

Mould misses mark as next asbestos

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Mould infestation can cause enough damage to render a building uninhabitable.

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For some members of the legal profession, mould has been a disappointment. Looking for “the next asbestos” as a source of successful class actions, they hoped that anecdotes about injury to health due to mould would become firm, defensible evidence. However, an asbestos-sized tide of class actions hasn’t happened, despite the impressive array of legal talent that has done its best to make it so.

From a legal point of view, what does asbestos have that mould doesn’t? With asbestos, it was quite clear, early on, that there was a serious health risk directly related to asbestos fibres – and so far, there is no expert agreement on the amount of general health risk there is with mould, particularly those that thrive on dead organic materials. Several large, deep-pocketed companies profited from asbestos – and although there are companies profiting from cleaning up mould, none makes a living from making it. Third, asbestos had the issue of culpability, in that companies were deliberately exposing individuals to a known health risk. This is not so clear with mould.

Simply put, there is no clear-cut evidence that most moulds are harmful to most people.

Does this mean that lawyers can safely ignore mould? No. All of the scientific, medical and legal scrutiny has helped clarify the mould picture, and it points to some issues relevant to lawyers involved in environmental, medical, public-health, workplace and real estate work.

To understand the health and legal implications of mould, some background is in order. Mould needs three things to grow – the spores themselves, organic matter on which to grow, and water. Since the spores are always present in the air and many buildings contain some wood or other organic material (drywall is particularly welcoming as a home for mould), controlling mould



Illegal indoor marijuana cultivation, as in this grow-op discovered by police, can often produce serious levels of mould due to excess water leakage and moisture in the air

generally means controlling water. This water can come in through a wide range of means, including shoddy construction or damage to a roof, walls, windows or other parts of the building, leaky plumbing (including burst pipes in the winter), basement seepage, flood damage and water from firefighting. The amount of water influences which strain of mould is most successful in colonizing a part of a building, as each strain of mould has its own preferred level of water activity.

Mould problems have become more frequent since the trend began towards energy efficiency in buildings. Older buildings, built of stone, wood frame, brick plaster and wood lathe, were far from airtight. Water that came in, generally evaporated right back out again, so mould had little chance to grow. Starting in the 1970s and 1980s, however, buildings were increasingly designed to be air-tight in the interests of energy conservation. As a side effect, water entering the building stayed there – encouraging the growth of mould.

The combined effect of closed-loop ventilation systems, the greater use of air conditioning and reduced numbers of air changes, is that those inhabiting modern buildings breathe mould spores more often.

Not all moulds are created equal as regards their health implications. The spores, fragments and by-products of some moulds are clearly more dangerous than others, and any of them can be, and a health threat to anyone who lives or works in a building where the mould is found in sizeable-enough quantities. This means that testing for mould types and quantities is important, and any lawyer working on mould-related cases can benefit from a better understanding of the different types of mould.

Fortunately, there have been recent advances in DNA testing and other laboratory procedures that make accurate analysis of mould types available, so that the health threat can be determined.

A mould-testing laboratory can work from pieces of material with signs of mould, a tape lift or

swab sample taken from surfaces suspected of being mould-contaminated or air samples, which must be taken by a qualified professional.

Another issue that has become clearer is that some people are allergic to some types of mould that would not bother the majority. This may have troubling implications for landlords and employers. For example, employers are obliged by the *Occupational Health and Safety Act* to provide a "safe work environment," does this mean that they must protect the specific vulnerabilities of each employee, such as allergies? Could mould allergies be considered "disabilities" under the *Human Rights Act*, requiring employers and landlords to "accommodate" those who have them? The amount of accommodation required seems likely to depend on how common, and how serious, are the allergies, and on what options employers and landlords have to deal with them.

Particular care to detect and minimize mould will be necessary in facilities that regularly cater to those with compromised immune systems, such as medical facilities and nursing homes. While the immune systems of most people will shrug off the effects of most types of mould, this may not be the case with people whose immune systems have been compromised. This can include people with medical conditions that affect their immune systems, such as chemotherapy, HIV/AIDS, or people whose immune systems have been incapacitated deliberately for organ-transplant purposes. Infants, with their immature respiratory and immune systems, may also be especially vulnerable.

This means, for example, that medical facilities, nursing homes and daycares need to pay particular attention to mould issues. They may need special procedures when purchasing, building or renovating their facilities, including asbestos remediation. To control the spread of asbestos fibres and other particulate, work crews will sometimes use sprays of water to

wet-down the work area. Since water is one of the elements necessary to mould growth, it is important that the crews keep the water from spreading into the drywall and other building materials that may form a habitat for mould to grow. Fortunately, the body of accepted standards and procedures for mould remediation is growing. These standards include protection of employees carrying out mould remediation and working in mould-contaminated areas.

Thus, mould may never be the next asbestos. But neither has it gone away as a challenging legal and technical issue. Lawyers advising clients on these issues need to stay up to date on developments.

One recent development has been the trend for home-insurance policies to specifically exclude mould. This is because it is often too hard to determine which mould may have been caused by flooding due to heavy rain or a backed-up sewer, and which is the result of a steady water seepage in a corner of the basement. As a result, insurance companies have found it better to avoid the friction and bad relations that tend to develop when denying a client's claim for mould damage, as it could not be proven that the damage was caused by the event in question rather than being pre-existing.

Mould also becomes a source of legal conflict when pre-existing mould damage that has possibly caused damage to wooden structural elements, is missed by house inspectors prior to a purchase. Most house inspectors are not trained to determine the extent or implications of mould infestations.

Accordingly, it may be best for a lawyer advising on a real estate transaction to ask the home inspector, in writing, to be alert to signs of moisture and dampness, and to suggest that if these signs are found, bring in a professional qualified in assessing mould damage.

It could also make sense to recommend calling in a specialist if the property has previously experienced leaks,

floods or other moisture problems, especially if the regular inspector does not claim competence in the area and/or if the buyer is particularly sensitive to mould.

Qualifications of such individuals are not widely agreed-upon, but there is a certification available through the Institute of Inspection, Cleaning and Restoration that can provide some indication of the person's skill level. While this is a U.S.-based organization, the Canadian federal government has been promoting its qualification system as an indicator of skill in this area. It also helps to look for individuals and firms with a history of doing such work, and who have a demonstrated track record of success.



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