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MESOTHELIOMA CASES CLE

I. Presenters

- A. Robert Ramsey, Esquire
- B. Robert E. Lytle, Esquire

II. Robert E. Lytle - Background

- A. Partner, Szaferman Lakind
- B. Former Assistant Mercer County Prosecutor
- C. Former New Jersey Deputy Attorney General

III. What is mesothelioma?

- A. Incurable disease caused by asbestos exposure.
- B. Mostly affects the lungs.
- C. Life Expectancy is six to twenty-four months.
- D. Exceedingly painful death.
- E. Patient essentially suffocates to death.

IV. Incubation period varies from five to sixty years.

V. Link to Cigarette Smoking

- A. No scientific link between smoking and mesothelioma.
- B. Lung problems related to smoking may be a complicating factor.

VI. Causes of Mesothelioma

- A. Almost always asbestos exposure.
- B. Rarely caused by erionite, which is a mineral found in volcanic ash.
- C. Many cases resulting from erionite exposure occur in Turkey.

VII. Time is a Crucial Factor in Mesothelioma Litigation

- A. Due to the brief life expectancy of the plaintiff, timing is crucial.
- B. When complaint is filed, answers to interrogatories must be ready.
- C. Client must be ready to be deposed on short notice.
 - 1. Discovery Deposition
 - 2. Shortly after discovery deposition, De bene esse deposition.

3. Day in the life video.

VIII. Origins of Mesothelioma Cases

- A. In the past, most cases resulted from industrial, or workplace, exposure to asbestos.
- B. More recently, cases are resulting from exposure to asbestos contained in consumer products.
- C. Currently, most cases arise from exposure to talc related products, such as talcum powder and a variety of cosmetics.

IX. Johns-Manville Plant, located in Manville, New Jersey, is a major producer of asbestos.

X. Causes of Action

- A. Workers' compensation and third party liability for supplier.
- B. When the proximate cause is exposure to asbestos in industrial products, such as furnaces, brakes, and clutches, the case is not governed by the Products Liability Act, *N.J.S.A. 2A:58C1-7*. Accordingly, the cause of action must be based on the strict liability claims of failure to warn, manufacturing defect, design defect, negligence, implied warranty, and/or express warranty.
- C. When the proximate cause is exposure to consumer products, such as cosmetics and powders, the case may proceed under the Products Liability Act. Accordingly, the theory may not be based in negligence; it must be based on one or more of the strict liability claims of failure to warn, manufacturing defect, design defect, implied warranty, or express warranty.
- D. Prior to the decision in *Sun Chemical Corp. v. Fike Corp.*, ___ *N.J.* ___ (2020), a plaintiff could not sue under both the Products Liability Act and the Consumer Fraud Act. In *Sun Chemical*, the New Jersey Supreme Court ruled that when misrepresentations or relevant omissions occurred in the marketing of the consumer product, the plaintiff may proceed under both the Product Liability Act and the Consumer Fraud Act. By also proceeding under the Consumer Fraud Act, the plaintiff may be entitled to treble damages and attorney fees.

XI. Wrongful Death

- A. Almost all suits will include a wrongful death Count.
- B. Wrongful Death Act (*N.J.S.A. 2A:31-4*) v. Survival Act (*N.J.S.A. 2A:31-1*)
 - 1. A wrongful death claim is brought on behalf of the family of the deceased. A survival action is brought on behalf of the deceased by the estate.
 - 2. Damages in wrongful death claims are based on losses suffered by the family, *i.e.*, loss of income and support, loss of consortium, and medical and funeral

expenses. In survival actions, damages are awarded for the deceased's losses as if he or she had survived, such as pain and suffering.

XII. Plaintiffs are getting younger due to the number of claims based on talc products.

XIII. Asbestos Trust Funds

1. Asbestos trust funds are bankruptcy trusts provided for in 11 *U.S.C.* §525(g).
2. Bankruptcy courts allow companies to fund these trusts with insurance proceeds.

XIV. Financial Impact on Families

- A. Uninsured plaintiff.
- B. Significant loss of income when the plaintiff is young.

XV. An expert witness, generally an economist, will quantify damages.

XVI. While autopsies are generally not conducted, plaintiff's counsel may show the jury evidence of asbestos left in lung tissue.

XVII. Medical Testimony

- A. Sometimes treating physicians will testify.
- B. Usually, a medical expert will review the records and exposure history and opine as to the cause of the disease.

XVIII. Defenses

- A. Experts will contest that the disease is mesothelioma because there are tests of cells that are inconclusive.
- B. Plaintiff was not exposed to a sufficient amount of asbestos from the product in question.

XIX. Potential Settlements

- A. Defense won't settle until there is a realistic trial date.
- B. All New Jersey mesothelioma cases are heard by the same judge in Middlesex County.
- C. Due to the short life expectancy for mesothelioma patients, court rules allow for expedited discovery, depositions, and trial dates.
- D. The Special Discovery Master will work to resolve these cases through settlements.
- E. Plaintiff's goal is to get to trial within twelve months.
- F. The average trial lasts between three weeks and three months.
- G. Sometimes cases with many more similarities than differences will be consolidated.

XX. Jurisdiction Issues

A. Personal Jurisdiction (General) v. Specific Jurisdiction

B. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

C. *Bristol-Meyers Squibb Co. v. Superior Court of California, San Francisco County*, 582 U.S. ____ (2017).

XXI. Statute of limitations begins running when the plaintiff has been diagnosed or otherwise knows that he or she is suffering from mesothelioma.

XXII. Juries in Middlesex County have been fair.

XXIII. Is asbestos still being used?

A. Fifty countries have banned the use of asbestos; the U.S. is not one of them.

B. If there is a feasible substitute for asbestos, companies must use it. For example, cornstarch may easily be substituted for asbestos in talc.

C. Many companies, perhaps after a cost/benefit analysis, are still using asbestos, despite the availability of feasible substitutes.

D. Consumers must educate themselves.

E. FTC has not even mandated warnings.