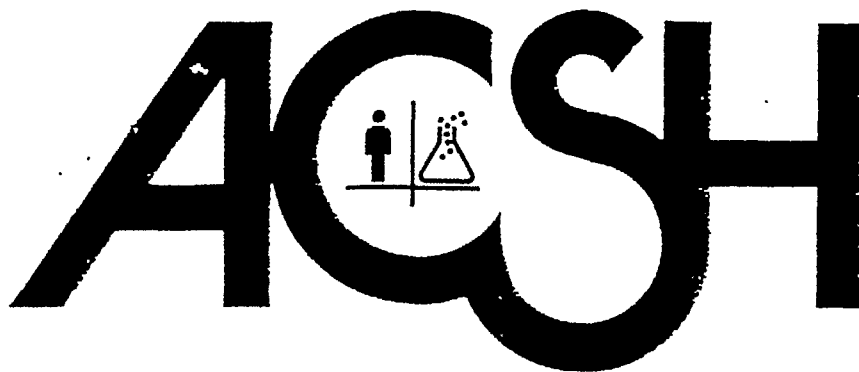




NEWS & VIEWS

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A nonprofit tax exempt educational association promoting scientifically balanced evaluations of chemicals, the environment and human health.

ENVIRONMENTAL LITIGATION-A NEW BILLION DOLLAR BABY

Jack
by Mary Katherine Hayes
and
Elizabeth M. Whelan

A jury has recently awarded Richard Hogard, 40 years old, \$1.2 million in general damages for injuries he suffered in a decade of working with asbestos as an insulator at the Long Beach Naval Shipyard. The jury decided that his problems were caused by asbestosis, a condition which causes scarring of the lungs, from inhaling asbestos fibers while on the job. The judgment was made against Johns Manville Corporation of Denver and Raybestos Inc. of Trumbull, Conn., two manufacturers of asbestos.

The case sets a troublesome precedent for future asbestos trials, and indeed other environmental litigation because the award was not made on a purely scientific basis. In the Hogard case the plaintiff, although he did show signs of scarring in his lungs, also smoked heavily for 25 years. In addition, Hogard suffered from chronic bronchitis, a known smoking-related condition, and had previously developed pneumonia, which could easily account for the lung tissue scars.

Even if the presence of asbestosis could be clearly documented in this case, scientific research has demonstrated that smoking aggravates certain asbestos related conditions. Furthermore, asbestos workers who smoke run a significantly higher risk of death from asbestosis and even more profoundly, lung cancer, than their nonsmoking counterparts.

Nevertheless, the jury in this California State Court case voted nine to three in favor of Mr. Hogard. The jury's reaction could be indicative of a growing attitude we have toward human health in general. Today, our society with its almost desperate search for causes for human disease is using litigation to pin the blame on "environmental" factors, particularly if they are associated with



The Love Canal area is the subject of a multibillion dollar lawsuit

Photography Unit Division of Laboratories
and Research New York State
Department of Health Empire State
Plaza Albany, N.Y.

Industry and technology. The court dockets are increasingly crowded by numerous suits involving the alleged relationship between products of our modern society and human health. While the specific decisions of these legal battles differ, "environmental" factors can be judged guilty without the benefit of scientific fact and the long range implication to the consumer frequently is the same: higher prices, decreased product availability, and declining innovation due to hampered research and development.

Health related litigation has become a way of life in the U.S. It is becoming increasingly difficult to pick up a newspaper and not read about some party suing a manufacturer for damages such as birth defects, miscarriages or cancer which are claimed to result from exposure to a manufacturer's product or its contaminants. More often than not, chemicals are blamed for the misfortune.

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ACSH NEWS & VIEWS

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ACSH TALKS WITH CONGRESSMAN JAMES G. MARTIN

Elected to the House of Representatives in 1972, Congressman James G. Martin represents North Carolina's 9th Congressional District, which includes the city of Charlotte. Before his election, Mr. Martin earned his doctorate in organic chemistry from Princeton University and taught for 12 years at Davidson College near Charlotte. In the House, Congressman Martin serves on the Ways and Means Subcommittee on Health.

ACSH:

YOU HAVE A PH.D. IN CHEMISTRY, A BACKGROUND THAT CONTRASTS SHARPLY WITH THE CAREERS OF MOST OTHER CONGRESSMEN. DO SCIENTISTS TURNED POLITICIANS APPROACH PROBLEMS DIFFERENTLY THAN OTHER CONGRESSMEN?

MARTIN:

Well, differently in the sense of having a different perspective on the meaning of evidence and a little better understanding of how the scientific process works. For example, when we get into a battle every year over the National Science Foundation grant program, the fellows in Congress from a science background are part of a little cluster that defends basic research by pointing out that it is the key to every scientific breakthrough you have any likelihood of achieving.

ACSH:

WHAT ABOUT THE FUNDING OF APPLIED RESEARCH?

MARTIN:

If there is a need for applied research, it can be financed by the private sector who will get a return on the patent rights.

If there is a practical application of the research, government shouldn't have to pay for it. The person who benefits should be paying for it. The federal government should fund only the basic research private industry is not likely to pursue.

ACSH:

HR3778 IS THE BILL YOU PROPOSED TO REPLACE THE DELANEY CLAUSE. WHY DO YOU FEEL THE CLAUSE SHOULD BE MODIFIED?

MARTIN:

It's obsolete. It was written 22 years ago, at a time when our analytical chemists were assuring us that our food supply was pure. Then they could detect three parts per million and assured everybody there was absolutely nothing there. Therefore, this absolute zero risk concept was put into law

generally, because not so much was known about the causes of cancer.

Today, we know that there are many chemicals — both natural and artificial — in the food supply in very small amounts because we can detect parts per billion, and in some cases parts per trillion, of pesticide residue.

Further, we've seen that in the intervening years, people who breed sensitive rats and then feed them excessive overdoses of some near lethal dose of a chemical, have found ways to refine their art. They have forced an oncogenic potential in a test animal that isn't there under normal circumstances. I'm concerned that what they're doing is not really showing a weak carcinogenic effect of the chemicals they're feeding these animals. What they are doing is so overloading the defense mechanism of the animal that little kidney function remains. As a result, we're observing not the carcinogenic potential, but the biological dysfunction either of the blood, kidney function or the DNA repair mechanism.

ACSH:

IN HR3778 YOU ALLUDE TO AN EVALUATION OF THE BENEFITS DERIVED FROM AN ADDITIVE AND RECOMMEND THAT THEY BE COMPARED TO THE RISKS BEFORE A REGULATORY DECISION IS MADE. THEORETICALLY, THAT SOUNDS GREAT, BUT AREN'T THERE DEFINITE PROBLEMS WITH THE METHODOLOGY FOR EVALUATING BENEFITS?

MARTIN:

In the first place, there are sometimes circumstances where the benefits are hard to quantify. And, at other times, even if you can quantify the benefits, the units are not the same as the morbidity statistics of cancer that may or may not be related.

But, to me, the difficulties are not nearly as bad as completely ignoring the benefits. At the present time, regardless of what you know about the benefits, they cannot be taken into account under the Delaney Clause. The benefits have to be ignored altogether.

In the case of saccharin, for example, there are a lot of different types of health risks you should take into account — increased risk to people who are diabetic, have hypertension, have high blood pressure, or hyperglycemia. Clearly, there are a number of conditions whose symptoms can be relieved by the rise of artificial sweeteners. So, clearly there are a lot of health benefits, but they are difficult to quantify.

ACSH:

ARE DIRECT MEDICAL AND NUTRITIONAL BENEFITS THE ONLY FACTORS THAT SHOULD BE WEIGHED AGAINST HEALTH RISKS?

chemicals that caused his early death.

CIGARETTES — There have been a dozen cases tried so far in attempts to seek damages against the cigarette manufacturers for the health problems related to smoking. Oddly enough, of all cases mentioned, existing scientific evidence provides exceptionally strong support for a causal relationship between cigarettes and a variety of illnesses. Nevertheless, no case thus far has been successful in demonstrating this in a court of law. There are several problems. For one, the various brands of cigarettes a person may have smoked over the years make it difficult to pin the blame on one manufacturer. (This was not the case with DES litigation, where suits were settled in favor of the daughters whose mothers had used the drug during pregnancy despite a failure to determine which specific DES manufacturer was involved.) Also the warning that appears on the side of cigarette packages implies that the smoker assumes the risk to health when he buys the tobacco product. This is obviously not a valid point for someone who smoked during the pre-label years and stopped once the health effects were reported.

It might seem that scientists and lawyers have irreconcilable differences as far as product liability litigation is concerned. It is true that both professionals look at the same problem from entirely different points of view. Scientists demand fact. Lawyers, on the other hand, seek to establish reasonable probability that an illness can occur given certain medical evidence. For every lawyer arguing a case on one side, there is another lawyer equally determined to prove an opposing viewpoint. When asked to define "reasonable", the consensus of lawyers polled by ACSH described it as a probability whose occurrence was "more likely than not". In other words, if the odds are 51 percent to 49 percent in favor of probability toward an ill effect, then it is reasonable.

This concept is not solely limited to the actual presence of disease. It also extends to those people who are presently healthy, but run a risk of contracting illness somewhere down the line due to the probability factors surrounding particular exposure.

The trend toward litigation, no matter what the outcome, has other long range implications which ultimately result in increased cost to all consumers. Insurance

carriers for chemical companies are charging enormous rates simply to cover their losses. Manufacturers, for their part, are more careful with their newer products. They go through extended testing in an attempt to minimize possible future liability before a product is introduced to the market. Together with a redirection of finances to cover legal costs, this is reflected in less innovative research and development. The consumer then, has fewer products to choose from and pays higher prices for those products that do make it to market.

Indeed, we have reached the age where chemicals are considered guilty until proven innocent. In a recent book on environmental cancer, the physician author suggests the following: "Assume you are a middle aged or elderly nonsmoking lady living in Salem County, New Jersey, who has developed bladder cancer. It should seem reasonable to take the position that there is a significant probability that your cancer was caused by discharge of aromatic amine carcinogens into your air and water from nearby plants known to be handling these carcinogens." He then describes how to go about gathering evidence for a lawsuit, although he also says that such a case would be "difficult to prove". The success would rely heavily on the probability factor. However, finding out that chemicals leaked out of the plant somewhere in the past could really be a big help, he adds.

Is this really a path of justice we are following, or are we settling out on a billion dollar chemical witchhunt?

Despite concerted efforts to the contrary, it is still impossible to live in a totally clean environment. At some point in the near future, we as a society must determine what constitutes an acceptable versus an unacceptable risk. For the time is rapidly approaching, when we will no longer be allowed the luxury of looking toward environmental litigation as a panacea for disease.

The recent activation of Washington's Mount St. Helen's volcano may have some interesting consequences. It is inevitable that the volcanic ash transmitted through the air will increase claims of a threat of lung cancer in heavily exposed populations. Yet our legal recourse, as it has been established up to this point, would imply an initiation of a suit against God. Where do we go from there?

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