NOTE

ASBESTOS LAWSUITS IN RUSSIA: BRING ONE IF YOU CAN

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I. INTRODUCTION

Once known as a miracle material used by emperors and priests to entertain the crowds with its nonflammable qualities, asbestos is now known as a toxic material that causes cancer. Despite asbestos’ ill fame, the market for the toxic material keeps booming, especially in the developing countries and emerging markets. The health considerations of asbestos exposure tend to be overlooked due to the durability and the cost-effectiveness of the material. What also tends to be overlooked is the ability of the people whose health has been compromised to recover their damages in court.

This Note explores the realities of asbestos litigation in the Russian Federation. Russia is the world’s largest producer of asbestos, producing almost fifty percent of global asbestos output. Two Russian corporations—UralAsbest and Orenburg Minerals—are responsible for the production of over one million tons of asbestos per year. Russia exports approximately $100 million worth of asbestos annually, which makes it one of the key industries in the country. Russia is also the world’s third largest consumer of asbestos-containing products. In

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1 History of Asbestos Use, MESOTHELIOMA CANCER ALLIANCE, http://www.mesothelioma.com/asbestos-cancer/asbestos-history.htm (last visited Jan. 12, 2013). “Legend has it that an early Roman emperor used to marvel at the fact that he could throw his asbestos tablecloth into the fire after meals and it would emerge clean and unscathed.” Id.

2 Khrizotilovyĭ Asbest—Mify i Real’nost’ [Chrysotile Asbestos—Myths and Realities], ECOACCORD.ORG (Mar. 2009), http://www.ecoaccord.org/pop/doc/asbest.doc. Another legend has it that around 1300 B.C., Chinese and Indian priests wore clothes made from asbestos threads, in which they could enter into and emerge from the fire without being burnt, to the astonishment of the crowds. Id.

3 RICHARD DOLL & JULIAN PETO, HEALTH AND SAFETY COMMISSION, EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2 (1985).


5 Id.


7 Id.

8 Khrizotilovyĭ Asbest—Mify i Real’nost’, supra note 2; LaDou, supra note 4.

9 Shleynov, supra note 6.
2007 alone, Russia consumed more than 333,000 tons of asbestos.\(^\text{10}\) Not surprisingly, the asbestos industry is strongly backed by the Russian government, and the opposition at the grass-roots level is close to nonexistent.\(^\text{11}\)

High rates of production and consumption of asbestos in Russia naturally translate into high rates of asbestos-related illnesses and deaths; the annual asbestos-related death toll reached 10,400 in 2005.\(^\text{12}\) Despite this fact, asbestos claims remain un-litigated in Russia. There is no reliable record of any asbestos cases being brought to court,\(^\text{13}\) nor is there any record of asbestos victims having received relief through the court system during the last two decades.\(^\text{14}\) The fact that the key dispute resolution forum—the court—remains unused by the victims of asbestos exposure raises a crucial and somewhat overlooked issue: are there particular obstacles that deter potential asbestos litigants from seeking redress via the Russian court system? And, if the answer to this question is in the affirmative, what can be done to overcome these obstacles?

This Note will address both issues. It will argue that the unique combination of socioeconomic and legal factors deters Russian asbestos victims from bringing their claims to court. After a brief discussion of the current global asbestos situation in Part II, Part III will focus on the asbestos situation in Russia. It will discuss current trends in the production, export and usage of the toxic material, as well as the economic, political and social significance of the industry. It will argue that the duopolistic nature of the industry, combined with unfaltering government support and lack of regulatory action, creates an

\(^{10}\) Id.


\(^{13}\) Carlos Bianchi et al., Malignant Mesothelioma in Central and Eastern Europe, ACTA MEDICA CROATICA 161 (2000). Not only is there no record of any asbestos case being brought to court, there is no official record as to the levels of asbestosis and mesothelioma. Id.

\(^{14}\) ALEKSANDR TRANIN, INSTITUTE OF STATE AND LAW RUSSIAN ACADEMY OF SCIENCES, ÊKOLOGICHESKI NEBLAGOPOLUCHNYE TERRITORIE: PONIATIE, ZAKONODATEL’STVO, PRAKTIKA [Areas of Ecological Concern: Concepts, Legislation, Practice] (2012), available at http://www.igpran.ru/public/articles/TraninA.2012.pdf. Indeed, the latency of environmental litigation is staggering—only 1% to 4% of cases are filed in court. Id. As Dr. Brinchuk notes, even though the number of environmental violations in Russia is on the rise, the number of cases litigated is decreasing rapidly, which is partly caused by the current state of environmental and procedural law. Id.
environment in which tort law becomes the only institution capable of providing relief for asbestos victims. Part IV will analyze the present state of civil litigation in Russia, concentrating on toxic torts, and asbestos claims in particular. It will highlight particular structural obstacles, such as: uncertainty surrounding the nature of recoverable harm and plaintiff’s standing; stringent causation requirements; the high cost of litigation; and the issue of limited redress available for potential litigants. Part V will discuss the possible adjustments to the civil process in Russia. It will provide potential avenues for reform to ensure that the victims in Russia are able to avail themselves of the process of justice.

II. ASBESTOS AROUND THE WORLD

A. Asbestos: Health Dangers

The term “asbestos” generally refers to a group of naturally occurring silicate fibrous minerals. Due to their fibrous nature, the minerals can be separated into threads, which are highly resistant to heat, fire and chemical reactions and do not conduct electricity. Due to its qualities, asbestos has been widely used in the building and construction industries, as well as in cementing, shipbuilding and automotive manufacturing.

Asbestos fibers are easily inhaled when a person is exposed to the material in its friable form, or when non-friable asbestos-containing material is deconstructed. Such exposure to asbestos fibers can lead to development of asbestosis, lung cancer, mesothelioma, pleural plaques, pleural thickening and effusions. The social groups at risk of asbestos exposure are diverse. Naturally, asbestos miners and mining communities are at the greatest risk from asbestos-related diseases due

18 Id.
19 Term “friable asbestos-containing” material refers to the material containing more than one percent of asbestos that, when dry, can be crumbled, pulverized or reduced to powder by hand pressure. National Emission Standard for Asbestos, 40 C.F.R. § 61.141 (2012). “Non-friable” material does not possess these qualities. Id.
20 DOLL & PETO, supra note 3, at 2-3.
21 Asbestos: Elimination of Asbestos-Related Diseases, supra note 16.
to their continuous exposure to the material in its friable form. General industry employees, construction industry employees, and maritime employees are also placed at high risk of exposure when performing renovation or demolition of asbestos-containing objects. There is evidence that family members of workers exposed to asbestos also face an increased risk of developing asbestos-related diseases. Considering the fact that the natural deposits of asbestos as well as asbestos-containing products are found around the world, it becomes apparent that the health risks associated with asbestos exposure have a global impact.

B. International Regulation of the Asbestos Industry

The health dangers inherent to asbestos exposure present a cross-border issue that could not go unnoticed by the international regulatory agencies and organization. As early as 1986, the International Labor Organization (ILO) presented ILO Asbestos Convention No. 162 (ILO C-162) that provided measures to be taken for the prevention, control, and protection of workers against health hazards due to occupational exposure to asbestos. The countries that ratified the ILO C-162 are responsible for enacting domestic laws that should provide for appropriate penalties to ensure effective compliance with the ILO C-162’s provisions, and should be secured by an adequate system of inspection. For instance, employers are required to monitor the working environment and keep a record of such monitoring available upon employee’s request. The ILO C-162 is binding on the states that ratified it.

The ILO C-162 addressed the workers’ health concerns associated with the production of asbestos and provided guidance for the
“controlled use” of the material. 32 It was apparent, however, that many countries that did not produce asbestos (and which consequently were not parties to the ILO C-162) nonetheless imported asbestos and other toxic materials without necessarily being informed about the adverse health effects of the materials by the suppliers. 33 Such unrestricted imports resulted in high rates of secondary occupational and non-occupational exposure to the toxic materials. 34

To ameliorate the situation, the Rotterdam Convention was established in 1998 and became effective in 2004. 35 The aim of the Convention is to ensure the Prior Informed Consent (PIC) of countries importing various hazardous chemicals, and to promote importing countries’ right to know by providing appropriate information about environmental hazards. 36 Despite its noble aim, the Rotterdam Convention failed to ameliorate the issue of unrestricted asbestos imports due to one core limitation: as of today, asbestos is not one of the substances covered by the Convention. 37 The latest attempt to list asbestos as an Annex III chemical failed in June 2011, when, during the fifth meeting of the Conference of the Parties to Rotterdam Convention, the state parties failed to reach an agreement on the matter. 38

C. Current Global Trends in Asbestos Production and Consumption

Notwithstanding a widespread knowledge of the dangers of
asbestos exposure and subsequent regulatory attempts, people around the globe continue to suffer from asbestos exposure’s adverse consequences. The World Health Organization estimates that 107,000 people die every year globally because of occupational exposure to asbestos.39 One of every three deaths caused by occupational cancer is presumably caused by exposure to asbestos.40 Some commentators argue that the current situation has reached a state of global epidemic.41 It is estimated that cancer caused by exposure to asbestos may take the lives of as many as ten million people before asbestos is banned worldwide and the exposure is brought to an end.42

Despite the gloomy forecasts, many countries have already taken steps towards the prevention of asbestos exposure. For example, the United States has a long history of asbestos regulation. As early as the 1970s, the U.S. Consumer Product Safety Commission banned the use of asbestos in wallboard patching compounds and gas fireplaces.43 In 1989, the Environmental Protection Agency (EPA) issued a final rule banning most asbestos-containing products.44 This rule, however, was modified by a decision of the United States Court of Appeals for the Fifth Circuit in Corrosion Proof Fitting v. EPA,45 in which the court held that the EPA failed to present “substantial evidence” to justify the complete ban.46 Following the Corrosion Proof Fitting decision, only flooring felt, rollboard and specialty paper remained banned.47 Despite the EPA’s rule overturn, numerous phase-out regulations remained in place.48 As a result, the current production and consumption of asbestos in the United States is close to null.49

The European Union (EU) followed in the footsteps of the United States. In 1999, the Commission of the European Communities adopted a directive that required all EU members to ban the utilization of

39 Asbestos: Elimination of Asbestos-Related Diseases, supra note 16.
41 LaDou, supra note 4, at 285.
42 Id.
44 Id.
45 Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991).
47 Asbestos Ban and Phase Out Regulations in the United States, supra note 43.
48 Id.
49 Id.
asbestos starting in the year 2005. In 2003, the Commission adopted an additional directive that imposed limitations on the extraction of asbestos and the manufacture and processing of asbestos products. As a result of these legislative efforts, on January 1, 2005, the effective prohibition of production and distribution of asbestos went into force throughout all member states. Despite the prohibition, asbestos remains the primary carcinogenic toxin affecting European workers, second only to tobacco as an environmental source of cancer.

As restrictions were imposed on asbestos consumption in developed countries, new markets mushroomed in developing economies in Asia: India, Pakistan, Indonesia and Thailand have shown increases in sales of asbestos-containing products. Within the region, only Japan and South Korea have stopped use of the material.

Similar developments have taken place in Africa, Latin America, and Eastern Europe. In Africa, South Africa is one of the few African countries that have recently imposed an absolute ban on asbestos, Zimbabwe, however, is set to reopen the Shabanie-Mashava mine, which holds such vast amounts of raw asbestos that it contains enough material to last for twenty years of continuous mining. In Latin America, only Chile has completely banned asbestos, whereas Brazil remains one of the world’s largest producers and consumers of asbestos. In Eastern Europe, Kyrgyzstan, Kazakhstan, Belarus, and Ukraine are developing their markets for asbestos, while the Russian Federation remains the world’s incessant leader in both production and consumption of the toxic material. Interestingly enough, many of the

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53 Id. at 6.
54 Id. at 9.
58 KAZAN-ALLEN, supra note 52, at 10.
59 LaDou, supra note 4, at 288.
60 Khrizotilovyĭ Asbest—Mify i Real’nost’, supra note 2; LaDou, supra note 4, at 288.
pro-asbestos countries that have ratified ILO C-162\textsuperscript{61} continue to purposefully misuse ILO C-162’s “controlled use” provisions as an argument against the complete ban of asbestos.\textsuperscript{62}

This brief overview of the global asbestos industry presents a clear picture. The production and consumption of asbestos has not decreased, but rather has simply shifted from developed to developing economies.\textsuperscript{63} While developed countries, which subject the asbestos industry to heavy administrative regulation, are moving towards a complete \textit{de jure} or \textit{de facto} ban on the production and consumption of asbestos, less developed countries, where the industry is either under-regulated or completely unregulated, continue to produce and consume the toxic material at an increasing rate.\textsuperscript{64} The proposition that “as countries gain in industrial affluence, their hazardous industries migrate to poorer neighboring states”\textsuperscript{65} once again has been proven to be true, this time in the context of the asbestos industry worldwide.

III. ASBESTOS IN RUSSIA

Russia is an example of a country with a booming asbestos market, both in regard to the demand and the supply sides.\textsuperscript{66} Russia leads the planet in asbestos production.\textsuperscript{67} In 2008, Russia produced more than one million tons of asbestos,\textsuperscript{68} almost fifty percent of the world supply, and more than three times that of the next largest producer, China.\textsuperscript{69} Orenburg Minerals is Russia’s largest asbestos producer.\textsuperscript{70} It mines


\textsuperscript{62} KAZAN-ALLEN, supra note 52, at 10. Indeed, in 2006, the ILO adopted a Resolution that called for the elimination of future use of asbestos. The 2006 ILO Resolution emphasized that the ILO C-162 should not be used as a justification for continued use of asbestos, even if the countries have enacted the required national laws that regulate the industry. The ILO Position on Safety in the Use of Asbestos, supra note 27, ¶ 4.

\textsuperscript{63} LaDou, supra note 4, at 287.

\textsuperscript{64} Id.

\textsuperscript{65} Id. at 289. See also Ken Takahashi & Antti Karjalainen, A Cross-Country Comparative Overview of the Asbestos Situation in Ten Asian Countries, 9 INT’L J. OCCUP. ENVTL. HEALTH 244 (2003) (highlighting that wealthy industrialized countries show a steady decrease in asbestos use, whereas poorer developing Asian countries show a significant increase).

\textsuperscript{66} Shleynov, supra note 6.

\textsuperscript{67} Mesothelioma & Asbestos Worldwide, supra note 12.

\textsuperscript{68} Id.

\textsuperscript{69} Shleynov, supra note 6.

\textsuperscript{70} Id.
more than 500,000 tons of chrysotile (i.e., white asbestos) a year, and its
deposits hold enough asbestos to sustain this rate of production for at
least another fifty years.71 Another asbestos behemoth is Uralasbest.72
It employs 6,600 people and produces forty-five percent of Russia’s
chrysotile output.73

Not surprisingly, Russia is the world’s largest exporter of the toxic
mineral.74 It exports more asbestos than the next four top exporting
countries combined.75 In 2004, the total revenues derived from export
of asbestos exceeded $100 million.76 Uralasbest exports seventy-eight
percent of its commodity output.77 The precise export data for
Orenburg Minerals is unavailable, but local government officials have
reported that Orenburg Minerals has increased its exports by 4.7 times
in 2009.78

Russia is also one of the world’s largest consumers of asbestos.79
It is the world’s third-largest consumer, trailing only China and India.80
In 2007, Russia consumed more than 333,000 tons of asbestos.81
Russia’s asbestos is used in roofing materials, automobile brakes and
insulation.82 Almost 60,000 miles of the country’s water pipes are lined
with asbestos cement.83

According to some sources, the annual asbestos-related death toll
in Russia reached 10,400 in 2005.84 However, the exact data on
mesothelioma and asbestosis epidemiology is scarcely known due to the
lack of medical track records.85 Despite the high death toll and the
apparent dangers associated with the use of asbestos, the asbestos
mining companies do not appear to have suffered any loss of status.86

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71 Id.
72 Id.
23, 2012).
74 Shleynov, supra note 6.
75 Id.
76 Khrizotilovyj Asbest—Mify i Real’nost’, supra note 2.
77 Enterprise Today, supra note 73.
78 Aleksei Chernyshëv Provël Zasedanii po Preduprezhdenniu Negativnogo Vozdeĭstviia na
Ėkonomiku Orenburž'ia [Aleksy Chernyshov Held Meeting to Prevent Negative Impacts on the
79 Mesothelioma & Asbestos Worldwide, supra note 12.
80 Id.
81 Khrizotilovyj Asbest—Mify i Real’nost’, supra note 2.
82 Mesothelioma & Asbestos Worldwide, supra note 12.
83 Shleynov, supra note 6.
84 Mesothelioma & Asbestos Worldwide, supra note 12.
85 BIANCHI & BIANCHI, supra note 40.
86 Shleynov, supra note 6.
This fact can be partly attributed to the economic significance of the asbestos industry. It is one of the most profitable industries in the Russian economy, generating close to $800 million per year.\textsuperscript{87} It is also one of the key job-creating industries in Russia.\textsuperscript{88} The significance of the market sector is particularly evident in the Ural region of the country, where asbestos is seen as a “linchpin industry.”\textsuperscript{89} For example, the town of Asbest, a so-called “mono-city,” was founded specifically to staff the UralAsbest mining factory.\textsuperscript{90} Today, more than seventy percent of the town’s population is employed in the asbestos mining industry.\textsuperscript{91} Considering the fact that asbestos is the only industry currently developed in that location, banning or even capping the industry is likely to result in significant economic damage to the whole region.\textsuperscript{92}

The effect of the geographical monopoly of asbestos mining companies is further amplified by the duopolistic structure of the industry. UralAsbest and Orenburg Minerals are the only two companies involved in the mining of asbestos in Russia.\textsuperscript{93} The companies’ explicit cooperative strategy,\textsuperscript{94} combined with the lack of regulatory and administrative oversight, results in the companies’ unlimited bargaining power, which in turn leads to the companies’ complete control of the Russian market for asbestos.\textsuperscript{95}

Some commentators argue that the prolificacy of the asbestos industry in Russia is partly due to unwavering government support.\textsuperscript{96} In 2009, Vladimir Putin allegedly promised to support Russian producers of asbestos, especially in times of international political pressure generated by the growing anti-asbestos movement.\textsuperscript{97} A year later,
during the first World Social Security Forum in Moscow, Viktor Ivanov, the head of the Chrysotile Association, stated that “‘it’s just a PR campaign when they say that asbestos can kill.” 98 Yevgeny Kovalevsky, a delegate from the Russian Academy of Medical Sciences, informed the public that, for the general population, there are not significant risks, and that he has not seen a single scientific study that shows the need for a ban of asbestos. 99 As Carl Cranor, a distinguished professor of philosophy and a faculty member of the Environmental Toxicology Graduate Program at the University of California, Riverside suggests, such beliefs in the “safety” of the substance tend to result in “under-regulation” of the industry and under-compensations of the potential litigants. 100 Thus, the legislative and procedural mistakes resulting from such beliefs impose extra costs on the victims suffering from the toxicity of the substance. 101

The situation is further complicated by the pro-asbestos propaganda espoused by the Russian asbestos lobbying group, the Chrysotile Association, which is part of an international network that promotes the “controlled” use of the toxic material. 102 The Chrysotile Association’s message is simple and consistent: white asbestos (i.e., chrysotile) is less dangerous than other forms of asbestos and may be safer than the substitute materials. 103 Russian scientists endorse the message; they state that the EU ban is unnecessary and that a worldwide ban would be a direct attack on Russian industry and jobs. 104 Any opposition to the use of asbestos is simply labeled as “deliberate

98 Asbestos Alert, supra note 11.
99 Id.
101 Id.
102 Shleynov, supra note 6.
103 Id. The message is pervasive: not only is it espoused and reiterated by the federal and local government, but there are also printed “Asbestos Saves Lives” brochures (in Russian as well as in English). Walker, supra note 90. In addition, the Russian Chrysotile Association publishes a periodic newsletter called “Chrysotile Today,” which is designed to explain the benefits of the use of asbestos to the public. Recent front-page stories include: “Yes to Asbestos;” “Affordable Housing: Chrysotile Will Help;” “Support from Above: Vladimir Putin for Domestic Producers;” and “For Asbestos: the Government Will Show Support to Mono-cities.” Chrysotile Today Newsletter, CHRYSOTILE.RU, ASSOCIATION (Russ.), available at http://chrysotile.ru/ru/site/index/newspaper (last updated Sept. 4, 2013).
misinformation” and “Western propaganda.”

This peculiar combination of factors—the economic significance of the asbestos industry, the strong political support, and the pro-asbestos social propaganda—creates an unbalanced and unregulated playing field where the two companies backed by the government define the rules of the game. In a situation like this, where regulatory action is scarce or nonexistent and the political pressure is strong, tort law is the only social institution that can provide relief for the victims of toxic exposure to asbestos.

IV. ASBESTOS LITIGATION IN RUSSIA

Tort law establishes public standards of conduct that must be privately enforced by the injured parties. The threat of courts’ adverse decisions is a major way in which the tort law seeks to control exposure to toxic substances. Since tort law “operates on the basis of private incentives largely immune to political control,” it (at least in theory) provides victims of exposure to a toxic material with an opportunity to obtain relief despite possible contravening political pressures.

In Russia, the right to bring a claim in the environmental context stems from Article 42 of Russian Constitution of 1993, which granted Russian constituents “the right to a favorable environment, reliable information about its condition and to compensation for damage caused to his health or property by ecological violations.”

105 UralAsbest’s website states that in Western Europe and a number of other countries, the mass media has created an “atmosphere close to a psychosis” in relation to asbestos, and that even though “the hysteria on chrysotile-asbestos still grows” it “would be silly for UralAsbest to refuse him.” V.A. Kochelaev, Causes and Effects of Anti-asbestine Campaign, Ural Asbest, http://www.uralasbest.ru/ve.php?fp=7 (last visited Sept. 27, 2013). Another mass media source “explains” that anti-asbestos campaigns are initiated and supported by the countries that do not have access to natural deposits of asbestos and which consider asbestos to be “an inconvenient competition” to their well-developed metal and chemical industries. Asbest—Kachestvennye Razlichiia [Asbestos—A Qualitative Difference], STROI-MOS.RU (Nov. 2, 2012, 11:52 AM), http://www.stroi-mos.ru/index.php?ukey=news&blog_id=372&PHPSESSID=743137800f0424eaa51e0b4096f71a14.

106 Rosenberg, supra note 15, at 1695.

107 CRANOR, supra note 100, at 5.

108 Id.

109 Rosenberg, supra note 15, at 1704.

110 Id.

111 Elizabeth Barrett Ristroph & Ilya Fedyaev, Obstacles to Environmental Litigation in Russia and the Potential for Private Actions, 29(2) ENVIRONS 221, 224 (2006).

112 KONSTITUTSHA ROSSIĬSKOĬ FEDERATSHI [KONST. RF] [CONSTITUTION] art. 42 (Russ.).
Article 42 seems to provide broad relief, neither the Russian
government nor Russian citizens have been doing much to vindicate
those rights.\footnote{Ristroph & Fedyaev, supra note 111, at 225.} High litigation costs, minimal damage awards, standing
issues, an almost insurmountable burden of proof, and a lack of \textit{stare decisis} all deter victims from bringing their claims to court.\footnote{Id. at 227-43.}

\textbf{A. Pre-trial Stage: Recoverable Harm and the Issue of Standing}

Probably the greatest deterrent to tort litigation is the uncertainty as
to which harm is recoverable by means of the litigation process. Under
Article 79 of the 2002 Environmental Protection Statute, “all harm to a
person shall be recovered”;\footnote{Zakon RSFSR ob Okhrane Okruzhayusheĭ Sredy [Environmental Protection Statute],
ROSSIISKAIA GAZETA [ROS. GAZ.] Jan. 10, 2002.} however, the statute does not provide any
working definition of “all harm.”\footnote{Ristroph & Fedyaev, supra note 111, at 226.} Plaintiffs must rely on the Civil
Code to determine what “all harm” entails, but they cannot rely on
precedent to clarify the Civil Code, since Russia is a civil law state
where courts are not bound by the \textit{stare decisis} principle.\footnote{Id.}
Without prior knowledge of the type of harm for which relief could be granted, it
is almost impossible for the potential plaintiffs and their attorneys to
estimate the feasibility of the future lawsuit.\footnote{THOMAS WILLGING, FEDERAL JUDICIAL CENTER, \textsc{TRENDS IN ASBESTOS LITIGATION} 13 (1987).} Article 79 of the 2002
Environmental Protection Statute simply fails to provide the necessary
information needed for the potential litigant to make an informed
decision whether to commence the litigation.

Uncertainty as to the recoverable type of harm is not the only
problem potential toxic tort litigants and their families have to deal with
during the pre-trial procedure in Russian courts. Another challenge
litigants face is the uncertainty surrounding the issue of who has
standing to bring a suit. Under Article 3 of the Code of Civil Procedure,
only interested parties that are injured (or their guardians) have a right
to file a toxic tort claim. The statute does not provide for protocol when a person exposed to asbestos dies before the case is filed in court, technically precluding relatives of the deceased victim from bringing a toxic tort claim due to the lack of standing. Article 3 of the Code of Civil Procedure also fails to address the situation where a plaintiff dies during the trial, making the issue of standing even murkier.

B. Burden of Proof: Causation

Even if a plaintiff is able to establish recoverable harm and satisfy the standing requirements, there is still a need to prove the essential elements of a tort claim: duty, breach, causation, and damages. The causation element presents the greatest challenge by far. The Russian courts are instructed to pay special attention to “causation-in-fact.”

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119 Ristroph & Fedyaev, supra note 111, at 227. Before the 2002 law reform, members of the injured family, the prosecutor, the authorized state body, and even non-governmental organizations had standing to bring such a claim without prior authorization by the victim.


121 Death of a plaintiff during litigation is not an unlikely scenario in the context of asbestos disease claims. For instance, the average life expectancy following the diagnosis of mesothelioma is about one year. Mesothelioma Life Expectancy, ASBESTOS.COM, http://www.asbestos.com/mesothelioma/life-expectancy.php (last visited Nov. 2, 2012). Given the novelty of asbestos claims in Russia, there is no data available as to the average time of asbestos claim resolution; however, if Chernobyl toxic torts cases are any indication, it may take as long as five years from the moment of filing until recovery. See, e.g., Burdov v. Russia, 2002-III Eur. Ct. H.R. 317.

122 Article 56.1 of the Code of Civil Procedure places burden of proof on the party bringing a claim. Each party must prove the circumstances relied on as grounds for their claims and objections, unless otherwise provided by federal law.

123 Postanovlenie Plenuma Verkhovnogo Suda RF o Prakteike Primenenia Sudami Zakonodatel’stva ob Otvetstvennosti za Ekologicheskie Pravonarusheinia [of the Russian Federation Supreme Court Plenary Ruling on Practice of Implementation by Courts of Legislation on Responsibility for Environmental Infringements], BIULETN’ VERKHOVNOGO SUDA RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 1998, No. 15, ¶ 2. Some commentators argue that the attention is misplaced; since the asbestos cases are ultimately based on an individual worker’s personal injuries claim, “they demand individual attention at the point of allocation of damages and, to a lesser extent, in the proof of causation-in-fact.” WILLGING, supra note 118, at 13.
Although the Code itself is silent on the standard of causation, some legal commentators argue that only the showing of direct causation between a defendant’s activities and the plaintiff’s damages will suffice.\textsuperscript{124} To establish direct causation, the plaintiff must provide each of the following: (1) proof of contamination of a certain area that amounts to violation of permissible levels of harmful substances; (2) a statement of medical examination by authorized medical professional confirming the existence of a health disorder as a result of environmental contamination; and (3) expert testimony showing the causation between the contamination and the health disorder of the injured party.\textsuperscript{125}

Establishing causation-in-fact is a troublesome task for a plaintiff.\textsuperscript{126} To make a showing that the actions of the particular defendant were a contributing cause of the plaintiff’s specific injuries is burdensome and sometimes an impossible task to complete.\textsuperscript{127} Since asbestos-related diseases may have multiple other, non-asbestos-related causes, the provable exposure to a specific product at a specific worksite might be insubstantial when there may be exposure to other disease-triggering substances.\textsuperscript{128} Moreover, the problem of providing sufficient evidence is further exacerbated where plaintiffs are trying to bring an unconventional cause of action, such as an asbestos claim in Russia. The required evidence, such as epidemiological and medical studies, may not be fully developed\textsuperscript{129} or may be simply unavailable.\textsuperscript{130}
Plaintiffs also cannot avail themselves of even a scarce number of precedents due to lack of *stare decisis* in the civil law system.

“[D]isputes over specific causation and the nature and extent of damages are enough to generate triable issues of fact.”\(^{131}\) The Russian judicial system does not provide the right for a trial by jury in civil cases.\(^{132}\) Russian judges, therefore, have complete control over the final disposition on the factual issue.\(^{133}\) As one commentator notes, this makes the complexity of the cases a double-edged sword: “a bright and energetic judge can parse difficult issues and evidence,” while a less patient judge, who is “unwilling to spend the time needed to comprehend complex issues can turn a toxic tort case into a litigation nightmare.”\(^{134}\) The Civil Procedure Code further amplifies the uncertainty of the case outcome by directing the judge to evaluate the evidence “on the basis of [the judge’s] own internal convictions.”\(^{135}\)

### C. Award of Damages and Compensation

One of the goals of tort law is to reimburse the plaintiff’s actual harm or loss by awarding damages—monetary payments intended to compensate for a legally recognized wrong.\(^{136}\) The plaintiff’s expected payoff from the lawsuit is based not only on the plaintiff’s knowledge of the true damage but also on the plaintiff’s estimate of the court’s error in measuring that damage.\(^{137}\) Thus, the expected payoff from pressing a claim is affected by legal rules that specify the basis for computing damages.\(^{138}\)

Prior to the 2002 reform, the Environmental Protection Statute

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\(^{130}\) There were at least twenty-seven epidemiological studies conducted in the U.S. between 1980 and 2001 addressing the issues of asbestos exposure and asbestos-related diseases. *See American Acad. of Actuaries, Overview of Asbestos Issues and Trends* 30-31 (2001). In contrast, as of 2001, even a record of the actual rates of mesothelioma was unavailable for Russian plaintiffs, due to factual data concealment. *See Bianchi et al., supra note 13;* LaDou, *supra* note 4.

\(^{131}\) WILLGING, *supra* note 118, at 11.

\(^{132}\) The Constitution of the Russian Federation stipulates trial by jury only in a limited number of criminal cases, such as murder, kidnapping, rape, and human trafficking. *Richard J. Terrill, World Criminal Justice Systems: A Survey* 439 (7th ed. 2009).


\(^{134}\) *Id.*

\(^{135}\) ГРАЖДАНСКИЙ ПРОЦЕССУАЛЬНЫЙ КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ [ГПК РФ] [Civil Procedural Code] art. 67.1 (Russ.).


provided a non-exhaustive list of recoverable damages, to which plaintiffs and their counsel could refer while estimating the financial feasibility of a potential lawsuit. The reformed version of the statute, however, disposes of the list and grants the judge the authority to interpret the “harm must be compensated in full” provision. Although Article 15 of the Civil Code attempts to channel the judge’s decision-making by providing a working definition of “damages,” it still leaves plenty of room for judges’ discretion.

Even more discretion is allowed with respect to moral damages. Article 1101 of the Civil Code expressly states that:

The amount of the compensation for the moral damage shall be determined by a court of law depending on the nature of physical and moral suffering caused to the victim, and also on the degree of guilt of the inflictor of damage in cases when guilt is a ground for the redress of injury.

It is up to the judge to determine the nature of the moral suffering and the degree of guilt involved—categories inherently prone to subjective and arbitrary interpretation. Russian courts tend to disfavor awards for moral damages, and even when they do award such damages, the sum is usually low, anywhere between $35 and $3,500.

The judicial reluctance to grant meaningful awards, combined with the vast discretion awarded to the judges, creates a high degree of uncertainty as to the amount of the expected payoff. This uncertainty acts as a significant barrier to the development of toxic tort litigation in Russia. Another hurdle is a lack of recognition of punitive damages by Russian legislation. This further reduces the incentive of a

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139 The recoverable damages included (1) loss of capacity to work; (2) costs of medical treatment; (3) lost professional opportunities; (4) moving costs; (5) lifestyle changes; and (6) moral damages (akin to damages for pain and suffering). See Federal’nyi Zakon RF ob Okhrane Okruzhaiushcheĭ Sredu [Federal Law of the Russian Federation on Environmental Protection], SOBRANIE ZAKONODATEL’STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1991, No. 2060-1, art. 89.2.
140 Ristroph & Fedyaev, supra note 111, at 229.
141 Id. at 230. Article 15 of the Civil Code defines “damages” as “the expenses, which the person, whose right has been violated, made or will have to make to restore the violated right, the loss or the damage done to his property (the compensatory damage), and . . . missed profit . . .” GRAZHDANSKĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] art. 15 (Russ.).
142 Id. art. 1101(2) (emphasis supplied).
143 Id.
144 Ristroph & Fedyaev, supra note 111, at 230.
145 Id. at 245.
146 Id.
plaintiff to engage in litigation, due to the unprofitability of the whole affair.\footnote{Ristroph & Fedyaev, supra note 111, at 249.}

D. Costs of Litigation

“A rationally self-interested person decides whether to press a claim by asking whether the cost of going forward exceeds the expected payoff.”\footnote{Cooter & Rubinfeld, supra note 138, at 536.} As previously discussed, the payoff side of the equation is highly unpredictable in the context of Russian courts. An analysis of relevant statutes suggests that the same is true for the costs of litigation.

Article 88.1 of the Civil Procedure Code defines two types of expenses in connection with civil litigation: the state fee and the costs of actual litigation.\footnote{GRAZHDANSKIĬ PROTSESSUAL’NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] art. 88.1 (Russ.).} The amount of the state fee depends upon the size and nature of the claim brought, as prescribed by Chapter 25.3 of the Tax Code.\footnote{NALOGOVĬ KODEKS ROSSIĬSKOĬ FEDERATSII [NK RF] [Tax Code] art. 333.19(1) (Russ.).} The state fee is a sunk cost: once paid, it is not reimbursed, regardless of the outcome of the case.\footnote{Id. art. 333.20(1)(6).} In many instances, the state fee is not determined by the nature of the claim, but is calculated as a percentage of the monetary value of the damage claimed.\footnote{Id. arts. 333.19, 333.20.} the greater the damage, the greater the initial monetary outlay for the plaintiff. This fact, combined with the general judicial reluctance to grant substantial damages awards,\footnote{See Ristroph & Fedyaev, supra note 111, at 245.} further tips the scale against pressing a toxic tort claim in the Russian courts.

After the state fee is paid, the plaintiff still needs to cover the costs of litigation. Article 94 of the Civil Procedure Code defines costs of litigation as: money paid to witnesses, experts, specialists, and translators; transportation and living expenses of any third parties involved in the litigation; attorneys’ fees; compensation for the lost time of the opposing party, in the case of a frivolous claim; and any other expense the court may appoint.\footnote{GRAZHDANSKIĬ PROTSESSUAL’NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] art. 94 (Russ.).} As with the award of damages, judges are free to employ their personal judgment and beliefs when
rendering case-by-case determinations of “any other expenses.” Thus, plaintiffs are placed in a position of uncertainty and are unable to make an informed decision about whether to press a potential claim.

If a plaintiff wishes to retain a witness, expert, specialist, or a permanent translator, plaintiff must provide monetary compensation based on actual time spent on litigation and the expert’s average salary. If the witness is unemployed, plaintiff still must provide compensation based on actual time spent on litigation and the minimum wage rate. In the context of a toxic tort claim, where expert testimony is legally required to show causation, the plaintiff has to bear this out-of-pocket expense without any estimate of its feasibility. The risk is further amplified by the fact that Russia is a “loser pays” jurisdiction: if the plaintiff loses the case, he or she will have to carry the burden of the litigation expenses of the winning party, as well as their own.

Undoubtedly, tort litigation is a costly endeavor in any jurisdiction. Nevertheless, states that allow for contingency fee agreements tend to be more amenable to litigants who have a legal claim but cannot otherwise afford legal services. In such jurisdictions, the plaintiff is relieved from the burden of out-of-pocket expenses, since the payment of legal fees is conditioned on the successful outcome of a case and is based on a percentage of the recovery. Russia is not such a jurisdiction. In January 2007, the Constitutional Court of the Russian Federation put an effective prohibition on contingency fees in legal services provision contracts. Even though contingency fees are ethically permissible, the Court held that the Civil Code’s “performance of certain services” does not encompass “reaching a certain result”; hence, the law does not allow for a success-based fee in

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156 Under Article 98 of the Civil Procedural Code, the loser must cover all the expenses of the winner. See also Ristroph & Fedyaev, supra note 111, at 242. If the party does not agree with such decision, the party has a right to appeal the court’s decision on fee distribution to the higher court. Id. at 242-43.

157 GRAZHDANSKII PROTVESUSSA’NYI KODEKS ROSSIISKOI FEDERATSI [GPK RF] [Civil Procedural Code] art. 95.2 (Russ.).

158 Id.

159 See Ristroph & Fedyaev, supra note 111, at 235.

160 GRAZHDANSKII PROTVESUSSA’NYI KODEKS ROSSIISKOI FEDERATSI [GPK RF] [Civil Procedural Code] arts. 98, 100 (Russ.).

161 THERESE A. CANNON, ETHICS AND PROFESSIONAL RESPONSIBILITY FOR PARALEGALS 256 (5th ed. 2008).

162 Id.

163 Maria Yaremenko, Russia, in WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE 344 (Paul G. Karlagodt ed., 2012).

164 Id.

Regardless of the outcome of the case, the “performance of certain [legal] services” has to be paid for.\footnote{Id.} This steep cost is likely to serve as an additional deterrent for the plaintiff, who is already heavily burdened with costs of state duties, expert testimonies, and evidence production.

One possible way to ameliorate this financial burden is to allow plaintiffs to pool together similar toxic tort claims and to bring a suit as a class. Indeed, in 2009, the Russian legislature amended the Arbitration Procedural Code of 2002 to include an express provision for class action lawsuits.\footnote{LINKLATERS, COLLECTIVE ACTIONS ACROSS THE GLOBE—A REVIEW 18 \[2011\]. See also Federal’nyĭ Zakon RF o Vnesenii Izmenenii v Otdel’nye Zakonodatel’nye Akty Rossii̱skoi Federatsii \[Federal Law of the Russian Federation on Amendments to Certain Legislative Acts of Russian Federation\] SOBRANIE ZAKONODATEL’STVA ROSSIÎSKOI FEDERATSII \[SZ RF\] \[Russian Federation Collection of Legislation\] 2009, No. 205-FZ, art. 46.} The scope of this procedural form, however, is very limited: it applies only to commercial relations and capital market transaction disputes; class actions are still not available for tort claims pressed in the Russian courts.\footnote{Class Action, RUSSIAN LAW ONLINE, http://www.russianlawonline.com/class-actions-russia \[last visited on Sept. 23, 2012\].} The unavailability of class action suits means that plaintiffs positioned in a similar situation cannot bring their claims together. As a result, plaintiffs cannot pool their resources and thereby take advantage of the economy of scale to minimize the costs of litigation.

The procedural fellowship, an alternative form of combined action authorized by the Civil Procedure Code, does not produce the same advantages as class action.\footnote{Ristroph & Fedyaev, supra note 111, at 248.} Even though it allows several plaintiffs to file a common suit against the same defendants, each of the plaintiffs and the defendant must act independently toward each other during the proceedings.\footnote{Id.} Although the parties can be represented by the same attorney and split the attorney’s fees, there is still a need to conduct individual discovery, provide individual evidence, and petition for individual relief based on each party’s unique damages.\footnote{Id.}
Tort Litigation in Russia: Summary

Tort law is the only institution capable of providing relief for the victims of asbestos exposure in Russia, the jurisdiction where two powerful corporations—UralAsbest and Orenburg Minerals—have complete control over the unregulated market for asbestos, and where the market duopoly is further reinforced by strong political and social support. Even though tort litigation is technically available for asbestos victims, the analysis of Russian litigation’s realities presents a less optimistic outlook.

Currently in Russia, a potential toxic tort litigant faces a high degree of uncertainty as to the feasibility of a potential lawsuit, as well as high monetary costs of litigation that are unlikely to be offset by the potential damage recovery. Hence, although a litigant is theoretically able to rely on tort law when seeking redress, a rational litigant represented by a rational attorney is practically prevented from doing so. The resulting conundrum—the situation where the only theoretically functional forum for dispute resolution is practically not available for the party seeking redress—highlights the need for reforming Russian toxic tort litigation in general, and Russian asbestos litigation in particular.

V. SUGGESTIONS FOR REFORM

The extent to which the underlying structural obstacles preclude effective asbestos litigation in Russia underscores the need for change. Although there is no “one size fits all” solution for how to facilitate and implement this change, the various approaches to asbestos litigation that have evolved globally in the recent past set out a potential framework for much-needed reform.

In many jurisdictions outside Russia, the traditional tort theories have undergone a significant adaptation to accommodate toxic tort claims in general, and asbestos claims in particular. Traditional tort doctrines imposed obstacles to recovery due to their stringent requirements for proof, causation, and injuries; those theories were stretched to accommodate the novel claims based on exposure to toxic substances. These evolutions, supplemented by abundant academic research and discussion, present a wealth of solutions that could serve...
as guidance on how to improve the state of asbestos litigation in Russia. The following sub-sections address each of the key structural obstacles discussed in Part IV and provide suggestions on how these obstacles could be overcome.

A. Pre-Trial Stage: Expanding Scope of Recoverable Harm and Standing

As a result of law reform in 2002, the Russian legislature has adopted a much narrower approach to standing: only the party who has been actually injured can bring a tort claim. Generally, the limitations created by statutory standing are “founded on concern[s] about the proper-and properly limited-role of the courts in a democratic society.” The overly broad restrictions on access to courts, however, can have negative effects on the operation of society. As in the case of asbestos victims in Russia, the increased barriers preclude equal access to justice and further marginalize citizens who already lack power and resources to avail themselves of the protection of the law.

Contrary to the developments in Russia, the current global trend is to reduce the barriers to law enforcement through citizen activism. Courts and legislatures in many countries have started to recognize that citizens and citizen groups can and should play an important role in this process. For instance, in Europe, where access to courts is statutorily regulated, parliaments have increasingly granted groups with registered interests the right to participate in legal actions related to those interests. In the United States, the statutory provisions for standing in the context of environmental litigation range from an “adversely affected” person approach to a very broad “any person/any citizen” approach. Indeed, even if a person who suffered from asbestos exposure dies without filing a suit, the decedent’s estate has standing to

176 See supra Part IV(A).
179 Id.
180 Id. at *11-*12.
181 Id.
182 Id. at *8.-*9.
183 Id. at *8.
bring a wrongful death claim and recover damages. Such widespread access to litigation is more likely to result in equal justice, without impeding any of the democratic values the standing limitations are designed to preserve.

In light of these global developments, Russian courts, as well as the legislature, should take note of different available approaches to standing and should strive to strike the right balance between the proper role of the courts and the degree of protection these courts are able to provide.

B. Causation: Improving Access to Required Information

Probably the greatest and most insurmountable obstacle in establishing causation is lack of required information. Although Russian citizens have a statutorily created right to receive frequent, trustworthy, and timely information about factors that affect human health, the nature and extent of such information is undefined, and there is no enforcement mechanism that would ensure the speedy and efficient release of that information by the government and other organizations.

Dr. Olaf Hagemeyer of the University of Aachen, Germany, suggests a possible solution for remedying such an informational vacuum. He suggests that, in order to overcome the problem of proving occupational exposure, a central register of all asbestos-exposed

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184 As recently as November 2012, the Virginia Supreme Court held that the estate of a man who, while serving in the Navy, had been exposed to asbestos in a private shipbuilding company was not barred from filing a wrongful death claim against the shipbuilder. Gibbs v. Newport News Shipbuilding & Drydock Co., 733 S.E.2d 648 (Va. 2012). See also Nathan Bass, Va. SC: Asbestos Victim’s Estate Can Sue Shipbuilder, LEGAL NEWSLINE (Nov. 8, 2012), http://legalnewsline.com/issues/asbestos/237999-va-sc-asbestos-victims-estate-can-sue-shipbuilder.

185 See BONINE, supra note 178, at *2.


187 Although section 8.4.2 of the Information, Information Technologies, and Information Protection Law expressly prohibits the limiting of access to environmental conditions information, the law does not provide for any punitive measure for failure to provide such information. Federal’nyĭ Zakon RF ob Informatissi, Informatsionnykh Tekhnologiiakh i o Zashchiche Informatissii [Federal Law of the Russian Federation on Information, Information Technologies, and Information Protection], SOBRANIE ZAKONODATEL’STVA ROSSIISKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 149-FZ, art. 8 (Russ.). Indeed, only several corporate entities and only half of regional agencies responsible for publishing the information actually publish it. Ristroph & Fedyaev, supra note 111, at 240 n.135.

188 KAZAN-ALLEN, supra note 52, at 13.
workers should be compiled. A researcher from Denmark suggests that a compulsory requirement to provide an occupational history during medical examinations would enable doctors to categorize the malignancy as an occupational-linked illness and consequently would improve the statistical record on asbestos-related diseases. Trade unions’ campaigns aimed at raising the awareness of asbestos workers, as well as of the population at large, might be a useful tool in achieving this objective: workers’ collective bargaining power is likely to provide a sufficient enforcement mechanism to ensure the timely release of the required information.

An example of effective information collection and sharing comes from the United States. At the federal level, the Occupational Safety and Health Administration (OSHA) is responsible for the health and safety of workers who may be exposed to asbestos in the workplace, while the U.S. Environmental Protection Agency (EPA) is responsible for protection of the general public. At the state level, local Departments of Health provide information about asbestos, as well as keep track of asbestos exposure and abatement. The wealth of information collected by these agencies significantly improves the efficiency of preparation for trial; comparatively, in Russia, it is almost impossible to obtain the required scientific data, while “the exchange of pretrial expert reports is the norm” in almost all of the federal districts in the United States.

Another serious obstacle with regard to causation arises from the Russian courts’ stringent interpretation of causation-in-fact. The current

189 Id. France is a real-life example of the effectiveness of such a measure. There, the main source of asbestos claims is the list of the manufacturers of products containing asbestos; currently over one thousand such sites have been listed. See LAURA SALVATORI, ALESSANDRO SANTONI & DARREN MICHAELS, ASBESTOS: THE CURRENT SITUATION IN EUROPE 11 (2003), available at http://www.actuaries.org/ASTIN/Colloquia/Berlin/Salvatori_Santoni_Michaels.pdf. This list is updated by decree each month. Id.

190 KAZAN-ALLEN, supra note 52, at 14.


194 For instance, the New York State Department of Health provides a wealth of information about asbestos for various target audiences, such as homeowners, contractors and workers involved in asbestos abatement. See Asbestos, N.Y. STATE DEP’T OF HEALTH, http://www.health.ny.gov/environmental/indoors/asbestos/index.htm (last visited Oct. 22, 2013).

195 See supra Part IV(B).

196 WILLGING, supra note 118, at 48.
tendency is to require the showing of the absence of other confounders (i.e., the absence of exposure to other factors that could have caused the same harm). 197 Professor Cranor suggests that the outcomes of tort actions should not depend on such a showing. 198 As Cranor notes, “[O]ne can always invoke unmeasured confounders to explain away observational associations.” 199 The standards of evidence typically required by the scientific community are not the only appropriate ones: less stringent standards might suffice to establish casual connections in toxic tort litigation, without sacrificing the validity of the procedure. 200

Indeed, some courts around the world have adjusted the law to reduce the heavy burden of proof. The U.S. courts, realizing the difficulty of proving causation-in-fact, have come to the aid of plaintiffs and have reduced the evidentiary burden by adopting novel theories of liability. 201 For instance, where there is no way to figure out which defendant caused which of the plaintiff’s injuries, courts might use market share liability “to make each defendant responsible for the same percentage of the damages as the percentage of market share that defendant has” within the industry. 202

This tendency to reduce the evidentiary burden put on plaintiffs is also evident in English and Canadian courts. 203 The current stance is that, where a judge is convinced that defendants who have a substantial connection to the injury are escaping liability because of plaintiffs’ inability to prove causation, the judge should not hesitate to adopt an alternative approach to the burden of proof. 204

Availability of information, and courts’ willingness to adapt to the realities of asbestos litigation and to adopt novel approaches when it comes to the burden of proof, are the two key elements that will improve the ability of Russian asbestos victims to avail themselves of the protection of the law. 205 As the discussed solutions suggest, it is not the task of the legislature alone. The government, judges, trade unions,

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197 Ristroph & Fedyaev, supra note 111, at 235; see also CRANOR, supra note 100, at 8.
198 CRANOR, supra note 100, at 8.
199 Id.
200 Id. at 82.
201 NEO J. TUYTEL, ASBESTOS LITIGATION IN BRITISH COLUMBIA: CANADA’S FIRST “MASS TOXIC TORT” *21, available at http://www.courts.state.ny.us/reporter/webdocs/asbestos.htm. Those courts have advanced at least four theories of liability: market share liability, alternative liability, concert of action, and enterprise liability. Id.
203 TUYTEL, supra note 201, at *50.
204 Id. at *52.
205 See supra Part V(B).
the medical community, and society at large all have an important stake in facilitating this change.206

C. Ensuring Award of Sufficient Damages

Potential litigants in Russia have to rely on judges’ arbitrary decisions about what constitutes a fair redress of the harm suffered.207 As to the moral harm, the litigant should not expect to receive more than $3,500.208 Punitive damages are per se not recognized and are therefore not available as a part of compensation.209

Considering the complete lack of precedent (no asbestos claim has been fully adjudicated in Russia as of yet), the likelihood of a judge with no previous exposure to asbestos litigation accurately gauging the amount of damages seems far-fetched. Even in the United States, where the history of asbestos litigation spans more than forty years,210 the courts continuously struggle to define what amounts to an adequate redress.211 Having neither a precedent nor a workable legal standard to rely upon, a Russian judge is faced with the almost insurmountable task of damage calculation, while the litigant is confronted with uncertainty, translating into reluctance to try the case.

Of course, as in the United States, Australia, and other countries with extensive histories of asbestos litigation, a workable judicial standard will develop as more cases are litigated. For now, the only option for a Russian judge faced with this novel task is to rely on other, better developed areas of law, and to try to forge the most suitable

206 Id.
207 See supra Part IV(C).
208 Id.
209 Id.
211 See, e.g., id. at 2-3. As recently as 2012, a judge reduced a $32 million verdict awarded to a plaintiff to $8 million. Matter of NYC Asbestos Litig., Dummitt v. Chesteron, No. 1090196/10, 2012 WL 3642303 at *24 (N.Y. Sup. Ct. Aug. 20, 2012). The judge noted the recent trend in asbestos cases of awarding lesser damages, citing cases where awards of $3.5 million, $4.5 million, $8 million, and $6 million were sustained. Id. at *23. Clearly, any such point of reference when deciding on the amount of damages is lacking for a Russian judge faced with the task.
The necessary adjustments should also be made with regard to redress of moral harm. Although judges in Russia are currently reluctant to award moral damages, such a stance toward the issue is not a given. Indeed, many courts around the world have started to expand their definition of the moral harm deserving of redress. For instance, due to the exceptionally lengthy latency period associated with some exposures, as with asbestos, the courts in the United States permit plaintiffs to proceed on damages theories that were unknown to tort litigation only a decade ago. Those novel theories include post-traumatic stress disorder, decreased quality of life, and emotional distress. The inclusion of any number of these novel theories into the definition of “moral harm” as adopted by Russian courts is likely to increase the chance that victims of asbestos exposure in Russia would be able to attain justice via the judicial process.

Similar adjustments are needed in the case of punitive damages. Instead of endorsing a blanket “no punitive damages” rule, Russian courts and legislatures should approach this form of relief as a tool that can punish and deter misconduct the legal system regards as heinous or egregious. The pursuit of punitive damages by private litigants can function as a partial remedy for weak administrative controls and non-existent regulation of the asbestos market in Russia. Moreover, the chance of winning punitive damages will give potential asbestos litigants “the financial incentive to invest and risk substantial resources in the investigation and prosecution of corporate wrongdoing” that otherwise goes unpunished.

A similar problem arose in Australian courts as late as the 1980s when the first asbestos cases were litigated. Courts there have adopted the approach used for calculation of damages in common law negligence claims: a plaintiff should be awarded a sum of money so as to restore him or her to the position he or she would have been in if there had been no negligence. Id. at 3.

Ristroph & Fedyaev, supra note 111, at 230.
Ellis, supra note 133, at 4-5.
Id. at 5.
Id.

Symeon Symeonides, Resolving Punitive-Damages Conflicts, 5 Y.B. PRIVATE INT’L L. 1, ¶ 2.1 (2003). For instance, courts in the United States have developed stringent tests to ensure that punitive damages are available only in the appropriate circumstances. TUTTEL, supra note 201, at 35-36. The tests enunciated by the courts include reckless disregard for the public safety or the rights of others, and flagrant indifference to unreasonable risks of harm. Id. at 36. Moreover, the U.S. Supreme Court has placed additional limitations on punitive damages based on Due Process considerations. Symeonides, supra, ¶ 3.1.

Id. ¶ 2.5.
Id.
Asbestos litigation is a costly endeavor, for the plaintiff as well as for the defendant. Although there are as yet no numbers to analyze in Russia, the statistics coming from the United States present a vivid picture. By 2000, a total of $54 billion had been spent on U.S. asbestos litigation.\textsuperscript{220} Transactional costs associated with the litigation process have consumed more than half of the total spending.\textsuperscript{221} The high cost of litigation presents a substantial obstacle for bringing the claim, especially in jurisdictions like the Russian Federation, where neither contingency fee arrangements nor class actions are available as a potential out-of-pocket cost reduction device.\textsuperscript{222}

Considering that Russia is a jurisdiction where no significant expansion of the scope of tort liability has taken place, and where the asset pool available to plaintiffs seeking redress is extremely limited, the legitimatization of the contingency fee arrangement might be the very step needed to put the mechanism of tort litigation in motion. For example, in the United States, where asbestos litigation is considered the longest-running mass tort litigation in the country’s history,\textsuperscript{223} plaintiffs’ lawyers finance virtually all claims through contingency fees.\textsuperscript{224} Although contingency fee arrangements are the subject of substantial criticism and debate,\textsuperscript{225} they might be an essential first step to encourage asbestos victims in Russia to test the unchartered waters of asbestos litigation, and to secure support and advice of Russian lawyers willing to take on a novel claim.\textsuperscript{226}

The out-of-pocket costs resulting from the current unavailability of contingency fee arrangements are further amplified by the unavailability of class action suits in the context of asbestos litigation. The procedural form of class action is designed to improve the efficiency and economy

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\item \textsuperscript{220} Stephen J. Carroll et al., Rand Institute for Civil Justice, Asbestos Litigation 93 (2005).
\item \textsuperscript{221} Id. at 95, 103. Defense transactional costs account for approximately thirty-one percent of total spending, while claimants’ transactional costs account for approximately twenty-seven percent of total spending.
\item \textsuperscript{222} See supra Part IV(D).
\item \textsuperscript{223} Carroll et al., supra note 220, at 21.
\item \textsuperscript{225} For economic analysis of effectiveness of contingency fees in the context of asbestos litigation, see id. For proposed reform on the contingency fee policy, see Michael Horowitz, Making Ethics Real, Making Ethics Work: A Proposal For Contingency Fee Reform, 44 Emory L.J. 173 (1995).
\item \textsuperscript{226} See Ristroph & Fedyaev, supra note 111, at 247.
\end{itemize}
\end{footnotesize}
of litigation. In addition to efficiency considerations, the class action serves to facilitate the spreading of litigation costs amongst numerous litigants with similar claims, the very effect that is needed to trigger the inflow of asbestos claims into Russian courts.

As was previously discussed, class actions are not unknown to Russian civil procedure. It is currently used in litigation of commercial transactions and capital market transactions disputes, so Russian judges and lawyers are familiar with this procedural device. The expansion to toxic tort law of the procedural form in its current state, however, might not result in the desired outcome. As of this writing, Russian law does not allow an individual plaintiff to opt out of a class. Once a class action suit is filed, an individual claimant who decides not to join the class is not allowed to file a separate claim against the same defendant, either during the litigation process or upon its completion. An individual claimant has no choice but to join the class and throw himself or herself upon the mercy of a judge-appointed representative plaintiff, with no guarantee of adequate representation. One commentator notes that, where judges have a wide discretion to appoint representatives, the level of corruption runs high. This, in turn, may trigger massive abuses of the procedural form, with no actual benefit to asbestos victims.

By developing a better understanding of class action as a tool designed to increase access to justice, rather than simply copying the procedural form without paying attention to its substance, Russian legislation is likely to open the door to legal actions that, otherwise, would have been uneconomical to bring. This reduction of the per-capita cost of such litigation, in turn, is likely to increase individuals’ power and willingness to enforce their private rights in court.

227 ALBA CONTE & HERBERT NEWBERG, 1 NEWBERG ON CLASS ACTIONS § 1:6 n.2 (4th ed. 2002) (citing Gen. Tel. Co. v. Falcon, 457 U.S. 147, 159 (1982); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)). The American courts appear to have adopted class action as a useful method of streamlining asbestos litigation, since class action tends to reduce the expenditure of time and money needed to resolve the common important issues arising in asbestos lawsuits. See TUYTEL, supra note 201, at *44.


229 Class Action, supra note 168.


231 Id.

232 Id.

233 Id.

234 Id.

235 Id.
VI. CONCLUSION

The analysis presented in this Note supports the proposition that tort law is the only legal institution currently available that is capable of providing redress to the victims of asbestos exposure in Russia. Despite this fact, various factors—pre-trial hurdles, impossibility of showing of causation in fact, limited damage awards, and high costs of litigation—continue to inhibit the development of asbestos litigation in the Russian Federation. Plaintiffs are put in a hostile litigation environment characterized by high levels of uncertainty and soaring litigation costs.

This Note presented and analyzed several avenues for reform needed to improve the situation, in particular, the expansion of the definitions of recoverable harm and standing; the introduction of compulsory, centralized track records documenting asbestos exposure; and the possibility of punitive damages, as well as contingency fees and class action toxic tort claims. The Note does not purport to suggest that these are either the optimal or the only available solutions. Undoubtedly, more research is needed to find the most appropriate way in which the Russian judicial system should be fine-tuned to accommodate the needs of currently unprotected asbestos victims. Nevertheless, crystallization and concretization of the existing problem is the first step that the Russian government, courts, and society at large need to take, if the ultimate answer is ever to be found.