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ANNUAL MEETING

ASBESTOS-RELATED LUNG DISEASE

BY

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Beginning primarily with the Industrial Revolution, we have succeeded in demonstrating dramatically that man is the only animal prone to befoul his own nest. We have, in our search for technological progress, polluted our air, our water and even our subsoil. Millions of new products have come on the market with far more emphasis on the utility of the product than upon its effect on the environment or the health of the user. In an age of specialization, our attempted solution, in recent years, has been to arrange for yet another group of specialists to concern themselves, at least to some extent, with the safety of the product. Yet even these specialists have had somewhat dubious success--primarily, I think, because most are a part of a bureaucracy, whether governmental or corporate, with a narrow and restricted view, but always with the prime objective of any such group--to preserve its own function. Thus, we have achieved, for example, the scientific and hygienic miracle of replacing the troublesome dust that used to be in our atmosphere with carcinogens, the sewage pollution of our streams with even more deadly pollutants, and the germs that used to be in our food with poison.

Of all the situations where products once thought beneficial and harmless are now seen as "hazardous to our health", the most startling is the case of asbestos.

As recently ago as World War II, asbestos insulation was considered a safe and useful product. We now know that as-

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bestos is one of the most dangerous of all natural materials. Our ignorance of the true nature of asbestos has claimed the lives of thousands, and there are many thousands more, already condemned to disability and a painful death.

The dramatic increase in asbestos related disease, as well as the development of the law relating to such diseases, surely must be one of the truly significant medical and legal phenomena of our time.

I realize that I am speaking to a group primarily interested in workers' compensation. My remarks will be concerned with the liability aspects of asbestos related litigation. But bear with me. My remarks might be of help to you in your field, and, besides, as personal injury attorneys, if you have not yet been involved in a liability asbestos case, you probably will be.

It might be well to begin with an explanation as to what asbestos is. It is not simply one material, but several. It is the term given to fibrous minerals of a number of different classifications. The term asbestos, then, refers to several types of fibrous material, mineral in nature, generally found embedded in mineral formations. These fibers, when separated from the surrounding material, can be used in much the same manner as animal or vegetable fibers, such as wool or cotton, and thus can be spun and woven. These fibrous materials

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have the properties of relative indestructability and resistance to fire.

Asbestos has been known for centuries. We find reference to the use of it as a lamp wick as early as the 5th century B.C. It is mentioned by such early writers as Pliny the Elder, Herodotus and Plutarch. The material was described by Marco Polo and used by Charlemagne. Benjamin Franklin was the owner of a purse made from asbestos, and asbestos clothing for firemen was used as early as 1827.

During the latter part of the 19th century, after the discovery of large deposits of a type of asbestos known as chrysotile in Quebec, there was a considerable development of its use, particularly for building purposes. Pipe covering containing asbestos was developed in 1874. Substantial deposits of a different type of asbestos, the type known as crocidolite, and later the type known as amosite, were found in South Africa. The spinning process was developed in the latter part of the century. Asbestos cement was first produced in 1903 and the following year the manufacture of asbestos-cement board was begun in the United States.

However, it was in World War II that the tremendous increase in the demand for asbestos came, particularly for the manufacture of protective clothing and insulation. By 1972, well over 700,000 tons of asbestos were used in the United States

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alone. By the end of 1978, almost 32,000,000 tons of asbestos have been used in this country, most of it since 1940.

Probably the largest producer of asbestos in the world is the Soviet Union. It is also produced in substantial quantities in Canada, South Africa, Rhodesia and, to a considerably lesser extent, in the United States.

Thus, during the lifetimes of most of us present today, an entirely new element has been introduced in substantial quantities into the industrial environment. We are only now becoming aware of the devastating cost in terms of human health and life.

While a large percentage of asbestos used in this country has gone into insulating material, there are thousands of other uses. As a fire and heat resistant ingredient, there is no one material available at reasonable cost which is as effective as asbestos in applications where excessive heat is involved.

The earliest known disease caused by asbestos was, of course, asbestosis. But we can no longer confine ourselves to a consideration of asbestosis. There are other pathogenic effects. Specifically, these include mesothelioma, a type of cancer affecting primarily the lining of the lungs, a disease which, up until the wide spread use of asbestos, was rather rare. Further, we have now come to recognize the part asbestos plays in bronchogenic carcinoma, this being the same type of lung cancer that the Surgeon General warns of on cigarette packages, and this is

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particularly true where the asbestos user is also a smoker. Probably other types of cancer are produced, although the research in this area is not yet complete.

Asbestosis, by definition, is pulmonary fibrosis produced by the inhalation of asbestos fibers, just as silicosis is produced by the inhalation of silica, anthracosis by the inhalation of coal, and so on.

The first report of asbestosis came in 1906,[1/] although some four years earlier asbestos was included by the Inspector of Factories in England in the list of dusts known to be injurious to man.[2/] Other isolated reports appeared in medical literature in the ensuing years, but it was not until 1918 that any of the real attention was drawn to the matter. In that year, a Vice-President of the Prudential Insurance Company called attention to the probable harmfulness of asbestos dust and intimated that his

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1/ This was a report by Dr. H. Montagu Murry to a Departmental Committee on Industrial Diseases in England. The report was apparently not published. See Cooke, W. E., Asbestos Dust and the Curious Bodies Found in Pulmonary Asbestosis. Br. Med. J., II, 578 (1929)

2/ Anderson, A. M., Historical Sketch of the Development of Legislation for Injurious and Dangerous Industries in England. In "Dangerous Trades" (T. Oliver, ed.), Dulton, New York, 1902.

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company would not issue life insurance policies on asbestos workers.[3/]

Historically, the first turning point came in 1924 with the report of a death from pulmonary fibrosis in an asbestos worker.[4/] Further reports were made during the next six years, and by 1930 it could be said that asbestosis had definitely arrived. By 1930, epidemiological studies were well underway.[5/]

It should be emphasized at this point that, with the exception of some isolated reports which received scant attention, the studies were directed at the effect of the inhalation of asbestos among workers who were exposed to asbestos fibers in large quantities, such as miners and workers in asbestos textile and other manufacturing plants, as distinguished from insulation workers.[6/]

3/ Hoffman, F. L., "Mortality from Respiratory Disease in Dusty Trades. Morganic Dusts." Bull. U.S. Bur. Labor Stat. No. 231 (Md. Accident Hyg. Ser. No. 17) U.S. Bur. Labor, Washington, D.C. (1918).

4/ Cooke, W. E., Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust. Br. Med. J. II, 147 (1924).

5/ Wood, W. B. and Gloyne, S. R., Pulmonary Asbestosis, Lancet I, 445 (1930).

6/ See Lanza, A. J., McConnell, W. J., and Jehnel, J. W., Effects of the Inhalation of Asbestos Dust on the Lungs of Asbestos Workers, Public Health Dept., 50, 1 (1935); Dressen, W. C., et al, A Study of Asbestosis in the Asbestos Textile Industry, Public Health Bull., 241 (1938).

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In 1946, the Fleischer-Drinker Report was published, this being a health survey of workers engaged in pipe covering operations using asbestos materials in the construction of Naval vessels. This report concluded that that type of employment was relatively safe.[7/]

With the 20-20 vision of hindsight, we now know that this report was misleading, primarily because the authors did not realize the long latency of the disease.

In 1947 the American Conference of Governmental Industrial Hygienists first issued guidelines suggesting threshold limit values for exposure to asbestos dust. The first TLV was 5,000,000 parts per cubic foot of air, which was later reduced, in 1968, to 2,000,000. The current threshold limit values are expressed in numbers of fibers per cubic centimeter, and the current threshold limit value is two fibers per cubic centimeter.

It was not until 1965 that the prevalence of asbestosis among insulation workers was widely publicized. This first came in the form of a report published by Dr. Irving J. Selikoff and others in the Annals of the New York Academy of Science.[8/]

7/ Fleischer, W. E. et al. A Health Survey of Pipe Covering Operations in Constructing Voval Vessels. J. Ind. Hyg. Toxicol. 28, 9 (1946).

8/ Selikoff, I. J., Churg, J. and Hammond, E. C., The Occurrence of Asbestosis among Insulation Workers in the United States. Ann. N.Y. Read. Sci., 132, 139 (1965).

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The year 1965, in my opinion, is the milestone year. Prior to that date, a strong argument can be made that the State of the Art, at least insofar as insulation workers are concerned, was not such as to put an insulation manufacturer on notice of the extreme hazard involved in the use of his product. After 1965, he should have known. Since 1965, there have been many studies made, and it is now universally recognized that the insulation worker runs a great risk of contracting asbestosis.

A recognition of the connection between malignant mesothelioma and exposure to asbestos fibers came a little later. This may be defined as a malignant tumor, arising from the mesothelia surface lining. Certainly by 1971 the occupational incidence of mesothelioma had been well documented, and the medical community added mesothelioma to asbestosis as a disease which could be attributed to asbestos exposure, even in insulation workers.[9/]

The development of information concerning lung cancer came somewhat later, although here again there were isolated reports of lung cancer in asbestos textile workers and miners. Once again, Dr. Selikoff's work was of great importance. He

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9/ Selikoff, I. J. and Lee, D. H. K., "Asbestos and Disease," Academic Press, N. Y., 1978, Chapters 1 and 10.

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publicized not only the relatively high incidence of lung cancer among asbestos workers,[10/] but also the very startling statistics showing the synergistic effect of cigarette smoking and asbestos exposure.[11/] While there is some disagreement as to the exact figures, it is now well recognized that a smoking asbestos worker has a far, far greater chance of developing lung cancer than a non-smoking and non-asbestos worker. For example, in a recent study, it was found that the death rate per 100,000 from lung cancer was 11 for those with no history of exposure to asbestos, 58 for non-smoking asbestosis workers, while in the case of asbestos workers who smoked, it soared to 641.

Incidently, there seems to be no evidence that smoking increases the risk of mesothelioma among asbestos workers.

There are other diseases which some would classify as "asbestos-related". These include cancer of the gastrointestinal tract and other diseases. However, as I have mentioned, the medical research in these areas has not progressed to the point where any meaningful conclusions can be drawn.

10/ Selikoff, I. J., et al, Asbestos Exposure and Neoplasia, J. Am. Med. Assn., 188, 22 (1964).

11/ Selikoff, I. J. and Lee, D. H. K., "Asbestos and Disease", Academic Press, N. Y., 1978, Chapter 11.

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The first "asbestosis" case was filed in the Eastern District of Texas at Beaumont in 1968.[12/] That case and the second case were settled for relatively small amounts. The third case filed was the Borel case. Borel was tried to a verdict, and an appeal was taken to the 5th Circuit Court of Appeals. The 5th Circuit's opinion was handed down in 1973. This opinion opened the floodgates, and it is estimated that more than 10,000 similar cases have been filed in the past seven years, all of course patterned after Borel.[13/]

In the Borel case, the court held that the manufacturer of the product is held to be an expert, and must keep abreast of scientific knowledge, discoveries and advances. If the scientific knowledge is such that the manufacturer could reasonably foresee an unreasonable danger in the anticipated use of the product, the manufacturer is under a duty to adequately warn of such danger. In the absence of a warning, or if the warning is inadequate in the light of the scientific information, liability for injury incurred in the use of the product exists.

Up until 1964, there were no warnings on insulation containing asbestos. Beginning in 1964, some of the manufacturers began placing warning labels on the packages of insulation,

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12/ Samuel P. Potter v. Fibreboard Paper Products, et al, C.A. 6329, USDC, Eastern District of Texas, Beaumont Division.

13/ Borel v. Fibreboard Paper Products Corporation, et al, 493 Fed. 2d, 1076 (CCA, 5th, 1973).

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and by 1967, some sort of warning was universally used. However, the warnings were pretty mild, and the court in Borel held that the jury could reasonably have concluded that the warnings did not adequately communicate to the workers knowledge of the dangers to which they were exposed.

In the typical case, the plaintiff is an insulation worker who has been working with products containing asbestos for many years. The plaintiff's attorney, at least in the earlier cases, would undertake to show that the scientific knowledge, even prior to Dr. Selikoff's article, was that asbestos dust was harmful. This is done by the introduction of the various medical articles. This is usually followed up by the testimony of a medical witness who counters the argument of the defendants that the scientific knowledge applied only to textile workers and miners, as distinguished from insulators, by giving his opinion that the earlier articles in the medical literature should have alerted the manufacturer to the possible danger of the use of even small amounts of asbestos, and thus should have either warned or should have conducted further investigation--even though most of the articles before 1965 had to do with textile workers and miners, rather than insulators. Thus, the issue of the State of the Art was extremely important. In many of these cases, there is also the issue, as to each individual defendant, of the exposure of the plaintiff to that particular defendant's

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product. Typically, the plaintiff will have been working around asbestos products for many years, and his memory as to the particular products used would be understandably vague. By the same token, the typical defendant, particularly one of the smaller companies, finds it almost impossible to refute testimony that its particular product was used by the plaintiff. We should bear in mind that in many cases we are dealing with alleged exposures 20 or 30 years ago.

There remain many unresolved questions of law in these cases. I will discuss these briefly.

Perhaps the most significant development is the application of the doctrine of Collateral Estoppel. This doctrine has been applied in a number of instances, and a number of courts have refused to apply it. I know of no real authoritative appellate decision.

While the doctrine of Collateral Estoppel may be a useful one, I must frankly tell you that some courts have gone to extreme lengths in its application. It has been held that those defendants who were parties to the final judgment in the Borel case were estopped from contesting the issue of the defectiveness of the product. This, of course, precludes the defendant from ascerting the State of the Art defense or of relitigating the issue of the adequacy of the warning. The only issues remaining would be the exposure of the plaintiff to each defendant's pro-

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duct, medical causation and damage.

This same court applied the doctrine of Collateral Estoppel not only to those defendants who were parties to the judgment in Borel, but also to those defendants in the Borel case who settled prior to trial, and who obviously had not had a chance to litigate the issues of liability. Even more startling, that same court applied the doctrine to at least one manufacturer who had not even been a party to the Borel case, or to any other case in which a final judgment was rendered against it. In effect, that court held that the Borel decision judicially established that all insulation products containing asbestos were defective, even though the manufacturer in question had never had any opportunity whatever to litigate the question as to the defectiveness of its product or the adequacy of its warning.[14/]

This same court, in a similar products case, has held that the State of the Art is immaterial in a case where the defect is alleged to be the lack of a warning or the inadequacy of a warning. The same court also held in a warning case that evidence concerning the utility of the product is inadmissible.[15/]

14/ Leroy Hebert v. Fibreboard Paper Products Corporation, et al, B-77-595-CA, USDC, Eastern District of Texas, Beaumont Division.

15/ Stewart Goins et ux v. The Lincoln Electric Company, et al, B-77-49-CA, USDC, Eastern District of Texas, Beaumont Division.

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Following the ruling of that trial court on the issue of Collateral Estoppel, an application for Writ of Mandamus was made to the 5th Circuit, which was denied. That particular case was subsequently settled before trial, and the matter has never reached the appellate courts. Frankly, I feel that the trial judges, confronted with a flood of these cases, are using the threat of Collateral Estoppel to encourage the reduction of the docket by settlements.

It is my opinion that the question of Collateral Estoppel will ultimately be applied as to those defendants who have actually litigated the issue. If so, any given manufacturer will sooner or later be cast in judgment, and thereby collaterally estopped. Thus, it is probably only a matter of time until the issue of primary liability in these cases is no longer viable.[16/]

There has been a good deal of conflict among the various jurisdictions concerning the availability of the State of the Art as a defense. There have been a few cases in which it has been held that a defendant in a strict liability case cannot defend on the ground that at the time the product was manufactured, the State of the Art was such that the particular method of manufacture

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16/ Some hope that the doctrine will not be applied offensively may be derived from Parklane Hosiery v. Shore, 99 S.Ct. 645 (1979). This is particularly true where the results of the litigated cases vary, as in these asbestosis cases. See "Collateral Estoppel: The Changing Role of the Rule of Mutuality" 41 Missouri Law Review 521 (1976).

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was considered proper. Although I know of no case holding this in an asbestosis case, our Federal Court in Beaumont, Texas has so held in a similar products case where the alleged defect, as in an asbestosis case, was the alleged failure to give an adequate warning. I am going to discuss this general subject in a little more detail in a moment.

Another difficult question has to do with the apportionment of the damages. In Borel, the court, following Texas law,[17/] held that the damages should be apportioned equally. Stated more precisely, the court held that the plaintiff was under no duty to show how much of his injury was attributable to the product of any given defendant, and in the absence of any proof, the court would apportion the damages equally among these joint tortfeasors.

This would be well and good if all manufacturers were about the same size. However, it would seem manifestly unfair to hold a very small manufacturer, whose product had been used by the plaintiff on only a few occasions, equally liable with a large manufacturer whose products had been used by the plaintiff extensively over a period of many years.

17/ Landers v. East Texas Salt Water Disposal Co., 15, Tex. 251, 248 S.W.2d 731 (1952). See Prosser on Torts, Sec. 52. See too the annotation in 100 ALR (2d) 16. The same result is reached under the so-called "Concert of Action" theory. See Hall v. E. I. DuPont de Nemours and company, 345 F.Supp. 353 (E.D., N.Y., 1972).

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The suggestion has been made that the damages be apportioned on the basis of each defendant's share of the market.[18/] This would also not seem to be the answer. Many of these manufacturers distributed their products regionally, and the mere fact that a given defendant had a certain share of the market would by no means indicate that the particular plaintiff was exposed to that defendant's product at all. I think that the ultimate answer here is going to be some apportionment based upon the percentage of use of a particular product by a particular plaintiff. Admittedly, this is very imprecise. However, juries decide issues as unresolvable as this every day.

Another issue for consideration is the effect of a settlement by some but not all defendants. In the Borel case, the court simply subtracted the amount paid by the settling defendants from the amount of the verdict. This issue was not strongly litigated in the Borel case, and it is my view, that in Texas at least, the proper procedure would be to reduce the verdict proportionately.

In a recent case in the Federal Court in Beaumont, 13 of 14 defendants settled for a total of $400,000. The case

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18/ A recent California case adopts this view. Sindell v. Abbott Laboratories, #L.A. 31063, Supreme Court of California (1980). This theory is discussed in an article concerned with the liability of various drug manufacturers for damages resulting from the use of Diethyestilbestrol (DES). "DES and a Proposed Theory of Entesprime Liability" 46 Iordham Law Review 963 (1978).

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proceeded to trial against the remaining defendant, a relatively small company. The verdict was $3,000,000. If the ruling in Borel is followed, the plaintiff would recover $2,600,000 from the litigating defendant, but if the pro rata rule is followed, he would recover only 1/14 of the verdict or $214,285 or about 2.4 million less. At the moment of this writing no decision has been made by the Trial Court. I personally am firmly of the opinion that the pro rata rule should be applied.[19/]

I cannot close without some comments on the true nature of the so-called "sales defect" case, or warning case. As I have indicated, there are a number of decisions from the appellate courts holding that a defendant may not defend on the basis of the State of the Art at the time the product was manufactured. This might be justified in a case involving a manufacturing defect, or even a design defect.[20/] I do not see how this can be justified in a warning case, which actually is a case involving a sales defect. In an asbestosis case, we are not dealing with

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19/ Palentine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. Sup. Ct., 1964). See too Petco Corporation v. Plummer, 292 S.W.2d 163 (Civ. App.--Dallas, 1965). See 25 American University Law Review 236 (1975).

20/ A recent Texas case has held that State of the Art is no defense in a design case. Bailey v. Bootland of Houston, Inc., 585 S.W.2d 805 (Civ. App.--Houston, 1979). Application for Writ of Error has been granted by the Supreme Court of Texas, and we can expect a ruling by the Supreme Court late this fall. See too Cunningham v. MacNeal Memorial Hospital, 266 NE (2d) 8976 (Ill., 1970).

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either a manufacturing defect or a design defect. The insulation was designed properly, from a technological point of view, and the manufacturing process did not go awry. The product is defective only because it is unreasonably dangerous when used in its anticipated manner without a warning, or because the warning which was given was inadequate in the light of the danger involved. Once we get into the question of the adequacy of the warning (or even more basic, the question of whether a warning should be required at all,) it seems to me that we necessarily must become involved with the State of the Art. Actually, where the only defect is the lack of a warning or the inadequacy of the warning, I do not see how a plaintiff can raise an issue without getting into the question of the State of the Art. The question of whether a warning should be given or whether a given warning is adequate in light of the dangers involved, must necessarily be based upon the manufacturer's presumed knowledge, as an assumed expert, of the hazards involved in the use of his product. I am unable to see how this can be determined without reference to the State of the Art.

I think the whole problem here, in all of these areas, is really one which we lawyers have created countless times in the past. We tend to attempt to force a new concept into the rigid framework of earlier rules of law. This goes back to the fiction of the old common law causes of action. In this situation,

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we are attempting to force a negligence concept into the framework of a strict liability concept. We pay lip service to the proposition that fault plays no part in a strict liability case, but at the same time, in a warning case, we apply the traditional negligence concepts of reasonableness and forseeability. As shown by Borel, the general rule of strict liability subjects the seller to liability to the user even though the seller has exercised all possible care in the preparation and sale of the product. However, as the court pointed out, this is not the case where the product is alleged to be unreasonably dangerous only because of the failure to give adequate warning. Rather, a seller is under a duty to warn only of those dangers that are reasonably forseeable. The Borel court recognized that in a warning case, we are really dealing with a negligence concept. This sentence is revealing:

> "The requirement of foreseeability coincides with the standard of due care and negligence cases in that a seller must exercise reasonable care and foresight to discover a danger in his product and to warn users and consumers of that danger."

This is the concept of the restatement (Section 402a, Comment A). See too Davis v. Wyeth Laboratories, Inc., 399 Fed.2d 121 (9th Circuit, 1968). I would take the position,

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therefore, that these cases should be tried on a negligence theory, rather than on a strict liability theory. I say this with a full realization that the entire concept of strict liability is grounded upon social concepts, rather than legal logic. However, I think that this social concept can be served just as well by the use of a negligence theory in warning cases. We are, after all, really engaged in determining where a loss should equitably fall. But perhaps this philosophical speculation is beyond the scope of this paper.

As we have seen, within the past few years, with the development of the asbestos industry, an entirely new and devastating element has been introduced into our environment. Within the past seven short years, a tremendous amount of litigation in this field has developed. Despite the fact that the insulation manufacturers have not used asbestos for the past six or seven years, the problem will be with us for years to come. In the case of asbestosis, we have seen that there is a long period of latency, as much as 30 years. It has been estimated that; for the balance of this century, 20,000 asbestos workers will die annually as a result of exposure to the product. Thus, we can expect this flood of cases to continue and even to increase. Insofar as asbestos-related diseases other than asbestosis itself, we see the advancement of medical science presenting even more and more information concerning the harmful effect

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of asbestos. We have progressed from asbestosis to mesothelioma to bronchogenic carcinoma, and it would not be unrealistic to predict that further progression will take place. This situation is exacerbated because of the increase in longevity. Simply stated, there are going to be more and more cases of asbestos-related disease as the lifespan increases and more people live long enough for the disease to manifest itself. The situation is growing in another direction. These cases started out involving only insulation workers. We are beginning to get cases involving persons who were peripherally exposed to asbestos, including the wife of the asbestos worker who washes his clothes, the worker in some other trade who has worked on jobs where asbestos insulation has been installed, and even members of the general public who have simply had the misfortune to be in a locality where asbestos fibers are in the air, or even the water. Further, more and more products are being indicted. We are all familiar with the recent scare about hair dryers. However, there are many other sources of asbestos in our environment. I might mention brake linings, roof coatings, floor tile and many others. I am told that at one point some manufacturer produced cigarettes with a filter containing asbestos. If one were bent upon acquiring a case of lung cancer, smoking this kind of cigarette would seem to be the easiest possible way.

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The mere fact that we have now become aware of the hazards of asbestos, to the extent that substitute products can be used, does not afford a solution. Asbestos by its very nature is almost indestructible and there remain thousands of installations containing asbestos which ultimately will be removed, with the necessary release of asbestos fibers into the environment. I am told that there is an entire housing project in Puerto Rico built from wallboard containing asbestos. Practically every ship in the United States Navy contains much asbestos insulation. There are millions of square feet of asbestos floor tile as well as millions of square feet of acoustical ceiling material. And so on. Nor can we rely upon improved respirators and other safety devices.

It seems to me that we are inevitably going to have to have some sort of federal compensation law covering asbestos-related diseases. I would have in mind something like the Black Lung Legislation.[21/]

One might object to such legislation because it singles out only one substance. There are literally thousands of substances which we now recognize as being hazardous, and the list is growing all the time. Why, then, should we single out asbestos?

21/ Coal Mines Health and Safety Act, 30 USCA. See 901-36; Black Lung Benefits Reform Act of 1977, Publ. L. No. 95-239. See Forum, Vol. XI, No. 3, Spring, 1976.

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I think the answer to this may be that our experience with asbestos has been a unique one. I can think of no other substance with such unrecognized dangerous qualities which was so widely used. It may well be that this country will ultimately get to the point where all environmentally produced illnesses are compensated on some basis other than upon traditional, or even new, tort concepts. Be that as it may, we are confronted with a specific problem in asbestos-related diseases, and from a practical point of view, the manufacturers simply cannot afford the foreseeable cost of the present system of reparations, not to mention that the case load in our courts will soon become intolerable. Rather than compromise the integrity of our system of justice simply in order to reduce the case load, I would much prefer the suggested system of compensation along the lines of workmen's compensation.

CONCLUSION

I can feel little pride in either our technological system nor our legal system in connection with the history of asbestos-related diseases and the law. It would, I think, be too harsh to assert that the insulation manufacturers deliberately ignored the health hazards of asbestos in their pursuit of profits, although this claim has indeed been made. It is, however,

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all too clear that there was not nearly enough concern about the hazard, and as a result, the largest single occupational health problem of our time--at least to date--has come about. This tragedy has affected and will affect hundreds of thousands, has caused and will cause incalculable human suffering, and will probably maintain its number one position until our ultimate confrontation with the undisposed of, and perhaps undisposable, nuclear waste.

The basic question, of course, insofar as any system of reparations is concerned, is who will bear the obvious pecuniary loss. We can only compensate with money. Like Lady MacBeth's doctor, the law cannot minister to a mind diseased nor pluck from the memory a rooted sorrow. The question is simply who shall pay for the loss and how this can best be determined. Under the present system, we put the burden upon a few insurance companies who happened to insure insulation manufacturers years ago, at a time when the catastrophic results of the use of the product insured were clearly beyond the contemplation of the underwriters, even though the courts have charged the insureds with constructive knowledge of the hazard. Further, we determine the liability through the application of rules of law never designed for such a situation, and, because of the magnitude of the litigation, we compromise the body of our law by judicial

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legislation motivated not by any sense of fairness or justice, but by desire to "clean up the docket". All we have succeeded in doing, thus far, is to continue with our inefficient and frequently inequitable system, and in the process clog our courts to the point where judges are writing bad law simply in order to reduce the case load.

There ought to be a better way.

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