The Silicosis "Epidemic": Lessons for Orthopaedic Surgeons

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In 2005, more than 10,000 plaintiffs filed lawsuits against manufacturers of grinding wheels and sandpaper, claiming they were suffering from silicosis, a pulmonary disease caused by inhaling fine particles of silica. An astute U.S. Federal District Judge (who had formerly been a nurse), upon learning that just a handful of doctors provided the plaintiffs' diagnoses without performing comprehensive evaluations, issued a scathing judicial order that contains many insights about the impropriety of false diagnoses for medical-legal purposes. Orthopaedic surgeons, often involved in the legal system as fact and opinion witnesses, have much to learn from the judge's opinion.

Introduction

Several years ago, a silicosis "epidemic" appeared on the American scene that exceeded by tenfold a seemingly comparable incidence in the 1930s. This lung disease, caused by inhaling tiny particles of sand (from grinding wheels, sandpaper, and sandblasting equipment) may cause profound disability or death. The earlier episode happened while miners drilled a tunnel through a mountain of almost pure silica near Hawk's Nest, West Virginia. More than a thousand workers developed pulmonary symptoms, about half dying from the illness[1]. Since then, our nation has experienced a steady decline in silicosis due to safety measures, including masks and respirators, wetting down the cutting surface, and adequate ventilation[2].

These advances in occupational health were seemingly reversed by the new epidemic, which involved many thousands of workers from a large variety of trades and professions. Each became a plaintiff against manufacturers of grinding equipment in a mass tort litigation that threatened to swamp the legal system.

Fortunately, an insightful jurist smelled something fishy. U.S. District Judge Janis Graham Jack—in a ruling early in the silicosis legal proceedings—authored a stinging indictment of lawyers and doctors involved in the litigation[3]. Moreover, many of her conclusionary remarks ring especially true for orthopaedic surgeons. Many of us, after all, become involved with lawyers, whether in workers' compensation injuries, motor vehicle accidents, compensable slip-and-falls, and product or professional liability lawsuits involving the musculoskeletal system.

This paper analyzes the remarkable circumstances leading up to *In re: Silica, Order No.29*, and its legal fallout, national consequences, and ethical implications for practitioners performing medical-legal evaluations and caring for those with compensable maladies. It argues that orthopaedic surgeons must be mindful when informing legal disputes lest they follow the same corrupted path taken by those involved in creating a silicosis epidemic.

Background

In the late 1990s, plaintiff lawyers specializing in asbestosis litigation began to run out of clients. It did not take long for them to discover a new particulate lung disease, silicosis, to pin on manufacturers of grinding and sandblasting equipment, auto and machine shops, and a host of other deep pocket entities. The problem was: How to find plaintiffs with the condition?

Some lawyers contracted with companies that set up mobile screen units in the parking lots of shopping centers and other heavily trafficked places. The companies erected signs (or placed ads in newspapers) offering free chest x-rays to anyone who ever did grinding, sandblasting or any other activity that might result in aerosolization of silica. A clerk in these units took a brief employment history, after which a screening chest x-ray was obtained. A doctor in the trailer stethoscoped lungs and asked a couple of questions. People subjected to this process were told they would soon receive their test results[4].

Sure enough, many such individuals eventually got letters from screening firms informing them they had silicosis and were entitled to a cash settlement, even though they had no symptoms of lung disease at the time. The letters named a law firm that generously offered to represent the victims of this serious disease and take care of all the details.

Altogether, around 10,000 such silicosis cases appeared in state and federal courts across the land, mostly in the Deep South, centered on Mississippi, Louisiana, and Texas. These product liability claims were filed against the large companies (like 3M) that manufactured grinding wheels, sandpaper, and related products[5].

Through accident or design, the federal judiciary consolidated the cases into the Corpus Christi courtroom of Judge Jack, a

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Clinton appointee and former nurse (who was married to a cardiologist)[6]. She must have realized something was amiss when just a handful of doctors diagnosed all 10,000 cases of silicosis. Moreover, legal filings by defense attorneys revealed that thousands of the silicosis plaintiffs were previously involved in asbestosis litigation, thereby claiming to suffer from both conditions, an extremely rare occurrence[7].

The plaintiffs' lawyers tried to block efforts by defense attorneys to depose the so-called "diagnosing doctors," those few radiologists, general practitioners, and occupational medicine physicians who confirmed the disease in so many people. Judge Jack ruled in favor of the defense, allowing the depositions to go forward[8].

The Doctors' Depositions

The first doctor deposed was George H. Martindale, a radiologist from Mobile, Alabama. He diagnosed 3,617 plaintiffs with silicosis, employing the identical phraseology in every report: "On the basis of the medical history review, which is inclusive of a significant occupational exposure to silica dust, physical exam and the chest radiograph, the diagnosis of silicosis is established within a reasonable degree of medical certainty[9].

When deposed, Dr. Martindale backed down rapidly, contending that he did not diagnose *any* plaintiff with silicosis. In fact, he testified that he did not even know the criteria for the condition. During the deposition, Dr. Martindale withdrew every diagnosis of silicosis he had made![10]

Dr. Martindale admitted he was paid by N&M, a company with an x-rays trailer. That entity, in turn, received $750 for each person diagnosed with silicosis that signed up with the lawyers behind the scheme[11].

The plaintiffs' lawyers acted shocked, *shocked*, after Dr. Martindale "flipped." One told Judge Jack, "It caught us by great surprise[12]." Moreover, they contended that the defense attorneys somehow "got to" Dr. Martindale, flipping him.

Judge Jack responded to this challenge. She ordered that defense lawyers steer clear of the diagnosing doctors and, in a remarkable move, ordered all future doctor depositions to be conducted in her courtroom[13]. [Federal jurists, unlike most other judges, sometimes question witnesses during proceedings.]

Dr. Kevin Cooper, a general practitioner, was one of the doctors who sat in the parking lot x-ray trailers, asked a couple of questions of each potential plaintiff from a form provided by N&M and listened to the their chests. He testified that it was "easy work" because his role was exceedingly limited "compared to what I do in my normal practice." He stated: "not having to make a call about anything whatsoever, not having to make a diagnosis, write a prescription, do anything like that, that's easy work[14].

Dr. Glynn Hilbun, a general surgeon, did the same, lured by the $5,000 per day fee[15].

In spite of the fact that Drs. Cooper and Hilbun were diagnosing doctors, "Both doctors [in their depositions] emphasized that they did not diagnose any of the plaintiffs with silicosis. Indeed, both doctors testified that they had never diagnosed anyone with silicosis," according to Judge Jack[16].

At the epicenter of this medical-legal process stood Dr. Ray Harron, a radiologist. In 1995, at the age of 63, Dr. Harron testified that he "kind of gave up real medicine and [he has] just been doing this pneumoconiosis work[17]." From 1995 until 2005 (when the silicosis litigation blew up in his face), Dr. Harron has worked exclusively for plaintiffs' lawyers, reading chest x-ray films and diagnosing asbestosis and silicosis for use in litigation. In fact, all of Dr. Harron's work was arranged by N&M, the trailer company. In many cases, Dr. Harron provided the two-minute trailer examinations, and in others, he just read the films. However, in every one of the approximately 6,350 reports (2,600 of which were diagnosing reports and the remainder were x-ray reports) from Dr. Harron, he admitted that he failed to write, read, or personally sign the actual report. Dr. Harron described his conclusions this way: "it's a legal standard and not a real diagnosis[18]."

When, on occasion, Dr. Ray Harron wasn't available for exams, his son, radiologist Andrew Harron, stepped in, following essentially the same protocol as his father[19]. He thereby confirmed that, when it comes to situational ethics, the apple often does not fall far from the tree.

It appears that Judge Jack was most disappointed with Dr. Barry Levy, author of a widely used occupational medicine textbook[20]. He diagnosed 1,389 plaintiffs with silicosis. As Judge Jack put it: "For the past 18 years, Dr. Levy has not been a treating physician, but instead earns his income through consulting in litigation on behalf of plaintiffs. His standard billing rate is $600 per hour, and he has the option of charging $900 per hour for weekend and after hours work…Dr. Levy billed approximately $34,000 simply to prepare for his testimony" in her courtroom[21].

Dr. Levy, working in Massachusetts, never examined any plaintiffs. He was asked during deposition if he might have been practicing medicine in Mississippi without a license. He testified "I was not practicing medicine…I was providing diagnostic information in the context of medical/legal consultation[22]."

Relying on the so-called physical examinations performed in the trailers and x-ray interpretations by others, Dr. Levy "diagnosed" silicosis in 1,239 plaintiffs in 72 hours, devoting less than four minutes to each evaluation[23]. In his textbook, however, Dr. Levy wrote that it takes about 90 minutes to obtain a detailed silica dust exposure and medical history from a patient evaluated for silicosis. Such thoroughness was necessary, Dr. Levy stated in his book, because so many pulmonary conditions share radiographic features with silicosis[24].

Judge Jack concluded that "it is clear that Dr. Levy had an agenda: diagnose silicosis and nothing else[25]."

The other diagnosing doctors provided comparable self-damning testimony.

Judge Jack's Ruling

Judge Jack, after hearing the diagnosing doctors' testimonies, disqualified them from participating in the litigation, essentially

quashing the lawsuits. Her 249 page *In re: Silica Products Liability Litigation, Order No. 29* is so full of insights about the dangers of medical-legal corruption of the judicial process that it is worthwhile to quote parts of her opinion at length.

"In the majority of cases, these diagnoses are more the creation of lawyers than of doctors. Conversely, virtually all of the challenged diagnosing doctors seemed to be under the impression they were practicing law rather than medicine. They referred to the Plaintiffs as "clients" rather than "patients", and they utilized shockingly relaxed standards of diagnosing that they would never have employed on themselves, their families or their patients in their clinical practices…[26].

"And, finally, despite diagnosing a serious and completely preventable disease at unprecedented rates, not a single doctor even bothered to lift a telephone and notify any governmental agency, union, employer, hospital or even media outlet, all of whom conceivably could have taken steps to ensure recognition of currently-undiagnosed silicosis cases and to prevent future cases from developing[27].

"One can imagine the outcry that would have resulted had these doctors kept silent after diagnosing thousands of new cases of avian flu or mad-cow disease. Had these doctors been acting as doctors—and had they genuinely believed their diagnoses were legitimate—they would have taken this simple and humane step. Instead, these diagnoses were about litigation rather than health care. And yet this statement, while true, overestimates the motives of the people who engineered them. The word "litigation" implies (or should imply) the search for truth and the quest for justice. But it is apparent that truth and justice had very little to do with these diagnoses—otherwise more effort would have been devoted to ensuring they were accurate. Instead, these diagnoses were driven by neither health nor justice: they were manufactured for money[28]."

"The record does not reveal who originally devised this scheme, but it is clear that the lawyers, doctors and screening companies were all willing participants…[29]."

"This explosion in the number of silicosis claims…suggests perhaps the worst industrial disaster in recorded world history…Moreover, given the sheer volume of claims—each supported by a silicosis diagnosis from a physician—one would expect the CDC or NIOSH to be involved, examining and responding to this enormous epidemic. One would expect local health departments and physician groups to be mobilized…But none of these things have happened. There has been no response from OSHA, the CDC, NIOSH or the American Medical Association to this sudden, unprecedented onslaught of silicosis cases…[30]."

"In short, this appears to be a phantom epidemic, unnoticed by everyone other than those enmeshed in the legal system: the defendants, who have already spent millions of dollars defending these suits; the plaintiffs, who have been told that they are suffering from an incurable, irreversible and potentially fatal disease; and the courts, who must determine whether they are being faced with the effects of an industrial disaster of unprecedented proportion–or something else entirely…[31]."

"Limited judicial resources are consumed weeding out meritless claims, costing the judiciary, costing other litigants whose suits are delayed, and ultimately costing the public, who pays for a judicial system that is supposed to move with some degree of speed and efficiency. Defendant companies pay significant costs litigating meritless claims. And what harms these companies also harms the companies' shareholders, current employees, and ability to create jobs in the future. And, potentially, every meritless claim that is settled takes money away from Plaintiffs whose claims have merit[32]."

The Impact of Judge Jack's Ruling

Judge Jack's ruling had immediate and widespread fallout. The diagnosing doctors soon became targets of state and federal inquiries. Several lost their licenses to practice medicine. Their reports in asbestosis litigation were disallowed by increasingly skeptical judges throughout the country, as were those of other equally unethical practitioners[33].

The U.S. Congress, struggling with legislation to augment the Asbestosis Trust Fund, called upon the silicosis-diagnosing doctors for testimony. They all claimed Fifth Amendment protection from self-incrimination[34]. Subsequent judicial opinions and state legislation ended the need for additional monies for the Trust Fund, as the number of asbestosis claims plummeted—although not soon enough to prevent 85 companies from bankruptcy[35].

Plaintiff attorneys complained that Judge Jack's opinion so spooked radiologists who were federally certified to read pneumoconiosis cases ("B-readers") that none could be found to support claims of those truly injured by aerial particulate exposure.[36].

Lessons for Orthopaedic Surgeons

So what does Judge Jack's *Order No. 29* have to do with today's orthopaedic surgeons, usually unstained by mass tort attorneys? As a former health care professional, Judge Jack shined a light on the oft-neglected impact that bogus diagnoses have on patients. Here is how she described it: "In the case of the Plaintiffs who are healthy, at least some of them can be expected to have taken their diagnoses seriously. They can be expected to have reported the diagnoses when applying for health insurance and life insurance—potentially resulting in higher premiums or even the denial of coverage altogether. They can be expected to report the diagnoses to their employers and to the Social Security Administration. And they can be expected to report the diagnoses of this incurable disease to their families and friends. These people have been told that they have a life-threatening condition… But it should not be forgotten that a misdiagnosis potentially imposes an emotional cost on the Plaintiff and the Plaintiff's family that no court can calculate[37]."

Misdiagnoses for medical-legal purposes occur in many specialties. Workers claiming job-related impairment, plaintiffs in personal injury lawsuits, and persons filing for disability benefits usually interact with doctors on referral from an attorney. In some cases, soft tissue injuries that do not show up on imaging studies cause the symptoms. In other situations, amplification of low-grade (or non-existent)

complaints prevails. To boost a claim's value, or to provide some justification for protracted treatment or surgical intervention, a treating practitioner may describe normal age-related findings on diagnostic testing as pathologic processes.

Patients, hearing that they have "three crushed discs" or a "torn rotator cuff," usually believe what they have been told. As with a false silicosis diagnosis, patients tell their family and friends the bad news. They are required to include such diagnoses on insurance application forms. Moreover, even when the patient recovers from the symptoms, the diagnoses stay alive as long as the evaluation's record is stored. Years later, if a person sustains a serious compensable injury, the pay-out may be reduced by the existence of an earlier bogus diagnosis.

While orthopaedists evaluating and treating claimants on behalf of lawyers may sincerely believe that they are helping those patients by increasing a claim's monetary value, physicians in this position must understand that, aside from the heavy societal cost attendant to such amplification, it is the patient who suffers the most when exaggerated diagnoses are proffered.

As Kennedy observed about the fundamental difference between orthopaedists and lawyers, "The role of the orthopaedic physician is to promote improvement and recovery, to engage in damage control and to aim for long term rehabilitation that reaches the highest possible level of functioning…The role of the lawyer, however, is to project a worst case scenario: to project permanent disability and an ultimate lack of rehabilitation potential. The best financial interest of the attorney, and, in the short term, of the client, seems to be emphasis on the darkest possible recovery forecast." In such an environment, attorneys are professionally obligated to convey to their clients, either directly or by implication, "that more damage and greater permanence are better, perhaps even essential for the case[38]."

Whittington put it this way: "One could not consciously and rationally design a system more perfectly set up to produce chronic invalidism than our present personal injury compensation schemes[39]."

In the workers' compensation realm, nations and jurisdictions within countries have tried a number of approaches to deal with the remarkable reality of compensation. Every 10% increase in disability benefits results in a 3% increase in claims[40]. Furthermore, as Handler, a frequent writer on the subject has stated, "the enormously costly enterprise of Workers' Compensation Insurance benefits so many who are involved in its execution far more than it benefits the unfortunate claimant…[41]."

Dr. Ray Bellamy, guest editor of a Symposium "Chronic Pain, Secondary Pain and Somatization" analyzed the impact monetary compensation has on illness behavior and physician willingness to support their claims. He noted the following: "Orthopaedic surgeons, neurosurgeons, neurologists, and rheumatologists apparently have acquiesced and adjusted to the economics and exigencies of these compensation systems, which often reimburse healthcare providers far more generously than for traditional patient care[42]."

Moreover, radiologists and electromyographers have gotten involved in the bogus diagnosis business by over-interpreting findings on imaging and nerve conduction studies, in my personal experience. Oftentimes, normal variants or age-related changes are described as pathologic findings. Doing so helps validate a diagnosis, thereby adding to the value of the claim. Unfortunately, the impact of such exaggerated diagnostic interpretations reinforces the sick role of the claimant, convincing him or her that they, in fact, have a serious medical condition.

Practitioners behaving in this manner are no different than those chided by Judge Jack. Although she "cured" more than 10,000 people of silicosis, other medical-legal epidemics, according to Bellamy, continue to plague society. He lists as epidemics carpal tunnel syndrome, cumulative trauma disorders, fibromyalgia, and chronic fatigue syndrome[43].

Aside from the consequences of false diagnoses mentioned by Judge Jack, a far more dangerous outcome often attaches to exaggerated diagnostic pronouncements: unnecessary surgery. Indeed, it is the rare individual who benefits from an operation performed in a compensation or tort situation where pathological findings are marginal or nonexistent.

Perhaps the time has come to modify the way doctors and lawyers interact in our nation's healthcare enterprise. In fact, such a change will be required if we are to attain the goal of expanding coverage to uninsured individuals while, at the same time, reducing overall medical costs. If and when health care become universally available, it might become appropriate to preclude lawyer-to-doctor referrals for any and all purposes, thereby eliminating the underlying motivation for many false and exaggerated diagnoses.

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