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Diagnostic Abuse in Silica Litigation

By 2001, growing numbers of workers were claiming they had suffered lung damage from inhaling silica dust on the job—so many, in fact, that silica began to be feared as the next asbestos. In 2003, more than 10,000 claims were aggregated in the Southern District of Texas before U.S. District Court Judge Janis Graham Jack. The proceedings in that courtroom uncovered gross abuses in the diagnosis of injuries, and Judge Jack's scathing opinion, published in 2005, was an important contributor to the collapse of the litigation.

A recent RAND report presents analysis of the factors that led to the exposure of these abuses and considers what can be learned from the experience that could improve the performance of the civil justice system in handling future mass litigation. The research was based on knowledge gained in previous RAND research on asbestos, data on silica claims from a major defendant in the litigation, interviews with more than 40 people involved in the case or in similar mass torts, and a review of the proceedings before Judge Jack.

Exposure of Abuse

Researchers identified actions by the defense attorneys, decisions by the judge, and special features of the litigation itself that contributed to the exposure of abuse.

Actions by the Defense

Aggregated cases. Defendants succeeded in removing cases filed in Mississippi and Texas state courts to federal court, where they could be brought together before a single judge. This strategy was contested by some defense firms. They feared that removing so many cases to a single court was risky and that the discovery process could give plaintiffs' attorneys ideas for bringing other cases. As it turned out, aggregating the cases allowed defendants and the judge to see that a small number of doctors accounted for nearly all the diagnoses.

Abstract

This brief analyzes the factors that led to the exposure of widespread abuse in the diagnoses that were the basis of thousands of silica injury claims in the Texas courtroom of U.S. District Court Judge Janis Graham Jack. Drawing lessons from this experience, the authors suggest ways in which the civil justice system could be changed to make it easier to uncover abusive medical diagnostic practices in mass personal-injury litigation in the future.

Challenged diagnoses. The defense attorneys challenged the diagnoses, a strategy that was also contentious. Defense attorneys who were opposed to the confrontational tactics of the lead defense firm made a case for settling the claims. They argued that challenging them could add to legal costs or even to reprisals by plaintiffs' attorneys.

Creation of a large database. The leading defense firm built detailed databases on a large number of silica and asbestos claims, including claims that were not part of the litigation before Judge Jack. This expensive undertaking was made possible by two conditions: advances in computer software and the fact that the lead defense firm represented many defendants and could spread the costs of the database among them. These data ultimately revealed that large numbers of silica plaintiffs had previously filed asbestos claims.

Procedural Decisions by Judge Jack

Several key decisions by Judge Jack were highly unusual in such personal-injury mass tort cases.

Early disclosure of diagnoses. Early in the proceedings, Judge Jack required a fact sheet for every plaintiff, which contained all the pertinent medical and diagnostic information. This is typically requested during the discovery phase, and, if the case settles before then, it is never provided.

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Deposition of doctors. Judge Jack also allowed the diagnosing doctors to be deposed by defense attorneys in her presence. Leading attorneys interviewed for the study indicated that the latitude to question doctors across all the plaintiffs in front of a judge, who cross-examined the witnesses herself, was unprecedented.

This process allowed the judge to uncover many irregularities in diagnostic practices. One small Mississippi screening company that had no medical director processed diagnoses for 6,757 plaintiffs, about two-thirds of whom had previously been diagnosed with asbestosis. The law firms paid these companies only if they returned a positive diagnosis and the potential plaintiff signed with the firm. Twelve doctors diagnosed all 9,032 plaintiffs based strictly on the evidence of x-rays. Virtually all of the diagnoses failed to satisfy the minimum medically acceptable criteria for the diagnosis of silicosis: They failed to adequately document exposure to silica dust with an appropriate latency period and failed to rule out other explanations for x-ray evidence or lung distress.

Active case management. Judge Jack also actively managed the case. According to some of those interviewed, it is not uncommon for judges to allow a case to languish for a few years in the hope that the parties will settle. Judge Jack, however, called for early disclosure of diagnoses, required depositions of doctors in her presence, and held a monthly status conference with opposing counsel.

Unique Characteristics of the Case

Several features of the litigation itself contributed to the discovery of diagnostic abuses:

- a large number of cases and the preexistence of litigation in a closely related area (asbestos)
- the absence of a signature, terminal, silica-related disease, which reduced defendant concerns about cases coming to trial and about plaintiffs' attorneys' threats to target defendants who did not settle.

Policy Implications

Although this case demonstrates that the tort system is capable of discovering abusive medical diagnostic practices, it also raises questions about why the system did not uncover such abuses in the largest mass tort to date: asbestos litigation. The authors identify several changes in legal procedure and practice that have the potential to increase the likelihood that

abusive diagnostic practices will be uncovered in future mass personal-injury litigation. The pros and cons of the changes warrant further examination and should be evaluated considering experiences in other types of large-scale personal-injury litigation. In particular, it is important that the impact of potential changes on the ability of truly injured parties to pursue remedies in the civil justice system be considered.

Improve Judicial Practices and Procedures

The silica case suggests that a number of judicial processes could be adjusted to make it easier to detect such fraud:

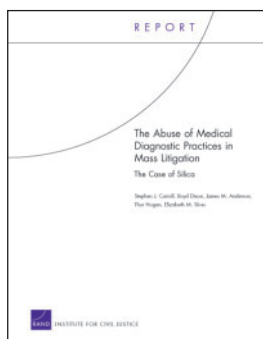
- Require diagnosis to be provided with relevant medical records at time of case filing.
- Require parties to present evidence of appropriate diagnostic practices early on in the case.
- Provide a set of recommended practices for mass personal-injury cases to federal judges.
- Enhance mechanisms for aggregating information across claims for pretrial purposes.

Consider More-Serious Sanctions for the Plaintiffs' Bar

Judge Jack imposed a small fine on one law firm for “unreasonably and vexatiously” multiplying the proceedings, but she did not take advantage of the authority under Rule 11 of the Federal Rules of Civil Procedure to impose fines that deter improper attorney conduct. The study proposes that judges routinely consider fines designed to deter and recommends strengthening Rule 11 for that purpose.

Pay Closer Attention to the Performance of the Defense Bar

Some interviewed for this study reported that some defense attorneys churn a claim to generate fees, with the ultimate goal of settling without any concerted effort to challenge suspect diagnoses. It is difficult to address such practices, since they are difficult to observe or substantiate. Given the importance of the issue, however, policymakers and practitioners should seriously consider what types of responses might be effective. One such strategy might be to develop a way to chronicle and evaluate defense tactics in mass personal-injury litigation. The results could motivate greater attention to ethics issues in law schools and investigations by professional review panels. ■



This research brief describes work done for the RAND Institute for Civil Justice documented in *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica*, by Stephen J. Carroll, Lloyd Dixon, James M. Anderson, Thor Hogan, and Elizabeth M. Sloss, TR-774-ICJ (available at http://www.rand.org/pubs/technical_reports/TR774/), 2009, 82 pp., \$23, ISBN: 978-0-8330-4912-4. This research brief was written by Laura Zakaras. The RAND Corporation is a nonprofit research organization providing objective analysis and effective solutions that address the challenges facing the public and private sectors around the world. RAND's publications do not necessarily reflect the opinions of its research clients and sponsors. RAND® is a registered trademark.

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