PERSPECTIVES ON ASBESTOS LITIGATION: KEYNOTE ADDRESS

Judge Barbara Rothstein*

JUDGE ROTHSTEIN: You heard a lot of images given to the asbestos litigation, and I'm going to give you mine. As a visitor to Los Angeles, one of the key sites that I saw the first time I came here was the La Brea Tar Pits. Somehow those Tar Pits seem a perfect image for the asbestos litigation. First of all, this case has been mired down in litigation that some people would think is the equivalent of tar. Second, it possibly is trapped, or has been trapped, or will be trapped, for eons, or at least for as far in the future as most of us can see. Finally, it's not only the time, but it's also the sheer size. If there's ever litigation that is the mastodon of litigation in federal courts, this case has to be it. So I would keep that image in mind.

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As we heard this morning, there are almost a million claims,[1] only 2,000 of which have proceeded to trial, and a small fraction of which have been settled. There are approximately 8,400 defendants by the time one counts all the peripheral cases coming in, about 80 of which are presently in bankruptcy.[2] We anticipate future claims that range in estimates anywhere from hundreds of thousands to two million. Of course, we don't know, but we do know that they are going to be waiting for as long as 40 years, and this morning we heard the possibility of 60 years.[3] Now that's enough to start making you think of eons and mastodons.

In my opinion, and this is only my personal opinion, in looking at the courts and how we have handled asbestos litigation, we see a colossal failure. I think there are many reasons for that, and I'm going to examine some of them. Resolutions other than the courts have been suggested. We've heard about administrative solutions. We've heard about legislative solutions. And as you've all heard this morning, they really didn't go anywhere. They were of no avail, though they were earnestly pursued, and by people who had some really good ideas. This is a case in which there are serious injuries—many of which result in death. When we look at how the courts have handled them, it's not for lack of lawyering and it's not for lack of judges trying, that the courts have failed. We have to look historically, and we have a distinct advantage there, all of us today here, thanks to all of the literature, to be Monday morning quarterbacks. We can look back upon what the disasters were in the asbestos litigation. The important thing to me is to recognize them, to see them, to see how we can learn from them, and to make sure that they don't happen in other cases that reach the courts, none of which are quite this dimension, but many of which present serious challenges.

The asbestos failure poses serious questions that we've heard repeated this morning over and over again, about conflicts within the basic notions of the American tort system. It is fundamental to our justice system that each individual is entitled to competent representation. They're entitled to trial, and that is a jury trial, entitled to an early trial. All of these are the bedrock things you've heard about this morning.[4] We believe that each case deserves at least this minimal due process. Individual consideration of

1. *See* Alan Calnan & Byron G. Stier, *Perspectives in Asbestos Litigation: Overview and Preview*, SW. U. L. REV. 459, 462 (2008).

2. *Id.* at 462-63.

3. Helen E. Freedman, Judicial and Practical Perspectives: Transcript of Justice Helen E. Freedman 35 (Jan. 18, 2008) (unpublished transcript, on file with the Southwestern University Law Review).

4. *See* Phil Harley, *Judicial and Practical Perspectives: Transcript of Phil Harley*, 37 SW. U. L. REV. 553, 556 (2008).

cases is what our justice system is founded on and what we are committed to. But what happens when trying to do all of those things means that cases don't get resolved? That there's no redress for injuries? That tension (that was articulated this morning) I see as the basic tension in the asbestos litigation, and the fact that this tension has not been resolved makes this litigation so troubling. It's one thing to say that everybody is entitled to an individual trial. It's another thing to say, but incidentally you're not going to get one. You probably die before you get one or you may not get one for years and years to come. So what do we do?

Incidentally it is very interesting that, as referred to this morning, in the 9/11 situation, nobody even thought about all of these bedrock things. They established a fund and some people opted out, but very few. In the 9/11 case, our ideal litigation was not going to be the paradigm. That was decided early on. Of course, it had something that was very gripping emotionally, and that Congress was willing to respond to. The fund that was set up was able to respond quickly. It responded individually but not the way we ordinarily expect. Most of the cases were resolved without juries and not in the courtroom, but they were resolved, which is a distinct advantage.

I think when we look back we can see that the asbestos litigation really was caught in a perfect storm. Factors all came together that were destined to create the tar pit image that I like to use. First of all, at the time asbestos litigation came up, the MDL panel was not aggressively functioning, at least not in the product liability area. The panel did not focus on mass torts. It didn't see itself addressing mass tort cases as a part of its function. Indeed the asbestos cases were referred to the MDL panel five times, and turned down every time. It was only when eight federal judges got together and all eight of them jointly petitioned the MDL panel and said "you've got to help us out," that the MDL panel finally took hold of this litigation. I mean think of it. Think of this coming up without MDL as a resource. It was doomed to chaos right from the start, because cases went to many, many federal courts, and if the attorneys didn't like the federal courts, they went to state courts, and some attorneys filed their cases in both federal court and state court to see which one would get to it first (or last, depending on what the attorneys wanted). That's one factor.

The second factor was that in the beginning there were questions about the science, and federal judges quite frankly were not used to dealing with scientific issues. There were questions—some people would say there still are—about what types of cancers were caused by asbestos. There was never a question about asbestosis. Everybody agreed on that. But there was not agreement on where you went from there.

A third factor, just to keep the perfect storm going, was that the number of defendants kept growing. It kept increasing and going from one level to another level to another level, so what you had was sets of parallel litigation. We had all of these defendants trying to decide who was really going to be responsible and how much each was going to chip in to make this thing work.

In addition to the defendants multiplying, we also had a wide spectrum of plaintiffs, and that presented an overwhelming problem. The number we've already mentioned. It was astronomical. But the range of injuries also presented a huge problem. At one end of the spectrum there were the injuries that were so serious, mesothelioma, lung cancer, that we knew most of these people were going to die or certainly be seriously impaired. At the other end, there was a whole bunch of people who weren't impaired, at least now, and were showing no signs of impairment, and so to add to the problem, there was the likelihood of future claims. Now that ended up probably being the part of the storm that no other litigation to this day has been able to match. When you have injuries you can't possibly evaluate, you can't even tell how serious they will be. This has understandably proved a true stumbling block to settlement and to managing calendars.

And if that wasn't enough, the asbestos litigation became I think the first case in which serious plaintiff and attorney fraud surfaced. The piling on of plaintiffs who had questionable injuries was something that I don't think the court system had ever dealt with seriously. And I frankly think that as the asbestos litigation was proceeding, as we can see now through the hindsight lens of the silicosis litigation, the lowest levels of the medical and legal professions were joining forces to introduce into this litigation a type of plaintiffs' claims that complicated and distorted the litigation.

I'm going to read to you from the independent review that was done of chest x-rays submitted as evidence in the asbestos litigation. This independent review was published in the journal called *Academic Radiology*. The reviews revealed symptomatic distortions of the results, and concluded: "[o]bjectivity and truthfulness among reader radiologists were supplanted by partisanship and distortion of or departure from the truth, driven by financial gain."[5] Remember these are radiologists now, looking at the radiologist reports of chest x-rays in the asbestos litigation. That's their critique of their own. Judge Carl Rubin, in the course of his asbestos litigation, became very suspicious of the radiology reports he was getting and he appointed medical experts of his own. He appointed his own

5. Murray L. Janower & Leonard Berlin, *"B" Readers' Radiographic Interpretations in Asbestos Litigation: Is Some-thing Rotten in the Courtroom?*, 11 ACAD. RADIOLOGY 841, 842 (2004).

medical experts and had them go over the radiation reports and begin ferreting out some of the less reliable reports.

But perhaps one of the most significant factors in this perfect storm that I'm describing to you was the lack of managerial judges. Now this morning we heard from Justice Freedman[6] and of course now we know what a managerial judge is all about. But back when asbestos litigation arose, it arose in the culture where most judges at the time simply wanted to hold these cases and let them get settled by the attorneys. Thus many judges failed to recognize at the time the need for early aggressive case management and new procedures. In an FJC conference of clerks from courts with heavy asbestos caseloads in the early '80s, one court clerk indicated that his court's program for asbestos case management consisted of designating a person to go through the cases each month and change the name of the party to quote, "the estate of the party." Now we have come a long way from that. It wasn't until really well into the '80s that judges seriously saw themselves as case managers, and in fact, it was the asbestos litigation that moved that along and made it clear to judges that when these cases came and when their calendars got out of control, they had to learn case management procedures.

Another factor was that these cases were proceeding in both state and federal courts. At the time there was no precedent for state/federal cooperation. The attorneys chose what court they wanted to be in, and there was no way for any state court judges to communicate with federal court judges. Yet another factor was that many of the defendants went into bankruptcy, which introduced a whole new court system, which was as ill-equipped to work on this as the federal district courts were.

Another complication in the asbestos litigation was the fact that the initial defendants were so egregiously guilty of hiding what they knew, that the need for punitive damages jumped out at everybody. And when you start having early cases awarding punitive damages, you immediately know what's going to happen to cases that are trailing at the end. So faced with this perfect storm of combinations, which made any kind of global settlement impossible, various courts made valiant efforts to try to control what was going on. But I think it was inevitable that the court system would fail. Judges tried things. They tried to aggregate trials and they started out putting a few cases together, and more cases together, and then they would put even more cases together, and the next thing you knew the court was going to extrapolate to 3,000 other plaintiffs, and guess what the Court of Appeals did with that? The Court of Appeals said: "Wait a

6. *See* Freedman, *supra* note 3, at 34.

minute. This isn't what we do in the American system of justice. People get individual trials." So then finally MDL judges were appointed who tried to fashion a settlement, and that was going to be a settlement of all types of plaintiffs, considering future claims, and that one went all the way up to the Supreme Court, and the Supreme Court sided again with the idea of individualized justice. *Ortiz*[7] and *Amchem*[8] struck down that attempt at settlement, and these were the cases that ultimately set the stage for the fact that this wasn't going to be resolved by a global settlement.

The delays that accompanied the attempt at global settlement in the MDL really made people turn away from the MDL process in this situation, because what happened is that cases went into the MDL, and some people described it as a roach motel. They checked in, but they never checked out. That kind of problem frankly has cast a shadow over the MDL. Ultimately it was recognized that these attempts by the courts really hadn't worked, and that our methods for resolving litigation such as this needed improvement.

I think it's important to take a look to see what courts have learned from what happened in the asbestos litigation. I believe we have learned a tremendous amount.

First of all, judges have learned that we need to be managers of our case loads and managers of our cases, and we've learned that this becomes especially important in MDL cases and in mass tort cases. Now judges who are getting MDL cases manage them much more aggressively. I'll use my own case as an example. My case involved a drug called phenylpropanolamine (PPA). In PPA, I worked with the state judges very, very closely. We heard motions together. In Seattle we have a courtroom where they have a bench large enough to seat half of the Ninth Circuit. So judges came from all over the country, from many different states, and they sat with me, and it was a wonderful experience.

What we also did was coordinate our discovery. We didn't have to have depositions taking place over and over and over again in every state and in federal courts. I set up a discovery procedure and I invited all of the state attorneys to share in taking depositions. I tacked on extra hours for them to ask questions, and they could participate in any deposition they wanted to. Of course very few of them came because it is much easier to hand your questions to somebody else, and in general causation, they were willing to turn their questions over to the federal attorneys who were working the MDL.

7. 527 U.S. 815 (1999).
8. 521 U.S. 591 (1997).

Also, the role of judges handling science in the courtroom has changed. We at the Federal Judicial Center and other places have many, many seminars trying to teach judges science. Remember most of us judges went to law school for a very good reason. We didn't like science. We thought we would never have to take a basic science course again. And of course, now what do we have to learn: toxicology, epidemiology, statistics. It goes with the turf. Also, now there are manuals and guides. The Center has published the *Reference Manual on Scientific Evidence*.[9] The ABA has specialized sections that deal with science and technology. The ability to have *Daubert* hearings to get general causation decided early on in the case, and again to work with state judges in doing this, makes a big difference.

One of the most important things is I think judges are now alert for is fraud, particularly since the silicosis case and the difficulties in the Fen-Phen case, and the backward look we now have at the radiology in the asbestos case. I believe there is a very enterprising defense attorney who came up with the idea of comparing some of the plaintiffs in the silicosis case with plaintiffs in the asbestos cases and the numbers were astounding. When you get the same people in both cases, it does cause one to wonder. I think that caused Judge Jack in the Southern District of Texas to go off in the same direction Judge Rubin went years ago. Judge Jack did so on a broader scale in a scathing opinion. The fact that judges are now aware of the potential for fraud, I believe and I hope, will make it more difficult to complicate these cases with plaintiffs who are just free-loading off of the system.

All of this doesn't really help the asbestos litigation. As I have said before, I think we could wait long in our life times to see another case that has the perfect storm factors that the asbestos litigation brought together. Let's hope there isn't another one of those. But what is a good sign, I think, for all of us is that we've learned from the litigation. Thanks to the asbestos litigation, cases like breast implants, Vioxx, PPA, silicosis, and many others won't get stuck in the same tar pit, and we as members of the justice system can make the system work better.

Thank you very much.

9. (Fed. Judicial Ctr. ed., 2d. ed. 2000), *available at* http://air.fjc.gov/public/fjcweb.nsf/pages/16 (last visited Dec. 10, 2008).