

# Investigation on the Applicability of Procedural Norms in Mass Environmental Tort Cases

Jiejing Yao\*

Shanghai University of Political Science and Law, Shanghai, China

\* penghui@sass.org.cn

**Keywords:** mass tort; uncertainty; damage compensation fund; group litigation.

**Abstract:** Before the uncertain factors are removed, it is suspected to put the cart before the horse to rely on liability insurance and damage compensation fund to regulate mass damage accidents. Tort litigation is developing a mass tort solution through repeated games and trial and error through the establishment of inclusive dispute resolution model. The group litigation system has provided institutional support for the judicial settlement of mass damage accidents. For the proposition of drawing lessons from and establishing procedural rules in a certain legal system, it is necessary to explore the economic development, legal tradition, social reality, legal needs and other issues, instead of simply applying the doctrine of "take it from others".

## 1. Regulatory Issues Caused by Mass Environmental Tort Cases

Oil spills, nuclear leaks and various human and ecological disasters caused by biological and chemical technologies can be said to be by-products of the highly developed industrial and scientific level since the twentieth century.[1] The above accidents are completely different from all kinds of catastrophic events caused by natural causes, such as hurricanes, earthquakes, tsunamis, volcanic eruptions and the corresponding casualties and property losses. Such mass damage accidents often go beyond the scope of nation-state and cause long-term effects of varying scales in the region and even in the world. [2]

In the era of globalization in which industrial production is scaled up and international communication is normalized, any kind of risk and the damage caused by it will cross the national boundaries and become a regional, international and even global disaster. This kind of mass damage accident caused by risk not only causes serious personal damage and ecological disaster to human beings, but also faces huge cognitive and information dilemma in understanding, regulating and preventing this kind of accident because of a series of unpredictable uncertainties in the process of its development. In this case, through including liability insurance, damage compensation fund way to establish a procedural, standardized and wide coverage of the characteristics of efficient and fair compensation mechanism, is considered to be able to overcome the traditional tort litigation, such as the high cost of litigation, litigation process of redundancy and other shortcomings.[3] But in practice, liability insurance and damage compensation fund have failed to play the expected effect in mass tort cases. Therefore, we can consider building a group litigation system to effectively avoid the above-mentioned problems.

## 2. Removal of Uncertainties-identification of Substantive Issues

First of all, the establishment of socialized damage compensation mechanism is based on the understanding of risk. No matter what form of socialized damage compensation mechanism, its establishment and effective operation must meet a prerequisite, that is, its designers must have a clear understanding of the probability of damage, the chain of causality between the accident and the result of damage, and the problem of liability sharing in the field of its regulation. [4]In general, accident risk in traditional society can be solved in the context of classical industrial society, However, mass tort often occurs in the field of global disasters caused by nuclear risk, biochemical

risk and other systems. At this time, the existing human experience and scientific knowledge can not provide effective reference and support for its cognition, regulation and prevention.

Secondly, the effective operation of the socialized compensation mechanism is based on the investigation of the facts of the case and the applicable law. The effective operation of socialized compensation mechanism depends on the confirmed accident facts and clear legal rules, only when the qualification of the victim, the specific compensation standard, the balance between the actual and potential victims, the proportion of the compensation obligor's contribution, the overall scale of the compensation for damages and the liability to cover the bottom are made clear, can the key issues on which the compensation mechanism for damages is based be solved. But in practice, this is almost impossible to determine. [5]The reason is that in some cases of mass tort, due to the obstacles in cognitive level, scientific and technological development, information acquisition and so on, it is difficult to determine the victim, the result, the causality and the duration of the damage. In this case, it is doubtful whether an effective damage compensation mechanism can be designed so that the victims of mass infringement cases can receive timely compensation.

### **3. Amendment of Individualized Tort Litigation Mode--Application of Group Litigation System**

The concentrated outbreak of mass tort cases highlights the defects of the traditional tort case handling model in the protection of plural subjects, and the relationship between individual cases and their entirety makes the contradiction between the scarcity of judicial resources and the demand of the public for access to justice highlighted and magnified. [6]The establishment of group litigation system has become the basic direction for the courts, lawyers and victims to solve the problem.

First of all, form a situation in which all parties to the litigation act in concert. The mass tort litigation has experienced the development from the pre-litigation review stage to the merger trial stage. In this process, the informal but coordinated actions of the parties to the litigation have formed an inclusive group dispute settlement mode in essence. Judges began to conduct a consolidated trial to such cases, and through the jury on representative cases such as causation and punitive damages general issues, so that more similar cases of liability and damages to get the same or similar decisions. [7]

Secondly, to overcome the defects of the traditional tort litigation casework mode by group litigation. The verdict of group litigation is binding not only on the member who directly participates in the litigation, but also on the party who does not participate in the litigation or who sues and responds to the same litigation in the future. Opt out mechanism is often used in group litigation, which extends the effect of judgment to the parties who have suffered the same kind of damage or have the same legal relationship, unless the parties expressly opt out. This concentration of claims through legal provisions can reduce the difficulty of forming a community of plaintiffs in group litigation, while reducing the cost of information communication and opinion exchange among members.

From the above we can see that tort litigation is developing a mass tort solution through repeated games and trial and error through the establishment of inclusive dispute resolution model.[8] It can be said that it is the group litigation system that makes the judicial solution of mass damage accidents get the support of the system, which makes the traditional tort litigation can deal with the relief of many victims under the risk society through the improvement of the case-based processing mode. [9]

Because of the special problems caused by the correlation between the individual case and the whole of mass damage accidents, it is an inevitable trend to establish a group dispute resolution mechanism which can accommodate plural subjects under the guidance of the objective of removing the uncertainty factors of the accidents. Therefore, in order to solve the disputes and damages caused by mass tort accidents, the effective accident regulation mode should have a dual structure of combining substantive and procedural issues: substantive problem resolution is the

ultimate goal of mass tort case regulation, while procedural problem resolution lays the institutional foundation for such case regulation.

#### **4. Application of Procedural Norms in Mass Environmental Tort Cases**

The establishment of procedural norms is beneficial to the trial of such cases, the protection of the interests of the victims and the promotion of the standards of finding out the facts of the cases in the aspects of the reasonable establishment of the litigation process by the parties and the court, the reduction of the waste of resources in the use of evidence and the determination of the same legal issues in the existing judgments. [10]Of course, improvements in procedural rules should also take into account the procedural traditions of the existing legal system and the realities of the judicial process. For the proposition of drawing lessons from and establishing procedural rules in a certain legal system, it is necessary to explore the economic development, legal tradition, social reality, legal needs and other issues, instead of simply applying the doctrine of "take it from others". [11]For example, group litigation can effectively integrate the claims of many parties in mass tort cases, which is beneficial to simplify the relevant procedures and make better use of resources, and also has natural advantages in finding out the facts and collecting evidence.[12] However, the system is mainly applied in the United States law, the litigation system of the United States does not strictly distinguish between public law and private law, and there is no distinction between civil and administrative litigation. In contrast, China's judicial system and legal theory strictly distinguish between public law and private law, and the distinction between civil litigation, administrative litigation and public interest litigation is clearer, so it is still a problem that needs to continue to be carefully studied whether group litigation rules can be introduced into China's procedural rules system to meet the challenges of mass tort cases.

#### **Acknowledgments**

This work was financially supported by The National Social Science Fund of China fund.

#### **References**

- [1] Li-Ping W, Ning L. On External Responsibilities of Polluters without Intentional Liaison —Expansion on Article 67 of the Tort Law [J]. *Journal of Political Science & Law*, 2017.
- [2] Schwarze, R, Hoffmeister, O. Erratum: The Winding Road to Industrial Safety: Evidence on the Effects of Environmental Liability on Accident Prevention in Germany [J]. *Geneva Papers on Risk & Insurance Issues & Practice*, 35(4):668-668.
- [3] Enneking L F H. Foreign direct liability and beyond. Exploring the role of tort law in promoting international corporate social responsibility and accountability [J]. 2013.
- [4] Review by: Charles T. Kimmett. Rethinking Mass Tort Law [J]. *Yale Law Journal*, 105 (6): 1713 -1718.
- [5] Mathis K, Huber B R. *Environmental Law and Economics* [M]. 2017.
- [6] Review H L . Rethinking Actual Causation in Tort Law[J]. *Harvard Law Review*, 2017, 130.
- [7] Hanke P C. *Climate Change, Environmental Damage and Migration: A Law and Economics Perspective* [M]// *Environmental Law and Economics*. Springer International Publishing, 2017.
- [8] Revesz, Richard L. "Federalism and Environmental Regulation: A Public Choice Analysis"[J]. 2001, 115(2):553-641.
- [9] Michael Finus, Juan-Carlos Altamirano-Cabrera, Ekko C. Van Ierland. The effect of membership rules and voting schemes on the success of international climate agreements [J]. 125 (1-2):95-127.

- [10] Dorothy Thornton, Robert A. Kagan, Neil Gunningham. Compliance Costs, Regulation, and Environmental Performance: Controlling Truck Emissions in the US[J]. *Regulation & Governance*, 2008, 2(3):275-292.
- [11] Rob Van der Laan, Andries Nentjes. Competitive Distortions in EU Environmental Legislation: Inefficiency versus Inequity [J]. *European Journal of Law & Economics*, 11 (2): 131-152.
- [12] Gilles Grolleau, Lisette Ibanez, Naoufel Mzoughi. Industrialists hand in hand with environmentalists: how eco-labeling schemes can help firms to raise rivals' costs [J]. *European Journal of Law & Economics*, 24(3):215-236.