

12-15-2003

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Recommended Citation

George L. Priest *The Cumulative Sources of the Asbestos Litigation Phenomenon*, 31 Pepp. L. Rev. Iss. 1 (2004)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol31/iss1/10>

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The Cumulative Sources of the Asbestos Litigation Phenomenon

George L. Priest*

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This paper attempts to address, in a brief and preliminary fashion,¹ the sources of the current asbestos litigation phenomenon. I call our current asbestos litigation situation a “phenomenon” rather than a “crisis” because the term “crisis” implies a newly emergent or immediate form of distress. In my view, the asbestos litigation phenomenon has resulted, in contrast, from a cumulative set of intentionally adopted changes in law and procedure that together have created litigation that is and will continue to be unending and infinite in magnitude. At the time these multiple changes were introduced, each of them was thought helpful—perhaps even necessary—for dealing with the consequences of asbestos-related injuries. Together, however, they have resulted in a litigation phenomenon unlike any other ever experienced in America or other countries controlled by the rule of law.

In order to appreciate the cumulative effect of these changes, it is helpful to understand how our composite system of accident law, government regulation, and market regulation operates to control sources of injury in our society. As will be seen, this system incorporates a form of internal self-correction of injury generation that constrains the extent to

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1. I have been at work for a number of years and am continuing to work on a project seeking to identify all of the changes in law and procedure that have been introduced to address asbestos litigation.

which injuries are suffered and, as a consequence, the extent to which litigation is required to provide redress for those injuries. As we also shall see, virtually all of these restraints have been relaxed in the context of asbestos-related claims. The most significant relaxation occurred within accident law—the law of torts—and is manifested in the extraordinary litigation that we observe today.

I. SOCIETAL MECHANISMS FOR CONSTRAINING INJURIES

The structure and the separate elements of the various mechanisms in society for constraining injury are well-known; the description below is hardly controversial. I wish to emphasize the self-limiting and self-correcting nature of the system, which has received somewhat less attention than individual elements. I first discuss the mechanism of accident law where the most significant changes have occurred with respect to asbestos.

Our accident law system is called into play with the occurrence of an injury. In our society, most injuries do not give rise to legal claims and are redressed by forms of first-party health or accident insurance or by personal savings or assets. An injury may give rise to a legal action, however, where it can be claimed that the injury was caused by an identifiable source that could have prevented the injury.

In such a context, the law empowers the victim to collect full damages from the injurer. Damages are measured to exactly equal the victim's loss—not more, not less—simultaneously providing compensation to the victim for the loss and internalizing the costs of the injury to the injuring party. It is widely believed that the internalization of injury costs will lead the injurer, and through a deterrent effect, parties that might be injurers, to adjust activities so that such losses do not occur in the future.²

Potential injurers may obtain insurance for the liabilities created by their activities. But insurers execute the insurance function in ways that similarly serve to create incentives to reduce accidents. For example, insurers structure the terms of coverage of insurance policies,³ engage in direct risk control efforts following the inspection of a policyholder's operations, and underwrite forms of coverage and subsequently change insurance premiums based upon a policyholder's experience, all to deter injury-causing behavior.⁴

In cases of extraordinary misbehavior, punitive damages may be available to serve as an exceptional form of deterrence. But punitive damages are generally rare and are best defended as means of more perfectly

2. In fact, there is very little empirical evidence demonstrating a reduction in the accident rate as a consequence of increased liability. See GEORGE L. PRIEST, *PRODUCTS LIABILITY LAW AND THE ACCIDENT RATE IN LIABILITY: PERSPECTIVES AND POLICY* 184 (Litan & Winston eds., Brookings Institute 1988).

3. This is accomplished chiefly by excluding or limiting coverage of risks within the control of the policyholder. See George L. Priest, *The Government, the Market, and the Problem of Catastrophe Loss*, 12 J. RISK & UNCERTAINTY 219 (1996).

4. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1539–50 (1987).

internalizing full injury costs; thus, they are more likely to be awarded where there is some reason to believe that compensatory damages will be insufficient. Examples are when the injury is difficult to detect, such as price-fixing in antitrust law where treble damages are awarded because consumers can form no independent judgment of the level of the competitive price and so cannot detect every time they are overcharged; when the defendant is unknown, such as a midnight dumping of a toxic waste; or when there has been some effort by the defendant to conceal or cover up the loss or the source of the loss.

The mechanism of accident law, of course, is organized through a set of procedural rules that provide for general fairness in its operation. Other procedural techniques, such as the class action, serve (in theory) to perfect the system by allowing the aggregation of low-valued claims that otherwise might not be prosecuted and to achieve efficiency in claims resolution.⁵

For some activities that are expected to generate losses continuously—such as activities in the workplace—our society has supplanted tort law with an insurance system that eliminates the necessity of proving that the accident could have been practicably prevented. In this type of insurance system, compensation is provided at levels substantially lower than in tort law, but total accident costs remain internalized as long as wages incorporate compensating differentials based upon workers' perceptions of the risk of suffering uncompensated loss.⁶

In some instances, the magnitude of losses caused by an injurer's activities may overwhelm the assets of the injurer, forcing it into bankruptcy, but these instances are also likely to be rare because of the existence of insurance and the incentives the accident law system creates to reduce the frequency and magnitude of injuries. Where there is a bankruptcy, victims no longer obtain compensation through the accident law system (or obtain reduced compensation as claimants against the bankrupt's limited assets), but instead rely on insurance or insurance-like substitutes, such as first-party insurance, personal assets or, for the extremely low-income, government provided redress.

As mentioned previously, the legal system is not the only societal mechanism creating incentives to reduce the accident rate. There exist additional economic (market) constraints, as well as moral constraints, on injury-causing behavior. As a general matter, producers have no economic incentive to provide products or services that needlessly cause injuries. Once consumers become aware of the injury-causing features of products, they can be expected to decline to purchase them. Thus, the market itself

5. See John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 *IND. L.J.* 625, 652-53 (1987).

6. For an effort to measure compensating differentials, see generally W. KIP VISCUSI, *EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE* (1979).

will discipline loss generation. Similarly, although it is infrequently emphasized, individuals who make products or manage production are humans as well. Our society incorporates a general ethic of increasing safety and reducing loss; no one wants to be held responsible for unnecessarily contributing to another person's harm when that harm could have been prevented.

In addition to the market and accident law system, our society imposes substantial, direct regulation of accident-causing behavior at the federal, state, and local levels. Federal agencies with authority to mandate safety-related investments have been given authority over most important harm-causing activities—agencies such as the National Highway Traffic Safety Administration (truck and auto safety), the Federal Aviation Administration (airline and airplane safety), the Food and Drug Administration (pharmaceuticals and food products), the Occupational Safety and Health Administration (workplace safety), and the Environmental Protection Agency (pollution and other environmental harms), among others. There are also vast areas of direct safety regulation at the state and local levels, including the enforcement of building codes (incorporating a myriad of safety-related requirements), zoning regulations (limiting the interaction of industrial and residential uses), the regulation of auto driving through traffic rules, and, of course, general behavioral regulation by local police. This, again, is an incomplete list.

Together, these various mechanisms—the market, government regulation, and accident law—constrain the level of injuries suffered in our society. These mechanisms are designed to be self-correcting, reducing the extent of future loss. They do not merely accept losses and compensate them, they prevent them. Thus, with respect to all activities, as greater losses accumulate or information develops as to the source of injury generation, each of these mechanisms for injury control become activated. The market responds in the form of reduced purchases or higher wage demands. Existing regulatory agencies become alerted and consider mandating safety investments. Relatedly, though after the fact, our system of accident law internalizes the costs of injuries through an increase in judgments against the source of the harm. These judgments lead insurers to manage the risks directly, increase premiums, or, at the limit, exclude coverage of the risk. To the extent that judgments are not insured, they serve as a direct economic incentive to the source of the harm to make investments, to reduce the frequency or magnitude of harm, or to reduce the level of activity generating the harm. All of these mechanisms serve the ambition, either directly or through the creation of incentives, of reducing the extent of harm suffered in our society. And the system appears to work effectively; there are very few examples in modern history of continuous sources of loss.

II. THE ASBESTOS CONTEXT IN CONTRAST

The interesting question, of course, is why is asbestos so different? What has led our society to a point with respect to asbestos at which there is no apparent self-correction, with claims of harm from exposure steadily increasing over time despite hundreds of thousands of settlements between defendants and injured claimants? In my view, there are multiple sources of the asbestos litigation phenomenon. The constraints created by the market were ineffective because of the long time lag between sales of the product and the recognition of the physical impact of asbestos on health. As a consequence, today's market forces are irrelevant; there is no United States market for asbestos. For quite different reasons, government regulation has been ineffective. The government acted, but it was too late to prevent the first line of asbestos-related injuries. Asbestos use has been generally prohibited, but in all other respects, government regulation is generally irrelevant.⁷ The existence of governmental regulation has been ignored by tort law.

That leaves accident law as the only effective societal mechanism today for controlling asbestos-related claims. The constraints of accident law, however, have proved entirely ineffective. Indeed, I believe that changes in the accident law mechanism have had the effect of increasing the number of asbestos-related claims and will continue to increase them into the future. The principal reason is that, over the years, our courts have relaxed each of the standards and rules that served, in earlier times, to constrain tort law recoveries. As we shall see, there are no effective constraints on asbestos litigation in current accident law.

Asbestos litigation is different from any other subject of litigation in the history of American tort law because courts have believed—and many still continue to believe—that the problem of providing redress for asbestos-related losses is so difficult and compelling as to justify changes in each of the self-correcting features of the mechanism of accident law. Like Holmes' description of the reason that great cases make bad law, these historical judicial concerns about asbestos-related injuries represent a response to “a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.”⁸

A brief review of modern accident law shows that the laws of substantive torts, procedure, insurance, and bankruptcy, among others, have been relaxed in order to facilitate recovery of asbestos-related claims. Indeed, we might well describe the law relating to asbestos claims as establishing a distinct recovery system, different in multiple respects from

7. There is an exception with respect to clean-up activities removing existing asbestos.

8. *N. Sec. Co. v. United States*, 193 U.S. 197, 401 (1904).

the basic system of law and procedure that addresses all other areas of injury. In my observation, the asbestos law system has:

1) relaxed the requirement of proving demonstrated injury by allowing suits and recoveries by exposure-only claimants, by claimants alleging no more than a fear of injury, and by claimants desiring monitoring for the detection of a potential injury;

2) relaxed the causation requirement of carefully identifying the source of the injury. More specifically, the asbestos law system has relaxed the tort law requirement of showing that the injurer could have prevented the injury in some practicable way. Most claims today proceed on a failure-to-warn theory, which is largely fanciful with respect to actual prevention, since it can hardly be believed that warnings, if issued, would have effectively eliminated the risk of injury;

3) provided damages in amounts substantially greater than awarded for identical injuries in other accident contexts. In an empirical study in progress, I have found that, in wrongful death cases, recoveries for asbestos-related losses are multiples greater than recoveries for equivalent losses (deaths) suffered in other contexts;

4) expanded the concept of joint and several liability beyond its particular deterrent function and vastly reduced the requirement of showing causative links, again eliminating any relationship to a standard that would compel a showing that a defendant could have prevented the injury;

5) provided punitive damages in magnitudes greater than in other accident contexts and greater than could possibly be justified by the deterrence rationale. Indeed, punitive damages in asbestos cases have turned the justification for that institution on its head. Punitive damages can be justified only where it is believed that compensatory damages alone will be insufficient to fully internalize injury costs to defendants. Punitive damages continue to be awarded in magnitudes that threaten the prospect of recovering compensatory damages for thousands of claimants;

6) vastly expanded the obligations of insurers by negating insurer constraints on coverage in a variety of ways. These include ignoring the significance of the policy period by adopting forms of continuous trigger, expanding claims periods, allowing direct actions, and adopting many other coverage-expanding definitions

that essentially break down the operation of the basic commercial general liability policy;

7) ameliorated the concept of litigation finality through the second injury doctrine;

8) relaxed a variety of procedural rules, such as venue standards and *forum non conveniens*, and adopted novel aggregative mechanisms that cannot be justified either as promoting efficiency of process or as making possible the litigation of negative-value claims.

These are only a few of the changes in the legal system, which have resulted from concerns over asbestos-related losses that have generated the asbestos litigation phenomenon that we observe today. These changes in the law have been justified by courts, generally uniformly, on the belief that asbestos-related claims are so compelling that they should command special rules to address the problem. Asbestos litigation in the United States is unlike any other form of litigation because each of the limiting and self-constraining features of our system of accident law have been rendered ineffective, and each of the elements required for recovery under accident law have been relaxed.

This is not to say that courts have simply acquiesced to the claim of every asbestos plaintiff. More typically, judicial decisions in asbestos cases proceed with rhetoric that allows recovery in the case before the court, yet still claims to retain some limiting principle with respect to future claims. The recent United States Supreme Court opinion in *Norfolk & Western Railway Co. v. Ayers*⁹ is illustrative. In that case, the Supreme Court allowed for first-time claims under the Federal Employers' Liability Act on the grounds of fear of cancer from exposure to asbestos, though the Court insisted that the claim could only proceed if the worker could show some physical manifestation of exposure. Thus, the Court vastly expanded grounds of recovery based upon asbestos exposure (the only claimed injury was mental anguish) while purporting to retain some limit on the expansion. Cumulatively, however, this rhetoric of limitation has proved meaningless. In subsequent cases, the limitations of one case have been relaxed for another, and the availability of recovery has continued to expand.

These various changes in the law have not been unchallenged, and there have been efforts to adopt what might be called counter-measures—modest tort reform and actions against aggressive plaintiffs' attorneys—seeking to offset or reduce the cumulative effects. The magnitude of the asbestos-

9. 123 S. Ct. 1210 (2003).

related changes to the accident law system, however, cannot easily be reversed.

As a consequence, we see today, in asbestos litigation, cases that would have been inconceivable thirty years ago and cases that are still inconceivable in any context other than asbestos. Many other commentators at this symposium have commented on settlements involving tens or hundreds of thousands of claimants. These settlements, however, are informed by the nature of individual asbestos claims in the courts. This current individual litigation is extraordinary, and I invite any skeptic to pick up Mealey's bi-weekly *Asbestos Litigation Report* to observe the modern scene.¹⁰ As merely examples, within the past two years the following cases have been reported:

1) a California man obtained a \$1.1 million judgment where his only exposure to asbestos consisted of his once changing the brakes on a family car;¹¹

2) a California man obtained a \$4.5 million judgment where his only known exposure to asbestos occurred during *one day* when his mother and grandfather brought him as a baby to observe the reconstruction of their church;¹²

3) the Maryland Court of Appeals affirmed a \$9 million verdict in favor of a woman whose only exposure to asbestos occurred when she was a child during the time her father was remodeling their basement using a wallboard joint compound that contained asbestos.¹³

These cases are illustrative of modern asbestos litigation. As is immediately apparent, they are vastly different from typical cases in other areas of tort law. Why? Because they are asbestos cases.

Individual cases of this nature, of course, dictate the terms of the settlements of the claims of thousands. The individuals in these cases suffered actual diseases (in each case mesothelioma).¹⁴ The multi-thousand claimant settlements most typically involve named plaintiffs with real diseases and thousands of exposure-only claimants with no disease or disability. If cases and settlements with these characteristics are possible in our modern asbestos law system, it is not implausible to predict that the asbestos litigation phenomenon shows no sign of ending. By these

10. Of course, it is illustrative of the nature of current asbestos litigation that there exists a demand for a bi-weekly asbestos litigation report.

11. MEALEY'S LITIG. REP.: ASBESTOS, Feb. 1, 2002, at 14-15.

12. MEALEY'S LITIG. REP.: ASBESTOS, Apr. 20, 2001, at 3-4.

13. MEALEY'S LITIG. REP.: ASBESTOS, June 21, 2002, at 4-5.

14. There exists idiopathic (i.e., source unknown) mesothelioma, a defense the respective juries rejected in each of these cases.

standards, all Americans are victims of asbestos. All current citizens have been exposed to the number of asbestos fibers involved in a one-time changing of brakes or a one day visit to a church under construction, or emitted by wallboard tape compound in a family basement.

As a consequence, the various predictions of 2 million or 3.5 million outstanding claims mentioned at this symposium are, in my judgment, vast underestimates. Given the standards of our current asbestos law system, the asbestos litigation phenomenon will never end.

