

SOCIAL AND CULTURAL PERSPECTIVES: TRANSCRIPT OF PROFESSOR NEIL VIDMAR

Neil Vidmar*

PROFESSOR VIDMAR: I have a confession to make. With all the work that I have conducted on the jury system I really never gave much thought to the asbestos at all and it was the invitation to this conference that caused me to do some searching, along with Mirya Holman, my collaborator. Along the way I discovered, to my embarrassment, that I had forgotten that my colleague and long-time co-author, Valerie Hans, discussed from interviews with members of three juries that decided asbestos cases. Parts of those interviews are contained in her book, *Business on Trial*.¹ I will draw from her insights for this talk.

Our research for this conference builds upon the RAND study on asbestos litigation.² It has a very nice survey and discussion of jury trials. Mirya and I searched Lexus and Westlaw to compile profiles of jury trials occurring in the years 2001 and 2006. Asbestos cases tend to be high profile cases and they are likely to be reported, but we do not claim that our sample is comprehensive, but we believe it generally represents a pretty good sample. The tables set forth in our powerpoint presentation describe what we found.³ One case was filed in federal court but all the rest were in state courts.

In 2001 there were 58 jury trials that took place in 12 states, and 17 occurred in California.⁴ In 2006 the number was down to 34, and 21 of those were in California.⁵ In both time periods the majority of trials

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1. (Yale U. Press, 2000).
2. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION, (RAND Inst. for Civil Justice 2005).
3. *See infra* Slides 1-16.
4. *See infra* Slide 1.
5. *Id.*

involved mesothelioma.⁶ Similarly, the majority of trials involved a single plaintiff.⁷ The most frequent occupations of the plaintiffs were as mechanics and pipefitters, including former U.S. Navy sailors or employees.⁸ However, painters and drywall installers were also represented among the plaintiffs.⁹ An interesting group of plaintiffs with mesothelioma or other diseases were women, sometimes teenagers, who had had the chore of washing their father's work clothes.¹⁰

The defendants in the trials tended to be suppliers of asbestos-containing products.¹¹ In 2001 half of the cases involved a single defendant and the remainder involved multiple defendants.¹² In 2006 trials 15 of the 25 trials involved a single defendant.¹³

In 2001 the plaintiff win rate overall was 73% and in 2006 it was 62%, but these rates differed depending on whether the claim was mesothelioma, cancer or asbestosis.¹⁴ The average award in each trial in 2001 was \$2,294,720 and in 2006 the average trial award was \$7,534,238.¹⁵ However, mean awards in these cases can be very deceptive because there were often defendants who shared responsibility with the named plaintiff but were not part of the lawsuit. One of the slides provides an example from the *Sandell* case.¹⁶ The jury was asked to apportion the percent of responsibility for damages among 12 companies.¹⁷ The important issue arising from this insight is that because of setoffs from prior settlements and defendant companies that had gone bankrupt and were therefore judgment proof, plaintiffs received only a small percent of the damages assessed by the juries. We can provide only rough estimates of the actual awards by adjusting for the percent of defendant liability and the number of plaintiffs if there was more than one plaintiff. We were able to do these calculations for 19 cases from 2001 and 13 cases from 2006. Thus, a best estimate is that in 2001 the mean amount awarded per plaintiff was \$1,707,933 and for 2006 the figure was \$2,333,719.¹⁸ The net award calculation for 2006

6. *See infra* Slide 2.

7. *See infra* Slide 3.

8. *Id.*

9. *Id.*

10. *Id.*

11. *See infra* Slide 4.

12. *Id.*

13. *Id.*

14. *See infra* Slide 5.

15. *See infra* Slide 6.

16. *See infra* Slide 9.

17. *See infra* Slide 9.

18. *See infra* Slide 8.

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needs to be compared to the gross award of \$7,534,238.¹⁹ In short, as all experienced students of the legal system know, plaintiffs often receive a lesser damage award than that rendered by the jury.

We can gain indirect insights about the decisionmaking of the juries by looking at some of the details of the jury reports. One interesting finding was that contrary to some research indicating that juries are reluctant to award damages for loss of consortium, in asbestos cases juries were not so reluctant. In 2001 there were 12 awards to spouses that ranged from \$125,000 to \$3 million.²⁰ In 2006 there were four awards that ranged from \$250,000 to \$400,000.²¹ It would be nice to investigate why juries were willing to consider awards for loss of consortium in these cases. Perhaps the reason involves jury sympathy for spouses who had to nurse their partners through the final stages of a very unpleasant process of dying.

However, if juries were sympathetic to loss of consortium claims, they were less sympathetic to plaintiffs who were seen as perhaps contributing to their disease. In 2001 juries reduced the award of one plaintiff with mesothelioma by 20% and another by 50%.²² In 2006 a jury reduced the award of a mesothelioma plaintiff by 40%.²³ Since mesothelioma is a signature disease of asbestos exposure, and smoking, theoretically at least has no relation to that disease, it seems the jurors had a different view.

PROFESSOR FRANCIS E. MCGOVERN: There is medical evidence that if you smoke and are exposed to asbestos your rate goes up.

PROFESSOR VIDMAR: That is interesting and comports with other research. I mentioned that my colleague Valerie Hans had interviewed 28 jurors from three asbestos trials in 1989 and 1991. There were multiple plaintiffs and multiple defendants and the defendants were found liable in all of those cases.

One theme that came through in her interviews was the initial skepticism of the jurors toward the claims. A quotation in one of my slides sums it up:

Some lawyers were running around getting clients to sue companies who sold asbestos install asbestos and trying to make somewhat of a killing on it. We didn't have much sympathy for the plaintiffs because we figured this bordered on being an unethical procedure. The lawyers went and found

19. *See infra* Slide 6.

20. *See infra* Slide 7.

21. *Id.*

22. *See infra* Slide 10.

23. *Id.*

these people, [who] filed a grievance to get something out of it, because the lawyer is going to get about 40% or more of anything they get.²⁴

MODERATOR MYRNA RAEDER: Does she [Professor Hans] say how the jury knew that the lawyers were getting 40% and where they got the information that lawyers are running around town?

PROFESSOR VIDMAR: They bring it in from the outside. If somebody that has been involved on cases before they are making guesses. People know about contingency arrangements.

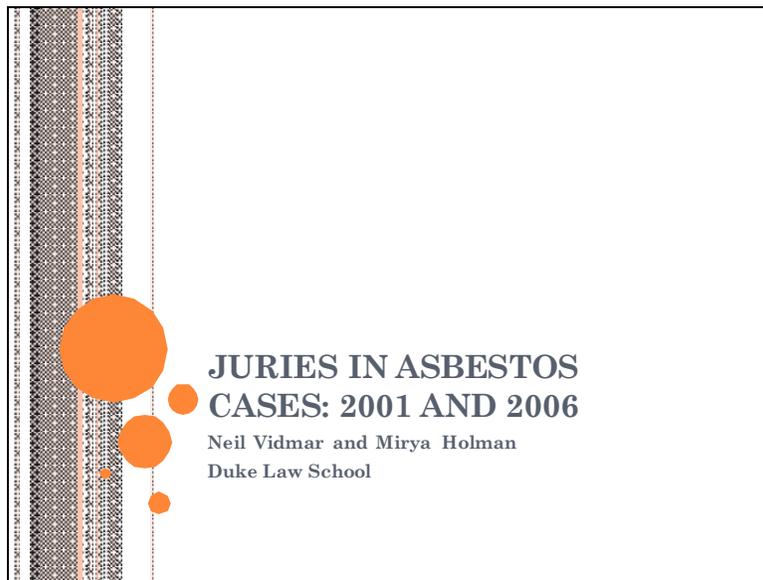
The final matter from Hans' interviews is that jurors did have higher expectations for corporations than for people in general.

24. *See infra* Slide 12.

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Slide 1

NUMBER AND PLACE OF JURY TRIALS	
∞ 2001: 58	∞ 2006: 34
? CA: 17	? CA: 21
? TX: 11	? TX: 4
? PA: 10	? NY: 2
? OH: 4	? FL: 2
? MD, NC: 3	? PA, IL, KY, VA, WA: 1
? IL: 2	
? DE, FL, MO, SC, VA, WI :1	

Slide 2

ILLNESS CLAIMS

∞2001

- Mesothelioma: 34
- Cancer: 12
- Asbestosis: 9
- Other: 2

∞2006

- Mesothelioma: 25
- Cancer: 2
- Asbestosis: 5
- Other: 2

Slide 3

NUMBER AND TYPE OF PLAINTIFFS AT TRIAL

∞2001:

- 42 Cases with a Single Plaintiff *
- 14 Cases with Multiple Plaintiffs
 - ∞ Most frequent occupations: Mechanics, Navy, boilermakers and operators, insulation installers, pipe fitters (Secondary from washing father's clothes= meso; 13 Ps = pleural disease from household exposure)

∞2006:

- 31 Cases with a Single Plaintiff
- 3 Cases with 5 Plaintiffs
 - ∞ Most frequent occupations: Navy mechanics and subsequent employees; painters; drywall installers
 - ∞*Husband and wife plaintiffs are counted as single plaintiffs

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NUMBER AND TYPE OF DEFENDANTS AT TRIAL

2001

- 28 Cases with a Single Defendant
- 29 Cases with Multiple Defendants
- Most common: AC&S; Exxon; Flexitallic Inc.; Harbison & Walker Co.; John Crane; USX Corp.; Weyerhaeuser Co.

2006

- 15 Cases with a Single Defendant
- 10 Cases with 2 Defendants
- Most common: Bondex; John Crane; Georgia -Pacific Corporation; Thorp Insulation

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PLAINTIFF WIN RATE

2001

- 73% Overall
 - Asbestosis (n=9) 100%
 - Cancer (n=12) 83%
 - Mesothelioma (n=34) 71%

2006

- 62%
 - Asbestosis (n=5) 66%
 - Cancer (n=2) 100%
 - Mesothelioma (n=25) 48%

Slide 6

MEAN AWARD WHEN PLAINTIFF PREVAILS

∩ 2001

‡ \$2,294,720

‡ Range: \$40,000 - \$35,200,000

∩ 2006

‡ \$7,534,238

‡ Range: \$300,000 - \$31,000,000

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JURY AWARDS OF LOSS OF CONSORTIUM

∩ 2001: 12 awards, mean award of \$466,80

‡ Range of awards: \$125,000 to \$3,000,000

∩ 2006: 4 awards, mean award of \$273,000

‡ Range of awards: \$250,000 to \$400,000

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MEAN ADJUSTED (D % LIABILITY) VERDICT *

- ⌘ 2001 (N= 19) (30%) \$1,707,933
- ⌘ 2006 (N= 13)(26%) \$2,333,719

* Based on available data



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APPORTIONING LIABILITY AMONG MULTIPLE DEFENDANTS

- ⌘ E.g. *Sindell*
- ⌘ For each person or product found by you to have caused Kelvin Sandell's mesothelioma, find the percentage cause by that defendant

⌘ Bondex International, Inc. and/or RPM, Inc.	9%
⌘ Carey Canada	15%
⌘ Celotex	3%
⌘ Certaineed Corporation	3%
⌘ Georgia-Pacific Corporation	9%
⌘ Johns Manville/Manville Corporation	15%
⌘ Kaiser Gypsum Company	9%
⌘ Kelly-Moore Paint Company	9%
⌘ National Gypsum Company	5%
⌘ The Flintkote Company	3%
⌘ Union Carbide Corporation	15%
⌘ United States Gypsum Company	5%



Slide 10

Plaintiff Win but Contributory Negligence for smoking

2001:

2 plaintiffs with meso 20% and 50%
6 plaintiffs: 25 %;50 %; 3.5%;30%;4 %;and 35%

2006:

1 plaintiff with meso: 40%
2 plaintiffs with cancer: 60% and 12.4%

Slide 11

JUROR INTERVIEWS FROM VALERIE HANS' BUSINESS ON TRIAL (2000)

- ⌘ 28 jurors from three asbestos trials (1989 -1991)
- ⌘ All three trials: Multiple plaintiffs and multiple defendants
- ⌘ Defendants found liable

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JUROR VIEWS

⌘ **Initial Skepticism about claims :**
"Some lawyers were running around getting clients to sue companies who sold asbestos and installed asbestos and were trying to make somewhat of a killing out of it. We didn't have very much sympathy for the plaintiffs because we figured this bordered on being an **unethical procedure**. These lawyers went and found these people, [who] filed a grievance to get something out of it, because the **lawyer is going to get about 40% or more of anything they get** " (C4-J3).

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PERSONAL RESPONSIBILITY

⌘ "I worked in a dental laboratory, and I've been exposed to acrylics. **But I don't feel as though I should sue the company** , because if I didn't like the smell or thought it was doing any harm to me **I could have quit** " (C4-J1).

Slide 14

HIGHER STANDARDS EXPECTED FOR CORPORATIONS

⌘: "Maybe a **little higher [standard of responsibility for the company]**, because of the fact that most big corporations have **research departments**, they have medical staffs, and all that to test their products and if they label it safe when they start making it, they should be more liable because if a person starts making something, it's just that one person and he has to rely on other information. The corporations have researchers and research departments and medical departments **that they should maybe know a little more than the average person**" (C26-J7).

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TRIAL EVIDENCE CHANGED INITIAL SKEPTICISM

⌘ "There was **a number of letters** that they read from one company to another and from people they'd actually hired to **investigate the dangers**, and the letters were presented as evidence. There was even **a report brought into evidence** from the United States Health Service back in the **early 1930s** telling them some of the dangers of asbestos. Maybe it wouldn't be common knowledge, but it certainly should be to an asbestos producer, that there were dangers involved **and they chose to suppress them**, I thought" (C22 -J5).

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JUROR RESPONSES SIMILAR TO JURIES IN OTHER CONTEXTS

