FRASER LITIGATION GROUP

ASBESTOS LITIGATION IN BRITISH COLUMBIA

Canada's First "Mass Toxic Tort"

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1. INTRODUCTION

Over the past 25 years the American courts have been inundated by a tidal wave of personal injury litigation arising out of exposure to asbestos. By the middle of the past decade a second and potentially larger wave of property damage asbestos litigation had begun to break. At issue are literally billions of dollars in potential damage awards and insurance claims. The first Canadian asbestos cases are on their way to trial, and many more are certain to follow.

The purpose of this paper is to survey the prospects for asbestos and other "toxic tort" litigation in Canada. The authors will offer a perspective from British Columbia, the jurisdiction in which they practice, and where the first Canadian asbestos cases are being tried. This paper will first relate a brief history of asbestos and asbestos litigation in the United States. Topics covered will include asbestos and its uses, the emergence of asbestos as a toxic substance and an overview of the two waves of asbestos litigation. The next section will consider the scope of the asbestos problem. The largest section of the article will consist of an analysis of the American asbestos litigation experience: the two waves of personal injury and property damage or "abatement" cases. Topics covered will include the plaintiff's case, the defences, third-party claims and damages, as well as procedural matters. The analysis of the abatement cases will focus on the recovery of economic loss. The next section will focus on the progress of asbestos litigation in Canada and the growing body of case law in British Columbia, in light of the American experience. This paper will conclude with a consideration of the implications of the asbestos experience for other "mass" toxic tort litigation.

At the outset a caveat is in order. No single paper could possibly address all of the issues relating to asbestos and other toxic tort litigation in the United States and Canada. A number of American books and numerous articles have been written on the medical and legal aspects of asbestos, some of which are cited, and several seminars on the topic are held every year, considering the results of thousands of cases. In fact, there are a number of American case report series that deal exclusively with asbestos and even asbestos property damage cases.[1] By contrast, the author is aware of only two Canadian articles in the area, both cited, and both of which consider the American jurisprudence concerning insurance coverage for asbestos claims,

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1 Asbestos case report series include: Asbestos Litigation Reporter, "The National Journal of Records of Asbestos Litigation" (Edgemont, Pa.: Andrews); and Mealey's Litigation Reports, "Asbestos" (Wayne, Pa.: Mealey). Asbestos property damage case report series include: Mealey's Litigation Reports, "Asbestos Property Actions" (Wayne, Pa.: Mealey); and National Journal of Asbestos in Buildings Litigation (Springfield, Pa.: McGuire).

and only now are we beginning to see some significant reported Canadian cases which consider the merits of asbestos-related claims.

The purpose of this paper is therefore limited to sketching out what can only be an outline of an emerging and extremely complex area of the law in Canada.

2. A BRIEF HISTORY OF ASBESTOS AND ASBESTOS LITIGATION

This section will cover the following topics:

1. asbestos and its uses;

2. the emergence of asbestos as a toxic substance, including the now known asbestos-related diseases;

3. the two waves of asbestos litigation in the United States personal injury and abatement cases; and

4. the legislative response.

(a) Asbestos and Its Uses[2]

"Asbestos" is a generic name for various naturally and abundantly occurring fibrous minerals with unique qualities that have resulted in their widespread and pervasive use in our modern industrial society. Unfortunately, asbestos' unique properties, coupled with its widespread use, have made it a source of truly massive toxic tort litigation.

There are six different types of asbestos: chrysolite, crocidolite, amosite, anthophyllite, actinolite, and trenolite. Chrysolite, or chrysotile asbestos, accounts for over 90 per cent of the asbestos commercially used in the United States. Chrysolite is mined in Canada, specifically in British Columbia, Newfoundland and Quebec, as well as various states of the United States, and elsewhere in the world. The remaining 10 per cent is relatively evenly divided among the other five types, which are mined in various states of the United States, and elsewhere in the world. Asbestos differs in colour, as well as the dimensions and virulence of its fibres. Chrysolite is white, crocidolite is blue and amosite is brown. Crocidolite and amosite asbestos fibres tend to be longer and thinner, and therefore more hazardous, than chrysolite fibres.

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[2] See generally T.R.M. Davis, "Allocation of Liability for Latent Diseases Among Insurance Carriers" (1986) 4:1 Can. J. Ins. L. at 13; G.G. Gabrielson, Jr., "New Directions in Asbestos Litigation" in W.B. Alcorn, Jr., Asbestos Litigation (New York: 1982) 15; Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario, Report of the Royal Commission on Asbestos (7 May 1984); J.F. Segal & K.E. Thomson, "Environmental Impairment: Canadian and American Treatment of Toxic Tort" (1985) 3:5 Can. J. Ins. L. 87; Dr. I.J. Selikoff, "Asbestos-Associated Disease" in Marcy-Rosenau Public Health and Preventative Medicine (New York: Appleton-Century-Crofts, 1980); and T.E. Willging, Trends in Asbestos Litigation (Washington: Federal Judicial Centre, 1987).

Asbestos was once referred to as the "magic mineral", largely because of its fibrous nature and its unique qualities of flexibility and resistance to abrasion and fire. Its use therefore became widespread and pervasive. Between 1934 and 1984, the world's use of raw asbestos increased from 500,000 tons to 2,500,000 tons per year. From 1890 to 1970, approximately 25,000,000 tons of asbestos were used in the United States alone, approximately two-thirds in the construction industry, in schools and other buildings. For example, between 10,000 and 20,000 tons per year were applied as thermal insulation to pipes, boilers and high temperature equipment in factories, refineries, power plants and homes. More than 40,000 tons per year of asbestos-containing fire-proofing materials were sprayed in American highrise buildings during the 1960s. Asbestos has also been used for sound-proofing, for thermal and electrical insulation, for roofing and flooring, for gaskets, pipe lagging and wrapping, tar coating and surfacing, and for caulking, moulding and spackling. Asbestos has been packed, woven, sprayed and mixed into sheets, boards, tiles and shingles, as well as textiles, paper, cements and sprays.

Asbestos has also been used in a wide variety of consumer products, including clothing, hair dryers and even papier-mache kindergarten materials. As another example, most of the brake linings on the tens of millions of automobiles and train cars in use today contain 50 per cent or more asbestos. It has been estimated that there may be as many as 3,000 asbestos-containing products in use today, which can be found in public and commercial buildings and private homes everywhere. In the words of Dr. Irving Selikoff, "Asbestos became woven into the fabric of industrial civilization."[3]

The mining and milling of asbestos and the manufacture and use of asbestos-containing products releases asbestos fibres into the air. For example, the release of fibres can continue long after asbestos-containing materials have been installed in a building. Just as asbestos is virtually indestructible, so are the fibres that are released. It is these fibres which are inhaled or ingested by people living and working around asbestos and asbestos-containing materials, and it is this widespread and pervasive exposure to asbestos fibres that has caused so much personal injury and (arguably, as will be seen) property damage, and therefore generated the tidal wave of American asbestos litigation to date.

(b) The Emergence of Asbestos as a Toxic Substance[4]

It is now widely accepted that exposure to asbestos is associated with three distinct disease processes:

1. asbestosis;

2. mesothelioma; and

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[3] Selikoff, above, note 2 at 22.

[4] See generally L. Wilson in D.R. Gross & S.J. Levy, Asbestos Property Damage Litigation (New York: 1985) 51; D.R. Hensler et al., Asbestos in the Courts (Santa Monica, Ca.: The Institute for Civil Justice, Rand, 1985); and Selikoff, above, note 2.

3. cancers, including lung, gastrointestinal and other cancers.

However, it has taken the medical and scientific community, industry, government and the courts more than half a century to come to this conclusion. Moreover, the state of this knowledge, as will be seen, is one of the many factual issues involved in determining liability in asbestos litigation. Plaintiffs argue, with the benefit of hind-sight, that defendants long knew or must have known of the dangers of exposure to asbestos. Defendants, not surprisingly, argue that they could not have foreseen the often tragic consequences. Before considering each of the above disease processes, it is in order to briefly consider the history of medical and scientific awareness as well as the regulatory responses to the problem.

Medical and Scientific Awareness[5]

From the beginning of the modern asbestos industry, in the 1870s, factory inspectors and physicians in Britain, the United States, Canada and Germany began noting the high incidence of pulmonary disease and death among workers. Most of the early medical and scientific developments concerned the British textile industry. In 1906, H. Montague Murray, a physician at Charing Cross Hospital, London, testified at an inquiry by a British governmental commission into occupational disability compensation. He gave evidence that he had seen a man in 1898, very short of breath, who had worked in an asbestos factory, and that an autopsy had revealed that the man's lungs were badly scarred. Murray concluded that the workroom dust had produced the scarring. He also predicted that, since the problem was known, such cases would be unlikely in the future. Little did Murray know.

As early as 1918, a representative of the Prudential Insurance Company noted the adverse health experience of asbestos workers, and stated that the company would not issue life insurance policies to them. However, it was not until 1924 that attention was first attracted to the disease potential of asbestos dust. It was then that Cooke published an article in The British Medical Journal, entitled "Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust," a case study of a 33-year-old woman who had died with pulmonary fibrosis after working for 20 years in an asbestos textile factory. Even then there were misgivings, because it was thought that tuberculosis could have caused the scarring of the woman's lungs. Other cases were studied, in which tuberculosis could not have explained the findings, and Cooke named the condition pulmonary asbestosis.

A series of clinical, epidemiological and industrial hygiene studies followed in Britain. In 1930, Merewether published a paper in the Journal of Industrial Hygiene, entitled "The Occurrence of Pulmonary Fibrosis and Other Pulmonary Affections in Asbestos Workers". However, not unlike Murray, he concluded that only 2200 people were at risk in the entire British textile industry, that the disease could be controlled by reducing the level of dust to which the textile spinners were exposed, and that the disease would disappear within the decade.

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5 See especially Selikoff, above, note 2, and Wilson, above, note 4.

In the early 1930s, Lanza and his colleagues undertook an industry-wide study at the request of the asbestos industry by the Metropolitan Life Insurance Company. His paper was published in 1936 in the Journal of the American Medical Association under the title of "Asbestosis". He concluded that prolonged exposure to asbestos did cause "asbestosis", but that this condition was milder than silicosis, that it did not result in any marked disability, and that it would not be practical to establish standards for dust content in the air.

It was at about this time, in 1935, that Lynch, Smith and Gloyne first reported that asbestos exposure was also associated with lung cancer. Research into asbestosis continued and in 1938 Dreessen published a study of the asbestos textile industry in the United States. Dreessen made a tentative finding that exposure to 5,000,000 particles of asbestos per cubic foot of air during an 8-hour day, 40 hours a week ("p.p.c.f."), was a safe level. However, not unlike Murray, Merewether and Lanza before him, Dreessen suggested that the problem of asbestosis was one of mere dust control and would probably soon disappear. This attitude continued through the 1940s and the 1950s.

It was in 1946 that the annual report of the Chief Inspector of Factories of Great Britain published some unsettling statistics. Whereas only approximately 1 per cent of deaths of Great Britain were attributed to lung cancer, more than 13 per cent of all recorded asbestosis victims also had lung cancer, and 8 per cent of deaths among women were also associated with lung cancer. A large proportion of women worked in asbestos textile factories at that time. It was at about this time, during the 1940s and 1950s, that the connection between asbestos and mesothelioma was first reported.

In 1955, Doll published a paper in the British Journal of Industrial Medicine entitled "Mortality from Lung Cancer in Asbestos Workers." He reported that among a group of men employed for 20 or more years in the asbestos industry, the risk of lung cancer was increased tenfold. However, he reported that the cancer problem was fading because of dust controls. In 1958, in a study for the Quebec Asbestos Mining Association, Braun and Truan concluded that there was no cancer risk associated with asbestos exposure.

During the 1960s, the pace of medical and scientific knowledge accelerated, and more became known about mesothelioma and later lung cancer. In 1960, Wagner and his colleagues reported on 47 cases of mesothelioma which had occurred in the preceding 5 years. At that time, most major medical centres had seen only one or two cases. In 1964, gastrointestinal cancer was first linked to asbestos, as were increased incidences of cancer of the larynx or pharynx and the kidney.

As asbestos-related diseases became known and understood, so did the relationship between exposure and the diseases. As a result, it became known that these diseases were not unique to asbestos workers, but seemed to be affecting a widening circle of the general population. The most ominous finding of the Mancuso and Coulter study in the early 1960s was that there was a strikingly increased rate of death from lung cancer among insulation workers, who were users, as opposed to manufacturers, of asbestos products. The number of asbestos users was obviously much greater than manufacturers. This finding therefore indicated that a much wider

circle of the general population was at risk. This was underscored by the report of Wagner and his colleagues in 1960. They had studied mesothelioma victims who all came from a part of South Africa where there were many small asbestos mines. Some of the victims had played as children on tailing mounds, but one had merely lived by a road upon which asbestos had been brought to a mill.

In 1964, concern grew about disease hazards for greater numbers of the general population, the so-called "asbestos breathers", and not just asbestos workers. In 1964, Marr published a paper in the American Industrial Hygiene Association Journal entitled "Asbestos Exposure During Naval Vessel Overhaul." He recognized the level of 5,000,000 p.p.c.f. which Dreessen had recommended, and concluded that pipe-covering and insulation during overhaul and repair was a dangerous activity and that shipyard employees should wear respirators. However, he expressed uncertainty as to whether it was the long or short asbestos fibres that were pathogenic. As seen above, the long, thin crocidolite and amosite fibres are now known to be the most virulent. Also in 1964, Selikoff published an article in the Annals of the New York Academy of Science entitled "Asbestos Among Insulation Workers." He noted that asbestosis was uncommonly seen in men with less than 20 years of exposure. As will be seen, this study was a major catalyst for asbestos litigation.

In 1965, Newhouse reported 11 cases of mesothelioma whose only known asbestos exposure was living in the homes of asbestos workers. In 1968, Harries reported five cases of plural mesothelioma among civilian employees of the Royal Navy dockyard in Devonport, England. That same year, Stumphius described similar findings at that Royal Schelde shipyard in the Netherlands. The significance of asbestos-related disease among shipyard workers is that only approximately one in 500 were asbestos workers as such. However, because of the nature of shipyard work, many of the other trades were also exposed, even if only intermittently or indirectly. The significance of disease among the families of asbestos workers needs no elaboration.

What is perhaps most noteworthy from this very brief history is that, while there may have been relatively early indications of the connection between asbestos and various diseases, there also appears to have been little certainty about the significance of the findings. Consider the equivocal opinions of Murray, Cooke, Merewether, Lanza and Dreessen, before the war, and Doll, Braun and Truan thereafter. It is therefore not surprising that it took as long as it did for medical and scientific opinion to conclude that there was a clear causal relationship between exposure to asbestos and asbestosis, mesothelioma and various cancers. As a result, it is difficult to pinpoint when it was medically or scientifically concluded that asbestos was a cause of these diseases. It is even more difficult to say when any conclusions were reached with respect to acceptable levels of exposure.

The Regulatory Response[6]

It was not until 1932, more than 25 years after Murray's rather sanguine conclusion, that the British Parliament recognized the risks associated with widespread industrial use of asbestos and enacted statutory regulations which classified asbestos as a compensatory disease. It was not until 1938 that the United States Public Health Service Bulletin published guidelines proposing a tentative standard of 5,000,000 p.p.c.f. as an acceptable dust concentration level for asbestos. Even so, this did not have any legal force.

It was almost another 10 years later, in 1946, that the 5,000,000 p.p.c.f. standard was incorporated in the list of maximum acceptable concentration values of the American Conference of Governmental Industrial Hygienists. Again, this had no legal effect. It was not until almost 15 years later, in 1960, that the 5,000,000 p.p.c.f. standard was adopted under the *Walsh-Healey Act* for employers conducting business with the United States government. In 1968, the American Conference of Governmental Industrial Hygienists listed a reduced proposed threshold limit value of 2,000,000 p.p.c.f. In 1969, this reduced standard was accepted under the *Walsh-Healey Act*. In 1970, 2,000,000 p.p.c.f. was adopted as an interim standard for all United States industries covered by the *Occupational Safety and Health Act*.

In 1968, after lengthy investigations by the Environmental Protection Agency, Congress passed the *Asbestos Hazard Emergency Response Act*, which ordered school systems throughout the United States to inspect their buildings for asbestos, determine where asbestos-containing materials posed hazards to humans, and abate those hazards. Congress only mandated clean-ups for school buildings, but it seemed only a matter of time before the law was expanded to cover other buildings as well. By contrast, the Ontario Royal Commission on Asbestos came to the following conclusion, in 1984:

> "There is no evidence of significant health risks to the general public from exposure to the ambient air and in buildings unless the person is breathing in the immediate vicinity of loose asbestos that is being disturbed."[7]

Even by the middle of the 1980s, there was a lack of unanimity regarding the hazards of exposure to asbestos, and the need for remedial action.

We now turn to the three asbestos-related diseases. As will be seen, there are at least three common threads with respect to these diseases, namely, difficulties in diagnosis, long latency periods and a strong statistical correlation with cigarette smoking and other causes. As will also be seen, this has important implications for proof of causation, limitations defences and contributory and intervening negligence. Similarly, the history of awareness of the problem has important implications for claims in conspiracy or fraud, the "state-of-the-art" defence and

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6 *Ibid.*

7 Report of the Royal Commission on Asbestos, above, note 2 at 4.

punitive damages. Similarly, uncertainty as to acceptable levels of exposure has a direct bearing on the need to abate the problem, and therefore the viability of property damage claims.

(i) *Asbestosis*[8]

Asbestosis was the first disease associated with asbestos, in about 1924. It remains the most common asbestos-related disease. Asbestosis is a type of pulmonary fibrosis, which results in the fibrous tissues of the lung being abnormally scattered and spread apart. Although it is clear that inhaling asbestos fibres causes scarring of lung tissue, medical scientists are not clear as to the manner in which the inhalation causes the fibrosis. Asbestosis is a progressive disease, which cannot be detected by routine examination in its early stages. However, as the fibrosis grows it can result in shortness of breath, basal lung noises, coughing, curvature or "clubbing" of the fingers and toes, restricted pulmonary lung function and deficient oxygenation of the blood. It frequently disables or even kills those afflicted by it. Nevertheless, the disease does not necessarily result in disability or death. Some patients with extensive scarring of lung tissue are able to live and work without impediment. The opposite is also true.

Asbestosis is difficult to positively diagnose, and may also be diagnosed as chronic bronchitis, pulmonary tuberculosis, broncho pneumonia or similar conditions. Latency periods for asbestosis, that is, the period between exposure to asbestos and the manifestation of the disease, range from 10 to 40 years. During this period the disease is dormant and cannot be detected by routine examination or x-rays. It is also significant that, in one study, it was determined that death from asbestosis was almost three times as common among those who smoked cigarettes as those who did not.

(ii) *Mesothelioma*[9]

Mesothelioma was the last disease associated with asbestos, in about the 1940s and 1950s. Mesothelioma is a very rare form of cancer which eventually spreads across the lining of the abdomen or chest. It is characterized by shortness of breath, coughing, weight loss and incapacitating pain. It invariably results in death. By 1965, Selikoff conclusively established asbestos as a major cause of mesothelioma. By 1982, Chahinian had estimated that asbestos was a significant etiologic factor in approximately 80 per cent of all cases. However, Borrow, in 1973, concluded that some element in addition to asbestos is necessary to the development of mesothelioma. He also identified other causes.

Mesothelioma can also be difficult to diagnose. The latency period for mesothelioma can exceed 20 years. It appears that the disease may also be triggered by much lower levels of exposure than asbestosis or even lung cancer. In this sense, asbestosis and lung cancer are the diseases of the asbestos worker, while asbestos breathers are proportionately more likely to

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8 See especially Selikoff, above, note 2, and Wilson, above, note 4.

9 *Ibid.*

contract mesothelioma. There does not appear to be any connection between mesothelioma and cigarette smoking.

(iii) *Cancers*[10]

Exposure to asbestos also significantly increases the danger of contracting a number of types of cancer, including lung and gastrointestinal cancers. This association was first established in about 1935, with respect to lung cancer.

A. *Lung cancer*

Lung cancer is the most deadly of all asbestos-related diseases. Many victims of asbestosis actually die of lung cancer. It is noteworthy that lung cancer generally occurs in the upper lung and remains in the main bronchii, whereas asbestos-related lung cancer tends to be in the lower lung, and frequently begins in the outer portions. This aids in establishing the probable cause of the disease. There is clear evidence that chrysolite, amosite and anthophyllite asbestos are associated with increased risk of lung cancer. Animal evidence also implicates crocidolite asbestos. Lung cancer is a disease with many causes. In 1972, Kanerstein and Churg concluded that asbestos is merely an instrumentality by which the effect of tobacco is enhanced, and concluded further that if asbestos is a carcinogen, it is only a weak one. Selikoff states that asbestos does increase the risk of lung cancer.

Latency periods for lung cancer range from 15 to 35 years, with a 25 year average. Further, numerous studies have confirmed the statistical correlation between asbestos, cigarette smoking and lung cancer. One study has indicated that asbestos workers who do not smoke are five times as likely to contract lung cancer as non-asbestos workers. Smokers in general were 11 times as likely to contract lung cancer as non-smokers. By contrast, asbestos workers who were smokers were almost 60 times as likely to contract lung cancer as non-smokers.

B. *Gastrointestinal and other cancers*

Gastrointestinal cancer is three times as common among asbestos workers as in the general population. Cancers of the esophagus, oropharynx and larynx appear only to be more common among asbestos workers who smoke. This suggests that exposure to asbestos is not sufficient to cause the disease, by itself. Cancer of the stomach, kidney, colon and rectum do not appear to be linked to smoking.

(c) The Two Waves of Asbestos Litigation

It has been suggested that the convergence of two key developments, one legal and the other medical, generated the tidal wave of asbestos litigation that has since inundated the American courts.[11] The key legal development was the publication in 1965 of the American Law

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[10] *Ibid.*

[11] Alcorn, Introduction to Asbestos Litigation, above, note 2 at 5.

Institute's *Restatement (Second) of Torts* (the "Restatement"). Section 402A of the *Restatement* codified and applied the principle of strict liability to vendors of defective or unreasonably dangerous products. As has been seen, it was at about the same time that Selikoff made a clear connection between asbestos and lung cancer in his celebrated study. These two developments generated the first wave of personal injury cases, and approximately 20 years later, the second wave of property damage or "abatement" cases.

(i) *Personal Injury Cases*

Borel v. Fibreboard Paper Products Corp.[12] is the seminal case in all asbestos litigation. Clarence Borel was an asbestos insulation worker from Texas. He was first exposed to asbestos in 1936. In 1969, he became disabled by asbestosis. One year later, he was diagnosed as also having mesothelioma. Mr. Borel filed for compensation from his employer under the Texas *Workers' Compensation Act*, but his maximum recovery was limited by statute. He therefore commenced an action in tort seeking recovery of full compensatory damages against several asbestos manufacturers which had supplied products to his employer. He gave evidence that he and his co-workers had not been informed of the hazards of asbestos. He testified that respirators were not made available when he first started working with insulation. Although they became available in later years, workers were not required to use them and seldom did so because they were awkward and uncomfortable. Evidence was also adduced that none of the manufacturers had tested the effect of asbestos dust on workers, determined if workers' exposure exceeded threshold limits or warned of the hazards of inhaling the dust.

Mr. Borel alleged strict liability, negligence and breach of warranty. The issues in his case included whether the manufacturers were strictly liable for his injuries, whether the defendants' failure to warn of the risk of injury made their products unreasonably dangerous, and whether the danger to workers was foreseeable when the product was sold. The defences raised included the statute of limitations, state-of-the-art, assumption of risk, product misuse, contributory negligence and "sophisticated employer", a form of intervening or superseding cause or negligence.

Mr. Borel died of lung cancer before the trial, after which a verdict was returned in favour of his widow and estate. That verdict was affirmed on appeal to the Fifth Circuit, and *certiorari* was denied by the Supreme Court of the United States. Tens of thousands of asbestos personal injury cases, settlements and trials have followed. The decision in Borel is significant for its findings of fact and its conclusions of law, in a number of ways:

- strict liability was applied;
- the manufacturers were held to the standard of care of experts;
- an independent duty to warn was imposed;
- the convergence of strict liability and negligence theory was acknowledged;
- warranty theory was considered;

[12] 493 F.2d 1076 (5th Cir. 1973), *cert.* denied 419 U.S. 869 (1974).

- cause was proven where the manufacturers' conduct was a substantial factor in causing some injury;
- the limitations period was held not to start at least until the disease was diagnosed;
- the state-of-the-art defence was considered but not found on the facts;
- the elements of assumption of risk were set out;
- product misuse was not found on the facts;
- contributory negligence was distinguished from assumption of risk and not found on the facts;
- the sophisticated employer defence was not accepted; and
- all defendants who had caused some injury were held jointly and severally liable for all injuries.

However, it would have been naive in the extreme to presume that one case would resolve all of the complex and difficult issues which would arise in asbestos litigation. Indeed, as will be seen, rather than resolving any issues, Borel generated millions of pages of evidence, submissions and reasons with respect to a myriad of issues concerning liability theory, causation, defences, and damages. Ironically though, 25 years later, Borel still stands as a valuable guide-post in this area of law. During the quarter century since Borel, innumerable battles have been won and lost over numerous legal issues and matters of evidence, one of the results of which has been bankruptcy in the asbestos industry.[13]

A. *Some legal issues*

By way of example only, some of the major legal battles have involved the exclusivity of workers' compensation legislation, the awarding of punitive damages and recovery by defendants against their insurers. In 1973, plaintiffs began to successfully challenge the exclusivity of state workers' compensation legislation, enabling plaintiffs to recover against asbestos manufacturers in tort. By 1981, new evidence of defendants' knowledge of the dangers of asbestos, and concealment of this information from plaintiffs, began resulting in substantial rewards of punitive damages. Also by 1981, asbestos defendants began suing their insurers for coverage. Most of these issues will be dealt with in greater detail below. The insurance coverage litigation opens a Pandora's box of other issues, and will not be dealt with further in this paper.

B. *Evidentiary matters*

As the tidal wave rolled on, evidentiary battles pitched back and forth. In the early years, plaintiffs uncovered evidence that several major manufacturers had known about the dangers of asbestos exposure as early as the 1930s but had concealed this knowledge from their employees and had established policies of not informing their employees when they developed asbestos-related diseases. This evidence included the famous "Sumner Simpson Papers",

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[13] See generally Hensler et al., above, note 4 at 18-23.

minutes of meetings of the Asbestos Textile Institute since 1944, and records of meetings of industrial relations managers for Johns-Manville during the 1960s. Sumner Simpson was the former chief executive officer of Raybestos-Manhattan, another major manufacturer. By the late 1970s, defendants began to successfully respond with evidence that, prior to the results of Selikoff's research, which were first published in 1964, research had not indicated that asbestos was a significant health hazard at the levels to which asbestos insulators had been exposed. However, during the late 1970s and early 1980s, plaintiffs uncovered and countered with evidence that manufacturers had in fact been aware, as seen above, as early as the 1950s, that asbestos exposure was causing disease among insulation workers. Some of these records were known as the "Kaylo Documents". Kaylo was an asbestos insulating product manufactured and distributed by Owens-Illinois and Owens-Corning. It was this evidence, combined with the earlier documents on manufacturers' knowledge and concealment, that resulted in punitive damage awards, beginning in 1981.

C. *Bankruptcy*

Also in 1981, a number of asbestos manufacturers began filing for bankruptcy under chapter 11 of the United States *Bankruptcy Act*. The most significant of these was the bankruptcy of Manville Corporation, formerly known as Johns-Manville, in August 1982. Others included Advocate Mines of Canada, Amatex Corporation, Continental Producers, Forty-Eight Insulations and UNR Industries, all in the first half of the 1980s. More recent bankruptcies include Carey Canada, Celotex Corporation, Eagle-Picher Industries, National Gypsum, Nicolet Inc. and U.S. Gypsum. One wonders if these manufacturers' insurers can be far behind?

(ii) *Property Damage Cases: Abatement*

It was an out of court settlement that generated the second wave of asbestos litigation, the property damage cases. These are also known as "abatement" cases, because they deal with the prevention or "abatement" of asbestos-related personal injury, by removing or compensating for the cost of removing asbestos from buildings. In April, 1984, U.S. Gypsum Co., a leading asbestos producer, paid $675,000 ($377,000 for costs of removal and $298,000 for punitive damages) to settle a case involving the removal of asbestos from schools in Lexington County, South Carolina.[14]

On March 12, 1985, the first jury verdict was returned in a school property damage case, in favour of the defendants, in Anderson County Board of Education v. National Gypsum Co.[15] The verdict was ultimately affirmed on appeal.[16] However, that industry victory was short-lived. In Spartanburg County School District No. 7 v. National Gypsum Co.[17], another jury returned a

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14 Lexington County, South Carolina School District v. United States Gypsum Co., No. 82-2072-0 (1984).
15 No. 3-83-511 (E.D. Tenn. 1985).
16 821 F.2d 1230 (6th Cir. 1987).
17 No. 83-1744-14 (S.C. 1985).

defence verdict, but this was overturned on appeal,[18] and the second wave of asbestos litigation has followed.

(d) The Scope of the Asbestos Problem

As can already be seen, the asbestos problem is almost breathtaking (no pun intended) in its scope. This is because of the staggering numbers of actual and potential plaintiffs and defendants, as well, of course, as the enormous amounts in issue.

(i) *Plaintiffs*

Asbestos litigation has rippled outwards, from workers directly exposed to asbestos, to those indirectly exposed, to their families, and to people with other environmental exposure. Plaintiffs have included workers in the asbestos mining, manufacturing and insulation industries, as well as others who have worked in and around asbestos mines, as well as plants and buildings in which asbestos was being or has been installed, and their families. Some of the classic cases have involved factory, insulation and shipyard workers. Other cases have involved, for example, a clerk who worked in a building fire-proofed with asbestos,[19] and a prison inmate exposed to asbestos insulation.[20] In fact, it has been estimated that up to 90 per cent of urban dwellers in North America may have lung scarring from inhaling asbestos fibres.[21] This makes virtually all of us potential victims and therefore plaintiffs in asbestos litigation.

(ii) *Defendants*

Defendants have included asbestos mines, manufacturers and suppliers, as well as the plaintiffs' employers. Property damage litigation has added contractors, subcontractors and architects to this list. Approximately 300 mining, manufacturing and supply companies have been named as defendants. Many insurers have also been named as third parties.

(iii) *The Amounts in Issue*

Consider some of the statistics related to asbestos and asbestos litigation:[22]

- it is estimated that 733,000 public, commercial and residential buildings in the United States contain some form of asbestos;

- the projected total cost of implementing the mandate under the *Asbestos Hazard Emergency Response Act* is in excess of $51 billion;

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18 805 F.2d 1148 (4th Cir. 1986).

19 Layne v. GAF Corp., Cuyahoga County, Ohio Court of Common Pleas, 84-07419.

20 Rice v. North Carolina Department of Corrections, Court of Appeals (4th Cir. 1989), Case No. 88-6788.

21 Davis, above, note 2 at 13.

22 See generally Alcorn, in Asbestos Litigation, above, note 2 at 7; Hensler et al., above, note 4 at 21-23 and 32-33; and Willging, above, note 2 at 12-16.

- as of 1985, the number of pending asbestos cases in the United States was estimated at between 33,000 and 50,000;

- it has been estimated that, by the year 2010, between 180,000 and 200,000 additional cases will have been filed;

- many cases consist of class actions, involving hundreds or even thousands of plaintiffs;

- most personal injury cases involve an average of 20 defendants;

- numerous plaintiffs have received damage awards in excess of $1 million;

- as of 1985, it was estimated that liabilities for personal injury cases only filed at that time could range between $8 billion and $87 billion, not including punitive damages;

- as of 1982, it was reported that 21 plaintiffs had been awarded approximately $40 million in punitive damages; and

- in 1981 alone, the American insurance industry collected more than $6 billion in product liability premiums, but paid out approximately $120 for every $100 collected.

It is no wonder that asbestos has been referred to as a source of "mass" toxic tort litigation.

3. ASBESTOS LITIGATION: AN ANALYSIS OF THE AMERICAN EXPERIENCE

This section will cover the following topics:

1. personal injury cases;

2. abatement cases; and

3. procedural matters.

(a) Personal Injury Cases

As the personal injury wave of litigation began 25 years ago, and the abatement cases are only just beginning, most matters involving the plaintiffs' case, the defences, third-party claims and damages will all be dealt with under this heading. The analysis of the abatement cases will focus on issues unique to property damage claims.

(i) *The Plaintiff's Case*

In order to succeed, the plaintiff must of course make out a cause of action against the defendant. The plaintiff must also prove that the act or omission of the defendant actually caused him loss or damage.

A. *Causes of action*

The three standard theories of liability in most American asbestos cases, as in other types of product liability cases, are:

1. strict liability;

2. negligence; and

3. breach of warranty.

Other potential causes of action include:

1. nuisance or trespass;

2. statutory violation;

3. conspiracy or fraud;

4. misrepresentation; and

5. causes of action unique to American jurisprudence, as well as constitutional and legislative enactments.

Strict liability

The doctrine of strict liability has opened the floodgates for asbestos and other product liability actions because it has the lowest threshold requirements. Unlike negligence, strict liability does not require a finding of fault on the part of the defendant. Unlike breach of warranty or even misrepresentation, strict liability does not require a relationship of privity between the plaintiff and the defendant.

The plea of strict liability is based either on the common law, or, more often, on section 402A of the *Restatement*. Section 402A provides:

> "Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> > (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby

> caused to the ultimate user or consumer, or to his property, if:
>
> > (a) the seller is engaged in the business of selling such a product, and
> >
> > (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although:
>
> > (a) the seller has exercised all possible care in the preparation and sale of his product, and
> >
> > (b) the user or consumer has not brought the product from or entered into any contractual relation with the seller."

The liability imposed by section 402A is therefore (arguably, as will be seen) "strict" in the sense that it does not require a finding of negligent conduct or "fault" on the part of the defendant.

A brief review of the prior common law development of strict liability is in order. As with most of the plaintiff-oriented developments in American jurisprudence, strict liability came into its modern existence in California. The seminal judgments were written by Justice Traynor in Escola v. Coca Cola Bottling Co. of Fresno[23] and Greenman v. Yuba Power Products Inc.[24] In Escola, Justice Traynor stated:

> "Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks."[25]

Traynor's dictum in Escola became the law in Greenman , where he stated:

> "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection

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23 24 Cal.2d 453, 150 P.2d 436 (1944).
24 59 Cal.2d 57, 27 Cal. Rptr. 697 (1963).
25 Above, note 23 at 443 (P.2d).

> for defects, proves to have a defect that causes injury to a human being.
>
> …
>
> The purpose of [strict products] liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturer that puts such products on the market rather than by the injured persons who are powerless to protect themselves."[26]

The policy rationale which emerges from Escola and Greenman is that the courts were prepared to set aside procedural and evidentiary standards to assist injured plaintiffs in circumstances where they could otherwise be deprived of compensation because of their inability to discover and prove specific negligent acts. As will be seen, that policy rationale may now have been substantially reduced, such that the tests of strict liability and negligence have converged and, at least in the context of asbestos litigation, perhaps even merged.

It is generally accepted that strict liability in tort has three basic possible bases:

- manufacturing defects
- design defects
- lack of or inadequate warning of dangers

It has been suggested by a number of commentators that, at least in cases of failure to warn, and perhaps even certain types of design defects, strict liability is the functional equivalent of negligence.[27] As will be seen, this has important implications for the state-of-the-art defence and for the future of asbestos litigation in Canada. This convergence or merging is particularly significant because asbestos cases do not involve what would classically be described as "manufacturing" defects. Manufacturing defects result when a product is not manufactured as designed. A product may also be defective in that it was improperly designed, although properly manufactured. A defective design may result in the product not doing what it was intended to do, such as brakes that do not stop a car.[28] A defective design may also result in the product doing what it was intended to do, but also causing unintended harm, such as

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[26] Above, note 24 at 62 (Cal.2d).

[27] See generally D.R. Gross, "Collateral Estoppel and Affirmative Defences" in Alcorn, Asbestos Litigation, above, note 2 at 121-131; The Interagency Task Force on Product Liability, U.S. Department of Commerce, "Executive Summary of the State of Product Liability Law" in Alcorn, Asbestos Litigation, above, note 2 at 336-340; and K. Bushnell & W. Jordan, Recent Developments in Asbestos Litigation (San Francisco, Ca.: Litigation Research Group, 1984) at 31-34; and D.R. Gross, "A Brief Summary of Products Liability: Particularly the State of the Art as a Defense in New Jersey" in Gross & Levy, Asbestos Property Damage Litigation, above, note 4 at 171-183.

[28] See the facts in Phillips v. Ford Motor Co., [1971] 2 O.R. 637, 18 D.L.R. (3d) 641, rev'g [1970] 2 O.R. 714, 12 D.L.R. (3d) 28 (C.A.).

asbestos fire-proofing that does resist heat and flame, but also causes disease in the user or consumer.

The debate regarding the convergence of strict liability and negligence, in the context of design defects and failure to warn, centres around the decision of the Appellate Division of the New Jersey Supreme Court in Beshada v. Johns-Manville Products Corp.[29] Beshada was an asbestos insulation case in which the plaintiff alleged that the defendants had failed to warn him of the hazards of exposure. The decision in question involved the review of a motion by plaintiff's counsel to strike a state-of-the-art defence.

Former Justice Pashman, speaking for the Court, summarized the issue on the motion:

> "The sole question here is whether defendants in a product liability case based on strict liability for failure to warn may raise a "state of the art" defense. Defendants assert that the danger of which they failed to warn was undiscovered at the time the product was marketed and that it was undiscoverable given the state of scientific knowledge at that time."[30]

Then Justice Pashman distinguished between strict liability and negligence in the context of design defects:

> "In Cepeda, we explained that in the context of design defect liability, strict liability is identical to liability for negligence, with one important caveat: "The only qualification is as to the requisite of foreseeability by the manufacturer of the dangerous propensity of the chattel manifested at the trial this being imputed to the manufacturer.""[31]

Next, the Judge summarized the defendants' position:

> "As it related to warning cases, the state-of-the-art defense asserts that distributors of products can be held liable only for injuries resulting from dangers that were scientifically discoverable at the time the product was distributed. Defendants argue that the question of whether the product can be made safer must be limited to consideration of the available technology at the time the product was distributed. Liability would be absolute, defendants argue, if it could be imposed on the basis of subsequently discovered means to make the product safer since technology will always be developing new ways to make products

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29 447 A.2d 539 (N.J. 1982).
30 *Ibid.* at 542.
31 *Ibid.* at 544.

> safer. Such a rule, they assert, would make manufacturers liable whenever their products cause harm, whether or not they are reasonably fit for their foreseeable purposes.

Defendants conceptualize the scientific unknowability of the dangerous propensities of a product as a technological barrier to making the product safer by providing warnings. Thus, a warning was not "possible" within the meaning of the Freund requirement that risk be reduced "to the greatest extent possible."[32]

Finally, Justice Pashman stated his reasons for striking the state-of-the-art defence, before devoting an additional two pages of his judgment to a consideration of the policy justifications for his holding:

> "Essentially, state-of-the-art is a negligence defence. It seeks to explain why defendants are not culpable for failing to provide a warning. They assert, in effect, that because they could not have known the product was dangerous, they acted reasonably in marketing it without a warning. But in strict liability cases, culpability is irrelevant. The product was unsafe. That it was unsafe because of the state of technology does not change the fact that it was unsafe. Strict liability focuses on the product, not the fault of the manufacturer. "If the conduct is unreasonably dangerous, then there should be strict liability without reference to what excuse defendant might give for being unaware of the danger."[33]

Despite Justice Pashman's disclaimer, at least one commentator has written that the decision is tantamount to the imposition of absolute liability, leaving causation as the only issue to be determined.[34] The authors cannot help but agree. Since Beshada, the American courts have been divided over the admissibility of state-of-the-art evidence, and therefore the difference, if any, between strict liability and negligence, other than for manufacturing defects. It is not surprising that commentators and other courts might come to the opposite conclusion, as section 402A itself defines offending products as being "in a defective condition **unreasonably** dangerous to the user or consumer." How can a product be "unreasonably" dangerous if the danger was neither known or knowable at the time it was sold or manufactured?

Approximately one year after Beshada, the same Court appeared to reverse its position, in O'Brien v. Muskin Corp.[35] The issue in that case was whether a swimming pool was defective in design. The first paragraph of Justice Pollock's reasons state:

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32 *Ibid.* at 545-546.
33 *Ibid.* at 546.
34 Gross, in Gross & Levy, Asbestos Property Damage Litigation, above, note 4 at 174-175.
35 94 N.J. 169, 463 A.2d 298 (1983).

> "[W]e conclude that state-of-the-art evidence is relevant to the risk-utility analysis and admissible in a strict liability case involving a defectively designed product."[36]

Justice Pollock goes on to state:

> "By implication, risk-utility analysis includes other factors such as the "state-of-the-art" at the time of the manufacture of the product. … The "state-of-the-art" refers to the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed."[37]

Another year later, another design defect or failure to warn case was remanded to the Appellate Division of the New Jersey Supreme Court, in light of the decision in Beshada. This was the case of Feldman v. Lederle Laboratories.[38] The case involved the side effects of a tetracycline drug, which caused teeth to discolour. Justice Schreiber, speaking for the Court, stated:

> "When the strict liability defect consists of an improper design or warning, reasonableness of the defendant's conduct is a factor in determining liability. The question in strict liability design-defect and warning cases is whether, assuming that the manufacturer knew of the defect in the product, he acted in a reasonably prudent manner in marketing the product or in providing the warnings given. Thus, once the defendant's knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant's conduct.
>
> Generally, the state of the art in design defect cases and available knowledge in defect warning situations are relevant factors in measuring reasonableness of conduct.
>
> Similarly, as to warnings, generally conduct should be measured by knowledge at the time the manufacturer distributed the product. Did the defendant know, or should he have known of the danger, given the scientific, technological, and other information available when the product was distributed; or, in other words did he have actual or constructive knowledge of the danger? The *Restatement*, supra, has adopted this test in

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36 *Ibid.* at 305.
37 *Ibid.* at 301.
38 97 N.J. 429, 479 A.2d 374 (1984).

comment j to section 402A, which reads in pertinent part as follows:

> "Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. … Where the product contains an ingredient … whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, **if he has knowledge, or by the application of reasonable developed human skill and foresight should have knowledge of the presence of the ingredient and the danger**. (Emphasis added)"

Under this standard negligence and strict liability in warning cases may be deemed to be functional equivalents."[39] (Emphasis added)

Then Justice Schreiber squarely confronted Justice Pashman's earlier reasons in Beshada:

> "This test does not conflict with the assumption made in strict liability design defect and warning cases that the defendant knew of the dangerous propensity of the product, if the knowledge that is assumed is reasonably knowable in the sense of actual or constructive knowledge. A warning that a product may have an unknowable danger warns one of nothing. Neither Cepeda nor Suter stated that the manufacturer would be deemed to know of the dangerous propensity of the chattel when the danger was unknowable. … In our opinion Beshada, *supra*, would not demand a contrary conclusion in the typical design defect or warning case. If Beshada were deemed to hold generally, or in all cases, particularly with respect to a situation like the present one involving drugs vital to health, that in a warning context knowledge of the unknowable is irrelevant in determining the applicability of strict liability, we would not agree. Many commentators have criticized this aspect of the Beshada reasoning and the public policies on which it is based.[40]

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[39] *Ibid.* at 385-386.

[40] *Ibid.* at 387-388.

The reasoning in O'Brien and Feldman has been followed by other New Jersey courts in subsequent decisions.[41] The same approach has also been followed in other American jurisdictions. In Carter v. Johns-Manville Sales Corp.,[42] the District Court found that Texas law permitted the use of hindsight in design defect but not duty to warn the cases, under strict liability. As a result, the state-of-the-art defence was allowed with respect to duty to warn, but disallowed with respect to the plea of design defect. Justice Parker commented that, by disallowing the use of hindsight, the failure to warn test was indistinguishable from a traditional negligence test. We will hear more from Justice Parker later.

It was not surprising that Beshada would be seriously challenged. To return, not for the last time, to Borel itself, the Court of Appeals had already considered strict liability and negligence in the context of duty to warn, back in 1965:

> "As explained in comment j to section 402A, a seller has a responsibility to inform users and consumers of dangers which the seller either knows or should know at the time the product is sold. The requirement that the danger be reasonably foreseeable, or scientifically discoverable, is an important limitation of the seller's liability. In general, "[t]he rule of strict liability subjects the seller's liability to the user or consumer even though he has exercised all possible care in the preparation in sale of the product". Section 402A, Comment a. This is not the case where the product is alleged to be unreasonably dangerous because of a failure to give adequate warnings. Rather, a seller is under a duty to warn of only those dangers that are reasonably foreseeable. The requirement of foreseeability coincides with the standard of due care in negligence cases in that the seller might exercise reasonable care and foresight to discover a danger in his product and to warn users and consumers of that danger."[43]

After a quarter of a century, the American courts therefore appear to have come full circle. At least with respect to failure to warn, the tests under strict liability and negligence are, in the authors view, functionally the same. The tests with respect to design defects have also converged. This leaves strict liability as clearly having a lower threshold of liability only with respect to manufacturing defects, which are not in issue in the asbestos cases. Further, the policy rationale enunciated in Escola and Greenman has been reduced, giving justification to this convergence. As seen above, plaintiffs have been very successful in discovering and proving specific negligent and even deliberate acts by asbestos defendants.

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41 Brown v. United States Stove Co., 98 N.J. 155 (1984); and Campos v. Firestone Tire & Rubber Co., 98 N.J. 198 (1984).

42 557 F.Supp. 1317 (E.D. Tex. 1983); see also Aumiller v. Johns-Manville Sales Corp., No. 7-81-585 (D.Md. 1983); and Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975).

43 Above, note 12 at 1088 (F.2d).

Negligence

Unlike strict liability (to the extent that the two doctrines do differ), negligence does require a finding of fault on the part of the defendant. The reasonableness of the defendant's actions in American negligence cases is generally determined by means of "risk-utility analysis," which has been discussed in some of the cases already cited. This analysis was defined by the Court of Appeals in Reyes v. Wyeth Laboratories:

> "The reasonable man standard becomes the fulcrum for a balancing process in which the utility of the product properly used is weighed against whatever dangers of harm inhere in its introduction to commerce. … [If] the potential harmful effects of the product … outweigh the legitimate public interest in its availability, it will be declared unreasonable per se and the person placing it on the market held liable."[44]

Reyes was a pharmaceutical case involving the drug DES. It is not difficult to appreciate the utility of pharmaceuticals, which can be weighed against the risks associated with them. Neither is it difficult to appreciate that, particularly with the availability of alternative and non-toxic products, the utility of asbestos may be characterized as markedly less. As a result, one would expect that a very high standard of care would be imposed upon asbestos manufacturers, irrespective of whether strict liability applies.

This high standard was indicated for the first time by the Court of Appeals in Borel:

> "[T]he manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product. … The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby. But even more importantly, a manufacturer has a duty to test and inspect his product. The extent of research and experiment must be commensurate with the dangers involved. A product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal."[45]

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44 498 F.2d 1264 at 1274 (5th Cir. 1974).

45 Above, note 12 at 1089-1090 (F.2d).

Breach of warranty

Although warranty was discussed in Borel and the concepts of "unfitness" or "unmerchantability" were equated with the "unreasonably dangerous" standard in tort, warranty is of course a theory of contractual and not tortious liability. As such, an asbestos supplier cannot be held liable under warranty theory to the employees of its customers, and this theory will not be considered further.

Other causes of action

For the most part, other causes of action are of little utility, given the availability of negligence and more particularly strict liability. Nevertheless, a brief discussion follows.

Nuisance and trespass. Claims in nuisance and trespass have been advanced in a number of abatement cases, but with singular lack of success.[46]

Statutory violation. This is not, generally speaking, an independent cause of action, except with respect to a government's breach of its own statutorily-imposed duty, but is subsumed under negligence theory. Breach of a statute may be *prima facie* evidence of negligent conduct. Beyond that, remedies may be available under state consumer protection legislation. However, that is beyond the scope of this paper.

Conspiracy and fraud. Conspiracy and fraud have both been recognized as distinct causes of action in asbestos litigation, although such allegations have met with little success to date.[47] The burden of proof under these theories is onerous, but they do offer the potential for larger damage awards against a greater number of defendants and for circumventing limitations defences and bankruptcies, as well as piercing the "corporate veil". This last matter will be discussed later. Some indication of the onerous burden of proof is given in the discussion of the "concert of action" theory of liability below. Fraudulent concealment will be discussed separately in the context of limitations defences and damages, and particularly punitive damages.

Misrepresentation. To the extent that misrepresentation relates to contractual theories of liability, it will not be discussed. To the extent that it relates to liability in tort, the above discussion of negligence theory is applicable. This is so, to a large extent, with respect to

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[46] See Adams-Arapahoe School District No. 28-J v. Celotex Corp., 637 F.Supp. 1207 (D.Colo. 1986); Manchester (City) v. National Gypsum Co., 637 F.Supp. 646 (D.R.I. 1986); Hooksett (Town) v. W.R. Grace & Co., 617 F.Supp. (D.C.N.H. 1984); but see contra, Detroit (City) Board of Education v. Celotex Corp. No. 84-42 9634-NP (Mich.Cir.Ct.).

[47] See Adams-Arapahoe School District No. 28-J v. Celotex Corp., above, note 46 (conspiracy); Hooksett (Town) v. W.R. Grace & Co., above, note 46 (conspiracy and fraud); and Starling v. Seaboard Coast Line Railroad Co., 533 F.Supp. 183 (S.D.Ga. 1982) (fraud); conspiracy claims have been dismissed in Detroit Board of Education v. Celotex, Puppe v. H.K. Porter Co., No. A2-86-078 (DND), San Diego v. U.S. Gypsum, Trust Co. Bank v. U.S. Gypsum and Wade v. Armstrong World (all uncited decisions reported in Mealey); and fraud claims have been dismissed in Clarksville v. U.S. Gypsum and Solow v. Grace (both also reported in Mealey).

negligent misrepresentation in the abatement cases, where contract theory will generally apply as well. To the limited extent that this type of negligence arises in personal injury cases, the relevant principles are embraced within the duty to warn cases.

Uniquely American causes of action. In the United States, claims may also be advanced for violations of federal common law, and claims may be made against the United States government under the *Federal Tort Claims Act* and for violations of guaranteed rights under the United States Constitution, known as "constitutional torts". As these claims have no direct counterpart under Canadian law, they will not be discussed further.

B. *Proof of causation*

In addition to making out the elements of each cause of action, the plaintiff must prove that his loss or damage was caused by the wrongful act or omission of each defendant. In Flatt v. Johns-Manville Sales Corp.,[48] the District Court for the Eastern District of Texas noted that the plaintiff must prove four elements in the chain of causation:

- asbestos dust is a competent producing cause of the plaintiff's disease;
- the plaintiff was exposed to the defendant's products;
- the exposure was sufficient to be a producing cause of the plaintiff's disease; and
- the plaintiff did contract the disease.[49]

This involves proving both that exposure to asbestos did or probably did cause the plaintiff's injury or disease, and that one or more of the defendants' products caused the plaintiff's exposure. Proving that exposure to asbestos was probably sufficient to cause a disease is known as "generic causation". Proving that exposure to the defendants' products did or probably did cause the plaintiff's disease is called "causation-in-fact". Generally speaking, a manufacturer's conduct will be considered a proximate cause of the plaintiff's injury whenever it is found to be a substantial contributing factor in bringing about the harm.[50] It can be appreciated in these cases that although the evidentiary burden of proving generic causation may not be that great, the burden of proving causation-in-fact can be heavy indeed. It is therefore not surprising that some courts have come to the aid of plaintiffs, much like the Court in Beshada did with respect to "absolute liability".

Generic causation

As seen above, there is ample medical and scientific evidence of generic causation, that is, that exposure to asbestos dust can cause various diseases. However, the probability that exposure

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48 488 F.Supp. 836 (E.D. Tex. 1980).
49 *Ibid.* at 838.
50 Neal v. Carey Canadian Mines Ltd., 548 F.Supp. 357 (E.D. Pa. 1982).

to a particular product caused a particular disease will vary depending upon the circumstances. For example, different types of asbestos fibres are more harmful than others, different products contain different amounts and types of asbestos, different products generate different amounts and types of asbestos dust, some diseases, such as lung cancer and to a lesser extent mesothelioma, have other causes, the statistical correlation with exposure varies between diseases, and diseases such as asbestosis may be misdiagnosed. For example, a so-called "chrysotile defence" may be advanced, namely, that chrysolite asbestos fibres are relatively benign, and the manufacturers of products containing them should not be held liable. Factors such as these can have a significant effect on the probability that exposure to a particular product caused the plaintiff's disease. The complex and difficult evidentiary problems are self-evident. Add to this the fact that tens of thousands of asbestos cases have been tried to date, and it quickly becomes apparent that generalizations with respect to sufficient proof even of generic causation are virtually impossible to make. Consider the observation of Judge Klein in Blue v. Johns-Manville Corp.:

> "In two cases before this judge, two men had similar physical problems. They each had pleural thickening and some shortness of breath. In the case involving the man who most counsel believe to be the sicker of the two, the jury awarded $15,000. For the other plaintiff, the jury awarded $1,200,000. These results make this litigation more like roulette than jurisprudence."[51]

Causation-in-fact

Proving causation-in-fact involves proving that the plaintiff was sufficiently exposed to the defendant's product to have caused his disease. Some indication of the elements which the courts will require is given in Migues v. Fibreboard Corp.[52] In that case, the Court of Appeals for the Fifth Circuit held that the following uncontroverted evidence was sufficient to support the jury's conclusion that the defendant's products were the producing cause of an insulation worker's death:

- the plaintiff died of mesothelioma;
- asbestos fibres were present in the plaintiff's lungs at the time of death;
- asbestos inhalation is (arguably) the only known cause of mesothelioma;
- the manufacturer produced insulation products containing asbestos; and
- the plaintiff worked with the manufacturer's asbestos-containing products.

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51 10 Phila. 23 (1983).

52 662 F.2d 1182 (5th Cir. 1981).

When one considers the lengthy latency periods associated with asbestos-related disease, it is not difficult to appreciate that this can be the Achilles' heel of any plaintiff's personal injury case. The plaintiff may have been exposed to a product as much as 40 or more years ago. Memories have faded or failed, witnesses have died or cannot be located and documents have been lost or destroyed. As a result, the plaintiff may not be able to adduce any product identification evidence, and his case against any given defendant may fail. Some courts have therefore found a way to shift the evidentiary burden of causation-in-fact from the plaintiff to the defendants. At least four such theories of liability have been advanced, in the guise of mechanisms for the apportionment of damages:

1. market share liability;

2. alternative liability;

3. concert of action; and

4. enterprise liability.

Although the theories differ somewhat, they all have substantially the same effect.

Market share liability

The most widely known of these burden shifting devices is "market share" liability. This was the theory put forward by the Supreme Court of California in Sindell v. Abbott Laboratories.[53] All four theories were discussed in that case. Judith Sindell's mother had for many years prior to her daughter's birth taken DES, which was used to prevent miscarriages, but which was also alleged to have caused cancers in female offspring. Mrs. Sindell was unable to identify which one of the various drug manufacturer defendants had made the pills her mother had taken, although all manufacturers used the same formula. The Court considered and dismissed as inapplicable each of the other three burden shifting theories, reflected on the perceived policy considerations (much like Justice Pashman did in Beshada) and then came to this breathtaking conclusion:

> "Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule in Summers is warranted. As we have seen, an undiluted Summers rationale is inappropriate to shift the burden of proof of causation to defendants because if we measure the chance that any particular manufacturer supplied the injury-causing product by the number of producers of DES, there is a possibility that none of the five defendants in this case

[53] 26 Cal.3d 588, 607 P.2d 924 (1980), *cert.* denied 449 U.S. 912 (1980).

> produced the offending substance and that the responsible manufacturer, not named in the action, will escape liability.
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> But we approach the issue of causation from a different perspective: we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose.
>
> If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished.
>
> The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries."[54]

One needs go no further than the reasons of Justice Richardson, alone in dissent, to appreciate that this was nothing less than a revolution in the law of tort:

> "In these consolidated cases the majority adopts a wholly new theory which contains these ingredients: The plaintiffs were not alive at the time of the commission of the tortious acts. They sue a generation later. They are permitted to receive substantial damages from multiple defendants without any proof that any defendant caused or even probably caused plaintiffs' injuries.
>
> Although the majority purports to change only the required burden of proof by shifting it from plaintiffs to defendants, the effect of its holding is to guarantee that plaintiffs will prevail on the causation issue because defendants are no more capable of disproving factual causation than plaintiffs are of proving it. "Market share" liability thus represents a new high water mark in tort law. The ramifications seem almost limitless, a fact which prompted one recent commentator, in criticizing a substantially

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54 *Ibid.* at 936-937 (P.2d).

> identical theory, to conclude that "elimination of the burden of proof as to identification [of the manufacturer whose drug injured plaintiff] would impose a liability which would exceed absolute liability."[55]

Beshada purported to impose absolute liability on product manufacturers, leaving only causation to be proved, and Sindell purported to shift the remaining burden of proving causation from the plaintiff to the defendant.

Approximately one year later, the Sindell approach was adopted by the District Court for the East District of Texas in an asbestos case, Hardy v. Johns-Manville Sales Corp.[56] This was another decision of Justice Parker. However, another year later, a federal court in California declined to extend market share liability to asbestos cases in In re Related Asbestos Cases.[57] In re Related Asbestos Cases concerned motions, among other matters, with respect to the use of the market share theory. Chief Judge Peckham, speaking for the District Court, stated:

> "After careful consideration of the issue, it is concluded that the market share liability theory was not intended to be applied in a context such as the one which is before the court. Where asbestos is the product in question, numerous factors would make it exceedingly difficult to ascertain an accurate division of liability along market share lines. For example, unlike DES, which is a fungible commodity, asbestos fibres are of several varieties, each used in varying quantities by defendants in their products, and each differing in its harmful effects. Second, defining the relevant product and geographic markets would be an extremely complex task due to the numerous uses to which asbestos is put, and to the fact that some of the products to which the plaintiffs were exposed were undoubtedly purchased out of state sometime prior to the plaintiffs' exposure. A third factor contributing to the difficulty in calculating market shares is the fact that some plaintiffs were exposed to asbestos over a period of many years, during which time some defendants began or discontinued making asbestos products.
>
> Perhaps more important than the practical difficulty in ascertaining shares here is the fact that, unlike the plaintiff in Sindell, who was completely unable to identify which defendant had manufactured the product which her mother had ingested, plaintiffs in the present case apparently plan to call as witnesses

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55 *Ibid.* at 938.
56 509 F.Supp. 1353 (E.D.Tex. 1981).
57 543 F.Supp. 1152 (N.D.Cal. 1982).

> individuals who will testify that plaintiffs were exposed to asbestos products manufactured by defendants. Where a plaintiff does have information as to the identity of the defendants who caused his alleged injury, the rationale for shifting the burden of proof in Sindell is simply not present."[58]

A number of courts in various jurisdictions had also declined to extend market share liability to asbestos cases.[59]

Then, in 1987, the Ohio Supreme Court rejected market share in asbestos cases in Goldman v. Johns-Manville Sales Corp.[60] Mrs. Goldman was the wife of a former bakery employee who died of cancer allegedly caused by exposure to asbestos at his place of work. Justice Wolff considered the above reasons in In re Related Asbestos Cases, and then stated the following, in comparing the facts in Sindell:

> "DES was a synthetic estrogen that was produced pursuant to a single formula. Thus, while the drug was marketed by 200 companies, there was no difference in the drug or its health risks. In contrast, asbestos is not a "product", but rather a generic name for a family of minerals.
>
> Crucial to the Sindell courts reasoning was this fact: there was no difference between the risks associated with the drug as marketed by one company or other, and as all DES sold presented the same risk of harm, there was no inherent unfairness in holding the companies accountable based on their share of the DES market. This fundamental difference between DES and asbestos indeed, asbestos tape alone is enough to undercut the Sindell justification for market-share theory in this case."[61]

In 1988, the California courts had an opportunity to breath new life into Sindell, but declined to do so, in Mullen v. Armstrong World Industries Inc.[62] In that case, the California Court of Appeals rejected market share liability in asbestos cases. As a result, some sanity had returned to the law of causation, at least in the context of asbestos litigation.

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58 *Ibid.* at 1158.

59 Diamond v. Johns-Manville Sales Corp., No. 79-2206 (D.Md. 1986); Hannon v. Waterman Steamship Corp., 567 F.Supp. 90 (E.D.La. 1983); Prelick v. Johns-Manville Corp., 531 F.Supp. 96 (W.D.Pa. 1982); Starling v. Seaboard Coast Line Railroad Co., above, note 47; and Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983); as well as Baltimore v. Keene, Leng v. Celotex Corp., No. 1-89-1864 (Ill. Ct. App.), Little v. Techbestos, Inc., No. A4104-87T2 (N.J. Super. App.), Smith v. Eli Lilly and White v. Celotex (all uncited decisions reported in Mealey).

60 33 Ohio St.3d 40, 514 N.E.2d 691 (1987).

61 *Ibid.* at 700-701.

62 200 Cal.App.3d 250, 246 Cal.Rptr. 32 (1988).

Alternative liability

The "alternative liability" theory is based on section 433B(3) of the *Restatement*:

> "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."

The seminal case under this theory is Summers v. Tice,[63] which was cited in Sindell, and in which the plaintiff was injured when two hunters negligently shot in his direction. Although the plaintiff could not prove whose bullet had injured him, both hunters were held jointly and severally liable when both of them failed to exculpate themselves. This theory was rejected in Sindell, where only five of the possible 200 defendants were before the Court. In Goldman, the Court also rejected alternate liability because the plaintiff was not able to show that any, let alone all, of the defendants had acted tortiously, as required by comment (g) to section 433B(3). This was because she could not prove that any of the defendants had supplied any asbestos products to the bakery where she alleged her husband had contracted his fatal disease. The Court noted, as had the courts in In re Related Asbestos Cases and Mullen, that different asbestos-containing products contain different types of asbestos fibres which create different risks. As a result, joint and several liability would result in an inequitable allocation of liability. Alternative liability is therefore no substitute for product identification evidence.

Concert of action

The concert of action theory is based on section 876 of the *Restatement*, which provides:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so as to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

The Court in Sindell rejected this theory. The plaintiff alleged that the defendants had failed to adequately test the product or warn of its dangers and that they had relied on one another's tests and taken advantage of each other's marketing and promotional techniques. The Court held that:

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[63] 33 Cal.2d 80, 199 P.2d 1 (1948).

> "These allegations do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings and that they substantially aided and encouraged one another in these omissions.
>
> Application of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant."[64]

However, given the evidence which plaintiffs have uncovered to date of knowingly failing to warn and suppressing information, this may now be a more viable theory of liability in asbestos litigation.

Enterprise liability

The enterprise liability theory was first advanced in Hall v. E.I. Du Pont De Nemours & Co.[65] It is also known as "industry-wide" liability. Like alternative liability, it is based on section 433B(3) of the Restatement. In Hall, the plaintiff children were injured by exploding dynamite caps, which could have been manufactured by one of six defendants. As the explosions destroyed the evidence, the product which caused the injuries could not be identified. The rationale of this theory was stated by Judge Weinstein:

> "If plaintiffs can establish by a preponderance of the evidence that the injury-causing caps were the product of some unknown one of the named defendants, that each named defendant breached a duty of care owed to plaintiffs and that these breaches were substantially concurrent in time and of a similar nature, they will be entitled to a shift of the burden of proof on the issue of causation."[66]

The reasoning in Hall has been rejected by almost every court which has considered it in the context of an asbestos claim. In Mullen the defendants argued that, unlike blasting caps, asbestos-containing products could be identified and traced to their respective manufacturers. For example, a lung biopsy can reveal the colour, type and dimension of asbestos fibres present, which can help to narrow the identity of the product which caused the plaintiff's disease. Plaintiffs can also use product catalogues and the like to refresh their memories as to

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64 Above, note 53 at 632 (P.2d).
65 345 F.Supp. 353 (E.D.N.Y. 1972).
66 *Ibid.* at 380.

which products they were exposed to. The Court of Appeal affirmed without discussion the trial Court's order sustaining the defence demurrers. The plaintiffs did not file a further appeal.

Mullen has therefore likely closed the book in California on the inapplicability of the market share and enterprise theories of liability to asbestos cases. As a result, the law has likely returned to its previous position, namely, as underscored in Aumiller v. Johns-Manville Sales Corp.,[67] that the plaintiff must prove that each of the defendants' conduct, and not merely the collective conduct of all of the defendants, was a substantial contributing factor in causing his injury.

(ii) *The Defences*

The standard defences in asbestos and other product liability cases include the following:

1. statutes of limitation;
2. state-of-the-art;
3. statutory compliance;
4. assumption of risk;
5. product misuse;
6. contributory or comparative negligence;
7. intervening or superseding cause or negligence;
8. concurring cause or negligence;
9. sophisticated employer or consumer;
10. employer immunity, under workers' compensation legislation;
11. governmental immunity; and
12. spousal immunity.

A. *Statutes of limitation*

The limitation defence is probably the most frequently asserted. It was advanced in Borel, and it is still advanced today. With latency periods of 10 to 40 years, this is almost inevitable. This is particularly so where, even when symptoms begin to manifest themselves, cases of asbestosis may easily be misdiagnosed. Even when the disease is properly diagnosed, the

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[67] Above, note 42.

plaintiff may not make a causal connection between the disease and the defendant's product. Most limitation statutes provide that the limitation period begins to run when the cause of action "accrues". In the context of asbestos litigation, the courts may utilize one of several different dates of "accrual":

- the first exposure to the asbestos;
- the last exposure;
- when the plaintiff's injury began, regardless of the plaintiff's awareness;
- when the disease became medically diagnosable; and
- when the plaintiff knew or reasonably should have known that the injury had occurred.

Although the rules differ from state to state, and there is support for each of the rules in at least some jurisdictions, the trend has been towards adoption of the "discovery" or "discoverability" rule, which embraces the last two accrual dates listed above. The "first exposure" rule has been adopted in New York, in Steinhardt v. Johns-Manville Corp.,[68] and in Indiana, in Braswell v. Flintkote Mines Ltd.[69] The "last exposure" rule was adopted by an appellate court in the case of O'Stricker v. Jim Walter Corp., before being rejected by the Ohio Supreme Court.[70] The "injury" rule was adopted in Virginia in Locke v. Johns-Manville Corp.[71]

The restrictive approaches would in many cases result in plaintiffs' claims being barred before any symptoms manifested themselves, or even before any disease process began. However, in toxic tort cases, where long latency periods are a fact of life (or death) and the disease may be the result of cumulative or multiple exposures over a prolonged period of time, each exposure may contribute to the cause of the disease. The traditional concept of "accrual", for example, in a motor vehicle accident case, would seem to be inapplicable. Again, the courts have responded to this perceived injustice, by devising the "discovery rule". Another restrictive approach taken by some courts has been that once a limitation period expires for one asbestos-related disease, it expires for all such diseases.

The "discovery rule"

Most jurisdictions have held that a cause of action only accrues when the harmful effects of exposure to asbestos are manifested (the test applied in Borel), when the plaintiff recognizes that his disease is related to exposure, or when the plaintiff could reasonably have connected

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68 446 N.Y.S.2d. 244 (1981), *cert.* denied 456 U.S. 967 (1982).
69 723 F.2d 527 (7th Cir. 1983).
70 447 N.E.2d 727 (Ohio 1983).
71 275 S.E.2d 900 (Va. 1981).

the exposure to his harm or disease.[72] This is known as the "discovery" or "discoverability rule". The effect of this approach is to "unbar" many toxic tort and therefore asbestos claims. The rationale for this rule was best stated by the Court of Appeals in Karjala v. Johns-Manville Products Corp.:

> "As in silicosis cases … 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 a claim attaches and the statute of limitations will begin to run."[73]

However, just as the states are divided as to the applicable rule, the cases are divided as to the precise proposition that the rule stands for. The rule has been interpreted to provide that the cause of action accrues at various stages, which can be listed in order of increasing liberality:

- when the disease is medically diagnosable;
- when the plaintiff discovered or could have discovered that he was injured;
- when the plaintiff discovered or could have discovered the cause of his injury;
- when the plaintiff could have identified the party that caused his injury; and
- when the plaintiff realized that that party owed him a legal obligation.

The trend in the American courts is to adopt the middle position, that the cause of action accrues when the defendant either knew or could have known of both his injury and the cause of his injury. The test of "medical diagnosability" was for a time adopted by the Wisconsin courts, in Neubauer v. Owens-Corning Fibreglas Corp.[74] However, the "discovery rule" was subsequently adopted in Hansen v. A. H. Robbins Inc.,[75] a Dalkon Shield case, and subsequently in an asbestos case, Reimer v. Owens-Corning Fibreglas Corp.[76] The "knowledge of injury" test was adopted by the Illinois courts, in Nolan v. Johns-Manville Asbestos[77] and McDaniel v. Johns-Manville Sales Corp.[78] Numerous jurisdictions have adopted the "knowledge of cause"

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72 See for example, Burd v. N.J. Telephone Co., 76 N.J. 284, 386 A.2d 1310 (1978); Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978); Karjala v. Johns-Manville Products Corp., above, note 42; Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973); Louisville Trust Co. v. Johns-Manville Products Corp., 580 S.W.2d 497 (Ky. 1979); and G.D. Searle & Co. v. Superior Court for Sacramento County, 49 Cal.App.3d 22, 122 Cal. Rptr. 218 (1975).

73 Karjala, above, note 42 at 160-161.

74 686 F.2d 570 (7th Cir. 1982), *cert.* denied 103 S.Ct. 1233 (1983).

75 335 N.W.2d 578 (Wis. 1983).

76 576 F.Supp. 197 (E.D.Wis. 1983).

77 421 N.E.2d 864 (Ill. 1981).

78 542 F.Supp. 716 (N.D.Ill. 1982).

rule, including Louisiana,[79] New Jersey,[80] Pennsylvania,[81] Rhode Island,[82] and West Virginia.[83] The authors are not aware of any reported decisions adopting the last two and most liberal tests.

However, two exceptions to the discovery rule have also evolved. A number of cases have held that the discovery rule does not apply to wrongful death actions brought by the survivors of asbestos victims.[84] The effect of this exception is that discoverability dies with the victim, and that the date of death becomes the latest date from which the appropriate limitation period will begin to run. The other exception is in cases where the cause of action has been fraudulently concealed by the defendant.[85] In fraudulent concealment cases, the plaintiff must prove active concealment,[86] mere failure or refusal to warn is insufficient.[87]

As might be expected, some state legislatures have responded to this liberal approach to limiting causes of action. Some states have adopted "cap statutes" or "statutes of response" which combine the discovery rule with a provision barring suit if the action was started more than a certain number of years after manufacture or sale. In one state - Nebraska - the pendulum has swung back to a liberal approach, as the legislature has amended its cap statute to expressly except asbestos cases.

One or all diseases?

In Staiano v. Johns-Manville Corp.[88] and Matthews v. Celotex Corp.,[89] the Pennsylvania and North Dakota courts, respectively, concluded that a new limitation period does not commence each time a new disease develops from the same tortious conduct. However, a subsequent decision of the same Pennsylvania Court, in Doe v. Johns-Manville Corp.,[90] circumvented the problem by awarding damages for an asbestos victim's increased risk of contracting cancer in the future. A number of other cases have come to the contrary conclusion. In Wilson v. Johns-Manville Sales Corp.,[91] the Court rejected the defendant's argument that the plaintiff's cause of action for mesothelioma only accrued when that disease was discovered, and not five years earlier, when he was diagnosed as having asbestosis. In Pierce v. Johns-Manville Sales

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79 Woessner v. Johns-Manville Sales Corp., 576 F.Supp. 596 (E.D.La. 1984).
80 Jarusewicz v. Johns-Manville Products Corp., 458 A.2d 156 (N.J.Super.L. 1983).
81 Staiano v. Johns-Manville Corp., 450 A.2d 681 (Pa.Super. 1982).
82 Manchester (City) v. National Gypsum Co., above, note 46.
83 Pauley v. Combustion Engineering Inc., 528 F.Supp. 759 (S.D.W.Va. 1981).
84 See, for example, DeCosse v. Armstrong Cork Co., 319 N.W.2d 45 (Minn. 1982); and Redeker v. Johns-Manville Products Corp., 571 F.Supp. 1160 (W.D.Pa. 1983).
85 See, for example, DeCosse v. Armstrong Cork Co., above, note 84.
86 *Ibid.*
87 Cazalas v. Johns-Manville Sales Corp., 435 So.2d 55 (Ala. 1983); and Pitts v. Unarco Industries Inc., 712 F.2d 276 (7th Cir. 1983).
88 Above, note 81.
89 569 F.Supp. 1539 (D.N.D. 1983).
90 471 A.2d 1252 (Pa.Super. 1984).
91 648 F.2d 111 (D.C. Cir. 1982).

Corp.,[92] the Maryland Court came to the same conclusion, noting that to hold otherwise would result in the same type of unfairness that the discovery rule, earlier adopted in Maryland, was intended to prevent. The Court also noted that this would avoid the type of speculation inherent in the Martin case, as the courts would otherwise be compelled to assess the risk of further illness and award damages accordingly. Other courts have also held that asbestosis, mesothelioma and lung cancer are distinct diseases to which separate limitation periods apply.[93]

B. *"State-of-the-Art"*

The availability of the "state-of-the-art" defence was discussed earlier, in the context of strict liability. The defence itself is that a manufacturer or supplier of a product should not be held liable on the basis of hindsight, where the defendant did not known and could not have known of the existence of the defect at the time that it placed the product into the stream of commerce. It is not a defence which alleges that a defect or danger was known to the defendant but could not be removed from the product. Neither does it allege compliance with or conformity to industry or government standards.

This defence has been dealt with by numerous commentators and courts. The defence was in fact first dealt with, in the context of asbestos, in the Borel case. It will be recalled that Mr. Borel suffered from asbestosis. It will also be recalled that numerous medical and scientific studies dating from the 1930s demonstrated the relationship between asbestosis and the inhalation of asbestos dust. The Court was therefore satisfied that the dangers of asbestosis were reasonably foreseeable to the defendants when the manufacturers sold their asbestos-containing products. As a result, the defendants were unable to make out the state-of-the-art defence.

Borel did not foreclose the state-of-the-art defence, particularly in cases involving mesothelioma, lung and other cancers, because the connection between asbestos and these diseases was not made until later, in the 1950s and 1960s. However, we have also seen that, as the saga of asbestos litigation unfolded, more and more damning evidence of industry knowledge has come to the fore. State-of-the-art has therefore become a less and less tenable defence on the facts. Further, as the years go by, the courts are dealing with more and more recent victims of asbestos. Clearly, the more recent the exposure and therefore disease, the more advanced the medical and scientific knowledge at the time of exposure, and the less likely will it be for state-of-the-art to succeed. However, what of relatively static materials which release only minimal amounts of asbestos fibre into the air?

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92 464 A.2d 1020 (Md. 1983).

93 Adams v. Johns-Manville Sales Corp., 727 F.2d 533 (5th Cir. 1984); and Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984).

C. *Statutory compliance*

Compliance may obviously be raised as a defence in a claim founded on an alleged breach of statute. However, the authors are not aware of any American cases where statutory compliance has been found to be a defence to a claim founded on strict liability or negligence. Indeed, in Hammond v. North American Asbestos Corp.,[94] the Illinois Supreme Court held that compliance with government specifications did not relieve an asbestos company of its duty to warn. And in Chapin v. Johns-Manville Corp.,[95] a federal District Court rejected the defence of compliance with government specifications on the basis that the manufacturer sold its products to private entities as well as to the government. Nevertheless, there is some authority to the effect that asbestos manufacturers may be immune from liability if they were working as government contractors, following government specifications and disclosing any knowledge regarding asbestos hazards, such that the government was placed on an equal footing with respect to asbestos knowledge.[96] This is known as the "government contractor" defence.

D. *Assumption of risk*

The elements of *volenti non fit injuria* , at least under Texas law, were summarized in Borel:

> "(1) the plaintiff knows the facts constituting a dangerous condition;
>
> (2) he knows the condition or activity to be dangerous;
>
> (3) he appreciates the nature or extent of the danger; and
>
> (4) he voluntarily exposes himself to the danger.[97]"

The plaintiff's knowledge may have been imparted by the defendant, or obtained from other sources. If the knowledge was imparted by the defendant, this would suggest that the duty to warn had been discharged. In such circumstances, the plaintiff may have ignored warnings or failed to use safety equipment, such as respirators. Where lung cancer is the disease, the plaintiff may also have been a smoker.

The plaintiff's knowledge may also have been obtained from other sources. For example, in Thomas v. Kaiser Agricultural Chemicals,[98] a farmer was injured when he was sprayed with liquid nitrogen fertilizer while filling an applicator. The Court held that the plaintiff's experience as a farmer, coupled with his knowledge that he was dealing with a dangerous substance, raised an issue with respect to assumption of risk. However, Mr. Borel "knew the dust was

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94 454 N.E.2d 210 (Ill. App. 1982).
95 No. S79-0272-N (S.D.Miss. 1982).
96 In re Related Asbestos Cases, above, note 57; and Tefft v. A.C. & S. Inc., No. C80-924M (W.D.Wash. 1982).
97 Above, note 12 at 1096 (F.2d).
98 81 Ill.2d 206, 407 N.E.2d 32 (1980).

bad" but "never [knew] how dangerous it was"[99] and he was held not to have assumed risk. He did not appreciate the nature or extent of the danger.

The requirement of "voluntarily" assuming the risk has given rise to replies by plaintiffs based on "economic coercion".[100] Economic factors which have been held to vitiate consent include fears that a slow-down in the plaintiff's production, as a result of using safety equipment, would slow down the whole production line and draw attention to himself, fears that refusing to work with asbestos may lead to loss of employment and fears of not being able to find alternative employment in a tight job market.[101] Mr. Borel's decision to continue in his employment was held to be neither voluntary nor unreasonable.

E. *Product misuse*

The defence of product misuse may be invoked where a plaintiff failed to follow adequate instructions or warnings, or where a plaintiff used a product in an unforeseeable manner or, in some cases, for other than its intended use.[102] If adequate instructions or warnings were given, then the defence would likely be redundant because asbestos-containing products do not cause harm because of unforeseen or unintended uses; asbestos is inherently dangerous. In Borel, the Court made a point of noting that the plaintiff had used the asbestos insulation for precisely its intended purpose.[103]

F. *"Contributory" or "comparative negligence"*

"Contributory negligence", as the term is generally used in American jurisprudence, is meant in the strict sense of a complete defence to the plaintiff's claim. Under section 402A of the *Restatement*, contributory negligence is not generally a defence to a claim founded on strict liability unless the plaintiff's conduct is both voluntary and unreasonable.[104]

Under comment (n) to section 402A of the *Restatement*:

> "Contributory negligence of the plaintiff is not a defence when such negligence consists merely in a failure to discover the defect in a product, or to guard it against the possibility of its existence."

As a result, in states which follow the *Restatement*, acts or omissions such as a worker's failure to use a mask or a respirator to protect himself from the dust would not constitute a defence in strict liability actions, unless the conduct was sufficient to establish the defence of *volenti*. This of course would make contributory negligence redundant as a complete defence.

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99 Above, note 12 at 1104 (F.2d).

100 See, for example, Johnson v. Clark Equipment Co., 547 P.2d 132 (Or. 1976); and Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 406 A.2d 140 (1979).

101 *Ibid.*

102 The Interagency Task Force on Products Liability in Asbestos Litigation, above, note 2 at 341.

103 Borel, above, note 12 at 1099 (F.2d).

104 *Ibid.* at 1098.

However, contributory negligence, used in the strict sense, has in the United States given way to "comparative negligence" as a means of apportioning damages. To the extent that the plaintiff is held liable for his own injuries, comparative negligence is a partial defence.[105] In addition to ignoring warnings or refusing to use safety equipment, smoking may be an act of contributory negligence in, for example, cases of lung cancer, even if smoking is not proved to be the proximate cause of the plaintiff's disease. To the extent that damages are apportioned among defendants, comparative negligence is not, strictly speaking, a defence, but it is significant in the context of third-party claims, which are discussed below.

G. *"Intervening" or "superseding" cause or negligence*

Section 440 of the Restatement provides:

> "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which is antecedent negligence is a substantial factor in bringing about."

This defence is variously known as "superseding cause" or "independent" or "intervening cause". The rules for determining whether an intervening force is a superseding cause are set forth in sections 442 to 453 of the *Restatement*. Section 440 also provides:

> "The fact that an intervening act of a third person is negligence in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> > (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
> >
> > (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
> >
> > (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent."

One example of this defence is the so-called "sophisticated employer" defence, discussed below.

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105 The Interagency Task Force on Product Liability in Asbestos Litigation, above, note 2 at 342.

H. *"Concurring" cause or negligence*

Although "concurring" cause or negligence has been listed as a possible defence to a product liability claim, it really has two aspects. First, it embraces contributory or comparative negligence, discussed above. Second, it can also be considered as a means of shifting the burden of fault, either in whole or in part, to a third party. This will be discussed below.

I. *"Sophisticated employer"*

The "sophisticated employer" or "sophisticated consumer" defence can be considered either as a separate defence or as a type of intervening or superseding cause or negligence, discussed above. This defence has been recognized where the level of the employer's knowledge or the nature of the employment relationship requires that the burden to warn of the dangers inherent in the use of a product be shifted from the manufacturer to the employer.

One example of this was in the case of Little v. PPG Industries Inc.[106] That case concerned the death of a worker at a steel plant who was using a chemical solvent manufactured by the defendant. In that case, the Court of Appeals of Washington quoted Prosser[107] as follows:

> "Where the buyer is notified of the danger, or discovers it for himself, and delivers the product without warning, it usually has been held that the responsibility has shifted to him, and his negligence supersedes the liability of the seller."[108]

This defence has been recognized in two situations. First, it has been recognized in cases where supervisory personnel with technical or engineering skills control the activities of the injured employee.[109] The rationale in these cases is that the warning from the manufacturer would be superfluous. Jacobsen v. Colorado Fuel & Iron Corp.[110] concerned the injury of an employee in the course of using a metal strand as a hold-down device. In that case the Court stated:

> "Where a supplier furnishes a chattel, the use of which is to be directed by technicians or engineers, it is sufficient to insulate the supplier from liability for failure to warn if the warnings given are sufficient to apprise the engineers or technicians of the dangers involved. There is no duty to warn those who simply follow the directions of the engineers or technicians, or, to put it differently, there is no duty of a supplier of chattels to foresee that the

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106 19 Wash.App. 812, 579 P.2d 940 (1978).

107 Law of Torts, 4th ed. (1971), s. 102, pp. 667-668.

108 Above, note 106 at 947 (P.2d).

109 Hopkins v. E.I. Du Pont De Nemours & Co., 212 F.2d 623 (3rd Cir. 1954), *cert.* denied, 348 U.S. 872 (1954); and Jacobsen v. Colorado Fuel & Iron Corp., 409 F.2d 1263 (9th Cir. 1969).

110 Above, note 109.

> engineers or technicians will fail to follow warnings given or to employ knowledge possessed."[111]

Second, the defence has been recognized where the employer, though not an expert, knows of the potential dangers associated with the use of the manufacturer's product.[112] In Young v. Dow Corning Corp.,[113] an employee was injured by fumes produced by an industrial resin commonly used by his employer. The plaintiff's employer was aware of the danger because the manufacturer had labelled the product with warnings of the potential hazard. The Supreme Court of Kansas stated:

> "[T]he manufacturer of a product which is potentially hazardous to health and who gives adequate warnings of such potential hazard, by label or otherwise, to its immediate vendee, and industrial user, has no additional duty to warn the vendee's employee of such hazards, and is not liable in a negligence action to such employee for failure to do so."[114]

In comparison, the Court in Siebel v. Symons Corp.[115] held that a warning to the plaintiff's employer regarding the dangers associated with the use of a support rod did not insulate the manufacturer from liability to the plaintiff employee. However, the Court in *obiter dicta* suggested a distinction which may make the defence more likely to be accepted in cases of toxic substances, such as asbestos:

> "There is a line of cases holding that a warning communicated to an employer for communication to the employee may insulate the manufacturer from liability to the employee when the employer fails to communicate the warning. However, such cases arise from factual situations where either the inherent danger is slight or the difficulties of giving the warning are immense (as where toxic liquids are delivered in large quantities and used by many persons in small quantities), or where the warning was held to be adequate as a matter of law."[116]

Examples of factual circumstances to which this distinction might apply would include shipyards.

However, it must be remembered that the Court in Borel rejected the manufacturer's argument that the insulation contractors had an intervening and exculpating duty to warn the plaintiff of

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111 *Ibid.* at 1273.

112 Young v. Dow Corning Corp., 451 P.2d 1977 (Kan. 1969); and Marker v. Universal Oil Products Co., 250 E.2d 603 (10th Cir. 1957).

113 Above, note 112.

114 *Ibid.* at 184.

115 221 N.W.2d 50 (N.D. 1974).

116 *Ibid.* at 53.

the dangers associated with asbestos. Admittedly, there was no evidence before the Court that Mr. Borel's insulation contractor employers knew or should have known of such dangers. The Court's reasons for rejecting this argument themselves suggest circumstances similar to those suggested in the Little case, in which this defence may apply:

> "The defendants assert, in effect, that it is the responsibility of the insulation contractors, not the manufacturers, to warn insulation workers of the risk of harm. We reject this argument. We agree with the Restatement: a seller may be liable to the ultimate consumer or user for failure to give adequate warnings. The seller's warning must be reasonably calculated to reach such persons and the presence of an intermediary party will not by itself relieve the seller of this duty. … In general, of course, a manufacturer is not liable for miscarriages in the communication process that are not attributable to his failure to warn or the adequacy of the warning. This may occur, for example, where some intermediate party is notified of the danger, or discovers it for himself, and proceeds deliberately to ignore it and to pass on the product without a warning."[117]

The same result was reached in Neal v. Carey Canadian Mines Inc.,[118] another asbestos case. In that case the Court referred to section 447 of the *Restatement* and stated:

> "The fact that Philip Carey was in a better position to protect the plaintiffs from exposure to asbestos fibre and dust does not automatically mean that Philip Carey's conduct was a superseding cause of plaintiffs' injuries. Supplier defendants did not present any evidence that the conduct of the employer, Philip Carey, was highly extraordinary within the industry and, thus, unforeseeable to the supplier defendants. … Rather, supplier defendants presented evidence of inadequate dust control, the absence of warnings, and the absence of adequate medical monitor, which although relevant to the issue of proximate cause, did not amount to sufficient evidence of extraordinariness within that industry as evidenced by the conditions in the supplier defendants own plants. … For these reasons the court did not find that there was sufficient evidence to charge the jury that the conduct of Philip Carey prior to the plants closing may be found to have been extraordinary and that it might constitute a superseding cause of plaintiffs injuries."[119]

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117 Above, note 12 at 1091-1092 (F.2d).
118 Above, note 50.
119 *Ibid.* at 371-372.

At least one other court has also rejected this defence because it considered that the defendant manufacturer's conduct in manufacturing and selling the harmful product was a substantial factor in causing exactly the health hazard which the plaintiff eventually developed.[120] However, in In re Related Asbestos Cases,[121] the District Court dismissed the plaintiff's motion to strike sophisticated employer and sophisticated consumer defences, holding that, as these defences go to the issue of causation, they are available even in strict liability cases. The Court also noted that the sophisticated consumer defence had not yet been clearly embraced by the California courts.

It may be that this defence will only be available in pure duty to warn cases, where the defendant has discharged its duty to warn the employer, or where the employer or consumer has in fact misused the product. The former situation was suggested in Jacobsen and Young, and in *obiter* in Siebel. The latter situation is embraced by the product misuse defence, and would be virtually redundant as a separate defence. In any event, these will be rare cases indeed.

J. *Employer immunity - workers' compensation legislation*

Most workers' compensation legislation limits an employee's right of recovery against his employer for injuries sustained during the course of his employment, and bars any tort claims for additional amounts. In Borel, it was precisely such legislation which prompted Mr. Borel to sue the manufacturers who had supplied asbestos-containing products to his employers. Plaintiffs have argued, with some success, that the legislation should not be used to bar claims:

1. for intentional torts;

2. of fraudulent concealment;

3. where the employer was acting in a second or "dual" capacity, as a supplier of asbestos- containing products;

4. against related companies; and

5. claims against individuals who are not fellow employees but independent contractors.

Intentional torts - including fraudulent concealment

The courts have been divided as to whether deliberate acts or omissions of employers fall inside or outside of the legislation.[122]

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120 Gray v. Johns-Manville, In re General Dynamics Asbestos Cases, C.M.L. No. 1 (D.C. Conn. 1979).

121 Above, note 57.

122 Cases permitting actions against employers: Neal v. Carey Canadian Mines Inc., above, note 50; and Matter of Johns-Manville Asbestosis Cases, 511 F.Supp. 1229 (N.D.Ill. 1981); cases barring actions: Kofron v. Amoco

Dual capacity

Several courts have held that an employer's "dual capacity" as both an employer and a supplier of asbestos does not pierce the veil of immunity provided by the legislation.[123]

Related companies

The courts are also divided as to the immunity of parent and subsidiary companies.[124] Moreover, there may be difficulties in making out a cause of action against a non-employer corporation.

Independent contractors

Potential independent contractors include company doctors, medical consultants, safety personnel and insurance carriers.

It can be seen that employer immunity, coupled with the potential for a sophisticated employer defence on the part of manufacturer defendants, could be a boon to defendants and potentially devastating to plaintiffs.

K. *Governmental immunity*

There is some authority for the proposition that governments will be immune from acts or omissions resulting from policy decisions, but not acts or omissions related to carrying out an existing policy.[125]

L. *Spousal immunity*

This doctrine can also limit the rights of spouses in the so-called "family contact" cases.

(iii) *Third Party Claims*

All potential defendants in asbestos cases are also potential third parties. Defendants may seek contribution or indemnity either "upstream" or "downstream" from themselves. It is in this context that the doctrines of comparative or concurring cause or negligence, as well as the market share theory of liability, have their most meaningful application. However, the very

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Chemical Corp., 441 A.2d 226 (Del. Supr. 1982); Tysenn v. Johns-Manville Corp., 517 F.Supp. 1290 (E.D.Pa. 1981); and Nutt v. A.C. & S. Co., 466 A.2d 18 (Del.Super. 1983).

123 Farrall v. Armstrong Cork Co., 457 A.2d 763 (Del.Super. 1983); Oyster v. Johns-Manville Corp., 568 F.Supp. 83 (E.D.Pa. 1983); Kohr v. Raybestos-Manhattan Inc., 522 F.Supp. 1070 (E.D.Pa. 1981); Johns-Manville Asbestosis Cases, above, note 122; and Nutt v. A.C. & S. Co., above, note 122.

124 Cases holding parent companies immune: Tucker v. Union Oil Co. of California, 603 P.2d 156 (Idaho 1979); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373 (10th Cir. 1980); and Mingin v. Continental Can Co., 408 A.2d 146 (N.J. Super.L. 1979); cases holding subsidiary companies not immune: Thomas v. Mycon Inc., 244 F.Supp. 151 (D.D.C. 1965); and Latham v. Technar Inc., 390 F.Supp. 1031 (E.D.Tenn. 1974).

125 Raymer v. United States, 482 F.Supp. 432 (W.D.Ky. 1979).

nature of asbestos and its uses make an apportionment of damages between defendants and third parties a problem of great difficulty and complexity. Consider the reasons in Goldman and In re Related Asbestos Cases. Consider also the differences between different types of asbestos and therefore various asbestos-containing products, in terms of their virulence, as discussed above. Causation is only one of the problems. There are also two other specific liability problems, namely, limitations defences and employer immunity.

A. *Limitations defences*

At least one court has held that statutes of limitations do not bar claims for contribution or indemnity against third parties.[126]

B. *Employer immunity*

However, the trend in the cases is to bar third party claims against employers who are immunized by workers' compensation legislation.[127]

(iv) *Damages*

There are two major issues with respect to damages:

1. apportionment of damages; and

2. punitive damages.

A. *Apportionment of damages*

As most asbestos litigation issues, this was first discussed in Borel. Unlike Sindell and Hall, but not unlike Summers, there was clear product identification evidence in Borel. Nevertheless, Mr. Borel could not prove that a specific asbestos- containing product had caused his illness. This was a scientific and therefore evidentiary impossibility. However, the Court stated the following regarding causation:

> "It is undisputed, however, that Borel contracted asbestosis from inhaling asbestos dust and that he was exposed to the products of all the defendants on many occasions. It was also established that the effect of exposure may result in an additional and separate injury. We think, therefore, that on the basis of strong circumstantial evidence the jury could find that each defendant was the cause in fact of some injury to Borel."[128]

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126 Hornsby v. Johns-Manville Corp., 96 F.R.D. 367 (E.D.Pa. 1982).

127 Farrall v. Armstrong Cork Co., above, note 123; In re General Dynamics Asbestos Cases, 539 F.Supp. 1106 (D.Conn. 1982); and White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981); *contra*, Leonard v. Johns-Manville Sales Corp., 305 S.E.2d 528 (N.C. 1983).

128 Above, note 12 at 1094.

The difficulty the Court faced was not determining liability, but apportioning damages. That difficulty was resolved in this way:

> "Having concluded that each defendant was the cause in fact of some injury to Borel, we now come to the question of apportionment of damages. In general, a defendant is liable only for that portion of the harm which he in fact caused. A problem arises, however, where, as here, several causes combine to produce an injury that is not reasonably capable of being divided. In the instant case, the trial court resolved this issue by holding the defendants jointly and severally liable for the entire harm. Asserting error, the defendants argue that if the injury cannot be reasonably apportioned, the plaintiff must bear the entire loss unless it can be shown that the tortfeasors acted in concert or with unity of design.
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> …
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> The effect of the Landers case may be stated as follows: Where several defendants are shown to have each caused some harm, the burden of proof (or burden of going forward) shifts to each defendant to show what portion of the harm he caused. If the defendants are unable to show any reasonable basis for division, they are jointly and severally liable for the total damages.
>
> …
>
> Applying these principles to the present case, we conclude that the defendants may be held jointly and severally liable for the total damages."[129]

The Court therefore employed a burden-shifting device for the limited purpose of (not) apportioning damages, although not to aid the plaintiff in proving causation.

B. *Punitive damages*

One of the most controversial issues in asbestos litigation is the availability of punitive damages. At least two courts have ruled that punitive damages are not available in asbestos actions based on strict liability, as such cases supposedly focus on the product and not the defendant's conduct.[130] However, the trend in the cases is to awarding punitive damages in the

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[129] *Ibid.* at 1094-1096.

[130] Gold v. Johns-Manville Sales Corp., 553 F.Supp. 482 (D.N.J. 1982); and Jackson v. Johns-Manville Sales Corp., above, note 93.

appropriate circumstances.[131] The tests enunciated by the courts have included reckless disregard for the public safety[132] or the rights of others,[133] and flagrant indifference to unreasonable risks of harm.[134]

Punitive damages frequently constitute a significant portion of the total award and have in some instances exceeded the compensatory damages. For example, in one asbestos abatement case, a jury verdict was granted for compensatory damages of $6.4 million and punitive damages of a further $2 million.[135] Although the compensatory award was reduced to $4.8 million on appeal, the punitive damage award was affirmed.

(b) Property Damage Cases: Abatement

Many of the principles established in the personal injury cases have equal application in the abatement cases. Generally speaking, the same theories of liability are put forward. Most cases involve claims by owners of buildings against manufacturers or installers of asbestos-containing materials. As the plaintiffs are therefore in privity with the defendants, one might expect many more claims in contract as opposed to the almost purely tort claims in the personal injury context. However, as the discovery rule regarding limitations has no application in contract, most building owners are in fact founding their claims in tort. As such, most claims are advanced in strict liability or negligence. A key issue that arises is the availability of recovery for economic loss in tort. Other claims that have been advanced have been in restitution, indemnity, nuisance and trespass. The latter two theories were dealt with above. It will be seen that recovery under each cause of action will depend upon the level of asbestos in the building, and therefore the risk of harm to human health. It will also be seen that the degree of risk may affect the quantification or mitigation of damages.

(i) *Recovery of Economic Loss in Tort*

One of the most vexing issues in modern tort law concerns the recoverability of so-called "economic loss"; that is, damages in the absence of present physical harm. In the mid to late 1980s, this issue resurfaced in the context of asbestos abatement litigation. Some states permit the recovery of purely economic loss, while others do not. As a result, the key element in property damage cases is proof of physical harm, or at least the prospect of harm, to people or property.

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131 See, for example: Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa.Super. 1983); Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982); Neal v. Carey Canadian Mines Inc., above, note 122; and Thiry v. Armstrong World Industries, 661 P.2d 515 (Okl. 1983).

132 Thiry, above, note 131.

133 Neal v. Carey Canadian Mines Inc., above, note 122.

134 Moran, above, note 131.

135 Greenville (City) v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987).

A. *Recoverability of pure economic loss*

In Hooksett (Town) School District v. W.R. Grace & Co.,[136] the District Court for the District of New Hampshire considered the two schools of thought with respect to recovery of economic loss before concluding that, in New Hampshire, such recovery is not available.

However, at least two states permit the recovery of pure economic loss. In Cinnaminson Township Board of Education v. United States Gypsum Co.,[137] the District Court held that, under New Jersey law, damages for economic loss were recoverable under strict liability. This principle was first established in Santor v. A & M Karagheusian Inc.,[138] a case in which the plaintiff recovered damages from the manufacturer of defective carpeting in the absence of privity. Santor has been followed in a long line of New Jersey cases, including Cinnaminson.

More recently, the United States Court of Appeals came to the same conclusion under South Carolina law. In Greenville (City) v. W.R. Grace & Co.,[139] the Court of Appeals distinguished one of its earlier decisions under South Carolina law, as well as the recent decision of the United States Supreme Court in East River Steamship Corp. v. Transamerica Delaval Inc.[140] In 2000 Watermark Association Inc. v. Celotex Corp.,[141] the Court of Appeals had considered whether, under South Carolina law, a plaintiff could recover in negligence for injuries which were purely economic. That case involved a claim in negligence against the manufacturer of roofing materials which had blistered, resulting in shortened life expectancy and lessened aesthetic appeal, but no leakage.

In East River, the United States Supreme Court considered whether a cause of action in tort was stated when a defective product malfunctioned, injuring only the product itself and causing purely economic loss. In that case, two turbines installed on ships chartered by the plaintiffs malfunctioned, resulting in damage only to the turbines themselves. Applying reasoning consistent with 2000 Watermark, the Supreme Court held that, under admiralty law:

> "A manufacturer in a commercial relationship has no duty under either negligence or strict products-liability theory to prevent a product from injuring itself."[142]

The Court in Greenville distinguished Watermark and East River on the basis that the defective products in those cases had only injured themselves, and had not injured or threatened to injure people or property. The Court noted, as a matter of fact, that the installation of Monokote asbestos fire proofing had contaminated the Greenville City Hall with asbestos

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136 Above, note 46.
137 552 F.Supp. 855 (D.N.J. 1982).
138 44 N.J. 52, 207 A.2d 305 (1965).
139 Above, note 135.
140 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (N.J. 1986).
141 784 F.2d 1183 (4th Cir. 1986).
142 Above, note 140 at 895 (U.S.).

fibres, and that this had endangered the lives and health of the building's occupants. The Court then stated:

> "In Watermark, we indicated that a manufacturer whose product creates an unreasonable risk of harm may fairly be held liable when the product causes personal injury. We think that the South Carolina courts would be willing to extend tort liability to the manufacturer whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the environment, thereby causing damage to the property owner who has installed the harmful product in his building. In this case, Greenville cannot be precluded from asserting a claim for negligence on the part of Grace simply because none of the occupants of the Greenville City Hall has yet developed an asbestos-related disease. Such diseases may not develop until decades after exposure to asbestos. We think that a plaintiff such as Greenville should not be required to wait until asbestos-related diseases manifest themselves before maintaining an action for negligence against a manufacturer whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the environment."[143]

The Court then cited an unreported decision of the South Carolina Circuit Court, as well as three other federal District Courts, as support for this proposition. As a result, it is not necessary for the courts to permit recovery for purely economic loss, in the absence of present physical harm to people or property. Economic loss may be compensated for under the broader policy rationale that a present risk of physical harm should not be permitted to become a reality.

B. *Physical harm or risk of harm*

The District Court for the District of Rhode Island had, by the time of Greenville, considered the distinction between physical damage and economic loss, citing Cinnaminson, among other cases. Manchester (City) v. National Gypsum Co.,[144] concerned a defendant's motion to dismiss, among other matters, on the basis that New Hampshire law did not permit recovery of pure economic loss in tort.

Judge Pettine stated a policy rationale similar to that in Greenville:

> "I would note at the outset of this discussion that it is at best, somewhat artificial to try to characterize the damage plaintiff claims as either one or the other, as either physical damage to its

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143 Above, note 135 at 978.

144 Above, note 46.

> property or economic damage. Such pigeon holes may have been useful when tort and contract suits were less complex, but today in situations where dangers are discovered only after many years and where the harm caused or to be caused comes from allegedly dangerously defective materials which must be removed so as to avoid further dangers, the reasons for such divisions are less clear and the ability to make such distinctions is questionable.
>
> Indeed, the cases which have dealt with this same question, either in the asbestos situation or in that of other hazardous or toxic chemicals, reflect this dilemma. There are courts which have characterized the type of damage which has been claimed here as economic damage."[145]

Judge Pettine then held:

> "The City of Manchester's Complaint does not concern the slow and gradual deterioration of its products nor the failure of the products to meet some standard of quality. Instead The Complaint alleges that the hazardous asbestos products have contaminated the City of Manchester's buildings and the objects in them in a way which makes it harmful to the users. Specifically, the asbestos has purportedly contaminated the ceilings, walls, floors, furniture, drapes, and air quality of the buildings. The Complaint then alleges that the physical damage to the property may be measured by the cost of repairing and replacing the asbestos products. … Consequently, I find that the City of Manchester has made a sufficient allegation of physical harm to its property so as to state claims for negligence and strict liability under New Hampshire law. The City is entitled to offer evidence to support these claims."[146]

After ruling out recovery of pure economic loss, the Court in Hooksett then went on to consider whether the plaintiff's pleadings disclosed an allegation of physical harm, for the purpose of the defendant's motion to dismiss:

> "In the case at bar, the Plaintiff alleges that asbestos fibres contained in the Defendant's product were released into the school's atmosphere thus contaminating the air, the carpeting, the curtains, other school furnishings, personnel and occupants. Alerted to the unreasonably dangerous propensities of the

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145 *Ibid.* at 649-650.

146 *Ibid.* at 651-652.

> asbestos, the Plaintiff claims it had no choice but to take immediate action to remove and replace all that which had been contaminated by the airborne fibres.
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> The asbestos was but a single ingredient of the acoustical insulation and fireproofing spray applied at the school. Yet, it managed to contaminate the remainder of the insulator, the curtain, walls and carpets of the school among other things. Such contamination constitutes a physical injury to Plaintiff's premises; where a defect in Defendant's product i.e., the asbestos creates a cognizable safety hazard, the resulting injury to property is as actionable in strict liability and negligence as personal injury resulting from the defect would be."[147]

Similarly, in New York (City) v. Keene Corp.[148] and Adams-Arapahoe School District No. 28-J v. Celotex Corp.,[149] the Court found that the plaintiffs had alleged sufficient physical harm to found claims in strict liability and negligence. In Adams-Arapahoe, Judge Carrigan noted the trend to permit strict liability and negligence claims to proceed in asbestos abatement cases:

> "Plaintiffs second and third claims are based on theories of strict liability in tort and negligence. Plaintiff essentially asserts that the asbestos products in question were dangerously defective and posed a serious risk of harm to persons, and damage to property, through the actual and potential release of asbestos fibres. The damages sought in each claim relate to the cost of removing and replacing the asbestos products and items that the asbestos allegedly contaminated in the plaintiff's schools.
>
> Defendants have moved to dismiss these claims on the ground that the plaintiffs failed to allege the existence of physical harm to either person or property, an element critical to an actionable tort. Defendants further contend that the plaintiff's claims amount to a demand for reimbursement for economic loss, a remedy assertedly not available in a strict product liability or negligence action.
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> In actions similar to the instant case, the trend is to permit claims for strict liability in tort and negligence to proceed where the remedy sought is removal and replacement costs."[150]

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147 Hooksett, above, note 47 at 130-131.

148 132 Misc.2d 745, 505 N.Y.S.2d 782 (1986), aff'd 513 N.Y.S.2d 1004 (A.D. 1987).

149 Above, note 46. The plaintiffs were ultimately awarded damages by the jury, which was affirmed by the judge (Mealey).

150 *Ibid.* at 1209.

However, the defence of economic loss continues to be put forward, and several other courts have accepted this argument, while still another has held that the mere diminution in value of property, in and of itself, constitutes physical harm.[151]

(ii) *Restitution and Indemnity*

In circumstances where a building owner has already taken steps to abate the perceived asbestos risk, claims have also been advanced under the theories of restitution and indemnity, but with little success.

A. *Restitution*

Claims in restitution are based on section 115 of the *Restatement of Restitution*. A cause of action lies if the plaintiff performed an act which was "immediately necessary to satisfy the requirements of public … health, or safety."

A claim in restitution was denied in Greenville (City) v. National Gypsum Co.,[152] on the basis that the defendant had no duty to remove the asbestos products from the schools. A similar claim was dismissed in Hooksett, where the Court held that the plaintiff appeared to have been acting as a volunteer when it removed the asbestos, and that the plaintiff was not performing any duty of the defendant to remove after first having notified the defendant of any such duty. Nevertheless, a claim of restitution was permitted to proceed to trial in Keene.

B. *Indemnity*

Claims for indemnity are based upon section 76 of the *Restatement of Restitution*, which provides that "[a] person who, in whole or in part, has discharged a duty . . . which as between himself and another should have been discharged by the other, is entitled to indemnity."[153] As such, indemnity, as opposed to restitution, requires a preexisting duty on the part of the plaintiff.

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151 Economic loss allowed: Asbestos Insurance Coverage Cases, Board of Education of Chicago v. AC&S Inc., App. Crt., Third Div., No. 86-817 (Ill. Sup Ct. No. 67576) - diminution in value, Board of Education of Pekin Public Grade Schools District No. 106 v. W.R. Grace & Co., No. 84-L-2282, Ill. Cir. Crt., Tasewell Co., 10th Judicial District, Chase Manhattan Bank v. T&N, Franklin County School Board v. Lake Asbestos of Quebec Ltd., No. 84 AR 5435-NW (N.D. Ala. 1986), Independent School District No. 662 v. Keene Corp., Washington County, MN 10th Judicial District, No. C5-84-1701, Mullen v. Armstrong World Industries, No. 268 517 (Cal. Super. Ct. Dec. 3, 1985); Permuter v. U.S. Gypsum, D. CO No. 87-510, U.S.F.&G. v. Wilkin Insulation Co., 193 Ill. App. 3d 1087, and Wilshire Blvd. Building v. Metropolitan Life Insurance Co., C.D., CA No. 89-6048; Economic loss dissallowed: Banc One Building Management v. Grace, AIB, WI Supreme Court No. 89-2330, Board of Education of Township High School District No. 207, 211 v. Abitibi Asbestos Mining Co., Ill. Cir. Ct. Cook Co. No. 85-CH-83905, Catasaqua Area, (PA) School District v. Eagle-Picher Industries, E.D. PA No. 85-3743, Livingston Board of Education v. U.S. Gypsum and Mott-Smith v. Cutshaw (all uncited decisions reported in Mealey).

152 Slip. Op. No. CIV-2-83-294 (E.D. Tenn. 1984).

153 Hooksett, above, note 47 at 134.

In Hooksett, such a claim was dismissed on the basis that the plaintiff "[had] yet to be found liable to anyone for any claim arising out of asbestos exposure." In other words, the claim of indemnity was premature. However, the Court in Keene did permit the alternative claim for indemnity to proceed to trial.

(iii) *The Threshold of Physical Harm or Risk*

A key element of the factual defence will be that levels of asbestos fibres found inside buildings are insufficient to cause asbestos-related disease, and therefore do not constitute physical harm, or present a risk of harm, for the purpose of strict liability or negligence. It is noteworthy that a number of jury verdicts have rejected claims involving relatively static materials, while awarding judgment with respect to more volatile materials.[154]

It is also worthwhile to consider the opinion of the Ontario Royal Commission on Asbestos. The key conclusion of the Commission was that there was no risk of harm from breathing air in buildings except "in the immediate vicinity of loose asbestos that is being disturbed."[155] The result of the jury verdicts to date has been more or less consistent with this conclusion, with some exceptions.

(iv) *Quantification or Mitigation of Damages*

Some asbestos in buildings may be so loose and volatile that there is no practical alternative to protecting the public health through removal. However, it may be that the risk from other asbestos-containing materials may be adequately reduced by less expensive means, such as encapsulating the material with a spray barrier or enclosing it with other materials, such as gyproc or tiling. Also, the courts may be prepared to limit damages to the cost of these alternative safety measures. To the extent that any loss remained, such as diminishment of property value, this would be a purely economic loss, and only recoverable in jurisdictions which do not require physical harm or risk.

(c) Procedural Techniques

In an attempt to manage or streamline asbestos litigation, limit the number of issues and reduce pre-trial and court time, counsel and courts have utilized a number of innovative

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[154] Plaintiff verdicts: Adams-Arapahoe School District No. 28-J v. Celotex Corp. (first vinyl floor tile verdict, affirmed by judge - see note 149), Athens City Board of Education v. National Gypsum Co., No. 85-355 (E.D. Tenn.) (acoustical plaster); and Spartanburg County School District No. 7 v. National Gypsum Co., above, note 17, defence verdict in first trial vacated 805 F.2d 1148 (4th Cir. 1986), plaintiff verdict in second trial (acoustical plaster); defence verdicts: Anderson County v. United States Gypsum Co., No. CIV-3-83-511 (E.D. Tenn. 1985), aff'd 821 F.2d 1230 (6th Cir. 1987) (acoustical ceiling plaster); Benton Harbour (Michigan) v. W.R. Grace, Berrion County Case No. 85-3008-N-Z-Z (1989) (ceiling plaster); Cinnaminson Township Board of Education v. National Gypsum Co., Case No. 80-1842 (D.L. N.J. 1988) (plaster); and Reorganized Church of Jesus Christ of Latter Day Saints v. United States Gypsum Co., D.C. No. 85-0322--CU-W-6 (1988) (ceiling tiles). But in Arkansas Oklahoma Gas Corp. v. Arkansas Public Service Commission, Arkansas Court of Appeals No. CA 88-260 the Arkansas Court of Appeals held that non-friable asbestos should not have been removed. Contrast Adams-Araphoe, *supra*.

[155] Ontario, Report of the Royal Commission on Asbestos, above, note 2 at 4.

procedural techniques. Counsel have sought to apply certain issue preclusion doctrines, and counsel and the courts have also sought to utilize various trial management procedures and other informal approaches. In large measure, this is the story of Judge Parker, out of the East District of Texas. He was mentioned earlier, in the Carter case, in the context of market share liability. Judge Parker has been a true leader in the struggle to manage the almost unmanageable volume of asbestos litigation in the American courts, and he has met with some success.

(i) *Issue Preclusion Doctrines*

The following doctrines have been put forward by counsel and considered by the courts.

1. *res judicata*;

2. collateral estoppel;

3. *stare decisis*; and

4. judicial notice.

The doctrine that has attracted the most attention is collateral estoppel. However, none of these doctrines have had the effect of significantly streamlining the litigation. Indeed, they may have complicated it by adding procedural matters to the already burgeoning substantive issues to be dealt with.

A. *Res judicata*

The doctrine of *res judicata* forecloses relitigation of the same cause of action by parties involved in a prior suit. The most common use of this doctrine stems from long latency periods and the related limitations problems. At least one court has held that the doctrine bars a second action by a plaintiff with regard to asbestos-related injuries which had not manifested themselves by the time of the first action.[156]

B. *Collateral estoppel*

Collateral estoppel is a doctrine by which relitigation is precluded with respect to specific issues which had been actively litigated and had resulted in a final adjudication on the merits. The distinction between collateral estoppel and *res judicata* is that the former extends beyond the cause of action in the earlier litigation. The doctrine may be used "offensively" by a plaintiff seeking to bar a defendant from relitigating an issue lost by the defendant in an action with another party. It may also be used "defensively" by a defendant seeking to preclude a plaintiff from asserting an issue lost against a previous defendant.

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156 Carbonaro v. Johns-Manville Corp., 526 F.Supp. 260 (E.D.Pa. 1981).

Collateral estoppel may only be invoked where the following requirements are met:[157]

- the issue sought to be precluded must be substantially identical to the issue previously decided. This is a difficult burden in asbestos cases because of the discreet factual differences which bear on issues of liability;

- the issue previously determined must have been essential to the outcome of the first action;

- the issue must have been actively litigated and determined on the merits resulting in a final judgment;

- the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate in the previous action. Although mutuality of parties is not required, the party against whom the doctrine is asserted must have been a party in the prior litigation. There is also authority to the effect that this requirement is not met where the party to be estopped has more procedural rights and remedies available in the second action. Another factor is whether the litigant had the incentive to fully and vigorously litigate in the first action; and

- the doctrine is not applicable when the litigant was unable, as a matter of law, to obtain appellate review of the prior determination.

There is also authority that the following factors will mitigate against the application of collateral estoppel:[158]

- where the previous judgment relied upon is inconsistent with other judgments;

- where the party asserting the doctrine could readily have joined itself to the prior action; and

- where new evidence may be available to dispute the prior finding.

Considering these requirements and additional factors, it is not surprising that collateral estoppel has had a mixed reception in asbestos litigation. It has been Judge Parker who has done the most to advance this cause. In Mooney v. Fibreboard Corp.,[159] and Flatt v. Johns-Manville Sales Corp.,[160] Judge Parker collaterally estopped several defendants, who had previously lost in Borel, from relitigating the issue of whether asbestos products were defective, based upon a prior holding that asbestos products were defective for lack of adequate warnings.

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157 See generally D. R. Gross, "Collateral Estoppel" in Alcorn, Asbestos Litigation, above, note 2 at 109-112.
158 *Ibid.* at 112-115.
159 485 F.Supp. 242 (E.D.Tex. 1980).
160 488 F.Supp. 836 (E.D.Tex. 1980).

Then, in Hardy v. Johns-Manville,[161] Judge Parker again collaterally estopped the Borel defendants from raising a state-of-the-art defence. Judge Parker's ruling applied to all defendants in the new case, including those who had not been parties in Borel. However, the Court of Appeals, not surprisingly, reversed his ruling.[162] With respect to those defendants which were not named in Borel, the Court held that they had not had a full and fair opportunity to litigate the issue. With respect to those parties who were defendants in Borel, the Court held that the verdict in Borel was ambiguous with respect to certain key issues related to the defendants' duty to warn, that there was a history of inconsistent verdicts on liability in asbestos suits, and that the defendants in Borel did not have adequate incentives to vigorously litigate that issue.

Nevertheless, limited offensive uses of collateral estoppel have been allowed. In Amader v. Johns-Manville Corp.,[163] the District Court allowed collateral estoppel with respect to the issue of whether the defendants' high temperature insulation product was defective when manufactured between 1962 and 1968. However, the Court rejected collateral estoppel on the issue of whether plaintiff's exposure to the insulation was a substantial factor in causing his injuries. Similarly, in Bertrand v. Johns-Manville Sales Corp.,[164] collateral estoppel was allowed on the issue of whether asbestos can cause lung disease, but disallowed on the issues of state-of-the-art and whether the defendants' products were unreasonably dangerous.

C. *Stare decisis*

In Migues v. Fibreboard Corp., Judge Parker applied *stare decisis*, holding that the dangerousness of asbestos products was an issue of law that had been decided against the defendants in Borel, which had been upheld by the Court of Appeals. However, the same Fifth Circuit rejected Judge Parker's decision on appeal.[165]

D. *Judicial notice*

Judge Parker had cited judicial notice as an alternative justification for his short-lived order in Hardy, on the basis that the doctrine permits judges to base their decisions on "self-evident truths that no reasonable person could question."[166] However, although sympathetic to Judge Parker's efforts to streamline the enormous case load in the East District of Texas, the Court of Appeals rejected this doctrine as well, stating that "the proposition that asbestos causes cancer … is not at present so self-evident a proposition as to be subject to judicial notice."[167]

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161 Above, note 56.
162 681 F.2d 334 (5th Cir. 1982).
163 541 F.Supp. 1384 (E.D.Pa. 1982), reconsideration denied, 546 F.Supp. 1033 (E.D.Pa. 1982).
164 529 F.Supp. 539 (D.Minn. 1982).
165 662 F.2d 1182 (5th Cir. 1981), at 347.
166 Above, note 162 at 347.
167 *Ibid.* at 347-348.

(ii) *Trial Management Techniques*

Considerably more success in streamlining has been achieved through the use of various trial management techniques and informal approaches. These techniques include the following:

1. bifurcation of issues;

2. consolidation of trials; and

3. class actions.

Class actions clearly hold the greatest potential for streamlining litigation.

A. *Bifurcation of issues*

Trials are generally bifurcated,[168] if at all, into two phases, the first concerning liability and the second concerning damages. However, even more discreet issues can be segregated, such as causation-in-fact, which may dispose of an entire case. The American courts have discretion to bifurcate distinct and independent issues. This has led to variations in bifurcation with such intriguing designations as "reverse bifurcation" and "reverse trifurcation".

However, the key is whether issues are indeed distinct and can be resolved independently of one another. Where evidence on one issue is also germane to another, bifurcation is unlikely. Other considerations will include any prejudicial effect which bifurcation may have on the outcome of the case, the convenience of the parties and the court, and any savings of counsel or court time.

B. *Consolidation of trials*

Trials may also be consolidated,[169] either in their entirety or with respect to discreet issues, either within judicial districts or between districts. The latter is known as "multi-district consolidation." A number of factors must be balanced, including the risk of prejudice or possible confusion, the risk of inconsistent judgments, the burden on the parties, witnesses and available judicial resources, and the relative time and expense of individual as opposed to consolidated trials. The burden is on the party objecting to the consolidation to demonstrate a prejudicial fact. Examples of common factual and legal issues that have been observed as a basis for a consolidated trials or hearing include the following:

- all issues as to whether defendants failed to warn workers and whether the failure to warn was a proximate cause of the plaintiffs' injuries;

- whether products supplied by the defendants to the plaintiffs at their work site were the proximate cause of their injuries;

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168 See generally Willging, above, note 2 at 102-104.

169 *Ibid.* at 90-93.

- whether the plaintiffs' claims are barred by statutes of limitations;
- whether the state-of-the-art defence should be allowed;
- whether the "government contractor" defence bars liability; and
- whether the defendants' conduct was so outrageous as to warrant punitive damages.

C. *Class actions*

This is probably the most well-known and controversial trial management technique in mass tort litigation. After some ambivalence, the American courts appear to have adopted class actions as a useful method of streamlining asbestos litigation. This may be reflective of the almost overwhelming burden that the litigation had placed on the courts.

Rule 23 of the Federal Rules and Procedures specifies, among other criteria, that the members of the proposed class must be numerous, the claims of the representative plaintiffs must be typical of those of the other class members, and the questions of law of fact that are common to the class must outweigh the differences among the class members. To proceed with a federal class action, plaintiffs must obtain the approval or certification of the trial court. The state courts generally follow this federal model.

In Yandle v. PPG Industries Inc.,[170] the Court rejected an application for class certification because the individual issues predominated over the common questions shared by the proposed class. Among the individual questions cited were that class members had individual medical conditions, they had different jobs and they worked during different periods of time, as a result of which their exposures were dissimilar. Further, the defendants may have had differing duties to inform individual members, the statutes of limitation could have different members, the individuals within the class might bear different degrees of responsibility for their own injuries because their use of safety equipment varied.

However, Judge Parker did much to resurrect the class action in asbestos litigation, in Jenkins v. Raymark Industries Inc. He had certified a class composed of 755 asbestos personal injury claims filed prior to January 1, 1985. Judge Parker had concluded that evidence concerning state-of-the-art would vary little as to individual plaintiffs while consuming a majority of the time required for their trials. Considerable savings could therefore be realized by resolving this and other defence-related questions, including product identification, product defectiveness, gross negligence and punitive damages, in one class trial.

The Court of Appeals had this to say in affirming Judge Parker's decision to certify the class action:

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[170] 65 F.R.D. 566 (E.D. Tex. 1974).

> "Courts have usually avoided class actions in the mass accident or tort setting. Because of differences between individual plaintiffs on issues of liability and defences of liability, as well as damages, it has been feared that separate trials would overshadow the common disposition for the class.
>
> The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters.
>
> If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past. Be that as time will tell, the decision at hand is driven in one direction by all the circumstances. Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says "days of the same witnesses, exhibits and issues from trial to trial".
>
> Necessity moves us to change and invent. Both the Agent Orange and the Asbestos School courts found that specific issues could be decided in a class "mass tort" action even on a nationwide basis. We approve of the district court's decision in finding that this "mass tort" class could be certified."[171]

Shortly after the Fifth Circuit dealt with Jenkins, the Third Circuit Court of Appeals affirmed the certification of a nationwide voluntary class for compensatory damages, but vacated the certification of a mandatory class for punitive damages, all arising out of the use of asbestos in school buildings. In In re School Asbestos Litigation,[172] the Court of Appeals summarized the findings of the District Court with respect to the requirements for a class action:

> "The court directed the certification of a 23(b)(3) class, finding the numerosity requirement satisfied by estimates that friable asbestos is present in approximately 14,000 of the nation's schools, about 8,500 of which have an abatement problem. Commonality existed in an underlying core of issues identified as:
>
> "(a) The general health hazards of asbestos;
>
> (b) defendants' knowledge or reason to know of the health hazards of asbestos;

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171 Jenkins v. Raymark Industries Inc., 782 F.2d 468 at 473 (5th Cir. 1986).

172 789 F.2d 996 (3rd Cir. 1986).

> (c) defendants' failure to warn/test; and
>
> (d) defendant's concert of action and/or conspiracy involving formation of and adherence to industry practices."
>
> Those elements could "be established by common proof, which although it may be complex, does not vary from class-member school to class-member school."
>
> The typicality requirement was satisfied because the plaintiffs' theories of liability were harmonious, and the named plaintiffs stood in a position similar to other members of the class."[173]

The Court concluded with the following statements:

> "Experience shows that in the asbestos litigation arena redundant evidence is the rule rather than the exception. In case after case, the health issues, the question of injury causation, and the knowledge of the defendants are explored, often by the same witnesses. Efforts to achieve expeditious disposition of the cases by invocation of stare decisis and collateral estoppel have been largely unsuccessful. …
>
> The use of the class action device appears to offer some hope of reducing the expenditure of time and money needed to resolve the common issues which are of substantial importance. As the Jenkins Court commented, "It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases". …
>
> We acknowledge that our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The district Court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date."[174]

The resurrection of the class action in asbestos litigation appears to have made all of Judge Parker's efforts worthwhile.

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173 *Ibid.* at 1000.

174 *Ibid.* at 1010-1011.

D. *Other informal approaches*

Other informal approaches have included assigning one judge to all asbestos cases, putting forward test cases, issuing master pre-trial orders and permitting the use in other cases of evidence in one case. However, regardless of the doctrines and techniques applied and the approaches taken, the American courts are still straining under the weight of asbestos litigation, with no end in sight.

4. THE PROGRESS OF ASBESTOS LITIGATION IN CANADA

Asbestos litigation has now arrived in Canada, in a very major way, and the first British Columbia personal injury case will likely go to trial on liability in the fall of 1992. At least one major abatement case is also well on its way to trial, even sooner, in early 1992. It will be suggested that findings of liability will follow much the same pattern in Canada as they have in the United States, but only time will tell.

This section will focus on the key similarities and differences anticipated between asbestos litigation in Canada and the United States. The topics considered will be:

1. personal injury and abatement cases; and

2. procedural matters.

(a) Personal Injury and Abatement Cases

In British Columbia, George Hunt is following in the well-worn footsteps of Clarence Borel. Mr. Hunt is terminally ill with asbestosis and mesothelioma. He formerly worked as an electrician for the British Columbia Ferry Corporation's Victoria Machinery Depot. He alleges that he contracted his diseases as a result of exposure to asbestos insulation used on the British Columbia ferries. Mr. Hunt has named in his action 13 defendants who mined and manufactured asbestos, as well as the Quebec Asbestos Mining Association. The Workers' Compensation Board and Mr. Hunt's employer have also been third partied.

The new owners of the "Harbour Center" complex in downtown Vancouver have sued the previous owners' contractor, fireproofing subcontractor, fireproofing supplier and architect, with respect to the installation of asbestos-containing fire-proofing in those buildings. The contractors' various insurers over time have been third-partied, as has the Workers' Compensation Board. There are also suits in progress with respect to the Bentall office towers in Vancouver, B.C. Hydro's Burrard Thermal Plant and the entire fleet of B.C. Ferries, as well as pulp and paper mills.

(i) *The Plaintiffs' Case*

The main causes of action in Hunt v. T & N plc[175] are negligence, including failure to warn, and conspiracy. The causes of action in Privest Properties Ltd. v. Foundation Co. of Canada,[176] and the other abatement cases, include breach of contract, strict liability and negligence, including failure to warn.

A. *Causes of action*

The key difference between Canadian and American products liability law lies in the distinction (if any) between strict liability and negligence. Conspiracy and fraud will also be discussed, because they are raised in Hunt, as will recovery of economic loss, which is a somewhat less uncertain area of the law in Canada. Except as noted herein, there is little practical difference between the causes of action which are available in Canadian and American asbestos cases.

Strict liability and negligence

In Canada, products liability is governed by negligence and not strict liability.[177] There is no doubt that our courts will consider whether the product is defective in light of the state-of-the-art at the time of manufacture.[178] However, one of the factors which the courts will take into account in determining the appropriate standard of care is the inherent danger associated with the product.[179] The duty to warn extends beyond known dangers to dangers which ought reasonably to be known.[180] In determining whether a manufacturer ought to have known of dangers associated with a product, the manufacturer will be held to the knowledge and skill of an expert.[181] In fact, in some circumstances, our courts will impose a standard of care so high that it approximates absolute liability. This is so in the case of products which are dangerous in themselves.[182]

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175 S.C.B.C. Action No. C885383, Vancouver Registry.

176 S.C.B.C. Action No. C884875, Vancouver Registry.

177 Phillips v. Ford Motor Co., above, note 28.

178 Brunski v. Dominion Stores Ltd. (1981), 20 C.C.L-.T. 14 (Ont. H.C.).

179 Comstock International Ltd. v. Edmonton Flying Club, [1979] 6 W.W.R. 633, (sub nom. Edmonton Flying Club v. Northward Aviation Ltd.) 17 A.R. 507 (C.A.), leave to appeal to S.C.C. refused (sub nom. Canadian International Comstock Co. v. Northward Aviation Ltd.) (1979), 21 A.R. 270n, 30 N.R. 617 (S.C.C.); Lem v. Barotto Sports Ltd. (1976), 1 C.C.L.T. 180, 1 A.R. 556, 69 D.L.R. (3d) 276, (sub nom. Ho Lem v. Barotto Sports Ltd.) [1976] 6 W.W.R. 430 (C.A.).

180 Lem v. Barotto Sports Ltd., above, note 181; Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, 40 D.L.R. (3d) 530; and Cominco Ltd. v. Westinghouse Canada Ltd. (1981), 45 B.C.L.R. 26, 127 D.L.R. (3d) 544 (S.C.), rev'd in part (sub nom. Cominco Ltd. v. Canadian General Electric Co.) (1983), 45 B.C.L.R. 35, 147 D.L.R. (3d) 279 (C.A.), leave to appeal to S.C.C. refused (1983), 47 B.C.L.R. xxxiii (S.C.C.).

181 Labrecque v. Saskatchewan Wheat Pool, [1977] 6 W.W.R. 122, 78 D.L.R. (3d) 289 (Sask. Q.B.), aff'd [1980] 3 W.W.R. 558, 110 D.L.R. (3d) 686, 3 Sask. R. 322; and Ruegger v. Shell Oil Co., [1964] O.R. 88, 41 D.L.R. (2d) (H.C.).

182 Bator v. Chief Mountain Gas Co-op Ltd. (1980), 22 A.R. 302 (C.A.); Fenn v. Peterborough (1976), 14 O.R. (2d) 137, 1 C.C.L.T. 90, 73 D.L.R. (3d) 177 (S.C.), varied on other grounds (1979), 25 O.R. (2d) 399, 9 C.C.L.T. 1,

Given the convergence of strict liability and negligence in the American jurisprudence, it is doubtful that findings of liability will differ significantly between Canadian and American courts on any given set of facts. This is especially so in light of the early medical and scientific knowledge of the potential for harm, dealt with above. It could be argued that, 25 years later, the American courts have not departed from Borel to any great extent. It would therefore seem unlikely that the Canadian courts will do so.

Conspiracy and fraud

The conspiracy allegations in Hunt have already resulted in an appeal to the Supreme Court of Canada. One of the defendants, Carey Canada Inc., succeeded on an application to dismiss the claim against it as disclosing no reasonable cause of action. The plaintiff was not exposed to asbestos-containing products sold by Carey. Mr. Hunt's injuries, therefore, could not have been the direct result of any conspiracy to which Carey was a party. Carey took the position that Mr. Hunt could only recover damages for injury which was the **direct** result of a conspiracy. The Chambers Judge referred to the test propounded by Estey J. in Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.[183] The Court of Appeal reversed the Judge's finding, and their decision has now been upheld by the Supreme Court of Canada.[184] The appeal was allowed without any analysis as to whether Mr. Hunt's damages were sufficiently direct to found a cause of action, and the Supreme Court similarly avoided any discussion of that issue. In the meantime, Carey has gone bankrupt.

Recovery of economic loss

In Canada, as in other Commonwealth jurisdictions, the law with respect to recovery of pure economic loss is somewhat more clear than it is in the United States. In Canada, the case of Rivtow Marine Ltd. v. Washington Ironworks Ltd.[185] appears to rule out recovery for economic loss in the products liability context, even where there is a risk of harm to people and property.

The facts in Rivtow are well known. The defendant supplied a defective crane. Cracks in the framework resulted in the collapse of an identical crane and the death of its operator. Rivtow took their crane out of service, had it repaired and sued for both the costs of doing so and for their downtime. The Supreme Court of Canada held that Rivtow was only entitled to the difference between the actual loss due to its downtime and what its loss would have been had it been warned of the problem and therefore able to do the repairs during its slow season. In other words, Rivtow was denied recovery both of the costs of repairing the crane itself and what their downtime would have been even if they had been warned.

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104 D.L.R. (3d) 174 (C.A.), aff'd (sub nom. Consumers' Gas Co. v. Fenn) [1981] 2 S.C.R. 613, 18 C.C.L.T. 258, 129 D.L.R. (3d) 507, 40 N.R. 425; Saccarado v. Hamilton (1970), [1971] 2 O.R. 479, 18 D.L.R. (3d) 271 (H.C.).

183 [1983] 1 S.C.R. 452.

184 [1989] B.C.W.L.D. 1516 (B.C.C.A.), judgment of Anderson and Esson JJ.A, aff'd (1990) 49 B.C.L.R. 273 (S.C.C.).

185 Above, note 180.

It can be readily appreciated that if the same approach was taken to asbestos abatement cases, the quantum of any recovery would likely be greatly reduced.

In Kamloops v. Neilsen,[186] the Supreme Court did permit the recovery of economic loss, where there was a risk of physical harm which had resulted from the plaintiff's breach of its statutory duty to the plaintiff. In Nielsen, the Supreme Court awarded Neilsen the cost of rebuilding much of the home that he had constructed in reliance upon the building permit issued by Kamloops' building permit. Kamloops had failed to warn Neilsen of problems with the soil conditions on his lot, and the foundations of his home had started to crack. As such, there is no clear authority in Canada for recovery of economic loss in a products liability case; quite the contrary.

Much of the controversy over recovery of economic loss in the Commonwealth arises out of the decision of the English House of Lords in Anns v. Merton London Borough Council.[187] Anns was another soil conditions case, in which the House of Lords awarded damages for economic loss where there was a risk of physical harm. However, in a subsequent decision, D & F Estates Ltd. v. Church Commissioners for England,[188] the House of Lords limited the Anns case to permitting an award of damages for economic loss only where there is a clear risk of physical harm. More recently, in Murphy v. Brentwood District Council,[189] the House of Lords expressly overruled the Anns case. As a result, the recovery of economic damages has been all but eliminated in England, and, in Canada, recovery where there is a risk of physical harm appears to be available only in cases involving a breach of statutory duty.

The implications of this line of authority for asbestos property damage cases were foreshadowed in the decision of the decision of the English Court of Queen's Bench in Merlin v. British Nuclear Fuels plc.[190] In that case, the plaintiffs had purchased a house some six miles south of a nuclear reprocessing plant operated by the defendants. The plaintiffs collected a sample of house dust, which was subsequently analyzed and found to contain high levels of radioactive contamination. Because of their concern about the health risks to their children which they believed would result from long term occupation of the house, they decided to move. They put the house on the market and, several years later, it was sold by public auction at a price far below than that which they had sought. They claimed compensation for financial loss, namely, the diminution value of their home which they said was caused by the level of radioactive contamination. They alleged that the defendants were in breach of their duties under legislation requiring each licencee of a nuclear site to insure that the property of others was not damaged by radiation.

Mr. Justice Gatehouse held that:

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186 [1984] 2 S.C.R. 2, 11 Admin. L.R. 1, 29 C.C.L.T. 97, 8 C.L.R. 1, 26 M.P.L.R. 81, 10 D.L.R. (4th) 641, 54 N.R. 1.

187 [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

188 [1988] 2 All E.R. 992 (H.L.).

189 [1990] 2 All E.R. 908 (H.L.).

190 (1990) 3 All E.R. 711 (Q.B.D).

> "The mere presence of ionized radiations within the plaintiff's property emitted from waste discharged from the site is not enough to constitute a breach of statutory duty. There must be consequential damage. The radionuclides with which this case is concerned … cannot do any significant damage to persons or property externally, but when inhaled, ingested or otherwise enabled to enter the body, they may induce cancers, but, of course, will not necessarily do so. **The presence of alpha emitting radionuclides in the human airways or digestive tracts or even the bloodstream merely increases the risk of cancer to which everyone is exposed from both natural and artificial radioactive sources. They do not *per se* amount to injury**." (Emphasis added)[191]

Both the English and Canadian authorities were recently considered by Mr. Justice Drost of the British Columbia Supreme Court, in Privest Properties Ltd. v. The Foundation Company of Canada Limited.[192] Foundation was the general contractor for major renovations to the Harbour Centre complex. One of its subcontractors applied to parts of the building spray fire-proofing known as "monokote", which is alleged to contain asbestos. Ten years later, during further renovations, the asbestos was allegedly discovered for the first time. The Workers' Compensation Board issued a cease-work order which prevented the owners from completing the renovations until the monokote had been removed and replaced.

Privest now seeks damages for their related expense and inconvenience, as well as a declaration that Foundation is obliged to indemnify them for any future claims arising out of the contamination of the building by the release of asbestos fibres into the air. The economic loss issue arose in the context of an application by Foundation for declarations that their comprehensive general liability insurers had a duty to defend Privest's claim.

Drost J. considered the above English and Canadian cases, as well as the American cases discussed earlier, and made the following statements:

> "As far as Canadian law is concerned, it seems clear that unless there has actually been personal injury or damage to other property, the costs of repairing or replacing defective work is considered to be pure economic loss rather than damage to property …
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> …

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191 *Ibid.*, at p. 722.

192 (1991) 57 B.C.L.R. (2d) 88 (S.C.).

> … [U]nder our law, the mere presence of a defective product in an otherwise sound structure does not, in itself, constitute damage to property."[193]

For these and other reasons, His Lordship dismissed Foundation's application.

There would seem to be little doubt that one of the British Columbia asbestos property damage cases will sooner or later find its way to Ottawa, and that the plaintiffs will be asking the Supreme Court of Canada to reconsider their decision in Rivtow and adopt the more liberal approach to economic loss taken by some of the American Courts. In the meantime, Rivtow, and its application in the Privest case, may prove to be the Achilles heel of the burgeoning number of Canadian asbestos property damage claims. In the meantime, Judge Drost's decision is under appeal.

B. *Causation*

Even more than with recovery of economic loss, the law of causation in Canada is in flux, again as the result of a recent decision of the House of Lords. In McGhee v. National Coal Board,[194] the English Court of Appeal recognized the fact that the burden of proving causation is becoming heavier as our modern world becomes more complex. This is particularly true in products liability cases, which often become battles between experts, muddying the evidentiary waters to the extent that the plaintiff cannot prove his case on a balance of probabilities. For a time then, the English and Canadian courts moved towards shifting the burden from plaintiffs having to prove causation to defendants, in some circumstances, having to disprove causation.

This trend has been dramatically reversed in England by the decision of the House of Lords in Wilsher v. Essex AHA.[195] However, a recent decision of the Supreme Court of Canada appears to have left the door open to such an approach in this country.

The first of the English burden-shifting doctrines enjoyed only a brief existence, courtesy of the Court of Appeal in Hotson v. East Berkshire AHA,[196] before being extinguished on further appeal to the House of Lords.[197] This doctrine was to the effect that a plaintiff should be entitled to recover a portion of his claimed damages if he could prove that the defendant has caused him to suffer a "loss of a chance" of avoiding injury, even if it could not be proved that the injury would have been entirely avoided if proper care had been taken.

Before the decision of Lord Bridge in the Wilsher case, three other doctrines of causation had begun to emerge:

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193 *Ibid.*, at p. 123.
194 [1972] 3 All E.R. 1008 (H.L.).
195 [1988] 1 All E.R. 871 (H.L.).
196 [1987] 1 All E.R. 210 (C.A.).
197 [1987] 2 All E.R. 909 (H.L.).

1. The burden of proof had been shifted away from the plaintiff and to the defendant so that the consequences of deficiency in the evidence fell upon the defendant;[198]

2. In some circumstances, evidence indicating that the defendant merely increased the risk of the plaintiff's injury was used to show that the defendant actually caused the plaintiff's injury;[199] and

3. In some circumstances, the court would draw an inference of causation if the plaintiff showed that the defendant's negligence materially increased the risk of the plaintiff suffering his injury.[200]

These doctrines had their genesis in the decision of the House of Lords in McGhee and the Court of Appeal in Wilsher. Only the last of these doctrines appears to have survived Lord Bridge's speech in Wilsher.

It is useful to compare the facts in Wilsher and McGhee. Martin Wilsher was born prematurely, and given oxygen in order to survive. He received too much oxygen and developed a condition which resulted in total blindness in one eye and partial blindness in the other. The expert evidence was equivocal as to whether his condition was caused or contributed to by the amount of oxygen he had received. The evidence did indicate that excessive oxygen was one of a number of possible causes. The trial judge held that the plaintiff had proven causation, but the Court of Appeal disagreed.

Mr. McGhee worked in a brick factory. His employers did not provide any washroom facilities at the kilns, and Mr. McGhee developed dermatitis. The evidence was that the dermatitis was somehow caused by the presence of brick dust on Mr. McGhee's skin. His inability to wash the dust from his body after work had materially increased the risk he would suffer from dermatitis. In other words, the failure to provide washroom facilities failed to break the chain of causation of Mr. McGhee's dermatitis. By contrast, the evidence in Wilsher was that there were a number of possible chains of causation, and that the defendant's acts had initiated only one such chain.

In his lengthy reasons in Willsher, Lord Bridge reaffirmed the law laid down in Bonnington Castings Ltd. v. Wardlaw[201] to the effect that the burden of proving causation remained on the plaintiff throughout the case, and that, except in unusual cases, the plaintiff must prove that the defendant has "caused or materially contributed to the injury, and not merely increased the risk of injury".[202] The only burdenshifting doctrine left from McGhee was that, in some

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198 McGhee (*supra*) as applied in Clark v. MacLennan [1983] 1 All E.R. 416 (H.L.).

199 Dissent in Wilsher v. Essex AHA, [1986] 3 All E.R. 801 (C.A.) and Thompson v. Smiths Shiprepairers (North Shields) Ltd., [1984] 1 All E.R. 881.

200 McGhee (*supra*) as applied in Wilsher (*supra*) (C.A.).

201 [1956] 1 All E.R. 615, [1956] A.C. 613.

202 *Ibid.*, at p. 618 (All E.R.).

circumstances, the court would infer from proof that the defendant materially increased the risk of injury that the defendant did in fact cause or materially contribute to the injury. At this point, a *prima face* case would be made out and the evidentiary burden would be shifted to the defendant to disprove causation. The two other emerging doctrines were abolished.

Furthermore, although Wilsher left the door enough ajar for causation to be inferred in some cases, it can be seen that the door has not been left open very wide, and that these cases will be few and far between. On the facts in McGhee, there could be little doubt that the brick dust caused the injury and that the lack of washing facilities therefore materially contributed. However, it is precisely in more difficult cases such as Wilsher, where there was more than one possible chain of causation, that plaintiffs will be looking for ways to lighten their burden of causation.

Three cases suggest how these developments may effect asbestos claims in Canada. The first of these is Farrell v. Snell,[203] which went to the Supreme Court of Canada and was one of many medical malpractice cases to consider McGhee and Wilsher. In Farrell an opthalmologist, while performing eye surgery to remove a cataract, noticed some bleeding but decided that there was no haemorrhage and proceeded with surgery. Nine months later it was discovered that the patient's optic nerve had atrophied. Although this could have resulted from a haemorrhage, the expert witnesses could not establish either whether this was the definite cause or when the atrophy had occurred. The trial and appeal courts held that the plaintiff had shown *prima face* that an injury suffered during the surgery was the cause. Both levels of court relied upon McGhee, and the Wilsher case had decided by the time the Supreme Court of Canada heard the final appeal.

Although this was a medical malpractice case, the Court made the following broad statement:

> "The traditional approach to causation has come under attack in a number of cases in which there is concern that due to the complexities of proof, the probable victim of tortious conduct will be deprived of relief. This concern is strongest in circumstances in which, on the basis of some percentage of statistical probability, the Plaintiff is the likely victim of the combined tortious conduct of a number of defendants, but cannot prove causation against a specific defendant or defendants on the basis of particularized evidence in accordance with traditional principles. **The challenge to the traditional approach has manifested itself in cases dealing with non-traumatic injuries such as man-made diseases resulting**

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[203] Farrell v. Snell [1990] 2 S.C.R. 311, 4 C.C.L.T. (2d) 229, 72 D.L.R. (4th) 289, 110 N.R. 200, 107 N.B.R. (2d) 94, 267 A.P.R. 94, [1990] R.R.A. 660; the other cases being Cherry v. Borsman (1941) 5 C.C.L-.T. (2d) 243 (B.C.S.C.); Couillard v. Syme (1988) 44 C.C.L.T. 113 (Alta. Q.B.); Gallant v. Fialkov (1969) 50 C.C.L.T. 159 (Ont.S.C.); Haag v. Marshall (1989) 1 C.C.L.T. (2d) 99 (B.C.C.A.); Kersey v. Wellesley Hospital (1988) 46 C.C.L.T. 271 (Ont.S.C.); Kitchen C.I. v. McMullen (1989) 50 C.C.L.T. 213 (N.B.C.A.), leave to appeal to S.C.C. dismissed February 22, 1990; and Rayner v. Knickle (1988) 47 C.C.L.T. 141 (P.E.I. S.C.) currently under appeal].

> **from the wide spread diffusion of chemical products, including product liabilities in which a product which can cause injury is widely manufactured and marketed by a large number of corporations …**"[204] (Emphasis added)

The Court then said this about McGhee:

> "… I have examined the alternatives arising out of the McGhee case. They were that the plaintiff simply proved that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. **If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiff's cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives.** In my opinion however, properly applied, the principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent. Reversing the burden of proof may be justified where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroyed the means of proof at his disposal. In such a case it is clear that the injury was not caused by neutral conduct. It is quite a different matter to compensate a plaintiff by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone."[205]

Continuing, Madam Justice McLachlin, speaking for the Court stated:

> "… I find it preferable to explain the process without using the terms secondary or evidential burden. It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is not a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden … in my opinion this is not a true burden of proof, and use of an

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204 *Ibid.*, at p. 294 (D.L.R.).

205 *Ibid.*, at p. 299 (D.L.R.).

> additional label to describe what is an ordinary step in the fact-finding process is unwarranted.
>
> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, and the inference of causation may be drawn all the positive or scientific proof of causation has not been adduced …
>
> It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is determined by the law …"[206]

Her Ladyship went on to note that in Wilsher the House of Lords had refrained from deciding the case because the evidence of the experts was seriously in conflict, and that that was not true of the case before them.

When will the Courts draw the type of inference contemplated by Madam Justice McLachlin? In the second case referred to above, Hagg v. Marshall,[207] the defendant solicitor had failed to advise the plaintiff clients as to their lack of insurable interest in some property they were considering selling and failed to ensure that they had insurance coverage by securing a standard mortgage clause endorsement. The plaintiffs therefore had no security interest or insurance when the property was ultimately destroyed by fire. However, the solicitor argued that, even if he had been negligent, there was no evidence to show that his acts or omissions had, as a matter of cause-in-fact, resulted in the plaintiffs' loss. The British Columbia Court of Appeal noted that evidence could have been presented about the courses that might have been open to the Haggs if Mr. Marshall had complied with his duty, but that this was not done. There was therefore no evidence as to whether they would have rescinded the sale in question or whether they would have been able to obtain separate insurance against the risk of non-payment under the mortgage. In those circumstances, the Court declined to apply the "inference" principle from McGhee which has survived the Wilsher decision.

In the final case, Markal Investments Ltd. v. Morley Shafron Agencies Ltd.,[208] the British Columbia Court of Appeal dismissed a plaintiff's claim arising out of snow load damage where his insurance agent had advised him that coverage would not be available for his flea market tent. In that case, the plaintiff had not led any evidence as to whether coverage would have in fact had been available. Madam Justice Southin stated as follows:

> "[I]t is my opinion that, in law, a possibility is not enough when the issue is causal connection. See Hotson … and Wilsher …,

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206 *Ibid.*, at p. 301 (D.L.R.).
207 (1990) 1 C.C.L.T. 99 (B.C.C.A.).
208 (1990) 43 B.C.L.R. (2d) 348 (C.A.).

> which I think both stand for the simple proposition that a plaintiff must prove every ingredient of his cause of action on the balance of probability.
>
> …
>
> … There was, in truth, no evidence from which one could infer, on a balance of probability, that this tent as it was in the autumn of 1984 could have been insured for snowload."[209]

However, the answer to this problem may turn on how the House of Lords would deal with the decision of the English Court of Appeal in Bryce v. Swan Hunter Group plc,[210] which was decided a year before the House of Lords decision in Wilsher, but was not referred to in Lord Bridge's reasons.

Mr. Bryce suffered from mesothelioma. Phillips J. held that whether the defendant employer's breaches of duty merely added to the number of possible causes of the plaintiff's injury, or whether they had accumulative effect which other innocent causes of that injury, the increased the risk of injury therefore taken to have caused it. His Lordship applied McGhee. However, as Wilsher holds that it is not enough to show that a breach of duty enhanced a general risk to the plaintiff, it would appear that a different conclusion might now be reached on the facts of Bryce. On the other hand, a Canadian court hearing those facts may be prepared to draw an inference, as the Supreme Court did in Farrell.

With respect to the four American theories, neither the English nor the Canadian courts have experimented with anything as radical as "market share" liability or the other burden-shifting devices discussed in Sindell, with one exception. The "alternative liability" theory is alive and well in Canada. That theory, first put forward in Summers, was echoed in Cook v. Lewis.[211] This was another case of two defendant hunters shooting in the direction of the plaintiff. However, as seen above, this theory is very limited in its application.

By contrast, the doctrine established in McGhee, and demolished in Wilsher, was a true burden shifting device, equivalent to that utilized in Borel. All that remains in Canada then is a limited alternative liability theory, the "inference" principle left over from McGhee and a very large question mark left by the decision in Farrell.

To this extent then, the law in Canada may be markedly different from the United States, and may benefit defendants at the expense of plaintiffs. However, the comments of the Supreme Court of Canada in Farrell, to the effect that it "would not hesitate" to adopt one of the non-traditional approaches to causation if it was "convinced that defendants... were escaping

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209 *Ibid.*, at pp. 359 & 362.
210 [1988] 1 All E.R. 659 (C.A.).
211 [1951] S.C.R. 830, [1952] 1 D.L.R. 1.

liability because plaintiff's cannot prove liability", suggests that a very major change may be in store in cases involving "man-made diseases resulting from … products liabilities …".

C. *The "alter ego" doctrine*

In addition to the conspiracy plea, and the possible use of alternative theories of causation, another means by which plaintiffs may seek recovery against an ever-widening circle of asbestos defendants is through the use of the "alter ego" doctrine. In the seminal decision of the House of Lords in Solomon v. Solomon,[212] it was recognized that a company is a separate legal entity, with its own rights and obligations separate and apart from those of its shareholders. The Law Lords indicated that, except in cases of fraud, the "corporate veil" should not be pierced, in that a company would not be treated as the agent or alter ego of its shareholders.

Over the years further exceptions to this general rule have been developed, and the courts have recognized that, in certain circumstances, a company may be considered as the agent or "alter ego" of its shareholders or "parent" companies. Precisely when one company will be held as the agent or alter ego of another will depend on the facts of the case. In Aluminum Company of Canada v. Toronto[213] the Aluminum Company was the parent of a number of wholly-owned subsidiaries. The issue in that case was whether the business of the parent extended to the subsidiaries for the purpose of taxation. The Supreme Court of Canada stated the test to be applied in these terms:

> "The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can be said that the latter has, in the true sense of the expression, no independent functioning of its own. The facts here are not in dispute. There is no doubt of the control of policy generally by the parent company. There is also a degree of connection in directorate personnel, but it is quite impossible to say, for instance, that the bauxite company does not function in its own right as a corporate body exercising discretion, directing its local affairs and generally serving the purpose for which its incorporation was intended. It is not a public company and the business which it actually carries on is its own. We have here then, a condition which in each case effectively delimits and differentiates the corporate activity of the parent company from that of the subsidiary."[214]

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212 [1885-9] All E.R. 33 (H.L.).
213 [1944] S.C.R. 267, [1944] 3 D.L.R. 609.
214 *Ibid.*, at pp. 271-272 (S.C.R.).

More recently, the Ontario Court of Appeal dealt with this issue in Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce.[215] Chief Justice Gale stated the issue in these words:

> "Of overriding importance … will be the respect afforded the legal independence of the subsidiary by its parent; that is, whether on a full view of the facts, the subsidiary looks as though it has its own business, rather than being completely subservient to and dependent upon its parent. Also important will be the purpose for which it has sought to impugn the subsidiaries integrity, and the position of the applicant."[216]

His Lordship reviewed a number of the earlier cases and offered the following tentative catalogue of factors as relevant criteria for determining this issue:

> "1. The capitalization of the subsidiary;
>
> 2. the degree of observance of corporate formalities;
>
> 3. the extent of the relationship between the business of the parent and the subsidiary;
>
> 4. the nature and extent of the business dealings between parent and subsidiary;
>
> 5. The corporate histories of both parent and subsidiary;
>
> 6. the relationship between boards of directors and upper management personnel of parent and subsidiaries;
>
> 7. the extent of the ownership interest of the apparent in the subsidiary … the presence of an independent minority interest may still be of some relevance."[217]

In neither Aluminum Company or Canada Life v. C.I.B.C. was the subsidiary held to be the alter ego of the parent.

This issue has already been considered in the British Columbia asbestos litigation. In Hunt, the plaintiff sought to amend his Statement of Claim and add certain companies as defendants on the basis that each was the "parent and alter ego" of corporate defendants who had already been named. That application was dismissed and the plaintiff appealed. The appeal was also dismissed, Mr. Justice Hutcheon holding that the mere allegation of a "parent and alter ego"

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215 (1974) 44 D.L.R. (3d) 46 (Ont.C.A.).
216 *Ibid.*, at pp. 50-51.
217 *Ibid.*, at p. 50.

relationship did not disclose sufficient facts to support a cause of action.[218] In doing so, His Lordship made the following statement, which gives some indication as to the standard by which such allegations will be measured in products liability cases:

> "Before the parent is liable in law for the acts and omissions of its subsidiary, one must show that control existed and was exercised. That would be the material fact to be pleaded and at trial proved by evidence. In this case, it would be necessary for the plaintiff to plead that, at all material times, Celotex **effectively controlled** Carey Canada Inc. in its asbestos business."[219] (Emphasis added)

Similar allegations have been made and are pleaded in more detail in other asbestos actions, such as the B.C. Ferries case. In the United States, plaintiffs have not enjoyed any great success using this doctrine.[220] It remains to be seen whether the British Columbia asbestos cases will break any new ground on this issue.

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218 (1990) 41 B.C.L.R. (2d) 269 (C.A.).

219 *Ibid.*, at p. 271.

220 Allegations dismissed in: Kacprzycki v. AC&S Inc., No. 88-34-JRR (D DE); and Nazarewych v. Bell Asbestos (Mealey).

(ii) *The Defences*

The defences in Hunt and Privest include the *Limitation Act*,[221] state-of-the-art, volenti, product misuse, contributory negligence, intervening or concurring negligence of, among others, the

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[221] R.S.B.C. 1979, c. 236, and particularly section 6, which provides:
"(1) The running of time with respect to the limitation period fixed by this Act for an action

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy … is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has commenced to run so as to bar an action rests on the trustee.

(3) The running of time with respect to the limitation periods fixed by this Act for an action

(a) for personal injury;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought under the *Family Compensation Act*;

…

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

(4) For the purpose of subsection (3),

(a) 'appropriate advice', in relation to facts, means the advice of competent persons, qualified in their respective field, to advise on the medical, legal and other aspects of the facts, as the case may require;

(b) 'facts' include

(i) the existence of a duty owned to the plaintiff."

Workers' Compensation Board, and sophisticated user. Except as noted here, there is little practical difference between the defences available in Canadian and American asbestos cases.

A. *Statute of limitations*

There is no doubt about the discovery rule, at least in British Columbia. That rule, as well as the common law regarding fraud and fraudulent concealment, is codified in section 6 of the British Columbia *Limitation Act*. In Neilsen, the Supreme Court of Canada also considered section 6(3) and held that it gives legislative force to the discovery rule. In that case, the plaintiff did not discover the cracks in the foundation, which could only be seen from the crawl space, until years after they had likely first appeared. The Court went out of its way to reject the decision of the House of Lords in Pirelli General Cable Works Ltd. v. Oscar Faber & Partners,[222] which had in turn adopted the decision of the Court of Appeal in Cartledge v. E. Jopling & Sons Ltd.[223] Cartledge was a case of lung disease where it was held that the cause of action arose upon the plaintiff's lungs being damaged, even though the injury was not discoverable until after the applicable limitation period had expired. The Supreme Court rejected these decisions before even considering section 6(3). As a result, Mr. Cartledge's claim, and therefore many asbestos personal injury claims, would be unbarred by section 6(3).

It is noteworthy that in 1982 the British Columbia legislature amended its *Limitation Act* to extend the limitation period for actions regarding urea formaldehyde foam insulation to December 22, 1986.[224] Can a similar amendment for asbestos litigation be far behind? Or can we expect a "cap" amendment?

B. *State-of-the-art*

This defence is available, as noted above, subject to the same factual difficulties as experienced in the American cases, starting with Borel.

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222 [1983] 2 A.C. 1, [1983] 1 All E.R. 65 (H.L.).

223 [1963] A.C. 758, [1963] 1 All E.R. 341 (H.L.).

224 Section 16 of the British Columbia *Limitations Act*, as am. S.B.C. 1982, c. 19, s. 2, provides:

> "No action for damages caused by urea formaldehyde foam used as insulation that is brought on or before December 22, 1986 shall be barred on the ground that the bringing of the action is otherwise barred by this Act."

C. *Contributory negligence*

Contributory negligence in Canada is equivalent to what is generally referred to as "comparative negligence" in the United States. The effect of the plaintiff's contributory negligence on apportionment of liability among defendants was considered in Leischner v. West Kootenay Power & Light Co.[225] The Court of Appeal considered the effect of sections 1 and 2 of the British Columbia *Negligence Act*.[226]

The Court held that, where the fault of the plaintiff and two or more tortfeasors contributed to the plaintiff's loss, the tortfeasors are liable only severally, and not jointly, regardless of whether all tortfeasors are named as defendants. This could have serious ramifications for plaintiffs who smoked or failed to wear respirators where (as there usually are) several defendants, and particularly where one or more of the manufacturers or suppliers are bankrupt.

D. *Employer immunity - workers' compensation legislation*

Just as in the United States, the British Columbia *Workers' Compensation Act*[227] also provides immunity for asbestos employers. There is a large body of jurisprudence regarding the scope of such employer immunity, which is simply beyond the scope of this paper. However, an unusual issue under this broad topic has already been ruled upon in the British Columbia asbestos litigation, and deserves some comment.

The British Columbia Workers' Compensation Board has paid disability benefits to numerous workers, and the Board is advancing subrogated claims against various asbestos companies, in

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225 70 B.C.L.R. 145 (C.A.), [1986] 3 W.W.R. 97.

226 Sections 1 and 2 of the *Negligence Act*, R.S.B.C. 1979, c. 298, provide:

"1. Where by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault, except that

(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(b) nothing in this section shall operate so as to render a person liable for damage or loss to which his fault has not contributed.

(2) The awarding of damage or loss in every action to which section 1 applies shall be governed by the following provisions:

…

(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss shall be entitled to recover from that other person the percentage of the damage or loss sustained as corresponds to the degree of fault of that other person."

227 R.S.B.C. 1979, c. 437.

the name of certain of them, including Mr. Hunt.[228] The Board is, in many respects, the real but unnamed plaintiff in the British Columbia personal injury actions.[229]

The defendant companies have third partied the Board, claiming contribution or indemnity for any liability against them. In general terms, the defendants allege that the Board failed to exercise its statutory powers to regulate the workplaces within the province in order to protect workers against injury or disease.

The Board brought a summary judgment application to dismiss the third party claims against it. The application was dismissed.[230] The Court of Appeal, both in Chambers and then on a subsequent review application, denied the Board leave to appeal from that decision.[231]

The defendants argued, among other matters, that the board has a unique status in relation to the overall scheme of the legislation, such that it is not merely an "employer", as defined by the *Act,* but has a separate and additional status which does not afford **employer** immunity. In allowing this issue to proceed to trial, the Chief Justice of the British Columbia Supreme Court noted both that on a summary judgment application the Board could only succeed if it was "plain and obvious" that the third party claims against it had no chance of success, and that the scope of potential liability of governments and public bodies appears to be broadening rather than narrowing.[232] This decision therefore preserves a very unusual situation, where one party is effectively both the plaintiff and a "defendant", in the same proceeding.

(iii) *Damages*

Subject to the contributory negligence legislation, and the effect of Leischner, the apportionment of damages in Canada will not differ significantly from the United States. In British Columbia, the rule in Borel has been codified in section 4 of the *Negligence Act:*

> "4. Where damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person as at fault, and except as provided in section 5 where 2 or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault."[233]

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228 Hunt v. T & N plc, (unreported) S.C.B.C. Action No. C885383, July 17, 1990, Reasons of the Honourable Chief Justice, at p. 3.

229 *Ibid.*

230 *Ibid.*

231 Hunt v. T & N plc, (unreported) C.A. Action No. CA012883, Vancouver Registry, December 4, 1990, Reasons of the Honourable Mr. Justice Gibbs, in Chambers; aff'd (unreported) January 29, 1991.

232 Above, note 228, at p. 11.

233 Above, note 226.

Punitive damages are also available in Canada in product liability cases, in much the same circumstances as in the United States.[234] However, punitive damage awards in the United States have historically been much higher than they are in Canada.

(b) Jurisdictional Issues

In light of the large number of jurisdictions that have a connection with the mining and manufacturing of asbestos products, and the divergent standards of liability and levels of damage awards which are available, it is not surprising that the jurisdiction in which these actions are heard has been hotly contested.

(i) *Jurisdictional Disputes*

In the Hunt case, Lac D'Amiante du Quebec, Ltee. applied unsuccessfully to move the actions against it from British Columbia to Quebec, among other matters, on the basis that it is the law of Quebec, under its *Civil Code*, that should be applied to determining whether a tort was committed.[235] In the Bentall towers case, W.R. Grace has unsuccessfully sought to set aside service against it, on various technical grounds with respect to the evidence adduced by the plaintiffs indicating that they have a good "arguable case" that the defendant had committed a tort within British Columbia.[236] Such challenges will doubtless continue.

(ii) *The "Anti-Suit" Injunction*

As well as bringing actions in British Columbia the Workers' Compensation Board has advanced claims in the United States, in the names of various worker plaintiffs. In July, 1988, and at the instance of the Board, nine plaintiffs sued asbestos companies in the Texas courts. Other plaintiffs have since been added to that action, for a total of almost 200. Not all are from British Columbia. Some are from other provinces.

The Texas defendants applied unsuccessfully to the Texas courts for orders that those courts had no jurisdiction or should decline jurisdiction. The Texas courts were prepared to take jurisdiction in part on the basis that by statute Texas does not recognize the doctrine of *"forum conveniens"*. That doctrine permits a court to determine that while it does have jurisdiction in a case it ought not to exercise its jurisdiction because some other forum is more convenient for the trial of the case. The doctrine applies in most common law jurisdictions but has been abolished by statute in Texas.[237]

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234 Blacquiere v. Canadian Motor Sales Corp., (1975), 10 Nfld. & P.E.I.R. 178, 17 A.P.R. 178 (P.E.I. S.C.) (liability denied on other grounds); Buchan v. Ortho Pharmaceutical (Canada) Ltd., (1984) 54 O.R. (2d) 92, 32 B.L.R. 285, 35 C.C.L.T. 1, 25 D.L.R. (4th) 658, 12 O.A.C. 361 (C.A.); and Vlchek v. Koshel (1988), 30 B.C.L.R. (2d) 97, 44 C.C.L.T. 314, [1989] 1 W.W.R. 469 (S.C.), aff'd (1988), 32 B.C.L.R. (2d) xxxi (note) (C.A.).

235 (unreported) C.A. Action No. CA011075, Vancouver Registry, July 26, 1989, Reasons of the Honourable Mr. Justice Lambert (In Chambers).

236 G.W.L. Properties Ltd. v. W.R. Grace & Company, (unreported) CA012687 Vancouver Registry, October 17, 1990, Reasons of the Honourable Mr. Justice Hinkson.

237 Alfaro v. Dow Chemical, 751 S.W. 2d 208; aff'd 786 S.W. 2d 674, *cert.* denied January 7, 1991.

In December, 1989 several of the Texas defendants commenced lawsuits in British Columbia, seeking a declaration that British Columbia is the natural forum for the trial of the action involving British Columbia residents. The asbestos company plaintiffs in British Columbia (ie. the defendants in Texas) then applied for an injunction to restrain the Workers' Compensation Board and the British Columbia worker plaintiffs (in the Texas action) from continuing with their claims in Texas. The injunction was granted.[238] As a result the Workers' Compensation Board has agreed to stay any further proceedings in Texas for the present.

The Board took an appeal to the Court of Appeal, which was dismissed.[239] In his reasons on the appeal the Chief Justice of British Columbia said in part:

> "Here, as there is only one natural forum, I would, if necessary, also support the judgment of Chief Justice Esson on that ground as well as the absence of the forum non conveniens rule in Texas. It is the responsibility, in my view, of the courts of each jurisdiction to ensure, if the question arises, that its citizens do not bring proceedings other than in the natural forum. If every jurisdiction did this then the international legal community could plan its affairs without risk of suits being brought in courts of convenience to only one party."[240]

The British Columbia Court of Appeal relied heavily on a Privy Council decision, SNI Aerospatiale v. Lee Kui Jak.[241] In that case a helicopter crashed in Brunei killing a wealthy resident of that country. The helicopter was built by a French company, SNI, owned by an English firm and operated by that firm's Malaysian subsidiary. The only connection with Texas was that SNI had a sales office in that state.

The heirs of the man killed in the accident were residents of Brunei and sued SNI in that country, as well as in Texas. The Texas action was brought in the hope of obtaining a much larger award of damages than was permitted by Brunei law. SNI applied to the Brunei court to enjoin the Brunei heirs from taking the case to Texas. The Brunei court refused the injunction. The Privy Council (as the final Court of Appeal for Brunei), allowed the appeal and enjoined the Texas action. It is important to recognize that the Privy Council was not purporting to tell the Texas court whether it could try the case. It was exercising jurisdiction over residents of Brunei. The British Columbia courts have done the same in the Amchem case in respect to British Columbia residents and the Workers' Compensation Board. They have not purported to tell the Texas court what to do.

The criteria for granting the SNI injunction were said to be as follows:

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238 (1989), 38 C.P.C. (2d) 232 (B.C.S.C.).
239 (1990), 50 B.C.L.R. (2d) 218 (C.A.).
240 *Ibid.*, at p. 226.
241 [1987] 3 All E.R. 510 (P.C.).

> "To justify the grant of an injunction the defendant must show (a) that the English court is the natural forum for the trial of the action to whose jurisdiction parties are amenable and (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.
>
> In practice, however, the principle so stated would have the effect that, where the parties are in dispute on the point whether the action should proceed in an English or a foreign court, the English court would be prepared, not merely to decline to adjudicate by granting a stay of proceedings on the ground that the English court was forum non-conveniens, but, if it concluded that England was the natural forum, to restrain a party from proceeding the foreign court on that ground alone. Their Lordships cannot think that this is right …
>
> … In the opinion of their Lordships, in the case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in a foreign court if such proceedings would be rexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant and the plaintiff is allowed to pursue the forum to proceedings, but also of injustice of the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantage in the foreign forum of which it would be unjust to deprive him."[242]

A case in British Columbia, subsequent to Amchem, where an application for an "anti-suit" injunction failed is Bell Helicopter Textron Inc. v. Brown.[243] This case also involved a helicopter crash. It occurred in British Columbia and those killed and their heirs were residents of British Columbia. The essential difference in this case was that, unlike in SNI and Amchem the defendant helicopter manufacturer had its headquarters in Texas. In Amchem the Court of Appeal had said that there was no connection with Texas and in SNI the Privy Council had said that there was very little. In Amchem the Court of Appeal said British Columbia was the **only** natural forum. The British Columbia Supreme Court (in fact, the same judge who granted the

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242 *Ibid.*, at pp. 521-522.

243 (1991) 55 B.C.L.R. (2d) 310 (S.C.).

anti-suit injunction in the Amchem case) in Bell found there was a connection with Texas and that, although British Columbia was **a** natural forum, it was not the **only** natural forum.

The British Columbia Supreme Court said that even if British Columbia was the most natural forum that "is not enough to justify granting the very drastic remedy of enjoining the British Columbia residents from proceeding against Bell in its home state".[244] It is apparent that the facts of each case must be carefully examined before considering whether it is appropriate to seek an anti-suit injunction.

The Supreme Court of Canada has granted leave to appeal the decision of the British Columbia Court of Appeal, and the final appeal is likely to be heard in the spring of 1992. If the appeal is dismissed the effect will be to prevent the British Columbia Workers' Compensation Board from bringing asbestos claims in Texas. However, it may not prevent the Board from taking asbestos claims to other American jurisdictions where there may be a closer connection between the plaintiffs' claim and that jurisdiction. Those other jurisdictions may also employ the doctrine of *forum conveniens* and therefore decline jurisdiction, in which case an anti-suit injunction application would not be necessary in this country.

If the appeal is allowed asbestos companies (and likely many other suppliers of goods and services) can expect to have Canadian residents, who were injured in Canada by products which are also in circulation in the United States, sue in Texas or perhaps some other American state. The benefits to the plaintiffs would perhaps be the application of American procedural rules, including a much wider use of jury trials and class actions, as well as the application of strict liability and very different approaches to awarding damages, including damages for pure economic loss and punitive awards. Punitive awards are granted in the United States on a far greater scale than has ever been the case in Canada.

(c) Procedural Matters

(i) *Issue Preclusion Doctrines*

It will be seen that the Canadian legal system is less well-equipped, in a procedural sense, to cope with mass toxic tort litigation. The doctrines used in the United States to limit repetitious litigation are simply less well-developed in Canada.

A. *Issue estoppel*

The doctrine of collateral estoppel appears to exist only in part in Canada, in the more limited form of issue estoppel. This doctrine does (arguably) require mutuality of parties in the earlier

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244 *Ibid.*, at p. 316.

litigation, a requirement which places a still further limitation on the rights of parties and the powers of the courts to preclude relitigation of issues.[245]

(ii) *Trial Management Techniques*

The demands of modern litigation have spurred the recommendations of the Hughes Report and the resulting changes to the British Columbia *Rules of Court*, which favour a more active and creative approach to trial management. However, remaining limitations in our *Rules* will continue to limit our ability to apply lessons learned from the American asbestos litigation experience.

A. *Bifurcation of issues*

As was underscored in Burns v. Kelly Peters & Associates Ltd.,[246] severance of issues will generally occur only in rare or exceptional cases, where the determination of one issue will likely put an end to the litigation. In Burns, the plaintiffs in separate actions with respect to various MURB projects claimed that they had been defrauded with respect to their investments. The Chambers Judge dismissed their application to try the issue of liability before damages on the ground that proof of damages was an essential element of the claim in fraud. However, liability and quantum were severed in Hunt, essentially by agreement, in light of Mr. Hunt's failing health. Quantum was resolved at a separate trial in February 1990 and that award, of approximately $140,000, is currently under appeal by Mr. Hunt. By contrast, the third party claims against the insurers in Privest were not severed when application was made to do so.

B. *Class or "representative" actions*

The rules regarding "representative" actions in Canada are not nearly as well-developed as the class action rules in the United States. In Cooper v. Kelly Peters & Associates Ltd.,[247] one of the companion cases to Burns, Mr. Cooper, on behalf of himself and several other investors, sought a declaration that certain defendants were jointly and severally liable with the defendant limited partnership to those plaintiffs who were entitled to rescission of their investments or damages. The Chambers Judge expressed sympathy for the plaintiffs and, citing the reasons of the Supreme Court of Canada in Naken v. General Motors of Canada Ltd.,[248] noted that a split proceeding was neither provided for nor precluded by the *Rules*, and may be both proper and appropriate in certain circumstances. However, she discontinued the representative proceedings, nothing the inadequacy of the *Rules* to the practical task of managing such

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245 Kramer v. Lindsay Specialty Products Ltd. (1986), 8 C.I.P.R. 84, 9 C.P.R. 297, 3 F.T.R. 4., but see Watson, Garry D., "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality", Canadian Bar Review, Vol. 69, No. 1, p. 623.

246 (unreported), B.C.S.C. Action No. A840169, July 21, 1988, reasons for judgment of A.G. MacKinnon J. (in Chambers).

247 (1987), 19 B.C.L.R. (2d) 187, 24 C.P.C. (2d) 40 (S.C.).

248 [1983] 1 S.C.R. 72, 32 C.P.C. 138, 144 D.L.R. (3d) 385, 46 N.R. 139.

proceedings, which made it likely that they would continue to be rare events, particularly where they sought to determine liability and quantum in separate proceedings.

(iii) *Informal Approaches*

The asbestos litigation in British Columbia to date indicates that lessons have been learned from the American experience. Hunt is being used as a test case, with pleadings framed alternatively in conspiracy and fraud, the clear intent being to impugn the defendant's conduct with respect to the larger "class" of plaintiffs to which Mr. Hunt belongs. In Amchem, the Chief Justice imposed as one of the terms of his injunction order that evidence already obtained through pretrial depositions and documentary discovery in the Texas proceedings may be used in any British Columbia action brought by the Amchem defendants, to the same extent that such evidence could be utilized in the Texas court.

However, the litigation is in many respects following the American experience of numerous chambers applications and appeals. Several interlocutory applications have already been brought, particularly with respect to production of documents and amendments and parties to proceedings. Even issues as narrow as the right to serve pleadings *ex juris* have been addressed. On one application, one of Mr. Hunt's lawyers was even ordered to be cross-examined on his own affidavit. As in the United States litigation, there seems, at times, to be no limit to the complexities of this litigation.

A. *Summary judgement or trial*

Summary judgement and summary trial applications have been dismissed in both Hunt and Privest. In Hunt, the Workers' Compensation Board failed to have the third party claim against it dismissed, as noted above. In Privest, the defendant contractor, the Foundation Company of Canada, was similarly unsuccessful as was one of its insurers, both after lengthy hearings.

(iv) *Document Issues*

Given the global nature of our economy it is not surprising that documents relevant to both the Canadian and American asbestos litigation may be found in many jurisdictions. There have been two significant developments in the British Columbia litigation, one of which has limited the availability of relevant documents, and the other of which signals a flow a documentary evidence from Canada to the United States.

A. *Production*

Quebec being the centre of the Canadian asbestos mining industry, it would seem logical that many relevant documents will have come into existence in that province. However, they are unlikely to ever be produced in cases heard outside that jurisdiction.

In 1958, the Quebec National Assembly enacted the *Business Concerns Records Act*.[249] Similar "blocking statutes" have been enacted in Ontario as well as the United States, the United Kingdom, Australia and France. The effect of the legislation is that no one is allowed to remove from Quebec any document relating to any business concern in that province. In other words, a demand for production of documents by a corporate defendant in one of the British Columbia cases will have no effect on that defendant's documents which are located in Quebec.

Not surprisingly, the plaintiffs have sought to challenge the validity of that legislation, among other matters, on constitutional grounds. However, both the Chief Justice of the British Columbia Supreme Court and the Court of Appeal have rejected the plaintiff's arguments based upon the Charter of Rights, and an appeal is now being taken to the Canada Supreme Court.[250]

B. *Confidentiality*

The rules regarding production of documents in British Columbia are, generally speaking, much more stringent than they are in most of the United States. That being the case, American plaintiffs (or Canadian plaintiffs suing in the United States) could benefit from the more liberal production of documents available in this country.

In Hunt, the plaintiffs applied for an order allowing them to provide to Texas counsel documents obtained from one of the asbestos defendants in the British Columbia litigation. Judge Wetmore allowed the application, holding that there was no implied undertaking on a party to whom documents were produced to use them only for the purpose of that litigation.[251] In His Honour's words "the law in British Columbia is that privacy, confidentiality, call it what you will, is not a fundamental right that is *per se* to be protected".[252] This decision has since been upheld by the Court of Appeal.

At least to this extent, plaintiffs may perceive some tactical benefit in pursuing the Canadian litigation. This is because they may be able to obtain fuller disclosure of documents in this country and then use that evidence to try and obtain the larger damage awards which are available in the United States, without even having to prove negligence.

(d) Enforcement of Judgements

British Columbia is the second major asbestos producing province in Canada. This province has not enacted legislation similar to the Quebec *Business Concerns Records Act*. However, it has enacted legislation insulating asbestos defendants from enforcement of judgments obtained in

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249 now R.S.Q. 1977, C-D12.
250 (1990) 67 D.L.R. (4th) 687 (B.C.S.C.); aff'd [1991] 5 W.W.R. 475 (B.C.C.A.).
251 [1990] 3 W.W.R. 474 (B.C.S.C.).
252 *Ibid.*, at pp. 479-480.

other jurisdictions. This enactment is the so-called "Cassiar amendment" (referring to Cassiar Mines), found in section 41.1 of the British Columbia *Court Order Enforcement Act*.[253]

5. THE PROSPECTS FOR OTHER TOXIC TORT LITIGATION

Asbestos has not been the only source of mass toxic tort litigation, but it has been unique in its scope and complexity. There has also been substantial American litigation with respect to:

- other naturally occurring substances, such as arsenic, lead and mercury;
- chemicals, such as kepone, polychlorinated biphenyls ("PCBs"), polyvinyl chlorides ("PVCs"), and polyurethane;
- formaldehyde, including urea formaldehyde, used in building materials and construction;
- pharmaceuticals and personal-use products, such as Bendectin, DES, the Dalkon Shield and MER/29;

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[253] Section 41.1 of the British Columbia *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, as amended by S.B.C. 1984, c. 26, s. 8, provides:

"(1) In this section

'asbestos' means naturally occurring, highly fibrous, heat insulating and chemically inert silicate minerals belonging to either serpentine or amphibole groups and includes chrysolite, crocidolite, amosite, anthophyl-lite, tremolite and actinolite and any other mineral commonly known as asbestos;

'judgment' means

(a) a judgment or order given in a proceedings outside Canada, or

(b) a judgment or order given in another province of Canada resulting from an action on or registration of a judgment or order described in paragraph (a).

(2) Notwithstanding this or any other Act or law, where a judgment is given for loss or injury that arises out of exposure to or the use of asbestos that has been mined in the Province

(a) the judgment shall not be registered in or enforced by a court, and

(b) a proceeding in respect of the judgment shall not be commenced in a court or, where a proceeding was commenced before this section comes into force, the proceeding shall not be continued.

(3) Where a person has a cause of action under the domestic law of the Province for loss or injury that is suffered outside Canada and arises out of exposure to or the use of asbestos mined in the Province, he may commence an action under the domestic law of the Province, notwithstanding that a judgment has been given in respect of the loss or injury or that a proceeding might have been commenced outside Canada for the same relief."

- herbicides, such as Agent Orange; and
- as well, cigarettes, the swine flu vaccine, and microwave radiation.

There can be little doubt that, with the deterioration of the earth's environment emerging as the major issue in the world today, similar problems and litigation will follow in Canada. We have already seen some UFFI cases and, in British Columbia, there are also major claims in progress involving chemical spills and dioxins discharged from pulp and paper mills, which other panelists will be addressing.

The asbestos litigation has been unique because of difficulties in diagnosis, long latency periods, difficulties in proving causation-in-fact, growing medical and scientific recognition, as well as industry knowledge of the risks and difficulties in determining acceptable levels of exposure. PVC-related disease can take up to 20 years to manifest itself, as can lung cancer caused by cigarette smoking. Smokers will similarly have difficulties proving causation-in-fact, and medical and scientific awareness of the risks of smoking has also grown over time. Doubtless attempts will be made to gather evidence of early industry knowledge of the risks as well. There are also difficulties in determining acceptable levels of exposure to formaldehyde. It is the wide-spread and pervasive use of asbestos which has generated the sheer volume of litigation. The Dalkon Shield also generated approximately 300,000 claims, and the numbers of cigarette smokers is self-evident.

The asbestos litigation has demonstrated how the courts will attempt to deal with difficult issues of liability, as well as the sheer volume of litigation. It is doubtful that we have seen the last of theories such as market share liability, or cases such as Sindell and McGhee. It is also undoubted that we will see more class action suits in the United States, as well as renewed efforts to utilize issue preclusion doctrines. Pressure will mount to adopt similar approaches in Canada. We are also likely to see more legislation in this area, as well as moves toward alternative dispute resolution mechanisms.

The world is becoming more complicated and polluted by the day. Tomorrow's mass toxic torts may involve dioxins, groundwater contamination, or pesticides and herbicides such as Alar and Captan, to name a few. Just as government and business will have to adjust to these difficult and changing environmental circumstances so will counsel and the courts.

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