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Courts Shoot Down Asbestos Causation Theory

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Unobtrusively, but with increasing frequency, some courts are focusing anew on certain forms of asbestos litigation and on certain pivotal issues.[1] Despite what the U.S. Supreme Court called an "asbestos-litigation crisis" and urgings for a national dispute-resolution scheme, no congressional response emerged.[2] Thus, it was left to the courts to try to manage asbestos dockets swollen with claimants alleging they had asbestosis, lung cancer or mesothelioma. A Rand Institute for Civil Justice study in 2005 observed that, through 2002, approximately 730,000 claims had been filed. A Congressional Budget Office estimate in August 2005 posited that some 322,000 asbestos bodily injury cases were pending in state and federal courts.[3]

Early asbestos lawsuits targeted producers of asbestos and asbestos-containing products who numbered in the hundreds (in 1982, about 300 such companies). However, as these defendants fell in bankruptcies, "waves" of new lawsuits spread to companies farther removed from direct production, said now to number over 8,500 defendants. One well-known plaintiffs' lawyer described the litigation as an "endless search for a solvent bystander."[4]

The term "asbestos," derived from the Greek word meaning "inextinguishable" (reflecting one of its principal characteristics: fire resistance), is a popular generic designation but, in reality, there are more than 30 different minerals of fibrous structure whose physical properties vary. However, only six principal minerals were deemed of substantial economic value, and these have widely divergent toxicities and risk factors.[5] Thus, defect and causation evidence regarding physical, chemical and toxicological behavior of "amphibole asbestos" (actinolite, amosite, anthophyllite, crocidolite and tremolite) is simply not applicable to so-called "serpentine asbestos" (chrysotile), which was the dominant form of asbestos used in motor vehicle brakes and in certain gaskets. (Epidemiological studies have reported findings showing no increased risk of mesothelioma among auto mechanics, a world-wide worker population one would expect to abundantly reflect the disease if exposure to chrysotile were causal.)

Toxicological data show that chrysotile is more rapidly removed from the lung than amphibole asbestos. The physico-chemical properties of chrysotile are altered by the application of the mineral in brakes and clutches, thermal effects that reduce the biological activity of chrysotile. As a mineral, chrysotile degrades readily, losing magnesium in an acidic environment (the lung and phagocytes are lower pH environments). Progressive chemical degradation of the chrysotile fiber decreases its ability to induce the tumor. Thus, there is a large difference between the different asbestos types in producing mesothelioma. Chrysotile is simply a different substance. These points have been elaborated incisively in a recent amicus curiae brief filed by 11 distinguished scientists in a Pennsylvania asbestos case.[6]

Testimonial Attack

Given the challenge posed by such generally accepted science, certain plaintiffs' experts have taken to testifying on what has come to be called the "any exposure" or "any fiber" or "single fiber" theory of causation. This line of testimonial attack contends that asbestos disease is a cumulative dose-response process. Therefore, say they, each and every exposure to asbestos during a person's lifetime, no matter how small or trivial—even a single fiber—substantially contributed to the disease, whether it be asbestosis, lung cancer or mesothelioma. However, since some asbestos is everywhere and, thus, a person's lungs are likely to get millions of fibers over a lifetime—so-called "background exposures"—the "single fiber" experts are forced to focus upon occupational or "shade tree" automotive brake repairs as exposures that cause disease.[7] This "any fiber" gambit allows plaintiffs to sue a host of defendants claiming that the asbestos exposure caused by each (or only select defendants, if the state's law of joint tortfeasor liability is tactically favorable) was a substantial factor in causing the mesothelioma or other disease.

In recent years a number of courts have rejected the experts' use of the "any fiber," "any exposure" theory.[8] Now, almost "hot-off-the-press" is the Sixth Circuit's decision in *Moeller v. Garlock Sealing Technologies, LLC*, issued on Sept. 28.[9] Olwen Moeller was a pipefitter who worked with Garlock's asbestos-containing gaskets from 1962 to 1970. But he also sustained significant exposure to asbestos insulation made by others during and even beyond those years. Prior to Mr. Moeller's death from mesothelioma in 2008, he and his wife sued Garlock and others alleging exposure to the gaskets was a substantial factor in causing his death.

On causation, plaintiff presented the "any exposure" testimony of Arthur Frank, a physician who sub-specialized for 40 years in the study of occupational exposure to asbestos. Garlock's expert, James Crapo, a pulmonologist, testified that the particular type of fiber in the gaskets could not have caused the mesothelioma. Rather, asbestos exposure from the insulation was far more severe than any exposure from gaskets. Garlock moved for a directed verdict arguing that plaintiff did not prove the gaskets were a substantial cause but the judge submitted the case to the jury which answered the strict liability question "no" and the negligence question "yes." The jury awarded some $516,000.

On appeal, after a careful review of the record, the U.S. Court of Appeals for the Sixth Circuit agreed that plaintiff "failed to prove that Garlock's product was a substantial factor in bringing about the harm." Dr. Frank testified only that all types of asbestos can cause mesothelioma and that "any asbestos exposure counts as a 'contributing factor.'" The appellate court concluded such testimony does not establish that exposure to Garlock gaskets in and of itself was a "substantial" factor in causing the mesothelioma. Quoting from the Sixth Circuit's prior *Lindstrom* case,[10] the panel observed that a plaintiff "must show a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural."[11]

In *Lindstrom*, the court approved the following observation by the district court in that case: "[The plaintiff's expert] opines that there is no safe level of asbestos exposure, and that every exposure to asbestos, however slight, was a substantial factor in causing Lindstrom's disease. If an opinion such as [the plaintiff's expert's] would be sufficient for plaintiff to meet his burden, the Sixth Circuit's 'substantial factor' test would be meaningless."[12]

Theory Rejected

In *Moeller*, plaintiff presented no evidence quantifying decedent's exposure to asbestos from Garlock's gaskets. Although there was testimony that he worked with the gaskets "every day," plaintiff failed to establish how many he removed, how frequently he removed them (as opposed to installed them). On the other hand, the evidence showed that his exposure to asbestos from insulation "would have been thousands of times greater than his exposure from removing gaskets." Because of the "massive exposure" to non-Garlock asbestos, there was insufficient evidence to infer that the gaskets "probably, as opposed to possibly," were a "substantial" cause of the mesothelioma. Paraphrasing a Pennsylvania Supreme Court decision that rejected the "any exposure" theory, *Gregg v. V-J Auto Parts Co.*,[13] the Sixth Circuit suggested that a conclusion of substantial cause for Garlock's gaskets "would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume."[14]

In the *Gregg* case cited in *Moeller*, the Pennsylvania Supreme Court said that even though it was "common for plaintiffs to submit expert affidavits attesting that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease," such opinions were "not couched within accepted scientific methodology." The court called the "willingness on the part of some experts" to offer such opinions "one of the difficulties" courts face in the mass tort case.[15] The Pennsylvania court rejected such "each and every exposure" opinions as a "fiction" that would subject defendants to full joint-and-several liability for injuries and fatalities in the absence of reasonably developed scientific reasoning about substantial factor causation.[16] In *Summers v. Certainteed Corp.*,[17] a 2010 decision, the Pennsylvania Supreme Court expressly reaffirmed that it had "rejected the viability of the 'each and every exposure' or 'any breath' theory" in asbestos cases, quoting extensively from *Gregg*.

In *Butler v. Union Carbide Corp.*,[18] plaintiff presented Dr. John C. Maddox, a pathologist, who opined that each exposure to asbestos above "background" levels (or those present in ambient air) contributed to causing decedent's mesothelioma. After holding a *Daubert* hearing, the trial court issued an "extensively researched" order granting defendant's motion to strike the Maddox opinion and, later, granting summary judgment to Union Carbide. Defense experts testified that the chrysotile asbestos in the Union Carbide product comprised one percent or less of the total number of pounds of material handled by decedent. In his eight-year exposure, the total amount of time he could have been exposed to the chrysotile material was eight days.

The Georgia Court of Appeals affirmed the trial court. The scientific literature did not support Dr. Maddox's specific causation opinion. Further, it was noted that a Texas appellate court, in *Smith v. Kelly-Moore Paint Co.*,[19] recently had rejected Dr. Maddox's opinion of "no threshold dose" for chrysotile exposure (his "any exposure" theory). Similarly, in *Borg-Warner Corp. v. Flores*,[20] the Texas Supreme Court had earlier rejected the testimony of Dr. Barry Castleman and another expert that mere proof of exposure is sufficient to prove causation.

Conclusion

Judicial gatekeeping of experts' reliability under *Daubert* and *Frye* compels sharp scrutiny of the new wave of asbestos theories. Good science should trump glib hypotheses, as some courts have demonstrated. The amicus curiae brief filed on behalf of 11 distinguished scientists mentioned above (none of whom received funding from or testified as experts for any of the parties in the case) sets out a slew of methodological errors by the "any exposure" expert, among them: (1) eschewing the need to consider the dose level of exposure and minimum threshold of fiber levels; (2) not considering the physical, chemical and toxicological differences among various types of asbestos and ignoring overwhelming evidence that chrysotile asbestos "has far less, and maybe nil, potential to cause lung cancer and mesothelioma than other types"; (3) rejecting the generally accepted distinction between general causation and specific causation and not even establishing general causation for chrysotile asbestos; (4)

suggesting that the "every exposure" and "cumulative risk" theories are generally accepted when they are not; and (5) ignoring the large body of toxicological studies that show chrysotile asbestos is not potent as a cancer-causing agent.

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Endnotes:

1. By way of disclosure, this writer's law firm defends automobile manufacturers in asbestos litigation.

2. *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 597-598 (1997).

3. M.A. Behrens and W.L. Anderson, "The 'Any Exposure' Theory: An Unsound Basis for Asbestos Causation and Expert Testimony," 37 SW U. L. Rev. 479 n. 2 (2008) (providing website links).

4. Id. at 494-495.

5. *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1065 (Okla. Sup. Ct. 1987); *Mullen v. Armstrong World Industries Inc.*, 246 Cal. Rptr. 32, 36, 37 (Cal. App. 1988); *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. Sup. Ct. 1985).

6. See Amicus Curiae Brief of 11 Noted Scientists filed in the Supreme Court of Pennsylvania in *Betts v. Pneumo Abex LLC*, April 25, 2011, 2010 PA S. Ct. Briefs 82010; 2011 PA S. Ct. Briefs Lexis 5, a pending appeal raising the "any exposure" issue.

7. See M.A. Behrens and W.L. Anderson, supra n. 3, 37 SW U. L. Rev. at 480-483.

8. See cases listed in M.A. Behrens and W.L. Anderson, Id. at 480-482, naming the experts involved and discussing throughout the article the testimony and courts' reasoning.

9. 2011 U.S. App. Lexis 19987 (6th Cir. Sept. 28, 2011).

10. *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, 492 (6th Cir. 2005), aff'g sub nom, *Bartel v. John Crane Inc.*, 316 F.Supp.2d 603 (N.D. Ohio 2004).

11. *Moeller*, 2011 U.S. App. Lexis at *11.

12. *Moeller*, Id. Lexis at *11.

13. 943 A.2d 216, 223 (Pa. Sup. Ct. 2007).

14. *Moeller*, 2011 U.S. App. Lexis 9987, at *13.

15. *Gregg*, 943 A.2d at 226.

16. Id. at 226-227.

17. 997 A.2d 1152, 1162 n. 14 (Pa. Sup. Ct. 2010). For an excellent discussion of *Gregg*, *Summers*, a critique of the "any fiber" theory and related issues, see the Amicus Curiae Brief of the Product Liability Advisory Council in *Betz v. Pneumo Abex LLC* in the Pennsylvania Supreme Court (April 25, 2011), Pa. S. Ct. Briefs Lexis 6.

18. No. A11A0481 (Ga. Ct. App. June 15, 2011) (Slip Opinion).

19. 307 S.W. 3d 829, 837-839 (Tex. App. 2010).

20. 232 S.W. 3d 765, 774 (Tex. Sup. Ct. 2007).