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A Global View of Mesotheliomas and Asbestos Litigation: Both Are Many Years Away from Peaking When Looking Outside the US

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Commentary

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Asbestos-caused disease - and resulting personal injury litigation - are sometimes viewed as uniquely American phenomena. But in fact asbestos-caused disease is growing around the world, resulting in several nations enacting asbestos compensation funds, and various nations experiencing increasing amounts of litigation seeking compensation for asbestos-caused injuries. The rising incidence of asbestos-related disease arises from historic patterns of use of the naturally-occurring mineral fiber. And, over the recent decades, asbestos use expanded in Asia, Africa, Russia[1] and South America,[2] thus setting in motion events predicted to cause future disease. The global spread of asbestos compensation payments and litigation is in turn a function of increasing disease, the increasingly global nature of tort litigation, and the power of the Internet, as well as alliances between lawyers and NGOS around the world.

I. Examples of Global Claiming

There are widespread examples of global asbestos claiming. Japan has both national asbestos compensation legislation,[3] and lawsuits seeking damages for asbestos disease allegedly resulting from work at railroads and other employers.[4] Korea also pays asbestos compensation.[5] The UK's Supreme Court's recently disappointed insurance companies by approving national legislation in Scotland to allow more asbestos-related litigation.[6] Specifically, in *Axa General Insurance Ltd. & Ors v. Lord Advocate & Ors* [2011] UKSC 46,[7] the court approved lawsuits to obtain compensation for pleural plaques, a condition associated with past asbestos inhalation, but which in general does not produce impairment of daily function. Elsewhere in Europe, France[8] and Spain[9] are experiencing increases in lawsuits seeking compensation for asbestos disease. South American workers exposed to asbestos also are increasingly involved in claiming; some have filed lawsuits in the U.S.,[10] and victim's rights groups continue to emerge and grow in Brazil and other nations.[11]

II. Mesotheliomas

Historic patterns of asbestos use are the root cause of today's increasing rates of asbestos-related disease, and mesothelioma tumors are generally considered a signature disease arising from inhalation of asbestos. Mesothelioma is a highly lethal cancer arising in mesothelial cells. Most mesothelioma tumors arise in the lining around the lungs, and are referred to as pleural mesothelioma. Pathology and epidemiology in both humans and animals have tightly tied most of those tumors to past inhalation of asbestos fibers.

There appears to be, however, some background rate of mesotheliomas that arise for presently unknown reasons.

Today, mesothelioma tumors increasingly arise in both men and women, and more and more of the mesothelioma tumors arise in the lining encasing organs in the abdomen. These "peritoneal" mesothelioma tumors are more frequently appearing in women. Some of the women suffering from the tumors plainly did inhale asbestos fibers through their own work or through "secondary exposures," such as laundering the clothes of a family member who worked with asbestos fibers. But, in other instances, the women, researchers, and lawyers are able to identify few, if any, circumstances for past asbestos inhalation. Therefore, some lawyers, clinicians and researchers debate the number of peritoneal mesotheliomas actually caused by asbestos or whether the tumors arise from or are related to some other cause.[12] In the United States, the vast majority of mesothelioma tumors end up in litigation (perhaps 2,000 per year), and defendants and insurers are paying claims for both pleural and peritoneal mesotheliomas.

III. Growing Frequency of Mesotheliomas Outside the United States

Mainstream thinking is that mesotheliomas have peaked in the U.S.[13] In contrast, outside the U.S., the number of mesothelioma tumors is projected to continue increasing well into the 2020s, with some countries experiencing a disease rate almost 5 times greater than the disease rate in the United States. Around the globe, there are growing waves of mesothelioma tumors, and scientists predict the waves will continue to grow until at least 2040, as is detailed infra. The waves are expected to arrive in different nation at different times and with varying intensities. The variables arise from different patterns in terms of the types of asbestos fibers used, and the timing and amount of the use. For example, UK workers are suffering from mesothelioma tumors at a rate almost five times higher than the rate in the U.S., and the volume of tumors is predicted to continue to rise for many years.[14] Naturally, questions are asked about why the rate of mesotheliomas is so much higher in the UK than in the U.S.

Some answers to the questions may be gleaned from the work of Dr. Julian Peto, a London-based epidemiologist with world-class skills,[15] honors[16] and reputation arising from decades of work on various health issues, with many involving cancers.[17] Dr. Peto's publications identify multiple factors as causing the increasing waves of mesotheliomas, and include a 1999 paper in Nature, titled the European Mesothelioma Epidemic.[18] That paper was updated in 2004 by others involved in the 1999 paper.[19] A 2009 paper for the HSE provides even later data.[20]

One factor is widespread use of asbestos-containing products in the UK well into the 1980s. In contrast, U.S. asbestos exposures apparently were reduced significantly in the 1970s due to federal regulations such as OSHA workplace rules and NESHAP regulations to restrict release of asbestos fibers during building demolition and renovation. Ironically, the UK had enacted asbestos limits[21] earlier than they were put in place in the U.S., but the regulations were less stringent than in the U.S.,[22] and did not cause the markets to more broadly eliminate the use of asbestos-containing products.

IV. Amosite Fiber Use

Among other things, various of Dr. Peto's papers relate the higher UK's higher mesothelioma rate to its larger and later use of amosite fibers, a brown-colored asbestos fiber that is part of a class of asbestos fibers known as amphibole fibers. The fibers were mined primarily in South Africa,[23] and indeed the word amosite is a loose anagram for asbestos from mines of South Africa. The amosite fibers are generally considered far more carcinogenic than are white (chrysotile) fibers. The amphibole fibers are in general thought to be more potent because of much higher "biopersistence," meaning the time the fibers remain inside living creatures before they are removed by bodily defense mechanisms. The amphibole fibers also are needle-like in structure, and contain higher contents of minerals such as iron, which some suspect may play a role in the disruption of cellular signaling systems related to development of cancer.

The variables, however, are still the subject of study. And, arguments about carcinogenicity are complicated by the fact that some white (chrysotile) fibers are mined from ore said to be "pure" while other chrysotile fibers are said to include some degree of "contamination" by small amounts of amphibole fibers present in the ore. But, the broader point made by Dr. Peto is that the amphibole fibers unquestionably are more "toxic," and

there also is plain documentation to prove that relatively large amounts of amosite fibers were in use in the UK until at least 1980, with many of the fibers used in asbestos-cement boards used in building construction. As a result, carpenters and other tradesman in the UK face mesothelioma disease rates far higher than counterparts in other countries. Thus, a 2009 paper by Dr. Peto and others includes the following comment: "An important factor underlying the very high risk in British construction workers, particularly carpenters, is likely to be the widespread use of power tools on amosite insulation board, which continued with no effective dust control until the 1980s."[24]

V. Global Mesothelioma Projections

Dr. Peto has at various times presented calculations setting out curves projecting mesothelioma deaths around the world. The numbers of course are not gospel, and various models can be used to project cancers in general and mesothelioma in particular. But Dr. Peto's projections draw on years of work, including detailed scientific publications in peer-reviewed journals. During 2008 and 2009, Dr. Peto traveled and presented talks[25] and informal PowerPoint presentations for discussion and consideration by other medical professionals. His July 24, 2009 presentation in Boston[26] included a PowerPoint presentation with projections based on a model that assumes that after asbestos exposure has largely stopped, the mesothelioma rate in each birth cohort follows the same age-distribution in all countries.[27]

Dr. Petos's 2009 presentation at Harvard includes a chart projecting approximately 447,000 mesotheliomas in some but not all countries of the world during the period from 2000 – 2049.[28] Those significant numbers do not include projections for China, Indonesia, India or Russia, which all are significantly involved in mining of asbestos fibers or manufacturing of products containing asbestos. Therefore, the aggregate number of mesotheliomas will surely go well past half a million deaths over 50 years, which means an annual average of at least ten thousand mesotheliomas – and probably deaths - unless science can find a way to slow, stop or repair the pathways to cancer. The aggregate regionalized projections are set out in the table below:

Region/Country	Mesotheliomas expected – 2000 through 2049
United States	90,000
UK	78,000
Western Europe (except UK and Italy)	154,000
Eastern Europe	22,000
Japan	47,000
Australia	27,000
New Zealand	4,000
Mexico	14,000
Argentina	7,000
Chile	4,000
TOTAL	447,000

VI. Projected Peak Years

Dr. Peto's presentation also included curves projecting the years in which regions may see the peak waves of mesotheliomas, the approximate numbers at the peak, and curves projecting the annual rate at which mesotheliomas will continue but decline. The curves are simply that, and are not tables of precise numbers. Numbers derived from observation of the curve are set out in the table below, and are for male deaths only based on an assumption of largely no asbestos exposure for men born after either 1970 or after 1960. The curves are not identical, and so the numbers below are approximate interpretations from viewing the tables.

Country/ Region	Approximate Peak Year	Approx. Projected Number of Mesotheliomas in Peak Year	Approx. Projected Number of Annual Mesotheliomas Ten Years After the Peak Year
USA	2012	2,100	1,950
UK	2017	2,200	1,975
Australasia	2022	770	710
Japan	2028	1,225	1,050
Central and South America	2035	580	420
TOTAL		6,875	6,105

Numbers of the sort above are only projections, and other scientists derive other numbers using different modeling assumptions. But the numbers are all significant, and are drawing increasing attention from governments, insurers, victims, persons at risk, corporate risk managers, corporations facing evolving accounting rules regarding disclosures of contingent risks, and lawyers and businesspersons in all phases of the modern, global litigation industry.

VII. Asbestos Use and Asbestos Bans

In view of the number of the sort above, an NGO (International Ban Asbestos Secretariat - IBAS) has for more than a decade worked for and achieved asbestos use bans in many countries.[29] Nonetheless, asbestos use also is continuing and expanding in some countries. Thus, asbestos use is growing in China, India, Indonesia and other developing countries, especially through asbestos-cement building products.[30] Due to increased demand for asbestos fibers, investors are trying to reopen old chrysotile fiber mines in Canada[31] and Africa,[32] and existing mines continue operations in places such as Asbest, a mining town in the Russian Ural Mountains. The Uralasbest mine annually generates a half million metric tons of fiber from its 1,000 foot deep mine that is about half the size of Manhattan – its length is 11 km (7 miles) and its width is 2.5 km (1. 5 miles).[33]

The arguments on asbestos use are difficult. At least in theory, the products can be safely manufactured in well-run facilities, and users would always exercise caution when installing the products or remodeling a building containing asbestos-cement board. But theory is not always reality, and the world literature includes numerous examples of ongoing, horrific conditions in manufacture and use.[34] Therefore, mistaken judgments may well produce many deaths and significant suffering.

VIII. Growth in Asbestos Claiming Outside the US

The growing disease rates are accompanied by increasing claiming arising in a variety of ways and in part driven by global linkages through the Internet and alliances between firms. In civil law countries such as France and Italy, more claiming is occurring, including former employees pursuing claims against former employers. In Italy, two former Eternit officers recently were found guilty of criminal charges involving dangerous working conditions, and were held liable for civil claims involving hundreds of former employees of Eternit plants involved in manufacturing asbestos-cement products.[35] In the Eternit proceedings, damages for civil claimants were set at ?30,000 for all deceased victims and ?35,000 for current claimants. The Eternit decision also included an award of damages to an Italian government agency (INAIL) which had asserted cost recovery claims related to amounts paid out for pensions and medical payments.

NGOs and law firms also are driving increasing claiming. One U.S. plaintiff's firm sponsors the World Asbestos report, a website devoted to asbestos use and claiming around the world.[36] Meanwhile, IBAS also has organized "victim's rights" groups around the world.[37] Meanwhile, international disease claims can flow into some but not all asbestos trusts created during bankruptcy proceedings in the U.S. and the UK,[38] as well as into private trusts created to resolve claims from African asbestos miners.[39] Accordingly, there are asbestos-focused plaintiff's firms around the globe, including Australia's Slater & Gordon,[40] and the UK's Leigh Day and Co.[41] Other firms mention Spanish language skills[42] or sponsor Spanish language websites which promote asbestos-claiming.[43]

Meanwhile, prominent U.S. plaintiff's firms increasingly promote their global alliances of lawyers. Thus, South Carolina based Motley Rice uses its website to describe a "global network of lawyers" able to represent clients "anywhere in the United States and several countries around the world."[44] On the west coast, the home page of the website for the Kazan McClain firm refers to having represented clients "across the United States, and in Canada, Mexico and the United Kingdom."[45]

A recent merger between an Australian law firm and a UK law firm further highlights the increasing globalization of personal injury litigation. On January 30, 2012, Australia's Slater and Gordon announced its GBP 53.8 million acquisition of Russell Jones & Walker, a UK law firm.[46] Both firms were built around personal injury claims, including asbestos claims. RJ & W also owns a brand known as Claims Direct – a process for attracting and managing litigation for individuals, and the third most recognized legal brand in personal injury litigation in the UK.[47] Asbestos claiming no doubt will be part of future growth of the combined firms.

IX. Conclusion

With asbestos use and disease increasing around the world, the asbestos litigation industry inevitably will continue to expand. Like multinational manufacturers, plaintiff's firms are entrepreneurially looking around the world for ways to grow their business. The claiming may not all take place through litigation – some governments and private companies have created compensation funds as alternatives to litigation. Overall, however, it appears inevitable that both mesotheliomas and litigation will continue to increase for many years.

Endnotes

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27. The presentation was at one time online at the source cited in the preceding footnote. A copy is on file with the authors of this paper.

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