



Products Liability Committee



THE MOON IS NOT MADE OF CHEESE – A DEFENSE PERSPECTIVE ON THE ASBESTOS PLAINTIFFS’ EXPERTS’ “EVERY EXPOSURE COUNTS” THEORY

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In most, if not all, mesothelioma cases, medical causation *vis-à-vis* product identification is a paramount issue. Typically, many defendants’ products have been identified by the plaintiff, co-workers or both. Those products have been described in numbers of ways and dust exposures from working with or around them likewise have varied. It is not uncommon to see both lengthy intense exposures to some products and intermittent minor exposures to others described in detail in the same deposition.

Faced with these varying “exposure” allegations, mesothelioma plaintiffs’ attorneys strive to cast as wide a liability net as possible. From a medical causation standpoint, they do this through a sophisticated cadre of experts, primarily but not always pathologists. These experts, well recognizing that their task is to establish the liability of as many defendants as they can, rely

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mesothelioma; in other words, every exposure counts. The opinion that “each and every exposure” to asbestos contributes to cause a later-diagnosed disease is also often expressed as each and every breath of asbestos-containing air contributes, each and every inhaled asbestos fiber contributes, each and every occupational exposure to asbestos contributes, each and every “above background” or “above-ambient” exposure contributes, or there is no “safe level” of asbestos exposure. It is also referred to as the cumulative dose theory.

Although the wording may vary, the meaning does not. All exposures, without regard to fiber type, frequency, intensity or proximity are to be treated with equal condemnation. These opinions are subject to vigorous challenges in most jurisdictions throughout the country, with varying results. There are many surveys and studies reporting how various jurisdictions treat the admissibility of these opinions. Suffice it to say that most asbestos litigants will be required to deal with these experts and their purported causation opinions in some fashion. This article seeks to provide a common sense analysis of the problems attendant to the theory.

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Mesothelioma Causation at the Cellular Level

The “every exposure counts” theory must be held up against what science has established concerning how mesothelioma is caused at the cellular level. Doing so illustrates the folly of the opinion as a matter of basic logic. A vital source of this information comes from Dr. Arnold Brody, a common plaintiffs’ expert.

Dr. Brody believes and has testified that mesothelioma develops when one or slightly more than one “target” mesothelial cell(s) have been attacked by asbestos fibers. The fibers that reach these target cells damage the DNA in them, causing “insults” or “errors” that impede the cells’ ability to control their growth. He has explained that there is a range of errors required, certainly more than three and probably within [15 or 16](#). He is unable to be more precise than that. Importantly, Dr. Brody concedes that not all fibers inhaled reach the target cells and cause errors. In fact, he admits that which fibers in fact do so is a matter of chance. He has agreed that since some proportion of inhaled fibers

reaches the target cell(s), by definition some proportion does not.

Compare this with the “every exposure counts” theory. Logically, the two concepts do not line up and are, in fact, counterintuitive. The “every exposure counts” theory ignores Dr. Brody’s basic scientific causation model. If some inhaled fibers do not reach the target cell(s), they do not cause disease. If this is true, and Dr. Brody admits that it is, then again by definition, every exposure cannot cause disease because no one can say which fibers reached the target cells and which fibers did not.

Dr. Brody has also testified many times that once the target cell or cells have been attacked to a sufficient degree, the disease process (metastasis) has begun and mesothelioma is inevitable. When that has occurred, no other exposures matter and the patient will develop the disease irrespective of any future exposures.

Again, applying this logic to it, the “every exposure counts” theory fails. Although science cannot say precisely when disease inevitability happens, we do know that it happens at some point in time. Even so, post-metastasis exposures, deemed irrelevant by Dr. Brody, will be wrongly included as causative by the “every exposure counts” theory.

Lastly, Dr. Brody has testified that the theory has never been scientifically tested, is unsupported by any data, has not been published in peer-reviewed literature, is a “concept” which is “intuitive,” and has not been “put together as a scientific principle and tested.”

The Theory at its Foundation

The “every exposure counts” theory can make its proponents sound absurd. Married to the concept that each and every exposure, no matter how insignificant, contributes to disease, the expert is forced to accept as true propositions that defy common sense.

Presented with common sense analogies, one “every exposure counts” expert has conceded that the theory can be inaccurate by its very nature, including as causative factors (here bullets) that are not.

Q: Going back to the whole fiber attacking cells, there’s no way of knowing which fibers from which products actually accomplished that fact, correct?

A: Well, again, using the cumulative exposure approach, they all contributed by making it more likely that that result happened.

Q: Well, that's my point. If somebody is in a shooting gallery and 50 people shoot at him and one bullet kills him, the other 50 people – or the other 49 people that shot at him were not causative of his death, correct?

A: *Well, unless you couldn't trace the bullets to see, then you could attribute it to all of them.*

Q: *Well, that's just it, you can't figure it out, so you include all the shooters.*

A: *That's a reasonable analogy since that's the way cumulative exposure works.*

Abraham Dep., Oct. 13, 2010, *Cashman v. Aamco Transmissions, Inc.*, C.A. No. 06-5839 (Mass. Super.) (emphasis added).

Astoundingly, Dr. Abraham is telling us that if he is provided with less information, he can find more causation. That is precisely what the theory is designed to do.

What the Theory Really Means and What the Courts Say about It

Most, if not all jurisdictions require in some form or another that an exposure be a substantial contributing cause to disease. The “every exposure counts” expert either recognizes this burden or has been informed of it by counsel. Hence, when asked, he or she will say that each exposure meets that burden. What these experts really mean is this – the cumulative dose theory cannot exclude any exposures as causative, so it includes them all. This is significant. Including something that one cannot exclude is *not* legal causation. In fact, doing so turns the burden of proof on its head.

There is some risk of opinions that amount to changing the burden of proof. I have heard testimony from Dr. Mark that you cannot eliminate a particular product or exposure, and I accept and believe that as scientifically reliable. *But to go from the inability to eliminate as a possible cause to an opinion that it is a substantial contributing cause, I think there's a danger that that particular opinion based on the inability to eliminate it is*

an impermissible opinion with respect to the law of the burden of proof and the law of what a substantial contributing cause is.

Trial Tr., Mar. 16, 2009, *Watts v. Alfa Laval, Inc.*, C.A. No. 2007-1756 (Mass. Super.) (Healy, J.) (emphasis added).

The United States District Court for the District of Utah, Central Division excluded the theory, again finding fault with the inclusion of causes that cannot be excluded. “This asks too much from too little evidence as far as the law is concerned. It seeks to avoid not only the rules of evidence but more importantly the burden of proof.” [Smith v. Ford Motor Co., No. 2:08-CV-630, 2013 WL 214378, at *2-3 \(D. Utah Jan. 18, 2013\)](#) (emphasis added).

More recently, a different judge in a separate case similarly concluded that the “every exposure counts” theory, as presented by the plaintiff’s experts, “is based on their lack of information sufficient to show the level of exposure which does not create a risk of mesothelioma. This is not reliable enough evidence for the Court to allow it in under the standards of *Daubert* and Rule 702.” [Anderson v. Ford Motor Co., No. 2:06-CV-741 TS, 2013 WL 3179497, at *5 \(D. Utah Jun. 24, 2013\)](#). The court added that the corpus of medical and scientific literature relied upon by the plaintiff’s experts merely “shows that any exposure to asbestos *could* cause mesothelioma, but no one knows how likely that is.” *Id.* at *6.

Further, even courts that have accepted the scientific validity of the “every exposure counts” argument nevertheless have emphasized that the theory, standing alone, is legally insufficient to establish proximate causation absent “a more specific showing of the ‘frequency, regularity, and proximity’ of such exposure.” *Sweredoski v. Alfa Laval, Inc.*, C.A. No. PC 2011-1544, slip op. at 16 (R.I. Super. Jun. 13, 2013).

However, Maryland’s highest court held that expert testimony espousing the “every exposure counts” theory was properly admitted because it was based on evidence of the decedent’s repeated exposures to high levels of asbestos fibers. [Dixon v. Ford Motor Co., -- A.3d--, 2013 WL 3821431, at *7 \(Md. July 25, 2013\)](#). The *Dixon* Court did, however, acknowledge that “[t]hat kind of opinion, if offered in a case of truly minimal exposure to the defendant’s product, may well raise concerns that would need to be tested under *Frye*....”

Conclusion

The “every exposure counts” theory is a challenge. The courts continue to wrestle with the opinion, with the trend going slightly against admitting it, or at least requiring that it be coupled with some analysis of individualized evidence of exposure. While common

sense and the theory continue to compete, common sense may be starting to prevail. The moon may not be made of cheese after all. ⚖️

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