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# Twenty-five Years of Toxic Tort Litigation: Lesson Learned – Challenges Defined

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Litigation = Failure

# Choices

- Get Angry at the Legal System; or
- Learn What it has to tell us about our programs and how to make them better.

## Law

- The Law Trumps OSHA;
- IH focus is on "Risk" while the courts focus on "Cause";
- What was known and when was it known?
- Most lawsuits based on "Failure to Warn"; and
- Lack of exposure data is not proof that exposures did not occur.

## Defendants

- Product Manufacturers;
- Insurers;
- Onsite Contractors;
- Premise Owners;
- Other 3<sup>rd</sup> Parties; and
- Employers

## Plaintiffs

- Diseases, especially cancer, are manifesting themselves near or post retirement;
- Plaintiffs lack classical TWA exposure histories;
- Plaintiffs present with periodic short & intense exposure histories (Petro-chemical & Batch);
- Many exposure histories are <40 years; and
- Many first exposures now beginning in 1960's, 1970's, & 1980's.

## Knowledge

- IH's are generally not interested in the history of IH/Occupational Diseases;
- Vast majority of hazards have been studied at some level before OSHA (<1970's);
- 1<sup>st</sup> US published safety textbook with a chapter on IH – Tolman 1913; and
- Current opinions may not be scientifically justified.

## Management

- Organization has no IH policies or talent;
- Policies not executed at worker level;
- Warning/training nonexistent or inadequate;
- Inadequate, incriminating or little or no exposure data; and
- Decisions made on "Professional Judgment"

## Failure to Warn

- "No advice or instructions to workmen subjected to an insidious hazard is worth the energy required to enunciate it, or the paper on which it is written, unless it is interpreted by intelligent demonstration at the site of the hazard, and implemented by suitable and adequately maintained equipment, and reinforced by the medical supervision that will detect the early evidences of inadequacies in preventive measures or departures therefrom."

Robert A Kehoe, 1951

## Failure to Warn

- What are the hazards?
- How do I know when I'm at risk?
- How do I protect myself? and
- What should I not do with this product?
- MSDS format makes a poor warning!

## Exposure Data

- Without a scientific basis “Professional Judgment” is simply guessing or even worse, wishful thinking;
- “Professional Judgment” consistently underestimates exposures. (Mulhausen & Hewett)
- With data you know something, without it you know nothing (Lord Kelvin); and
- Without a profound knowledge of the system you can't manage it (Deming).

## Challenges

- Warning/Training – Minimum of 40 hours to change behavior.
- Data – Statistically defensible.
- Put major emphasis on reducing peak exposures!
- Inspection!

“People do not do what you  
EXPECT them to do they do what  
you INSPECT them to do”.

Motto of the US Air Force Inspector General

# The IH Professional

- Get beyond OSHA! Practice in the "Gap"; and
- "Anticipate" the future; don't wait for it to catch up to you or your programs.

"The purposes of the professions engaged in occupational health are not those of applying special techniques for the limitation of absenteeism, or of reducing compensation costs, or of imposing hygienic disciplines upon industrial employees, but are rather a broad means of securing and improving the health of the industrial population, of increasing its potentiality for productive effort, and of cultivating certain important factors that increase the satisfaction of industrial employees in their day's work."

Dr. Robert A. Kehoe, 1956