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Asbestos Achievements

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ASBESTOS ACHIEVEMENTS

Anita Bernstein*

The fraught subject of asbestos liability offers little space for disputatious participants and commentators to come together. What little consensus on the subject exists tends to focus on dollars. The blandest generalization one can make about asbestos liability is that it has caused, and will continue to cause, a lot of money to be paid out. Researchers have estimated that by 2002 asbestos liability had amounted to more than \$70 billion and had driven more than 75 corporations into bankruptcy;¹ they anticipate that between 2002 and the end of liability, perhaps fifty years hence, another sum between \$130 billion and \$195 billion would join the current \$70 billion expended.² This liability has spread its effects far beyond the dozens of bankrupted businesses, causing secondary losses to the economy amounting to hundreds of billions of dollars.³

Another generalization—only slightly less widely shared than the first—laments the failure of asbestos disputants to agree on a compensation scheme in place of liability. The costly mechanism of personal injury litigation caused the above-referenced money to be expended while giving injured persons only a tiny fraction (when secondary losses to the American economy are included in the denominator) of these billions.⁴ Once it became clear that asbestos suppliers ought to be held responsible for the harms of their product,⁵ public law—statutes and regulation—could in

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1. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 92-97 (RAND Inst. for Civil Justice 2005) [hereinafter RAND REPORT].

2. *Id.* at 105-06.

3. *Id.* at 121-23.

4. The fraction becomes tiny only when the secondary losses to the economy are counted. Before then, it is merely small: Transaction costs account for about two-thirds of moneys spent. RAND REPORT, *supra* note 1, at 104-05.

5. PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 10-18, 34-36 (1985) (summarizing hazards and what the industry knew of them); RAND REPORT, *supra* note 1, at 22.

principle have forced some cost internalization on the heedless asbestos business while achieving compensation at a lower price.⁶ Just a few years before *Borel v. Fibreboard Paper Products Corp.*⁷ launched the modern era of liability for asbestos injury, Congress had taken a public-law path by taxing industry to establish an insurance fund that paid for pneumoconiosis ("black lung disease"), the signature harm suffered by coal miners.⁸ The social problem of asbestos-related injury, much more costly and complicated than pneumoconiosis, has so far escaped legislative resolution, and the defeat of the Fairness in Asbestos Injury Resolution Act of 2005 probably marked the end of hope for a congressional reprieve.⁹

With this lament about the rise of liability and the fall of a legislative solution established, transaction costs come into view, and the next generalization notes that asbestos liability has been a source of fabulous wealth for plaintiffs' lawyers. Some who utter this generalization call asbestos plaintiffs' lawyers greedy and over-enriched, and their gains ill-gotten.¹⁰ One authority on the asbestos litigation, a participant in this Symposium, began an article with a familiar invocation of manic excess: "Over the past several years," wrote Deborah Hensler in 2005,

asbestos litigation has become the 'poster child' for the tort reform movement in the United States. Asbestos litigation is frequently described as an entirely non-meritorious litigation, driven by greedy plaintiff attorneys who seek only to line their own pockets and by greedy plaintiffs who have crowded onto the gravy train to easy money.¹¹

6. Michael Green, *A Future for Asbestos Apportionment?*, 12 CONN. INS. L.J. 315, 317 (2006) [hereinafter Green, *Asbestos Apportionment*] (observing that "asbestos is a poster child for a legislatively-enacted compensation scheme").

7. 493 F.2d 1076 (5th Cir. 1974).

8. See 30 U.S.C. §§ 901-45 (2004).

9. Jeb Barnes, *Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos*, 28 JUST. SYS. J. 157, 158 (2007).

10. Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 21 CARDOZO L. REV. 991, 995 (2005) [hereinafter Brickman, *Fairness*]; *Trial Lawyers Getting Rich Off of Asbestos Claims, Hatch Says*, U.S. FED. NEWS, Feb. 9, 2006 (quoting a U.S. senator: "Too many people have died, too many people have lost their jobs, and too many asbestos attorneys have private jets because of the existing asbestos litigation nightmare."); see also Susan K. Livio, *Johns-Manville Deal to Boost Cancer Trust*, NEWARK STAR-LEDGER, June 24, 2000, at A15 (blaming "exorbitant attorneys' fees" for depleting an asbestos fund). For stronger rhetoric, see Thomas Grillo, *After 8 Years, a Milestone in Battle over Mold*, BOSTON GLOBE, Nov. 25, 2003, at A1 ("greedy lawyers looking for the next cash cow as asbestos lawsuits diminish."); Stuart Taylor Jr., *The Greedy vs. The Sick: Lawyers are Using Asbestos Claims to Cheat the Rest of Us*, LEGAL TIMES, Sept. 30, 2002, at 60.

11. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 255 (2005).

The nearby footnote cites two Wall Street Journal editorials, among many that attacked the asbestos plaintiffs' lawyers.

Moving out of consensus land, we consider now a widely (though not universally) shared condemnation of these advocates. Asbestos gains are ill-gotten, commentators say, not only because they are indecently large but because lawyers accreted their wealth by dishonest means. Critics have denounced lawyers who suborned perjury,¹² retained clients whose interests they knew were in conflict,¹³ garnered their "inventory"¹⁴ in violation of professional responsibility rules,¹⁵ mendaciously equated mere exposure with injury, and directed corruptible physicians and other medical experts to lie about how ill their clients were.¹⁶

This view regards asbestos litigation as pathological in origin, deviating from an ideal. The old-school, benign "traditional medical model," as summarized by the incisive critic Lester Brickman, permits personal injury litigation to be launched only after "a wrongfully injured person sees a doctor to treat his or her illness or injury and then seeks out a lawyer."¹⁷ Asbestos plaintiffs' lawyers have scorned this honorable path. Their "entrepreneurial model of asbestos liability," in worrisome contrast to the traditional model, impels lawyers to "recruit plaintiffs, who are usually unaware of any injury and lack any symptoms or lung impairment"¹⁸ Brickman identifies six features of the dreaded model as applied to asbestos: (1) "a massive client recruitment effort," which screened perhaps a million former industrial workers, most of them asymptomatic and unlikely to contract any asbestos-related injury in the future; (2) "the manufacture of specious medical evidence;" (3) "entrepreneurial witness preparation techniques" that elicit false testimony; (4) an extraordinary number of filed claims; (5) settlement strategies that perversely help to

12. Walter Olson, *Thanks for the Memories*, Overlawyered.com, June 1998, <http://www.overlawyered.com/articles/olson/memories.html>; but see W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH. L. REV. 1343, 1354 (1999) (arguing that helping a client remember brand names on asbestos packages that he last saw decades ago does not necessarily create false testimony).

13. Lester Brickman, *Ethical Issues In Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 846-53 (2005) [hereinafter Brickman, *Ethical Issues*].

14. One federal appellate opinion condemning a plaintiffs' lawyer for breaching his fiduciary duties to his asbestos clients used this phrase with little irony. See *Huber v. Taylor*, 469 F.3d 67, 70 (3d Cir. 2006).

15. Brickman, *Ethical Issues*, *supra* note 13, at 847-49.

16. Lester Brickman, *Disparities Between Asbestos and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 518 (2007) (accusing plaintiffs' lawyers of having presented false medical data in support of personal injury claims).

17. Brickman, *Fairness*, *supra* note 10, at 997.

18. *Id.*

finance new claims rather than make the litigation go away; and (6) the relocation of these behaviors and strategies to bankruptcy courts, where insolvent defendants have found no real haven.¹⁹ Other observers also denounce lawyerly initiative on the plaintiffs' side of the asbestos caption.²⁰

In this Article, I endeavor to set the record straighter than it now stands, by praising the "entrepreneurial lawyering" that has faced such unremitting and harsh criticism.²¹ I do not thereby write on a blank slate. Other commentators have rendered praise to asbestos liability. Decades ago, Paul Brodeur published a monograph to say that liability brought to light the "outrageous misconduct" of asbestos suppliers who, knowing that exposure to their product was dangerous, failed to warn vulnerable workers.²² The products liability scholar Marshall Shapo has observed that asbestos liability effected enhancements for "the fund of social knowledge, and, ultimately, for consumer welfare."²³ My contribution here, rooted in my own specialization in torts and professional responsibility, is to credit plaintiffs' lawyers for the innovative changes to tort doctrine that they helped install.

The prevailing commentary that insists on a contrary stance—extending to these lawyers little more than grudging admiration for having made themselves rich, along with a heaping helping of scorn for their ethics—does not give these achievers their due. Even if some asbestos lawyers deserve criticism or punishment for dishonesty in their advocacy (a claim that I take seriously but do not explore in this Article), they also deserve recognition for their loyalty to their clients and their dogged pursuit of better doctrine. I commend what zealous advocacy has made possible.²⁴ These consequences extend well beyond merely these lawyers' winning in court and making money: they show promise of making personal injury law work better for other groups of plaintiffs.

19. *Id.* at 997-1000.

20. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358-59 (1995); Robert A. Kagan, *On Surveying the Whole Legal Forest*, 28 LAW & SOC. INQUIRY 833, 844 n.14 (2003); James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 238 (2006).

21. On "entrepreneurial" as an ironic pejorative when written by those who side with business defendants, see Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27, 33 (2004).

22. BRODEUR, *supra* note 5, at 45 (linking *Borel* to revelations about industry knowledge).

23. Marshall S. Shapo, *Millennial Torts*, 33 GA. L. REV. 1021, 1031 (1999) (summarizing some consequences of asbestos litigation).

24. For elaboration on these views, see Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006).

I. PROCEDURAL VICTORIES

After *Borel v. Fibreboard Paper Products Corp.*²⁵ opened the strict-liability gates, lawyers for prospective plaintiffs who had been exposed to asbestos at work but had not suffered physical impairments faced difficulties. Doctrine frustrated them at several turns. They could file a personal-injury action promptly, if only their client had an injury.²⁶ Or they could wait until an asbestos-related injury emerged, even though in his own view each exposed person was harmed *now*, tormented by the sword-of-Damocles latency of his encounter with poison. Persons exposed to asbestos needed legal advice immediately, but the contingent-fee tradition of American personal injury law does not offer those who do not yet have a claim any mechanism to pay for it. A plaintiff would receive at least a sense of solidarity, and perhaps material gain, if he could join other exposed workers in a class, but class action doctrine demands more commonality among members than having been exposed to the same toxin.²⁷

"If I were having a philosophical talk with a man I was going to have hanged," Oliver Wendell Holmes once wrote, "I should say . . . we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises."²⁸ One need not be so unreceptive to personal-injury claims as Holmes was to fill in "a philosophical talk" informing our plaintiff of where he unfortunately stands. Tort law purports to recognize injury, rather than inchoate wrong: that a supplier of asbestos negligently put a dangerous product into commerce will not suffice to create an actionable harm.²⁹ State legislatures enact short statutes of limitations for negligence claims because they are concerned about fairness to defendants, the unreliability of human memory, the deterioration of evidence, and the poor fit between long-gone occurrences and current experience.³⁰ As for this person's inability to

25. 493 F.2d 1076 (5th Cir. 1974).

26. See DAN B. DOBBS, *THE LAW OF TORTS* 1 (2000) (noting the centrality of injury in defining the meaning of "tort").

27. See Peter A. Drucker, *Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate for Class Action Treatment?*, 29 SETON HALL L. REV. 213, 215-16 (1998) (suggesting that the answer to the author's question is no).

28. Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski dated December 17, 1925, in *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935* 806 (Mark DeWolfe Howe ed., 1953).

29. Drucker, *supra* note 27, at 216.

30. DOBBS, *supra* note 26, at 551-52. It is fair to say, as did one court, that for claims involving latent disease the quality of evidence tends to improve rather than deteriorate as time passes. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982). But any legislature could fix this anomaly if it so desired.

afford legal advice: he inhaled poison on the job; perhaps his union will find him a lawyer. If not, his lack of counsel joins the other deprivations of his working-class life.³¹ Paid-for legal aid in the United States has been reserved mostly for individuals who face loss of liberty; it does not underwrite personal injury claims. Class certification or other aggregation? No. Courts cannot regard asbestos injury as shared within a group of litigants when, for most of them, no injury has occurred.

Nobody kept prospective litigants from the courts with a Holmesian philosophical talk; nor did claimants have to compete over public funds. Instead, judges changed the rules to welcome litigation. Persons unimpeded by injury brought personal injury claims that were not dismissed for failure to state a cause of action. Discovery of harm replaced instances of tortious conduct as the point at which causes of action accrued. Courts facilitated aggregation of claims, rescuing contentions that might have failed in isolation.³² These successes against the conventional "philosophical talk" could not have occurred without aggressive and adroit lawyering.

A. *Recasting Injury*

Clarence Borel, who suffered from asbestosis and then died of mesothelioma, or what the court misleadingly called a form of lung cancer, before winning his Fifth Circuit victory,³³ differed from most of the asbestos plaintiffs in that he had experienced an injury attributed to the toxic product to which he was exposed.³⁴ *Borel* brought an injured cohort of asbestos workers to American liability doctrine. Over the years the majority of Mr. Borel's successor-plaintiffs have been, in the peculiar

31. Cf. Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 1116 (1992) (arguing that the poor lack legal services "because they are rational. Given their limited wealth, the poor simply would rather spend their money on other things. In other words, legal services are very, very low on a poor person's shopping list. Food is higher. Shelter is higher. Clothing is higher.").

32. RAND REPORT, *supra* note 1, at 28-33. Moreover, while the Supreme Court's settlement decisions in the 1990s defeated class certification for many asbestos claimants, *see, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999), other aggregations remained, giving plaintiffs more collectively than "what individual trials would yield." Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1784 (1994).

33. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 367 (2002).

34. The point is controversial, *see* RAND REPORT, *supra* note 1, at 76, and rests in part on how one defines an injury. Here, I follow the RAND convention and focus on impairment, in the sense of an impediment to daily living. *Id.* at 7.

jargon of asbestos liability, “unimpaired.”³⁵ An adjective that means “lacking an injury” went on to modify a noun meaning “person entitled to claim that he has an injury.”³⁶

Asbestos liability also introduced the “inactive docket.”³⁷ A docket is supposed to mean a list of “causes for trial”³⁸—causes that are active in that they are pending: “on the docket,” according to the *Oxford English Dictionary*, means “in hand; under consideration.”³⁹ The inactive docket, however, consists of cases that are *not* under consideration. Also known as a deferred docket or a pleural registry, this innovation allows uninjured plaintiffs to obtain an index number and preserve their asbestos claims from dismissal on statute of limitations grounds.

In contemporary asbestos litigation, plaintiffs’ lawyers oppose the inactive docket because it includes no mechanism to pay them for their personal-injury advocacy on behalf of people who have no injury.⁴⁰ They spend much time and effort trying to pull their clients’ names from this roster. Meanwhile, their adversaries on the defense side heap praise on this innovation.⁴¹ My recognition of achievement by advocates for asbestos plaintiffs thus diverges from these partisan assessments.

That the winning side feels defeated, and the losing side vindicated or at least relieved, by the rise of inactive dockets shows how the plaintiffs’ bar succeeded in moving the entitlements-and-expectations goalposts. The law’s ordinary response to a personal injury claim that lacks a personal injury is to eject it, not to recognize it with a docket entry. In the words of the Federal Rules of Civil Procedure (echoed in state provisions for demurrer and the like), judges dismiss such an action “for failure to state a claim upon which relief can be granted.”⁴² The inactive docket, established to provide prompt relief should a plaintiff later develop an asbestos-linked

35. See *id.* The first case to recognize an unimpaired plaintiff was *Bernier v. Raymark Industries, Inc.*, 516 A.2d 534 (Me. 1986).

36. RAND REPORT, *supra* note 1, at 7.

37. *Id.* at 26.

38. 4 OXFORD ENGLISH DICTIONARY 912 (J.A. Simpson & E.S.C. Weiner, eds., 2d ed. 1989).

39. *Id.*

40. RAND REPORT, *supra* note 1, at 26.

41. See Mark A. Behrens & Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253, 262-64 (2006); Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1, 6-7 (2001); Victor E. Schwartz et al., *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 276 (2003).

42. FED. R. CIV. P. 12(b)(6).

injury, and to remove the impediment of legislated limitations on the time to bring suit, elevates this subset of personal injury claims.

Now that asbestos lawyers have made the injury requirement more flexible, rather than a rigid on-off binary, it becomes possible to envision inactive dockets for other types of claims. Lead paint offers an example. The *New England Journal of Medicine* has said that sixteen percent of American children "have been mentally and neurologically damaged because of exposure" to this toxic substance.⁴³ Courts could permit pre-injury filing and then wait to see whether children exposed to lead develop brain injuries, meanwhile keeping the entities that they might choose to sue (paint makers, other manufacturers, builders, landlords, government housing programs, schools) on the liability hook. The project is a daunting one, but after the achievements of asbestos lawyers, it has become imaginable.

B. Reform of the Single Action and Discovery Rules

Before asbestos liability, courts had held plaintiffs to a single action rule that barred the splitting of causes of action, the better to forestall "vexatious and repetitive litigation."⁴⁴ Initiative from asbestos lawyers set plaintiffs free to prosecute litigation that defendants, and perhaps judges, would regard as vexatious and repetitive—to complain first about lesser harms like pleural thickening or asbestosis and later about mesothelioma. One student commentator, noting that asbestos has marked the foremost exception to the single action rule, observes that courts "have almost universally rejected this interpretation in asbestos cases" but declines to give credit where credit is due: the reason for this more favorable treatment of asbestos claims, according to the author, is "probably [that] the ultimate injury (cancer) was not a progression of the injury at the time of suit (asbestosis)."⁴⁵

Unlikely, given that many courts have recognized a cause of action for increased risk of cancer,⁴⁶ a claim that relies on an implicit notion of progression. Personal injury doctrine does not indulge hypochondriacs who

43. Katha Pollitt, *Fetal Rights, Women's Wrongs*, in REASONABLE CREATURES: ESSAYS ON WOMEN AND FEMINISM 169, 184 (1995).

44. James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 819 (2002) (citations omitted).

45. Note, *Latent Harms and Risk-Based Damages*, 111 HARV. L. REV. 1505, 1510 n.32 (1998).

46. Henderson & Twerski, *supra* note 44, at 822-23.

suppose nothing more than that they will become gravely ill with something or other in the future,⁴⁷ and that whichever defendant they name should pay for it. Courts could accept asbestosis and pleural thickening as harbingers of cancer to come only because they saw a relation between the two manifestations.

Increased risk of cancer has now left the landscape; courts have concluded that abolishing the single action rule can do the same work, and with more analytic clarity.⁴⁸ Indeed, these two theories of responsibility for injury are mutually inconsistent. If exposure to asbestos causes asbestosis in the twentieth year after exposure ("year 20"), followed by mesothelioma ten years after that ("year 30"), for example, then courts can award compensation for mesothelioma either in year 20, with reference to increased risk, or in year 30, when the more severe disease has manifested. But not in both year 20 and year 30: that would constitute double recovery. Nevertheless, both the year-20 and the year-30 perspectives have succeeded in separate actions, as well as the inactive-docket approach, which welcomes plaintiffs into court long before year 20 while also preserving their year-20 and year-30 entitlements.⁴⁹ The claims have flourished at a range of development points. And so we remain in need of a better account than the no-progression explanation for the unique strength of asbestos claims against what had been a daunting single-action barrier.

The most parsimonious explanation is that asbestos litigants defeated adverse doctrine because judges were moved by the substantive justice of their demands. Courts recognized the validity of early filing (i.e. for exposure only), middling filing (for asbestosis or pleural thickening), and late filing (for cancer). Lawyers with unexceptional levels of talent and energy would have advised their clients to accept with resignation these claim-thwarting procedural rules, or failed to argue effectively for doctrinal change. Asbestos advocates, by contrast, told a compelling story about all stages of their clients' encounters with poison.

Plaintiffs' lawyers won a related victory when they persuaded courts to turn on the limitation clock at a time they favored. For most personal-injury plaintiffs, causes of action accrue at the time that human bodies are harmfully touched.⁵⁰ For asbestos, under current understandings of limitation rules, accrual does not commence until victims discover their

47. 4 OXFORD ENGLISH DICTIONARY 573 (J.A. Simpson & E.S.C. Weiner, eds., 2d ed. 1989) (defining hypochondria as "[a] morbid state of mind, characterized by general depression, melancholy, or low spirits, for which there is no real cause").

48. See Henderson & Twerski, *supra* note 44, at 822.

49. See *supra* text accompanying notes 30-33.

50. See Robinson v. Weaver, 550 S.W.2d 18, 19 (Tex. 1977).

harm, with discovery leniently construed.⁵¹ This judicial generosity is not unique to asbestos, but asbestos cases are prominent in the annals of reprieve. Courts have, for instance, held that knowledge about asbestos exposure did not constitute discovery for purposes of a mesothelioma claim,⁵² and that the judicially recognized extension of a limitation period based on time of discovery must benefit only asbestos plaintiffs.⁵³

The time-of-discovery approach to accrual looks like an uncontroversial instance of common sense mixed with sympathy for an injured person, but before the successes of asbestos litigation, courts really did expect a plaintiff to sue before he could know he was injured. Judge Jerome Frank wrote a famous dissent complaining that this dominant stance said, in effect, that "you [can] die before you are conceived, . . . be divorced before ever you marry, . . . harvest a crop never planted, . . . burn down a house never built, . . . [and] miss a train running on a non-existent railroad."⁵⁴ He accused his colleagues who held otherwise of living in "topsy-turvy land."⁵⁵ But Judge Frank was outvoted—even in 1952, years after the Supreme Court had endorsed a time-of-discovery accrual rule in a FELA case.⁵⁶

While asbestos lawyers were solidifying their time-of-discovery victory, courts were declining to extend it to other types of claims. For example, young women who learned that their reproductive organs were damaged by DES, a toxin that their mothers had ingested during pregnancy, illustrated the discovery problem in classic terms. DES and asbestos are similar toxins in two pertinent respects. First, the injurious effects of both substances take years to manifest, thus presenting to courts this discovery issue. Second, once manifested, some of these injurious effects—asbestosis and mesothelioma for asbestos, clear cell adenocarcinoma for DES—have a

51. See, e.g., *Rose v. A.C. & S., Inc.*, 796 F.2d 294, 297 (9th Cir. 1986) (holding that the cause of action did not accrue until the plaintiff knew not only about the illness but the identity of the manufacturer); *Karjala v. Johns-Manville Prod. Corp.*, 523 F.2d 155, 159-60 (8th Cir. 1975) (approving a jury instruction telling jurors they were free to determine the time at which plaintiff should have realized he had a claim for his longstanding asbestosis).

52. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 116 (D.C. Cir. 1982); *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627, 635-36 (Wis. 1999).

53. *Pustejovsky v. Rapid-American Corp.*, 35 S.W. 3d 643, 653 (Tex. 2000); see also Bruce J. McKee, *Alabama: A Jurisdiction Out of Control?*, 41 N.Y.L. SCH. L. REV. 637, 641 (1997) (noting that Alabama statutory law refuses to recognize the discovery rule except for two types of claims, fraud and asbestos).

54. *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) (citations omitted). Judge Frank was objecting to the application of a Connecticut statute of limitation.

55. *Id.*

56. See *Urie v. Thompson*, 337 U.S. 163, 170 (1949).

“signature” association with the toxin in question.⁵⁷ Because the harms associated with both DES and asbestos almost never happen to an unexposed person, the passage of years does not impair the quality of evidence that the plaintiff holds, as it might in a personal injury claim that does not feature a signature harm.

Many DES victims sought legal counsel as soon as they knew they were injured and, like Tom Urie of FELA fame, tried to file suit promptly. They did not delay in learning about the link between maternal DES and their physical anomalies, either. Lawyers turned them away, citing the statute of limitations.⁵⁸

In one of the many decisions that freed asbestos plaintiffs from the “single action” characterization of a limitation period,⁵⁹ the Wisconsin Supreme Court reviewed earlier holdings on this issue.⁶⁰ The first plaintiff in Wisconsin to win the favor of a discovery rule had been a woman injured by the Dalkon Shield contraceptive, but other litigants had fared less well.⁶¹ One Wisconsin litigant learned that her cause of action had accrued when she received a blood transfusion that impaired her fertility, not when her infertility manifested itself.⁶² Another plaintiff needed years to connect her disabling emotional distress to her having been molested by a priest, coupled with negligence by the Archdiocese of Milwaukee, in years past:⁶³ too bad.

The success of asbestos lawyers is manifest also by their having won over judges, rather than needing to plead their cause to statute-rewriters. Spurred into activism in New York, a redoubt of early “time of injury” deadlines, some DES claimants joined with other reformers to lobby the state legislature for help.⁶⁴ They did not win the discovery rule that their counterparts had achieved so easily in asbestos litigation, but did get the lesser measure of a revival statute, a special new law that gave them a year

57. On signature effects, see FAQ, DES Action, available at <http://www.desaction.org/faq.htm> (noting that clear cell adenocarcinoma “is practically nonexistent in non-exposed women”); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. CIN. L. REV. 1319, 1319 (2002) (identifying asbestosis and mesothelioma as signature diseases). See also *infra* notes 71-74 (reviewing evidence about asbestos-related signature effects).

58. See Anita Bernstein, *Markets of Mothers: Hymowitz v. Eli Lilly & Co.*, in TORTS STORIES 151, 163 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

59. *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627, 636 (Wis. 1999).

60. *Id.*

61. See *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578, 583 (Wis. 1983).

62. See *Olson v. St. Croix Valley Mem'l Hosp. Inc.*, 201 N.W.2d 63, 65 (Wis. 1972), *overruled by Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578 (Wis. 1983).

63. See *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W. 2d 780, 785 (Wis. 1995).

64. See *Singer v. Eli Lilly & Co.*, 549 N.Y.S.2d 654, 655 (App. Div. 1990).

to file what otherwise would have been stale claims.⁶⁵ Courts have held plaintiffs tightly to the narrow terms of this reprieve.⁶⁶ Another class of delayed-discovery plaintiffs, sexual abuse claimants, also failed in court and had to resort to lobbying.⁶⁷

Elsewhere, in a review of this time-of-discovery line of cases, I explore the possibility that judicial favoritism for male claimants over female ones could explain the contrast between these asbestos victories and the rejection of women's claims as time-barred.⁶⁸ For present purposes, I do not press that contention, and would say that even if sexism was necessary for the successes of asbestos plaintiffs and their lawyers, it could not have been sufficient: Asbestos lawyers got rid of unwanted doctrine that had burdened many men. Eloquent and dogged advocacy established the injustice of topsy-turvy land barriers to otherwise meritorious claims.

II. PROVING WHAT CAUSED MESOTHELIOMA

Here we move away from the unimpaired plaintiffs who occupy most of Part I. Impaired plaintiffs (a minority of asbestos claimants) brought actions for a variety of diseases, predominantly asbestosis, mesothelioma, and lung cancer.⁶⁹ They won favorable outcomes on the causation criterion that personal injury law could extend to other plaintiffs who allege that another defective product hurt them.⁷⁰ Reserving for the next part my discussion of asbestosis and lung cancer claims, which raise a separate issue, I consider mesothelioma here.

65. *See id.*

66. For example, the revival statute was a condition precedent, rather than an adjustment to the statute of limitations, as one New York appellate court admonished a plaintiff who tried to sue after attaining majority, and so was not subject to tolling. *See id.*

67. Rosemarie Ferrante, Note, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress*, 61 BROOK. L. REV. 199, 216-17 (1995) (summarizing developments following the failure of a leading personal injury claim, *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986)). Legislative extensions of time to file claims, bearing the markers of compromise, frequently add burdens to plaintiffs in exchange for the boon of later accrual. *See Singer*, 549 N.Y.S.2d at 655-56.

68. *See* Anita Bernstein, *Fellow-Feeling in the Law of Personal Injury* 210 (unpublished manuscript, on file with the Southwestern University Law Review). In *Clay v. Kuhl*, 727 N.E.2d 217, 222 (Ill. 2000), a plaintiff alleging sexual abuse argued that she was situated similarly to an asbestos plaintiff and should receive the same leniency for her delay in filing. The court rejected her contention. *Id.* at 222-23.

69. Here I observe the RAND convention that pleural thickening does not constitute an impairment, although it can have symptomatic effects.

70. *See supra* Part I.A.

A. *The Background Challenge for Mesothelioma: Judges Skeptical About the Asserted Connection between an Antecedent and a Consequence*

Rarely today does one hear anybody question whether asbestos really does cause the lung diseases for which plaintiffs have recovered in the courts. Acclaimed studies in the early 1960s by the Mount Sinai physician-researcher Irving Selikoff settled the issue for many observers.⁷¹ Even conservative commentators inclined to resist other plaintiffs' claims about toxicity have spared asbestos plaintiffs their usual "junk science" doubts.⁷² A range of lung diseases are associated with exposure to this substance. Focusing at first on asbestosis, Selikoff found a strong correlation between asbestos exposure and this condition; he also observed plenty of cancer among asbestos workers.⁷³ Mesothelioma almost never occurs absent asbestos exposure; it is, or is at least very close to, what epidemiologists call a signature disease.⁷⁴

That said, asbestos plaintiffs who can establish the other elements of a personal injury claim—i.e. that (if negligence is the cause of action) the defendant supplier owed them a duty of care and breached that duty by failing to warn them of hazards, or that (using strict liability) the defendant supplier put a defective product into the stream of commerce—still have to show causation of the harm they suffered. The conventional wisdom that being exposed to asbestos gives you lung disease will not suffice in court. Evidentiary rules limit the admissibility of testimony purporting to establish a relation between exposure to a substance and the effect about which a litigant complains.

71. See *The History of a Deadly Mineral*, [CLEVELAND] PLAIN DEALER, Nov. 4, 2002, at A5 (providing a timeline, on which the Selikoff studies are prominent). But see Joseph Hooper, *The Asbestos Mess*, N.Y. TIMES, Nov. 25, 1990, at 38 (reporting newer studies inconsistent with Selikoff's findings).

72. David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 28 (2003) [hereinafter Bernstein, *Junk Science*] (finding very little "junk science"); Steven B. Handler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1151-52 (2005) (confining criticisms of asbestos liability to the inclusion of peripheral defendants). In his polemic against "junk science," which he sees as having warped American liability in a plaintiff-favoring direction, Peter Huber has kind words for asbestos liability, saying that "good science" underlies claims for the "great harm" it caused. PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* 152 (1991).

73. Irving J. Selikoff & E. Cuyler Hammond, *Asbestos-associated Disease in United States Shipyards*, 28 CA: A CANCER JOURNAL FOR CLINICIANS 87, 90 (1978).

74. Joyce A. Lagnese, *Economic Aspects of Mesothelioma*, in *MALIGNANT MESOTHELIOMA: ADVANCES IN PATHENOGENESIS, DIAGNOSIS, AND TRANSLATIONAL THERAPIES* 821, 821 (Harvey I. Pass et al. eds., 2005); see also *supra* note 57 and accompanying text.

The strict-liability era that *Borel v. Fibreboard Paper Products Corp.*⁷⁵ had launched in 1974 was well underway when, in 1993, the Supreme Court interpreted Rule 702 of the Federal Rules of Evidence to hold that trial judges must keep expert scientific evidence from juries unless they deem that evidence valid.⁷⁶ Non-constitutional, not binding on state courts, and written to clarify existing rules rather than herald a new right, *Daubert v. Merrell Dow Pharmaceuticals* showed little early promise of becoming an attention-getter like another Harry Blackmun work product, *Roe v. Wade*, but it grew large. Though twenty years younger than *Roe*, it has more than twice as many citations in published decisional law.⁷⁷

Commentary on the case, which is comparably vast, agrees that despite the permissive tenor of the holding (i.e., establishing many criteria for admissibility with no relative weight attached to each, rather than the unitary criterion of *United States v. Frye*,⁷⁸ the decision it overruled) and the liberal pedigree of Justice Blackmun himself, *Daubert* functions to restrict plaintiffs' personal injury claims.⁷⁹ Especially after the holding in a later case, *General Electric Co. v. Joiner*,⁸⁰ that trial courts enjoy latitude to apply the *Daubert* criteria to litigants as they see fit, judges gained a prerogative to look with deep skepticism at any new assertion that some antecedent caused an effect.⁸¹ Personal injury claims involving toxic exposure post-*Daubert* have had to reckon with this judicial skepticism: a plaintiff might possess good evidence about the dangerousness of a substance and some evidence about the causal mechanism that hurt her—and, of course, an injury—yet not reach a jury because of the trial judge's doubts regarding causation.⁸²

Skeptical judges do not need *Daubert* to sustain their skepticism. The competitor approach embodied in *Frye*, widely in use during the *Borel* era and still followed in some states, imposes "general acceptance" as a condition for admissibility.⁸³ Under the *Frye* standard, scientific evidence

75. 493 F.2d 1076, 1092 (5th Cir. 1974).

76. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993).

77. Searching Westlaw's ALLCASES database on January 31, 2008, I found 3567 citations to *Roe* and 7629 to *Daubert*.

78. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

79. Anita Bernstein, *Products Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C. L. REV. 1193, 1217-18 (2002) (reviewing cases and commentary); Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 473 (2005); Lisa Heinzerling, *Doubting Daubert*, 14 J.L. & POL'Y 65, 69 (2006).

80. 522 U.S. 136 (1997).

81. See *id.* at 146.

82. See *id.*

83. *Frye*, 293 F. at 1014 (holding that expert testimony based on scientific knowledge is

that is both valid and relevant is inadmissible unless the proponent can show that it reflects a consensus of experts in the field.⁸⁴

Daubert on remand, sometimes called *Daubert II*, went on to add what looks like another increment of skepticism facing the claims asbestos plaintiffs and their lawyers make.⁸⁵ The Ninth Circuit, inquiring into the validity of the proffered testimony, paused over whether the plaintiff's experts were testifying about "research conducted independent of the litigation."⁸⁶ Irving Selikoff's investigations of a connection between asbestos exposure and lung disease were financed by the insulation workers' union.⁸⁷ Although this funding source long preceded successful asbestos litigation, it suggests a partisan origin: unions have worked closely with asbestos plaintiffs' lawyers, setting up screening programs to identify asymptomatic lung disease in their rank and file.⁸⁸

Daubert II added another pertinent barrier when the Ninth Circuit "deemed inadmissible the opinion of any plaintiff's expert who attempted to draw a causal inference based on anything other than statistically significant, peer reviewed, published epidemiological studies that showed a relative risk above the background risk level of two or greater"⁸⁹—a stance that soon ended not only Jason Daubert's lawsuit but the Bendectin litigation generally, and chilled plaintiffs' attempts to characterize other substances as toxic; skepticism about causation became doctrine in new ways. The Supreme Court had written *Daubert* to say what was admissible evidence, not what would constitute sufficient evidence to support a judgment. Lower courts, however, read its admissibility rule to hold plaintiffs' experts to a sufficiency standard.⁹⁰

In sum, whether they had to litigate under a *Frye* or a *Daubert* approach to the scientific evidence that is needed to sustain the causation

admissible only if the proffered point is "sufficiently established to have gained general acceptance in the particular field in which it belongs").

84. *Id.*

85. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir. 1995).

86. *Id.* at 1317.

87. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1023 n.310 (1993).

88. Albert H. Parnell, *Medicolegal Aspects of Asbestos-Related Diseases: A Defense Attorney's Perspective*, in *PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES* 377, 384 (Victor L. Roggli et al. eds., 1992).

89. Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 339 (1999).

90. *Id.* at 347-48; Brief of Amici Curiae Margaret A. Berger & Jerome P. Kassirer in Support of Plaintiff-Appellant at 21-29, *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194 (11th Cir. 2002) (No. 61-11965 BB and 01-CC).

element of any personal injury claim, plaintiffs who brought actions for toxic exposure proceeded under conditions of skepticism that rested on a doctrinal foundation. A toxic substance claim demands scientific evidence about causation, not just the tempting recourse to *post hoc ergo propter hoc*.⁹¹ A plaintiff who brings a products liability action must also identify the supplying defendant.⁹² Epidemiological shortfalls, per *Daubert II*, can destroy the claim.⁹³ These daunting conditions, which make prevailing an achievement for plaintiffs and their counsel in any toxic substance claim for personal injury, imposed challenges on asbestos claimants and their lawyers.⁹⁴

B. The Asbestos Achievement: Holding Defendants Liable for Supplying the Asbestos Linked to Mesothelioma

The esteemed products liability scholar Jane Stapleton notes the extraordinary victory that asbestos plaintiffs enjoyed on causation doctrine with respect to mesothelioma.⁹⁵ Recall that asbestos liability began with *Borel*, brought by an asbestos installer who suffered from both asbestosis and mesothelioma, a cancer that can manifest on the lungs but is not lung cancer.⁹⁶ When the author of *Borel*, Judge John Minor Wisdom, called asbestos a cause of both asbestosis and mesothelioma,⁹⁷ he elided what a better etiology would have kept separate,⁹⁸ and his error lies at the heart of the causation question. Asbestosis, a scarring that clogs the airways of the lungs, is dose-related, the result of cumulative exposures.⁹⁹ Breathe a little asbestos and the asbestosis you will get, if you get it, is slight; breathe a lot

91. DAVID G. OWEN, PRODUCTS LIABILITY LAW 740 (2005).

92. *Id.* at 733 (stating the plaintiff's burden as having to prove "that the defendant is the source of the challenged product").

93. *Daubert*, 43 F.3d at 1320-21.

94. OWEN, *supra* note 91, at 740-41.

95. Jane Stapleton, *Two Causal Fictions at the Heart of U.S. Asbestos Doctrine*, 122 L.Q. REV. 189, 189-90 (2006).

96. The noted public intellectual Stephen Jay Gould suffered from mesothelioma for twenty years before dying not of it, but of lung cancer.

97. *Borel v. Fibreboard Paper Prods. Co.*, 493 F.2d 1076, 1083 (5th Cir. 1974).

98. See generally Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 165-66 (1984) [hereinafter Green, *Collateral Estoppel*] (calling the Fifth Circuit's *Borel* opinion "imprecise, internally inconsistent, factually inaccurate, and infuriatingly vague The court upheld a jury verdict that contained blatantly inconsistent findings and that made determinations for which there was no rational basis.").

99. Stapleton, *supra* note 95, at 191.

of asbestos and your asbestosis, if you get it, will be more severe.¹⁰⁰

"The severity of mesothelioma," however, like that of cancers typically, "is not dose-related; it is an 'indivisible' disease. The method by which it is contracted cannot therefore be a cumulative mechanism."¹⁰¹ Conclusions that are obvious, at least to Stapleton, follow. Asbestosis and mesothelioma are two separate diseases.¹⁰² The former does not cause the latter; responsibility for one does not necessarily entail responsibility for the other.¹⁰³ Because mesothelioma is not dose-related, its cause must be either what Stapleton calls a "single insult" or a "threshold mechanism."¹⁰⁴ If the single insult etiology is correct, the inhalation of one fiber of asbestos bestows mesothelioma on a person, and all other inhaled fibers in his lungs are ambient "noise," not necessary for his injury.¹⁰⁵ If, alternatively, a threshold explanation is correct, then a person remains free of mesothelioma while inhaling asbestos until the total quantity he inhales crosses a boundary, and then he develops the disease.¹⁰⁶

Science does not know whether the single insult or the threshold explanation for mesothelioma is the right one. Nevertheless, starting with *Borel*, courts have allowed plaintiffs to proceed implicitly on an unexplored, unproven threshold theory, holding suppliers liable on a "substantial factor" approach to causation¹⁰⁷—in other words, presuming that the increment of asbestos that they each supplied carried the plaintiff over his threshold—even though plaintiffs do not possess the scientific knowledge necessary to establish the accuracy of the threshold theory, the only etiology that can save their mesothelioma claims.

Like the procedural triumphs reviewed in the last Part,¹⁰⁸ this victory for plaintiffs over their *Daubert/Frye* evidentiary shortcomings illustrates how strong lawyering overcomes the poor hand that clients are dealt. "To collect in a 'meso' case," a recent chapter on toxics litigation concludes,

100. *Id.*

101. *Id.*

102. *Id.*

103. Calling this purported etiology "a matter of considerable controversy even today," Michael Green reviews the evidence in Green, *Asbestos Apportionment*, *supra* note 6, at 318 n.13. Given that "[i]t is universally accepted that the amount of asbestos exposure needed to cause asbestosis is greater than the amount needed to cause mesothelioma," Laura S. Welch et al., *Asbestos Exposure Causes Mesothelioma, But Not This Asbestos Exposure*, 13 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 318, 322 (2007), I see no reason to suppose that asbestosis causes mesothelioma.

104. Stapleton, *supra* note 95, at 191-92.

105. *Id.*

106. *Id.*

107. *Borel*, 493 F.2d at 1094.

108. See *supra* Part II.A.

"the plaintiffs' lawyer has only to identify one or more viable defendants to whose products the plaintiff was, arguably, exposed."¹⁰⁹ This victory wasn't supposed to happen. Through its preponderance standard, tort law purports to saddle toxic tort plaintiffs rather than defendants with the misfortune of scientific uncertainty. If the single insult etiology in fact explains mesothelioma, then any court that found, in ruling for a plaintiff, any individual defendant supplier liable (when multiple defendants in fact exposed the plaintiff to asbestos) misapplied the preponderance standard, and reached the wrong answer. Observers of the liability record must render credit where it is due.

III. APPORTIONMENT ACHIEVEMENTS

One scholar of both asbestos liability and apportionment returns us again to the ancestral *Borel v. Fibreboard Paper Products Corp.*,¹¹⁰ this time as an apportionment achievement for plaintiffs. Clarence Borel named eleven corporations as defendants.¹¹¹ The Fifth Circuit upheld a jury verdict that the non-settling defendants were all jointly and severally liable for Borel's lung diseases,¹¹² because of their failure to warn him.¹¹³ This aggregation swept together several entities that stood in different places vis-à-vis the plaintiff: for example, three defendants started to provide warnings in 1964, five years before Borel retired.¹¹⁴ The court held them liable anyway, on the ground that by 1964, Borel's condition was irreversible.¹¹⁵ Yet it also held the post-1964 suppliers liable, an inconsistency that worked entirely in the plaintiff's favor, and whose effects endure.¹¹⁶

The basic apportionment approach of *Borel* . . . has continued for the past thirty years. All defendants to whose defective asbestos products a plaintiff has been exposed are jointly and severally liable for the plaintiff's harm unless, pursuant to section 433B(2) of the Second Restatement, a

109. G. William Shaw & Warner J. Miller, *Special Cases: Asbestos Litigation*, in TOXIC TORT LITIGATION 349, 356 (Alan Rudlin ed., 2007).

110. 493 F.2d at 1095.

111. BRODEUR, *supra* note 5, at 40-41. Michael Green counts 10, however. Green, *Asbestos Apportionment*, *supra* note 6, at 321. The decision unhelpfully says "Fibreboard Paper Products Corporation, et al."

112. *Borel*, 493 F.2d at 1096.

113. *Id.* at 1091 (stating "the failure to give adequate warnings in such circumstances can render the product unreasonably dangerous").

114. *Id.* at 1104 (explaining that Johns-Manville placed a warning label on packages of its products in 1964).

115. *Id.* at 1105.

116. Green, *Asbestos Apportionment*, *supra* note 6, at 319-20.

defendant can establish that it caused something less than the entirety of the plaintiff's harm. Of course, they rarely can.¹¹⁷

Asbestosis and lung cancer present separate manifestations of this victory.

A. *The Asbestosis Apportionment Achievement*

As was just mentioned, breathe a little asbestos and the asbestosis you will get, if you get it, is slight; breathe a lot of asbestos and your asbestosis, if you get it, will be more severe. This pattern means that unlike mesothelioma, an "indivisible" injury,¹¹⁸ asbestosis is amenable to apportionment.¹¹⁹ A defendant supplier identified as a non-exclusive source of exposure should be obliged to pay only for the share of the plaintiff's asbestosis attributable to what it supplied, not the entire injury. Case law and *Restatements* are all in accord on this point.¹²⁰

Nevertheless, courts typically spare asbestosis plaintiffs the rigors of apportionment once they conclude that the quantity of asbestos that the defendants supplied was more than trivial. One application of this permissive outlook appears in the Supreme Court's most recent asbestos decision, where a plaintiff had been exposed to the defendant's asbestos for only three months and had worked with the substance elsewhere for thirty-three-years; the defendant was held liable for the plaintiff's entire condition of asbestosis.¹²¹ Commenting from Britain, one practicing lawyer attributes this pro-plaintiff outcome to more energetic advocacy on the plaintiffs' side.¹²²

117. *Id.* at 320-21 (citations omitted). Green adds that a "trivial contribution doctrine" now releases some defendants from responsibility. *Id.* at 325.

118. Stapleton, *supra* note 95, at 191.

119. *See id.* (explaining while this "indivisible injury" treatment accords with the scientific reality of mesothelioma it involves a dramatic "fiction" when applied to asbestosis).

120. *See* RESTATEMENT (SECOND) OF TORTS § 433B (1965); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § A19 (2000) and cases cited therein.

121. Stapleton, *supra* note 95, at 193, *citing* *Norfolk & Western Rwy v. Ayers*, 538 U.S. 135, 143 (2003).

122. "Apportionment of damages is the area which defendants need to concentrate on. If they ignore it then the future is grim from their point of view." Andrew Hogarth, *Apportionment: A New and Better Defence to Asbestos Claims?* at 18 (n.d.), available at [.](http://64.233.169.104/search?q=cache:nxC4OK2qNIIJ:www.12kbw.co.uk/docs/Apportionment%2520-%2520a%2520new%2520and%2520better%2520defence%2520to%2520asbestos%2520claims%2520-%2520Andrew%2520Hogarth%2520QC.doc+andrew+hogarth+apportionment:+A+new+and+and+better+defense+to+asbestos+claims&hl=en&ct=clnk&cd=1&gl=us; see also id. at 11 (noting that)

B. The Achievement for Lung Cancer Plaintiffs Who Were Smokers When They Were Exposed to Asbestos

Although the comprehensive and much-cited RAND studies of asbestos liability curiously do not count the proportion of plaintiffs whose lungs were also exposed to tobacco, asbestos workers have long had a reputation for heavy smoking.¹²³ Those who brought actions for lung cancer might have expected to suffer in court for having chosen to inhale a significantly more potent carcinogen. Some of them did.¹²⁴ The folksy plaintiffs' lawyer Ronald Motley, who had a cute trick-and-anecdote to dispel jury prejudice against plaintiffs who had smoked and sued for asbestosis,¹²⁵ reported that he felt close to helpless before his jury whenever he represented a smoker-plaintiff with lung cancer.¹²⁶

It is far from obvious how to assign responsibility in response to a claim by a plaintiff who, following exposure to both asbestos and cigarette smoke, developed lung cancer and brought an action against an asbestos supplier, or, as is more frequently the case, and for further complication, asbestos suppliers. The toxic torts scholar Gerald Boston, noting that both substances cause lung cancer, states the uncertainty in dramatic terms:

123. BRODEUR, *supra* note 5, at 225 (calling cigarette smoking "a habit that appears to have been indulged in by a great majority of asbestos workers"); Hooper, *supra* note 71 (observing that "the vast majority" of asbestos workers smoked). When one notorious asbestos manufacturer tried in the 1970s to prohibit smoking in its Texas plant and impose disciplinary sanctions on workers who defied the ban, its union contended that this policy violated its collective bargaining agreement, and the Fifth Circuit sided with the union, "notwithstanding uncontroverted evidence that asbestos workers who smoke are ninety-two times more likely to die of lung cancer than those who do not." Frances H. Miller, *Biological Monitoring: The Employer's Dilemma*, 9 AM. J. L. & MED. 387, 425 n.181 (1984) (citing *Johns-Manville Sales Corp. v. Int'l Ass'n of Machinists*, 621 F.2d 756 (5th Cir. 1980)).

124. See, e.g., *Zarow-Smith v. N.J. Transit Rail Operations*, 953 F. Supp. 581, 585-86 (D.N.J. 1997) (upholding comparative-responsibility apportionment in a FELA action); *Brisboy v. Fibreboard Corp.*, 418 N.W. 2d 650, 655 (Mich. 1988) (holding that because the smoker-worker plaintiff had assumed the risk of lung cancer, he had to accept a reduction in his damages).

125. See BRODEUR, *supra* note 5, at 234 (relating that Motley would routinely advise his clients to stop smoking, and that he found smoking "far and away the most difficult" attribute of a plaintiff to overcome before a jury). Asbestosis claims involving smokers could be handled more easily:

My strategy for dealing with the cigarette-smoking issue [in an asbestosis case] is to get to it early and keep it out front. For example, before beginning my opening statement I place a carton of cigarettes in an empty chair and proceed to inform the jury that I am going to tell them a story about a culprit called asbestos, but that my opponent is going to try this case against cigarettes . . . I talk a lot about a guard dog at an asbestos-textile factory in Great Britain that died of asbestosis . . . When they autopsied the poor thing, they found his lungs to be riddled with scar tissue caused by his inhalation of asbestos fibers. That was way back in 1933. But I get a lot of mileage out of it with juries for the simple reason that the dog didn't smoke—now did he?

Quoted in BRODEUR, *supra* note 5, at 235.

126. *Id.* at 234.

[Any two individual plaintiffs] who were exposed to comparable levels of asbestos would stand on equal footing as to their ability to demonstrate that asbestos exposure caused his or her lung cancer, even though one was a chronic smoker and the other a nonsmoker. Asbestos exposure multiplies the incidence of background lung cancer in all cases, whether or not the background includes smoking. A relative risk of about 5.0 translates into an etiological probability of 80%, meaning that exposure to asbestos causes 80% of the lung cancers among smokers and 80% of the lung cancers within the nonsmoking group.¹²⁷

And yet, Boston continues, a court cannot simply impose liability on the asbestos supplier(s) and go home, because smokers have a relative risk of approximately 10.0 when compared to nonsmokers.¹²⁸ For a person who smoked, and also inhaled asbestos, and then developed lung cancer, paradoxically enough, the probability that smoking caused his cancer is 90% and the probability that asbestos caused his cancer is 80%. Courts thus face a variation on the classic twin fires problem of tort law, where one fire attributable to the negligence of defendant *X*, big enough to cause all the damage the plaintiff suffered, had, before touching the plaintiff's property, merged with another fire attributable to the negligence of defendant *Y*, which also started out big enough to cause all the damage.¹²⁹ Although both defendants *X* and *Y* escape responsibility under a "but for" test for actual cause, the uncontroversial tort rule is that both can be liable for the entire loss.¹³⁰

Even if asbestos and cigarette smoke could be considered twins for this analysis, however, apportionment is not the same as causation; or, as Boston puts the point, "if courts could attribute to each fire some dimension of magnitude (that is, a relative risk)[.] they could rationally apportion the harm among these multiple causes."¹³¹ However the synergy between these two poisons may function, one of them plainly outweighs and exceeds the other as a source of lung cancer.¹³²

127. Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 ENVTL. L. 549, 575 (1995).

128. *Id.*

129. *Id.* at 630 (quoting *Anderson v. Minneapolis, St. P. & S. Ste. M. Ry.*, 179 N.W. 45 (Minn. 1920)).

130. RESTATEMENT (SECOND) OF TORTS § 432(2) cmt. d, illus. 3 (1979).

131. Boston, *supra* note 127, at 576.

132. See F.D.K. Liddell & B.G. Armstrong, *The Combination of Effects on Lung Cancer of Cigarette Smoking and Exposure in Quebec Chrysotile Miners and Millers*, 46 ANN. OCCUP. HYG. 5, 5 (2002) (summarizing evidence showing that the effect is independent rather than synergistic).

Yet apportionment on a risk-contribution basis remains rare.¹³³ In his study of post-*Borel* developments in apportionment, Michael Green finds three judicial approaches to cancer claims that combine asbestos exposure with exposure to cigarette smoke.¹³⁴ Courts in the first group assess the relative contribution of each input (asbestos and smoking) to the risk of cancer.¹³⁵ Courts in the second group refuse to take the smoking into account.¹³⁶ The third approach is to look at smoking as a plaintiff's conduct defense, requiring the defendant to prove that the plaintiff's smoking was negligent.¹³⁷

The first grouping appears neutral between defendants and plaintiffs (with Green's important reminder-caveat that in order to count, the cigarette smoking, whether done by the plaintiff or third parties, must have been wrongful). But this approach is not a majority rule. The second recasts reality to favor plaintiffs. The third, which shifts the costs of non-production to defendants, also appears relatively neutral, but has often proved too demanding for these suppliers to overcome.¹³⁸ Score another victory for able lawyers.

IV. CONCLUSION

Reviewing the attacks heaped on lawyers who represented asbestos plaintiffs brings out a few accusations that have *not* been made. For all the vitriol flung, no one has charged that these advocates intimidated the judiciary into submission. They did not win their victories by violence. It was not they who killed the cheaper alternative of a legislative solution to

133. See Boston, *supra* note 127, at 576 (explaining that few courts have actually apportioned the harm in a similar fashion).

134. Green, *Asbestos Apportionment*, *supra* note 6, at 324.

135. *Id.*

136. *Id.*

137. *Id.* at 333.

138. *Id.* at 324 n.40 (putting in the third category *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (Cal. 1997), which affirmed an improbable jury determination that the decedent's fault in maintaining a pack-a-day smoking habit for 30 years contributed only 2.5% to his lung cancer); *Altieri v. Fibreboard Corp.*, 617 A.2d 1302, 1303 (Pa. Super. 1992) (fear-of-cancer case with present asbestosis featuring a plaintiff who "was a heavy smoker;" the court refused an apportionment instruction because the statistical evidence on what inputs cause which cancers was too imprecise). In another favorable-to-the-plaintiff case not cited by Green, one court declared that "for smoking to be considered contributory negligence, it must be shown that the plaintiff had subjective knowledge of the synergistic relationship between the asbestos-related disease and smoking and appreciated the danger of continued smoking." *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 658 (E.D. Tex. 1990).

the asbestos crisis, even though they had a stake in warding it off.¹³⁹

With no misbehaviors by lawyers quite so dramatic to condemn, critics of these successes have focused on falsity as a constituent of asbestos claims. This Article has taken no position on the merits of these accusations. For purposes of noting asbestos achievements, however, it bears mention that while lies told in litigation will always be a serious threat to justice that no observer can responsibly shrug off, those critics who complained about dishonest tactics—perjury, witness coaching, the corruption of witnesses—described conduct relatively amenable to repair by forensic means. Opponents can cross-examine lying witnesses, report perjury and have it prosecuted, and take action to set aside judgments that rest on fraud.

To an outsider who holds no affinity for either asbestos claimants or their enemies, the bulk of the attack on asbestos plaintiffs' lawyers seems focused on its resentment of them for their having made and spent a fortune. Yachts! Private jets! Campaign contributions! The commentary expresses revulsion for the indecent profits reaped from the misfortunes of sick, or at least poison-exposed, working people.¹⁴⁰

In this context, the products liability and mass torts scholar George Priest—who prefers to call the asbestos status quo a “phenomenon” rather than a “crisis,” only because to him, “crisis” “implies a newly emergent or immediate form of distress”¹⁴¹—renders asbestos plaintiffs' lawyers an extraordinary if unintended compliment. Priest writes that “the law relating to asbestos claims” installed “a distinct recovery system, different in multiple respects from the basic system of law and procedure that addresses all other areas of injury.”¹⁴² In his 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

139. See Mark Behrens, *Judicial and Practical Perspectives*: Transcript of Mark Behrens 51 (Jan. 18, 2008) (attributing the failure of a congressional solution to infighting on the defense side) (unpublished transcript, on file with the Southwestern University Law Review); Barnes, *supra* note 9, at 158.

140. See, e.g., Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 634 (1994) (organizing a “taxonomy of anti-lawyer themes” including complaints “that lawyers are: (1) corrupters of discourse; (2) fomenters of strife; (3) betrayers of trust; or (4) economic predators”).

141. George L. Priest, *The Cumulative Sources of the Asbestos Litigation Phenomenon*, 31 PEPP. L. REV. 261, 261 (2003).

142. *Id.* at 265-66.

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.¹⁴³

Gee, one might wonder, how'd all that happen? Priest answers this question by saying the changes "have resulted from concerns about asbestos-related losses," as if these concerns needed no champions to bring them to the fore.¹⁴⁴ The subject of all his eight sentences is "the system."¹⁴⁵

Consistent with a prevailing view that asbestos liability is a force of nature, sudden and unruly like a tsunami, the Supreme Court has called this litigation an elephantine mass.¹⁴⁶ One student commentator gathers more

143. *Id.* at 266-67.

144. *Id.* at 267.

145. *Id.*

146. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

metaphors: Courts and observers equate it with "a rising tide . . . a flood . . . a torrent . . . a tidal wave . . . an avalanche . . . a massive, unending river . . . a cauldron of sticky, bubbly, and ill-smelling trouble."¹⁴⁷ Onward through a final metaphoric crescendo: "the Apocalyptic Beast."¹⁴⁸

Florid imagery about the unstoppable nature of Nature should not obscure a hard-fought succession of victories that workaday human initiative built. Asbestos liability (if we may tarry a moment preserving George Priest's passive diction) reveals clients who were retained and compensated. Antagonists were won over. Claims were strengthened by aggregation. Settlements were negotiated. Procedural hurdles were overcome. Evidentiary rules were made more permissive. Statutes of limitation, the province of legislatures, were revised by judges in a plaintiff-favoring direction. Hazards were exposed. Large business corporations were brought to their knees.

Lawyers advocating for clients effected these achievements. They rewrote the law of civil procedure and torts, bringing redress to clients who had started out obstructed by conservative rules and presumptions. One may debate the merits of their doctrinal innovations; but at a minimum, their victories suggest new opportunities to other persons hurt by negligence and defective products. Even if one grants that these lawyers were as relentless, dishonest, and greed-crazed as their foes say—for the record, I will say here I doubt it—they set a record for achievement that, in magnitude, surpasses what almost anyone else in the history of American civil justice has ever accomplished.

147. Matthew C. Stiegler, Note, *The Uncertain Future of Limited Fund Settlement Class Actions After Ortiz v. Fibreboard Corp.*, 78 N.C. L. REV. 856, 856 n.2 (2000).

148. This final metaphor comes from *Eagle-Picher Indus. v. Balbos*, 578 A.2d 228, 231 (Md. Ct. Spec. App. 1990) (quoting VICENTE BLASCO IBANEZ, *THE FOUR HORSEMEN OF THE APOCALYPSE* 172 (Charlotte Brewster Jordan trans., 1918)), *aff'd in part and rev'd in part*, 604 A.2d 445 (Md. 1992). *Id.*

