

Fall 2004

South Carolina TRIAL LAWYER

B U L L E T I N



Matthew J. Perry Federal Courthouse
Columbia, South Carolina

Household Asbestos Exposure Cases: Innocent Victims

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The widespread use of asbestos has caused unprecedented human suffering and has resulted in an American tragedy.¹ Thousands of workers have been unknowingly subjected to breathing toxic levels of asbestos fibers. The association between exposure to asbestos in the workplace and the development of asbestos-related diseases is well established.² The risk of asbestos-related disease, however, reaches beyond the workplace and into the homes of individuals who have been occupationally exposed to asbestos. This occurs when workers inadvertently bring home asbestos dust on their clothes and personal effects thereby contaminating their homes. It is generally recognized in the occupational health community that household exposure to asbestos can place workers' families at an increased risk of developing pleural abnormalities, asbestosis, lung cancer and mesothelioma.³ A review of death certificates in the United States conducted in 1999 found that the second most common occupation recorded on the death certificates of mesothelioma victims "housewife/homemaker."⁴ These numbers can be attributed to the fact that husbands or other household members brought asbestos home on their clothing. Airborne fibers in the workplace contaminate workers' clothing and personal effects and are then carried into the home exposing unsuspecting children, wives and other household members.

Household asbestos cases present a number of challenges that are not common in traditional, occupational exposure asbestos cases. Manufacturing and premises defendants in household asbestos cases will inevitably raise the argument that they did not have a legal duty that extended to

the household victim. These legal arguments often are raised in motions and during trial and must be addressed with a combination of legal maneuvering and evidence. Establishing defendants' knowledge of the risks to household members is a challenging undertaking that may require using a combination of general corporate knowledge and state of the art materials. Frequently, defendants argue that the household plaintiff's exposure was insufficient to be considered a substantial contributing factor and that the plaintiff's disease is idiopathic or caused by exposure from other source. Finally, damages are a delicate matter in which counsel must ensure that economic damages for homemakers are not undervalued. This paper discusses these and other challenges presented to household asbestos victims and provides strategies for addressing them successfully.

DUTY TO HOUSEHOLD PLAINTIFFS

In a household exposure case, one should anticipate that the defendants will argue that their duty to warn did not extend to the household plaintiff and, therefore, they can not be liable for the household plaintiff's injuries. To support this argument, defendants will assert that the harm to the household plaintiff was not foreseeable. Defendants frequently use this argument in motions practice—the issue of whether the injury to the household plaintiff was foreseeable will become an issue for the jury and thus must be addressed in the evidence presented at trial. The following section provides strategies

for addressing these defense arguments, which vary from jurisdiction to jurisdiction, depending on the applicable law.

Premises owners will argue that their duty to maintain reasonably safe working conditions extended only to those persons on its premises. Manufacturing and distributing defendants will argue that their duty of care in the design, manufacture and sale of a product extends only to direct consumers and users of the product. However, only a handful of jurisdictions have published case law on the subject of duty to victims of household asbestos exposure. For example, the Tenth Circuit Court of Appeals held in the *Rohrbaugh* decision that it was not foreseeable that the wife of an insulator, who was admittedly exposed to asbestos brought home on her husband's clothing, would develop an asbestos-related disease.⁵ The Tenth Circuit Court observed that under Oklahoma law, a manufacturer has a duty to warn consumers of potential hazards but that duty extends only to the ordinary consumers and users of the products. The court determined that the wife of an insulator was not a foreseeable user of the product at issue under Oklahoma law.⁶ The Maryland Court of Appeals reached a different decision finding that manufacturers had a duty to warn persons in the foreseeable zone of danger which was not limited to foreseeable consumers and users under Maryland law.⁷ In Maine, a U.S. Magistrate reached a similar decision and held that the government was negligent when it failed to warn shipyard workers' family members, or "domestic bystanders," of asbestos hazards.⁸

In jurisdictions without published decisions on the issue of duty to household



members, a plaintiff can use the existing law of negligence, foreseeability and product liability to structure an argument that supports a finding that a defendant did in fact have a duty to the household plaintiff. Many jurisdictions follow the analysis set forth in *Palsgraf*, which extends a defendant's duty to warn to all individuals in the foreseeable zone of danger.⁹ If a jurisdiction has adopted the *Palsgraf* reasoning, the "zone of danger" can be used to argue that workers' households should have been considered foreseeable zones of danger. For example, in the context of a motion for summary judgment, a plaintiff can argue that in light of the state of the art evidence available at the time in question, an issue of fact exists as to whether a defendant could have or should have known that the asbestos in their products (or on their premises) could be transferred by workers on their clothes into their homes.

Manufacturing defendants also may argue that strict liability is not extended to a household plaintiff. A household plaintiff can build a strong response to this argument depending on the law in the jurisdiction. A majority of jurisdictions allow "bystanders" to recover under the theory of strict liability.¹⁰ In these jurisdictions, a plaintiff has a strong argument that bystanders such as household members who were not directly exposed to asbestos through their personal use of a product, but injured by way of a defective product another person purchased and used, may recover under strict liability. However, keep in mind that household plaintiffs seeking to be considered "bystanders" will also have to establish for strict liability analysis that their injuries were foreseeable.

At trial it is important to ensure that adequate evidence is presented to establish foreseeability—specifically that the defendant knew or should have known that asbestos presented a hazard to workers' household members during the pertinent time periods. As discussed above, if the household plaintiff defeats defendants' arguments regarding duty in motions for summary judgment and motions in limine, a likely issue for the jury will be whether

or not the defendant could have or should have known of the hazards asbestos-containing products posed to household members. The first step in this process for a household plaintiff should be to introduce evidence that the person who brought the asbestos into the home was exposed in the workplace. Testimony regarding the plaintiff doing laundry, assisting with laundry, or playing or hugging a parent when the parent returned from a jobsite are examples of ways to establish exposure. The next step is to establish that the defendant knew or should have known that workers using asbestos-containing products could take asbestos fibers home with them if precautions were not taken to ensure that workers changed their clothes, showered, etc. prior to leaving the workplace.

A household plaintiff can overcome a lack of evidence pertaining to a defendant's direct knowledge of household exposures by demonstrating two things: (1) the defendant had general knowledge that asbestos was a hazardous substance; and (2) that the state of the art literature at the pertinent time periods recognized that workers should take precautions so as not to carry hazardous substances home on their clothes and personal effects. By tying together the household plaintiff's exposure, the defendants' general knowledge of the hazards of asbestos and state of the art materials regarding changing stations, etc., a household plaintiff will be able to demonstrate to the jury that the defendant should have known that workers' household members were at risk of being exposed to asbestos brought home on clothing and will overcome defendants' arguments regarding duty and foreseeability of the household plaintiff's injuries.

CORPORATE KNOWLEDGE

Direct evidence that a defendant knew that workers' were at risk for asbestos disease can be challenging to discover. However, a household plaintiff can establish through indirect evidence that the defen-

dants knew or should have known that their products (or, in the case of jobsite defendants, unsafe work environments) could injure workers' household members.

Direct evidence of a defendant's knowledge of the hazards asbestos posed to workers' household members can be found in several places. Internal documents may reference the medical literature or conventions that highlight the fact that exposure to dust brought home by relatives working with asbestos was a growing concern. For example, representatives of a particular asbestos defendant sued under a premises liability theory attended the 1964 New York Academy of Sciences meeting and reported that the main interest of the meeting was asbestos disease which had been found in persons who would not ordinarily be considered to have asbestos exposure. During this meeting, several researchers reported asbestos disease in family members of asbestos workers. In its internal report, this defendant specifically references exposure among workers' family members as one of the three main types of exposure addressed at the meeting. Internal documents and testimony may also reference the need for workers to change clothing and shower before leaving work. For example, in the 1950's a particular chemical company made efforts to reduce asbestos hazards at some of its chemical plants. Respiration and shower facilities were provided for employees doing asbestos insulation work.

Evidence can also be found in defendants' corporate documents pertaining to hazardous substances in general. For example, a premises liability defendant may have had a printed protocol for workers who handled hazardous materials. Although such a document may not mention asbestos specifically, it may set forth general procedures for workers to follow when dealing with hazardous materials. These procedures often discuss the importance of preventing hazardous substances from spreading outside the contained areas. These same documents may also be used to show that it was not until the 1970's that many companies first began to



protect workers and their families from dust being taken from the workplace to the home. Trade association documents also can provide evidence of what a defendant could have or should have known.

In the event defendant's internal documents or witnesses do not provide direct evidence of knowledge regarding the risks to workers' household members, evidence of a defendant's knowledge, or at least of what a defendant should have known about household exposures, can be demonstrated using a combination of documents discussing the hazards of asbestos in general and state of the art documents pertaining to industrial hygiene practices and household exposure. The household plaintiff can employ the traditional asbestos liability evidence against a defendant such as memoranda discussing OSHA, incidences of illness in a plant or medical examinations to demonstrate that the company knew asbestos was a hazardous substance. Using this evidence, along with the state of the art evidence discussed in the following section, a household plaintiff can demonstrate that a defendant should have known and practiced safety protocols to prevent asbestos from being taken into the homes of asbestos-exposed workers.

STATE OF THE ART EVIDENCE

The industrial hygiene community has been aware of the problem of workers taking hazardous substances home to their families since the early 1900's and, since that time, industrial hygiene practices have been recommended to prevent workers from taking hazardous substances out of the workplace. These industrial hygiene practices include having workers wear protective clothing in place of "street clothes," requiring workers to change out of contaminated work clothes before leaving work and providing showering facilities for workers. Articles and studies discussing the problem of household exposure and these preventative practices

can be used to demonstrate that defendants should have known that without adequate precautions the harm to the household plaintiff was a foreseeable danger. Some of the highlights in the state of the art literature that address early documentation of household contamination, and the importance of industrial hygiene practices to prevent household contamination, are discussed below.

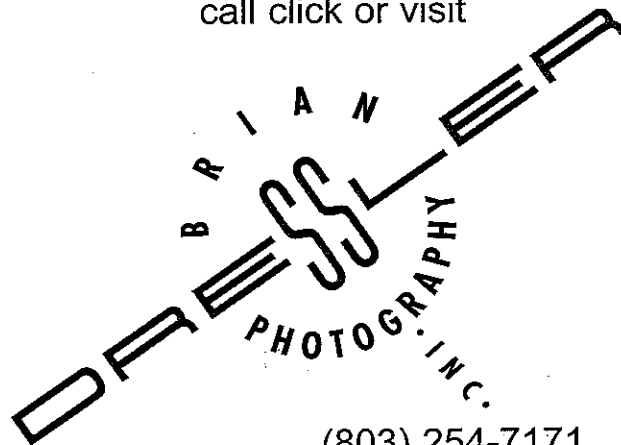
The first historical mention of asbestos

disease in household members of workers occupationally exposed to asbestos was a 1897 study, "Hygiene der Textilindustrie, Handburch der Hygiene." The author, A. Netolizky, observed emaciation and pulmonary problems in asbestos weavers and their families. In 1913, Tolman and Kendall identified sound principles of industrial hygiene which included that employees should wear protective clothing and provide adequate changing and wash-

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ing facilities for their employees so that hazardous substances would not be carried out of the workplace. This study found that protective clothing was deemed necessary to prevent workers from carrying hazardous substances into their homes. A 1924 study by Kober and Hayhurst recommended that street clothes not be worn at work and that employers provide changing and washing facilities for industrial workers.

Government and labor organizations recognized the importance of preventing exposure to individuals outside the workplace. The International Labor Organizations recommended in 1934 that workers in dusty trades be provided with rooms for changing and showering. In 1943, the United States Public Health Service published the Manual of Industrial Hygiene and Medical Service in War Industries which emphasized the importance of preventing workers from transporting workplace exposures out of the workplace.

In the 1960's, asbestos disease as a result of asbestos taken from the workplace into the home was documented. In addition to Wagner's well-known 1960 study, in 1964 Newhouse and Thompson reported mesothelioma in individuals who had lived with asbestos workers. Specifically, they reported a woman's death in 1947 as a result of pleural mesothelioma. This woman worked as a nursemaid to a manager of a gas works in East London where asbestos insulation was used. The manager likely had "bystander exposure" to asbestos yet his exposure was sufficient to bring home deadly levels of asbestos. They reported additional studies from the 1950's that further documented incidences of asbestos disease in individuals with household exposure and established that household exposure to asbestos could cause mesothelioma.

EXPOSURE

Challenges can also arise regarding whether the household plaintiff's exposure to asbestos was sufficient enough to

cause disease. Once in the home, normal housecleaning and laundry practices are inadequate for decontaminating the home and clothing. In fact, typical household practices can increase the hazards to the person performing these tasks as well as other household members.¹¹ In 1976, Dr. Paul Kotin, former head of NIOSH and physician with Johns-Manville Corporation, testified to the tragedy of take-home exposure before the United States Department of Labor as follows:

"Once asbestos gets into the home, carried home by the workmen, which in itself is a tragedy, it should not happen, it is asbestos that is there permanently. It gets into the rugs and carpets. It gets suspended by movement and, actually, you are getting a 24 hour-a-day exposure, but even worse that that is the fact that you are exposing a population of the family which includes the very young that is always the most susceptible."¹²

Nevertheless, many household plaintiffs inevitably will face the "idiopathic" defense, especially women. This argument is more easily overcome in mesothelioma cases where minimal exposures can be sufficient and underlying asbestosis is not an argument available to defense experts. A plaintiff must establish that asbestos dust was brought into the home; family vehicles and other locations; and that the plaintiff was in the position to breathe respirable asbestos fibers. Testimony can be graphic in the sense that a worker came home covered in dust and exposed children to the dust as he hugged them and his wife as she laundered his clothes. Testimony may reveal that the children, clinging to their mother's side, were exposed while she shook the clothes or they played in a pile of laundry. In other instances, it can be graphically described by the household plaintiff that she had to clean the asbestos dust out of her washing machine and dryer to keep them working. Also, some families used an older washing machine specifically for

work clothing. Other times the exposure is more subtle. Large amounts of dust may not have been apparent to the family but the worker worked with, and around, asbestos and brought the invisible dust home on his clothes, exposing his family to toxic dust.

DAMAGES

Plaintiffs in household exposure cases tend to be wives and children of industrial workers that were unknowingly exposed to asbestos. These plaintiffs can be powerful in generating emotion in a jury as they are unsuspecting and completely innocent victims. However, in order to maximize damages, it is important to ensure that when representing a household plaintiff, such as a housewife/homemaker who washed her husband's clothes, that the plaintiff does not depend on the sympathy of the jurors alone. With a homemaker plaintiff, counsel must assist the jury to adequately recognize and award compensatory and economic damages. Counsel for the household plaintiff must find a balance between creating sympathy for the innocent homemaker while simultaneously explaining why economic damages should be awarded for the valuable role she played in her family. Ensuring that compensatory and economic damages are adequately awarded is especially important in jurisdictions where tort reform and caps on damages limit awards for non-economic damages.

Research has demonstrated that juries tend to value the work of women, both in and out of the home, at a lower level than that of men who have traditionally been considered the "breadwinners" of the family unit.¹³ Therefore, in a household exposure case with a homemaker plaintiff, it is essential to provide evidence to the jury that demonstrates the economic value of housework and caretaking. Using the testimony of the plaintiff's husband, children, friends and the plaintiff herself, an economist can help to bolster the value of a household exposure case significantly.



This is a great benefit to the plaintiff and her family, who may not yet have realized the cost of replacing the plaintiff's work in the home. For example, if before her illness before her illness a household plaintiff attended to a husband or parent who was in ill health, the cost of replacing her services or placing the husband in a care facility should be considered. A household plaintiff may have done all of the cooking, cleaning and laundry in her home; contributed to the yard work; and provided child care for her children or grandchildren. The cost to replace these services at their market value would be unaffordable for most families today.

As mentioned above, in jurisdictions where tort reform limits non-economic damages, evidence of the economic damages a family will incur because of a homemaker's asbestos-related illness and inability to perform her daily tasks is extremely important. Without evidence regarding the plaintiff's contributions to the family and home, and expert testimony to place a value on these contributions, jurors will not have the tools to award greater economic damages. Even jurors who may acknowledge the importance of the homemaker's role and the value of a homemaker's work may be inclined to simply increase the amount of non-economic damages in order to assist a family if those jurors are not proved with the dollar value of the plaintiff's work. With a cap on non-economic damages in some jurisdictions, homemakers and their families can be at a disadvantage if strong evidence is not offered to establish the economic value of the plaintiff's role in the family. Counsel for the homemaker plaintiff should seek to overcome these disadvantages by introducing a strong combination of testimony of family members and experts that will demonstrate the value of the plaintiff's life and work in the home.

Nevertheless, in some instances, counsel for the household plaintiff will want to press the jury to define and determine for themselves what human activities must be protected and will urge the jury to enter a verdict that will alert companies to take the safety and protection of workers and their families more seriously. Stressing that the role of a mother or wife plays in the home is invaluable and can add to the figures provided by the economist and may result in a substantial verdict for the household plaintiff.

CONCLUSION

By using the law of foreseeability and the extensions of product liability law to non-consumers, documents demonstrating defendant's knowledge, state of the art evidence, and testimony documenting exposure and damages, a plaintiff can prevail against the challenges a household asbestos case will present. Household plaintiffs' cases continue to appear in increasing numbers, and although they present both legal and evidentiary challenges, household cases are both professionally and personally rewarding in that they allow counsel the opportunity to represent the wives and children of workers who are exposed to asbestos, unknowingly or unwillingly, in their own homes.



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- ¹ Each year there are about 2,500 new cases of mesothelioma, a cancer that affects the mesothelial cells which line the chest, abdominal and heart cavities, are diagnosed in the U.S. From 1990-1999 alone, there were more than 10,000 asbestosis deaths and annual asbestosis death counts increased by one-third. See *CDC Work-Related Lung Disease Surveillance Report*, Center for Disease Control 2002
- ² The toxic effects of asbestos on humans have been recognized for at least 2,000 years. First-century historians and authors, Strabo and Pliny the Elder, both observed adverse biological effects of asbestos in the lungs of slaves who wove asbestos into cloth. See Douglas H.K. Lee and Irving J. Selikoff, *Historical Background to the Asbestos Problems*, 18 *Env'tl Res.* 300, 303 (1979).
- ³ See NIOSH, *Report to Congress on Workers' Home Contamination Study Conducted Under the Workers' Family Protection Act*, 1995.
- ⁴ See *Work-Related Lung Disease Surveillance Report*, 2002, NIOSH
- ⁵ See *Rohrbaugh v. Owens-Corning*, 965 F.2d 844 (10th Cir. 1992); *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181 (10th Cir. 1995).
- ⁶ See *id.*
- ⁷ See *Anchor Packing v. Grimshaw*, 692 A.2d 5 (Md. App. 1997)
- ⁸ See *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989)
- ⁹ See *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).
- ¹⁰ See e.g. *Elmore v. American Motors Corp.*, 451 P.2d 84 (Cal. 1969); *Ciampichini v. Ring Bros., Inc.*, 40 A.2d 289 (N.Y. 1973); *Weber v. Fidelity Cas. Ins. Co.*, 250 So.2d 754 (La. 1971); *West v. Caterpillar Tractor, Inc.*, 336 So. D. 80 (Fla. 1976); *Jones v. White Motor Corp.*, 401 N.E.2d 223 (Ohio 1978); *Webb v. Zern*, 220 A.2d 853 (Pa. 1966); *Embs v. Pepsi Cola Bottling Co.*, 528 S.W.2d 703 (Ky. 1975).
- ¹¹ See NIOSH, *Report to Congress on Workers' Home Contamination Study Conducted Under the Workers' Family Protection Act*, 1995; EPA, *Guidance for Preventing Asbestos Disease Among Auto Mechanics*, 1986.
- ¹² 1976 Testimony Before the U.S. Dept. of Labor, Standards Advisory Committee on Construction Safety and Health, January 22, 1976
- ¹³ See Finley, Lucinda M. *Female Trouble: The Implications of Tort Reform for Women*, 64 *Tenn. L. Rev.* 847 (1997) (discussing the disparity in calculations of pecuniary losses between men and women and the failure of pecuniary loss calculations to adequately address women's household and caretaking activities).

