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National Jury Verdict Review & Analysis

KERSHAW vs. CELOTEX CORP., ET AL.

July term 1982 No. 3931

1989 Nat. Jury Verdict Review LEXIS 873

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Topic: Asbestos case - Shortness of breath upon exertion - Increased risk of cancer and lung infections - Plaintiff utilizes statistical evidence purportedly indicating that 40% of the deaths among asbestos workers exposed for more than 20 years stemmed from the exposure

Result: \$ 4,300,000 verdict

State: Pennsylvania

County: Phila. County

Judge: Judge Nelson Diaz.

Plaintiff Attorney: Neil Kitrosser of **Brookman, Rosenberg, Brown & Sandler** in Phila., Pa.
Attorney for Fiberboard, Owens Illinois and Pittsburgh Corning (Settled at the close of evidence): Robert N. Spinelli of Krusen, Evans & Byrne in Phila.

Defendant Attorney: Attorney for non-settling defendant: David Francis Luvara of Post & Schell PC in Phila.

Facts: This was an asbestos case tried on a reverse bifurcation basis which involved a plaintiff, aged 65 at the time of trial, who contended that as a result of his exposure to asbestos over the thirty years in which he worked in naval ship yards, he sustained asbestosis and pleural thickening which has caused loss of breath upon exertion and has rendered him at significantly greater risk of future lung cancer and lung infections, including pneumonia. The plaintiff also contended that he has suffered significant anxiety as a result of his increased health risks. The plaintiff's internist contended that x-rays disclosed both interstitial fibrosis, which was indicative of asbestosis, and pleural thickening, an asbestos related condition. The expert contended that the asbestosis was the primary cause of breathing difficulties upon exertion. The defendant's internist/pulmonary expert did not dispute that the x-rays revealed an asbestos related condition of pleural thickening, but contended that this condition was asymptomatic. The defendant's expert denied that the scarring in the inner area of the lungs was the result of asbestos exposure. The evidence revealed that approximately five years before trial, the plaintiff had suffered pneumonia and the defendant's expert maintained that this condition accounted for the scarring. The plaintiff countered that because of the severe pneumonia, a lung biopsy was conducted, and maintained that the findings reflected that multiple asbestos bodies were found in the three slides examined in the area of the scarring. The plaintiff's expert contended that in view of this evidence, it was clear that the scarring was indicative of asbestosis. The evidence also disclosed that the plaintiff had a 40 year history of cigarette smoking and that he quit approximately five years before trial and about the time the pneumonia was detected. The defendant's expert maintained that the sole cause of the plaintiff's shortness of breath upon exertion was the history of cigarette smoking and denied that any symptomatology was related to the asbestos exposure. The plaintiff's expert countered that there was no improvement during the five year period since the plaintiff quit smoking and maintained that if his cigarette smoking had been a significant cause of his breathing difficulties, substantial improvement would have been noted,

especially in view of the fact that the plaintiff did not suffer from emphysema. The defendant's expert contended that although improvement would generally be expected, especially if the smaller airways only had been injured by the smoking, the larger airways had suffered permanent damage as well and contended that this factor would account for the absence of improvement. The plaintiff confronted the defendant's expert with literature reflecting that if as many as two asbestos bodies were found in the area of fibrosis, it is reasonable to conclude that the patient suffered asbestosis, and contended that since numerous asbestos bodies were found in each of the three slides examined which were taken from the area of scarring, it was clear that the asbestos had caused asbestosis and that this condition was a substantial contributing factor in his symptomatology. The plaintiff's expert contended that the plaintiff faces a five fold increased risk of developing lung cancer in the future. The expert also maintained that the plaintiff will be permanently at increased risk of developing mesothelioma. According to the expert, the lung condition has also rendered the plaintiff at significant risk of developing lung infections, including pneumonia, and the plaintiff contended that this concern prompted his relocation to the warmer climate in Florida. The plaintiff's further expert contended that approximately 40% of the deaths among asbestos workers exposed for more than 20 years are caused by either lung cancer, mesothelioma, or lung infections associated with asbestos exposure. The defendant's expert disputed the validity of this conclusion. The plaintiff countered that his expert was largely basing his conclusions on extensive epidemiological studies of over 17,000 asbestos insulation workers. The defendant's expert further contended that irrespective of the study the statistics relied upon by the plaintiff were misleading as to the actual risk of any one particular individual succumbing as a result of the exposure. The plaintiff contended that he experiences significant anxiety regarding the prospects of cancer and is also very concerned for his wife, who does not drive and who depends upon him extensively. The plaintiff contended that currently, he cannot walk more than several blocks without becoming breathless and that he has been forced to significantly restrict his activities, including walks which he formerly enjoyed with his wife. The plaintiff's expert contended that the symptoms will not improve and may well heighten in the future. Ten defendants were initially named. All but one defendant settled prior to the verdict. The remaining defendant has stipulated that it will be responsible for 1/10th of any award which is ultimately upheld. The non-settling defendant's post trial motions are pending.

Plaintiff Experts: Plaintiff's expert internist: Irwin Stoloff from Phila., Pa.

Defendant Experts: Defendant's expert internist//pulmonary specialist: Paul Epstein from Phila.

Commentary: The Court instructed the jury that they could consider both the plaintiff's fear of developing cancer in the future as well as the actual risk as elements of damages. The plaintiff had suffered a prior bout of pneumonia some five years before trial, for which the plaintiff underwent a lung biopsy which returned with a finding of multiple asbestos bodies in the lungs. Although the plaintiff's expert did not causally relate this prior bout of pneumonia to the asbestos exposure, the evidence of a finding of multiple asbestos bodies, in addition to providing particularly persuasive evidence for the plaintiff's position that the asbestos exposure was a substantial contributing factor in his disease process, also probably provided, as a practical matter, especially tangible proof of the extent to which the plaintiff has been affected by and has been rendered more vulnerable to future health consequences because of the exposure, and probably contributed to the impetus necessary for an award of this magnitude. Additionally, the plaintiff pointed to the testimony of his expert internist to the effect that the approximately 40% of the deaths among asbestos workers exposed for more than 20 years are caused by either lung cancer, mesothelioma, or lung infections associated with asbestos exposure. This evidence underscored both the plaintiff's vulnerability and his extensive fear of dying from the asbestos exposure and probably contributed to the damages result notwithstanding the defendant's contentions that the statistical evidence was misleading.

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