



**PLAINTIFF'S
EXHIBIT**
GH-201

ANALYSIS AND PERSPECTIVE

ASBESTOS LITIGATION: THE JURY'S PERSPECTIVE

By Theresa Zagnoli and Elizabeth Foley *

This article contains a summary of arguments made and strategies used to try cases involving plaintiffs claiming lung disease due to occupational exposure to asbestos-containing products. It is compiled from information we have collected in asbestos cases over five years. These ideas, thoughts and comments were first extracted from juror interviews and lawyer comments, then analyzed and commented on in relationship to possible solutions and thought-provoking questions.

Juror demographics were identified through an analysis based on frequency statistics and chi-square cross-tabulations of approximately 200 jurors who served on asbestos cases across the country. Specific cases are not identified, due to the confidential nature of the consultants' relationship with the attorneys. This article identifies persuasive arguments or themes in asbestos trials based on what jurors, lawyers and consultants have marked as important.

Data were gathered from post-verdict studies, case analyses and various other memos and case strategy sessions. The authors believe these juror attitudes suggest strategies with applicability to other toxic tort and product liability cases. As long as environmental awareness is a concern of the American people and as consciousness of the various hazards presented by contemporary living becomes more heightened, there will be disputes. This article is a representation of the jurors' perspective on why the plaintiffs or defendants win on a variety of issues. It examines common strategies used by both sides. The findings have implications for voir dire, jury selection, opening statements and case argument.

1. State-Of-The-Art Defense Argument

Why does the defendant's state-of-the-art argument continue to persuade considering copious amounts of contrary documents consistently presented by the plaintiff's lawyers? Because it is an argument with which jurors are intellectually comfortable.

Many aspects of an asbestos trial are highly technical and can be intimidating. In comparison, state of the art is quite temporal. It is an argument jurors can sink their teeth into because it requires no particular expertise, education or background knowledge: it is simple and it is practical. Jurors can easily analogize to their own experiences, whether the defendants do it for them or not.

Jurors cite two state-of-the-art defense strategies that recur across cases. The first is use of analogies and the second is the all-knowing U.S. government.

Analogies are and always have been a powerful communication tool. They create a common ground. An

analogy is a vehicle for understanding and empathizing with an experience one has never had personally. When details and conflicting information are prevalent, it is much easier for a juror to hook incoming, often confusing, information onto something they already know: something familiar, something clear.

Jurors used the following analogies when describing their understanding of issues. This information was gathered from case files and post-verdict studies:

- Just like my "mama" used to tell me to eat eggs every day in the '40s and '50s, she was not trying to hurt me or fill my arteries with cholesterol; she truly thought it would help me.

- In 1903, there were no seat belts in automobiles; no one thought they were necessary.

- Secondhand smoke. How could you be responsible for making others sick with your smoke if you had no knowledge it was harmful? My mother did not know that smoking while she was pregnant could have harmed me.

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- Skin cancer: no one knew that lying in the sun could cause cancer.

The cumulative effect of these analogies could be referred to as a "pragmatic snowball." If jurors use analogies, they can infer that this is not a perfect world in which we live, that there are no guarantees you will never get sick. They also may infer that if we were to protect against every possible risk associated with technology and industry, every factory in the country would have to close its doors. A related conclusion suggested by the snowball effect includes the belief that this is a practical world, not a perfect world. That, while we do everything we can and though we rely on all the *available* knowledge so we do not harm ourselves or others, there are no guarantees.

Common products and practices considered hazardous: coffee, cigarettes, alcohol, white bread, sunbathing, automobile fumes—even hair spray and disposable baby diapers—suggest a perilous world. It's logical for the juror to ask, "If you are going to punish the asbestos companies, then shouldn't you also punish the cigarette manufacturers, the automobile manufacturers, the people who make the butter which clogs our arteries, etc.?"

What kind of precedent would this set? Where would it end: would we stop making progress in technology and science as a result of this attitude? Given all they knew, did manufacturers do the best they could? As industry advanced, science became more astute at detecting risks, certainly more so than in the '30s and '40s.

These juror statements and post-verdict summaries support that attitude. These quotations were taken from jurors after cases had been tried and verdicts had been rendered.

- Because it was not clearly shown that the defendants had knowledge [that] the person who comes indirectly in contact with asbestos could suffer from inhalation of the fibers, as it was unknown years ago that non-smokers face some of the same risks as smokers do when they inhale the smoke of a smoker.

- I do not want to hold corporations responsible for flawed data they used in the past.

- Perhaps they weren't sure asbestos was a big problem. If latency is a factor, how could the shipyard know in the 1940s that products installed then would be a problem in the 1980s.

- The fact that medical evidence was not universally accepted until 1972 was most persuasive.

- There was research for both sides, but there was evidence that the research was that asbestos was dangerous, and I guess if I owned an asbestos line, I would tend to disbelieve that and go with the people that

said it's not that bad. But those things you couldn't foresee, unfortunately.

- Because, if research in the field of asbestos at the time did not give evidence of the substance as being harmful and the manufacturer genuinely had no knowledge of the potential danger of the substance as we know now, then they shouldn't be held liable because research was not as advanced in the area as it is today.

Suggested Plaintiff's Strategies

1. Get your own analogies. Don't ignore their power of persuasion. Give examples to the jury of how sophisticated science was decades ago.

2. Turn every analogy around. Don't let even one slip by.

3. Point out that you are not arguing state of the art — you agree with everything the defendants say about state of the art. You are arguing *history*. One definition of history is a "chronological record of significant events."

4. Don't argue what the scientific community knew, argue what the defendant knew.

5. In the 1930s, we might not have had seat belts, but we still knew auto accidents could kill people. Plaintiffs don't say the defendants should have had the solution, only that they should have let us in on the problem.

6. Do away with the secondhand smoke analogy whether defendants use it or not. Jurors tend to come up with this one all on their own.

7. Make the relationship between what you argue the defendant knew and how that could have saved your client. Don't expect the jurors to do this themselves. The link must be well established.

II. Government Required/Allowed Arguments

Neither the Food and Drug Administration nor any other faction of the government imposed a ban on asbestos nor recommended restrictions; in fact, it *required* its use, particularly in the Navy and public schools. Jurors therefore ask, "If the U.S. government did not know, how could the asbestos companies have known? If the government said it was OK, it must have been OK." Jurors see government as the definitive source of all information that affects the public, especially in matters of health. There is a misconception about where "the government" gets its information. And even more fundamental, there is a misunderstanding of what the government's capabilities and resources are concerning research. Jurors deduce that the "government required it/allowed it." Therefore nothing illegal took place because it is hard to believe the government would

fail to protect the people if it knew the dangers of asbestos.

Research is showing this attitude is prevalent in patent cases as well. The average person believes the patent office is an omnipotent entity, rarely makes mistakes, and serves to protect the public and the invention. In patent cases it is generally to one side's advantage to educate the jurors about the patent office, the way it operates, the case overload, how much time is spent studying each product, etc. The purpose is not to undermine the credibility of the federal government, but to bring the jury to an understanding of the government's priorities, limitations, information sources and on whom or what the government relies to make regulations and rules.

III. The 'No Laws Were Broken' Argument

Another twist on the government required/allowed argument is the legality of asbestos use. Some argue that at the time of the alleged injury the asbestos companies were not breaking any laws or codes that pertained specifically to the use of asbestos or cautionary labeling. They did everything they thought they were supposed to do.

The following statements collected from post-verdict studies reflect the persuasiveness of this argument:

- We just thought that there was nothing done that was worth \$21 million in damages. We just figured that it was perfectly legal to have sold the product when they sold it and that there was no indication and no proof of any danger in the claim.

- I have seen a few memos indicating the defendants knew about the danger of asbestos. I have not been shown that they deliberately covered up this information or violated any government regulations.

- The laws and the knowledge, body of knowledge, at the time that building was constructed were one way. The Environmental Protection Agency and Occupational Safety and Health Administration did not exist until later.

- [Defendant] proved to me that they were not accountable for a building that met all specifications in the year of 1959—that it was built—they followed the specifications.

- It had to do with a building that was constructed and plans initiated in 1967. All the plans and specifications and material specified, the whole thing had met every possible building code there was.

Suggested Plaintiff's Strategies

It is interesting that, even after a trial is over, a jury may not know what law is supposed to have been broken.

There is an apparent lack of application of more general laws, such as product liability, to the specific situation. Jurors believe that the asbestos companies have not broken a law because there was none in place to break.

1. Listen carefully to the arguments and innuendo of defense counsel. Tell the jury at every opportunity what you are asking and what you are not asking of the defendants' behavior.

2. Remind them of the law. Explain to them that these are old laws, not new laws. Show them what the verdict form will look like. Keep their focus on the questions you want them to answer, not the ones that the defendants want. Steer them away from such beliefs as: it was legal to sell; no government regulations prohibited use. Confront these potential excuses for a defense verdict and discuss why they don't apply to your case; start in *voir dire* and don't let up until the end of closing.

3. It is always important to tell the jury what is at issue *and* what is not, and *why*.

IV. Defense Arguments On Plaintiff's Conduct

Jurors sometimes switch their focus from the asbestos companies' alleged negligence to the plaintiff's alleged negligence. This has been especially true when smoking is an issue. Defense attorneys portray plaintiffs as having no regard for the value of their own health because they took other types of health- or safety-related risks; thus, plaintiff's lifestyle and character become issues in the case. The less obvious or less severe the plaintiff's asbestos damage, the less likely the jury is to feel sympathy for the plaintiff. What they can't see, they don't believe or don't understand.

The following statements or summaries of statements are taken from post-verdict research regarding the plaintiff's responsibility:

- If he smoked and didn't worry about the problems before, then why should I give him millions of dollars now because his lungs are bad.

- The facts seem to tend more towards smoking caused or accelerated his lung problems more than exposure alone to the asbestos would have caused.

- [Plaintiff] did not seem to have much respect for his own life; he smoked and drank.

- Although both plaintiff and defendants were negligent regarding the overall situation, I feel that the plaintiff should have been more responsible for his own smoking habits.

- Other jurors believed the medical evidence regarding the causes of lung cancer and how asbestos played a *minor role* in contrast with the *major role* that smoking

played in the plaintiff's illness was the most effective argument the defense presented.

- Plaintiffs have not proved asbestos did more damage than smoking.

Suggested Plaintiff's Strategies

1. Make sure you have jurors who don't philosophically disagree with the plaintiff's lifestyle, whatever it is.
2. Demonstrate other areas in which the plaintiff took care physically, physiologically and spiritually: diet, exercise, doctor visits, church, vacations, etc.
3. Make it clear why the plaintiff didn't take precautions against asbestos dust; he/she didn't know it was lethal, only thought it was annoying.

The synergistic effect of smoking and asbestos exposure is perhaps one of the most difficult concepts for jurors to grasp. Synergy is not a word common to a juror's vocabulary. Therefore, medical testimony delivered on behalf of the plaintiff has less effect than other areas of testimony. It is easier for the jurors to fall back on what they know: 1) smoking causes cancer, and 2) people are responsible for their own actions, which is the defendants' position. Jurors must be convinced the plaintiff is suffering from lung disease and that the cause of the illness is asbestos related before they can begin to determine whose responsibility the disease is—plaintiff's or defendants'. Plaintiffs' lawyers can convince the jury that an injury has been caused by a combination of smoking and exposure to asbestos only if the jury accepts the new information.

Attorneys tried dozens of analogies and examples using pictures, props and graphics on hundreds of jurors over the past few years to re-focus jurors' perspective on smoking and its relationship to lung disease. Recently, Ron Motley of Ness, Motley, Loadholt, Richardson & Poole, Charleston, S.C., convinced jurors that one (smoking) plus one (asbestos exposure) *does not* equal two (possible injury) but rather 22 (a sure trip down the road to lung cancer). Motley's $1 + 1 = 22$ equation clearly demonstrates a creative approach to working with the jurors' existing framework to help them understand one side's point of view.

V. Jury Sympathy For Corporations

In some cases the unconscionable corporation attack by the plaintiff has backfired. It seems the "corporate raider" approach may be losing some of its impact, particularly with certain kinds of jurors (yuppie and conservative or pro-business types). Conservative trends are becoming as prevalent in juries as they are in elections. Although some corporations, such as Exxon or high-finance "wheeler-dealers," may be in bad standing these days, many others are spending millions of dollars to build a positive public image; for example, AT&T's ad campaign, Target's environmental initiative, Chrysler's air bags, McDonald's paper containers and

Waste Management's recent "We work for the environment" ads. Whatever the case, jurors do not believe the heartless, for-profit-only corporate image is potent and persuasive. Conservative or pro-corporation trends vary with geographic location and type of industry and should be considered.

The following statements depict this trend:

- The word "conspiracy." It's hard to believe companies deliberately conspired to harm people.
- Perhaps they were not sure asbestos was a big problem.
- Medical evidence was not universally accepted at the time.
- Even the government did not know it was dangerous.

Post-verdict studies have added some credibility to the notion that not all jurors are willing to accept the cold-hearted corporation idea of the conspiracy approach, at least not generally. Jurors acknowledge those corporations that are good, responsible and caring. Research shows that it is natural for people to trust, have faith in and believe in those around them. Because we are a generally optimistic society, coupled with corporate America's public relations, it isn't as easy to determine who will cheer for whom in a David and Goliath tale.

Suggested Plaintiff's Strategies

1. Do not focus on the concept of the defendants deliberately hurting people, but on the concept of them having blinders on for profit's sake.
2. Defendants weren't looking for things that would cost them money, i.e., a dangerous product, they were protecting a product that made them money.
3. Always tie the allegedly illegal behavior of the defendants to what the consequences would have been if they had acted in any other way. Even though it appears to be obvious, the jury often needs help and frequently misses the point. The evidence will be more effective if the jury understands its purpose.
4. Provide for the jury what reasonable alternative route the defendants could have taken with the information they *admit to having*. In other words, if the defendants only knew about mine workers' lung diseases due to occupational exposure, what would have been the correct, legal, moral, ethical thing to do so that information would have put the plaintiff on notice of the dangers.

VI. Defense Minimizing Harm Of Exposure

"We all have asbestos in our lungs." Obviously, there is a distinction between the source of asbestos we have in

our lungs and that which the plaintiff has in his/her lungs, as well as a difference in the amount of exposure. However, when this information is bestowed upon naive jurors for the first time, it allows them to generalize all sorts of conclusions.

Another common statement that jurors reveal in post-verdict studies is: "The air is full of harmful chemicals." One juror used this as a basis for a pro-defense verdict: "We breathe in chemicals all the time at the beach, at work and at home." Another juror commented, "Breathing the air in almost any enclosure will probably prove harmful one day with or without the presence of asbestos."

Recently, a community attitude study showed that over 50 percent of the people in a major metropolitan area believe damage to the environment is an inevitable part of doing business. The forgiveness level may be increasing as awareness increases. The more aware people are and the more they attempt to adopt good, environmentally sound practices, the more they become aware of how difficult and costly it is to do so. This debate leads the jury down the "price of progress" path. Given the nation's attention to environmental issues and awareness of hundreds of pollutants in the air, it is no wonder that jurors have fierce opinions. At the same time, they are confused as to proper behavior for the future and about who is to blame for damage in the past.

Suggested Plaintiff's Strategies

1. Make the distinction clear between the amount of asbestos in the jurors' air and that in the air the plaintiff breathed.
2. The price of progress is one thing, but attempt to make the defendant's motivation purely economic. Asbestos wasn't progress — it didn't lead to a better world.

VII. Conclusion

Although both plaintiff and defense lawyers are continually looking for and finding new evidence and angles on asbestos litigation, cases are won or, what is more important, lost by both sides on the basic issues. Our research may serve as a reminder that often the same arguments continue to be of concern to jurors. Jurors do an amazing job of simplifying the case to the point where they can either accept or reject it. Rarely do they make determinations based on innuendo, subtlety or nuance. They want the big picture. They want it to make sense and they want it to be fair. Part of their measure of fairness is who has responsibility for what and when. On many issues, the jurors return to the question of what could be reasonably expected of the defendant and the plaintiff, often holding others to a higher standard than their own behavior. Once they answer the question of reasonableness, they have decided the issue.

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