

Recent Trends in Asbestos Personal Injury Litigation: The Longest-Running Mass Tort Lives On

by Anthony Carr, Esq., Shaheen & Gordon

Asbestos personal injury litigation began over 50 years ago. Since 2013, I have had the honor of being involved in this extremely rewarding, but equally challenging litigation. I spent my first four years of practice in Hawaii where I primarily represented working class people who were diagnosed with mesothelioma – often retired Navy personnel and Pearl Harbor Naval Shipyard civilian workers – and litigated against Fortune 500 companies such as Toyota, ExxonMobil, Caterpillar, and Mead. Since moving back to New Hampshire, a surprising number of lawyers have remarked, almost incredulously: “Asbestos litigation is still a thing?” While the answer is a resounding yes, and asbestos litigation remains the longest-running mass tort in American history, it is important to note that it has evolved significantly since its emergence in the 1970’s. As the saying goes, “this is not your father’s asbestos litigation.”

Background on Asbestos Litigation and the Relevant Science

a. Brief History of Asbestos Litigation

In 1966, legendary Texas trial lawyer Ward Stephenson filed the first product liability lawsuit in an asbestos case against various manufacturers of asbestos-containing insulation. Prior to that suit, there had been minimal litigation related to asbestos, and what little litigation existed was almost exclusively handled through worker’s compensation claims. Stephenson’s initial case proceeded to trial in May 1969, and the jury returned a defense verdict. In October 1969, Stephenson filed a similar case on behalf of one of the prior plaintiff’s co-workers, Clarence Borel. This time, the jury returned a plaintiff’s verdict and awarded close to \$80,000.00. The case was appealed and, tragically, Stephenson passed away four days before the Fifth Circuit upheld his verdict in a landmark decision, *Borel v. Fibreboard Paper Products Corporation et al.*, 493 F.2d 1076



(5th Circ. 1973). After the *Borel* decision, asbestos lawsuits began to trickle in throughout the United States.

The first wave of litigation, which began around 1973, was primarily focused on manufacturers of asbestos insulation, such as Johns-Manville. In the first few years, the insulation defendants were relatively successful in minimizing or eliminating their liability through state-of-the-art defenses that pointed to the allegedly minimal amount of published literature on the hazards of asbestos. Shortly thereafter, around the mid-1970’s, lawyers such as Ron Motley, a pioneer in asbestos litigation, began uncovering the asbestos industry’s long-running cover-up of the hazards of asbestos. Through relentless pursuit and zealous advocacy, the plaintiff bar discovered correspondence after correspondence which showed that certain companies knew about the hazards of asbestos as far back as the 1920’s, and actively worked to suppress such information from reaching the public domain. The mounting pile of evidence and, therefore, tort liability, led to Johns-Manville, a former Fortune 500 company, filing for bankruptcy in 1982. Generally speaking, insulation manufacturers remained target defendants in asbestos litigation until around the turn of the century, when Owens Corning, one of the largest manufacturers of insulation and roofing material in the U.S., filed for bankruptcy as it faced an estimated \$7 billion in tort liability.

b. Science of Asbestos101



Asbestos Sample

Asbestos is a mineral that occurs naturally in the environment. Beginning in the late 19th Century, asbestos was mined for use in commercial and industrial applications because its fibers are thin, durable, heat-

resistant, and do not conduct electricity; however, it was around World War II when its use began to greatly increase. Asbestos has been used in many industries and many products, including most prominently: shipboard applications that require gaskets, packing, and/or insulation such as pumps, valves, and boilers; automotive applications such as brake pads and clutch pads; various applications in construction such as acoustical spray, cement and adhesives, ceiling and floor tiles, and paint.

Most asbestos-related diseases are from first-hand occupational exposures. Tragically, people can also be exposed as bystanders or even in the house, such as by doing the laundry of someone who unknowingly brought asbestos fibers home with them. When asbestos- containing products

are disturbed, such as by scraping an asbestos gasket, invisible asbestos fibers are released which can be breathed in. The same qualities that make asbestos great for industry (i.e. its indestructability) make it a terror on the human body as these fibers can get trapped in the lungs and remain there for decades. Asbestos is a known carcinogen, with mesothelioma being the most common form of cancer associated with asbestos exposure. Part of what makes mesothelioma unique as a cancer is that it is what's referred to as a signal tumor, which means that this horrific disease is caused by exposure to asbestos. Other asbestos-related diseases include lung cancer, asbestosis, and pleuraleffusions. Mesothelioma is by far the most serious disease and serves as the focal point of litigation.

21st Century Asbestos Litigation

Asbestos litigation is still ongoing because people are still being diagnosed with mesothelioma and other asbestos-related diseases. The latency period is approximately 35 to 40 years between exposure and diagnosis. The number of new mesothelioma diagnoses has remained relatively steady at 2,000 to 3,000 per year from the onset of asbestos litigation through today, despite the fact that asbestos use began to significantly decline back in the 1970's. Therefore, there remain a number of people in need of recourse against those entities that substantially contributed to their illness. It has been predicted that 2020 will be the peak of asbestos claims, and that the number of claims will slowly reduce after then.

Also, there are thousands of companies that put unreasonably dangerous, asbestos- containing products into the stream of commerce. Claims against these entities still remain viable. Asbestos has never been universally banned in the U.S, and some applications, such as brake pads and other automotive components, continued to contain asbestos as recently as the 2000's.

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a. Case Investigation and Defendants

The long latency period between exposure and diagnosis creates a number of issues unique to asbestos litigation. Because of this it is imperative that asbestos attorneys are familiar with the details and strategies that are essential to asbestos claims. With most plaintiffs' exposures occurring 30 to 40 years before they get diagnosed, it would be a fool's errand to identify defendants and file a mesothelioma case - never mind litigate one - based solely on the client's memory. A critical aspect to any mesothelioma case is a detailed and sophisticated pre-suit investigation of the various potential sources for exposure.

The process of identifying defendants is extremely complicated. Taking shipboard cases as an example, today's defendants are mainly manufacturers of various equipment and machinery which contained asbestos gaskets, asbestos packing, and/or asbestos insulation such as valves, pumps, boilers, distillers, and air ejectors. Retaining a knowledgeable expert who is intimately familiar with the type of exposure at issue is just the start. While some documents are available at the National Archives identifying which companies made which products, these collections are from complete. Historically, the liability of the current "equipment defendants" in shipboard cases had been overlooked by both sides of the litigation. A great example is Crane Co, which was the largest provider of valves to the U.S. Navy throughout the 20th century and a viable, publically traded company. Crane Co. has only recently become a target defendant in asbestos litigation despite its long history of distributing dangerous asbestos-containing valves and replacement parts.

There is also an element of time pressure as the average length of survival after a mesothelioma diagnosis is approximately 12 months. Given this, it is important that a videotaped preservation



deposition of the client be performed while the client is still alive.

b. Medical Causation

The defense bar has strategically responded to the new wave of defendants by trying to reshape the well-settled science of asbestos. Many of the remaining viable defendants produced equipment, machinery, automotive components, and other products which contained the most common form of asbestos,

chrysotile. While insulation products contained chrysotile in some applications, they also contained a type of asbestos known as amosite, which is considered by some to be more potent. Although there are different types of asbestos fibers, the well-established science is that all forms of asbestos, including chrysotile, cause mesothelioma in humans, and that there is no safe level of exposure to any asbestos fiber.

Indeed, OSHA's website states to this day, "There is no 'safe' level of asbestos exposure for any type of asbestos fiber...epidemiological evidence has increasingly shown that all asbestos fiber types, including the most commonly used form of asbestos, chrysotile, causes mesothelioma in humans."

Nonetheless, the defense bar has spent untold millions of dollars funding journal articles and paying for expert testimony in an attempt to convince juries that exposure to chrysotile asbestos can never, in any event lead to the development of mesothelioma. See <https://www.publicintegrity.org/2016/02/16/19297/ford-spent-40-million-reshape-asbestos-science>. One defense IH expert on this issue is John Henshaw, the former head of OSHA, who was appointed by President George Bush. During his tenure at OSHA, Henshaw infamously did not believe in the concept of enforcement and instead "trusted" industry to do what they were supposed to, without penalty. A

tragic example of his conservative tenure was his decision to allow workers to clean up Ground Zero after 9/11 without requiring the use of respirators. In 2005, Henshaw's daughter, Shannon Gaffney, published her second article after graduating with her Ph.D., which was titled: "Asbestos exposures to truck drivers during World Trade Center clean-up operations." Gaffney's article just so happened to conclude that the Ground Zero truck drivers have no increased risk of developing an asbestos-related disease. This article will undoubtedly be used in the defense of Ground Zero claims, and is an example of how the defendants have become much more cunning in their defense of asbestos claims.

Conclusion

Over the past 10 years, asbestos litigation has become exceedingly sophisticated and complex, particularly as it relates to the dwindling number of remaining viable defendants, as well as the defendants' escalating efforts to reshape fundamental aspects of asbestos science. Forget the commercials you may have seen from TV marketing firms, which claim that billions of free money is just waiting to be claimed in bankruptcy trusts. In most instances, the only way to maximize a mesothelioma client's recovery is through the litigation of an individual civil action. Now, more than ever before, this is a significant undertaking that requires specialized knowledge



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and experience, an appreciation for the history of asbestos litigation, relationships with experts, and significant capital. Nevertheless, victims of asbestos disease deserve compensation, and this population will unfortunately continue to exist for the foreseeable future. ⚖️



ANTHONY CARR joined the personal injury team at Shaheen & Gordon in 2017. Anthony was born and raised in New Hampshire but spent his first years in practice in Hawaii. Prior to joining Shaheen & Gordon, Anthony spent four years practicing as a litigation associate for a nationally recognized trial firm in Honolulu, where he gained substantial litigation and trial experience handling complex asbestos litigation, products liability cases and cases stemming from abuse at assisted living facilities. Now back in New Hampshire, Anthony continues to concentrate his practice on representing individuals who have been seriously injured as a result of the neglect of others. In particular, Anthony often handles personal injury cases involving nursing home/elder abuse, asbestos/mesothelioma and other toxic torts, traumatic brain injury, products liability, and other catastrophic injuries.