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Jill M. Fraley

Washington and Lee University School of Law, fraleyj@wlu.edu

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Comment: Knowledge Circles and the Duty of Care

Jill M. Fraley*

There are significant reasons for pursuing solutions that are flexible and nuanced in the context of second-hand asbestos exposure. Those reasons center on history and geography—the history of asbestos manufacture and product use within the United States and the geography of both asbestos use and asbestos-related tort claims.

In her Note, Ms. Flinn discusses the development of three distinct strands of state tort law addressing the potential duty of care that an employer might owe an employee's family member who was exposed to asbestos.¹ The three distinct approaches center around first, foreseeability of the danger and harm;² second, the relationship between the claimant and the employer;³ and third, the misfeasance or nonfeasance approach, which focuses on whether the relevant behavior is an act or omission.⁴ Ms. Flinn addresses advantages and drawbacks of each of these positions and indicates whether these approaches tend to favor plaintiffs or defendants in tort litigation.

The Note then turns to evaluating two important recent developments in the field: the failed history of attempted federal legislative solutions⁵ and the novel approach of the Third Restatement,⁶ which creates a presumption of a duty where there

* Assistant Professor of Law, Director for the Center of Law and History, Washington and Lee University School of Law.

1. See generally Meghan E. Flinn, Note, *A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 WASH. & LEE L. REV 707 (2014).

2. *Id.* at 714–19.

3. *Id.* at 719–24.

4. *Id.* at 724–28.

5. See *id.* at 751–53 (discussing Congress's attempts to initiate asbestos litigation).

6. *Id.* at 728–30.

is a risk of physical harm, but allows that presumption to be outweighed by articulated policy considerations.⁷ Ultimately Ms. Flinn rejects both pursuing federal legislative solutions and the approach of the Third Restatement.⁸ She encourages a “multi-factored test” approach that would consider each of the tort factors traditionally relevant to an analysis of duty—including both the foreseeability of the harm and the relationship between the parties—while also incorporating the Restatement’s public policy approach to duty.⁹

Significantly, the Note recognizes that state tort law diverges when weighting these and other factors in the duty analysis, with some states relying heavily on foreseeability and others weighting the factors more evenly.¹⁰ Ms. Flinn encourages states to continue to use each of the factors, weighting them according to their own historical practice.¹¹ Additionally, she argues that the state legislatures rather than the federal should take on the task of considering appropriate legislation that would weight policy considerations raised by second-hand exposure cases.¹²

In this Comment, I want to take the opportunity to explain some additional support for the Note’s approach, which rejects what many have sought in terms of national consistency within this line of cases. My observations on these topics come from direct experience—through a few years of litigating products liability claims that included not only premises-based asbestos exposure claims but also second-hand exposure cases. In litigating those cases, I applied my training as a legal historian to the review of hundreds of boxes of client documents dating to the early half of the twentieth century along with summaries of

7. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010) (making an exception to the duty of reasonable care only where an “articulated countervailing principle or policy warrants denying or limiting liability”).

8. See Flinn, *supra* note 1, at 745 (rejecting the Third Restatement and proposing other solutions).

9. *Id.* at 746–51.

10. See *id.* at 745 (recognizing the different ways that state courts weigh the various factors relevant to take-home asbestos cases).

11. See *id.* at 750 (“[T]he multi-factored test gives each court the flexibility to implement its state’s common law on torts and to adhere to its precedent.”).

12. See *id.* at 755 (asserting that “individual state statutory responses most effectively address the problem of take-home asbestos exposure”).

research from numerous other cases and industries. In the following, I offer a few reflections about the complexity of the historical story, based on my own exposure to pending cases.

As the Note explains, one of the differences between the Third Restatement's approach and the foreseeability approach is that the former makes duty a question of law, while the latter approaches duty through a question of fact.¹³ The foreseeability approach, which is arguably also inherent in many policy considerations for second-hand asbestos exposure claims,¹⁴ immediately generates historical questions. Who knew that asbestos was lethal enough to cause harm to an employee's family members when carried home on clothing? When was that knowledge common or expected?

Unfortunately, in seeking simple, comprehensive, and national answers to those questions, courts often speak of the knowledge of "the asbestos industry,"¹⁵ a phrase too historically broad to generate very accurate conclusions. As a naturally occurring mineral substance with extraordinary physical properties in terms of thermal capacities and the manipulability of mineral fibers that rivaled fabrics, asbestos permeated industrial work within the United States for decades.¹⁶ Asbestos use spanned major industries beginning with the mining industry responsible for obtaining raw asbestos, and then including the production of building materials as diverse as shingles, siding, flooring, wiring, heating systems, and insulation, but also other major American industries including the manufacture of electronics from radios to household irons, automobile production, and numerous national-defense-related industries.¹⁷

13. See *id.* at 731–32 (explaining the Third Restatement's position).

14. See *id.* at 737–38 (proposing a link between foreseeability and public policy).

15. See, e.g., *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 445 (6th Cir. 2009) ("There has been no showing of any general knowledge of bystander exposure in the industry. Indeed, other courts have found there was no knowledge of bystander exposure in the asbestos industry in the 1950's.").

16. See *Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST. (May 1, 2009), <http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos> (last visited Jan. 28, 2014) (describing the nature and use of asbestos) (on file with the Washington and Lee Law Review).

17. See *id.* (discussing the use of asbestos in the United States and those industries that pose a high risk for asbestos exposure).

It is nearly impossible to make a coherent and accurate statement about the state of knowledge of asbestos toxicity within “the asbestos industry” because asbestos was a part of so many diverse industries that would have had differing rates of asbestos-related illnesses depending on the rate and method of exposures. Automobile brake linings, for instance, contained comparatively far less asbestos than insulation products.¹⁸ In short, there is every reason to expect that knowledge of asbestos toxicity—and particularly the toxicity of attenuated second-hand exposure—was uneven both geographically and temporally.

While some information may be inferred from the publication of peer-reviewed studies in national journals,¹⁹ for decades experts continued to disagree about facts that were important to understanding causation.²⁰ Many plaintiffs alleged exposure through multiple employments in multiple industries, thereby making it even more difficult for medical experts to pinpoint toxicity levels.²¹ Notably, one of the reasons the lethal toxicity of asbestos remained poorly understood for some time was the comparatively long latency period that exists for mesothelioma, which often develops fifteen to twenty-five years after exposure, but then becomes nearly immediately fatal.²² Most importantly, experts disagreed significantly about the level of exposure that was necessary to put a person at risk²³—an issue that would be particularly relevant to determining whether an individual

18. See *id.* (explaining asbestos levels of exposure in various industries).

19. See, e.g., Ellen P. Donovan et al., *Evaluation of Take Home (Para-Occupational) Exposure to Asbestos and Disease: A Review of the Literature*, in 42 CRITICAL REVIEWS IN TOXICOLOGY 703, 703–31 (Roger McClellan ed., 2012) (describing how and when the risks of take-home asbestos came to be understood).

20. See Flinn, *supra* note 1, at 743 n.226 (explaining that experts have fundamental disagreements about the evolution of the asbestos crisis).

21. See, e.g., *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 442 (6th Cir. 2009) (explaining that the plaintiff brought suits against General Motors and Cincinnati Gas & Electric Co. because her husband came into contact with asbestos while he worked for each of the companies). The plaintiff alleged that her husband’s exposure at either job could have caused her asbestos-related illness. *Id.*

22. See WORLD HEALTH ORG., ELIMINATION OF ASBESTOS-RELATED DISEASES 1 (2006) (explaining the latent effects of asbestos exposure).

23. See *Asbestos Exposure and Cancer Risk*, *supra* note 16 (discussing whether a “safe” level of asbestos exists).

corporation knew or should have known that any harm was likely to befall the family of an employee based solely on brief exposure to the employee's clothing.

None of this is said to defend the corporations, some of whom seem to have knowingly caused harm to the American public as well as their own employees. The point, rather, is to acknowledge that determining foreseeability for any individual corporation is a complex historical question.

Moreover, it is also a geographical question. Knowledge of asbestos toxicity not only spread more quickly through some industries than others, but it spread geographically throughout the country unevenly depending on the saturation of asbestos-using industries and asbestos-containing products.²⁴ As a broad generalization, because of its insulation properties, asbestos use was more common within New England than in the South, which faces fewer negative temperatures. As a result, in a time long before electronic communication, a company in Delaware or Pennsylvania had a greater likelihood of encountering expert knowledge on the toxicity level of asbestos than a company in Florida. Knowledge bases about toxicity are likely to parallel the geographical distribution of manufacture and production, as well as product distribution.

Similarly, because there is a geography to the history of asbestos mining and industrial use, there is also a geography to the resulting tort litigation. As the Note explains, some courts are greatly burdened by asbestos-related claims, while others only rarely encounter them.²⁵

Returning to the issue of foreseeability, I would postulate that the concept is so significant for many states in determining whether there is a duty—and also so often pulled into policy discussions—because foreseeability is inherently tied to our sense of fairness. We want to hold liable those companies that knew and did nothing to protect citizens (whether employees or not)

24. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., WORK-RELATED LUNG DISEASE SURVEILLANCE REPORT 159 fig.7-2 (2003) (illustrating the dispersion of mesothelioma cases throughout the United States and demonstrating that the northern states have the highest mortality rate).

25. See Flinn, *supra* note 1, at 755 (discussing the differing concentrations of asbestos litigation throughout the nation).

who did not know of the danger. I would further argue that if we want to approach foreseeability in secondhand asbestos litigation fairly, then we need to do so in the way that Ms. Flinn has argued within this Note—through flexible mechanisms that maintain state autonomy and continue to emphasize foreseeability as a key factor in determining whether there is a duty of care.²⁶ Similarly, state legislatures are better positioned than the federal government to craft statutory responses that will be narrowly tied to the industrial history of each area of the country.²⁷ In some states, the prevalence of certain industries or milestone publications on toxicity may well be sufficient to make desirable a statute that would postulate a certain level of foreseeability, thereby replacing fact-intensive judicial proceedings.²⁸

A quest for national uniformity or comprehensiveness in an approach to addressing second-hand asbestos claims would necessarily rely on generalities that would subsume the historical and geographical nuances of both industries and knowledge transfer. A more flexible approach, and one that seeks state legislative solutions, better fits the history and geography of the social problem at hand.

26. *See id.* at 750 (suggesting a flexible approach to take-home asbestos litigation).

27. *See id.* at 755–56 (encouraging state legislatures to draft litigation that corresponds with the state’s history with asbestos).

28. *See id.* at 754 (mentioning Ohio’s ban on take-home asbestos claims as a possible statutory approach).