

It's a bitter pill for workers when legal stakes are high **by Jim Morris, Houston Chronicle**

BEAUMONT -- In the bare-knuckles world of asbestos litigation, almost anything goes.

Plaintiffs and defendants in these complex product-liability cases enlist highly paid medical experts to testify. Lawyers comb the medical literature, extracting parts of articles that seem most favorable to their side. They seek to gain every possible pre-trial advantage.

And yet even by the extraordinary criteria of the asbestos game, what happened in Beaumont nearly five years ago stands out: For four weeks in late 1989 and early 1990, a group of asbestos manufacturers effectively assumed control of St. Elizabeth Hospital's lung-function testing laboratory.

The manufacturers insisted that widely accepted standards be changed. Their consultants used testing equipment and methods that consistently produced results in their favor.

These adjustments reduced the odds that asbestos-related disease would be diagnosed in more than 2,000 worker plaintiffs pressing a class-action lawsuit against the manufacturers.

The asbestos companies paid St. Elizabeth, Beaumont's largest hospital, \$251,000 for the use of its pulmonary lab and the time of its personnel during the four weeks. They paid the hospital's chief pulmonologist at least \$161,500 for 16 days of work.

After the litigants were tested, St. Elizabeth went back to using the lung-function standards it had thrown out at the behest of the asbestos companies, according to a recent patient report.

Officials with the hospital, a 495-bed enterprise of the Sisters of Charity of the Incarnate Word, declined comment.

Whether the asbestos companies' actions in Beaumont were inappropriate, or justifiable responses to a case of unprecedented scope and import, is hotly debated. Henry Garrard, an Athens, Ga., attorney who represents one of the manufacturers, Pittsburgh Corning Corp., acknowledged that what happened was unusual but said it was born of severe time constraints imposed by a federal judge.

"We were concerned about quality control," Garrard said of the changes that were made. "All we asked (the doctors) was to give us a valid opinion as to whether or not somebody had asbestos-related disease."

Although there were five defendants in the class-action lawsuit in late 1989, Pittsburgh Corning -- through medicolegal expert Garrard -- took the lead in pretrial medical testing. It was Garrard who pushed for the change in standards.

"I've suspected such things, but I've never seen it proved before," said Dr. Kaye Kilburn, an occupational medicine specialist and a professor at the USC School of Medicine in Los Angeles who has examined and testified for many asbestos victims.

"It's absolutely rank."

Garrard said he is the first to admit that asbestos litigation is distasteful. The legal system, he said, is "screwed up."

"The other side, or my side, either one can go out and hire someone to say whatever you want them to say," Garrard said. "When that occurs, doctors make lots of money, some of them. I find that to be a blight on our system."

Garrard blames judges. They should appoint independent panels of doctors to review asbestos cases, he said.

"We're getting thousands upon thousands of cases from people who are not injured," said Garrard, whose corporate client is named in 6,000 cases in Jefferson and Orange counties alone. "If we could get back to the doctors and the experts telling us who's truly injured and who's not, the asbestos monster could be brought to heel."

BUT plaintiff's attorneys, doctors and government officials familiar with asbestos litigation said the asbestos companies stretched the rules in Beaumont to the point of breakage.

"It's a classic example of what corporations that peddle poisons are willing to resort to to protect the huge sums of money they make," said Beaumont attorney Wayne Reaud, who helped represent the plaintiffs. "I know of nothing in any case, of any kind, to compare this to."

"To me, it's almost to be expected in a highly contentious, highly litigated arena," said Dr. Gregory Wagner, director of respiratory disease studies for the National Institute for Occupational Safety and Health in Morgantown, W.Va. "Does that mean I'm happy about it? No. I would have hoped that people in the hospital and the lab would have continued to use those standards they felt were most appropriate for scientific and medical purposes."

Wagner said the biggest loser amid all this legal brinkmanship is the worker, who may be denied medical care and other benefits.

Through interviews, depositions and other previously undisclosed documents, the Houston Chronicle has reconstructed the series of events that occurred in Beaumont between mid-December of 1989 and mid-January of 1990.

THE story begins with the certification of "Claude Cimino, et al vs. Raymark Industries, et al," as a federal class action in February 1989. The suit had been filed four years earlier on behalf of about 3,000 -- amended to about 2,300 -- former contract craftsmen and plant operators who had spent decades working around asbestos insulation and other asbestos-containing products in Texas refineries and chemical plants.

Originally, there were 21 defendants. Most settled, and by late 1989 only five remained: Pittsburgh Corning, Fibreboard Corp., The Celotex Corp., Asbestos Corp. Ltd. and Carey Canada Inc.

The suit alleged that the workers -- and in a few cases their wives, through secondhand exposures -- had developed lung cancer, asbestosis, mesothelioma, heart disease and other serious ailments from "asbestos products manufactured, sold and distributed by the various defendants." It further alleged that the defendants knew about the dangers of asbestos but "failed willfully and negligently" to warn the workers, a third of whom already had died.

By court order, a representative sampling of the cases -- 170 of 2,298 -- went to trial before juries in 1990. One hundred fifty-six of the plaintiffs won a combined \$126 million in damages. After calculations were made to apply those verdicts to the rest of the class -- a uniform amount was set for each type of disease -- the five asbestos companies collectively faced \$1 billion in liabilities.

Only Pittsburgh Corning and Asbestos Corp. appealed; Fibreboard settled and Carey Canada and Celotex filed for bankruptcy. The case is pending before the 5th U.S. Circuit Court of Appeals in New Orleans.

As is typical in product-liability cases, plaintiff's attorneys in "Cimino" had arranged for their clients to have complete physical examinations, including lung-function tests, prior to trial to determine the degree of their disabilities and their prognoses. Defense attorneys exercised their right to put the same people through "independent medical evaluations."

Neither action was out of the ordinary. Adversaries in an asbestos case often disagree about the severity of a worker's impairment.

But in Beaumont, the maneuvering went further. Sometime before the "Cimino" testing began in mid-December of 1989, the pulmonary lab at St. Elizabeth discarded the "normals" -- lung-function standards to which patients with possible disease are compared -- it had been using for years and replaced them with less-stringent normals preferred by Garrard.

Lung-function tests help a doctor determine whether a patient has a lung obstruction, restriction, or both. Depending on the type of test, the patient blows forcefully, exhales measuredly or pants into a machine and generates a numerical value, which is compared to a predicted, or normal, value for a healthy person. A percentage of predicted is then calculated.

If the normals used for comparison are too high, the patient may appear to be sicker than he is. If the normals are too low, the patient may appear healthy -- or not as sick.

IN a deposition taken Jan. 24, 1990, Dr. Harold Bencowitz, chief pulmonologist at St. Elizabeth and medical director of the pulmonary lab, explained under questioning by plaintiff's attorney Greg Thompson what happened at the hospital:

Q: As a board-certified pulmonary physician, you made no effort to change your normals prior to being hired by Pittsburgh Corning to testify in this litigation.

A: That's correct.

Q: And you changed those normals not at your own instigation, but at the request of an asbestos company, Pittsburgh Corning.

A: That's correct.

Q: Now, in your opinion, does that change mean that it's going to be easier to find abnormal readings or more difficult to find abnormal readings, if you understand that question?

A: It will make it more difficult.

In the same deposition, Bencowitz acknowledged that the asbestos companies paid him \$148,500 to perform independent medical evaluations of the "Cimino" litigants. In addition, he testified, he received "13,000 and some-odd" dollars to review lung-function tests at St. Elizabeth. Bencowitz received the money for 16 days of work, Garrard said.

A woman who identified herself as the business manager of Bencowitz's office said the doctor would have no comment.

Lung-function tests are used not only to diagnose asbestos-related disease, but also to diagnose conditions such as asthma and emphysema and to determine whether certain patients can withstand surgery.

The normals used to test the "Cimino" plaintiffs would have been used in the testing of other St. Elizabeth patients, said Garrard, the Pittsburgh Corning attorney. "Certainly, during the time that we utilized St. Elizabeth, the same predicted (normals) used for us had to be used for anybody else that came into the hospital," he said.

The Chronicle could not determine how many non-plaintiff patients, if any, were tested using the new normals.

In a deposition on June 25, 1990, lab supervisor Sam Shiller said the hospital ran, on average, 500 to 800 lung-function tests a year.

It is not clear to what extent the "Cimino" litigants were affected by the asbestos companies' actions. "Obviously, it had an adverse impact," said plaintiff's attorney Joe Rice of Charleston, S.C., "but we can't quantify it."

Garrard said jurors heard testimony about the testing changes

at St. Elizabeth during one of the trials. "It was not a major issue," he said.

In a memorandum dated Feb. 7, 1990, Shiller detailed the many "testing modification methods" suggested by the asbestos company consultants and adopted by St. Elizabeth. He documented procedural changes on Dec. 12, 13, 14, 19 and 20 of 1989.

DR. Nancy Dickey, a family practitioner in Richmond and vice chairman of the American Medical Association's Board of Trustees, would not comment on St. Elizabeth's testing procedures, but said that any changes in a hospital's normals or procedures should go through a strict peer-review process. They should "be predicated on science and scientifically collected data," she said, "not necessarily on the preferences or the influences of industry."

Garrard said the defendants' actions were dictated by a ruling from U.S. District Judge Robert Parker giving them only 30 days to conduct medical tests on all the plaintiffs.

"We tried to devise a program where we could accomplish, as best we could, some semblance of examinations," Garrard said. "We went to St. Elizabeth and said, 'Can you help us accomplish this?'"

Hospital administrators, as well as Bencowitz, agreed to help, Garrard said. "We had no relationship with Dr. Bencowitz prior to that."

Considering that he performed some 200 exams, Bencowitz's fee was "not out of line," Garrard said. "We didn't buy his opinions."

Bencowitz never testified at the "Cimino" trials. Judge Parker had ruled that the plaintiffs could not make an issue of Bencowitz's work for the asbestos companies unless defense attorneys called the doctor as a witness. They didn't.

Plaintiff's attorney Reaud said the asbestos companies had only themselves to blame for the short time allowed for testing. Most of the "Cimino" cases had been filed four years earlier, he said, and the defendants had ample time to get the workers examined.

But Reaud said the manufacturers, looking at enormous liabilities, were in no hurry to get to trial.

The asbestos companies hired a team of medical consultants -- led by Dr. David Burns, a pulmonologist and professor at the University of California-San Diego Medical Center -- to oversee the St. Elizabeth pulmonary lab.

In his deposition, lab supervisor Shiller testified that his boss, Bencowitz, told him: "Whatever Dr. Burns says, that's what I want you to do."

Burns said in a telephone interview that he had worked for Garrard prior to "Cimino." Burns was paid \$250 an hour for his

time in Beaumont, he said, and was there for five or six days, working 12-14 hours a day.

Nothing improper occurred at St. Elizabeth, Burns said, although there were "tremendous pressures" on the doctors and lab personnel because of the large number of patients.

Burns dispatched technicians to St. Elizabeth to recalibrate a piece of equipment called a "body box" because, he said, it was producing "clearly inaccurate" lung-volume numbers. Garrard already had requested, and the hospital had agreed to, a change in normals used in diffusion-capacity tests, which measure the lungs' ability to pass gases into the bloodstream and are important tools for the detection of asbestosis.

For at least five years, until December 1989, St. Elizabeth had used diffusion-capacity normals developed by Dr. Robert Crapo, a prominent pulmonologist at LDS Hospital in Salt Lake City and a professor of medicine at the University of Utah.

Although Crapo's normals are considered high -- they are based on the considerable lung capacities of clean-living, white, mostly Mormon men in a mountainous environment -- Bencowitz testified in his deposition that he had seen no reason to change them until the asbestos industry consultants asked him to do so.

Indeed, Crapo's normals are recommended by the American Thoracic Society, a professional association for lung doctors, as well as the AMA. They are widely used on the Gulf Coast and in other parts of the country.

CRAPO said in an interview that a hospital might be justified in using normals other than his if, for example, most of the patients were black. Lung capacity varies by race, age, sex and height, he said.

However, Crapo said, "The only reason a person should change their (normals) is if they have evidence that they don't properly fit the clientele they're serving. I would have real trouble changing them at the request of a company without the proper scientific justification for the maneuver."

Garrard said that Crapo's normals were inappropriate for a group of Gulf Coast workers who, unlike the men Crapo tested to develop his numbers, lived at sea level and probably smoked.

But Crapo said his normals were developed in a way that they can be used at sea level. Smoking may be an issue but in itself isn't enough to justify a sudden change in standards, he said.

"If I was in a situation where millions of dollars mattered and I was trying to be fair to both sides (in a lawsuit), it seems to me I would invest a few thousand bucks in doing the science and finding out what the most appropriate comparisons were," Crapo said.

St. Elizabeth was one of two places where the asbestos companies arranged for the "Cimino" plaintiffs to be tested. The

other was Beaumont's Holiday Inn Holidome, where a screening operation was established by Occupational Marketing Inc. of Houston. Doctors were brought in from out of town to help Bencowitz.

Work histories and X-rays were taken and limited lung-function tests called spirometries were performed at the Holiday Inn, Garrard said. Of the 2,000 or so plaintiffs who went to the hotel, he said, 700 to 1,000 who showed signs of impairment were sent to St. Elizabeth for more complete exams.

Different types of equipment were used in each place, Shiller said in his deposition, and the Holiday Inn machines almost always generated higher numbers.

"We were forced or told to use data from the Hilton (sic), or whatever it was, added to our data to get the whole picture," Shiller testified. "That's not the way we normally do things in our lab."

The effect, he said, was higher reported lung volumes among the patients tested at both places. The patients' reports didn't reflect that the tests were done in two locations, Shiller said, and therefore could have been misleading.

Crapo said he would "never allow that to happen. If I've contracted to do disability tests, I insist on total control of the testing from top to bottom."

Garrard said the Holiday Inn setup was necessary because of the time limit and the lack of adequate space and personnel at St. Elizabeth.

But Reaud said a number of hospitals in the Beaumont area could have helped test the "Cimino" plaintiffs. According to the Texas Hospital Association, Jefferson and Orange counties have seven hospitals -- excluding St. Elizabeth -- licensed for a combined 1,478 beds. A Chronicle survey found that all seven have lung-function testing facilities.

"They (the asbestos companies) set it up at the Holiday Inn because they wanted to control it," Reaud said.

DARRELL Bucklew, a 60-year-old retired pipe fitter and boilermaker from Kountze who suffers from asbestosis, has unpleasant memories of the 1989 testing.

At the Holiday Inn, Bucklew said, he and other "Cimino" plaintiffs were told to blow repeatedly into a spirometer. "They'd say, 'Just keep on blowing' until you couldn't blow no more. They put you through a living hell is what they done."

Bucklew said he was not aware that the asbestos companies had exercised such control over the testing process.

"It makes me feel pretty bad," he said. "They knew for years that that stuff was harmful and they never did anything about it. They ought to hang all of them."

Bucklew's experience demonstrates how the use of different testing equipment can have a significant effect on someone with asbestos-related disease.

On Oct. 12, 1989, Bucklew was tested at Reaud's request. St. Elizabeth -- prior to its arrangement with the asbestos companies -- did some of the testing and reported that Bucklew had a "forced vital capacity" of 69 percent of predicted. Forced vital capacity -- the amount of air a patient can expel after taking the deepest breath possible -- is a key indicator of asbestosis. Any reading below 80 percent of predicted is generally considered abnormal.

When Bucklew was tested again on Dec. 14, 1989 -- this time by the defendants on different equipment at the Holiday Inn -- his forced vital capacity was measured at 79 percent. In the space of two months, a man who had had a severe "restrictive pulmonary defect" had become a borderline case.

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