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Outrage Is Not Enough - Review of Brodeur: Outrageous Misconduct: The Asbestos Industry on Trial

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The fact that asbestos manufacturers have had to pay large amounts of money to some of their victims has made analysts such as Brodeur happy. They believe that the litigation system which led to these awards is a useful device because it compensates victims, punishes wrongdoers and, therefore, is capable of preventing harm. The lawyers who made it function are seen as glamorous actors. This is wrong on all counts. The torts' system compensates unevenly and poorly; it does not guarantee that wrongdoers will be punished; it is ineffective as a preventive device. Moreover, reliance on the torts' system obscures the reasons for wrongdoing and inhibits the development of better compensation schemes and more effective regulatory mechanisms. Its main functions are to make private insurers profitable, lawyers richer and, all too often, venal.

Paul Brodeur's "Outrageous Misconduct: The Asbestos Industry on Trial" is an amazing book. It is so because of the wealth of information it brings and the paucity of light it sheds. It is, despite its manifest sense of outrage, a very conventional book, indeed, one might say a very American book. It is more like an extended segment of 60 Minutes than it is like anything else. The popularity

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of that television programme rests on its apparent willingness to reveal corruption and wrongdoing everywhere. These revelations are made dramatic by permitting unsuspecting miscreants to continue to declare their innocence when the investigators (to the immense pleasure of the viewing public which knows the game) already have the goods on them. The unmasking of the wrong and the wrong-doer is everything. The causes of the wrongdoing, its prevalence, its place in the social spectrum, are not really issues for 60 Minutes. Indeed, the thrust of the programme is that a society which fosters programmes like 60 Minutes has a system that works: exploitation and evil are aberrational; compliance, altruism and good are the norm. The suggestion is that while sometimes the institutions created to maintain this good social system work a little imperfectly, such deficiencies can be remedied and 60 Minutes is there to remind us of the need to do so, to stand on guard. Brodeur's book reflects the same superficiality in approach.

It may seem harsh to characterize a book which tells the story of asbestos litigation in such minute detail as superficial. The superficiality, however, lies in the book's analytical failings, not in the author's assembly of data. While Brodeur is not purporting to write a theoretical book, there is, of course, no such thing as writing without a theory. Data are collected and presented on the basis of presuppositions. In Brodeur's case his motivation for writing is clear. He is angry, very angry, that major economic actors, asbestos miners, manufacturers and processors, knew of the dangers to which they were exposing the workers and the public at large and not only failed to warn their potential victims but, to the contrary, went to great lengths to hide the danger from them. He is even more outraged by the fact that when these entrepreneurs were confronted with their wrongdoing they denied it and, then, when their lies were made palpable, that they took refuge in all sorts of tactics to avoid having to compensate their innocent victims. It is doubtful that any reader of the book would find any reason not to share the author's rage. It is precisely because of this that Paul Brodeur's unarticulated theoretical assumptions may have great impact; the parade of horrible "facts" may lead readers not to look for, nor to question, these assumptions. Yet those assumptions are wrong, very wrong.

Given his approach, the 60 Minutes' approach, Brodeur's villains are portrayed as important, plausible sounding persons who protest their innocence in the face of mounting incriminating evidence. His heroes are the investigators and detectives who amassed the incontrovertible evidence of wrongdoing — principally the victims' lawyers. As his kind of lawyers can only succeed in their heroics when they are acting as trial lawyers, it is the trial system which becomes the central institution of redress, revenge, accountability.

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1 Other heroes include research scientists, such as Irving Selikoff of Mt. Sinai Hospital, New York, whose pioneering work on the effects of asbestos on workers advanced the cause of the torts' litigators.
and redemption. These starting positions cause the book to be badly flawed.

That Brodeur sees lawyers as saviours is evident from his description of these lawyers. It is their personal attributes and their personalities (like those of Mike Wallace, Harry Reasoner, Diane Sawyer and Ed Bradley) which count. Thus, note his description of Ward Stephenson, the lawyer who first succeeded in using the theory of products' liability to help workers recover for their asbestos-related losses:

Married and the father of two small boys he was a particularly groomed man of medium height with thinning, sandy hair and blue eyes, and he was noticeably self-conscious about a long deep scar on his left cheek.\(^2\)

Not only is Brodeur interested in the way lawyers look and in their family backgrounds, he has unstinted admiration for what he deems to be their adventurous imaginations. Some of this is captured in his description of a lawyer called Scott Balwin, whom he describes as "a small dark haired man with a mischievous smile who looks a bit like Burgess Meredith." He particularly admires Balwin because he had the cleverness to assume the appearance of being a hayseed by dressing himself up like a modern day Malvolio, thereby suckering a sophisticated city-slicker type business man into making damaging confessions.\(^3\)

Brodeur’s love of lawyering pyrotechnics is similarly unbounded. It is so unabashed that he often fails to notice the lack of success these forensic skills bring or, for that matter, the inherent difficulties reliance on them entails. For instance, he is very much taken by the astuteness displayed by Ward Stephenson when he examined witnesses on behalf of his client and, according to Brodeur, demolished powerful evidence against his client with a single question. The praise practically jumps off the page.\(^4\) Yet, he does not remark at all on the fact that Stephenson’s opponent, also a lawyer, by his clever cross-examination of Stephenson’s client in that same case, destroyed that client’s case. Stephenson’s client did not recover. The book is full of such unconscious irony. For example, in his recounting of the history of the development of the asbestos litigation, Brodeur points out, with some admiration, how diligent lawyers

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\(^2\) At pages 8-9. For similar (sometimes fawning) thumbnail sketches and anecdotes about leading lawyers in the asbestos litigation business, see the descriptions at pages 80, 97, 106, 127, 158.

\(^3\) P. 86. The business man is described as a "tall, elegant, and immaculately tailored man of 57". He describes another lawyer, at p. 135, as follows: "Ambitious, assertive, and self-confident Motley is a lanky, black-haired who bears a resemblance to the French actor Jean-Paul Belmondo and speaks with a deep drawl." Mike Wallace, eat your heart out!

\(^4\) P. 36. Sometimes Brodeur is so overwhelmed by plaintiff’s lawyers’ wiliness that he sees fit to reproduce huge slabs from the transcripts of examination of witnesses which, to say the least, lengthen the book unnecessarily and, if the reader is not overwhelmed by the idea of legal cleverness, are quite tedious; see particularly, ch. 8.
were in their investigative discovery work, how they came upon scraps of letters and other files, how they interviewed potential defendants’ executives and cunningly got them to reveal more than they should have, and so forth. What he does not comment upon is the haphazard nature of such a process of discovery. Again and again, by his own account, it transpires that lawyers in different parts of the country did not know, for quite long times, about discoveries made in other parts of the country. Thus, when lawyers did stumble upon pieces of pre-discovered evidence it was a bit like finding left-over gold in a mine abandoned by earlier successful diggers. In this context, note also that it is a little hard to accept the equanimity with which he treats the fact that some of the evidence uncovered in one set of cases cannot be made available to other lawyers (and their victimized clientèle) because some plaintiffs’ lawyers, when settling their particular cases, agreed with the asbestos producers that they would not make available any of the damning evidence they had gathered to other lawyers who might be interested in pursuing asbestos claims.5

In the same vein, Brodeur is very much taken by the ability of some lawyers to dramatize their cases before juries.6 For instance, he is full of admiration for a lawyer called Motley who, encountering the asbestos manufacturers’ argument that alleged asbestos-related diseases may often be the result of lifestyle habits, such as smoking, invented a form of reasoning which he called the rat terrier dog argument. He routinely told juries that a study showed that five men got asbestosis when working in a particular factory and that, acknowledgedly, this might be attributable to smoking. He then revealed that the same study found that a rat terrier spent most of his life in the factory and had also contracted asbestosis. This enabled him to finish his presentation with the argument: “The dog didn’t smoke — now did he?”7 As usual, Brodeur does not note that such tools of persuasion are available to both sides and that if a plaintiff’s well-being has to depend on how impressed a jury is by the nature of the presentation, this may backfire. Brodeur gives us an example of that himself, although he does not make the link. He describes how an asbestos plaintiff lost his case because, while he had obtained useful evidence from an expert by means of deposition, “it went down the tubes when the presiding judge decreed that it be read by his law clerk, who managed to do so in a monotone so flat that it’s a wonder the jurors didn’t fall asleep.”8

5 See his description of the Tyler plant case (ch. 3). He actually does note that, when cases were brought in the 1930’s and 40’s, the defendants made similar arrangements with the plaintiffs’ lawyers. Later on in the book Brodeur depicts his plaintiffs’ lawyers as heroes because they seek to protect the rights of other future litigants, not noting that in the past the same category of lawyers had frequently, in their haste to settle, ignored the plight of potential claimants. This is an endemic problem; see the description of the Dalkon Shield litigation by Mintz, n. 16.
6 See particularly at pp. 230-33, 240-43.
7 At page 235.
8 At page 137.
It is something of an irony that for someone who so admires the adversary system, Brodeur never acknowledges that it takes two to tango. To Brodeur the plaintiffs' lawyers' zeal is to be portrayed as meritorious because of the holy grail-type causes they are pursuing: seeking compensation for hapless, horribly injured people, wreaking revenge on plug-ugly buccaneers. He does not seem to notice that this cult of seeking satisfaction by the employment of rugged individualistic-type tactics has the potential to create both a very unattractive legal culture and a reprehensible profession. Thus, while his failure to see the double-edged aspects of the arguments he makes causes him to complain about the defendants' lawyers cave men-like tactics — such as the unorthodox use of Chapter 11 of the Bankruptcy Act process, or the making of exaggerated claims of potential liability in order to bring themselves within the confines of that scheme, etc., — it is not difficult to see that these lawyers were using the legitimate tools of their trade in exactly the same way as their opponents — the good guys — were doing. They could justify their behaviour on the same basis: they were using their abilities to further the needs of their individual clients. They were, therefore, bound to try to be as artful as they could be. Thus, if Brodeur glows with admiration (as he does) for people like Ward Stephenson because he pioneered a new strategy creating a new area of liability, he ought to be filled with equal awe and respect for the lawyers of Johns-Manville who were innovative enough to use an otherwise dormant instrument, the bankruptcy proceedings, to avoid the full wrath of their clients' torts' creditors. But, he is not. And, while he admires the cunning of the plaintiffs' lawyers who trap their clients' adversaries into making damaging admissions, he seems to be somewhat offended by defence lawyers who advise their clients to tailor their answers and materials so that they will not be so trapped. Thus, he shows strong signs of being perturbed because lawyers for Johns-Manville had advised scientists how to put the 'best' interpretation on their findings which, if they had been put out as originally drafted by the scientists, might have given workers a chance to bring successful actions much earlier than they did.9 In the same way, he notes the success of an asbestos companies' lawyer who was able to gain a run of wins by relying on different expert witnesses than he had before because the previous expert witnesses had not proven to be as adept as they ought to have been and, therefore, plaintiffs had succeeded against him.10 He does not seem to understand the implications of the fact that lawyers (on either side) are not bound to put forward scientific truth, but rather the truth on offer which suits them. In the same way, his view of lawyers as champions and heroes is not diminished by the fact that sometimes they act

9 See pages 113-115 where he describes the advice and editing efforts of Hobart and Minard of Newark.
10 The victories were those of Lively Wilson (pp. 136-37, 224). I use the expression "succeeded against him" because this is the way Brodeur sees the cases: a contest between lawyers.
— by his own lights — like pool-room hustlers. Thus, when lawyers appearing for the defendants sought to improve their clients' bargaining position by making public their disdain for the large fees charged by the plaintiffs' lawyers in the asbestos litigation, Brodeur characterizes them as hypocritical because of the huge sums of money they were making in helping Johns-Manville set up the litigation-avoiding bankruptcy processes. While Brodeur's indignation is completely justified, he might have acknowledged the fact that the plaintiffs' lawyers fees were rather large too and that these lawyers were not motivated only by the need to champion the oppressed. For instance, right at the beginning of the book, in the midst of his adulation for Ward Stephenson, he incidentally notes that Stephenson's contingency fee for his first case was 30%, a rate which, by the time he had developed what turned out to be a winning formula, had risen to 40%. Similarly, in chapter 3, Brodeur describes the first mass asbestos litigation case brought to successful conclusion by plaintiff lawyers, the Tyler Texas case. While Brodeur spends much of the chapter describing how clever the lawyers were, he does not remark (except right at the end of the chapter) upon the vast sums of money made by the plaintiffs' lawyers. Rather, he notes that Balwin was a clever lawyer and that this, in effect, is evidenced by the fact that he has made so much money. Again, in his description of the young lawyer Baron, he waxes lyrical. He does note that at one point Baron lost some of the "files" he had because he and the law firm to which he had belonged parted company. Fortunately for Baron the other asbestos litigation lawyers gave him a share of the action. 'Fortunately' is a carefully chosen word: the chapter finishes by noting that the plaintiff lawyers in the Tyler case were able to settle for $20 million. The writer is clearly impressed by the fact that the plaintiff lawyers were able to hang on for $20 million after being offered a paltry $9 million dollars at the beginning of tough negotiations. He does mention the fact that the lawyers did very well out of it and that the three principal ones, whose attributes and activities he describes

11 At p. 317, he records that the corporate law firms were charging Manville about $1.5 million a month and that in a year and a half, well-known firms, such as Heller, Ehrman White, and McAuliffe, had charged more than $6 million; the blue ribbon firm of Davis Polk & Wardwell had charged $3.5 million, etc.

12 While Stephenson did not make a large amount of money compared to other lawyers in this business, note that in the Tomplait case the plaintiff finished up with $37,500, whereas Stephenson, if Brodeur's figures are accurate, would have received $20,250. It does not seem as if Tomplait who, after all, suffered the debilitating injury, got much of a premium for it.

13 See the earlier discussion of the lawyer Balwin.

14 I will not take up the argument here that the $20 million did not only come out of the asbestos manufacturers' and processors' pockets; governments and unions were asked to contribute. There is virtually no comment on this issue by Brodeur. Yet, in a serious book, this kind of apparent complicity by other actors might have deserved some discussion.
in some detail in the text, made over $1 million each after they had paid off other lawyers who had referred work to them. A contingency fee of 30% on $20 million dollars yielded a tidy sum for the principal lawyers involved, even after they had paid finders' fees. It might be noted that these lawyers all made more money than any of the successful plaintiffs. It is this grossness and crassness which gave ammunition to the defendants' lawyers when settlement time came.¹⁵

Let me pause here and explain why I have spent a considerable amount of time and space on these aspects of the writer's blindness. My concern is that Brodeur does not see that the logic of a scheme which presumes that justice for all is advanced by individuals pursuing their own narrow interests at all costs permits everyone to behave in that way, regardless of their class position (that is, the clients') or of their personal motivation (that is, the lawyers'). Inequality in political and economic power is not a central issue in such a system, no matter how this inequality evolved historically. Nor is the productive nature (or the lack of it) of a self-maximizing activity of any interest to the integrity of such a regime. A scheme of this kind allows individuals to pursue individual interests at all costs and has the potential, therefore, to degrade the very dignity of individuals which it claims to promote. Thus, what Brodeur fails to perceive is that it is natural and justifiable, in the context of the ideology of individualism which is the soul of the torts' regime, for lawyers to advance their clients' (and their own) interests by tactics which, by standards evaluated by any other means, would be deemed reprehensible. Examples abound; this is not context particular. It is the logic of the framework which promotes unacceptable behaviour. It is this logic which permitted the lawyers for A.H. Robins, the manufacturers of the Dalkon Shield, to seek to blame injured women's sexual activity for the debilitating effects the plaintiffs attributed to the intra-uterine device made by the manufacturer. In making these arguments, lawyers for the manufacturer put questions to the women about their sex lives and personal habits, including questions about the names of their sex partners, their hygienic habits, before and after intercourse, their habits during menstruation, and so forth. In some instances, lawyers for A.H. Robins insisted that the women's husbands be present when such questions were to be asked, including questions about extra-marital

¹⁵ A crassness and greediness which has become obvious even to the plaintiffs' lawyers. Thus it is that Baron has been cited recently as having helped to set up a charitable fund to which successful plaintiff lawyers will contribute 25% of their earnings in support of research to prevent disabling diseases arising out of exposure to asbestos; see "Manville Creditors Oppose Settlement", Washington Post, 18 Feb. '86. This gesture simply had to be made. Further evidence of the real motivation of the people whom Brodeur thinks of as the champions of the oppressed was furnished by the tragedy at Bhopal. Elegantly suited American lawyers were flying over, signing-up clients as quickly as they could. A multi-billion dollar kind of settlement was in the offing; 30% of a few billions is almost as good an incentive as the desire to bring American-style justice to foreigners.
sex by either spouse. Eventually, it was proved that the defendants never intended that their device should be sold to females who were not sexually active or only to those who were sexually active in a restrictive manner. 16 That is, the intent of the defence tactics was harassment, pure and simple. Of course, it was "clever". Similarly, it is the logic of this framework which permits lawyers for defendants to look at a woman who has been seriously hurt, such as the grievously injured Diane Teno, and ask that the courts reduce the damages award because it will always be possible for this disfigured and disabled person to find a husband and, therefore, to lessen her dependence on other resources. 17 Or, again, it is this kind of logic which makes it appropriate for a fact-finder in a civil trial to look at a widow or widower and see whether they are good candidates for re-marriage. 18

All of the foregoing is mere quibbling. The greater deficiencies of the book lie in Paul Brodeur's complete misunderstanding of the ability of torts' law to deal with serious social and economic problems.

Because Brodeur sees plaintiffs' lawyers in the same way as Hollywood saw the champions who jousted for the protection and love of shy and beautiful princesses in King Arthur-type movies made in the late 40's and 50's, it never occurs to him that the litigation-adversary system (the torts' system) in which the jousting takes place may be of dubious value from the perspective of the furtherance of aims he wants to pursue, viz., compensation for victims and punishment for harm-inflicting manufacturers, processors and miners. Brodeur's argument is simple-minded. He justifies his preferences by the nature of the opposition to them. If a scheme is supported by the Enemy, then there is no need to think any further: it is a scheme to be rejected. Thus, Brodeur is sure that because the proposals for a social insurance fund of some kind in the asbestos litigation setting have been put forward by defendants (e.g. by Johns-Manville, through its lackeys, which included pliable politicians such as Gary Hart, Millicent Fenwick, with the complicity of such notables as Walter Mondale), they are a good indication that the torts' system is an ideal mechanism. He believes that he has supporting evidence which justifies this line of reasoning. He shows that workers' compensation schemes were created at the behest of employers. 19 Now, as workers' compensation schemes

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16 See Morton Mintz — At Any Cost (1985), Ch. 11.
19 For this he relies on some American legal history, such as that of Berman, Death on the Job; Occupational Health and Safety Struggles in the United States (New York: Monthly Rev. Press, 1978). The situation is much more complex. Thus, in Ontario some say it is fair to believe that the workers'
in the United States have not adequately looked after workers, nor have they proved useful devices for harm prevention, it follows for Brodeur that the torts’ litigation scheme — which he sees as the only alternative — constitutes a satisfactory response to the inevitable failure of Enemy-sponsored regimes of this kind. The banal nature of this approach is breathtaking.

To take an example from my own field of work, note that when unions feel too weak to rely on their collective bargaining power, they favour compulsory arbitration as an interest dispute settlement mechanism. When these conditions exist, employers oppose arbitration. When the circumstances are reversed, so are the positions. That is, the specific source of a proposal does not tell us much about its utility or merit. Thus, while it is true that it is some employers and capitalists who now see themselves as being hurt by the torts’ system and who, therefore, want it changed, Brodeur conveniently ignores the fact that it is the employing — capitalist classes which, for a long time now, have argued that the torts’ regime is ideal because it emphasizes individual endeavour, because it tailors remedies to the needs of individuals, because it imposes responsibility on the appropriate risk-creator when the risk materializes, in short, because, it is a system which mirrors the basic tenets of the free enterprise system which they glorify. After all it is this kind of thinking which the theorists of the law and economics school, the school which supports the pervasiveness of the invisible hand arguments (and, therefore, corporate market activity everywhere)

compensation scheme was established as a result of support by both employers and unions; see Risk, “This Nuisance of Litigation: The Origins of Workers’ Compensation in Ontario” in Flaherty, (ed.) 2 Essays in History of Canadian Law (1983) 418; for a different interpretation, see Piva, “The Workmen’s Compensation Movement in Ontario” (1975), 67 Ont. Hist., 39. Similar arguments rage in respect of the United Kingdom legislation and of some European schemes. But, Brodeur is not interested in refinements of this kind.


21 Brodeur himself reminds us of the fact that it is conventional wisdom that the torts’ system is a reflection of market ideology when he quotes a plaintiff lawyer as follows (at p. 287): “To us Manville is more than a legal adversary. . . . Its corporate actions shake our faith in the free enterprise system. Too many victims of asbestos disease have died for their survivors and friends to shed a tear for a company that has shown so little compassion for the victims of its willful acts. If Manville is successful in this attempt to misuse the law to evade responsibility for its deliberate, intentional actions, then our faith in the legal system will also be shaken.”
have been espousing. Brodeur, then, does not realize the obvious: the very scheme which his Enemy now wants to abolish or, at least severely curtail, was supported wholeheartedly by that same Enemy and its many associates until it turned sour for them.

In his simplistic way Brodeur does not see that a torts' system does not even serve the hapless victims of market and social activity very well, even when the "fortunate", that is, successful, asbestos plaintiffs are included in the tally. For instance, it is well known that less than 56% of all injured people recover anything at all from the torts' system. The Pearson Commission in England found that when all accidents which cause harm are included in the calculus, only 6.5% of people hurt recover anything from the private litigation system. In sum, looked at as a means to look after injured people, the results do not seem to warrant the adulation Brodeur is willing to bestow on the torts' regime. Moreover, the failure to compensate adequately and effectively holds true even in respect of the asbestos cases. Whereas Brodeur is overwhelmed by the effectiveness of the asbestos litigation (after all, did not some people collect millions of dollars, some lawyers make a bundle and Johns-Manville have to use a sneaky bankruptcy process?), it is to be

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23 See the Ontario Law Reform Commission's, Report on Motor Vehicle Accident Compensation (Toronto: Ministry of the Attorney General, 1973) which, in turn, gathered together the findings of Linden's, Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents (1965), a University of Michigan study by Conard et al., Automobile Accident Costs and Payments (1964), the British Columbia Royal Commission on Automobile Insurance, Report of the Commissioners (1968), an Oxford University Study by Harris and Hartz, Report of a Pilot Survey of the Financial Consequences of Personal Injuries Suffered in Road Accidents in the City of Oxford During 1965 (1968), and a study done by the United States' Department of Transportation, Automobile Insurance and Compensation Study: Economic Consequences of Accident Injuries (1970). The analysis led the Report to conclude that less than half the victims received any compensation at all, that only 28.8% of all victims received full compensation for the pecuniary losses and that most of those who recovered anything at all from the torts' system suffered minor losses. Amongst those who had minor losses, 80% received full compensation, whereas amongst those with serious injuries, 71% received less than a quarter of the losses they actually suffered. Note that the Law Reform Commission study dealt mainly with automobile accident victims where recovery is much easier to obtain than in other accident situations.

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noted that it was not until 1967 that Borel first was decided in a plaintiff's favour, thereby laying the ground for future successful litigation. Now, as asbestos-related disease was uncovered, by Brodeur's own account, in 1929 it is a little strange that Brodeur did not ask himself the question as to why it was that there had been no successful litigation prior to 1967. Such reflection would have revealed that neither the courts nor lawyers had been innovative enough to adapt torts' law so that it could become an instrument to compensate and to deter. Brodeur does point out that several attempts to sue were made by asbestos victims in the 1930's and 1940's but that they were unsuccessful. It turns out that they were unsuccessful because it was hard for plaintiffs to prove that the defendants knowingly had exposed them to a toxic substance, or which of several potential defendants should be held responsible for such exposure, or that their debilitation was not due to their regrettable lifestyle, etc. Note that these reasons for failure were the very same ones which made workers' compensation, according to Brodeur, such a Trojan horse-like scheme from the point of view of plaintiffs: the problematic of causal arguments, the difficulties created by the availability of conflicting expert evidence and/or the alleged misconduct of employees which enabled insurers to delay and, often, to avoid payment in this supposedly no-fault scheme.

Brodeur's analytical unwillingness or inability to face such arguments hides from him the importance of the innovative nature of the tactics of Stephenson, the lawyer he so admires. It is not just that he was imaginative; the strategies used by him also should have alerted Brodeur to the fact that torts' law had to be changed dramatically in order for asbestos victims to recover. In particular, for manufacturers to become liable it was necessary to have positive judicial holdings to the effect that manufacturers would have to bear legal responsibility if plaintiffs had been exposed to one of their dangerous products at some time during their working life. This required a good deal of manipulation by the courts, as defence lawyers made arguments that it was not clear whether the employee was employed by their client or exposed to their client's product when the disease was contracted. Both the development, and acceptance, of product strict liability-type doctrine and procedural mechanisms such as the triple trigger defence demonstrate that


26 This is the date Brodeur said the first extensive causal study was done in England leading to the passage of the first protective legislation in 1931. Brodeur himself notes that less convincing causal links had been found as early as 1900, again in 1906 and in 1924; see ch. 1.

27 At pages 22, et seq.

28 These were the difficulties faced by Stephenson's first client, Tomplait; see pp. 24 et seq.

29 See page 23.

30 See Chapter 1 for Brodeur's description of the development of product strict liability doctrines and his understanding of their importance. For the establishment of the triple trigger defence which stopped insurers from
it is only when the torts' rules are altered sufficiently to lighten the burden of proving "fault" in a particular defendant that it becomes easier for victims of asbestos producers to be compensated. Thus it is when the rules begin to approximate those of a social insurance scheme, one in which fault is less of a requirement or not a requirement at all, that the torts' system becomes more effective from a compensatory point of view. The logic, and one which Brodeur never perceives, is that if it is truly his wish to have innocent victims compensated effectively it will best be achieved by having a fund out of which all injured and diseased people are paid automatically. This would obviate what remains a serious problem for the proponent of the existing torts' system, namely that only a relatively small number of victims can ever be compensated, even under the newly developed and less demanding fault-finding rules. In this context, note that Brodeur is exultant about the increasing number of cases which were being brought by asbestos victims as the stricter product liability doctrines were being accepted by the courts. He points out that, as late as 1976, the number of cases being brought per annum was only 159 but that, by 1982, this had increased exponentially to six thousand a year. He is delighted because he knows that there are lots of people out there "who need to be compensated". As a result he casts aspersions and doubts on the Johns-Manville exercise undertaken by this company when it sought to predict the total number of claims which would be brought against it over time. Johns-Manville was concerned to show that there was a very large potential amount of liability which ought to permit it to use the Chapter 11 Bankruptcy Act processes but, of course, it did not want to show that there were so many claims outstanding that, in fact, reorganization of its affairs would be pointless and that it should therefore be declared insolvent. Brodeur suggests that Johns-Manville was deliberately underestimating the number of potential claimants. Brodeur obviously wants all asbestos victims compensated. But this is impossible. The system came to a grinding halt when it became apparent that several hundred thousand people might recover. Brodeur himself notes that 21,000,000 people have been exposed to asbestos. If Johns-Manville, after all the reorganization is over, will only take "care" of two to three hundred thousand people, lesser companies could take care of many less. The point is that, no matter how vigorously the torts' litigation is to be pursued, huge numbers of people will never be compensated.
unstinting support for the torts' system can now be more readily pinpointed.

He is absolutely scathing, as any faithful viewer of 60 Minutes would be, about the fact that American politicians lend themselves to help the Enemy make the case for the creation of a fund out of which asbestos victims are to be paid. This would deny victims the right to seek out a champion, (oops, a lawyer!), who would make sure that all victims would have their day (some day) in court. In particular, he argues that Senator Gary Hart's proposal was a sell-out of an American birthright by a craven politician:

Hart's measure . . . would have eliminated the right of these workers to be compensated for the pain and suffering they had endured as a result of asbestos disease, and would have protected the manufacturers from being judged guilty of outrageous and reckless misconduct, which would justify the awarding of punitive damages.  

Brodeur seems oblivious to the more promising aspect of the Hart proposal although, in describing it, he mentions it. Thus, after noting what Hart was denying, he points out that Hart meant to give eleven million workers and their families compensation for asbestos-related disability and losses. He castigates the miserliness of the awards to be made. Yet, the Hart proposal was to the effect that the minimum amount of compensation would be tied to the number of dependents a worker had and that it could not be less than two-thirds or more than 80% of a sick or dead workers' average weekly wage. This amount was to be paid throughout the duration of the worker's disability or until the remarriage of his widow or her widower.  

For Brodeur, then, to dismiss such a proposal, there must be two things which really count: the size of the award for injured victims and the public labelling of the defendants as miscreants. As to the former, he sadly lacks any kind of utilitarian judgment. It is not difficult to make a case to the effect that everyone getting a reasonable proportion of their normal income is better than a small number of people getting a huge amount of money and a mechanism such as the Asbestos Claims Facility, a form of pooled-fund compensation scheme. Similarly, in the Agent Orange cases the number of potential victims was between 600,000 and 2.4 million. A settlement was approved, "forcing" Dow Chemical to pay $180 million to those who actually manifest related symptoms. The first payments will be made 23 years after the event. Again, 2,000,000 women used the Dalkon Shield; so far 13,000 suits have been filed against A.H. Robins, only 59 tried. A.H. Robins has invoked the bankruptcy processes; see Alvin B. Rubin, "Mass Torts and Litigation Disasters" (1986), 20 Ga. L. Rev. 429.

36 At p. 259.
37 Ibid. Brodeur is clearly oblivious to the fact that there are more efficient ways to shame and punish outrageous conduct than the torts' system. His vision is limited by his love of the torts' system to which he can see no alternatives.
38 Of course, the eleven million that Hart suggested still fall short of the twenty-one million that Brodeur says might have to be compensated. Presumably Hart's proposal could be implemented so as to cover all asbestos-affected people.
larger number of people getting nothing. Certainly, this argument ought to be of some interest to a person who professes to be truly intent on effectively compensating victims. Further, if Brodeur had not been so enamoured of the forensic lottery known as the torts’ game, he might have noted that there is nothing in the logic of the creation of any kind of social fund which requires the compensation to be as low as Hart proposed it to be. That is, once he realises that the benefit levels depend on political decision-making, he might have used that very fervour for what he believes to be the American ideal of law to support the possibility of a scheme which depends on the operationalizing of the American ideal of political participation.

Brodeur manifestly, then, has a belief that there is such a thing as an appropriate award. Yet, he never comments on the fact that damages’ awards vary enormously from case to case. If the amounts are large, apparently, they are good awards. It never occurs to him that the personal circumstances of victims and their families vary and that these variations may not be reflected in awards made by courts at different times in different parts of the country. Brodeur himself noted that Tomplait only got $37,500, whereas people who brought successful actions much later finished up with million dollar awards. He never comments on the fortuity and unfairness of this kind of system. At the same time, he is very proud of the fact that, in 1979, the average settlement obtained by the plaintiffs was $21,000 whereas, by 1982 it had risen to $42,000, and that over those years the average amount awarded to 20,000 plaintiffs had been $30,000. Again, these amounts are well below the million dollar awards of which he makes so much in the latter part of the book, and again they bespeak of different dispositions at different times in different places, emphasizing the haphazardness of the torts’ system as a compensatory system. This does not seem to trouble Brodeur. In a similar vein he does not take note of the fact that the damages’ awards include amounts for pain and suffering and loss of amenities of life, that is, non-pecuniary heads of damages which are notoriously difficult to quantify. Brodeur himself argues, at various points, that the amount of damages will vary with the presentation of evidence, the availability of “good” expert evidence and the particular make-up of the jury. The result is that in some circumstances which elicit sympathy the amounts awarded for non-pecuniary losses will be very high and which, of course, would be hard to justify in a system which has compensation of actual losses as its focus. The upshot of all this is that the same deviation from the accepted standard of behaviour, that is the same amount

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39 Supra n. 12.
40 This is a principal reason for the Canadian Supreme Court’s holding that a conventional limit be put on the heads of damages; the other reason is to protect insurers and, thus, insurance policy holders; see Arnold v. Teno (1978), 3 C.C.L.T. 272; Thornton v. Board of School Trustees of School District No. 57 (Prince George) (1978), 3 C.C.L.T. 257; Andrews v. Grand & Toy Alberta Ltd. (1978), 3 C.C.L.T. 225.
Outrage is Not Enough

of fault, will be treated very disparately because of all these built-in difficulties. Brodeur never bothers to tell us why the system which he lauds so much should put up with so much incoherence.

Presumably Brodeur's apparent indifference to these issues stems from the fact that he believes that, as long as heavy damages are awarded, manufacturers, processors and miners are being punished just as they ought to be. If such deserved punishment results in a windfall being paid to some injured persons, Brodeur probably would say: "so be it". The fact that the punitive effect will vary greatly from case to case does not concern Brodeur: ethical retribution and deterrence will be served. He seemingly does not care that asbestos defendants may be punished many times for having committed the same wrong. Again, this is justified by an assumption: no punishment is enough for these wrongdoers. I have much sympathy for this approach, but it is not a principle consonant with our legal paradigm. Brodeur, a lover of the legal system, does not pay attention to the niceties of that very regime. In any event, Brodeur is wrongheaded in his belief that the right people are being punished when large damages are awarded to the injured litigants.

When the defendants are large corporations of the Johns-Manville kind, attacks on their treasuries rarely translate into punishment of the individuals who were the guiding minds behind the wrongdoing. Moreover, the effect of the damages' award will seldom be felt directly by the defendant corporations, as they will be insured against precisely such contingencies. It is crucial to remember that Johns-Manville was dealing with the asbestos litigation with a great deal of equanimity until its insurers started to refuse to meet the mounting litigation costs. The insurance companies were forced to act in this way because of their careless practices of insurance and, of course, by their inability to calculate the avalanche of punitive awards: they were the consequence of unanticipated changes in the law which prevailed at the time the risks were assessed. Note here that Brodeur never refers to the fact that his beloved torts' system could not operate without being shorn-up by some form of insurance scheme, whether it be privately or publicly funded. If he had seen that much, he might have to be more skeptical of the conventional wisdom which suggests that the commission of wrongful acts is being brought home to the people who behaved in a faulty manner. In any event, even in cases of the asbestos kind in which the insurance problems finally led to the defendant corporations feeling the pain of having to compensate their victims, it does not follow that the managers who were responsible for the wrongful behaviour will be dismissed, demoted or even censured. The difficulties are real: Who made the decisions in respect of which we want to apply punishment? How are these people to be found? Similarly, with respect to shareholders: Who were the shareholders who were in a position to stop wrongful behaviour at the relevant time? Who were the shareholders who profited from the actual wrongdoing? These questions, tough as they are, are even made more difficult by the nature of the asbestos litigation. The long period which must elapse between exposure to the substances and
the manifestation of diseases, when combined with the rule — judicially devised — that injury must be established once and for all by the time the trial takes place, means that managers and shareholders who were actually in responsible positions at the pertinent time may no longer be around when the plaintiffs' actions are brought to fruition. As a matter of logic, then, all that the proponents of the torts' system's utility, such as Brodeur, are left with is the argument that the very fact that retribution is possible against the perpetual personality of the corporation acts as an educating force, as something of an undifferentiated kind of general deterrence. As recent events show, this is highly unsatisfactory; the proof is in the pudding.

Now that it is well established that asbestos is a serious danger to public welfare, the American Environment Protection Agency has issued a report of a survey of just 10 cities in which it found that 733,000 public and private buildings contained asbestos in one form or another. As a result of this there has been pressure to have asbestos removed from such buildings. Stoffel and Phillips, two investigative journalists, have reported that this new "mega-bucks business" has led to a number of unqualified, unlicensed contractors doing the removal jobs in haphazard, dangerous ways. This, once again, will expose workers to all the hazards to which workers in asbestos processing plants were exposed. In addition, shoddy removal efforts have endangered the inhabitants of the buildings after the contractors have left. Very little, or no, control seems to be exercised over the removal processes.41 One can only assume that the contractors who are doing these jobs in this carefree fashion have not been taught a lesson by the supposedly efficient torts' system which has operated so vigorously against asbestos producing corporations.

In any event, even if it is assumed that the torts' litigation against asbestos defendants will lead to some anxiety in manufacturers of potentially hazardous products, it will be all too easy to avoid the potential liability which they fear. Schemes are already being suggested. They include such things as blitzkrieg liquidations whereby, when serious torts' liability looms, managers will wind up the company, leaving torts' creditors empty-handed (no doubt, managers will get the support of the other creditors who will be paid-off in part in that way); another idea is to set up subsidiaries or spin-off companies who are to produce the hazardous material, splitting off this activity from the less liability-creating activities of the investor. This latter tactic places reliance on the judiciary's well-known reluctance to pierce corporate veils.42

The point of all of this is that Brodeur, seduced by the glamour of the trial process and the drama of million dollar damages' awards and deceived by the fact that a rather unusual situation caused

41 Stoffel & Phillips, "Double Jeopardy; Asbestos is a Hazard that just won't go away", The Progressive, April 1986, p. 28.

insurance companies to go on the run, never recognizes the limitation of torts' law as a compensatory scheme and/or a deterrent one. In particular, he does not see any of the points brought out explicitly and implicitly in this review:

(i) The torts' system attributes fault, for policy reasons, by making victims prove it. Over 50% of all victims will fail to recover anything from the system. This is meant to be so, as recovery for all victims would no longer permit it to be a "fault" system.

(ii) There is no natural relationship between the compensation which is awarded and the severity of the fault.

(iii) Compensation of those victims who do recover bears no resemblance to their pecuniary and concrete losses; as to whether or not it bears a relationship to their intangible losses one is left to guess.

(iv) Delay is required by the system and this, of course, means that there is pressure on bleeding victims to accept terms of settlement which are inadequate.

(v) All of this entails the fact that there have to be victims before the system operates at all.

(vi) Judges and juries are asked to make guesses about what ought to be awarded.

(vii) Lawyers and judges, to do their job properly, are forced to impose indignities on seriously hurt people.

(viii) People who do not recover anything from the system — and there will always be some, often many — are forced into instant poverty, because the only asset most of them have is a steady income. This has been cut-off sharply. That is, those people become poor because they were the victims of accidents.

(ix) Insurance companies have become very wealthy because the torts' system requires that all risk-takers in society (capitalists, workers, consumers, house owners, etc.) seek to cover themselves against risk. In the result, the same risk is often covered by several policies. This is wasteful for all except insurers. The amounts tied up in such policies, if put into one pool could easily support a comprehensive and adequate no-fault compensation scheme.

(x) Lawyers prosper under the system in the United States they take 30% to 40% of all damages awarded.

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43 For an insightful description of this phenomenon in a particular area, see R.A. Hasson, "Subrogation in Insurance Law" (1985), 5 Oxford J. L.S. 416.


45 In addition to earlier comments made, note that, as part of a review of the American Trial Lawyers' Environmental and Toxic Tort Litigation Section, U.S. Law Week, 13 Aug. 1985, wrote: "Representing plaintiffs who have been injured by the myriad chemicals in the modern environment involves an enormous investment of time and money — at great risk of no recovery. The stakes are high enough, however, to attract the adventurous [lawyer]."
There is no evidence at all that the system leads to better behaviour in general.

The last point is the crucial one. Brodeur never confronts the issue as to why corporations behave as the asbestos ones did and why this kind of behaviour is in fact endemic. It never seems to occur to him that balancing money and life is part and parcel of all enterprise. What is peculiar about the private enterprise system is that, all too often, the potential victims are not given a role in defining the extent of the risk. It is this lack of participation or consent which leads us to treat the conduct of a mugger, an arsonist or a bank robber as scandalous, as totally unacceptable and, therefore, criminal behaviour. In cases of that kind we want to stigmatize and to punish individuals, not to ask them to bear some of the losses which they inflict and to permit them to pass on some of these imposed costs if they can.

If the asbestos story had been told so as to point out the fact that the behaviour of the defendant companies (that is, deliberately imposing risks on others by withholding information from them) was not abnormal at all, but one which is characteristic of the profit-maximizing nature of our society, especially as now, in a world of corporate giants, it is allied to the abandonment of any notions of individual responsibility, then it would have been a very helpful and well-told story. It might have lifted concerned people, such as Brodeur, up from the plateau of surprised, angered citizens to a new level of awareness. They would be in a position to begin to understand:

(i) that the harm which is done to people in the name of profit can be inflicted safely precisely because the only responsibility which Brodeur's beloved torts' system imposes is one which arises after injury has been inflicted, and,

(ii) that when that responsibility is finally imposed, it is unlikely to result in punishment of actual wrongdoers or even in the punishment of many of those who have vicariously profited (and richly so) from the errant behaviour of other wrongdoers.

(iii) It would have become manifest that the imposition of responsibility for wrongdoing via the torts' system is not likely to affect other profit-maximizers in such a way as to make them harm-avoiding actors in any other sphere of the economy (or even in the same one, as we have seen).

If all of this had been clear it would have become possible to confront the problem of outrageous conduct squarely. Its genesis would have come into focus; real remedies then could become the subject of research. Brodeur's book denies us these opportunities.

46 The focus could then be on how to improve regulatory, preventive mechanisms, given the endemic nature of corporate errant behaviour. I have begun to explore why such schemes are as deficient as they are and how they might be improved elsewhere; see Glasbeek, "Why Corporate Deviance is not Treated as a Crime — The Need to Make 'Profits' a Dirty Word" (1984), 22 O.H.L.J. 393. A lot more work is required.