Notes

Apportionment of Harm to Causes: Asbestosis and the Smoking Plaintiff

I. Introduction

Asbestos cases are currently being litigated in jurisdictions all across the country.[1] It is estimated that less than two percent of all workers who have been exposed to asbestos have actually filed claims, even though asbestos litigation has been going on for over a decade.[2] Thousands more claims will likely be filed, thanks in part to attorneys who are offering free x-ray screenings to new groups considered to be at risk from possible asbestos exposure.[3] In the past, presumed high risk workers were those who fabricated asbestos or installed it as insulation. Today tire workers and seamen represent a whole new pool of potential claimants.[4] There appears to be no ebb in sight to the tremendous increase in asbestos litigation.

These cases are founded upon various theories of liability and courts are wrestling everyday with new problems unique to the prolonged-exposure nature of asbestosis. Often the plaintiffs bringing these actions also happen to be tobacco smokers. Courts are struggling with and in some cases sidestepping the issue of whether one who smokes is entitled to less than total compensation irrespective of his degree of fault in bringing about his own disability. The Restatement (Second) of Torts suggests that apportionment of harm to causes is an appropriate theory upon which to rely in these cases.[5]

Of course, it is an essential element of any negligence or strict liability cause of action that the defendant's conduct caused some actual damage to the plaintiff.[6] Throughout the common law development of

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[1]Wall Street Journal, Feb. 18, 1987, at 1, col. 6.

[2]Approximately 40,000 claims have been filed out of a potential 2.5 million workers exposed to asbestos. *Id.*

[3]One law firm has set for itself a goal in 1987: screen 75,000 more tire workers for possible lung problems caused by exposure to asbestos. *Id.* (Positive results would, of course, represent potential tort claims. The ethical considerations and societal cost/benefit analysis of these controversial procedures will be left for another Note.).

[4]*Id.*

[5]*See* Restatement (Second) of Torts § 433A (1964).

[6]Green, Rationale of Proximate Cause 133-41 (1927). The requirement that the plaintiff show a causal link between defendant's action and damage done has served two fundamental functions. First, defendants have been protected from making reparations to plaintiffs for harm which they played no part in bringing about. Second, plaintiffs have been prevented from unjust enrichment since they may recover only that which is the result of the defendant's conduct. The goal of tort law is to make the plaintiff whole

tort theory, causation has been a practical obstacle which plaintiffs have been required to overcome in order to recover damages.[7]

A unique problem arose when a defendant argued that the plaintiff himself caused a portion of the harm for which he seeks recovery, and the defendant challenged the plaintiff's demand for damages. The well developed theory of contributory negligence and the more recent com-

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again, i.e., to place him where he would have been had the defendant not wronged him. It is not meant to place him in a better position than he would have been absent defendant's action.

[7]A brief review of the development of causation theory may be beneficial in helping the reader evaluate the focus of this Note. As early negligence theory developed, it became clear that it was not enough that the plaintiff show that the defendant's conduct caused the damage the plaintiff suffered. Courts began to recognize two separate types of causation.

(a) Cause in fact has been defined as that which is a "*necessary* antecedent" to the harm. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 41, at 265. (5th ed. 1984) [Hereinafter PROSSER & KEETON]. The term "embraces all things which have so far contributed to the result that without them it would not have occurred." *Id.*

(b) Proximate cause is said to be that conduct which "has been so significant and important a cause that the defendant should be legally responsible." *Id.* § 42, at 273.

As a result of the theory that defendant's conduct must be a cause in fact of plaintiff's injury, the "but for" rule has developed as a threshold test of causation. "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the conduct is not a cause of the event, if the event would have occurred without it." *Id.* § 41, at 266; *cf.* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) (not proper to use rule of causation that focuses solely on whether protected first amendment conduct played a substantial part in employer's decision not to rehire).

Because the "but for" test can lead one back to an infinite number of possibilities of causation, (e.g. but for defendant's parents meeting on that moonlit night . . .) this test alone is never enough though it is generally required. Once "but for" causation has been shown, the fact-finder will then look to see whether proximate causation is also present and thereby determine whether liability will attach. PROSSER & KEETON, *supra* § 41, at 266.

A different problem arises when two or more causes combine to bring about harm to the plaintiff. For example, if A sets a fire and it combines with a fire set by B to burn down C's house, the "but for" test fails. Either fire alone would have been enough to destroy C's house and each defendant could claim his conduct was not the cause of C's harm because C would have lost his house without his conduct. Both defendants could thereby escape liability though it seems clear both are culpable. Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 146 Minn. 430, 179 N.W. 45 (1920); Seckerson v. Sinclair, 24 N.D. 625, 140 N.W. 239 (1913).

As a result, the "substantial factor" test has evolved; the defendant will be held liable if his conduct was a substantial factor in bringing about plaintiff's harm. Whether defendant's conduct was a substantial factor is a question left for the jury to decide.

Some have argued that the test is not appropriate for a jury since the phrase "substantial factor" is essentially undefinable. HART AND HONORE, CAUSATION IN THE LAW, 263-66 (1959). Others counter that such a liability has not been imposed upon the use of the term "reasonable" in defining standards of conduct although it is similarly inexact. *See* GREEN, *supra* note 6, at 144-70; PROSSER & KEETON, *supra* § 41, at 266.

parative fault laws have guided courts in many of these types of cases.[8] Fault on the part of the plaintiff should not be a necessary antecedent to diminution of damage awards. Apportionment has been found to be appropriate in various types of cases. These are cases where sufficient evidence existed upon which a jury could reasonably apportion harm to two or more distinct causes. These cases include those involving successive injuries and pre-existing conditions. The underlying rationale of this group of cases is that a defendant should compensate a plaintiff only to the extent necessary to return him to the position he would have occupied had the defendant not acted. This same reasoning can be applied to apportionment when it arises in a typical asbestosis case in which the plaintiff is a tobacco smoker.

II. Asbestosis and Smoking

Once it has been shown that the defendant did cause the plaintiff some harm, there may still be an unresolved issue as to how much of the total harm is attributable to the defendant. Section 433A of the Restatement (Second) of Torts provides:

> (1) Damages for harm to be apportioned among two or more causes where

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[8]Contributory negligence is conduct on the part of the plaintiff which contributes as a legal cause to the harm he has suffered and which falls below the standard of due care which he must afford himself. Smith v. Smith, 19 Mass. 621, 13 Am. De. 464 (1824). Notwithstanding the defendant's breach of duty of due care toward the plaintiff, the plaintiff may not recover since the plaintiff is also at fault. One of the many reasons often cited for the growth of this doctrine is that the courts historically have perceived as unsatisfactory any attempt to apportion damages from a single harm between two or more parties. *See* Lowndes, *Contributory Negligence*, 22 Geo. L.J. 674, 683-84 (1934).

Relatively recent developments in tort law have evidenced the courts' general willingness to allow attempts at apportionment. The result of this reversal of theory has been the adoption of comparative negligence laws. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The court adopted a "pure" form of the doctrine where the plaintiff's damages are simply reduced by the percentage of fault which can be attributed to him. "Modified" contributory negligence allows a negligent plaintiff to recover only to the extent that his fault does not exceed fifty percent of the total. Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). The previous reluctance of the courts to accept comparative fault laws and the corresponding apportionment was based partly on "a marked distrust of the bias and general unreliability of the jury which would be expected to make [a decision based on its finding of causation]". Prosser & Keaton, *supra* note 7, at 470. The widespread acceptance of comparative fault laws today is indicative of a retreat from that distrust of the capabilities of juries.

One writer, in advocating the rationale of contributory negligence nearly a century ago, nevertheless noted that the all or nothing approach was not appropriate when "the impossibility of apportioning the damage between the parties does not exist." C.F. Beach, A Treatise of the Law of Contributory Negligence § 12, at 13 (3d ed. 1899).

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.[9]

One court, quoting Prosser, noted, " 'Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made.' "[10]

The possible application of section 433A to asbestosis cases depends largely on the ability of the medical profession to identify distinct pulmonary harms and their causes. The experts base much of their testimony on examination of x-rays of the plaintiff's lungs.[11] Such examinations often reveal more than one type of injury. The x-ray may show several different symptoms, some of which are typical of asbestos related problems, while others may be more commonly associated with tobacco smoking.[12] These separate instrumentalities may manifest themselves in various and distinct ways in the lungs. The injuries in turn can act separately or in combination to bring about a general "disability" in the plaintiff.[13]

Medical experts commonly describe a patient's pulmonary problems as either a *pulmonary impairment* or a *pulmonary disability*. The initial manifestation of harm due to the inhalation of asbestos fibers falls within the general category of "pulmonary impairment."[14] In *Martin v. Johns-Manville Corp.*,[15] an asbestosis case in which the court applied apportionment, the plaintiff was found to be suffering from various forms of pulmonary impairment. These are disturbances of lung function or structure due to disease.[16] Some pulmonary impairment diseases, whether asbestos related or not, may be asymptomatic and present in the lungs for long periods of time prior to detection.[17] Examples of

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[9]RESTATEMENT (SECOND) OF TORTS § 433A(1) (1964).

[10]Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 57, 502 A.2d 1264, 1270 (1985) (quoting PROSSER & KEETON, *supra* note 7, § 52, at 345).

[11]*Id.* at 52-55, 502 A.2d at 1267-69.

[12]*Id.*

[13]*Id.*

[14]LAWYERS' MEDICAL CYCLOPEDIA OF INJURIES AND ALLIED SPECIALTIES § 33.27b (Charles J. Frankel, M.D., LL.B. ed. Revised Volume 5 Part A 1983) [hereinafter LAWYERS' MEDICAL CYCLOPEDIA] (The term "pulmonary insufficiency" is an inexact term sometimes used to describe the inability of the lungs to adequately perform one of their many functions. At least one author has recommended that physicians dispose of the term and instead use the more descriptive "pulmonary impairment." *Id.*).

[15]349 Pa. Super. 46, 502 A.2d 1264 (1985).

[16]LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 14, at § 33.61 (Supp. 1984).

[17]*Id.*

apparent symptoms of pulmonary impairment include shortness of breath, chronic cough, expectoration, chest pain, and expectoration of blood.[18] A pulmonary disability occurs when the pulmonary impairment results in an inability to function at a specified level of activity,[19] as occurred in the *Martin* case.[20]

Because there are several possible pulmonary harms, an asbestos claimant will attempt to define his disability as broadly as possible in an attempt to assess the total damages to the defendant. On the other hand, the defendant should try to define the plaintiff's disability as precisely as possible. In so doing he can attempt to focus the court's attention on the specific harm caused by his product. This is not always an easy task however, as the cases[21] and the *Lawyers' Medical Cyclopedia of Injuries and Allied Specialties* indicate:

> The precise definition of disability will vary greatly from one situation to another and must be clearly specified, for example, as the degree of impairment resulting in disability for a specific job or for any job in a specific industry. [For example], definitions of disability under workman's compensation laws vary from state to state and are not always based on medically determinable impairment.[22]

In asbestos litigation, either subsection (1)(a) or (1)(b) of section 433A may become an issue when the one who claims disability due to the inhalation of asbestos fibers happens to be a tobacco smoker. Generally, when one seeks to recover from a manufacturer of asbestos, his action rests on the claim that he has been "disabled" as a result of asbestosis. A defendant may raise either of two defenses with respect to section 433A. First, there may be two separate injuries in the lungs, either of which may cause the patient some problems in his daily functions.[23] Second, the plaintiff may be seeking to recover for his overall disability to which separate causes, such as asbestos fibers and tobacco smoke, have contributed to some degree.[24] In the former case subsection (1)(a) applies; in the latter case subsection (1)(b) applies.

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[18]*Id.*

[19]*Id.*

[20]*Martin*, 349 Pa. Super. at 49, 502 A.2d at 1266.

[21]*See generally* Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973); Brisboy v. Fibreboard Paper Products Corp., 148 Mich. App. 298, 384 N.W.2d 39 (1985); Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 502 A.2d 1264 (1985).

[22]LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 14, § 33.27(b).

[23]*See, e.g.*, Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 502 A.2d 1264 (1985).

[24]*Id.*

Asbestosis was described in the *Martin* case as primarily a "restrictive" lung disease; one in which the lungs are unable to fill to capacity.[25] It is analogous to trying to blow up a balloon in a milk bottle; once the balloon is filled up so far it can expand no further due to the constraints of the bottle.[26]

If the plaintiff who is suffering from asbestosis also smokes cigarettes, it is likely that other, dissimilar diseases will be diagnosed in his lungs. Examples of diseases which are closely associated with smoking and which may be present in the plaintiff's lungs include bronchitis, chronic bronchitis, and pulmonary emphysema. *Bronchitis* is "an inflammation of the lining of the bronchial tubes (bronchi) which connect the windpipe to the lungs . . . the air flow to and from the lungs becomes labored and a heavy mucus or phlegm is coughed up . . . [if] this coughing and spitting continue for months and return each year, [chronic bronchitis is indicated]."[27] *Chronic bronchitis* is "almost always associated with heavy cigarette smoking"[28] and is an obstructive lung disease,[29] one in which the airway passages in the lungs are blocked and air flow through them is hampered. The bronchial tubes, once partially blocked, become a breeding place for infections.[30] *Pulmonary emphysema*, a disease from which the plaintiff in *Martin* suffered, is a disease in which the lung tissue undergoes progressive obstruction.[31] "The lungs become hyperinflated and certain areas may become quite tense and balloon-like, displacing and crowding relatively normal and functional lung tissue so that it becomes compressed and useless."[32]

Given the number of possible pulmonary problems, where evidence exists that the plaintiff suffers from more than one type of disease it is, at the very least, likely that asbestos is the cause of something less than one hundred percent of his total disability. This is where the concept of apportionment becomes relevant.

III. Analogous Applications of the Apportionment Doctrine

There are cases illustrating the validity of the proposition that exact, precise percentages need not be assigned to respective causes in order for apportionment to be appropriate. There needs to be merely "a reasonable basis for determining the contribution of each cause

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[25] *Id.* at 52, 502 A.2d at 1267.

[26] *Id.*

[27] Lawyers' Medical Cyclopedia, *supra* note 14, § 33.27b, at 46.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 47.

[31] *Id.* § 33.44a, at 70.

[32] *Id.*

. . . ."[33] Note that, in general, no particular degree of mathematical certainty is required to award damages so long as the amount awarded is supported by the evidence and is not based upon mere conjecture or speculation.[34] This general proposition is evident in other types of apportionment cases, including successive injury cases, and pre-existing condition cases.

A. Successive Injuries

Where a plaintiff is injured by the successive, not concurrent, negligence of two parties, the second tortfeasor is not held responsible for the entire damage.[35] Rather he will be held liable only for the damage that he caused. On the other hand, the original wrongdoer may be held liable for the entire damage if it is found that his negligence was a substantial factor in bringing about the injury directly precipitated by the second wrongdoer.[36]

In *Hughes v. Great American Indemnity Co.*,[37] the plaintiff was involved in a collision with another automobile. Three minutes later a second automobile struck his disabled vehicle while he was still inside. The plaintiff attempted to recover all of his damages from the insurer of the second automobile. He claimed that negligent drivers of both vehicles were joint tortfeasors and as such were jointly and severally liable for the entire injury.[38] The court held that the rule of recovery *in solido*[39] did not apply.[40] The evidence showed that the driver of the second car "caused . . . new injuries or aggravation of those already inflicted."[41] Consequently, the defendant was legally responsible only for those new or aggravated injuries.[42] This was true notwithstanding the difficulty in dividing the damages.

The plaintiff argued that "it would be impossible under circumstances such as those prevailing in this case to make proof which would segregate the injuries attributable to the separate blows."[43] The court found this

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[33]RESTATEMENT (SECOND) OF TORTS § 433A(1)(b) (1964).

[34]Whiteco Properties, Inc. v. Thielbar, 467 N.E.2d 433, 438 (Ind. Ct. App. 1984).

[35]Hughes v. Great American Indem. Co., 236 F.2d 71, 74 (5th Cir. 1956).

[36]PROSSER & KEETON, *supra* note 7, § 52, at 352.

[37]236 F.2d 71 (5th Cir. 1956).

[38]*Id.* at 72.

[39]In the civil law, an obligation *in solido* is one in which each of the several obligors is liable for the whole; that is, it is joint and several. BLACK'S LAW DICTIONARY 716 (5th ed. 1979).

[40]Hughes v. Great American Indem. Co., 236 F.2d 71, 74 (5th Cir. 1956).

[41]*Id.*

[42]*Id.* at 75.

[43]*Id.*

reasoning to be meritless. Relying on reasoning articulated by the United States Supreme Court,[44] the court held:

> Even if this were so, the difficulty of making proof would not change the principle of law involved. But we do not think that this is true. Damages do not have to be established with mathematical certainty so long as there is evidence that damages did probably ensue from the second collision and so long as a reasonable basis is established for recovery of those damages.[45]

The Supreme Court decision relied on in *Hughes* contained an illustration worthy of note. "Surveyors can measure an acre. But measuring negligence is different. . . . [It] call[s] for the exercise of common sense and sound judgment under the circumstances of particular cases. . . . Fact finding does not require mathematical certainty."[46] Although section 433A did not apply directly because neither case involved the issue of apportionment, the courts nevertheless have articulated a sound rule that is particularly appropriate to negligence and causation questions, both of which are left to the finder of fact.

These successive injury cases are analogous to certain types of asbestosis cases. If a plaintiff has smoked for a time prior to being exposed to asbestos fibers, he has almost certainly suffered some harm, even though it may not yet be manifested by noticeably disabling him. When he then inhales asbestos fibers and later, perhaps years later, is disabled by lung disease, the situation is similar to successive accidents. The plaintiff already suffered from some injury and the defendant should not be required to pay damages calculated to make the plaintiff "whole" again. He was not "whole" when he first came in contact with the defendant's product.

Apportionment was found to be proper by the Hawaii Supreme Court in *Bachran v. Morishige*,[47] a case factually similar to *Hughes*, except that the two accidents were separated by two years. The plaintiff continued to suffer during those two years and was disabled when the second accident occurred.[48] The court found that the jury could reasonably have determined the total harm being suffered by the plaintiff was not the proximate result of the later accident.[49] It then applied the

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[44]Schulz v. Pennsylvania R.R. Co., 350 U.S. 523 (1956). In *Schulz*, the plaintiff's decedent had disappeared while working for the defendant railroad and was later found drowned. Without strong evidence either way, the jury was allowed to decide the question of whether the death had resulted from the defendant railroad's negligence.

[45]*Hughes*, 236 F.2d at 75.

[46]*Schulz*, 350 U.S. at 525-26 (citation omitted).

[47]52 Haw. 61, 469 P.2d 808 (1970).

[48]*Id.* at 66, 469 P.2d at 812.

[49]*Id.* at 66, 469 P.2d at 811.

rule that the jury could make a rough apportionment and, if the jury found that to be an impossible task, then it could divide the total damages equally between the two accidents.[50] Furthermore, the court held that medical experts should be allowed to testify "most freely"[51] on the issue of apportionment because the jury is given wide latitude in determining the issue. Also, as testimony is given on apportionment, the expert witnesses should not be "limited or restricted by labels such as 'certainty,' 'reasonable medical certainty,' 'probability,' 'possibility,' etc."[52] If a medical expert cannot testify positively as to causation or contribution by causes, the jury will not be precluded from coming to a determination based on all the available facts.[53] This rule is founded on the undisputed principle that the fact-finder, not the expert witness, is the final arbiter of the question of causation.[54]

Successive injury cases can be analyzed in light of section 433A, which states that damages are to be apportioned where there are two distinct harms. In these cases the plaintiff was actually harmed twice, and absent apportionment, the defendant who was unlucky enough to have caused the second injury would pay more, perhaps much more, than the amount necessary to compensate the plaintiff for the harm actually caused by the defendant.

B. Pre-existing Conditions

The majority of cases in which apportionment has been advocated have arisen when an employee has sued his employer for damages suffered while on the job. Whether to apportion damages is a relevant issue if the employee's work-related injury aggravates a pre-existing physical condition. Courts usually construe workers' compensation statutes to reflect the legislatures' thoughts on when and how apportionment should

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[50]*Id.* at 68, 469 P.2d at 812.

[51]*Id.*

[52]*Id.*

[53]The court stated:

> When causation of the injury is a medical issue, as it is here, "[the] matter does not turn on the use of a particular form of words by the physicians in giving their testimony," since it is for the trier of facts, not the medical witnesses, to make a legal determination of the question of causation. Hence, the failure of a medical witness to testify positively as to what was the cause of the injury, or his statement that the accident "might" be or "probably" was the cause of the injury, is merely a circumstance to be taken into consideration by the trier of facts.

Id. at 67-68, 469 P.2d at 812 (quoting Dzurik v. Tamura, 44 Haw. 327, 330, 359 P.2d 164, 165-66 (1960)).

[54]*Id.* at 66-68, 469 P.2d at 811-13.

be applied.[55] The majority of the statutes contain a provision that requires a reduction in the amount of the plaintiff's recovery if it is shown that the plaintiff's disability is the result of aggravation of a pre-existing condition.

An Indiana case allowed the plaintiff full recovery for her injuries sustained while lifting powder kegs in the course of her employment.[56] The Industrial Board of Indiana found that the plaintiff's disability was due seventy percent to a pre-existing condition and thirty percent to her work related injury.[57] Nevertheless, the court held that when the plaintiff has a non-disabling defect prior to the work-related injury, no finding as to the relative contribution of each cause is appropriate.[58] Therefore, if the plaintiff has a pre-existing condition that has not yet manifested itself by physically disabling him, the condition may not reduce his award even if it was a ninety-nine percent contributing cause of his injury.

This theory may seem consistent with the classic law school metaphor: the "thin skull" doctrine.[59] The result is that often an employer takes his employee as he finds him;[60] however, this may not be appropriate in every case, especially when applied to plaintiffs who smoke. Generally the "thin skull" cases involved involuntarily weakened physical conditions. On the other hand, one who smokes has voluntarily placed himself

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[55]*See, e.g.*, Goodman v. Olin Matheison Chem. Corp., 174 Ind. App. 396, 367 N.E.2d 1140 (1977), where the court construed a typical statute which provides as follows:

> If an employee has sustained a permanent injury either in another employment, or from other cause or causes than the employment in which he received a subsequent permanent injury by accident, . . . he shall be entitled to compensation for the subsequent permanent injury in the same amount as if the previous injury had not occurred: Provided, however, that if the permanent injury for which compensation is claimed, results only in the aggravation or increase of a previously sustained permanent injury or physical condition, regardless of the source or cause of such previously sustained injury or physical condition, the board shall determine the extent of the previously sustained permanent injury or physical condition, as well as the extent of the aggravation or increase resulting from the subsequent permanent injury, and shall award compensation only for that part of such injury, or physical condition resulting from the subsequent permanent injury. Provided further, however, that amputation of any part of the body or loss of any or all of the vision of one or both eyes shall be considered as a permanent injury or physical condition.

IND. CODE § 22-3-3-12 (1982).

[56]Goodman v. Olin Matheison Chem. Corp., 174 Ind. App. 396, 367 N.E.2d 1140 (1977). *But see infra* text accompanying notes 126-32.

[57]174 Ind. App. at 400, 367 N.E.2d at 1143.

[58]*Id.* at 401-02, 367 N.E.2d at 1143.

[59]For example, one who negligently strikes another and thereby causes severe injury is responsible for the entire injury even though his act would have resulted in no injury to one who was of average health and in a non-weakened condition.

[60]*Goodman*, 174 Ind. App. at 405, 367 N.E.2d at 1146.

in a weakened physical condition. Furthermore, smoking tobacco will invariably lead to some disability even without some other contributing agent. The disability may be slight, in the form of a persistent cough, or severe, in the form of lung cancer; or the disability may take the form of anything between these two extremes. But a disability in whatever form is still a disability, and, unlike the "thin-skull" cases, the plaintiff has brought about his own weakened physical condition.

A California court has recognized the importance of this distinction.[61] Though not all aggravation cases require apportionment, it is appropriate "in those cases in which part of the disability would have resulted, in the absence of the industrial injury, from the 'normal progress' of the pre-existing condition."[62] One who smokes, at least in today's enlightened times, knows or reasonably should know that he risks almost certain pulmonary injury or disability.[63] Many courts have thus found that

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[61]Amico v. Workmen's Compensation Appeals Bd., 43 Cal. App. 3d 592, 117 Cal. Rptr. 831 (1974).

[62]*Id.* at 599, 117 Cal. Rptr. at 835 (quoting Ballard v. Workmen's Compensation Appeals Bd., 3 Cal. 3d 832, 837, 478 P.2d 937, 940, 92 Cal. Rptr. 1, 4 (1971)).

[63]The reader will note that all those who smoke are constantly reminded of the dangerousness of the habit by the various Surgeon General's warnings which appear on all cigarette packaging and advertising. As further evidence of the likelihood that injury will follow cigarette smoking, see the following table:

CIGARETTE SMOKING AND DEATH FROM LUNG CANCER

Current number of cigarettes per day	Age 35-54	55-69	70-84
	Lung cancer death rates per 100,000 persons-years		
Never smoked regularly	6	19	25
1- 9	38	68	134
10-19	24	168	243
20-39	58	264	446
40+	47	334	754
	Mortality differences		
Never smoked regularly	0	0	0
1- 9	32	49	109
10-19	18	149	218
20-39	52	245	421
40+	41	315	729
	Mortality rates		
Never smoked regularly	1.00	1.00	1.00
1- 9	6.17	3.53	5.32
10-19	3.90	8.77	9.62
20-39	9.37	13.82	17.52
40+	7.67	17.47	29.84

Lung Cancer. Age-standardized death rates, mortality differences, and mortality ratios

disability cases involving aggravation of a pre-existing condition are appropriate for the fact-finder to consider in determining relative causation.[64]

An Arkansas case, *Jenkins v. Halstead Industries*,[65] dealt with apportionment as it related to smoking cigarettes. The plaintiff was fifty-three years old and had smoked cigarettes for approximately twenty-five years.[66] In 1970 he started working as an inspector where he was exposed every day to fumes coming from a casting furnace.[67] He soon began having breathing difficulties.[68] After receiving medical treatment for lung problems in 1975, he worked as a packer for approximately one year and then as a rubber extruder operator where he was exposed to talc, a dry powdered chemical.[69] He continued in that position until he quit working due to his physical condition, contending that the talc caused his pulmonary problems.[70] It was undisputed that the plaintiff suffered from a chronic destructive pulmonary disease, emphysema, and that this ailment caused him to be totally disabled.[71] Medical testimony was offered to show that the talc aggravated the plaintiff's pre-existing lung disease and the Workmen's Compensation Commission found that eight percent of his impairment was attributable to the work place.[72]

The court upheld the finding, apportioned damages accordingly, and found "this is a case wherein an occupational disease was aggravated by another disease or infirmity, not itself compensable, and that apportionment was proper."[73] The court went on to state that it is irrelevant that the plaintiff's pre-existing disease was not an independently producing disability because that is not a prerequisite to applying apportionment principles.[74]

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for men with history of only cigarette smoking who were currently smoking cigarettes at enrollment by current number of cigarettes smoked per day and age at start of study. Death rates for men who never smoked regularly are shown for comparison. LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 14, table 28.

[64]Baranek v. Reese, 299 F.2d 784 (7th Cir. 1962); Irving v. Bullock, 549 P.2d 1184 (Alaska 1976); Jenkins v. Halstead Industries, 17 Ark. App. 197, 706 S.W.2d 191 (1986); Kellogg v. Worker's Compensation Appeals Bd., 26 Cal. 3d 450, 161 Cal. Rptr. 783, 605 P.2d 422 (1980); Richman v. City of Berkley (Dept. of Public Works), 84 Mich. App. 258, 269 N.W.2d 555 (1978).

[65]17 Ark. App. 197, 706 S.W.2d 191 (1986).

[66]*Id.* at 198, 706 S.W.2d at 192.

[67]*Id.* at 199, 706 S.W.2d at 192.

[68]*Id.*

[69]*Id.*

[70]*Id.*

[71]*Id.*

[72]*Id.* at 200, 706 S.W.2d at 192.

[73]*Id.* at 200, 706 S.W.2d at 193.

[74]*Id.* at 201, 706 S.W.2d at 193.

In *Jenkins*, the court seemed to recognize that the issue is strictly one of causation. No finding of prior disability is necessary when the impairment itself is a contributing factor to the plaintiff's later disability. Other courts have applied this reasoning and have given great latitude to the fact-finder in determining whether a disability is capable of being apportioned.[75] This deference to the fact-finder on the issue of apportionment is made apparent by examining jury instructions that have been upheld in aggravation cases.[76] An example from a Supreme Court of Alaska decision is instructive:

> A person who has a condition or disability at the time of the injury is not entitled to recover damages therefor. However, he is entitled to recover damages for any aggravation of such preexisting condition or disability proximately resulting from the injury.
>
> This is true even if the person's condition or disability made him more susceptible to the possibility of ill effects that [sic] a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.
>
> Where a preexisting condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation.[77]

These aggravation cases demonstrate the long-held judicial belief that causation is a question for the jury, once sufficient evidence has been introduced such that reasonable jurors could differ on the issue. This has been held true even where definite proof has been lacking as to each agent's relative contribution and where the jury must estimate the

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[75]*See, e.g.*, Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985); Richman v. City of Berkley (Dept. of Public Works), 84 Mich. App. 258, 269 N.W.2d 555 (1978).

[76]One example of such a jury instruction states:

> You should consider . . . any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of the plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

Gideon, 261 F.2d at 1139 n.24.

[77]Irving v. Bullock, 549 P.2d 1184, 1187 n.4. (Alaska 1976); *see also* J. Doolin's vigorous dissent, in part, in Cantrell v. Henthorn, 624 P.2d 1056, 1060 (Okla. 1981).

relevant percentages.[78] Courts realize the importance of taking into account a plaintiff's contribution to his own harm, even in cases where it is difficult to determine what proportion of his total harm was a result of his own action.[79]

Further evidence of the propriety of such a conclusion are the comparative fault laws currently effecting major changes in tort liability.[80] These laws are quickly eliminating the perceived unfairness of the all-or-nothing approach of contributory negligence.[81] The new laws dictate that a defendant will not be made to pay for all of the plaintiff's injury if the plaintiff was also at fault. Rough approximations are common in these cases and are no less appropriate when the focus is only the issue of causation. In these cases, one is again reminded of the Restatement which says that damages are to be apportioned if there is a reasonable basis for determining the contribution of each cause to a single harm.[82] There too, the focus is on causation, and the rationale is that a defendant should not be made to pay more than the amount necessary to compensate the plaintiff for the defendant's action.

IV. Apportionment in Asbestosis Cases

A. The Need for Apportionment

To date, apportionment has been allowed in few asbestos cases.[83] Generally, the courts have not found the requisite "reasonable basis for determining the contribution of each cause to a single harm."[84] Instead, some courts rely on contributory negligence and comparative fault laws and in doing so find that smoking cigarettes is not negligent.[85] The idea that negligence on the part of the plaintiff is a necessary prerequisite to a reduction in damages ignores the important issue of causation. No matter how negligent the defendant was, he may still challenge the assertion that he caused the total harm from which the plaintiff suffers. Courts often ignore this premise upon which section 433A is based.

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[78]Stine v. McShane, 55 N.D. 745, 203 Mo. App. 413 (1920); Hill v. Chappel Bros. of Mont., 93 Mont. 92, 18 P.2d 1106 (1933).

[79]*Id.*

[80]*See, e.g.*, *supra* note 8.

[81]*Id.*

[82]Restatement (Second) of Torts § 433A(1)(b) (1964).

[83]*See, e.g.*, Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 502 A.2d 1264 (1985).

[84]Restatement (Second) of Torts § 433A(1)(b) (1964).

[85]*See, e.g.*, Brisboy v. Fibreboard Paper Prods. Corp., 148 Mich. App. 298, 384 N.W.2d 39 (1985); *cf.* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1096-1100 (5th Cir. 1973) (discussing contributory negligence and assumption of risk).

In one case, *Brisboy v. Fibreboard Paper Products Corp.*,[86] an asbestos worker, Charles Rand, died of adenocarcinoma.[87] He was a heavy cigarette smoker for thirty years and an asbestos insulator for twenty-six years.[88] Evidence at the trial consisted of conflicting medical testimony.[89] Rand's expert witness testified that Rand's lung cancer was caused by asbestosis; at the same time the witness admitted that the plaintiff's cigarette smoking played a minor contributing role in the cancer's development.[90] The defendant's expert testified that Rand showed no evidence of pulmonary asbestosis and his cancer was caused solely by cigarette smoking.[91] The doctor who performed the autopsy stated that cigarette smoking can be related to lung cancer, but he felt that a stronger link exists between asbestosis and cancer than between smoking and cancer.[92]

The jury concluded that Rand's death was caused by the combined effect of asbestos fibers and cigarette smoke. The plaintiff's smoking was deemed to have been 55 percent responsible for his injuries.[93] The appellate court stated that while Rand could be said to have been negligent in assuming that risk of contracting cigarette-related lung cancer, this combined-effect lung cancer was somehow an unknown and unforeseen risk.[94]

Although this decision focused on contributory negligence, it is likely the court would apply the same rationale for comparative fault purposes.

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[86]148 Mich. App. 298, 384 N.W.2d 39 (1985).

[87]*Id.* at 300, 384 N.W.2d at 40.

[88]*Id.*

[89]*Id.* at 300-01, 384 N.W.2d at 40.

[90]*Id.* at 301, 384 N.W.2d at 40.

[91]*Id.*

[92]*Id.*

[93]*Id.* at 302, 384 N.W.2d at 41.

[94]The court used this language in deciding the issue:

> While we again find the issue to be a close one, we believe that the trial court properly refused to find Mr. Rand to have been contributorily negligent. Although Mr. Rand would have been contributorily negligent with regard to lung cancer caused solely by his cigarette smoking, there was no indication on the record that he was aware or should have been aware of the risk of cigarette smoking as it related to asbestos and asbestos-related lung cancer. Thus, decedent cannot be said to have been negligent with regard to the specific hazard which he actually encountered. The fact that the risk negligently undertaken by the decedent was very similar to that actually encountered does not alter this analysis . . . . In this case, Mr. Rand could be found to have negligently assumed the risk of contracting cigarette-related lung cancer but not to have assumed the risk of developing unknown and unforeseen diseases which might have been related to his smoking. We, therefore, find that the trial court properly declined to apply comparative negligence to reduce plaintiff's damages.

Id. at 307, 384 N.W.2d at 43 (citations omitted).

If the plaintiff was not "at fault," then no reduction in damages would follow; but lung cancer would seem to fall within the realm of foreseeable consequences that the plaintiff risked when he chose to smoke. There is "quite universal agreement that what is required to be foreseeable is only the 'general character' or 'general type' of the event or the harm and not its precise nature, details, or above all manner of occurrence."[95]

On appeal, the Michigan Supreme Court followed this latter analysis and reinstated the jury verdict, holding that the trial court had relied on an overly narrow definition of the risk of harm in refusing to accept the jury's verdict.[96] A smoker assumes the risk of developing lung cancer without regard to whether that risk is increased by extraneous factors.[97] Therefore, the jury's balancing of the risks was reasonable.[98] Additionally, the court rejected the argument that no rational basis existed for apportionment.[99] The court recognized that this is just the sort of judgment juries are frequently asked to make.

The notion that only the general character of the harm need be foreseeable is well articulated in a 1967 decision by the Supreme Court of Mississippi.[100] "[An act] resulting in injury is the proximate cause thereof, and creates liability therefore, *when the act is of such character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom.*"[101] Comparing that language to the facts in

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[95]PROSSER & KEETON, *supra* note 7, § 43, at 299. The authors explain that the birth of this reasoning can be traced back to two early cases in which a

> workman who might have been expected to be knocked down by the collision of a tug with a bridge was pinched between piles instead when the collision knocked out a brace, and an engine involved in a collision was thrown out of control, traveled in a circle, and collided again with the same train. Some "margin of leeway" has to be left for the unusual and the unexpected.

Id. (citing Hill v. Winsor, 118 Mass. 251 (1875) and Bunting v. Hogsett, 139 Pa. 363, 21 A. 31 (1890)).

[96]Brisboy v. Fibreboard Corp., 429 Mich. 540, 418 N.W.2d 650 (Jan. 25, 1988).

[97]"So long as there is a finding of proximate cause in each case, the negligence of the parties must be compared." *Id.*, 418 N.W.2d at 655.

[98]*Id.* The court noted that § 468 of the RESTATEMENT (SECOND) OF TORTS did not preclude apportionment under comparative negligence analysis even though the language of that section indicates that failure of a plaintiff "to exercise reasonable care for his own safety does not bar his recovery." RESTATEMENT (SECOND) OF TORTS § 468 (1964).

[99]*Brisboy*, 418 N.W.2d at 656-57.

[100]Nobles v. Unruh, 198 So. 2d 245 (Miss. 1967).

[101]*Id.* 198 So. 2d at 248 (emphasis in original) (Although this decision referred to a defendant's liability, proximate causation should not be tested differently when applied to the plaintiff's own contribution, or causation, or the harm); *accord* Tropea v. Shell Oil Co., 307 F.2d 757, 766 (2d Cir. 1962) ("in a general way"); Thornton v. Weaber,

Brisboy, it seems clear that Mr. Rand's lung cancer was foreseeable as a result of his smoking and would fit within Mississippi's definition of proximate cause.

It is true that courts traditionally have held that death is inherently incapable of being apportioned.[102] Assuming that in cases resulting in death, such as Rand's, a finding of "fault" on the part of the plaintiff should be essential to a reduced award, it does not necessarily follow that the court may not inquire whether the plaintiff himself caused some of the disability if he sues only for disability.

Section 433A of the Restatement makes it clear that apportionment may be appropriate irrespective of any finding of fault on the plaintiff's part.[103] This is especially evident when reading the official comments which accompany the text. Examples cited where apportionment is appropriate include those in which the negligence of the defendant combines "with a pre-existing condition which the defendant has not caused."[104] This would seem to apply to a case where the plaintiff's lungs have been affected by tobacco smoke prior to inhalation of asbestos fibers. Another example cited is a case in which "one of the causes in question is the conduct of the plaintiff himself whether it be negligent or innocent."[105] This seems to apply where smoke and asbestos fibers act together to inhibit plaintiff's breathing and thereby restrict his ability to function.

It is the court's responsibility to decide whether the plaintiff's harm is capable of being apportioned.[106] If that question is decided in the affirmative, then the judge is required to instruct the jury that, should it find that not all of the plaintiff's harm was the result of defendant's conduct, then it is to reduce the damages accordingly.[107] The burden of proof is upon the defendant who claims the damages should be apportioned.[108]

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380 Pa. 590, 595, 112 A.2d 344, 347 (1955) ("some injury of a like general character"); Carey v. Pure Distrib. Corp., 133 Tex. 31, 35, 124 S.W.2d 847, 849 (1939) ("the injury be of such a general character"); Byrnes v. Stephens, 349 S.W.2d 611, 614 (Tex. Civ. App. 1961) ("of such a general character as might have been anticipated").

[102]*See also* Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 57, 502 A.2d 1264, 1270 (1985).

[103]*See supra* note 9 and accompanying text.

[104]RESTATEMENT (SECOND) OF TORTS § 433A comment a (1964).

[105]*Id.*

[106]*Id.* § 434(1)(b).

[107]*Id.* § 434(2)(b).

[108]*Id.* § 433B. *Contra* Scott v. Rainbow Ambulance Serv. Inc., 75 Wash. 2d 494, 452 P.2d 220, 222 (1969) ("[If the plaintiff] is clearly one of two persons responsible for the injury involved, and plaintiff makes no attempt to segregate those damages, we find no over-riding reason in justice for shifting that burden of proof to the defendants").

B. Recent Application of Apportionment of Harm in Asbestos Litigation

Gideon v. Johns-Manville Sales Corp.,[109] is a leading case that held that evidence that the plaintiff is a cigarette smoker is admissible for purposes of the jury's determination of the cause of his illness.[110] In that case the plaintiff testified that for years he had been smoking a pack of cigarettes every day and that his doctor had advised him to quit smoking.[111] He refused to do so. The defendant introduced evidence of this fact to show that even if asbestos caused the plaintiff some injury, the plaintiff nevertheless had a duty to mitigate his damages and should not be allowed to recover for those injuries which he might reasonably have avoided.[112]

The court noted that it was wrong to characterize the mitigation issue as a "duty" of the plaintiff because a victim never owes a duty to the one who harms him.[113] "The principle, correctly stated, is that the injured person may not recover damages that do not result proximately from the defendant's breach of duty. Damages that might be avoided or mitigated are, therefore, not recoverable."[114] At first glance this may seem like mere semantics, but the court is actually recognizing a fine distinction. The court points out that mitigation simply, but crucially, bears directly on the issue of the extent of damages caused by the plaintiff's exposure to asbestos. No "duty" or "negligence" is necessary to a reduction of the award; mitigation is, rather, a natural consequence of the doctrine that a defendant shall not be required to pay for damages not proximately caused by his product or conduct. The *Gideon* court went on to conclude that the jury was capable of sifting through and weighing the evidence as to each potential cause of the plaintiff's injuries.[115] The concept of apportionment is an outgrowth of the same doctrine.

The same reasoning should be applied when a court is asked to assess the applicability of apportionment to a plaintiff's claim for damages. The authors of the Restatement agreed, as is evidenced by the comments and examples accompanying the text of section 433A.

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[109]761 F.2d 1129 (5th Cir. 1985).

[110]Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1139 (5th Cir. 1985).

[111]*Id.* at 1138.

[112]*Id.* at 1139.

[113]In the language of the court, "while it is commonly said that an injured party has a 'duty' to minimize damages, this is a misnomer, for the victim owes no duty to the person who hurts him." *Id.*

[114]*Id.*

[115]*Id.*

> A negligently scratches B's arm with a nail. The wound becomes infected, and B negligently fails to consult a physician until the infection has seriously damaged the arm. A is not liable for the aggravation of harm caused by B's negligence.[116]

The leading asbestosis case in which the section 433A doctrine of apportionment was applied is *Martin v. Johns-Manville Corp.*[117] The *Martin* court held that a damage award could be reduced if sufficient evidence existed such that a jury could come to a reasonable determination that part of the plaintiff's disability resulted from his smoking.[118] The plaintiff began smoking cigarettes in 1941. His smoking increased over the years until he was smoking two packs of cigarettes per day in the 1960's and 1970's. In 1978, after working with asbestos for 39 years, he became unable to work.[119] Prior to 1978, Martin was diagnosed as suffering from emphysema.[120] He believed his ailment was a result of his exposure to asbestos and of his tobacco smoking. Martin sued Johns-Manville for disability resulting from the manufacturer's failure to warn of the dangerous characteristics of asbestos. The jury was instructed that any damages it found could be reduced by the amount of his disability that was caused by his cigarette smoking.[121] When the jury awarded Martin $67,000, he appealed, arguing there was no factual basis for the apportionment instruction. That instruction stated:

> If after considering all of the evidence you find that Martin's condition was solely due to his smoking cigarettes, you would not award him any damages. If, however, you find that his condition was solely due to exposure to asbestos, then you would award him the full amount as you determine those damages to be. If, however, you find that his condition is due both to his cigarette smoking and to his exposure to asbestos, then you first determine what the total amount of damages are, and then the next thing you do is determine what percent of his condition is due to cigarette smoking, and then you will reduce the total amount by the percentage that you find is due to cigarette smoking.[122]

The Superior Court of Pennsylvania held that, based upon the facts of the case, the instruction was proper.[123]

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[116]RESTATEMENT (SECOND) OF TORTS § 433A, illus. 10 (1964).
[117]349 Pa. Super. 46, 502 A.2d 1264 (1985).
[118]*Id.* at 51, 502 A.2d at 1270.
[119]*Id.* at 49, 502 A.2d at 1266.
[120]*Id.*
[121]*Id.* at 50, 502 A.2d at 1266.
[122]*Id.*
[123]*Id.* at 51, 502 A.2d at 1267.

The medical testimony considered by the jury consisted of four medical doctors testifying on behalf of Mr. Martin and two on behalf of the defendant. Each of Martin's experts testified that he suffered from pulmonary disease consisting of both obstructive and restrictive components. Their testimony established that asbestosis is primarily a restrictive lung disease.[124] Additionally, even the plaintiff's expert witness established that emphysema and chronic bronchitis, from which the plaintiff also suffered, are (1) obstructive lung diseases[125] and (2) primarily caused by cigarette smoking.[126] One doctor testified that asbestosis also has some obstructive characteristics; for example, asbestos fibers may become trapped in air passages in the lung which can then become blocked.[127] One of the defendant's expert witnesses testified, however, that the plaintiff's x-rays "are not absolutely diagnostic of asbestosis."[128] Another of the defendant's doctors testified that the x-rays showed chronic obstructive lung disease caused by smoking.[129]

Testimony focusing on the plaintiff's overall pulmonary disability was much less exact. It was apparent that although both pulmonary impairment due to smoking and due to asbestos played a significant part in Martin's disability, neither one could be readily reduced to a specific percentage.[130] No doctor was able to conclude precisely what percentage of the disability was caused by the plaintiff's smoking.[131] Nevertheless, applying section 433A of the Restatement, the court held that sufficient evidence existed to enable the jury to reach a reasonable approximation of the relative contribution by each cause.[132]

> That the testimony did not establish the exact proportion that each disease contributed to [plaintiff's] disability suggests, not that the damages should not have been apportioned, but only that medical science has not yet been able to calculate the proportions as exact percentages. This inability does not diminish the fact that the causes of the harm were . . . distinct and capable of rough approximation.[133]

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[124]*Id.* at 52-55, 502 A.2d at 1267-68.

[125]An obstructive lung disease is one in which the airway passages in the lungs are blocked. LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 14, § 33.44a.

[126]*Martin*, 349 Pa. Super. at 52, 502 A.2d at 1267.

[127]Asbestosis is *primarily* a restrictive lung disease, as established by Martin's own doctors. *Id. See supra* text accompanying notes 17-19.

[128]*Martin*, 349 Pa. Super. at 53, 502 A.2d at 1268.

[129]*Id.*

[130]*Id.* at 53-55, 502 A.2d at 1258-59.

[131]*Id.*

[132]*Id.* at 57-8, 502 A.2d at 1270.

[133]*Id.* at 59, 502 A.2d at 1271.

It is important to note again that no finding of fault or breach of duty on the part of the plaintiff is necessary for apportionment to apply.[134] The *Martin* court adopted the reasoning of the Restatement and noted that damages may be apportioned even if the plaintiff has innocently contributed to his own harm.[135] It then emphasized that the "question whether [the plaintiff] was negligent in smoking cigarettes is irrelevant to deciding whether his damages may be reduced because of the part that smoking played in his disability."[136]

To evaluate the *Martin* court's judgment concerning apportionment based on rough approximation, it is helpful to examine other cases in which a similar result was reached. For example, in *Moore v. Johns-Manville Sales Corp.*,[137] a Texas court recently apportioned liability among several defendants even though the degree of relative causation had not been established scientifically. In that case, as in the *Martin* case, much evidence was given regarding the various types of pleural problems in the plaintiff's lungs. One expert testified, again in a manner similar to the doctors in *Martin*, " 'that there is no way to divide causation.' "[138] This addressed the issue of whether the damages are reasonably capable of being apportioned.[139] Notwithstanding the expert's testimony, the court held that if the factfinder is expected to conclude from the evidence that a product which a worker handled did or did not contribute to the plaintiff's disease, then the factfinder "should also be able at least to approximate the degree to which those products that pass the 'some effect' level caused the disease."[140] In other words, juries are expected to decide difficult fact issues all the time, and, if there is some basis upon which they can rely in connecting injury with causation, let them decide.

The court went on to note that, even assuming that medical testimony supported the proposition that asbestosis is indivisible, there is no rule that requires a jury to accept one of several expert theories on causation.[141]

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[134]RESTATEMENT (SECOND) OF TORTS § 433A comment a (1964).

[135]*Martin*, 349 Pa. Super. at 56, 502 A.2d at 1270.

[136]*Id.* at 56-57, 502 A.2d at 1270; *see also* Adams v. Johns-Manville Sales Corp., 727 F.2d 533 (5th Cir. 1984) (in this case the jury found that the plaintiff suffered from no asbestos related disabilities, relying on evidence that certain of his observed irregularities were attributable to his past heavy smoking).

[137]781 F.2d 1061 (5th Cir. 1986) (Three plaintiffs were suffering from asbestosis. Each of the defendants cross-claimed against each other. The court upheld a jury verdict that apportioned the liability among the various defendants for causing personal injury to the plaintiffs, each of whom had worked with the defendants' product).

[138]*Id.* at 1064.

[139]*Id.* at 1064-65.

[140]*Id.* at 1065.

[141]Note that the language of the court evidences the strong deference and trust that

The test of reasonableness of the jury's decision is simply whether there is sufficient evidence upon which it can rely in arriving at a rough approximation of the relative contributions.[142]

It is true that the apportionment in this case was not due to plaintiff's conduct. The reasoning, however, remains a constant and does not vary from case to case: The primary purpose of the system of tort jurisprudence is to see that plaintiffs are fairly compensated.[143] This necessarily implies that they are entitled to compensation only for those injuries the defendant caused. Accordingly, no defendant should be required to pay for damages which his conduct did not bring about. This is consistent with the primary purpose in that it helps to ensure the defendant will have the capacity to compensate future plaintiffs.[144]

V. Conclusion

It is generally accepted that asbestos fibers are toxic when inhaled and can cause severe pulmonary and respiratory problems. Similarly, it is rarely disputed that the inhalation of tobacco smoke causes severe problems of a like nature in those who choose to smoke cigarettes. When these two instrumentalities act in combination, the doctrine of apportionment should apply. Simply stated, a genuine issue of causation arises when a plaintiff who happens to be a smoker, brings an action against a manufacturer of asbestos, claiming his disability was caused by his exposure to the defendant's product.

A common theme emerges when one looks closely at the cases that have held apportionment to be applicable—one who contributes to his own disability will not be exculpated from responsibility merely because the defendant has acted to bring about some additional harm. This should be no less true merely because the defendant happens to be a manufacturer of asbestos.

The issue, and the focus of the courts, should be simply this: Is the injury reasonably capable of being separated as to result or cause?

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is placed upon juries:

> Juries are often asked to make difficult decisions and, even when expert evidence is available to assist them, they are not bound to follow the experts. The jury may discredit expert testimony and base its decision on its collective judgment and experience. Juries determine whether or not an illness was caused by a particular injury, the extent and duration of disability, and, in the present cases, whether the products of any defendant did or did not contribute to the cause of the plaintiffs' injuries. In none of these decisions is the jury controlled, although it may be guided by the expert witnesses.

Id. at 1064-65 (footnote omitted).

[142] *Id.* at 1065.

[143] *See generally* Prosser & Keaton, *supra* note 7, §§ 1, 2, & 4.

[144] *Id.*

The successive injury cases recognize the appropriateness of such an inquiry and generally find that separate instrumentalities contributed to the injury. The pre-existing condition cases apply the inquiry and generally find that more than one cause contributed to the plaintiff's overall injuries.

The rationale in these cases is the same, and, although those who apply the law must demonstrate compassion for disabled asbestos workers, one must not forget the primary goal of tort law. That goal is to place the plaintiff where he would have been had the defendant not wronged him; it is not to place him in a better position than he would have occupied absent the defendant's action. Finally, the legal system must continue to trust that juries have the capability to make the reasonable determinations necessary to achieve that goal. The tool to make that goal possible in the current and future asbestos cases is apportionment under Section 433A. Use of this doctrine will serve the important function of holding manufacturers accountable for harm caused by asbestos. At the same time, recovery will appropriately be limited only where the defendant can prove that a portion of the harm was caused by another, even if that other is the plaintiff.

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