THE PUZZLE OF MASS TORTS:
A COMPARATIVE STUDY OF ASBESTOS LITIGATION

A DISSERTATION
SUBMITTED TO THE SCHOOL OF LAW
AND THE COMMITTEE ON GRADUATE STUDIES
OF STANFORD UNIVERSITY
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF THE SCIENCE OF LAW

Andrea Boggio
March 2003
ABSTRACT

Exposure to asbestos—a naturally occurring mineral fiber with remarkable insulating properties—may cause diseases such as asbestosis, lung cancer, pleural plaques, diffuse pleural thickening, and, in rare instances, mesothelioma. Asbestos exposure has resulted in several million cases of asbestos-related diseases (ARDs), especially among workers in industrialized countries. The research explores the compensation of ARD victims in England, Italy, and Belgium and contrasts these countries' experiences to the same in the United States. The findings are that asbestos litigation is growing in all the countries studied and that the policy solutions that the US legal system and the European legal systems have implemented are remarkably different. While the compensation to the US asbestos victims has been provided under the paradigm of personal injury litigation, public insurance schemes have been the primary, although not exclusive, source of compensation for European claimants. Although such differences reflect the differences in the legal tools and in the institutional history of the two legal cultures, the litigation actors' preferences better explain the different developments. In fact, European lawyers have framed asbestos claims as occupational diseases thus seeking to expand workers' rights and social benefits rather than aiming to recover damages for personal injury cases occurred to their clients.
TABLE OF CONTENTS

PREFACE .................................................................................................................1

UNFOLDING THE PUZZLE: CONTEXT, QUESTIONS AND METHODS ..................3
1. THE POLICY DEBATE IN THE UNITED STATES ............................................3
2. THE COMPARATIVE PERSPECTIVE OF ASBESTOS LITIGATION: SEARCHING FOR THE RELEVANT QUESTIONS ............................................6
3. THE FACTUAL CONTEXT ..............................................................................9
4. METHODOLOGICAL CHOICES .................................................................10
   A) Selecting the Material ........................................................................11
   B) Data Collection ..................................................................................12
   C) Organizing the Material ....................................................................14

ENGLAND ..............................................................................................................17

PROLOGUE ..........................................................................................................17
1. OVERVIEW OF THE OPTIONS AVAILABLE TO SEEK COMPENSATION ........18
   A) Social Benefits and Occupational Exposure .......................................20
      Scope of the Scheme and Limits to Compensation ................................20
      Process ...................................................................................................22
      Retaining the Tort System? ...................................................................24
      Finance: Who Pays? ............................................................................25
   B) The Non-Fault Scheme (The Pneumoconiosis Etc. (Workers’ Compensation) Act 1976) ..............................................................................26
      Scope of the Scheme and Limits to Compensation ................................26
      Process ...................................................................................................27
      Retaining the Tort System? ...................................................................28
      Finance: Who Pays? ............................................................................29
   C) Using the Employer or the Producer ......................................................30
      Scope of the Litigation and Limits to Compensation ..............................30
      Process ...................................................................................................30
      Finance: Who Pays? ............................................................................30
   D) Environmental Exposure in Non-Occupational Setting ........................31

2. A CLOSER LOOK AT PERSONAL INJURY LITIGATION ...............................33
   A) Substantive Issues ..............................................................................34
      The Theories of Law ...........................................................................34
      Damages ..............................................................................................35
      Multiple Defendants and Apportionment of Liability .............................40
   B) Addres ..............................................................................................42
      Attorneys ............................................................................................44
      Supporting Groups ................................................................................45
      Experts ................................................................................................46
   C) Aggregation ........................................................................................46
      An Example of Asbestos Group Litigation: The South African Asbestos Litigation (Elahi v. Cape) .................................................................47
   D) Settlement .........................................................................................47
   E) ATTORNEYS’ FEES AND LITIGATION EXPENSES ..............................52
      Coordinating Lawyers and Funding Strategies .......................................52
      Liability for Costs ..............................................................................55
      Attorneys’ Fees ..................................................................................55

ITALY ....................................................................................................................57

PROLOGUE ..........................................................................................................57
1. OVERVIEW OF THE OPTIONS AVAILABLE TO SEEK COMPENSATION

A) Social Benefits and Occupational Exposure
   - Scope of the Scheme and Limits to Compensation
   - Process
   - Financing: Who Pays?

B) Mandatory Public Insurance Scheme for Occupational Diseases and Occupational Exposure
   - Scope of the Scheme and Limits to Compensation
   - Process
   - Financing: Who Pays?

C) suing the Employer
   - Scope of the Litigation and Limits to Compensation
   - Process
   - Financing: Who Pays?

D) Environmental Exposure in Non-Occupational Setting

2. A CLOSER LOOK TO PERSONAL INJURY LITIGATION

A) Indemnity Issue
   - Theorists of Law
   - Damages
   - Multiple Defendants and Apportionment of Liability

B) Action
   - Attorneys
   - Prosecutors
   - The Experience of the Prosecutors of Tort
   - Supporting Groups
   - Expert

C) Aggregation
   - Civil Trials
   - Criminal Trials
   - Settlement

D) Attorney Fees and Litigation Expenses
   - Contemporaneous Lawyers and Funding Strategies
   - Liability for Costs

3. BELGIUM

PROLOGUE

1. OVERVIEW OF THE OPTIONS AVAILABLE TO SEEK COMPENSATION

A) Social Benefits and Occupational Exposure
   - Scope of the Scheme and Limits to Compensation
   - Process
   - Financing: Who Pays?

B) Personal Injury Litigation for Non-Occupational AGD
   - Scope of the Scheme and Limits to Compensation
   - Process
   - Financing: Who Pays?

2. A CLOSER LOOK TO PERSONAL INJURY LITIGATION

A) The Legal System and the Absence of Personal Injury Litigation
   - Tort Law and Litigation
   - Criminal Law and Litigation
   - Factors that Contributed to Creating an Hostile Legal Environment

C) Overturning Legal Hostility

ANALYSIS
1. GROWTH IN THE NUMBER OF ABD CLAIM .............................................................. 401
2. COMPENSATION FOR PUBLIC INSURANCE SCHEMES FOR OCCUPATIONAL DISEASES ................................................................. 102
3. COMPENSATION FROM LITIGATION IN COURT ........................................... 107
   A) The Relationship between Public Insurance Schemes for Occupational Injuries and Litigation in Courts .................................................. 108
   B) Theory of Law .................................................................................................. 109
   C) Liability, Aggregation, and Settlement ........................................................... 112
   D) Funding the Litigation .................................................................................... 116
RECOMPOSING THE PUZZLE ............................................................................. 119
   1. CONVERGENCE TOWARDS “TOTAL JUSTICE” AND DIFFERENT CLAIMING PATHS .......................................................... 119
      A) Growing Claim consciousness: Consumers’ Protection vs. Workers’ Protection ................................................................. 119
      B) Dissatisfaction with Public Insurance Schemes .................................................................................................................. 121
   C) Different Claiming Strategies: Regulating Workers’ Compensation Benefits vs. Litigating Personal Injury Claims ...... 121
2. INHERENT RESOLUTION PROCESSES AND POLICY PREFERENCES: ADMINISTRATIVE SCHEMES V. LITIGATION ........................................................................................................ 123