Prepared for the Pacific Northwest Section of the American Industrial Hygiene Association, Northwestern Columbia River Associations of Occupational Health Nurses and the Northwest Association of Occupational Medicine.

THE RESPONSIBILITY OF THE LEGAL SYSTEM

IN AREAS OF OCCUPATIONAL HEALTH

JEFFREY S. MUTNICK

"I never give them hell. I just tell the truth
and they think its [*sic*] hell." Harry S. Truman.

Introduction

It has been our good fortune to have a government based upon a system of checks and balances. When one branch of government fails to meet its responsibilities, another provides a necessary avenue of relief. When Congress enacts laws, which exceed the boundaries of our Constitution, the courts are available to restrict the actions of Congress and bring its laws into conformity with the legal limits imposed by our forefathers. When the courts fail to provide relief for individuals to whom relief is due, the administrative branch is available to propose laws that protect the rights of those individuals. Such has been the history of our country from its inception through revolution, its development through Civil War, and its attempted enlightenment through the pronouncements of the United States Supreme Court in Brown v. Board of Education, 347 US 483, 745 Ct. 686, 98 L. Ed. 873 (1954), and the Civil Rights legislation of the 1960s.

In any evaluation of the responsibility of the legal system in areas of occupational health, this system of checks and balances must be kept in perspective. State legislatures and Congress can enact occupational disease legislation, which attempts to protect the health and safety of workers, and provides for evaluation of hazards in the work place. Without the court system to enforce this legislation, the efforts of legislatures and Congress are meaningless.

The spread of occupational disease affects millions of workers in mines, factories, fields and now research laboratories and office environments, continuing nationwide as an epidemic of silent, cumulative violence: an epidemic which only recently has been subject to a process of epidemiological documentation, due mostly to federal law. The Occupational Safety and Health Act of 1970 has produced studies and stimulated consciousness, which demonstrate the avoidable costs industry inflicted on laborers, their families and their genetic legacy. But the mere enactment of such legislation does not translate into effective control or curtailment of the hazards that exist in almost every work place. The political and economic power of corporations and trade associations has been used consistently to weaken and curtail the efforts of the

Occupational Safety and Health Act. Efforts have been made by political forces to restrict the adoption of industry standards, and the effectiveness of the Occupational Safety and Health Act has been directly related to the willingness of each political administration to enforce its provisions.

Fortunately, injured people have another recourse. In the court system, this has been referred to as "accountability," corporations and other culpable agents are held accountable by the creative evolution of the Common Law on a case-by-case basis. It is a process that is less susceptible to manipulation. Time and again, as injured workers have sought and received the compensation to which they are entitled, either through the use of Workers' Compensation laws or through access to the courts, the predictable response has been an attempt in state and federal legislative forums to enact restrictive or suppressive legislation.

The Workers' Compensation laws, once bitterly opposed by industry, have now become, in some respects, a shield against expanded liability and adequate awards. What was once viewed as a method to establish security of compensation with fixed damages instead of the uncertainty of litigation, has now become an obstruction to corporate liability for occupational diseases, especially those diseases with long latency periods. Statutes of limitations limiting the access of individuals to the court system when they have been inflicted with diseases with long latency periods have become another shield to corporate liability.

The use of the Workers' Compensation system by injured workers and effective access to the courts to obtain those benefits available, including the use of general and punitive damages, is the responsibility of the legal system and those who practice within it. This paper will review the legal remedies available to injured workers. In describing the legal theories upon which these remedies are based, the obstacles faced by plaintiffs' in asbestos litigation will be used as an example of the complexity of the problems facing those who have become victims of corporate irresponsibility.

Background

Disease occurs whenever the exposure to the toxic or carcinogenic agent occurs, regardless of the country, the type of industry, job title, job assignment, or location of exposure. The disease will follow the trail of exposure, and extend the chain of carcinogenic risks beyond the work place, to the users of the products, to the general environment, e.g., the home, wherever and to whomever such exposures have occurred. It is the exposure and the nature of that exposure that determines the risks and the diseases that will subsequently result.

The disease itself provides the medical evidence that the nature of the exposure was harmful, regardless of any description of limited or intermittent exposures or numerical designations in any regulations. There are marked variations for each individual in the biological host response to toxic and cancer-causing agents. The development of carcinogenic risks does not require continuous exposure.

The need for, and the importance of, warning information about infectious, toxic, or cancer-causing chemicals has been a fundamental principle of public health for over 100 years. Warnings make possible protective measures for those exposed, and provide the support for proper participation in the implementation of the protective measures required. The mere adoption of regulations has no real meaning without the professional, industrial and governmental recourse and legal and moral determination to implement such regulations. For decades, tens of thousands of industrial chemicals have been introduced into the working environment individually or in combination without prior testing for their cancer-causing effect. The difficult problem of recognition of health effects has been compounded, because there has never been more than a fraction of the professional personnel in industrial hygiene, toxicology and industrial medicine required to study the effects of such chemicals in the environment. Historically, the governmental effort, federal and state, and industrial hygiene and industrial medicine in the investigation of occupational cancer, as well as other toxic exposures, has been relatively insignificant. Industrialization has proceeded at an ever-expanding pace for decades, but there was never the concomitant recognition of the need to determine what would happen to the industrial population and the public in the terms of industrial-hazardous exposures. It must also be realized that studies in the absence of action to inform and protect the public, will not meet the needs of society.

Legal Overview

Defendants in toxic tort litigation have been employers of workers and manufacturers and distributors of products. In general, Workers' Compensation has constituted the worker's exclusive remedy against his employer for work-related injuries and illness. Because the employee who is suffering from a disease covered under Workers' Compensation retains a common law right of action against third parties, the primary target of litigation intended to compensate these workers has been the manufacturer of a product. Of late, there have been some attempts to impose liability on employers regardless, through penetration of the Workers' Compensation shield.

Liability of the Manufacturer

Products liability law provides for the individual suffering from industrially caused diseases, a foundation upon which to base a cause of action against the manufactured products. The liability of the manufacturer may be based upon the theory of negligence, strict liability or breach of warranty. Generally, these suits are based on strict liability, and at least one of the other two theories.

The theory of strict liability establishes that:

> "One who sells any product in defective condition unreasonably dangerous to the user or consumer is the subject of liability for physical harm thereby caused to the ultimate user or consumer." Restatement of Torts §402(a)

A product may be "unreasonably dangerous" but properly made, "when it is not accompanied by adequate instructions and warnings of the dangers attending its use." Prossor, Law of Torts 659 (4th Edition, 1971). The law of most states provides that even unavoidably unsafe products will not be considered unreasonably dangerous if properly prepared and accompanied by proper directions and warnings. See, Restatement §402(a), Comment K, at 353. In most cases where recoveries have been made against manufacturers of hazardous products, the theory of liability has been based on the manufacturer's failure to warn of the dangers inherent in it's products, and allow a worker or his employer the opportunity to protect himself from these hazards. See, Borel v. Fibreboard Paper Products Corp., 493 F2d 1076 (5th Circuit, 1973), cert den, 419 US 869 (1974).

Duty to Warn

In order to establish the liability of a third-party manufacturer, the plaintiff in a products liability lawsuit involving an unsafe product, must demonstrate that the defendant had a duty to warn the plaintiff of the risks associated with the product. Some states, including California, Oregon and Washington, have held that a defendant is required to warn of the risks of the product, regardless of whether the defendant knew of those risks. See, e.g., Kisor v. Johns Manville Corporation, 783 F2d 1337 (9th Circuit, 1986). Other states have held that the duty to warn exists only where the defendant was or should have been aware of the risks of the product in question. In both instances in the absence of a proper warning, the product is not reasonably safe (unreasonably dangerous). Plaintiffs have had little difficulty in demonstrating that a hazardous product not accompanied by warnings is unreasonably dangerous. The rationale for imposing this duty was explained by the court in Borel, Supra, which said:

> "A product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal. Nor may a manufacturer rely unquestionably on others to sound the hue and cry concerning a danger in its product. Rather, each manufacturer must bear the burden of showing that it's own conduct was proportionate to the scope of it's duty." Borel, Supra at 1090.

The proliferation of litigation in the area of products liability must have, by now, made the manufacturing community acutely aware of its obligations to warn of the hazards inherent in it's products and provide workers and consumers with an adequate opportunity to protect themselves from these hazards. Nevertheless, the asbestos tragedy provides a strong statement regarding the responsibility of the legal system to provide compensation for injured workers, while at the same time, demonstrating the arrogance of an industry indifferent to the value of human life. The history of the asbestos industry's derogation of the health of not only it's own workers, but also the users and consumers of it's products is a tragic symbol of the legal systems meeting of it's responsibilities. Lawyers on behalf of injured persons exposed to asbestos have, over a period of approximately 20 years, uncovered a trail of what has been characterized by one author

as, "outrageous misconduct" (See, "Outrageous Misconduct" – The Asbestos Industry on Trial, Paul Brodeur, Pantheon Books, 1985). We have copies of some of the pertinent documents demonstrating the conduct of the asbestos industry (contact us, and we can send them to you). They demonstrate the complete disregard of the health and safety of workers by corporate officials.

In order to secure these documents, plaintiffs' lawyers, at great expense, difficulty and with resistance undoubtedly unequaled in any litigation, have proceeded over a 20-year period to discover correspondence, corporate records, records of symposia, sales meetings, conferences upon which the liability for compensation of the victims of the asbestos industry has been predicated. Depositions of corporate officials, workers, managers, factory officials, medical personnel and experts hired by the asbestos industry, have extended over a period of 20 years in an attempt to unravel the full extent of what has been referred to as the "asbestos conspiracy." In proving the failure of the asbestos industry to warn persons exposed to asbestos of the hazards of such exposure, the legal system has provided an example for future toxic tort litigation. Unfortunately, recourse to the legal system has not always been used as effectively as they have been in asbestos litigation to secure compensation for people who have been injured in the work place. Dalkon Shield, Agent Orange, formaldehyde and isocyanate litigation are areas where the process has not yet reached its goals.

Adequacy of Warning

In areas of adequacy of warning, the industrial hygienist and industrial professionals generally have provided an additional method for the legal system to meet its responsibility. Where warnings do accompany a product, a plaintiff's success depends on showing the inadequacies of the warnings. Warnings are not considered adequate if they are too broadly worded and do not sufficiently specify the full nature of the hazards. Thus, the mild suggestion that inhalation of a product in excessive quantities over a long period of time may be harmful, conveys no idea of the extent of the danger and is, therefore, inadequate.

The existence of an intermediary, for example, an insulation contractor, may affect the manufacturer's duty to directly warn a worker or the ultimate consumer. The presence of the intermediary will generally not, by itself, relieve the manufacturer of the duty to warn. See, for example, Sterling Drug, Inc. v. Cornish, 370 F2d 82 (8th Circuit, 1966). However, the manufacturer may not be liable for miscarriages in the communication process. For example, if an intermediate party is notified of the danger and discovers it for himself and proceeds deliberately to ignore it and to pass on the product without a warning, the manufacturer may, under some circumstances, be exempt from liability. On the other hand, if the product is very dangerous and a warning is easily transmitted, failure to provide the warning to the ultimate user may not be justified. (See, Restatement §977, Comment B). This is an issue which will receive more attention in future litigation since the legal system has made the manufacturing community aware of the necessity for warnings.

Again, the asbestos tragedy is an example of the resistance of manufacturers to fully acknowledge the hazards of its products and adequately warn individuals of effective methods to avoid those hazards. Initially, the asbestos manufacturers did provide small, unobtrusive, general warnings as to the hazardous nature of the products. Only later, after extensive litigation and an awareness of the substantial liability to which the industry was exposed, did the manufacturers, more fully explain the nature of the hazards of the product, for example, asbestosis, mesothelioma and bronchogenic carcinoma, and begin to meet its responsibility in attempting to develop substitute products. The industry which had existed for over 100 years, managed, after the presentation of Dr. Selikoff's Symposium in 1964, to develop asbestos-free substitute products in less than eight years and effectively market these products. The industry, which had previously failed to place any warning on it's products upon development of an asbestos-free product, was able to place a mark of identification on the product itself to note the fact that it was asbestos-free. Examples of the corporate response to the general public's awareness of the hazardous nature of it's products are available from our office (contact us, and we can send them to you).

Causation

Assuming that a plaintiff can prove that a product had the capacity to cause injury (was unreasonably dangerous) and that it was not accompanied by warnings, the plaintiff must show that the defective aspect of the product caused the injury for which the plaintiff seeks compensation.

It is the area of causation that requires a cooperative effort between the legal system and the medical and industrial hygiene communities. Without expert assistance from industrial hygienists and medical professionals, a plaintiff is unable to demonstrate a causative relationship between the product and the disease. Epidemiological studies and industrial investigation are necessary to demonstrate the link between a product and disease. Although the history of occupational diseases extends back for centuries -- Ramazzini, in the 17th century wrote extensively of disease "in the shops of the craftsmen" -- many of them still go unrecognized today. One problem is identifying the harmful substances and understanding their effect on the worker. The National Institute for Occupational Safety and Health (NIOSH) recently classified 2,000 substances as playing some role in causing cancer in humans (Zubrenski, Establishing Causal Relationship in a Claim for Occupational Cancer, 53 Wisc. Bar. Bul. 8, March 1980). In considering all of the occupational diseases, the figure would be much higher. Frequently, illnesses are not recognized as occupationally related. All too often, the patient's trade or occupation will be specified simply as "laborer" or "plant worker." Even though the physician is able to diagnose that the worker has severe restrictive lung disease, usually no attempt is made to link the etiology and progression of the problem with a job-related condition or toxic chemical. As stated by John F. Finklea, M.D., the Director of NIOSH:

> "No matter how esoteric the causative agents, the disease usually manifests themselves in relatively conventional forms."

Ramazzini noted in the 17th century:

> "The arts that men practice are various and diverse and from them may arise various diseases. Accordingly I have tried to unearth the shops of craftsmen, for these shops or schools whence one can depart with more precise knowledge, whatever may appeal to the tasks of the investigators, and which is the main thing to suggest medical precautions for the prevention and treatment of such diseases as usually effect [*sic*] the workers . . . a doctor . . . should . . . question . . . carefully. . . . what occupation does he follow." (Ramazzini).

The passage and implementation of the Toxic Substances Control Act should assist in ameliorating the problem of awareness of toxic substances. Physicians and industrial health professionals must maintain a constant vigilance to lead them to suspect the occupational environment as a possible causative factor. The physician must be mindful not only of the present occupation of the worker, but of former ones, since the patient suffering from certain ailments may no longer be exposed to the occupational environment responsible for his or her present condition. The physician must be alert to those situations where exposure to certain chemicals and other environmental hazards were only occasionally experienced by the worker.

By continued vigilance regarding the occupational history and the hazards encountered, the physician can use these occupational findings more effectively in forming judgments concerning disabilities, and in the diagnosis and treatment of disease. More important, is the role the physician can play in preventing the reoccurrence of illness by proper reporting and by coordinating concerns about the worker with management and responsible public officials. In this, the physician and occupational health specialists can work together with the legal system.

Defenses

Before forming the impression that tort liability is easily imposed upon the manufacturing community when the physician, the occupational health community and the legal system work cooperatively, a few notes regarding the defenses which are available to and interposed by the manufacturers, are in order.

Probably the most successful defense available to a manufacturer is the claim that the statute of limitations has expired. Many statutes of limitations provide a limited period, generally, from two to six years, in which to bring an action for tortious injury. In the area of occupational disease where the injury is often cumulative, determining when this period begins to run can be extremely problematic. Plaintiffs and defendants have different interpretations of appropriate starting points. Defendants argue that the period runs from the plaintiff's initial exposure to the product. Many statutes of limitations require that litigation be commenced within a limited period of time after the products has been placed in the stream of commerce. In many occupational diseases, the

manifestation of the disease does not occur until a substantial period of time has elapsed. In those instances, the injured worker may have absolutely no recourse in the legal system for compensation. But, the manufacturer, having placed his product on the market, has effectively avoided responsibility through the passage of time. In such cases, the worker may also be barred from receiving workers' compensation benefits, again, due to the latent period of the disease. Even where workers' compensation benefits are available, most Workers' Compensation statutes do not provide compensation for pain, suffering and loss of companionship.

Some states statute of limitations do not commence to run until the conditions that constitute a cause of action are manifest. The application of this type of statute has been characterized as the "discovery rule." In the absence of a liberal discovery rule, many victims of disease are foreclosed from bringing a tort action. The courts' have described the discovery rule as follows:

> "The purpose of the 'discovery rule' is to postpone the commencement of the limitations period in cases where there is no overt act which places the person involved on notice that there may be an injury . . . the only way a worker can know an injury has occurred is some physical symptom of disease or through the report of a physician." Strickland v. Johns Manville International Corp., 461 F Supp 215, 217 (S. Dist. of Texas, 1978).

As the court noted in Karjala v. Johns Manville Corp., 523 F2d 155 (8th Circuit, 1975):

> "There is rarely a magic moment when one exposed to asbestos can be said to have contracted asbestosis; the exposure is more in the nature of a continuing tort. It is when the disease manifests itself in a way which supplies some evidence of causal relationship to the manufactured product, that the public interest in limiting the time for asserting the claim attaches in the statute of limitations will begin to run." Karjala, Supra, at 160–161.

Unfortunately, many states continue to restrict the access of individuals in court to a finite period of time, regardless of whether the disease has manifested itself or the injury can be perceived.

There are many other defenses which are available to the manufacturers in products liability cases. In Agent Orange litigation and asbestos litigation, the defendant's have attempted to shift responsibility to the United States Government through what has been characterized as a defense of "Government Specifications." In many types of toxic tort litigation, including Dalkon Shield litigation, asbestos litigation, Agent Orange litigation and isocynate litigation, the defendants have alleged that the medical and scientific community had not formed a precise opinion of the hazards of the products which was sufficient to place the manufacturer on notice of potential harm.

Procedural obstacles, such as attempts by manufacturers to obscure identification of its products, to blame or to attempt to shift the blame to other manufacturers who made similar products, are commonly utilized by the defendants. Invariably, the defendants will allege that the injuries were not caused by the inherently dangerous characteristics of the products themselves, but by the negligent use of the product by the employer or worker, again an attempt to shift the blame from the manufacturer to any other potential source other than the manufacturer or distributor.

The most difficult obstacle for any plaintiff to overcome in toxic tort litigation is the tremendous defensive response of the manufacturer. The common approach to the defense of toxic tort cases has been the "millions for defense" theory. There seems to be no limit on the amounts which the defendant will expend to avoid the plaintiff from having his "day in court." The Institute for Civil Justice of the Raan Corporation, of Santa Monica, California -- accompanied researchers supported by contributions of industry, including several asbestos manufacturers and their insurance carriers, issued a report on an investigation they had made into the costs of the asbestos litigation period. Asbestos in the Courts: The Challenge of Mass Toxic Torts, 1985.

Rand people said that one billion dollars had been spent on asbestos lawsuits from the early 1970s through the end of 1982, and that six hundred and sixty-one million had been paid by defendant manufacturers and their insurance carriers to close out asbestos disease claims that either had gone to trial or had been settled out of court. According to the Rand researchers, only 37% of that amount had actually gone to compensate the plaintiffs. The report went on to state that each asbestos case costs the defendant manufacturers and their insurers, about ninety-five thousand dollars, and that thirty-five thousand of this went to pay for defense lawyers fees and expenses, and out of the sixty thousand that remained, the average plaintiff paid twenty-five thousand for his or her attorneys fees and expenses and was so left with an average net of compensation of thirty-five thousand dollars.

In discussing the responsibility of the legal system, it is impossible to avoid the responsibility the legal system must accept for diverting funds, which could be better spent for compensation of victims, research and investigation of occupational diseases. For every lawyer intent upon securing adequate compensation for his client, there is another lawyer intent on avoiding the payment of this compensation. There can be no excuse for excessive legal fees either by the defense or plaintiff's bar. The common response to these fees, primarily from the industry, has been the proposal of a "Workers' Compensation" System to compensate injured workers. An example of this response is the Black Lung Legislation, which has been unfortunately characterized by its ineffectiveness.

Workers' Compensation

Workers' Compensation is a system that is based upon the absence of fault. In order for a worker to collect Workers' Compensation benefits, the worker must sustain an injury in the course and scope of his or her employment. If the injury or occupational

disease is sustained as a result of the worker's employment, the worker receives disability and medical benefits. Workers' Compensation benefits provided for injured employees are not only unconscionably low, but also, particularly in the case of occupational disease victims, often unobtainable. In July 1980, United States Department of Labor in a survey based upon 1978 data, reported that nearly 2 million American workers were disabled by occupational illnesses, suffering lost income totaling 11.4 billion dollars. Only one disabled worker in 20 received workers' compensation, however, with the total recovery amounting to 2.2 billion dollars. This disparity between loss and compensation, points out the failure of present compensation programs to meet this growing problem.

Because compensation insurance premiums are generally based on experience factors, most State Workers' Compensation Acts require determination of the origin and disease from the standpoint of exposure, to a certain identifiable toxic substance. Since occupational diseases characteristically have long latency periods, it is often impossible to determine exactly where the disease came from, or, in fact, to prove that it came from a single or group of exposures to a given substance. Even identifying a single employer against whom the claim should be filed is often a difficult, if not an impossible task in multiple continuing exposure cases. A sandblaster, for instance, who has contracted silicosis and has worked for more than one employer, will have difficulty differentiating and distinguishing the etiology of the disease for the purpose of designating both the offending substance and the responsible employer. In such instances, the use of what has come to be known as "the last injurious exposure rule" designates the last employer with whom the employee had an injurious exposure as the responsible employer. Most compensation systems have not established adequate mechanisms for avoiding the thirst for litigation of the insurance carrier, and the injured worker is often in the position of having to litigate his claim, even where he is capable of identifying his employer and his exposures.

Compensation Acts generally have unrealistic requirements on exposure and disability dates which were originally drafted for single traumatic accidents, and render many occupational disease claims to be filed untimely. The act typically requires the claim to be made within a period of months following the date of the last exposure or the manifestation of disability. In states which have specific requirements that the claim be filed within a limited period of time after the last exposure, any disease which has a latency period exceeding the statute of limitation, the claimant will not of manifested an identifiable disease during the period of limitation from last exposure and could not be aware of the necessity to file a claim. In states that require that the claim be filed within a limited period of time after the manifestation of disability, numerous claimants are deprived of benefits because of unrealistic court interpretations of when the disease has manifested itself.

Finally, in some states, the benefits available to the claimant are determined by the law in effect at the time of the last exposure, not at the time of disability. A worker employed by a company using toxic chemicals who left that employment in 1950, may be relegated to compensation benefits set under the 1950 Compensation Act even though the disabling disease manifested itself in 1980. An example of injured workers

who have failed to secure benefits under these circumstances is available from our office (contact us, and we can send it to you). (See Stone v. SAIF, 57 Or App 808 (1982); Grover Johnson v. SAIF, 78 Or App 143 (1986).

The underlying purpose of Workers' Compensation is twofold: to compensate victims and to prevent accidents. Because of the unique problems created by the latency periods of most occupational disease, neither objective has been fulfilled. This represents an area where the legal system fails to meet its responsibility. Lawyers representing claimants in Workers' Compensation cases have a responsibility to their clients to seek remedial legislation, which allows the recovery of adequate compensation for individuals who have sustained latent occupational diseases resulting from their exposures to the work place. Lawyers representing employers in occupational disease cases have a responsibility not only to the public, but also to their clients to effectively process these claims without the unnecessary interpolation of spurious procedural defenses.

The most tragic example of the failure of the legal system to achieve or to meet its responsibilities exists in those instances where individuals fail to secure the compensation to which they are entitled before the disease, which they contracted in the work place, takes their life.

Conclusion

> "There are not enough jails, not enough policemen, not enough Courts to enforce a law not supported by the people." Hubert H. Humphrey.

For the legal system to function effectively, it must have the support of the people who participate in it, directly and indirectly. Lawyers, judges, politicians and health professionals must all work together to enforce the law. With the cooperation of all these elements, the legal system will meet its responsibility in the area of occupational health to prevent the proliferation of future disease and compensate the victims of past failures.

Additional References: *Occupational Diseases – A Guide to Their Recognition*; United States Department of Health Education and Welfare, (NIOSH) Publication No. 77–181, September 1978; Barron, Fred – *Handling Occupational Disease Cases*, Law Press, 1981; Castleman, Barry I. – *Asbestos, Medical and Legal Aspects*, Law & Business Inc., 2nd Edition, Copyright 1986; and Brodeur, Paul – *Outrageous Misconduct – The Asbestos Industry on Trial*, Panthion Books, 1985.