STATE-OF-THE-ART AS A DEFENSE - IS IT REAL? GERRARD

I. THE GOVERNMENT IS THE SPRINGBOARD

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Although OSHA is a creation of the 1970's, the basic mind set of the general public is that the government has been involved intricately in control of workplace exposures almost forever. Most of the people today have not grown up in work in an atmosphere that did not include significant government involvement. This can become a play for state-of-the-art throughout starting with Dreesen as an official of the Public Health Service.

Emphasis added.

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II. IT WAS THOUGHT THAT OLD EXPOSURES WERE THE HIGH EXPOSURES AND IF THERE HAD BEEN A PROBLEM IT WAS TAKEN CARE OF BY NEW DUST CONTROL MEASURES

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After Dreesen, various publications, some of less importance, adopted similar positions. Interestingly, a study of various state laws also indicates that from time to time state, including New Jersey, adopted the 5 million particle standard as a relatively safe working standard. Depending upon the state in which a case is being litigated, this can be important to bolster the argument there was both a standard and government involvment.

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It was only in the 1970's that the U.S. Government finally instituted a standard . . .

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III. STATE-OF-THE-ART MUST BE KEPT SIMPLE AND SHORT FORM THE DEFENSE PERSPECTIVE

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If the defense gets into an article contest upon cross-examination of plaintiffs' doctors or presentation of defense doctors, it is very difficult to win the state-of-the-art question. A better approach seems to be to take the dozen or so key articles which can be made out as major events and dwell upon those at least to show that the various manufacturers and suppliers of asbestos products were not historically without some scientific basis for continuing to market products.

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Some research indicates that jurors tend to believe a greater burden is due to be placed upon an employer than upon companies such as manufacturers or suppliers of the products. Although there are no articles which make that point, a common sense approach throughout a trial may help to bolster state-of-the-art by continually showing that this individual who is before the Court as a plaintiff was nobody's employee who is in Court.

Emphasis added.

IV. RECONCILIATION OF VARIOUS DEFENDANTS IN THE SAME TRIAL

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One of the complexities of dealing with state-of-the-art is a fact that various defendants warned at various times about potential problems with asbestos. At first blush this seems like an insurmountable problem, however, it may not be.

. . . The best approach seems to be to try to convince the jury that things change over time and the needs for warnings change over time depending upon the product circumstances of the manufacturer and other practical considerations.

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After all, the threshold limit value concept is probably the best thing the defense has in its arsenal.

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Asbestos Medicine

87-12

October 29-31, 1987

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THE DEFENSE RESEARCH INSTITUTE
750 North Lake Shore Drive, Suite 500
Chicago, Illinois 60611

31.

STATE OF THE ART AS A DEFENSE - IS IT REAL?

I. THE GOVERNMENT IS THE SPRINGBOARD

The argument is made continuously by plaintiffs' lawyers and doctors who frequently testify for the plaintiffs that the government was not involved in setting standards pertaining to asbestos in the work place. Jury studies have indicated that jurors still believe the government has a strong part to play in control of what goes on in the working environment and that the government has had great influence in that arena historically.

Although OSHA is a creation of the 1970's, the basic mind set of the general public is that the government has been involved intricately in control of workplace exposures almost forever. Most of the people today have not grown up in work in an atmosphere that did not include significant government involvement. This can become a play for state-of-the-art throughout starting with Dreessen as an official of the Public Health Service.

I. IT WAS THOUGHT THAT OLD EXPOSURES WERE THE HIGH EXPOSURES AND IF THERE HAD BEEN A PROBLEM IT WAS TAKEN CARE OF BY NEW DUST CONTROL MEASURES

Even Merewether's work in 1930, "The Occurrence of Pulmonary Fibrosis and Other Pulmonary Affections in Asbestos Workers," Journal of Industrial Hygiene, can be construed as laying the foundation of the proposition that the old textile and plant type exposures were extremely heavy, but if dust control measures technologically available are used there will not be a problem in the future. Wood and Gloyne in 1934, "Pulmonary Asbestosis, A Review of 100 Cases," The Lancet, 1934, stated:

> The picture of pulmonary asbestosis is that of a pneumoconiosis occurring in a factory in which few precautions had been taken to protect the workers from a danger, the gravity of which was not realized. Happily these conditions are now a thing of the past and elaborate precautions have been taken to protect the workers. There is thus good reason to believe that the disease is now under control.

..."Id. at page 1383

The granddaddy statement pertaining to asbestos and standards for dust comes from Dreessen in 1938. The foundation of any state-of-the-art defense must build from what Dreessen, a public official, had to say in his article, "A Study of Asbestosis in the

33.

Asbestos Textile Industry," Public Health Bulletin No. 211, 1938. Dr. Dreessen placed matters in relative perspective for 1938 when he said:

> Because of the importance of the problem, it seems to be desirable to use such data as are at hand to define tentative safe working conditions that may serve as standards for the guidance of factor managers and engineers until more complete data are available. . . because clean-cut cases of asbestosis are found only in dust concentrations exceeding 5 million particles per cubic foot, and because they were not found at lower dust concentrations, 5 million particles per cubic foot may be regarded tentatively as a threshold value for asbestos-dust exposure until better data are available. . . it would seem that if the dust concentration in asbestos factories could be kept below 5 million particles. . . new cases of asbestosis probably would not appear.

After Dreessen, various publications, some of less importance, adopted similar positions. Interestingly, a study of various state laws also indicates that from time to time states, including New Jersey, adopted the 5 million particle standard as a relatively safe working standard. Depending upon the state in which a case is being litigated, this can be important to bolster the argument there was both a standard and government involvement.

After Dreessen, the next major event was the adoption by the American Conference of Governmental Industrial Hygienists of a standard for asbestos exposure at 5 million particles per cubic foot. Although the American Conference of Governmental Industrial Hygienists is not an official government organization, it was made up predominantly of government hygienists and the sound of the name gives it an official connotation.

A further government sounding event occurred in 1946 when Fleischer-Drinker and others published their article entitled, "A Health Survey of Pipe Covering Operations in Constructing Naval Vessels," Journal of Industrial Hygiene & Toxicology, 1946. There are many difficulties with that article, however, the important thing is that they state they feel that dust counts below 5 million particles per cubic foot indicate good dust control. Among the conclusions is the infamous "number 4" which states, "since each of the three cases of asbestosis had worked at asbestos pipe covering and shipyards for more than 20 years, it may be concluded that such pipe covering is not a dangerous occupation." Id. at page 16.

In furtherance of the question of whether dust control has now eliminated the problem, Dr. W. E. Smith, then a researcher in New York, went to Europe and met with most of the luminaries in that area who had dealt with industrial hygiene and asbestos matters. Dr. Smith in 1952 published a synopsis of the results of his trip in "Survey of Some Current British and European Studies of Occupational Tumor Problems," Industrial Hygiene and Occupational Medicine, 1952 and stated:

> It was a consensus of Dr. Gloyne, Dr. Wyers, and Dr. Merewether that the nature of the disease, asbestosis, as seen in England has changed so that it is less common and less severe in individuals whose employment in the industry has taken place only since 1932. It was the consensus that a lung tumor hazard formally existed in this industry in Great Britain but that there is no evidence to show that such hazard continues to exist under the working conditions now prevailing.

Id. at page 253.

At about the same time as Dr. Smith's visit to Europe, Drs. Isselbacher, Klaus and Hardy in their 1953 article in the American Journal of Medicine, "Asbestosis and Bronchogenic Carcinoma," stated that "experience has led to the acceptance of 5 million particles of asbestos per cubic foot of air, small enough size to be respirable, to be the safe working

condition." One of the important aspects of the Isselbacher quote is the fact that it talks about particles of asbestos.

At the now famous New York Academy of Sciences meeting in 1965, Dr. E. L. Schall in his article, "Present Threshold Limit Value in the U.S.A.: A Critique," Annals of the New York Academy of Science, 1965, stated that the present threshold limit value for asbestos in the U.S. was 5 million particles per cubic foot of air and that this had been adopted years ago by the American Conference of Governmental Industrial Hygienists and reaffirmed as recently as 1964. Dr. Schall reaffirmed the position that that was the level of concentration of asbestos dust to which it was believed nearly all workers could be repeatedly exposed without adverse effect.

Even Dr. Selikoff in the same New York Academy of Sciences meeting, in his article entitled "Asbestosis Among Insulation Workers" reaffirms the position that 5 million particles per cubic foot has been the standard, and he states that

> Measurement of dust exposures of insulation workers have been but infrequently reported and have been hampered by the very nature of the work. As in other asbestos work, peak counts are met which are excessively high, but generally counts for asbestos fibers have been within the 5 million particles per cubic foot of the ACGIH.

The approach of state-of-the-art need not end with the 1964 New York Academy meeting. Subsequent to that, efforts were made to determine what Dr. Selikoff had reported was correct or whether in fact people exposed to asbestos in the industrial setting had been exposed to amounts greater than 5 million particles per cubic foot. In 1968, Balzer and Cooper in their work, "The Work Environment of Insulating Workers," American Industrial Hygiene Association Journal, 1968, studied that particular question and concluded basically that insulation workers had not been exposed to levels greater than 5 million particle per cubic foot.

After this time between 1968 and 1972, the American Conference of Governmental Industrial Hygienists began to consider changing the recommended threshold limit value to a number less than 5 million particles per cubic foot and eventually did. It was only in the 1970's that the U.S. Government finally instituted a standard less than 5 million particles per cubic foot.

III. STATE-OF-THE-ART MUST BE KEPT SIMPLE AND SHORT FROM THE DEFENSE PERSPECTIVE

If the defense gets into an article contest upon cross-examination of plaintiffs' doctors or

presentation of defense doctors, it is very difficult to win the state-of-the-art question. A better approach seems to be to take the dozen or so key articles which can be made out as major events and dwell upon those at least to show that the various manufacturers and suppliers of asbestos products were not historically without some scientific basis for continuing to market products.

It is important in dealing with state-of-the-art matters to make sure the jury understands that the particular plaintiff in question was not an employee of a manufacturing defendant. Some research indicates that jurors tend to believe a greater burden is due to be placed upon an employer than upon companies such as manufacturers or suppliers of the products. Although there are no articles which make that point, a common sense approach throughout a trial may help to bolster state-of-the-art by continually showing that this individual who is before the Court as a plaintiff was nobody's employee who is in Court.

IV. RECONCILIATION OF VARIOUS DEFENDANTS IN THE SAME TRIAL

One of the complexities of dealing with state-of-the-art is a fact that various defendants

warned at various times about potential problems with asbestos. At first blush this seems like an insurmountable problem, however, it may not be.

The most simple approach is to make sure that the jury understands there are different types of products, different types of exposures, and even different types of asbestos used. From a practical standpoint, a cement product may have needed a warning sooner than a preformed pipe covering product. The best approach seems to be to try to convince the jury that things change over time and the needs for warnings change over time depending upon the product circumstances of the manufacturer and other practical considerations.

Probably the final thing to consider in the necessity to warn and the different timings of warnings is to attempt to get the jury to place themselves back in the 1960's, 50's, and 40's with the realization that times were different and expectations were different. Human factors experts or historians in general may be experts that we as defense lawyers have overlooked which might be helpful in making these presentations. Additionally, industrial hygienists who are not medical doctors probably should be used to a greater extent than they

are used now to show the newness of that field and how they in fact rely upon the threshold limit value concept in general. After all, the threshold limit value concept is probably the best thing the defense has in its arsenal.