

Asbestos Litigation: Innovations in Legal Procedure and How They Affect Outcomes

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“The hazards of asbestos were described by the Roman historian Pliny.”

Asbestos: Some Facts

- Asbestos was widely used from the 1940's to the 70's for its fire retardant capabilities.
- Breathing asbestos causes pleural disease, asbestosis, lung and other cancers, and mesothelioma (asbestosis and meso are “signature” diseases). Wide variation in disease severity—from no disability to quickly fatal.
- The probability of disease/disease severity rises with length/intensity of exposure.
- As many as 100 million people were exposed, so there is an unlimited supply of potential plaintiffs.
- The period from exposure to disease averages 30 years.

Asbestos Litigation

- 600,000 people have filed asbestos claims and 6,000 separate defendants have been sued.
- On average each plaintiff sues 20 defendants, so as many as 10 million claims have been filed.
- Most plaintiffs held several jobs and were exposed to multiple sources of asbestos, so causation is difficult to establish.
- Many plaintiffs have no disability from asbestos exposure, but they sue because of statutes of limitations and fear that the money will run out.
- Costs to date are \$54 billion. Five corporations have paid out \geq \$1 billion each.
- Many asbestos bankruptcies: my list has 28 since Jan. 2000 and 76 in total.
- Claims increased rapidly in the 1990's, even though most of the major producers were bankrupt.
- The eventual cost of asbestos claims is estimated to be \$200-275 billion – higher than Superfund!

Asbestos in the Courtroom: Procedural Innovations

Asbestos claims are concentrated in a few courts and threaten to cause judicial gridlock.

As a result, judges have introduced several procedural innovations that are intended to resolve many asbestos claims with a minimum of court time.

- *Case consolidation*: consolidate multiple asbestos cases for trial before a single jury. The jury makes a separate decision for each plaintiff.
- *Reverse bifurcation*: the jury decides causation and damages in phase one and liability in phase two. Settlement negotiations occur after phase one, often with direct participation by the judge. (“Straight” bifurcation isn’t observed in asbestos trials.)
- *“Bouquet trials”*: pick a small group of claims (8-20) from a larger group (100-10,000) and hold a consolidated trial for the small group. After the small group trial (or after phase one), hold settlement negotiations to settle the large group based on the template of the small group outcomes. If no settlement, the judge threatens to use the same jury to decide more cases in the large group and/or punitive.

Hypotheses:

1. Judges adopt procedural innovations that save trial time and encourage mass settlements.
2. The innovations also make trial outcomes more favorable to plaintiffs.
3. By encouraging mass settlements and making trial outcomes more favorable, judges give plaintiffs' lawyers incentives to file more cases. This ensures that the gridlock gets worse.

What I directly test in this paper is the effect of case consolidation and reverse bifurcation on trial outcomes.

Theoretical discussion:

The effect of procedural innovations on whether asbestos lawsuits settle and on trial outcomes.

Simple model of whether cases settle or go to trial:

Settlement cannot occur if :

Plaintiff's min demand > Defendant's max offer

Plaintiff's min demand = $c[pD - R - P] - wT$

Defendant's max offer = $pD + C + P + R$

Lawyers manage the litigation on plaintiffs' side.

Each side's predictions of the outcomes of trial are pD and pD .

C is the def's legal costs and c is the plaintiff's lawyer's contingency percentage.

wT is the plaintiff's lawyer's opportunity cost of time spent at trial.

R and R are adjustments for risk.

P and P are adjustments for effects that this case has on other asbestos cases, particularly on plaintiffs' lawyers incentives to file more cases.

How do procedural innovations affect trial time, whether settlements occur, and trial outcomes?

1. *Consolidation:*

Saves trial time by avoiding repeated presentations of the same evidence at trial (bad effects of asbestos).

Effect on settlement probability: Consolidation increases the risk of trial (R and R) by making trial outcomes more positively correlated, since the same jury decides all the cases based on similar evidence. Consolidation also raises legal costs for defendants. Both effects raise the probability of settlement.

Effect on trial outcomes: Consolidations usually combine minimally injured and severely injured plaintiffs. Juries assume that injuries will progress inevitably from minimal to severe, so they treat minimally injured plaintiffs better (higher D and D).

2. *Reverse bifurcation:*

Saves trial time if settlement occurs after phase one, so phase two is avoided.

Effect on settlement probability: Damages are more uncertain than liability (see data), so resolving damages increases the probability of settlement almost as much as resolving both, while saving trial time. Resolving uncertainty raises the probability of settlement by reducing disagreement between the two sides.

Effect on trial outcomes: Juries usually take both liability and damage evidence into account in determining damage awards. Plaintiffs' asbestos cases are weakest on liability/causation and strongest on damage. So when juries decide damages without having evidence concerning liability, damages tend to be higher.

3. “Bouquet trials” (usually combined with the other innovations).

Example: a bouquet trial in Mississippi involved 12 asbestos plaintiffs. In phase one, they received damages awards averaging \$4 million each. The judge then threatened that if the parties did not settle, he would use the same jury to decide the large group of 1,738 cases and would direct the jury to consider punitive damages. After an emergency appeal to the Mississippi Supreme Court failed, the defendants settled all 1,738 cases on extremely favorable terms for plaintiffs.

Bouquet trials save trial time if they encourage large group settlements.

They increase the probability of settlement of the large group by reducing disagreement between the two sides about the outcome if the large group went to trial (since the same jury will be used).

Judges want bouquet trials to be decided favorably to plaintiffs, because high damage awards threaten defendants' solvency and therefore increase defendants' willingness to settle large numbers of cases at once. Judge may therefore encourage juries to find high damages in order to encourage mass settlements.

Data

All trials of asbestos lawsuits reported in *Mealey's Asbestos Reporter*, 1987 -- mid-2002.

About 5,500 observations of individual plaintiffs.

Summary Statistics (mean values):

<i>State:</i>	
Pennsylvania	.27
Texas	.14
New York	.13
<i>Disease and plaintiff characteristics:</i>	
Mesothelioma	.16
Lung cancer	.11
Asbestosis	.42
Pleural disease or no information	.29
<i>Other plaintiff characteristics:</i>	
Known smoker	.10
If plaintiff died before trial	.13
<i>Procedural innovations:</i>	
Single plaintiff trial	.23
2-3 plaintiff trial	.11
4-5 plaintiff trial	.13
6-7 plaintiff trial	.10
>= 8 plaintiff trial (max = 328)	.42
If bifurcated trial	.16
If bouquet trial	.006
Correlation of bifurcated trial and single plaintiff (non-consolidated) trial	-.19
<i>Number of defendants:</i>	
1	.51
2-3	.26
>=4	.23

Outcome Characteristics

Prob. plaintiff wins (if liability decided)	.69
Compensatory damages (if positive)	\$804,000
Prob. punitive damages (if plaintiff wins)	.35
Punitive damages (if positive)	\$1,123,000
Expected total damages	\$629,000
Risk of liability for comp damages (σ / μ)	.67
Risk of compensatory damages (σ / μ)	2.8
Risk of liability for pun damages (σ / μ)	1.3
Risk of punitive damages (σ / μ)	5.3
Correlation of probabilities of winning	.41
Correlation of comp and pun damages	.17
Marginal effect of comp damages on pun damages	.11

(Dollar figures in 1987 dollars.)

Does consolidation increase the degree of correlation of outcomes?

Number of cases consolidated	Corr. Coeff.
2	-.0044
3	-.0027
4-5	-.0015
6	-.0004
7	-.0016
≥ 8	-.0022

Probit Results Explaining If Plaintiff Wins and If Plaintiff Receives Punitive Damages (Marginal Effects)

	If defendant liable	If pun damages (conditional on winning)
<i>Selected states:</i>		
Texas	.13*	-.41*
West Virginia	.28*	.49*
Mississippi	.16*	.50*
If Federal court	-.03	-.27*
<i>Procedural innovations:</i>		
2-3 plaintiff trial	.15*	.11*
4-5 plaintiff trial	.10*	.06
6-7 plaintiff trial	.02	.18*
>= 8 plaintiff trial	.033	.08*
Bifurcated trial	.29*	.54*
Bouquet trial	.21*	-.27*
<i>Plaintiff characteristics:</i>		
Mesothelioma	.16*	.19*
Lung cancer/smoker	-.19*	-.20*
Other cancer	-.06	.29*
Smoker	.13*	.01
<i>Number of defs:</i>		
2	.07*	-.04
3	-.03	-.005
>=4	-.06*	-.23*
N	5008	3471
R-squared	.19	.51

Tobit Results Explaining Compensatory and Punitive Damages (marginal effects in thousands of 1987 dollars)

	Compensatory Damages	Punitive Damages (if win)
<i>State:</i>		
Texas	428*	1,408*
West Virginia	518*	1,172*
Mississippi	1,860*	1,640*
Federal court	-90	-670*
<i>Procedural innovations:</i>		
2-3 plaintiff trial	90	100
4-5 plaintiff trial	140*	-361
6-7 plaintiff trial	-3	52
>=8 plaintiff trial	-239*	-582*
If bifurcated trial	709*	-863
If bouquet trial	2,780*	-1,610*
<i>Plaintiff Characteristics:</i>		
Mesothelioma	953*	643*
Lung cancer/smoker	-214	-374
Other cancer	482*	1,140*
Smoker	156*	-208
<i>Number of defs:</i>		
2	251*	-61
3	122	-199
>=4	-1*	-732*
N	4692	2596
R-squared	.015	.03

Predicted Effects of Case Characteristics on the Expected Value of Trial

	Compensatory Damages	Punitive Damages	Total
<i>State:</i>			
Texas	\$364	\$1,030	\$1,390
West Virginia	\$502	\$1,120	\$1,620
Mississippi	\$1,370	\$1,320	\$2,690
<i>Plaintiff characteristics:</i>			
Mesothelioma	\$741	\$506	\$1,250
Lung cancer/smoker	-\$245	-\$417	-\$663
Other cancer	\$302	\$838	\$1,140
Smoker	\$176	-\$63	\$113
<i>Procedural innovations:</i>			
2-3 plaintiff trial	\$140	\$180	\$320
4-5 plaintiff trial	\$151	-\$63	\$88
6-7 plaintiff trial	\$10	-\$262	\$272
>=8 plaintiff trial	-\$149	-\$124	-\$272
Bifurcated trial:	\$641	\$389	\$1,030
Bouquet trial:	\$2,040	-\$997	\$1,040
<i>Number of defs:</i>			
2	\$210	-\$72	\$138
3	\$71	-\$84	-\$13
>=4	-\$31	-\$591	-\$621

Conclusions

- Reverse bifurcation has a large effect on trial outcomes.
- Small consolidations have a positive effect on trial outcomes. Larger consolidations have a mixed effect.
- Results generally support the hypothesis that crowded court dockets encourage judges to adopt procedural innovations that raise the probability of mass settlements. Because mass settlements make asbestos cases profitable for plaintiffs' lawyers, they also encourage lawyers to file more cases.
- Results also suggest important state effects: file asbestos lawsuits in Mississippi and West Virginia because judges and the law in these states are extraordinarily favorable to asbestos plaintiffs. Strong state results may be due to heavy use of bouquet trials or may be due to something else.