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WELFARE STATE OR WELFARE COURT: ASBESTOS LITIGATION IN COMPARATIVE PERSPECTIVE

*Sheila Jasanoff & Dogan Perese**

INTRODUCTION

Since the United States Supreme Court issued its landmark evidence ruling in *Daubert v. Merrell Dow Pharmaceuticals*,¹ much ink has been spilled on how best to incorporate scientific and technical evidence into legal decisions. Interestingly, all concerned agree that the causes of the problem lie somewhere outside the courtroom door, although attorneys, scholars, and litigants by no means agree on just where in relation to that door—in particular, whether inside or outside it—to locate their proposed remedies. Corporate defendants have largely accepted the view that the problem has to do with importing “junk science”² into the

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¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

² See Kenneth J. Chesebro, *Galileo’s Retort: Peter Huber’s Junk Scholarship*, 42 AM. U. L. REV. 1637, 1638-39 (1993) (summarizing one author’s definition of “junk science” as “the mirror image of real science . . . cut[ting] across chemistry and pharmacology, medicine and engineering It is a catalog of every conceivable error: data dredging, wishful thinking, truculent dogmatism, and now and again, outright fraud”). See also Kara-Anne Yaren, *Trade and Genetically Modified Foods: Frankenfeats: A Call for Consistency*, 1 ASPER REV. INT’L BUS. & TRADE L. 149 (2001) (noting that although “there is no precise definition of ‘junk science’ there is a useful definition of a scientifically valid methodology: whether the theory in question can be (and) . . . has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling

courtroom. Accordingly, industry's preferred solution is to insist, as *Daubert* did, on proactive judicial gate-keeping at the pretrial stage.³ Judges, on this view, have a duty to ensure that only good science makes its way past a *Daubert* hearing to technically untutored and possibly too credulous juries. Just as passionately, much of the plaintiffs' bar believes that the causes of the problem lie considerably further back in time than the pretrial phase, as well as spatially further away from the legal process, in varieties of corporate misconduct that only jury trials can adequately sanction, for instance, in sometimes willful disregard for citizens, consumers, and workers; in the refusal to carry out timely research on health, safety and environmental problems; and in the sponsorship of biased and misleading research. Where defendants wave the red flag of "junk science," plaintiffs point to the notorious example of "tobacco science," studies commissioned by the tobacco industry in an effort to demonstrate that cigarette smoke, one of the most securely established of all cancer-causing agents, poses no health risks to humans.

In this paper, we too trace the reasons for science's unsatisfactory engagement with the law to places outside the courtroom, only our analysis treats the law-science relationship in the United States as an epiphenomenon of a dynamic that reaches deeply into political culture. Further, we suggest that the problem of law and science in modern industrial democracies cannot be divorced from the deeper problem of responding justly and efficiently to the residual risks created by technological activity. The latter issue, moreover, is handled very differently in different national legal and policy systems. Our focus here is on America's unique reliance on litigation to frame and find remedies for health problems allegedly caused by human negligence or error in private

its operation, and whether it has attracted wide spread acceptance within a relevant community").

³ See, e.g., *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997) (establishing a discretionary standard of review for reviewing trial court's determination of expert qualifications where industry sought review of trial court's decision to allow unreliable expert testimony); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (extending the *Daubert* requirements to include all expert testimony).

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enterprise. Using evidence from other countries, we argue that providing legislative solutions to such problems would reduce the litigation burden on United States courts. In the process, courts would also be relieved of a high percentage of the difficult expert conflicts that currently occupy their time and drain their resources.

The example we use to illustrate these points is United States asbestos litigation over approximately the past quarter-century. Comparing the American record on this issue with that of several European countries, we suggest that asbestos lawsuits have forced the United States court system to perform the redistributive functions of a welfare state, only at higher cost and with greater inefficiency than if the state had chosen simply to compensate asbestos victims directly.⁴ Our argument goes beyond the frequent critique of litigation as an economically inefficient means of redistribution and calls attention to its deficiencies as a device for rendering justice under conditions of inadequate knowledge and endemic uncertainty.

Put differently, we suggest that courts are inefficient distributors of welfare benefits not only because the legal process is too expensive in general terms, but more specifically because adjudication uses the act of making causal determinations as a conduit, or an obligatory point of passage, to redistribution. This is a particularly wasteful strategy in cases like asbestos, where the cost of individualized fact-finding has prompted large aggregated proceedings, with the somewhat perverse result of compensating more uncertain causal claims at relatively higher rates than more certain ones. In both this and similar cases, experience from other countries suggests that more equitable and socially acceptable outcomes could be arrived at *without* channeling the compensatory process through the bottleneck of case-by-case fact-finding—or seeking creative ways around that bottleneck. Public law frameworks would have the merit of focusing more directly on the injuries to be compensated than on the often uncertain causal chain that connects claimed injuries to the private behaviors that allegedly caused them.

⁴ See generally Laurie Kazan-Allen, *Asbestos Compensation in Europe*, INTERNATIONAL BAN ASBESTOS SECRETARIAT, May 30, 2000.

We do not address whether the different compensation systems considered in this paper arrive at optimal valuations of the cost of disease or injury for particular conditions and claimants. In other words, we do not ask whether mesothelioma or asbestosis are compensated at too high or too low a rate in the United States or elsewhere. The more general point we make is that judgments like these should be, at bottom, a matter of political deliberation in democratic nations. And to make such assessments, the relative openness and transparency of the legislative process is institutionally better suited than substitutes crafted by a no matter how ingenious judiciary.

I. ONE PROBLEM, MANY MANIFESTATIONS

Asbestos is the generic name for a variety of naturally occurring mineral fibers once widely used as fire retardants in construction and consumer products, including building insulation, ship-building, asbestos cement piping, brake linings, fireproof textiles, and even home hair dryers.⁵ Already in the 1920s, employers began to notice higher incidences of lung disease and cancer among asbestos workers. By the 1970s, surmise turned into science as those initial observations hardened into published epidemiological findings.⁶ Asbestos exposure was responsible for causing degenerative and eventually fatal lung disease, as well as several kinds of cancer, including one, mesothelioma, that was exclusively associated with asbestos and similar fibrous materials.⁷ Population-based studies made it possible to conjecture how many additional cases, and of which kinds, might be expected over time.

⁵ U.S. Env'tl. Prot. Agency, Asbestos: General Information, at <http://www.epa.gov/asbestos/help.html> (Mar. 9, 2004). There are six major types of asbestos fiber, of which the most frequently used are chrysotile, a member of the serpentine mineral family, amosite, and crocidolite, both belonging to the amphibole group. *Id.*

⁶ See generally IRVING J. SELIKOFF, ASBESTOS AND DISEASE (Academic Press 1978). See also, U.S. Dep't of Labor, Occupational Safety & Health Administration: Safety and Health Topics: Asbestos, at <http://www.osha.gov/SLTC/asbestos/index.html> (last revised Aug. 28, 2003).

⁷ U.S. Env'tl. Prot. Agency, *supra* note 5.

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Yet these predictions repeatedly underestimated the actual incidence of disease, as new classes of exposed persons were identified and asbestos-induced illness appeared even in people exposed to the substance outside of occupational contexts.

In general, the United States court system does relatively well at settling claims when the nature and causes of injury are well understood and the damages are clear, as for instance in routine automobile accidents. In the case of asbestos, abundant evidence documented the connections between exposure and disease; mesothelioma in particular was a signature disease, associated only with asbestos. Why then did asbestos litigation prove to be such an intractable problem for American courts? A major corporate mishap of recent years offers a number of clues. In 1998, the huge oil and gas services company Halliburton acquired Dresser Industries, its main rival, thereby immediately becoming the largest concern in the business.⁸ Eager Halliburton dealmakers, however, did not inquire into Dresser's legal liability from long-dormant asbestos lawsuits. It proved to be an epic miscalculation for Halliburton. According to a *New Yorker* article, "The asbestos settlements devastated the company's stock price, which fell by eighty percent in just over a year."⁹ One can speculate in retrospect that there was a failure of due diligence in investigating outstanding legal claims against Dresser, but more important from our standpoint is how such massive liabilities could have been overlooked in the first place. What is it about asbestos-related injuries that can render them both so numerous and so invisible?

Like the diseases that asbestos induces, compensation claims can lie hidden for many years. Long latency periods make it difficult to state with certainty when conditions will appear or how severely they will progress in given individuals. Uncertainty surrounds not only the timing, number, and seriousness of claims, but also the connection of particular claims to particular circumstances of exposure. Different asbestos fiber types are associated with different levels of risk, and more than one type

⁸ See Jane Mayer, *Contract Sport*, Vol. 80, Issue 1 NEW YORKER, February 16 & 23, 2004, at 87.

⁹ *Id.*

may be mixed into a particular product. Worker and consumer mobility impede attempts to pinpoint with accuracy how given claimants were exposed or how likely they are to fall ill. In short, even though the health impacts of asbestos are relatively well known in scientific terms, classes of plaintiffs and defendants remain indeterminate for purposes of the law, often for long periods of time. Under these conditions it has proved almost impossible to stem the tide of asbestos lawsuits or to adjudicate them efficiently once they have been initiated.

To appreciate the consequences of these uncertainties for the American legal process, it is instructive to compare the burden of asbestos actions on United States courts and on courts in other industrial nations where asbestos has exacted similar tolls in disease and death. Comparative information on asbestos claims and recoveries, however, has to be interpreted against a backdrop of radical differences in state responsibility for public health protection and associated cultures of regulation, risk management, and expertise. Differences between United States and European litigation patterns only make sense if we take into account how lawsuits operate in relation to other social mechanisms for taking care of the victims of illness and disability.

II. CULTURAL PERSPECTIVES ON HEALTH AND LITIGATION

Suits to recover damages for disease and injury in the United States play out within a health care system that is uniquely *laissez faire* by comparison with those of other industrial democracies. United States citizens, unlike most of their European counterparts, are not generally covered by national health insurance.¹⁰ Medicare and Medicaid, enacted in 1965 as part of the Great Society legislative program, provide basic coverage for older and low income citizens, respectively.¹¹ The remaining majority of

¹⁰ Nat'l Coalition on Health Care, Health Insurance Coverage, at <http://www.nchc.org/facts/coverage.shtml> (2003).

¹¹ Ctrs. for Medicare & Medicaid Servs., Medicare Information Resources, at <http://www.cms.hhs.gov/medicare/> (last modified Sept. 12, 2003). Current Medicare/Medicaid statistics show that there are 40.5 million enrollees in Medicare and 40.1 million enrollees in Medicaid. *Id.*

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Americans are covered, if at all, by varying employer-funded or private insurance schemes, leaving a large fraction of the population wholly uninsured.¹² A generously supported national research and development system, coordinated by the National Institutes of Health, has achieved extraordinary success in finding cures for individuals willing and able to pay for these results; striking examples include the advances made in drug treatment for AIDS¹³ and cancer over the past two decades. But while the more privileged have access to arguably the world's most sophisticated health care system, millions enjoy no such benefits, and health statistics for the poorest fifth of the United States population more closely resemble those of developing countries than of highly industrialized ones.

European countries, by contrast, provide substantially more equitable nationwide coverage under variously funded insurance programs. Universal, state-sponsored insurance is the rule, with emphasis on equity across individuals, possibly at the expense of innovation in the domain of rare illnesses and designer drugs. Preventive public health strategies are favored in relation to potentially expensive therapies, leading in turn to greater emphasis on clinical care in relation to biomedical research and development. These differences are summarized in Table 1, albeit in highly simplified and schematic terms that do not do justice to the complexities of either the United States or the varied European health care systems.

¹² Nat'l Coalition on Health Care, *supra* note 10.

¹³ See STEVEN EPSTEIN, *IMPURE SCIENCE: AIDS, ACTIVISM, AND THE POLITICS OF KNOWLEDGE* (University of California Press 1996) (accounting of how people with AIDS influenced the research process).

TABLE 1—HEALTH POLICY, CITIZENS, AND THE STATE

UNITED STATES	EUROPE
Private insurance	Social insurance, orchestrated by the state
Coverage through employment	Universal coverage, variously funded
Worker compensation for non-white collar employees	Worker compensation
High-quality care for considerable fraction of population; sub-standard care for others	Relative equality of care across individuals and regions
Focus on science-driven cures	Focus on primary care and prevention

A second sphere of difference that affects both the volume and outcome of asbestos litigation is the role of experts within the judicial system. A sharp line of demarcation can be drawn between the common law and civil law traditions. In the former, scientific and technical evidence is usually supplied by party experts and competing claims are adjudicated through the adversary process; in the latter, experts are court-appointed and have a duty to provide impartial expertise to the presiding judges. In civil law systems, the judge, not the parties, decides what types of expertise are germane to the matter at hand, and experts are often chosen on the basis of their affiliation with particular institutions or professional groups. Judicial management of expert evidence centralizes adjudicatory fact-finding and lowers the costs of the process; costs are further contained in many jurisdictions through fixed fee schedules for expert witnesses. Table 2 summarizes these differences, again in highly simplified form.

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TABLE 2—ROLE AND NATURE OF EXPERTISE IN THE COURTS

UNITED STATES (COMMON LAW)	EUROPE (CIVIL LAW)
Party appointed	Court appointed
Strategically chosen	“Neutral”
Stress on technical qualifications	Institutional roles matter
Adversarially examined	Advisor to court
Open to discovery	Opinion giver, not subject to discovery

It is worth noting too that the cost of fact-finding differs even within common law jurisdictions. Britain patterns with other European nations, and not with the United States, in barring contingency fees and adopting the rule that the loser of a lawsuit ordinarily pays the winner’s costs. Such measures create high threshold barriers for plaintiffs and may inhibit potentially legitimate as well as frivolous claims, but they reduce the overall amount and cost of litigation.

III. ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF HISTORY

Researchers have estimated that over 100 million people in the United States were occupationally exposed to asbestos during the twentieth century.¹⁴ This includes the 27.5 million Americans estimated to be exposed to asbestos between 1940 and 1980.¹⁵ At least 600,000 individuals have filed claims for harm resulting from asbestos exposure and, because individuals typically file such claims against multiple defendants, the total number of claims is actually much larger.¹⁶ In the year 2000 alone, 12 large

¹⁴ AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS, PUBLIC POLICY MONOGRAPH (Dec. 2001), *available at* http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf.

¹⁵ *Id.*

¹⁶ Michelle J. White, *Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation, and Bouquet Trials*, NBER WORKING PAPER SERIES

corporations reported that 520,000 new asbestos claims were filed against them.¹⁷ Insurers of asbestos defendants have paid an estimated \$32 billion in compensation to claimants; the result of such costly liability has led about 80 firms to file for bankruptcy, 30 of which filed since early 2000.¹⁸

Defendants' bankruptcies, however, have not dissuaded further asbestos mass tort claims as might have been expected. Instead, plaintiffs' lawyers are filing even more claims on behalf of claimants whose injuries are less severe and against defendants whose involvement with asbestos production is increasingly tangential. With an effectively limitless supply of both plaintiffs and defendants, asbestos has earned the distinction of being the largest mass tort in United States legal history.¹⁹ Two recent predictions of its total cost came out at \$200 and \$275 billion, suggesting that asbestos may end up costing more than Superfund, the most costly environmental program run by the United States federal government.²⁰

Asbestos litigation has evolved from a once regional issue into a national one and as courts modify their handling of increasingly numerous cases, claimants predictably seek fora in which they can achieve speedy resolution with a maximum payout and a minimum of litigation time and cost. In the early days of United States asbestos litigation (1970–1987), 60 percent of state court asbestos personal injury cases were filed in four states: California, Pennsylvania, New Jersey, and Illinois.²¹ By 1998–2000, however, filings of asbestos cases in these states accounted for only 7 percent of the total.²² At the other extreme, five states—Mississippi, New York, West Virginia, Ohio, and Texas—that had accounted for 9 percent of the cases filed before 1988 accounted

9362 (Dec. 2002), at <http://www.nber.org/papers/w9362.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT (Rand 2002).

²² *Id.*

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for 66 percent of filings between 1998 and 2000.²³ In part, the cases track legal changes easing plaintiffs' access to the courts. In California, for example, section 340.2 of the Code of Civil Procedure gives priority for trial scheduling to all plaintiffs with a terminal illness, allowing plaintiffs with mesothelioma to get to trial quickly.²⁴ Similarly, New York City has a special expedited trial schedule for asbestos plaintiffs with mesothelioma and other cancers.²⁵ Under Mississippi rules, trial courts lack the authority to order independent medical examinations of plaintiffs, limiting defendants' ability to challenge asbestos plaintiffs' disease allegations.²⁶ In Texas, where asbestos cases are dispersed over multiple jurisdictions and there are many different law firms representing plaintiffs, defendants who are named on thousands of cases may be noticed on the same day for scores of trials in a dozen or more jurisdictions.²⁷ All these factors place special settlement pressures on defendants, leading to a greater number of settlements than might otherwise be anticipated.

Over the last decade, the annual number of claims filed against most United States defendants has increased substantially, with some defendants seeing claims double in a single year. The number of defendants named by the typical claimant is also increasing. In the early 1980s, claimants typically named about 20 different defendants; by the mid-1990s, that number may have risen to 60 to 70 defendants.²⁸

²³ *Id.*

²⁴ CAL. CIVIL CODE § 340.2 (Deering 2004).

²⁵ CARROLL ET AL., *supra* note 21.

²⁶ *Swan v. I.P., Inc.*, 613 So. 2d 846 (Miss. 1993).

²⁷ CARROLL ET AL., *supra* note 21.

²⁸ DEBORAH R. HANSLER ET. AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOODS FOR PRIVATE GAIN 56 (1999), at <http://www.rand.org/publications/MR/MR969/>.

TABLE 3—U.S. ASBESTOS LITIGATION, 1982 AND 2002

	1982	2002
Number of claimants	21,000	600,000
Number of defendants	300	6,000
Average number of defendants per claimant	20	60-70
Total costs to date (nominal)	\$1 billion	\$54 billion
Bankruptcies	3	80
Estimated total future costs (nominal)	\$38 billion	\$145-275 billion

About two-thirds of United States plaintiffs whose claims reached final verdict through trial from 1993 to 2001 won an award, somewhat higher than the rate of plaintiff success nationally in all tort suits, and substantially higher than the rate of plaintiff success in product liability suits in many metropolitan jurisdictions.²⁹ Mesothelioma plaintiffs were most likely to be successful, but more than half of the claims for conditions other than cancer and asbestosis also succeeded.³⁰

The mean verdict for successful plaintiff claims over the period was about \$1.8 million, but mean awards varied substantially by disease category, from \$322 thousand for nonmalignant diseases other than asbestosis to \$3.8 million for mesothelioma. The mean award for successful asbestosis claims topped \$1.6 million. The mean award for successful mesothelioma claims rose dramatically from about \$2 million in 1998 to upwards of \$6 million in 2001, while the mean award for successful asbestosis claims increased five-fold, from \$1 million in 1999 to \$5 million in 2001. Just over half of the plaintiffs whose claims reached verdict were awarded several hundred thousand dollars or more. About one-quarter of the successful plaintiffs were awarded in excess of a million dollars. As in most tort litigation, a smallish number of very large awards

²⁹ *Id.*

³⁰ *Id.*

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account for the majority of all the money awarded.³¹

The Claims Resolution Management Corporation, an organization which monitors the disbursement of asbestos claims and advises prospective litigants, recently published the distribution of the Manville Trust's claims payments by disease category from 1995 through 2001.³² According to these data, mesothelioma claims accounted for about four percent of the total claims paid by the Trust over that period.³³ About 20 percent of the dollars paid by the Trust over the same period went to mesothelioma claimants, whereas about 8 percent were for cancers other than mesothelioma; that group received about 16 percent of the dollars.³⁴ Interestingly, nonmalignant claims accounted for about 88 percent of claims and 64 percent of dollars paid out.³⁵

IV. JUDICIAL INNOVATION AND ITS UNINTENDED CONSEQUENCES

Asbestos claims are concentrated in a few courts and the volume of claims in these courts makes it infeasible to hold individual trials for all claimants. To help stem judicial gridlock, judges have responded by developing innovative procedures intended to resolve large numbers of cases at minimal cost in court time.³⁶ One notable procedural innovation is consolidated trials, which are trials of multiple asbestos claims held simultaneously before a single jury. The jury makes separate decisions for each plaintiff against each defendant. Another such innovation is bifurcation, which divides the trial into two or more phases. In bifurcated trials, the jury decides liability in the first phase and damages in the second, while in reverse bifurcated trials the order is switched. After phase one, the judge suspends trial and directs the parties to negotiate a settlement, sometimes becoming closely

³¹ CARROLL ET AL., *supra* note 21.

³² David Austern, "THE MANVILLE TRUST EXPERIENCE," MEALY'S ASBESTOS BANKRUPTCY CONFERENCE (Claims Resolution Management Corporation, Fairfax, VA, 2001).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ White, *supra* note 16.

involved in the negotiations. For instance, the judge may threaten that, if the parties cannot reach a settlement, she will direct the jury to consider punitive damages. A third innovation is the “bouquet” trial in which a small group of cases is selected for trial from a larger group that may include thousands of cases. At the end of the bouquet trial, the judge directs the parties to settle the larger group of cases based on the result of the small group outcomes. If negotiations do not result in settlement, the judge may threaten to use the same jury to decide additional cases in the large group.³⁷

White provides a few notable examples of such innovations in action. In 1998, a reverse bifurcated bouquet trial of 12 plaintiffs’ asbestos claims in Mississippi resulted in phase one compensatory damages totaling \$48 million.³⁸ When the judge threatened to put the issue of punitive damages before the same jury, the defendants settled the 12 cases, reportedly for the full amount of the damage awards.³⁹ The judge then scheduled 63 more cases for trial before the same jury. The defendants submitted an emergency appeal to the Mississippi Supreme Court seeking to disqualify the judge for bias, but their appeal was denied. The defendants then settled all of the remaining 1,738 claims in the large group on very favorable terms for plaintiffs.⁴⁰ In one bifurcated trial in West Virginia in 2002 that involved 4,000 plaintiffs from 35 states suing a sole defendant, liability and a punitive damages multiplier were decided during phase one.⁴¹ The judge then instructed the parties to negotiate a settlement of all 4,000 claims. Although settlement negotiations are still ongoing, they are likely to succeed because the jury’s decision (in the reverse bifurcated trial) that the defendant must pay punitive damages of three times any compensatory damage award makes it extremely risky for the defendant to proceed to the damages phase.

Judges’ attempts to save trial time by encouraging mass settlements of asbestos claims may have made the asbestos crisis

³⁷ *Id.*

³⁸ *Id.* at 4.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

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more severe by encouraging plaintiffs' lawyers to flood the courts with additional claims, according to White.⁴² The following feedback seems to have resulted: because of the large numbers of claims filed in certain amenable fora, judges in these courts adopt procedural innovations that are intended to reduce trial time and encourage large numbers of cases to settle. These procedural innovations also change trial outcomes in a pro-plaintiff direction.⁴³ When large numbers of asbestos claims are settled on favorable terms for plaintiffs, then plaintiffs' lawyers find it profitable to file additional claims in the same courts. This worsens the gridlock and pressures judges to continue innovating. The threat of thousands of claimants free-riding on reduced per-capita evidentiary scrutiny pressures defendants to settle even when many claimants are asymptomatic or may have potentially faulty claims. The cost of responding to uncertainty across the board tends to increase payouts for lesser claims and reduce available funds for truly meritorious victims with demonstrable illnesses, though these, ironically, are the easiest cases to make in individualized proceedings. Furthermore, once damages can be recovered even in the face of increased uncertainty, the number of potential plaintiffs and potential defendants widens again and, as a result, the asbestos mass tort keeps snowballing.

Thus, though United States courts have been extremely ingenious in devising ways to deal with thousands of claimants at once, thus reducing the astronomical costs of individual fact-finding, the perverse result of such innovation has been a preemptive allocation of defendants' funds to the relatively uncertain realm of nonmalignant claims, possibly at the expense of more demonstrably meritorious claims. In a 1994 review, Durkin and Felstiner characterized the outcome of asbestos-related disease (ARD) litigation as having failed to provide adequate mechanisms of compensation to sufferers, despite strong incentives for all sides to reach resolution.⁴⁴ "The failed attempts [at various strategic

⁴² White, *supra* note 16.

⁴³ *Id.*

⁴⁴ Thomas Edward Durkin & William L. Felstiner, *Bad Arithmetic: Disaster Litigation as Less than the Sum of its Parts*, in *LEARNING FROM DISASTER* 158 (Jasanoff ed., 1994).

efforts by the parties] provide evidence that what occurred in the United States overall was more a series of unrelated attempts to shift financial responsibility than it was cumulative 'learning.'⁴⁵

V. COURT-PROVIDED ADMINISTRATIVE RELIEF

A controversial creation of a few bankruptcy courts was the settlement trust for asbestos claims, most notably the Manville Personal Injury Settlement Trust.⁴⁶ Thought by some to be the solution to mass toxic torts, such trusts were to provide compensation, superior claims-handling efficiency, equity between similar claims, and decreased transaction costs.⁴⁷ Settlement trusts, however, soon proved problematic: bargaining for the Manville trust began in 1982, but it did not begin payments to claimants until 1988. Furthermore, even though the trust began with \$1.7 billion in liquid assets, it was rapidly overwhelmed with claims, settlements that ran 50 percent higher than projections, and a faster pace of settlements than predicted.⁴⁸

Victims in the United States who used asbestos, rather than worked in manufacturing industries, have had the choice of relying on worker compensation (from employers like shipyards) or pursuing tort claims. Victims have largely chosen not to rely on worker compensation, since compensation claims paid significantly less than tort recoveries and were vulnerable to many of the same defenses.⁴⁹ As early as the mid-1980s, Hensler et al. highlighted the drawbacks presented by workers' compensation:

Many of the problems we have noted about the tort system, including timing of claims, standards for proving causation, and issues arising out of the involvement of multiple defendants have not been solved by state workers' compensation systems either. In addition, workers'

⁴⁵ *Id.*

⁴⁶ *Id.* at 159.

⁴⁷ *Id.* at 159-63.

⁴⁸ *Id.* at 167.

⁴⁹ ROBERT I. FIELD & RICHARD B. VICTOR, ASBESTOS CLAIMS: THE DECISION TO USE WORKERS' COMPENSATION AND TORT (Workers' Compensation Research Institute 1988).

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compensation systems have usually provided less than full compensation of wage loss, and no compensation for pain and suffering.⁵⁰

Given the above, the current state of United States asbestos litigation is not surprising. A claimant, possibly having to surmount a similar burden of proof for state-provided welfare, in this case workers' compensation, or a regulated trust, or a tort claim, will pursue the tort claim when the payoff is substantially greater and the court system actually facilitates the bringing of such claims. Even when uncertain about symptoms, the record of past litigation and a well-trodden path to innovative courts is likely to continue providing potential claimants with a positive incentive to file suit.

VI. EUROPE: FEWER CLAIMS, LOWER COMPENSATION

In Europe, asbestos claims have been fewer in number and have been compensated at significantly lower rates than in the United States.⁵¹ These settlements do not necessarily represent more just solutions in individual cases, especially for the most gravely injured plaintiffs. At the same time, the press of asbestos litigation has not converted the judicial system from its normal adjudicatory functions into serving as a de facto substitute for a legislatively and administratively managed health care system.

Up until the end of 1986, the ratio of asbestos-related civil actions in the United Kingdom compared to the United States was 1:5 even though there were proportionally nearly four times as many cases of mesothelioma in the United Kingdom. Figures cited by the firm Norton Rose from 1992-1996 show the average mesothelioma victim was sixty years old and received \$158,660 (compared to the 2001 average of \$6 million for successful United States mesothelioma claimants), the average asbestosis victim was also sixty years old and received \$108,465, and the average lung

⁵⁰ HENSLER ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* (Rand 1985).

⁵¹ Laurie Kazan-Allen, *Asbestos Compensation in Europe*, INTERNATIONAL BAN ASBESTOS SECRETARIAT, May 30, 2000.

cancer victim was sixty-five years old and received \$93,340.⁵² These numbers are far lower than even the lowest United States average of \$322,000 awarded for nonmalignant diseases.

French courts require that claimants surmount a high burden of proof, demonstrating defendants guilty of “faute inexcusable,” or outrageous misconduct. A successful case brought by 11 claimants resulted in the doubling of disability benefits and an award of \$26,000 each.⁵³ In 2000, the French government established the Compensation Fund for Victims of Asbestos Exposure (FIVA), a no-fault benefit system to provide automatic compensation for victims of both occupational and non-occupational exposure to asbestos; this program is expected to be operational in 2003.⁵⁴

TABLE 4—AWARDS, BURDENS OF PROOF, AND PENDING CASES

	Mesothelioma Mean Award	Asbestosis Mean Award	Burden of Proof for State- Provided Welfare	Burden of Proof for Tort Claims	Pending Civil Cases (est.)
U.S. (1993- 2001)	\$3.8 million	\$1.6 million	High	High	100,000 s
U.K. (1992- 1996)	\$159,000	\$108,000	Low	High	1,000s
Netherlands	\$50,000- \$80,000	N/A/	Low	High	100s

In the Netherlands, where total pending civil cases number in the hundreds, only 10-15 percent is likely to reach court and successful claimants have been awarded \$50,000-\$80,000 for mesothelioma.⁵⁵ Unlike the United States courts, their Dutch counterparts have not made substantial changes to expedite the processing of claims. In order to streamline the compensation

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

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process, however, the Institute of Asbestos Victims (IAV) was set up in 2000; the culmination of years of lobbying by the Dutch Committee of Asbestos Victims. Established in 1995 “to secure justice and compensation for all asbestos victims,” the group obtained the cooperation of employers, insurers, and the government.⁵⁶ Asbestos victims entitled to apply to the IAV are limited to mesothelioma patients with traceable employers/insurers whose exposure occurred within a thirty year limitation period. Interestingly, the IAV tries to resolve claims within four months, and to bring a claim before the IAV, individuals must renounce the right to bring a civil action. This combination of an alternative, speedy method of claim resolution with a relatively transparent burden of proof and an average award of \$45,000-\$50,000 is attractive to Dutch claimants when compared to the numbers of claims successfully brought in court, the time and risk of litigation, and corresponding awards that are not significantly more remunerative. The IAV is incapable of dealing with all of Holland’s asbestos victims as its rules bar asbestosis, lung cancer and the 30 percent of mesothelioma patients whose exposure took place more than thirty years ago. Disqualified victims can apply to the Government Asbestos Institute (GAI), a tripartite body which administers a national compensation scheme. Average settlements of \$17,700 are awarded by the GAI.⁵⁷

CONCLUSION

One great virtue of the common law system is its ability to carry out case-specific causal determinations, driven by the parties’ desire to establish the facts most relevant to their cases. The history of asbestos litigation, and of mass torts more generally,⁵⁸ shows how this very strength can turn into a source of weakness when

⁵⁶ *Id.*

⁵⁷ Jans, Van Den Bogaard & Locher, *The Monitoring and Enforcement of the Asbestos Policy in the Netherlands*, in 19 SOURCEBOOK ON ASBESTOS DISEASES (Michie 1980-2000).

⁵⁸ See Sheila Jasanoff, *Science and the Statistical Victim: Modernizing Knowledge in Breast Implant Litigation*, Vol. 32, No. 1 SOCIAL STUDIES OF SCIENCE 37 (2002).

courts are confronted by litigation volumes that overwhelm their capacity to engage in individualized fact-finding. In the effort to avoid that burden, United States courts over time have demonstrated extraordinary innovative capacity to streamline procedures and consolidate cases. The perverse result of these measures, however, has been to encourage still more litigants to pursue claims based on uncertain exposure to one of the most pervasive, as well as most deadly, of known toxic agents in the human environment. Defendants, for their part, have been encouraged to settle the seemingly endless flood of claims, with results that vary arbitrarily across legal jurisdictions and classes of claimants.

The sharp contrast between the United States situation and that in other industrial countries can be traced, in our view, to the state's backstop role in providing general health and welfare remedies for citizens. Where those costs are to some extent nationalized, and disease victims are taken care of through a system of universal coverage, whatever the source of their injuries, they have less incentive to sue for damages; correspondingly, the state can raise the entry barriers to litigation without abandoning sick citizens to open-ended health care costs and inadequate relief for even the gravest injuries. The decoupling of compensation from prior causal determinations leads, we would argue, to more efficient, as well as potentially more egalitarian solutions in cases where the causes are uncertain and the effects are distributed in indeterminate ways, as in the asbestos case, across vast numbers of individuals.

Of course, the United States courts, too, have sought in effect to decouple the pinpointing of cause in each individual case from providing across-the-board remedies to rationally grouped classes of claimants. The failure of court-established administrative mechanisms such as the Manville Trust highlights the inadequacy of even these seemingly efficient approaches. Lacking an effective basic system of health care, any person with a colorable claim to asbestos-induced disease has found attractive the prospect of turning to one or another judicially provided remedial scheme, whether through tort litigation or through a trust or fund. The result has been a snowballing of claims and no end in sight to the torrent

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of asbestos lawsuits.

In a zero-risk society, cases like asbestos would never arise because science would have the knowledge and regulators the foresight to prevent such threats from materializing in the first place. We, however, are inescapably the inhabitants of what the German sociologist Ulrich Beck has called “risk society”; in such societies the cost of progress and of desirable innovation is that some people will suffer adverse consequences that cannot be known in advance or effectively guarded against.⁵⁹ The only humane response in democratic societies is to assume collective responsibility for these externalities of our communal desire for social and technological advancement. Judgments about how much to pay the victims of progress will still call for difficult decisions, but courts are not the places where the relevant trade-offs can be most fully and fairly debated. The asbestos story suggests that even the world’s most venturesome court system cannot efficaciously pick up the pieces when knowledge and foresight fail us—as they inevitably will continue to do, and unpredictably so, in future cases.

⁵⁹ ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Sage Publications 1992).