

The Mentor

A NEWSLETTER OF THE STATE BAR OF MICHIGAN



“All experience is an arch to build upon” —Henry James

Fall 2019

News from the Editor

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Hi all.

As I write this editor’s note, it is the first day of Fall. A change of seasons and a change of section. I encourage you to sign up for the new Senior Lawyers Section as you renew your membership in the State Bar.

This Fall issue has a diverse set of articles, one of which will pique your interest. Charles Fleck welcomes the new Senior Lawyers Section; you can learn about the many services offered by the SBM Practice Management Resource Center; Otto Stockmeyer reminds us of the three facets of restitution: as an alternative to tort damages, as an alternative to contract damages, and as a source of recovery independent of tort and contract law; and James Johnson offers “A Short Primer on Mesothelioma,” a disease caused by exposure to asbestos.

As we move forward, we urge you to consider writing for *The Mentor*. We will consider essays, short stories, photos, articles about your last trip, your community involvement for our “Out of the Office” column, or articles about the law. The interests of our group are varied. We look forward to reading and publishing your contributions.

—*Roberta*



Roberta M. Gubbins, Editor

A Letter from the Senior Lawyers Section



Charles Fleck,
Chair Senior Lawyers

On September 19, 2019, the Master Lawyers Section of the State Bar of Michigan held its annual meeting at the Lansing Center, Lansing, MI. The Master Lawyers Section was dissolved and the new Senior Lawyers Section was created. New officers were elected.

I believe we have the makings of a great council since we are the first council of the new Senior Lawyers Section. All following years will look to us as the ground-breakers.

In that vein, let's be thinking about where we want the section to be this time next year. First, we need fund raisers since our treasury is pretty empty; second, let's think about how we can serve our members. What do they need? What do they need to know at this time of their practice? Where lie their interests? How can we provide information to our members? And, finally, whom can we mentor? How can we make this new section relevant?

I plan to call our first Council Meeting on October 17, 2019 to be held at the State Bar Building in Lansing at noon. A call-in number and an agenda will be provided, for those unavailable to attend in person.

Please be thinking about how we can serve our members as stated above and try to bring a thought on each of the listed ideas to discuss and any other areas you find relevant for this section.

The section officers are as follows: Charles Fleck, Chair; Michael Hayes Dettmer, Chair-Elect; Vince Romano, Vice Chair; Paula Cole, Secretary; and John Castillo, Treasurer. Council members are: David Comsa, Peter Conway, Lynn Corgan, Richard Corriveau, Julie Granthen, Roberta Gubbins, David A. Kallman, Ron Olszewski, and Richard Ruhala.

I will be naming committee chairs for the section at this first meeting. If anyone is interested in chairing a committee, please email to me your intent to serve and where.

The standing committees are:

1. Nominating (3 members)
2. Service to Senior Lawyers
3. Community Contributions

The special committees are:

1. Annual Meeting
2. Mentor to Others
3. Publications
4. Fund raising

The Council may recommend other committees or subcommittees as well.

Thank you for your willingness to serve.

Let's have a great year!

Charles Fleck, Chair

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The PMRC

Practice Management Resource Center

It's our practice to help you manage yours.

Whether you began practicing law last week, last year, or 20 years ago, you probably discovered the hard way that the basics of running a business and managing a law practice isn't something you learned how to do in law school. Accounting problems, managing employees, high technology costs and learning curves, and building a client base keep you from doing what you really want to do—practice law. Thanks to PRACTICE EZ™, help is as near as your computer or phone.

PMRC Helpline or Email

Call or email our practice management advisors for personalized one-on-one assistance regarding your practice management needs.

Call the Helpline at (800) 341-9715 or email your questions to pmrchelpline@mail.michbar.org

PMRC Website

The PMRC has a dedicated website with practice management resources, including forms, how-to kits, guidelines, whitepapers, podcasts, videos, blogs, and more. Visit our site to learn about and access these resources. Topic examples include:

- Law Practice Management
- Client Relations
- Technology
- Financial Management
- Marketing
- Record Retention

Learning EZ Website

Enhance your practice management knowledge and skills through a wide variety of learning options on this dedicated PMRC webpage. Join us to watch our webinar recordings; we and our learning partners have something for everyone.

Access the Learning EZ webpage through the PMRC site for an extensive range of learning options.

Digital Library

Visit the PMRC's free digital library that allows members to download audio and e-books to computers, laptops, smartphones, and tablets. Access a wide assortment of books in mere minutes. Follow the PMRC website instructions to browse the library and download your audio and e-books today!

Print Books Library

The print books library contains a variety of law practice management publications for loan to SBM members at a nominal fee. Sample topics include:

- How to Start and Build a Law Practice
- Winning Alternatives to the Billable Hour
- Management Tools for Lawyers, a Survival Guide for the Solo and Small Firm Lawyer
- Advice for Litigators
- Marketing on the Internet
- Virtual Law Practice

Podcasts

The State Bar of Michigan podcast series *On Balance* features a diversified array of legal thought leaders. Hosted by JoAnn Hathaway of the Bar's Practice Management Resource Center and Tish Vincent of its Lawyers & Judges Assistance Program, the series focuses on the need for interplay between practice management and lawyer wellness for a thriving law practice. Brought to you by the State Bar of Michigan and Legal Talk Network.

Seminars and Webinars

The PMRC offers live in-person seminars and view-at-your-desk webinars. Sign up to receive practice management updates to make sure you don't miss these free and low-cost events.

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Law Practice Today e-Zine

The PMRC has partnered with the ABA Law Practice Division to provide members with a monthly issue of *Law Practice Today*, bringing you the most current information and trends in the legal industry from legal professionals. *Law Practice Today* focuses on the practical side of being a lawyer; you'll also find articles on practice management, technology, and business and career management.

Michigan Bar Journal Column

Law Practice Solutions is a monthly feature column of the *Michigan Bar Journal* brought to you by the PMRC, featuring articles on practice management and technology for lawyers and staff.

News, Assistance, Resources

Check in for the latest practice management updates!

The PMRC is on Twitter:

@MIStateBarPMRC

Sign up for PMRC updates:

michbar.org/publications/subscription

PMRC Helpline: (800) 341-9715 or

pmrchelpline@michbar.org

24/7 online resource access: www.michbar.org/pmrc/content

Your resource for all things practice management!

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Use our social tag #practiceEZ to stay in touch and up-to-date.



A Fresh Look at Restitution

By Otto Stockmeyer

This article deals with the law of restitution. It once was a mainstay of the first-year law school curriculum, but has become sorely neglected. My purpose is to remind attorneys of its three facets: as an alternative to tort damages, as an alternative to contract damages, and as a source of recovery independent of tort and contract law.

What is Restitution? Restitution is liability based on unjust enrichment. Instead of asking whether the defendant caused harm to the plaintiff, restitution asks (1) whether the defendant's conduct caused the defendant to be enriched, and (2) whether that enrichment was unjust vis-à-vis the plaintiff.

Restitution liability is measured by the extent of the defendant's gain, not the extent of the plaintiff's loss. The guiding maxim goes back to Roman law, 2,000 years ago: "Let no one be made richer through another's loss."

Restitution as an alternative to tort damages.

Tort law deals with unlawful harm to one's person or property. Often the harm caused to the injured party does not enrich the tortious actor (he punches you in the face). But sometimes it does (she steals your car). In such a case the injured party may have a choice to bring a tort suit to recover compensatory damages (for conversion, for example), or to bring a restitution case to recover the wrongdoer's unjust enrichment.

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A classic example is the “egg-washer case,” *Olwell v Nye & Nessen Co*, 173 P2d 652 (1946). The owner of a machine for washing eggs stored it with the defendant. When World War II broke out and labor became scarce, the defendant took the machine out of storage and used it once a week for three years before being caught. The owner offered to sell the machine to the defendant for \$600. When the defendant offered only \$50, the owner sued.

The owner obviously had no use for the machine, and it was not damaged. Had the owner sued for the tort of conversion or trespass to chattels, damages would have been based on the rental value of the machine, not very much at all. But the owner’s attorney chose instead to sue for restitution, seeking to recover the monetary benefit to the defendant of using the machine (rather than hiring workers to hand-wash eggs).

The Washington Supreme Court agreed that the owner did not have to sue for “garden variety” tort damages. Rather, the owner could elect to sue for restitution of the amount the defendant saved by using the machine. The trial judge found that sum to be \$10 a week for 156 weeks, or \$1,560. But, since the owner’s lawyer only asked for \$25 a month, or \$900, that was the limit of the owner’s recovery.

The owner’s lawyer deserves an “A” for recognizing and pursuing the client’s restitution alternative. The client recovered more in restitution than would have been recovered in a tort lawsuit. But greater skill in accurately measuring the defendant’s unjust enrichment would have produced more than half-again as much.

Restitution as an alternative to contract damages.

Upon breach of a contract, the innocent party is entitled to damages equal to what was expected under the contract terms (the “benefit of the bargain”). Where the innocent party’s expenditures under the contract would exceed the contract price (a “losing contract”) there can be no damages recovery.

Here again, restitution provides an opportunistic alternative. In a leading construction case, *United States v Algernon Blair, Inc.*, 479 F2d 638 (CA 4, 1973), a subcontractor sued for recovery of the value of its labor and equipment following a mid-contract termination by the general contractor. The trial judge found that the subcontractor would have lost more money on the deal

than was owed on the contract. Thus, damages beyond partial payments already made were denied on the ground that the contract was a losing one.

On appeal, the U.S. 4th Circuit Court of Appeals recognized that the trial judge had correctly followed the “normal rule of contract damages.” But it applied the rule that upon a material breach of contract, the innocent party has the option to forego suit on the contract and instead claim restitution for the reasonable value of its part performance. Even if the amount exceeded the contract price.

Restitution where neither tort nor contract law applies. Restitution can be recovered in contexts where tort and contract do not apply for one reason or another. Here I call attention to a path-breaking new Michigan Supreme Court case where restitution triumphed independently of tort and contract law, *Genesee County Drain Commissioner v Genesee County*, ___ Mich ___ (Docket No. 156579, decided July 18, 2019).

The case involves a lawsuit by the Genesee Drain Commissioner against Genesee County for failure to share group health-insurance premium refunds. Claims for fraud and conversion were dismissed on the ground of governmental immunity for tort damages. So the Drain Commissioner added a claim for restitution, arguing that retention of the premiums unjustly enriched the county at the expense of Drain Commission employees.

The Court of Appeals held that governmental immunity does not bar restitution because it is based on implied contract, not tort. The Supreme Court affirmed, but on the ground that immunity for tort damages does not apply to restitution because (1) unjust enrichment is a cause of action independent of tort and contract, and (2) it seeks restitution, not compensatory damages (per Chief Justice McCormack, for five members of the court).

(A two-justice concurring opinion by Justice Markman perpetuates the older view that (1) all civil liability is based on either tort or contract, and (2) restitution for unjust enrichment is a form of damages premised on an implied contract.)

According to the majority opinion: No tort? No contract? No worry!—if a case for restitution can be established.

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Conclusion. The twenty-first century is beginning to witness a potential restitution renaissance. In 2011, a new *Third Restatement of Restitution and Unjust Enrichment* appeared. In 2014, University of Texas Law Dean Ward Farnsworth released a new textbook on restitution. In 2018, he and Professor Andrew Kull published a contemporary restitution casebook.

If Chief Justice McCormack is right that there are three sources of civil liability: tort, contract, and restitution, then Restitution should be restored to its rightful place in the first-year curriculum alongside Torts and Contracts. Meanwhile, I have tried to provide a fresh look at the subject, so that lawyers can recognize it when appropriate and reap its many benefits.

About the Author



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Website bio: www.cooley.edu/faculty/norman-stockmeyer

Articles: <https://ssrn.com/author=80303>

Out of the Office

I am going into assisted living down here in the Naples area and though I will have wifi and all the amenities it should be interesting—best to all the guys and gals who beat me up on motions for summary disposition. My tiny legacy is two published Mich. App. opinions*, many fun jury trials, and beers downtown with all of us and our stressed lives on hold.

Salute!

Bob Taub P-30198

P.S. To Fred Lauck--you're a brilliant man, along with the rest of you guys and gals!!!

* *Merit Mfg vs. ITT Higbie* and *Stark Steel vs. Michigan Consolidate Gas Co.* Search under “Legal Eagle” or Northwest Reporter series .

Moving? Changing Your Name?

In order to safeguard your member information, changes to your member record must be provided in one of the following ways:

- [Login to SBM Member Area](#) with your login name and password and make the changes online.
- [Complete contact information change form](#) and return by email, fax, or mail. Be sure to include your full name and P-number when submitting correspondence.
- [Name Change Request Form](#)—Supporting documentation is required

Be



A Short Primer on Mesothelioma

By James A. Johnson ©2019

Mesothelioma is a disease. The only known cause is exposure to asbestos. Asbestos particles are inhaled or ingested into the body. These particles cause abnormal growth of cells. It is a rare form of cancer that originates in many of the protective linings that cover major organs in the abdomen and chest. ***Pleural mesothelioma*** is the most common type of mesothelioma that grows in the area between the chest wall and lungs. From this area it progresses to the lungs themselves and other areas in the thoracic cavity. When it occurs in the abdomen it is called ***peritoneal mesothelioma***.¹

New York

Asbestos was used in buildings as a fire retardant including residential properties over the past 100 years. ***New York is a leading state for asbestos-related litigation compounded by the horrific 911 event releasing asbestos dust.***

Anyone can get mesothelioma who has repeated exposure to asbestos for prolonged periods of time.² High risk occupations include motor vehicle brake repair, shipyard workers, navy veterans, power plants, petroleum industry workers, naval submarine bases, insulation workers and people who work in asbestos removal. When asbestos is inhaled fibers travel through the upper air passages and become imbedded in the lungs. The latency period for developing mesothelioma can range from 10 to more than 50 years from the date of first exposure. Many companies knew that exposure to asbestos was dangerous but continued to use asbestos in their products.

Michigan

The automobile industry in Michigan used asbestos in many car parts prior to the 1990s. Brake pads, clutches and electrical systems gaskets are just some of the parts containing asbestos. Occupations such as electricians, pipefitters and construction workers are at an increased risk of developing asbestos related health problems.³

Texas

Texas ranks fourth in the United States for mesothelioma and asbestos deaths. At least 2,454 people died from asbestos-related diseases in Texas between 1999 and 2013. Oil refineries, shipyards, chemical plants and foundries are the primary occupations in Texas attributed to asbestos deaths from mesothelioma and asbestosis.⁴

Symptoms

Diagnosing mesothelioma requires very careful testing because symptoms are similar to other cancers. Tightness in the chest, inability to take a deep breath, severe coughing, difficulty swallowing, pain in the chest, weight loss and persistent tiredness are common complaints but each patient is unique and has different symptoms. Mesothelioma is so rare that your physician may not detect it unless you inform him or her of your exposure to asbestos. Moreover, malignant mesothelioma can develop 10-50 years after exposure, including secondhand exposure. Informing your physician of your exposure no matter how slight is critical. The definitive diagnosis of mesothelioma is confirmed only by a tissue biopsy.

Diagnosis

X-rays can provide valuable information early in the process of diagnosing a patient. A CT scan permits the physician to determine the size, location and shape of any mass or tumor. CT scans can also distinguish between fluid and solid tissue.

Positron emission tomography (PET) scans identify patients who may benefit from surgery. The scan identifies tissues that are actively using glucose and measures the amount of this activity. Tumors and cancer cells use more glucose than normal tissue resulting in these areas becoming prominent on the PET scan.

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Biopsy

If a patient has fluid in the abdomen or surrounding the abdomen a large bore needle is used at the biopsy site to obtain a specimen. Samples of the fluid are sent to the cytology and pathology laboratory to study malignant conditions. Microscopic appearance of the cells provides information as to the specific subtype of mesothelioma such as epithelioid, sarcomatoid or a mixture of the two called biphasic.

A more invasive procedure is thoracoscopy in which the surgeon inserts a lighted scope with a camera through a small incision in the chest wall. This procedure permits the surgeon to obtain multiple biopsies and a broad look into the chest. The surgeon can now identify areas where the disease is located and if the lung or diaphragm is involved, or if it is attached to the sac surrounding the heart. Biopsies are sent to a pathologist for testing to confirm the diagnosis of mesothelioma. Mesothelioma is a rare disease and many oncologists and surgeons are not familiar with it. You should get a second opinion.

Staging & Treatment

Staging is a medical term to describe the amount of disease found in the body. All decisions relating to the nature of treatment are made based on the stage of the disease. Mesothelioma typically affects many areas that line the chest, lungs and abdominal cavity. Lymph nodes, if affected, are an important aspect of the staging process and can influence the decision to operate. If a lymph node is cancerous and operable it will be removed at the time of surgery.

A number of treatment options are available such as chemotherapy prior to surgical intervention to decrease the size of the tumor. The goal of surgery is to remove all visible evidence of the disease. Each patient is unique and your medical team should coordinate your treatment based on your diagnosis and prognosis.

In an interesting aside, a California jury on May 13, 2019 awarded \$2 billion in punitive damages and \$55 million in compensatory damages to a California couple

who alleged Roundup weed killer caused their non-Hodgkins lymphoma. Alva and Alberta Pilliod used Roundup on their San Francisco Bay Area property for 35 years. This is the third time the maker of Roundup has been found liable for causing cancer.

Conclusion

Malignant mesothelioma is a form of cancer that is caused by exposure to asbestos that has a long latency period. A few sample high risk jobs are auto mechanics, especially brake pad installers, carpenters, ship builders, roofers, boilermakers, oil and refinery workers and plumbers that have some exposure to asbestos. Workers should bring any concerns regarding the safe handling of asbestos to their employers and union representatives.

Anyone who has been diagnosed with mesothelioma or any other asbestos related disease should explore his or her legal rights. A \$30 billion fund has been set aside to compensate workers and their families. Companies that manufactured, sold or used asbestos containing materials may be liable to employees and consumers who contract this disease. In April 2018 a New Jersey jury returned a \$37 million verdict in compensatory damages and \$80 million in punitive damages against Johnson & Johnson. It was determined that talc baby powder contained asbestos.

There is evidence that many companies withheld internal corporate documents of the dangers of asbestos but did nothing to share that knowledge with the public. Some companies have been successfully sued for willfully withholding information with blatant disregard for human safety.

About the Author

James A. Johnson is an accomplished trial law firm concentrating on serious personal injury and insurance coverage under the commercial general liability policy, sports & entertainment law and federal crimes. Jim is an active member of the Michigan, Massachusetts, Texas and Federal Court bars. He can be reached at www.JamesAJohnsonEsq.com

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Endnotes

- 1 <https://www.maacenter.org/mesothelioma> (last visited 8-7-19).
- 2 <https://www.health.ny.gov/statistics/chac/general/g78.htm> (last visited 8-7-19).
- 3 https://www.asbestos.com/search/?query=michigan&search_nonce=4af2678aa5 (last visited 8-7-19)
- 4 <https://www.asbestos.com/states/texas> (last visited 8-7-19)

Helpful Asbestos Resources

- Michigan: <https://www.asbestos.com/states/michigan>
Michigan ranks 10th in U. S. for mesothelioma & asbestos deaths. (last visited 8-7-19).
- Texas: <https://www.asbestos.com/states/texas> (last visited 8-7-19)
- Outrageous Misconduct: The Asbestos Industry on Trial, Paul Brodeur, 1985
- Fatal Deception: The Terrifying True Story of How Asbestos Is Killing America, Michael Bowker 2003.
- An Air That Still Kills: How a Montana Town's Asbestos Tragedy Is Spreading Nationwide, Andrew Schneider and David McCumber 2016
- Meso Foundation www.curmeso.org
- Pleural Mesothelioma Claims Center <https://www.pleuralmesothelioma.com>



CIVIL NEW
RULES

DISCOVERY

Michigan's new civil discovery rules become effective January 1, 2020.

Information & resources at michbar.org/civildiscovery

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