

A PSYCHOLOGICAL PERSPECTIVE ON THE SETTLEMENT OF MASS TORT CLAIMS

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I

INTRODUCTION

The motives for the development of mass tort claims resolution facilities are laudatory. The speakers at the conference that preceded the publication of this issue of *Law and Contemporary Problems*¹ noted the desire to settle claims quickly and fairly, and to increase the amount of awards by decreasing litigation costs. Although these motives seem strongly pro-client, it is striking that the injured parties themselves are not represented in this symposium, either directly or indirectly. They are not represented directly in that the authors are all attorneys who deal with mass torts. They are not represented indirectly in that no systematic evidence about the views of the injured parties themselves is introduced. Hence, we do not know what the injured parties want from the legal system, how they feel about traditional methods of handling their claims, and how they evaluate the new facilities that have been developed to deal with their grievances.

While we do not have direct evidence about how injured parties feel, we do have suggestions from their lawyers about how to deal better with the concerns of their clients. The lawyers in favor of claims facilities assume that their clients are primarily interested in receiving large and fair settlements, and in having their cases resolved quickly. These suggestions are consistent with lawyers' views about what clients generally want from the legal system: they want to win. Lawyers typically believe that clients evaluate their legal experiences by the size of the outcome upon settlement and the speed with which the outcome is delivered; they do not think clients are concerned with how the problems are solved or how the favorable outcomes are reached. Lawyers regard formal trials, settlement conferences, negotiations, and the use of claims facilities as similarly satisfying to clients if they lead to favorable settlements. Because lawyers regard the psychology of client satisfaction as self-evident, they typically do not seek information about claimant concerns.

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1. A Conference on Mass Settlement of Mass Torts, Research Triangle Park, North Carolina, April 28-29, 1989 (presented by Duke University School of Law and, its affiliate, the Private Adjudication Center, Inc.).

This symposium is typical; no effort is made to involve claimants in the design of claims facility procedures or systematically to assess claimant reactions to experiences in such facilities.

We need to look at empirical studies of clients to determine whether lawyers have an accurate sense of their clients' concerns in litigation. One important recent study is the 1988 RAND study of the New Jersey Automobile Arbitration Program,² which mandates arbitration of automobile injury lawsuits in several counties of New Jersey. The principal RAND study examined the resolution of 1,000 cases under this procedure. A substudy of participant evaluations is based on 300 interviews with litigants and 400 interviews with lawyers.³ A 1989 study, also conducted by RAND, compared tort litigants' views of trials, court-annexed arbitration, and judicial settlement conferences.⁴ This study is based on interviews with 286 tort litigants who had undergone one of four procedures: bargaining, trial, court-annexed arbitration, or judicial settlement conference.

If the representations of client concerns outlined by the lawyers in this symposium are true, the issues of delay, award amount, and award fairness should be central to litigants' evaluations of the claims resolution experience. The two RAND studies suggest, however, that other considerations more significantly affect claimant satisfaction with the litigation experience and the acceptance of the outcome. These other considerations should be deemed equally significant in the design and operation of claims resolution facilities.

II

LITIGANT CONCERNS

The primary conclusion of the two RAND studies is that very little about litigant reactions can be understood by considering only the issues of delay, outcome favorability, and outcome fairness. Instead, we must consider the primary determinants of litigant reactions to the claiming experience: perceptions of the way in which cases are settled. Litigants want their cases to be settled in dignified, careful, and unbiased ways.⁵

A. Perceptions of Justice and Satisfaction

What are the implications of these findings? The 1989 RAND study suggests that "improvements in [the] perceived justice and satisfaction [of legal procedures] are more likely to come from changes in the tone of the judicial process than from innovations designed to cut costs or reduce

2. Robert MacCoun, et al, *Alternative Adjudication: An Evaluation of the New Jersey Automobile Program* (RAND, 1988) ("The MacCoun Study").

3. *Id.*

4. E. Allan Lind, et al, *The Perception of Justice: Tort Litigant's Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (RAND, 1989) ("The Lind Study").

5. *Id.* at ix; MacCoun, et al, *The MacCoun Study* at 73 (cited in note 2) (noting that "disputants want a hearing [that is] dignified, respectful, and impartial").

delay.”⁶ While claims resolution facilities may handle cases more efficiently than the more traditional processes, it is not clear that they are responsive to these basic desires of the injured parties.⁷

What do disputants mean when they say they want a dignified procedure for resolving their problems?

The studies outlined above suggest that disputants generally are very interested in participating in the settlement of their cases, presenting their views about the problems and any proposed solutions, and having decisionmakers consider their views. The 1989 study found that litigants' perceptions about their control over the procedure were strongly related to satisfaction ($r = .40, p < .05$).⁸ The earlier study, which differentiated between having the opportunity to state one's case and influencing the decisions made, found that both aspects of participation were linked to satisfaction ($r = .30, p < .001$ and $r = .34, p < .001$, respectively).

Disputants are also concerned with the information the experiences convey to them about their status as grievants. As recent writers have emphasized, people feel entitled to pursue their claims for compensation, believing that they have a right to receive “recompense for injuries and loss.”⁹ Hence, people expect to be treated with dignity and respect, that is, as citizens who morally deserve the opportunity to seek compensation in litigation.

The 1989 study also found that the aspects of procedure associated with the dignity conveyed to litigants are tied to the litigants' evaluations of their experiences. These aspects include the perceived dignity of the procedure ($r = .37, p < .05$), its lack of bias ($r = .51, p < .001$), the comfort litigants felt ($r = .32, p < .05$), and the care they felt was exercised in making decisions ($r = .31, p < .05$). The 1988 study similarly found that satisfaction was linked to lack of bias ($r = .25, p < .001$), and to having sufficient time for the hearing ($r = .21, p < .01$). It also found that people were more likely to accept decisions from a hearing if they thought it unbiased ($r = .24, p < .001$) and adequate in length ($r = .16, p < .05$).

6. Lind, et al, *The Lind Study* at 5 (cited in note 4).

7. Although the two studies described deal directly with legal claims, their conclusions are not limited to that setting. Research exploring a broader range of peoples' experiences with legal authorities yields findings consistent with the conclusions suggested here. E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 61-127 (Plenum, 1988).

8. The statistic “ r ” reflects the degree to which two variables are related. It is called a correlation coefficient. The value “0.00” reflects no association, whereas “1.00” indicates that one variable completely explains another. Hence, higher numbers reflect a stronger association between two variables. The strength of a particular r is indexed by the likelihood of observing the correlation found by chance if, in fact, no relationship exists. For example, if the true relationship between judgments of control and satisfaction is 0.00 in a large group of people, and we draw many small samples of those people and look at the relationship between control and satisfaction among the people in those samples, we will observe a correlation of 0.40 less than 5 times out of 100. Hence, having found a correlation of 0.40 in the one sample of concern here, the likelihood that here is no relationship among the two variables is less than 5%. The higher the correlation, the less likely it is that it will be found by chance if, in fact, no relationship actually exists. Significance at the $p < .01$ level reflects less than a 1 in 100 chance, while significance at the $p < .001$ level reflects less than a 1 in 1,000 chance.

9. See, for example, Lawrence Friedman, *Total Justice* (Russell Sage, 1985).

The 1988 study constructed an overall treatment scale reflecting the non-outcome aspects of the litigation experience—participation, comfort, dignity, ethical and respectful treatment, and thorough consideration of the evidence—and found that the scale was highly related to both satisfaction ($r = .47, p < .001$) and the willingness to accept awards ($r = .47, p < .001$).

B. Issues of Delay and Outcome Favorability

While not the primary issues, issues of delay and award amount influence litigants' overall satisfaction with the litigation experience. In examining the impact of delay on litigant satisfaction with the outcome of litigation, the 1989 study found that the amount of time required to settle a case is unrelated to satisfaction ($r = .06$, n.s.). When subjective assessments of the "reasonableness" of the time involved are substituted for objective measures, however, then a small relationship between delay and satisfaction is found ($r = .24, p < .05$). Yet, the influence of delay on satisfaction is minor at best.

Both studies explored the relationship between the amount awarded and satisfaction, and found that disputants who receive larger awards are more satisfied (1989 study, $r = .32, p < .05$; 1988 study, $r = .25, p < .01$). The earlier study also found that higher awards are more likely to be accepted ($r = .30, p < .001$). Thus, as lawyers suspect, people are more likely to be satisfied with, and to accept, more favorable outcomes.

Finally, the 1988 study dealt indirectly with the question of outcome fairness. Litigants were asked whether their settlement "splits the difference among parties" (a mode of settlement known to produce settlements that disputants view as unfair). The study found that "unfair" outcomes reached in this way decreased satisfaction ($r = .38, p < .001$) and willingness to accept the decision ($r = .28, p < .001$). Hence, lawyers are again correct in thinking that people value fair settlements.

In sum, the results of the two studies support lawyers' beliefs that disputants want favorable outcomes. The studies also suggest that delay causes dissatisfaction, although the relationship is weaker. To the extent that claims resolution facilities can deliver these aspects of justice to mass tort litigants, the litigants will feel more satisfied with the outcomes of their cases. Both concerns are minor, however, compared to the issues related to the litigants' perceptions of treatment raised earlier.

III

MASS TORT CLAIMS

Although the two RAND studies do not directly examine the handling of mass tort claims, a recent study that does suggests support for the basic proposition advanced here. In 1990, Tom Durkin conducted a study that included in-depth interviews with asbestos victims who already were involved

in the civil justice systems of the United States and the United Kingdom.¹⁰ Durkin found that American victims repeatedly expressed a preference for adjudication. This preference was distinct from a desire for compensation, however. It stemmed from a desire to face the asbestos companies in court where the litigants could present evidence about their harm and the court could make official findings of wrongdoing. Durkin suggests that, if given the option of equal settlements, one reached quickly through arbitration and the other delayed several years by trial, many victims would nevertheless choose trials.

An important difference between American and British victims is that British victims almost never have trials. For example, in the case of asbestos, British rules and precedent have settled the issue of workplace liability and causation, so, to recover an award, a victim must only show that he or she has an asbestos disease and list his or her employers. From that point, a process that is faster than the American system, but from which victims are largely excluded, produces a "fairer" settlement outcome, in that awards reflect actual exposure to risk and injury sustained. Victims have little personal contact with their lawyers and few discussions with them about legal strategy. Durkin's interviews suggested that this exclusion led to substantial dissatisfaction with the litigation experience, in spite of the comparatively swift delivery of reasonable settlements.

IV

IMPLICATIONS

The difference between lawyers and litigants is that lawyers think litigants are primarily concerned with the outcomes they receive, while litigants actually are primarily concerned with procedural issues.¹¹ Settlement conferences provide an example of the implications of these differing perspectives. In such conferences, the lawyers, and sometimes the judge, meet to discuss and settle cases. Clients typically are not present at these conferences and remain uninvolved in discussions and/or negotiations about case settlements. When lawyers emerge from the conferences, they present "good" settlements to their clients and assume that the favorability of the settlements will ensure client satisfaction.

The findings discussed above suggest the contrary, however. Although lawyers are partly correct in believing that clients better receive more favorable settlements, they hold a fundamentally flawed view of what claimants want and, consequently, fail to deal with their clients' non-outcome related concerns. Non-outcome concerns are central to the impact of legal experiences on subsequent respect of the legal system and obedience of the law. These larger system level concerns are primarily responsive to

10. Tom Durkin, *The Settlement of Asbestos Claims in the United States and United Kingdom* (Am Bar Found Working Paper, 1990).

11. For a more general review of the literature on procedure, see Lind & Tyler, *The Social Psychology of Procedural Justice* (cited in note 7).

procedural concerns and only minimally related to issues of delay and outcome favorability.¹²

This symposium on claims resolution facilities reflects a continuing failure to deal directly with client concerns. Clients have not been involved in designing the facilities, and surveys of client satisfaction have not been central to efforts to determine the facilities' effectiveness. Instead, the facilities reflect lawyers' views about the concerns of their clients. Essentially claims resolution facilities represent a better form of settlement conference. If viewed from the perspective of claimant psychology, however, claims resolution facilities have the same problems as settlement conferences.

If facility planners take client concerns more seriously, the procedures used to resolve claims will involve greater direct client participation and control over case resolution. Examples of such a procedure include settlement processes in which claimants can discuss their injuries and needs with facilities' personnel and/or choose how the facilities will make decisions about claims (that is, pick the procedure used to resolve their case).

A primary message that emerges from research on the psychology of claimants is that the claimants value the opportunity to express their views to third parties. Ironically, while such opportunities lead to greater satisfaction, they also exacerbate the delays that claims resolution facilities have been designed to minimize. The studies discussed, however, suggest that suffering delays to the end of having one's day in court often leads to a more satisfactory claiming experience than does a swift procedure in which litigants are minimally involved.

Psychological studies of claimants also raise interesting questions about further streamlining the evaluation of claims through the use of procedures such as regression equations.¹³ Such procedures use the settlements reached by a few early claimants to establish the worth of a large number of subsequent claims. The use of regression equations allows many claims to be handled quickly and cheaply, swiftly dispensing compensation to many injured parties. From a psychological perspective, the question is how satisfying such a procedure is to claimants. While injured parties quickly receive compensation, they are denied the opportunity for individualized attention from the third party. Of course, before applying the regression formulas to establish damages, claims interviewers can give the claimants such attention while collecting information about the claimants' injuries. There is, however, a fundamental dilemma. To the extent that such interviews take on the characteristics of informal dispute resolution procedures, with expert third parties listening to the presentation of evidence, the claims resolution facilities lose some of their efficiency and cost-saving characteristics.

In summary, while claims resolution facilities have been developed to enhance the administration of justice in mass tort situations, their design has

12. See generally Tom R. Tyler, *Why People Obey the Law* 115-57 (Yale U Press, 1990).

13. See generally Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, 53 L & Contemp Probs 137 (Autumn, 1990).

not been based on an understanding of what claimants want from legal procedures. Consequently, many elements of subjective justice are either inadequately represented or are not represented at all. More careful attention to existing psychological research on claimants' reactions to legal procedures could lead to substantial gains in both satisfaction with the disposition of mass tort cases and the acceptance of decisions resolving mass tort claims.