

BURDEN OF PROOF

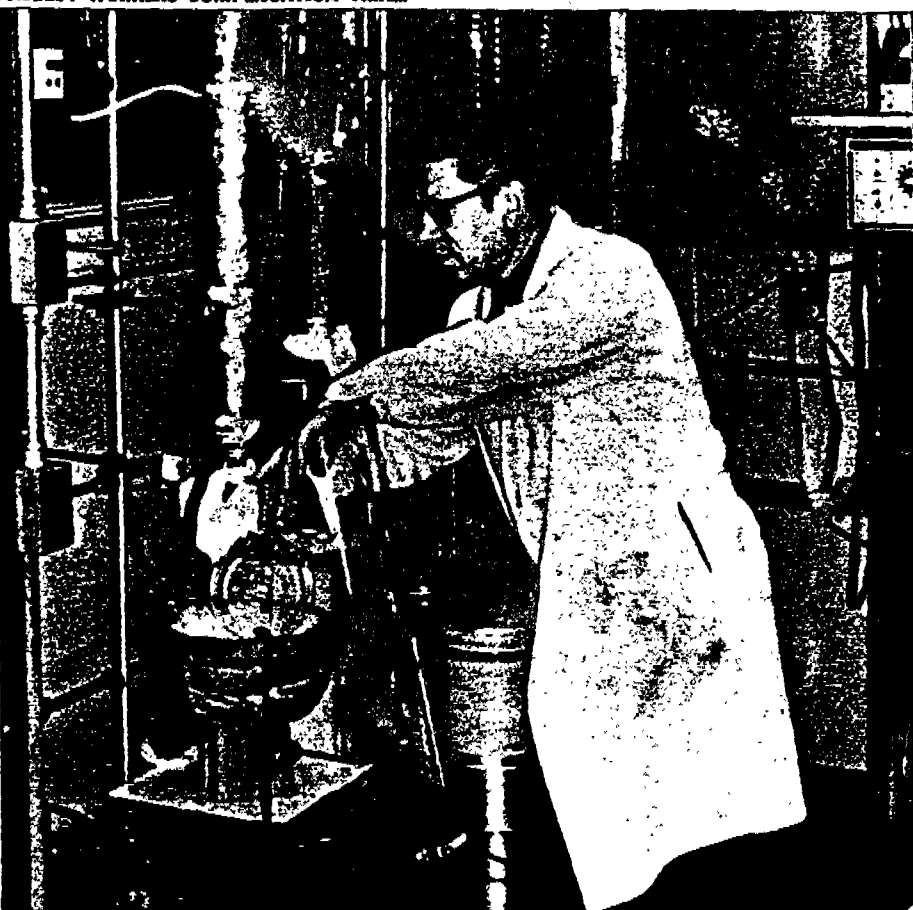
THREE OLIN CORP. CHEMISTS HAVE DIED OF THE SAME BRAIN CANCER. WAS IT COINCIDENCE, AS THE COMPANY MAINTAINS? OR WERE LAB CHEMICALS TO BLAME? THAT'S WHAT THE WIDOWS ARE CLAIMING IN THE STATE'S LONGEST WORKERS' COMPENSATION TRIAL.

The death from brain cancer at age 57 of chemist Joseph Karabinos in 1977 was more a private sadness for his family in Orange than a cause for apprehension among his former colleagues at the Olin Corp. laboratories in New Haven. It was just one death, and neither his widow nor the attending physicians suspected the possibility of a work connection.

In early 1980, the same brain cancer struck a second research chemist from the labs, 63-year-old Dr. Alan Ardis, shortly after he retired to the San Diego, Calif., area after nearly three decades with Olin. Back in New Haven, a third Olin chemist named Alexandre Ozolins took note of the cancers. "We've been working with the same chemicals," he told his wife, Marthe. "Don't be surprised if I'm the next one." She thought it a joke by her husband, whose photos reveal a sturdily built, dark-haired man in his late 50s with smile lines at the corners of his mouth. "He wasn't even sick," recalls Mrs. Ozolins.

But, shortly after his remark, he developed the same cancer, called "glioblastoma multiforme." He died in April 1981, at age 59. It was just four months after the death of his colleague Ardis, and it was 24 years after he began working for Olin. "I'm still in shock," says Mrs. Ozolins, a petite, elegant woman born in Germany. She was seated in the living room of the well-appointed three-story home she had shared with Alexandre since he returned from World War II with her as his bride. "At the time, our life was perfect," she says quietly. "Nothing exists anymore."

Olin's reaction—to deny any association between the deaths and the laboratories, hundreds of organic chemicals, including some certified carcinogens—is a common response when employees complain about the possibility of a disease from work. It is also the typical reaction when complaints arise that ailments have been caused by the environment—whether the feared hazard is from toxic waste sites, from pesticides and plant-killers, from air pollution, or from



Alexandre Ozolins: "Don't be surprised if I'm next," he warned his wife.

the chemicals in drinking water. There's good reason for businesses to be skeptical. They cannot fork out money to everyone who gets sick in the vicinity of one of their factories or products, and our legal system lays the burden of proof in such cases upon the claimant.

That burden is more onerous in health-hazard cases than in other litigation. That's because an absolutely vital link—diagnosis by expert physicians willing to testify and capable of overshadowing the company's experts—is so hard for most victims to obtain.

"It's really a disaster, the field of occu-

pational medicine in this country," says Professor Ray Elling of the University of Connecticut School of Medicine in describing the educational shortcomings of practicing physicians and their general unwillingness to determine the causes of long-latency ailments like cancer instead of just treating the patient. Indeed, experts say many victims don't even suspect their problems are connected to their work or environment, and thus never solicit medical opinion on the point.

Mrs. Karabinos, widow of the first chemist to die, never sought benefits from the company where he'd worked 15 years. Dr.

PHOTO COURTESY OF MRS. ALEXANDRE OZOLINS

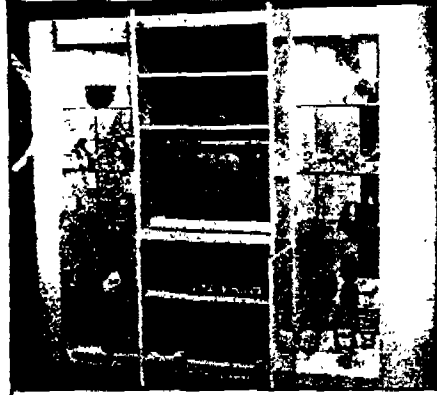
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LAW & COURTS

Karabinos had left Olin's research lab in 1967, and no pattern was apparent when he died 10 years later. She also was reluctant to undertake the ordeal of litigation.

The two more recent widows, Mrs. Ardis and Mrs. Ozolins, sought help because the number of cancer deaths aroused their suspicions. They consulted leading experts from Harvard and Yale universities. These physicians, specially trained in statistical analysis and workplace carcinogens, made studies and reported back that the cancers most likely were work-related. One said there seemed to be "an epidemic" of brain cancers at the lab. That evidence was disputed by physicians hired by Olin in a scientific square-off that has led to the longest workers' compensation trial in Connecticut history. Litigation has lasted more than four years, with testimony filling nearly a thousand pages of transcript. The case is still awaiting a decision.

One must wonder at the fairness of a process that requires such high entry stakes. How many victims and their families can obtain that sort of Harvard-Yale expertise, or any other kind? More generally, can't anyone think of a less onerous way to resolve these disputes?

Reform must ensure a fair level of compensation for victims at reasonable cost to businesses and to the taxpayers who finance the adjudication. Most important, it must target hazard-producers precisely enough to deter future harm.

The central problem, of course, is that no one really knows the long-term effects of most chemicals or whether they "cause" a specific person's ailment. Of tens of thousands of commercially important chemicals, "only a few have been subjected to extensive toxicity testing and most have never been tested at all," concluded a major study by the federal government's National Research Council last year.

Physicians cannot even diagnose a common problem such as strep throat with absolute certainty, much less the novel environmental hazards we keep hearing about. "Thirty percent of all people, kids for example, grow strep out of their throat, even when they feel just fine," says Dr. Mark Cullen, lecturing his students at Yale Medical School. "Does that mean they have 'strep throat'? Of course not. It just means they grow strep in their throats.

"Every disease probably has a sole cause," continues Cullen, who is director of the Yale Occupational Medicine Program. "If you were God and knew what was going on, you'd see there probably are linear patterns of cause and effect. But we have no way of knowing."

So when medical experts talk among themselves, many say it's moonshine to think they can be certain of the causes of these medical problems in individual cases, despite strong pressures from the lay community. Worried patients want certitude.

So do lawyers and judges.

The best scientists can do is study what happens when humans and animals are exposed to suspected hazards. Sometimes the relationships are so striking that experts speak with a great deal of confidence. Tobacco has been so extensively researched, for example, that the bulk of scientific experts believe smoking can be said to cause cancer.

But the Olin case illustrates just how variant scientific testimony can be—and the burden these disputes create. Olin countered the widows' experts with Dr. J. Wister Meigs, a retired Yale epidemiologist working on an Olin-financed study of more than 800 of the laboratories' employees since 1951. Many of the employees began work recently, and thus wouldn't be likely to have a disease such as cancer, generally regarded as not appearing until 13 years or so after the hazardous exposure. His study must factor in such complications as the different exposures that came from Ozolins' work as a "bench chemist" throughout his career (developing pesticides in the early 1960s) and the other two victims' work mostly as administrators.

Meigs testified that he couldn't draw any conclusions from three brain tumors. He said that unless more fatalities are discovered, it is impossible to say whether the chemists' deaths were just a coincidence.

Another Olin witness, Dr. Martin Krigman, director of neuropathology at the University of North Carolina School of Medicine, was more definite. He said the cancers were unrelated to work. One of his themes was that the Olin cancers could not have been chemically induced because they didn't look any different from other brain cancers of the same type. Challenging him was the widows' attorney, Robert Carter of New Haven, a mild-spoken Tennessean who studied at the University of Connecticut School of Medicine to improve his understanding of scientific evidence.

Dr. Krigman: I don't know which chemical or chemicals could possibly cause it [a brain tumor].

Attorney Carter: Do you know which chemical in cigarette smoke causes cancer?

Dr. Krigman: I don't believe cigarette smoke by itself will cause lung cancer.

The commissioner trying to decide the case, Rhoda Loeb, apparently wanted to ensure that she correctly heard this testimony from the Olin expert, a man of impressive credentials whose work included a consultant's post to the Warren Commission investigating the assassination of President Kennedy.

Commissioner Loeb: You don't think it's connected to tobacco?

Dr. Krigman: I don't.

Connecticut's General Assembly last year considered an innovative way to resolve these diagnostic debates about employees (though not for victims of

environmental problems). Employees stricken by cancer who worked with one of 20 "known" carcinogens (as listed in Connecticut law) would be entitled automatically to benefits. In the case of the Olin widows, each would get some \$19,000 a year in benefits for life because their husbands had worked with benzene and possibly vinyl chloride—even though Olin has maintained that the exposures were relatively minor and in accordance with contemporary safety standards.

"Obviously it does tip the scales in favor of the claimant," says state Rep. William Kiner, D-Enfield, in backing the reform measure. "But I believe that the way the system is set up now, the scales are tipped too far the other way."

"We believe it is unfair to saddle the employer with this presumption when the workplace may not be the sole cause of cancer," responds Maura Melley, vice president of the Insurance Association of Connecticut. "When you separate out from the occupational risks all other lifestyle factors—such as smoking, diet, alcohol consumption and other exposures in the home or in other places—then as little as 1 to 5 percent of cancer is related only to workplace exposures."

Others hammer against the proposal in a similar vein. "It's patently ridiculous," says John Anderson, counsel for the Connecticut Business and Industry Association, which has 6,000 member companies employing some 720,000 Connecticut residents. And lobbyist Zaiga Antonetti says the 4,600 Connecticut small businesses she represents would face "an extreme hardship" if such a law were passed.

Kiner's bill never made it out of committee last year and has not been reintroduced this session. Indeed, the leading initiative from this year's more conservative legislature has been to examine ways to scale back automatic benefits to police and fire workers suffering from heart and hypertension problems. The theory behind those awards, which cost Connecticut cities and towns some \$5.8 million last year, is that police and fire jobs are so stressful that stress-related ailments are presumed to be caused by work.

A promising way to resolve these causation disputes is fast gaining converts, although it hasn't yet been proposed in Connecticut's General Assembly. The idea involves "proportionate" benefits. That is, if guidelines or fact-finders estimate that there is a 50 to 60 percent chance that a cancer came from a specific hazard, the purveyors of that hazard would pay the victim 50 to 60 percent of the normal award or lawsuit judgment—not the whole amount. Similarly, hazard creators whose actions only slightly raise the chance of cancer in their vicinity would still have to pay something to cancer victims.

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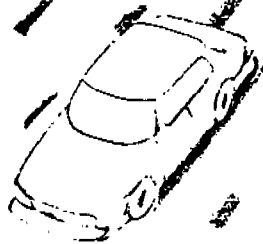
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LAW & COURTS

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Yale's Dr. Cullen says a national compensation scheme with a scientific advisory panel should be created. Periodically, it would define the best estimate of health risks from certain exposures.

The present all-or-nothing system encourages hardball litigation. Its results are so capricious that businesses do not have an economic basis for knowing if they should clean up marginal hazards, and victims do not know if it is worth their while to litigate for benefits.

Such a proportional compensation system has been proposed for victims of uranium mining and nuclear testing by U.S. Sen. Orrin Hatch, the conservative Republican from Utah who heads the Senate Labor and Human Resources Committee. He says most of these victims get nothing under present law. The idea should be considered for other health hazards as well, say scholars writing recently for law reviews and working for the President's Council of Economic Advisors.

Carter, the Olin widows' attorney, suggests that proportionate compensation is better suited for lawsuits than workers' compensation cases because he believes compensation benefits are too low in death cases as it is. But Connecticut's benefits (a maximum of \$381 weekly, from which an attorney's fee is deducted) are now among the highest in the United States, and even Carter suggests that proportionate compensation would be *theoretically* more fair and efficient than the present litigation system.

Yale's Dr. Cullen, whose clinic in New Haven helped the Olin widows and is the only such diagnostic clinic in Connecticut, says a national compensation scheme with a scientific advisory panel should be created. Periodically, it would define the best estimate of health risks from certain exposures. "Scientists do this all the time, forming consensus groups even when there is incomplete data," he says. "The courts would still have to play a role in the adjudication of an individual case. But at least there would be some guidelines."

"Now the courts are stuck with using expert witnesses in the traditional way—trying to judge the intelligence and sophistication of the witnesses. And it's really bizarre."

Editor's note: This begins a regular column on legal affairs by Andrew Kreig of Hartford, a writer who holds an MSL degree with honors from Yale Law School.