelevant inquiries into the sex lives of plaintiffs, ostensibly to determine whether unhygienic habits might have caused their diseases, but in reality to intimidate women and discourage them from suing the company. Pp. 194-96. One of the judges before whom Dalkon Shield cases were tried voiced a similar complaint about Robins' conduct. P. 8.

Pelvic inflammatory disease, however, may result from causes other than intrauterine devices, and therefore the causation issue has presented some plaintiffs with considerable difficulty. See generally Note, *Beyond the Dalkon Shield: Proving Causation Against IUD Manufacturers for PID Related Injury*, 13 GOLDEN GATE U. L. REV. 639 (1983). As of the end of 1984, Robins had won about half the cases which had gone to trial. See Middleton, *supra* note 2, at 9, col. 1.

17. On entrepreneur-lawyers generally, see S. SPEISER, *LAWSUIT* (1980).

Minnesota.¹⁸

Brodeur, on the other hand, lashes out sharply and often at those whom he views as contributing to the plight of asbestos victims. Doctors who failed to alert the public to the perils of asbestos "were acting in the time-honored tradition of the American medical profession, whose members, by and large, continue to avoid speaking out on important matters of occupational and environmental health" (p. 180). Senator Gary Hart receives the back of Brodeur's hand repeatedly (to the point of redundancy) for introducing a "bailout" bill written in consultation with Manville lobbyists and setting up a compensation system which would cut off Manville's tort liability (pp. 192, 254, 260, 318). Occasionally Brodeur's rhetoric can be excessive, as when he calls legislative efforts to emasculate the common law of products liability "a perverse and stupid exercise in participatory democracy" (p. 354).

Mintz' task is simpler than Brodeur's, in that his subject is more manageable. He is dealing with one corporation, one product, a more limited group of victims and a relatively brief time frame. Thus, he is able to tell his story chronologically, beginning with the invention of the Dalkon Shield. This makes *At Any Cost* easy to grasp for readers unfamiliar with the topic.

On the other hand, *Outrageous Misconduct* rests upon a much more complicated factual predicate. Asbestos has been used for more than 4500 years.¹⁹ The Greeks and Romans first observed its harmful effects (p. 10). It is a component of a wide range of products. Its victims — mainly workers — have come from varied occupations which subjected them to different levels of exposures. Cigarette smok-

18. Peter Huber calls Judge Lord's statement an "intemperate charge . . . badly out of touch with business reality." He goes on to state that "[i]f corporate officials and lawyers at Robbins [sic] had anticipated even a single death or serious injury from sales of the Shield it seems entirely obvious that the Company would never have dreamt of marketing the product." Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 319 n.149 (1985). This criticism seems badly out of touch with Judge Lord's actual charge, which focused almost exclusively upon Robins' conduct *after* the device was marketed. The statement is reprinted in its entirety in *At Any Cost* at pp. 264-69.

Judge Lord attached the text of his reprimand to a notation to the parties' settlement agreement in the case before him. Robins and the three executive officers appealed to the Court of Appeals for the Eighth Circuit to strike the reprimand from the record. The Eighth Circuit found the reprimand improper and ordered it stricken. *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984). Robins and the executives also filed misconduct charges against Judge Lord before the Judicial Council of the Eighth Circuit. They were dismissed on the ground that the ruling of the court in *Gardiner* had granted appropriate relief. Pp. 236-37. Lord estimated that he owed between \$70,000 and \$100,000 for attorneys' fees and expenses incurred in his defense.

The court's expungement of Lord's denunciation has not succeeded in suppressing it. In addition to its reprinting in *At Any Cost*, it has also been republished, with annotations, in 9 HAMLIN L. REV. 7 (1986) (issue dedicated to Judge Lord). See also S. ENGELMAYER & R. WAGMAN, *LORD'S JUSTICE* (1985).

19. See G. PETERS & B. PETERS, *SOURCEBOOK ON ASBESTOS DISEASES: MEDICAL, LEGAL, AND ENGINEERING ASPECTS A1* (1980).

ing greatly increases the risk that an asbestos worker will develop lung cancer. Moreover, the ranks of those whose decisions or inaction affected the degree of risk posed by asbestos products include not only officials of companies which sold asbestos products, but also insurers, physicians, attorneys, labor leaders, and government bureaucrats.

In substantiating his cover-up indictment, Brodeur opts to relate in chronological order not the emergence of facts from which Manville and others realized or had reason to realize the degree of risk posed by their products, but rather the product-liability suits which brought to the surface information with respect to what corporate officials knew and when they knew it. He strives for drama by treating the case against the industry like a detective story. Incriminating evidence gradually unfolds and ensnares Brodeur's targets.

But the complexity of the asbestos tragedy makes it difficult for the lay reader to piece everything together and absorb it coherently. For example, the narrative flow does not always differentiate clearly among the various kinds of employees exposed to asbestos dust — miners, textile workers, insulation workers — at various levels of exposure, and between lung cancer and other kinds of pulmonary disease caused by asbestos dust. Brodeur does quote extensively from the closing argument of plaintiff's attorney Scott Baldwin in *Jackson v. Johns-Manville Sales Corp.* (p. 242), an excellent piece of advocacy making the case for punitive damages against Manville and a second supplier on behalf of a sheet-metal worker who had been exposed to insulation materials in the shipyard where he was employed.²⁰ But the author should have undertaken to deliver his own comprehensive, systematic, straight-for-the-jugular summation distilling his entire case against the asbestos industry. His failure to do so reduces the book's persuasiveness.

II

Although the general public may find *Outrageous Misconduct* somewhat difficult to digest, Brodeur's detailed descriptions of asbestos product-liability cases and his spirited defense of the tort system should interest and challenge readers familiar with tort law.²¹ There is much of value and much with which to take issue in the book.

20. The Fifth Circuit reversed and remanded a judgment for the plaintiff in *Jackson*. 727 F.2d 506 (5th Cir. 1984). On rehearing *en banc*, the court reinstated a portion of the panel opinion and certified questions of law to the Mississippi Supreme Court. 750 F.2d 1314 (5th Cir. 1985). The Mississippi Supreme Court declined certification. 469 So. 2d 99 (Miss. 1985). The court *en banc* then affirmed the judgment for plaintiff. 781 F.2d 394 (5th Cir. 1986). The Supreme Court denied defendant's petition for a writ of certiorari. 106 S. Ct. 3339 (1986).

21. The book has evoked polar reactions. Compare Rosenberg, *The Dusting of America: A Story of Asbestos — Carnage, Cover Up, and Litigation* (Book Review), 99 HARV. L. REV. 1693 (1986) (favorable review of *Outrageous Misconduct*), with Huber, *The Risk Race* (Book Review), THE NEW REPUBLIC, Feb. 3, 1986, at 39 (unfavorable review).

His opening salvo is the story of *Borel v. Fibreboard Paper Products Corp.*,²² in which an insulation worker won a jury verdict against several asbestos suppliers and the United States Court of Appeals for the Fifth Circuit affirmed. As Brodeur notes, this was "the first case in the nation to test the applicability of section 402A [of the *Restatement (Second) of Torts*] to asbestos-insulation materials,"²³ although it did not produce the first decision on that point.²⁴ The *Borel* decision opened the way for an onslaught of product-liability litigation against the asbestos industry.

The hero of Brodeur's account of *Borel* is Ward Stephenson, the plaintiff's attorney, to whom he dedicates the book, and who died from cancer just before the Fifth Circuit handed down its decision. Stephenson was an East Texas trial lawyer who specialized in representing workers' compensation claimants injured in jobsite accidents. In 1961 he handled his first occupational disease claim, on behalf of a forty-year-old insulation worker who had developed a serious lung problem after two decades of exposure to asbestos materials. Under the Texas Workmen's Compensation Law, the maximum recovery for permanent total disability at that time was \$14,035. Stephenson was unable to recover even that pittance for his client. He felt compelled to settle the case for only \$7500 because of conflicts in the diagnosis of his client's illness by the physicians retained by the various parties to the proceeding. He then hit upon the idea of bringing a tort action against the manufacturers of the insulation materials with which the claimant had worked.

The discrepancy between the statutory amount recoverable under workers' compensation and the full tort damages which might be recovered for the total (and agonizing) disablement of a forty-year-old employee explains the strategic decision made by Stephenson as well as by other attorneys representing asbestos victims and facing similar limitations upon awards against employers.²⁵ Brodeur digresses to ex-

22. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

23. P. 41. Section 402A imposes strict tort liability upon sellers for harm caused by products "in a defective condition unreasonably dangerous to the user or consumer." RESTATEMENT (SECOND) OF TORTS § 402A (1965).

24. In *Bassham v. Owens-Corning Fiber Glass Corp.*, 327 F. Supp. 1007, 1009 (D.N.M. 1971), the court stated in dictum that the "physical harm" for which recovery is allowed under § 402A does not include occupational disease. The only support which the court proffered for this conclusion was drawn by analogy from a decision of the New Mexico Supreme Court which held that occupational disease was not an "injury by accident" and hence was not covered by the state's workers' compensation law. See *Aranbula v. Banner Mining Co.*, 49 N.M. 253, 161 P.2d 867 (1945). However, there is no indication from the text of § 402A or the comments to it that the drafters intended to incorporate judicial interpretations of statutory language totally unrelated to products liability.

25. One academic commentator has averred that plaintiffs suffering from occupational diseases have resorted to common-law suits rather than to workers' compensation because the latter is "terra incognita to the ordinary personal injury lawyer" and "tort lawyers simply do not know . . . the compensation system." Epstein, *Manville: The Bankruptcy of Product Liability Law*,

plain the origin of workers' compensation coverage of occupational illnesses, which were not included in the original bargain whereby workers gave up their common-law remedy for full fault-based damages in return for limited benefits for disability caused by work-connected injuries.²⁶ The proliferation of negligence claims on behalf of workers who had contracted silicosis during the early 1930s prompted the industry to lobby for the extension of workers' compensation to job-related diseases (p. 18). These amendments provided coverage that was limited as well as incomplete (pp. 22-23) and benefits so low that they neither compensated workers for more than a fraction of their actual loss²⁷ nor provided any real incentives for employers to avoid or reduce harmful exposures.²⁸ However, they furnished workers with their exclusive remedy against employers for occupational diseases.²⁹

Stephenson's third-party tort claim against various asbestos manufacturers whose products his client had used led to a modest settlement with five of the companies and a jury verdict in favor of the sixth, the Fibreboard Paper Products Corporation.³⁰ This was a learning and motivating experience for the attorney. When another sick insulation worker walked into his office later that same year, he filed a product-liability suit in federal district court against eleven manufacturers of asbestos materials to which his new client, Clarence Borel, had been exposed.³¹

Stephenson included in his complaint claims based upon negligence, gross negligence, breach of warranty, and strict liability. Texas had recently recognized strict tort liability as spelled out in section 402A of the *Restatement (Second) of Torts*, but its contours were as

REGULATION, Sept.-Oct. 1982, at 14, 16, 46. Brodeur amply demonstrates the baselessness of this assertion, at least with respect to the attorneys representing plaintiffs in the landmark cases.

26. See also J. PAGE & M. O'BRIEN, *supra* note 11, at 57-58.

27. See Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 925 (1980); see also J. PAGE & M. O'BRIEN, *supra* note 11, at 65-67.

28. See Note, *supra* note 27, at 934.

The trial judge in a suit brought by employees against Manville for conspiracy and fraud declared that Johns-Manville had "chosen to conceal the danger from its employees rather than invest funds into finding a safe way of handling the product," and that the company had undoubtedly done so because it was less expensive to pay workmen's-compensation benefits than to provide a healthy workplace.

P. 168. The California Supreme Court eventually ruled that the state workers' compensation statute did not bar employees from suing an employer in tort for certain kinds of extreme misconduct. *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

29. On the exclusivity of the workers' compensation remedy, see 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 65.11 (1987).

30. Brodeur attributes the defense verdict to plaintiff's inability to remember when or on which jobs he had used defendant's products. P. 36.

31. One colorful detail which Brodeur provides explains the style of the case. Stephenson had taken a dislike to the attorney who had defeated him in the prior litigation, thus he listed Fibreboard as the first defendant, so that the case would bear its name. P. 40.

yet ill-defined. The theory Stephenson pursued in *Borel* was that defendants ought to be strictly liable for failing to warn of the dangers posed by their products. But plaintiff's further contention was that the duty to warn under strict liability applied only to hazards which were known or reasonably foreseeable to defendants at the time the products were marketed. Thus, plaintiff's burden of proof under strict liability was no different from what he would have had to establish in a negligence case. Stephenson did not urge that strict liability should apply regardless of the knowability of the risk.³² Therefore, the only advantage furnished by strict liability would be the avoidance of most forms of contributory negligence,³³ an important factor in *Borel* because defendants asserted this defense as well as assumption of risk.³⁴

Defendants in *Borel* relied heavily upon the so-called "state-of-the-art" defense.³⁵ They contended that until the results of Dr. Selikoff's study of asbestos insulation workers became public in 1964, they neither had reason to know nor should have known that employees ran the risk of lung disease from prolonged exposure to their products. Stephenson argued that defendants could and should have known of the danger and should have informed Borel about it at a point in time when he could have avoided the harm he suffered from his inhalation of asbestos dust.

The jury found that all the defendants were strictly liable in tort, all but two of the defendants had been negligent,³⁶ none of the defendants had been grossly negligent, and Borel had been contributorily negligent. The district court entered judgment for plaintiff, and the

32. In Brodeur's account of the appellate argument made by Dean W. Page Keeton on behalf of the defendants, he states that Stephenson "unleashed a wickedly effective attack upon Keeton's argument by quoting several paragraphs from an article that Keeton himself had written about product liability and failure to warn" (p. 67), which advocated the imposition of strict tort liability despite the manufacturer's excusable ignorance of the risk. See Keeton, *Products Liability — Inadequacy of Information*, 48 TEXAS L. REV. 398, 407-08 (1970). It is difficult to understand how such a counterargument by Stephenson would have much of an effect, since his strict liability count did not seek to impose liability regardless of defendants' knowledge of the danger.

33. See RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) (only form of contributory fault which would be a defense to strict liability is voluntary and unreasonable encountering of known danger).

34. Defendants alleged, inter alia, that the decedent negligently failed to wear a respirator and to ask his employers to supply blowers. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1098 (5th Cir. 1973).

35. Use of the term "state-of-the-art" in this context is somewhat ambiguous, since the expression has been applied both to the degree of scientific awareness of risk and to the level of technological feasibility with respect to eliminating or reducing risk. See Page, *Generic Product Risks: The Case Against Comment k and For Strict Liability*, 58 N.Y.U. L. REV. 853, 877 n.104 (1983).

36. The verdict seems to have been inconsistent with respect to the two defendants that were found not to be negligent, since the tests used by the court to determine strict liability for failure to warn and negligent failure to warn were identical. However, the Fifth Circuit ruled that internal inconsistencies in the general verdicts would not require a reversal. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1094.

Fifth Circuit affirmed.³⁷

Brodeur's treatment of *Borel* differs significantly from that of Professor Richard A. Epstein, who sharply criticized the decision in a 1982 article.³⁸ Brodeur sees the case as exemplifying what is right with product-liability law, while Epstein views it as symptomatic of what is wrong. Brodeur finds the jury verdict and the holding of the Fifth Circuit as deriving irresistibly from the evidence Stephenson presented and his artful advocacy. Epstein concludes that the findings of fact and ruling of law in *Borel* were fatally flawed.

A close scrutiny of Brodeur's account of the trial, as well as the Fifth Circuit panel's statement of the facts of the case, suggests that the enthusiasm of the author for what he depicts as a one-sided victory for the plaintiff is misplaced. The evidence tending to show that defendants could have known that exposure to asbestos insulation products might cause asbestosis and cancer was barely sufficient at best. Stephenson legally established that by the mid-1930s a causal link was assumed between exposure to asbestos fibers in textile factories and asbestosis in textile workers. The only direct evidence pointing to early scientific awareness of a link between exposure to insulation materials and asbestosis came from an expert witness who cited reports of asbestosis in insulation workers which dated back to 1934. He did not indicate what level of exposure produced the illnesses which had been reported, and admitted on cross-examination that very little knowledge existed prior to 1964 to show that the inhalation of asbestos by insulators was hazardous (p. 47). Stephenson also established that the asbestos insulation companies had never done tests to determine safe levels of exposures in workers. Defendants presented evidence of a 1945 study which concluded that insulation workers in United States Navy shipyards did not face an unreasonable risk of asbestosis. However, most of the subjects of the study had been working in shipyards for less than the period of time after which asbestosis was generally known to manifest itself. The most favorable inference which might be drawn from this evidence is that asbestos suppliers could have had reason to suspect that insulation workers might run a risk of serious lung disease from the levels of dust to which their jobs exposed them.

Holding the asbestos manufacturers to the knowledge and skill of experts, both the trial judge and the Fifth Circuit recognized that the duty of reasonable care which defendants owed encompassed both remaining abreast of the latest scientific discoveries and testing products

37. The court found that decedent neither knowingly nor voluntarily assumed the risk, and therefore the defense of contributory negligence in the form of unreasonable assumption of the risk, as spelled out in Comment n to § 402A of the *Restatement (Second) of Torts*, would not bar recovery. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1096-98, 1106-08.

38. See Epstein, *supra* note 25.

for potential hazards. On the basis of the knowledge which was available to defendants and their obligation to test, the appellate court upheld the jury's finding that the risk could and should have been foreseen.

Epstein finds the Fifth Circuit's summary of the medical evidence "one-sided and incomplete, written far more like an over-argued brief than a judicial opinion."³⁹ He clearly would have drawn from it inferences favorable to the defendants. However, the issue before the court was not what conclusions to draw from the evidence, but rather whether there was sufficient evidence to raise a question for the jury.

The legal rule applied by the court also draws Epstein's fire. He argues that during the period within which Borel was using defendants' products, the manufacturers could have had no inkling of the duty to which the 1973 decision would subject them. "Before the case, the sum and substance of the manufacturer's duty was to make sure that its purchasers knew what its product was and perhaps to warn of any latent dangers of which it had knowledge but the user and consumer did not."⁴⁰ In his view, therefore, *Borel* took the asbestos industry completely by surprise. He further contends that the obligation to test ought to have been placed not upon suppliers but rather upon the companies which purchased the substance for processing or other uses by employees.

The unfairness point is dubious. The manufacturer's duty to test is at least as old as *MacPherson v. Buick Motor Co.*⁴¹ Indeed, in a case decided eleven years after *Borel*, Manville asserted as a defense that it had begun testing its asbestos-containing products as early as 1929.⁴² The first edition of the *Restatement of Torts*, published in 1934, spelled out clearly (and without any "perhaps") the supplier's duty to warn not only purchasers but anyone who the supplier might expect would use the product.⁴³ There was no reason for the asbestos companies to believe that these obligations applied to the sale of products which caused personal injury, but put no like burden upon sellers of products that might cause diseases.⁴⁴

Epstein is correct when he points out that companies purchasing

39. *Id.* at 43.

40. *Id.*

41. 217 N.Y. 382, 111 N.E. 1050 (1916) (assembler might be liable to purchaser for negligent failure to inspect finished product). On the manufacturer's duty to test, see James, *Products Liability*, 34 TEXAS L. REV. 44 (1955).

42. See *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1044 (5th Cir. 1984).

43. See RESTATEMENT (FIRST) OF TORTS § 388 (1934).

44. In a substantial number of jurisdictions the courts had refused to draw this distinction in common-law suits by employees against employers. As one commentator noted, "[W]here an occupational disease results from the negligence of the employer, thirty states have recognized the employer's liability either expressly by allowing recovery or impliedly by denying recovery because no negligence was shown." Banks, *Employer's Liability for Occupational Diseases*, 16 ROCKY MTN. L. REV. 60, 61 (1943).

asbestos had as much access as suppliers to the information introduced into evidence in *Borel* about the possible dangers of the substance. He goes on to argue that the legal duty to test ought to have been imposed only upon those companies, since they were best suited to conduct research on both the harmful properties of asbestos and the levels of exposure to which employees might safely have been subjected. One may question whether workers' compensation statutes, imposing limited liability for occupational diseases, provided employers with meaningful incentives to test.⁴⁵ In addition, Epstein seems to assume that the only studies which might have been done were epidemiological and related only to tolerance levels for asbestos dust. Yet it is conceivable that animal studies might have produced some indication of the hazard.⁴⁶ In any event, defendant's misfeasance in *Borel* was a failure to convey to workers an appreciation of the extent of the danger, not a failure to reduce asbestos dust to reasonably safe concentrations.

Both Brodeur and Epstein see *Borel* as pivotal. According to the latter, the "decision completely transformed the law" affecting the liability of suppliers of asbestos.⁴⁷ As has been suggested, this characterization may be somewhat overdrawn.⁴⁸ Brodeur puts his finger on the real significance of the case which "triggered the greatest avalanche of toxic-tort litigation in the history of American jurisprudence" (p. 73). It demonstrated to plaintiffs' attorneys that suits against asbestos suppliers on behalf of employees of purchasers could be won and provided a modern legal framework for pursuing product-liability claims based upon workplace exposures. In addition, Stephenson's digging prepared the way for subsequent discoveries which would leave the "state-of-the-art" defense in shambles.

In this latter respect, *Outrageous Misconduct* tends to undercut Epstein. Epstein's analysis of the *Borel* opinion is solid and interesting, although one may take issue with it. But he goes beyond *Borel* to deplore the wave of product-liability suits which followed *Borel* and inspired the Manville bankruptcy, yet bases his criticism upon the evidence and legal rules which produced the decision in *Borel*. One must read Brodeur to learn the facts which came to light in the post-*Borel* cases and which shifted the focus of the litigation from the supplier's failure to test to their failure to disclose (or suppression of) information which they actually possessed.

For example, plaintiffs' attorneys discovered that the medical director of Canadian Johns-Manville became convinced in the early

45. See note 28 *supra*.

46. One may criticize *Borel* for not requiring the plaintiff to prove that there were specific scientific tests that defendants could have performed and that would have revealed the risk.

47. Epstein, *supra* note 25, at 43.

48. See also Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 820 n.155 (1983).

1950s that insulators and pipe coverers were in danger of developing asbestosis (p. 99); that manufacturers of asbestos insulation materials owned companies which did insulation contracting, and employees of these companies had filed workers' compensation claims for asbestosis during the 1950s (pp. 138-40); that researchers had told the Asbestos Textile Institute (to which the asbestos suppliers belonged) in 1947 that the dust level thought to be safe provided no guarantee that workers would not develop asbestosis after prolonged exposures (p. 143); that animal tests begun in 1943 revealed that insulation products containing only 15% asbestos could cause lung disease (pp. 148-50); and that asbestos insulators settled product-liability suits against Manville in 1957 and 1961 (p. 165).

There was also evidence that Manville systematically withheld from its own employees the results of medical examinations which indicated they had contracted lung disease. The manufacturers repeatedly put pressure upon medical researchers to delay the publication of research establishing the dangers of asbestos and to soften or obscure their findings. One of the more ironic discoveries was a suggestion by a Manville attorney in 1934 that a researcher tone down the conclusion of a study of asbestos workers because it would hinder a version of the "state-of-the-art" defense that was then being asserted by the company in tort suits by employees.⁴⁹

Thus, the main thrust of the asbestos product-liability suits has been that the companies knew of the danger and failed to warn. Moreover, beginning in 1981, plaintiffs began to assert successfully that the manufacturers deliberately or wantonly concealed information about the perils of asbestos and therefore should be subjected to punitive damages.⁵⁰

III

Outrageous Misconduct and *At Any Cost* cast a positive light upon the torts system in its present form. Brodeur asserts that product-liability litigation is essential both as a preventive weapon against occupational diseases and as a mechanism to secure adequate compensation for victims. Mintz is somewhat ambivalent. His prescriptions in *At Any Cost* for the deterrence of corporate malfeasance do not include any specific emphasis upon tort law. However, much of the material

49. P. 114. According to the document, the attorney wrote that "it is only within a comparatively recent time that asbestosis has been recognized by the medical and scientific professions as a disease," and that:

[O]ne of our principal defenses in actions against the company on the common law theory of negligence has been that the scientific and medical knowledge has been insufficient until a very recent period to place upon the owners of plants or factories the burden or duty of taking special precautions against the possible onset of the disease to their employees.

P. 114.

50. See generally Special Project, *supra* note 4, at 690-709.

which comprises his case study of the Dalkon Shield comes from evidence that plaintiffs' attorneys unearthed during civil suits against Robins (p. x). In his acknowledgement he salutes trial attorneys as "a potent check-and-balance against conscienceless corporate power" and notes that they "achieve a measure of rough justice. They frequently draw press attention that usefully alerts millions of people to hazards that otherwise would not come to light . . ." (p. ix).

This latter point is perhaps overdrawn. It seems difficult to believe that the dangers of the Dalkon Shield would not have come to light in the absence of publicity generated by the filing of product-liability suits.⁵¹ And the Selikoff study, rather than *Borel* and its progeny, first alerted the public to the asbestos disaster.

Yet what both books under review demonstrate is the extent to which information tending to expose corporate disregard for the health and safety of workers and consumers surfaces through the litigation process. The incentives that the torts system provides to private attorneys seem to produce results that at the very least are complementary (and at best superior) to what is accomplished by other methods that society employs to oversee the conduct of mass producers.⁵² This does not mean that better, less costly, and more cost-effective mechanisms might not be devised to accomplish this policing task.⁵³ What it does suggest is that in an imperfect world, reducing the effectiveness of the torts option would increase the likelihood that malfeasance such as that described by Brodeur and Mintz would remain hidden from public view.

The action and inaction which produced the asbestos and Dalkon Shield disasters occurred despite the prophylactic pressure that product-liability law is supposed to exert. One critic has specifically cited the failure of the torts process to prevent these tragedies as rather conclusive evidence of its futility.⁵⁴

Yet there are other explanations for the patterns of misconduct committed by Robins and the asbestos industry. During the 1930s and 1940s, the asbestos industry might not have anticipated the emer-

51. The congressional hearings which publicized, inter alia, the hazards of the Dalkon Shield do not seem to have been inspired by the filing of torts suits against Robins. See *IUD Hearings*, supra note 11; *Hearings on Medical Device Amendments, 1973, Before the Subcomm. on Health of the Sen. Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973).

52. Both Brodeur and Mintz have explored the shortcomings of the regulatory agencies that failed to detect the misconduct that contributed to the asbestos and Dalkon Shield tragedies. See P. BRODEUR, *EXPENDABLE AMERICANS* (1974); *AT ANY COST* at 113-27.

For a discussion of the use of criminal sanctions to deter corporate misconduct in the marketing of dangerous products, see Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 *GEO. L.J.* 1 (1984).

53. See generally Sugarman, *Doing Away with Tort Law*, 73 *CALIF. L. REV.* 555 (1985).

54. See Abel, *Risk as an Arena of Struggle*, 83 *MICH. L. REV.* 772, 788 n.48 (1985).

gence of an aggressive plaintiffs' bar⁵⁵ skilled in the use of newly adopted discovery rules⁵⁶ and willing to share information gleaned during trials.⁵⁷ And because of the nonrisky nature of the goods that they had marketed before the Dalkon Shield came along (nonprescription cough medicines, lip balms, and flea collars, for example), Robins' officials had no experience at all with products liability. Moreover, during the early 1970s they seemed to have been afflicted with a kind of "Watergate" mentality which betrayed no glimmer of concern for the social consequences of their acts.⁵⁸

In addition, this negative assessment may give too little weight to the lesson to be drawn by other companies from the consequences that have befallen the asbestos industry and Robins as a result of their miscalculations.⁵⁹ Under the best of circumstances one may suppose that the foreseeable liability costs of a failure to take adequate account (or willful disregard) of the potential risks flowing from marketing decisions will encourage manufacturers to make reasonable efforts to prevent or minimize these risks. (On the other hand, it is also conceivable that the lesson to be drawn will be to eliminate tangible and possibly incriminating evidence of the corporate decisionmaking process so that it will not fall into the hands of plaintiffs' attorneys).⁶⁰

In highlighting the pluses of the torts process, the books under review swim against the current tide. Taking advantage of discontent provoked by steep increases in liability insurance premiums, political critics of tort law have launched a broad, frontal attack.⁶¹ State legislatures have responded by enacting "reform" statutes that curtail the rights and remedies of persons seeking compensation for injuries and

55. See Green, *The Thrust of Tort Law: Part I, The Influence of Environment*, 64 W. VA. L. REV. 1, 19 n.67 (1961); S. SPEISER, *supra* note 17, at 534-40.

56. See 4 J. MOORE, FEDERAL PRACTICE ¶¶ 26.57-26.60 (2d ed. 1986); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2002 (1970).

57. For an account of the first systematic effort by plaintiffs' attorneys to pool resources in toxic tort cases, see Rheingold, *The MER/29 Story — An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968).

58. In an annotation to his reprimand of Robins' officials, Judge Lord refers to "[w]hat Robins' former counsel Roger Tuttle has characterized as a Watergate-type coverup pattern of conduct exhibited by Robins with respect to the defense of the Dalkon Shield lawsuits." Lord, *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 HAMLINE L. REV. 7, 42 n.28 (1986).

For details of Robins' most recent miscreancy, see Mintz, *Judge Finds A.H. Robins in Civil Contempt*, Wash. Post, June 15, 1986, at A1, col. 1 (judge in bankruptcy proceeding held corporation in civil contempt for knowingly violating court orders and flouting both letter and spirit of law in making improper payments and transactions).

59. See Rosenberg, *supra* note 21, at 1705 n.31.

60. Mintz devotes an entire chapter to the suspicious circumstances under which thousands of documents sought from Robins by plaintiffs' attorneys disappeared. Pp. 210-27.

61. A number of recent articles on the tort reform controversy are cited in S. REP. NO. 856, 99th Cong., 2d Sess. 87 n.27 (1986). For an exchange of views, see Willard, *Restore Balance to the Tort System*, A.B.A. J., July 1, 1986, at 36; Davidson, *Drastic Change is Dangerous*, A.B.A. J., July 1, 1986, at 36.

illnesses.⁶² The Senate Committee on Commerce, Science, and Transportation reported out a federal bill that seeks to expedite settlements of product-related tort claims and standardize miscellaneous aspects of the law of products liability.⁶³ Yet this legislation nowhere addresses the finding of a federal task force that one of the causes of the product-liability "crisis" is the marketing of unsafe products.⁶⁴

Although the torts system may be necessary as a check upon corporate wrongdoing, in mass tort litigation the point may be reached where virtually all the evidence of misconduct has come to light through discovery and other mechanisms, and at the same time the financial resources available for compensating victims are limited. This appears to be the case with both the asbestos⁶⁵ and Dalkon Shield tragedies.⁶⁶

Mintz, preferring a narrower focus upon the issue of corporate malfeasance, does not address this issue. Brodeur, on the other hand, is implacably opposed to any sort of government intervention that would limit victims to less than their full remedy under tort law.⁶⁷

The latter position seems extreme. There may be something to be said for holding mass tort defendants liable repeatedly for full compensatory and punitive damages when they continue to deny their cul-

62. See Barron, *40 Legislatures Act to Readjust Liability Rules*, N.Y. Times, July 14, 1986, at A1, col. 1. These measures include curbs on contingency fees, abolition of joint-and-several liability, and limitations on recoverable damages. For a trenchant observation on liability caps, see NEW YORKER, June 9, 1986, at 33 (cartoon by James Stevenson). For an article expressing reservations as to whether these laws are achieving their intended purposes, see Hilder, *Insurers' Push to Limit Civil Damage Awards Begins to Slow Down*, Wall St. J., Aug. 1, 1986, at 1, col. 6.

63. S. REP. NO. 856, 99th Cong., 2d Sess. (1986). In late September the bill reached the floor of the Senate, where it sparked a prolonged and heated debate. Because the legislative session was scheduled to end on October 3, Senate majority leader Robert Dole removed the bill from the agenda. See N.Y. Times, Sept. 26, 1986, at A17, col. 1; see also 132 CONG. REC. S13,709 (Sept. 25, 1986).

64. See U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT I-20, I-24 to -26 (1978). The other principal causes of the "crisis" were found to be liability insurance ratemaking procedures which occasionally might have amounted to "panic pricing," and uncertainties in the tort litigation system. *Id.* at I-20, I-21 to -24, I-26 to -29.

65. When Manville filed for bankruptcy, the company was worth in excess of \$1 billion; there were 16,500 lawsuits pending against it and nearly 500 new suits were being initiated each month. See Chen, *supra* note 2, at 30.

66. As of the end of 1984, Robins had paid out more than \$300 million to Dalkon Shield claimants. The company projected that about 20,000 of the approximately 87,000 women injured by the device would ultimately bring suit. P. 242. On December 31, 1983 the company had total assets of slightly more than \$500 million. See Kleinfeld, *Ongoing Problems for Robins*, N.Y. Times, Aug. 1, 1984, at D1, col. 3. When Robins filed for bankruptcy in 1985, there were more than 5100 lawsuits pending against it. Since then, 310,000 women from around the world have filed notices of possible claims under a notification plan developed by the bankruptcy court, and another 22,000 filed claims after a court-imposed deadline. See Mintz, *Dalkon Insurer Enters Case*, Wash. Post, June 8, 1986, at D7, col. 1.

For recent critical accounts of the Robins' bankruptcy process, see Goldner, *Final Justice for A.H. Robins*, AM. LAW., Oct. 1986, at 32; Mintz, *Dalkon Shield Cases a Legal Quagmire*, Wash. Post (Business Supp.), Dec. 29, 1986, at 1, col. 1.

67. Pp. 323-54. See also Meier, *The Toxic Journalist*, Wall St. J., Apr. 16, 1986, at 31, col. 1.

pability and force individual plaintiffs to bear the effort and expense of a full trial to prove what has been established many times in the past.⁶⁸ However, a legislative solution that neither applies whitewash nor shortchanges victims would appear to be a better approach in situations where some adjustments must be made to assure fair compensation for all victims.⁶⁹ Such a scheme should not shelve the deterrent and punitive functions of tort law. At the very least, public recognition of blameworthiness should form a part of any statutory compensation plan and should influence its thrust.

There has been a tendency on the part of some to express alarm at the thought that the tort system may visit excessive punishment — the fashionable phrase is “overkill”⁷⁰ — upon corporations responsible for mass torts.⁷¹ *Outrageous Misconduct* and *At Any Cost* are useful reminders of who the real victims of “overkill” are.

68. On the difficulties in applying the doctrine of collateral estoppel to asbestos cases, see Special Project, *supra* note 4, at 659-90. For arguments against using the doctrine offensively to benefit asbestos victims, see Wilner, *Can An Industry Be Collaterally Estopped From Litigating Product Liability Issues?*, 4 J. PROD. LIAB. 189 (1981). See also Schwartz & Mahshigian, *Offensive Collateral Estoppel: It Will Not Work in Product Liability*, 31 N.Y.L. SCH. L. REV. 583 (1986).

69. For a critical analysis of proposed asbestos compensation legislation, see Special Project, *supra* note 4, at 780-806.

70. The term originated in Judge Friendly's opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). Plaintiff sought compensatory and punitive damages against a drug company for negligence and fraud in the marketing of an anti-cholesterol medication that caused cataracts in users. Pointing to a number of similar claims pending against defendant and demanding similar damages for similar injuries, Judge Friendly saw as the solution to what he designated as the “overkill” problem in mass tort punitive damage cases the subjection of plaintiff's proof to an especially strict scrutiny. In the case before him, this led him to find that defendant would not be liable for punitive damages. The lesson of *Roginsky* is that if corporate officials want to engage in outrageous misconduct and at the same time avoid liability for punitive damages, they should be sure to inflict harm on a grand scale. For a detailed treatment of the entire MER/29 episode, see R. FINE, *THE GREAT DRUG DECEPTION: THE SHOCKING STORY OF MER/29 AND THE FOLKS WHO GAVE YOU THALIDOMIDE* (1972).

71. See, e.g., Coccia & Morissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 22 TRIAL LAW. GUIDE 46 (1978); Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797 (1979); Note, *Punitive Damages in Mass-Marketed Product Litigation*, 14 LOY. L.A. L. REV. 405 (1981).