

FILE NAME: Newspaper & Magazine Articles (NMA)

DATE: 1970

DOC#: NMA162

DOCUMENT DESCRIPTION: Trial Lawyers Forum - Death and Injury from Inhalation of Asbestos Dust

Apr - June 1970

Trial Lawyers Forum

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DEATH

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INJURY from inhalation of asbestos dust

By
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Orange

Asbestosis is an insidious disease, the victims of which cry out for help from members of the bar and the medical profession, as well.

This is a disease of the lungs, incurable, irreversible, terribly disabling, often fatal, which in a sly way, comes about gradually and usually manifests itself ten to twenty years from exposure. Asbestos, once inhaled, is virtually indestructible and continues to cause reaction for the balance of one's lifetime.

Asbestosis is caused by the inhalation of asbestos dust and fibers. The disease has been known since ancient Greek times and has been extensively studied beginning in the late 1800's, and continuing to its highest point of study at the present time.

Asbestos is mined principally in Canada and in South Africa, and it is a variety of mineral having its origin millions of years ago in the earth's interior. It has significant industrial and commercial use, and it is estimated that asbestos is used in over 3,000 products, ranging from the nose cone of a missile, brake linings for automobiles, ironing board covers, draperies, insulation, and many, many other things. It can be woven into cloth and can withstand high heat temperatures. It is virtually indestructible. It cannot be frozen or burned unless the temperature gets to approximately 900° or more. Once asbestos fibers are in the human body, due to their indestructibility and due to the fact, of course, that the body temperature cannot be

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raised to 900°, they then become objects of infinite life.

It has been estimated that approximately a million individual fibrils of chrysotile asbestos can lie side-by-side in a linear inch, whereas only approximately 3,800 glass fibers of 600-odd human hairs can be aligned in the same distance.

In the early 1900's, 300 tons of asbestos was produced. It is now estimated, however, that over a million tons a year are used in the United

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States, and that total world output is over four million tons a year. It is not to be unexpected, therefore, that exposure to asbestos among professional workers and laymen alike is very rapidly increasing. There does not appear to be any direct relationship between the length of exposure and the severity.

It has been the writer's observation in studying this disease and working on asbestosis cases for a period of approximately seven years that a major difficulty exists among the medical profession in distinguishing asbestosis from other diseases such as silicosis and emphysema. Asbestosis is readily distinguishable by the skilled physician trained in this field from other diseases of the lungs, and this can be done by X-ray. Asbestosis causes peculiar X-ray indications that enable, short of autopsy, almost certain positive diagnosis.

A study of the Workmen's Compensation Laws of the various states of the United States indicates that beginning with the year 1913, asbestosis has been recognized as a compensable workman's compensation occupational disease. The principal studies, however, have concerned themselves with workers in mines and in asbestos factories where products such as insulating materials have been manufactured. Only until recently, and even now certainly on a minimal scale, has there been any study by the manufacturers of asbestos insulating materials of the effects of their products on the insulating workers using their products.

We recently handled in the United States District Court a lawsuit on behalf of an asbestos insulating worker who had the disease of asbestosis. This case was filed against the principal manufacturers of asbestos insulating materials with whose products the plaintiff had worked over a period of approximately twenty years. So far as we have been able to tell, this is the first case of its kind. Our principal contention of liability lay in the total of negligence on the part of the manufacturer's branch of exposure

and implied warranties, and that no warnings were given workers of the dangerous nature of the products, as well as the failure to devise a safe method of handling their products. Our position was that the existence of this disease had been known about for many, many years, had been written about extensively for over fifty years, and the states, since 1913, had recognized the disease as a compensable occupational injury, that the manufacturers of the insulating products used by the plaintiff knew of the disease and knew that their products contained asbestos, and that asbestos could cause the disease asbestosis. We further contended that the manufacturers were at fault for not testing and for not devising safe techniques for application of products containing asbestos.

Medical testimony in the trial was horrifying, to say the least. A patient with this disease can in likelihood be expected to experience a very tragic death. Once a patient has reduced pulmonary sufficiency, there is little that can be done even to relieve the pain and discomfort. Pneumonia is a great hazard. If a patient has pneumonia and the treating doctor does not know about the existence of asbestosis, a normal dosage of Demerol might very well suppress respiration to a point causing death. The use of oxygen over a prolonged period of time might have a drying effect on the lungs and in turn intensify the inadequacy of the lung capacity. So, the end result from the patient's viewpoint is indeed dismal.

Evidence was produced on the trial that one of the manufacturers in 1941 constructed a plant to manufacture asbestos insulating materials, and recognizing the serious nature of inhalation of the products, and recognizing the need to design a factory which would minimize the exposure of the workers to the inhalation of the dust, designed their factory with the idea in mind of reducing the possibility of inhalation of the dust among their workers. Even in spite of this knowledge, which was known by the management of the company and was recognized by the engineering department in its design of the plant, recognized by the legal department because on occasion workers would contract the disease which came within the state Workmen's Compensation Act; nevertheless, the manufacturer did not place any warnings on any of the boxes of their products indicating the danger

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In a high-speed, mechanized society such as ours, the archaic rule relating to *vis. Butterfield* and his long-dead horse should be buried with them. The courts should stop riding a horse that has been dead for over one hundred and fifty years.

The law must grow with the needs of society. Let us hope that men of courage and with a sense of destiny will meet the challenge of our times and not fit the image of a failure once described by Justice Cardozo in another connection but no less applicable here:

Judges march at times to pitiless conclusions. . . . They deplore the sacrificial rite. They perform it nonetheless with averted gaze, convinced as they plunge the knife that they are the building of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity. □

ADDITIONAL INFORMATION

The following is a list of selected readings concerning the problem of *Contributory Negligence vs. Comparative Negligence*.

Comparative Negligence, Contribution, Collateral Source: An Illinois Appellate, L. R. Practice, Vol. 2, J. 36:465 F. 1964.

Law on Comparative Negligence, T. F. Lambeth, Jr., TR LEX Q 2:16, Winter 1964.

Comparative Negligence and the Federal Tort Claims Act, M. L. Glass, Fed. B. L. 26:42, Winter 1966.

Comparative Negligence in Arkansas: A "Before and After" Survey, M. Rosenberg, NYS B. J. 32:437, December 1966.

Comparative Negligence, 2nd New York City for the Marine Corps, Marine Law Review 1:65, 1966.

Comparative Negligence—Contribution in the Missouri, Missouri Law Review, 30:137, Winter 1965.

Comparative Negligence, a Round, 211, Nov. 65, March 1967.

Comparative Negligence vs. Contributory Negligence, 1965, Journal 724, September, 1966.

The Rise and Fall of Comparative Negligence in Illinois, Illinois B. J. 57:103, September 1966, Maki v. Froh (Ill. 229 N.E. 2d 284).

Effect of Mississippi Comparative Negligence Statute on Other Rules of Law, Miss. L. J. 39:493, May 1968.

Common Law is Never Finished (Comparative Negligence on the March), L. R. Practice, Vol. 2, AIA L. J. 36:741, 1966.

Comparative Negligence—Paradox or Pandora's Box, R. L. Glass, N. Missouri, L. Journal, June 1968, J. 1:270, Winter 1968.

Industrial Accidents of a Comparative Negligence Rule in Illinois, U. Illinois L. J. 35:1, Summer 1967.

The Rise of Strict Liability: Illinois' Comparative Negligence Statute, 136 Paul L. Rev. 176:14, Summer 1968.

Contributory Negligence, Contribution and Comparative Negligence Questions, M. L. Hubert, Wisconsin Bar Bulletin, 55:61, Dec. 1962.

Comparative Negligence, 134, William Prosser, 31 Michigan Law Review 465, 469 (1963).

Contributory Negligence: An Outmoded Defense that Should be Abandoned, 45 ABA J. 92, 93 (1957).

Tort Contribution in Comparative Negligence, A Revised Law Method, Frederick Frank J. Mansueti, 11 U. Illinois Law Review 133, 134 (1966).

Contributory Negligence Rule: An Offense to Justice, 11, A. Glass, NYS B. J. 33:392, 473, October-December 1963.

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of the inhalation of asbestos dust. The manufacturer made no dust counts in the field and made no effort to conduct any studies of any sort designed to prevent the disease among these workers in the field using their products.

After the beginning of our litigation, certain of the manufacturers began to place a small warning sign on boxes of their insulating products, which read:

"CAUTION: This product contains asbestos fiber. Inhalation of asbestos in excessive quantities over long periods of time may be harmful. If dust is created when this product is handled, avoid breathing the dust. If adequate ventilation control is not possible, wear respirator approved by the U.S. Bureau of Mines for pneumoconiosis-producing dust."

Other than placing this small warning sign on certain of the boxes, few, if any, of the manufacturers did anything else and have not done anything significant even to this date to prevent the workers from contracting the disease.

There is no respirator or breathing device in common use today which will prevent the inhalation of asbestos dust by those using the product. Particularly in the insulating field, the products in order to be applied have to be sawed, scribed, cut and fitted, wire bands have to be hammered into place, and asbestos cement has to be poured out of its sack into a bucket of water and mixed so that it can be applied by hand or trowel. All of these procedures create dust, and yet, even to date, the manufacturers have not devised a safe system of application of their products which would prevent the inhalation of the fibers by the workers.

There exists a direct relationship between the length of time exposure to the inhalation of asbestos dust to the time at which the disease of asbestosis manifests itself. Studies made by Dr. Irving J. Selikoff, of Mount Sinai Hospital in

New York, who is perhaps the world's leading authority on this subject as it pertains to asbestos insulating workers, indicates that in those workers exposed to the dust for a period of ten years, 44.1% of such workers have abnormal lung findings; 72.8% of those exposed twenty years have abnormal lung findings; and 67.1% of those exposed for as long as thirty years have abnormal lung findings.

There have been reported cases of a wife whose only contact with asbestos was in cleaning her husband's clothes which contained asbestos dust, and after a number of years, the disease of asbestosis manifested itself in her. Cases indicate that some children in kindergarten using asbestos cement to make play toys were found in later years to have the disease with the only indicated contact with asbestos dust being that contact while in kindergarten.

In addition to the disease of asbestosis itself, it is now believed that inhalation of asbestos dust increases significantly lung cancer, as well as mesothelioma, and that frequently the death of workers who have asbestosis is oxygen starvation, cancer or cut pulmonary, all of which are considered to be a direct result of inhalation of asbestos dust. There is also an indication from medical studies that those workers who smoke cigarettes have a greater susceptibility to the disease than those who do not.

It has been suggested that in future decades, with the accumulation of asbestos and its increased use, the public will be subjected to higher concentrations of asbestos fibers and the diseases associated therewith. Drs. Selikoff, Churg and Hammond published in the Spring of 1964, in the *Journal of the American Medical Association*, an article on the biological effects of asbestos. There are many articles now available to the legal and medical professions dealing with this subject. Extensive studies are an absolute necessity in the prosecution of any type of litigation and even to consultation with medical authorities on this subject.

An excellent article appeared in *The New Yorker* magazine, October 12, 1966, written by Paul Dr. Dr. This article is scientific in nature, thoroughly authenticated, and we recommend it to anyone interested in the subject as the beginning point of their studies.

If an attorney has any client in his office who is suffering from lung disease, we feel that in the light of current medical knowledge, it is imperative that the attorney require a full investigation into the history of the client, his

possibility of association with asbestos, and that medical consultation of the highest order be sought.

More and more doctors, we feel, are becoming familiar with this disease. At the time of our initial studies, approximately seven years ago, we found it quite difficult to locate physicians experienced in the study of the effects of asbestos, in the diagnosis of the disease of asbestosis or associated diseases connected with the use or exposure to asbestos.

We suggest that the attorney for his beginning research see:

Annals of the New York Academy of Sciences, Vol. 132, Art. 1, Pages 1-766, "Biological Effects of Asbestos,"
The Wall Street Journal, November 7, 1968.

Hearing before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, Ninetieth Congress, Second Session on H. R. 14816, pages 349-369.

Cases which might help those attorneys studying the question are:

(1) Supreme Court of the United States, *Urie v. Thompson*, 377 U.S. 32 (1964), where a worker developed asbestosis after a number of years of employment. (There are four main theories in the United States to determine when a cause of action accrues or when the statutes of limitation begins to run, to-wit:

- (a) When the defendant commits his wrong;
- (b) When the cause of action accrues is the last contact by the plaintiff with the substance;
- (c) From the time of discovery or notice of disease, and;
- (d) From the time of discovery of the causal relationship.

Urie held that the cause of action did not accrue until the discovery of the disease.)

(2) *United States of America v. Wilroy*, 251 F.2d 691 (Fifth Circuit, Jan. 21, 1958), which says:

"But it is not the wrongful, i.e., negligent, act, which gives rise to the claim. For there must be damage caused by it. Until there is some damage, there is no claim and certain of course precluding the time in which suit must be filed (whether as a condition of right or remedy) can never operate prior to the time of suit would be permitted."

(3) *Wright v. Carter Products*, 244 F.2d 53, U.S. Court of Appeals, Second Circuit, May 1, 1957. This was an anti-per-

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In the case of David M., his young widow was told by the doctor that "complications" and cancer caused her young husband to die. Since no one told me in that cancer ward earlier the hospital for minor surgery to remove polyps of the colon—small benign growths—his widow gazed at the doctor's