



## Asbestos Medicine

Taking a Swing at Plaintiff's  
Experts: A Discussion of Recent  
*Daubert* Hits and Misses  
Breakout Session

Kevin Greene, Willcox & Savage

Forrest Ren Wilkes, Cosmich Simmons &  
Brown

# Factors to Consider

- Jurisdiction
- Historical rulings
- Judge(s)
- Standard (Daubert, Frye, other)
- Case Facts
- Plaintiff Experts
- Defense Experts

# Isn't that special?

## Dr. Mark:

- “Special exposures”
  - Exposures for which there is scientific evidence that the exposure increases the risk of developing diffuse malignant mesothelioma



# Dr. Mark

- “Methodology, as we understand it today scientifically, is asbestos; asbestos, and the disease is the methodology.”

Frye Hearing, February 11, 2008 (Afternoon Session), Chrysler Asbestos Litigation, at 21.

- The diagnosis itself is sufficient for him to opine that a person had a special exposure to asbestos:
  - Q. So at the time you authored this report, then, there was no special exposure that you were aware of that Mr. Erts had experienced, correct?
  - A. There was some special exposure because he developed the signal disease, but what special exposure or exposures there were, I did not know.
  - Q. And that's because you, upon the diagnosis of diffuse malignant mesothelioma, you assume that a person had a special exposure to asbestos, correct?
  - A. Yes.

Erts v. A.W. Chesterton Company, et al., in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida (March 25, 2011).

# Because I “identified it”

## Dr. Brodkin:

- Q Okay. In order for you to conclude that an exposure to asbestos was a substantial factor in increasing the risk, must that exposure be what you refer to as an identifiable exposure?
- A As an identified exposure.
- Q Identified exposure, okay.
- A Yeah. I would say I would be more specific than identifiable. It has to address whether there is a known asbestos source, whether there is an activity that generates airborne fibers and conditions such that those could be inhaled overcoming the body's defenses and adding to the body's burden of asbestos. Those would be the characteristics of an identified exposure.
- Q And is that -- do you require such an exposure before you will attribute a mesothelioma to asbestos?
- A Yes.



Bernard Steffen, et al., v. Calportland Company, et al., Deposition of Carl A. Brodkin, M.D., taken on April 6, 2011, p. 30-31

# Dr. Brodkin

- Q Okay. And I also understand that you don't quantify -- and by that, I mean put numbers on -- risk associated with exposure to any particular product.
- A That's true. I don't know of a medically or scientifically valid way to apportion risk on a product- specific basis, because mesothelioma is a dose-response disease. It's the cumulative dose that results in increased risk.
- Q (By Ms. Krow) Okay. So that means you can't say what percentage of Lopez's risk of developing mesothelioma is attributable to any particular exposure?
- A That's true.

*Lopez v. BASF Catalyst, LLC, et al., deposition, 4/19/2012 [14:13] - [14:25]*

# Isn't that simple?

## Dr. Finkelstein:

- Substantially increased risks are observed when increased by at least 10-20% above baseline.
- Relative Risk =  
Cumulative Occupational Exposure  
Cumulative Ambient Exposure

The chalkboard contains a dense collection of mathematical and scientific formulas and diagrams:

- $F = k \frac{q_1 q_2}{r^2}$
- $CH_4 + 2O_2 \rightarrow CO_2 + 2H_2O$
- $PV = nRT$
- $\frac{dy}{dx} \ln x = \frac{y}{x}$
- $a = mc\Delta T$
- $\log_a(\frac{1}{x}) = -\log_a x$
- $\lim_{x \rightarrow 0} \frac{(1+x)^n - 1}{x} = n$
- $v^2 - v_0^2 = 2a(x - x_0)$
- $T = \frac{2\pi}{\omega}$
- $v = v_0 + at$
- $P = mV$
- $v = \omega r$
- $\frac{\sin \alpha}{a} = \frac{\sin \beta}{b} = \frac{\sin \gamma}{c}$
- $a^2 + b^2 - 2ab \cos C = c^2$
- $E = mc^2$
- $F = \frac{\Delta P}{\Delta z}$
- $\sin^2 + \cos^2 = 1$
- $E_k = \frac{1}{2}mv^2$
- $y = x^2 + a$
- $v = f\lambda$
- $P = IV$
- $V = IR$
- $P = \frac{V^2}{R}$
- $P = I^2 R$
- $2H_2 + O_2 \rightleftharpoons 2H_2O$
- $\omega = 2\pi f$
- $\Delta P = \rho g \Delta h$
- $K_{eq} = \frac{[H_2O]^2}{[H_2]^2 [O_2]}$
- $\Delta E = h\nu$
- $F = \frac{G m_1 m_2}{r^2}$

Diagrams include a right-angled triangle with sides a, b, c and angles alpha, beta, gamma; a sine wave; a circuit diagram with a battery, a resistor, and a voltmeter; and a molecular structure of a benzene ring with an OH group.

#### 4. Air Pollution and Pregnancy (Ibrahimou et al. 2014)

These researchers studied whether maternal exposure to particulate matter (PM2.5) speciation chemicals during pregnancy is associated with the risk of preeclampsia. The most substantial risk for preeclampsia was observed for PM2.5 aluminum exposure during the entire pregnancy, resulting in 10% increased risk (odds ratio = 1.10; confidence interval = 1.03 to 1.18) per interquartile range increase in aluminum.

**Conclusion:** Scientists studying risk factors for cancer and other diseases have concluded that substantially increased risks are observed when these elevations range from about 10% to about 20%.

#### 6a. A Formula for Evaluating Substantial Elevation in Risk

The standard model to explain the incidence of mesothelioma is based upon the Armitage-Doll model of multistage carcinogenesis, first published in 1954 (Armitage and Doll 1954). In this model, the malignant cell arises from an accumulation of mutations in precursor ancestor cells. Data from the United States Surveillance, Epidemiology, and End Results (SEER) database over the period 1973-2005 was analyzed by Moolgavkar, of the Exponent Corporation, and colleagues (Moolgavkar et al. 2009). They found that a model that incorporated 5 mutations fit the American mesothelioma pattern well. Epidemiologists have confirmed that this model fits occupational cohort data well. Peto and colleagues applied it to the mesothelioma incidence rate of American insulators (Peto et al. 1982); deKlerk and colleagues found it to fit the experience of Australian asbestos miners (de Klerk et al. 1989); and Finkelstein found that it described the mesothelioma risk curve among Canadian asbestos-cement workers (Finkelstein 1990). It must be emphasized that this framework is *not* based upon downward extrapolation from the results of epidemiologic studies. Rather the model is derived from fundamental knowledge about the cause of cancer, and it is found to well describe the results of epidemiologic studies at occupational exposure levels.

The risk model described by Berman and Crump has been adopted by the EPA and other United States government agencies to describe the risk associated with asbestos exposures. Berman and Crump, of Aeolus Inc. And Louisiana Tech, have described the use of the model for risk assessment (Berman and Crump 2008). The form of the model is shown below:

$$I_M(t) = 3 \times K_M \times \int_0^{t-10} E(u) \times (t - u - 10)^2 du$$

They demonstrate that this model "predicts that the mesothelioma mortality rate varies linearly with exposure intensity  $E$  (for fixed duration,  $D$ , and time since first exposure,  $t$ ).

In this model,  $K_M$  is the potency factor for each fiber type, such as chrysotile or crocidolite and  $E$  is the exposure intensity. **Relative Risk** under two different exposure scenarios may thus be calculated by comparing the cumulative exposure under each scenario. In particular, we can compare the risk an individual would have acquired if he had no asbestos exposure other than ambient air with that acquired through occupational exposure.

In other words

Relative Risk =  $K_M \times$  Cumulative Occupational Exposure

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$K_M \times$  Cumulative Ambient Exposure

Now, the asbestos in ambient air is largely comprised of chrysotile. If the occupational exposure is to chrysotile, then the  $K_M$  is the same in both the top and bottom of the equation, and cancels out.

We are thus left with

Relative Risk = Cumulative Occupational Exposure

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Cumulative Ambient Exposure

#### 7) Mr. Colletti's Cumulative Ambient Exposure

According to Lee and van Orden (Lee and Van Orden 2008) in 1678 outdoor samples in the United States, the mean Optical Equivalent ( $> 5$  microns) concentration of asbestos fibers in ambient air was 0.00002 fibers/ml. Over a period of 60 years, Mr. Colletti's lifetime, this amounts to  $60 \times 0.00002 = 0.0012$  fiber-years for exposures of 24 hours per day.

#### 8) Exposures from Brake Work

If we now look at exposures from performing brake work, then Paustenbach (Paustenbach et al. 2003) reported that the job-TWA for a single brake job lasting about 1 hour was about 0.1 f/cc x 1 hour = 0.1 fiber-hrs/cc. There are  $24 \times 365 = 8760$  hours in a year. The exposure from 1 brake job is thus 0.1 fiber-hrs/cc / 8760 hours/yr = 0.000011 fiber-years. The exposure from one brake job is thus  $0.000011/0.00002 = 50\%$  of the annual ambient exposure and =  $0.000011/0.0012 = 1\%$  of the 60-year cumulative ambient exposure.

# Dr. Finkelstein

**“It's my opinion there is no level of asbestos exposure below which the risk of disease is zero.”**

*Muniz et al. v. Advanced Stores Company, Inc., et al.*, Testimony of Murray Finkelstein given on 1/16/14, p. 1110-1111

Q. And so if 1 percent of the Bendix brakes at these facilities generated dust that Mrs. Theriault inhaled that would be sufficient for you to render the causation opinion you've given in this case? . . .

A: **My opinion is that her asbestos exposures were sufficient to cause her disease.**

Q. Whatever they were? . . .

A: **Whatever they were.**

*Coletti v. Advance Stores Co., Inc., et al.*, Deposition of Dr. Finkelstein, Taken on September 1, 2016 at 56-58.

# “Let me Qualify that”

## Dr. Maddox:

- 6 Criteria (cumulative exposures, as qualified)
  - Real
  - Significantly above background
  - Obvious or demonstrated by literature
  - Repetitive
  - Dose response applies
  - Proper latency



# It's the Cumulative Dose

## Dr. Kradin:

"If a person sustains asbestos exposures above background/ambient levels of exposure as reflected by an occupational, para-occupational and/or domestic asbestos exposure and goes on to develop mesothelioma, it is my opinion that the exposures above background levels, taken in context of the individual's total (cumulative) asbestos exposures, are significant and non-trivial, and are medical and scientific causes in the development of the individual's mesothelioma. In the legal context, such asbestos exposures are often described or classified as "substantial contributing factors" or "contributing causes" or "significant factors" to the development of the individual's mesothelioma. It is not my opinion that a "single fiber," or that "each and every" or "any" exposure to asbestos, even those below background levels, are a substantial contributing factor in causing mesothelioma."



# Issues

- Cumulative Exposures
- Helsinki Criteria
- Bradford Hill Criteria
- Visible Dust
- Defense experts prove their case

## Bell v. Foster Wheeler Energy Corp., et al.

USDC ED Louisiana

October 11, 2016

- Dr. James Millette, materials analyst
- Reliability and fit of studies on which Dr. Millette relied
- Tyndall lighting studies
- “The evidence remains of value to the jury when evaluating the probative value of the general studies of the prevalence of mesothelioma in Navy machinists.”
- “Studies conducted in more confined working environments will nonetheless be of “some use” to the jury in setting the upper bounds of Mr. Bell’s possible exposure to asbestos from any one activity.”

Bell v. Foster Wheeler Energy Corp., et al.

USDC ED Louisiana

October 11, 2016

- No risk of jury confusion if the studies involve power scraping versus the hand scraping the plaintiff testified to.
- Defendants can cross examine to highlight that plaintiff did not perform all of the activities examined in the studies.
- Although Dr. Millette can testify as to laboratory studies that were not substantially similar to plaintiff's working environments,
- (1) the studies must be put into the proper context; and
- (2) plaintiffs will not be able to use Dr. Millette's testimony as a subterfuge to speculate as to Mr. Bell's working conditions.

Bell v. Foster Wheeler Energy Corp., et al.

USDC ED Louisiana

October 11, 2016

- “It is neither reliable nor permissible for Dr. Millette to testify – as he suggests in his expert report – that the studies conducted in wholly disparate working environments represent the likely exposure Mr. Bell had from performing a particular activity on a ship.”
- “Dr. Millette cannot testify that a particular study represents Mr. Bell’s likely exposure to asbestos until – at the very least – making a threshold showing in a *Daubert* hearing that the study took place under conditions substantially similar to [plaintiff’s] working conditions.”

Bell v. Foster Wheeler Energy Corp., et al.

USDC ED Louisiana

October 11, 2016

- Tyndall Lighting
- Premature - Unclear how plaintiffs propose to use the videos.
- Re-urge in pre-trial briefing

Bell v. Foster Wheeler Energy Corp., et al.

USDC ED Louisiana

October 6, 2016

- Dr. Richard Kradin, pathologist
- Dr. Terry Kraus, radiation oncologist
- Frank Parker, industrial hygienist
- Challenge to Dr. Kraus as unqualified denied  
– goes to the weight of his testimony, not  
admissibility

Bell v. Foster Wheeler Energy Corp., et al.

USDC ED Louisiana

October 6, 2016

- Each and Every Exposure theory of causation
- “By now, the deficiencies of the “each and every exposure” theory of causation in asbestos exposure cases have been extensively discussed and will not be repeated here.”
- “The each and every exposure theory “is not an acceptable approach for a causation expert to take because it is nothing more than *the ipse dixit* of the expert.” citing *Comardelle*.
- The rules of evidence do not permit an expert to testify that “[j]ust because we cannot rule anything out that we can rule everything in.”

## Bell v. Foster Wheeler Energy Corp., et al.

USDC ED Louisiana

October 6, 2016

- Each and every exposure versus Each and every significant exposure
- The Court sees no material difference between the “every exposure” theory and the “every significant exposure” theory.
- “Accordingly, though skillfully cloaked, plaintiffs experts’ conclusions that defendants’ products caused Mr. Bell’s mesothelioma again impermissibly rest on little more than the experts’ *ipse dixit*.”
- The Court will not allow plaintiffs’ experts to entirely rely on evidence of general causation to offer the “specific causation *opinion in this case*” that a particular product caused Mr. Bell’s mesothelioma.”

Bell v. Foster Wheeler Energy Corp., et al.

USDC ED Louisiana

October 6, 2016

- Plaintiffs' experts cannot testify about specific causation but they can testify about Mr. Bell's mesothelioma and general causation.
- "Likewise, provided that any Rule 403 objections are overcome, the experts may also respond to defendants' argument that certain exposures were *de minimus* by noting that certain studies suggest that specific causation cannot be ruled out."

## Crane Co. v. DeLisle

Fourth District Court of Appeal, Florida  
September 14, 2016

- Dr. James Dahlgren, occupational and environmental medicine, toxicology
- Dr. James Crapo, pulmonologist
- Dr. James Rasmuson, industrial hygienist
- Court failed to properly exercise its gatekeeping function as to Drs. Dahlgren, Crapo and Rasmuson

Crane Co. v. DeLisle  
Fourth District Court of Appeal, Florida  
September 14, 2016

- The Court should affirmatively prevent imprecise, untested scientific opinion from being admitted.
- Every exposure above background of 0.0002 f/cc is a substantial contributing cause of mesothelioma
- “Dr. Dahlgren did not explain his methodology at all.”
- “He did not provide any data or studies of the association between mesothelioma and chrysotile asbestos at low levels.”
- “Dr. Dahlgren’s testimony was more in the nature of ipse dixit, i.e. that it should be reliable merely because he is an expert.”
- We conclude the court abused its discretion in admitting Dr. Dahlgren’s testimony on the “every exposure theory.”

Crane Co. v. DeLisle  
Florida  
September 14, 2016

- Dr. William Longo
- Dr. James Millette
- The trial court did not abuse its discretion in holding Dr. Millette’s testimony admissible”

Crane Co. v. DeLisle  
Florida  
September 14, 2016

- Dr. James Crapo
- Not enough in the record for the trial court to make a proper determination of its reliability
- Dr. James Rasmuson
- To the extent that he relied on Dr. Longo's study, because he did not know whether the methodology of the study was accepted or the study was peer reviewed, the trial court could not conclude that Dr. Rasmuson's opinions were based on reliable data to satisfy *Daubert*.

# Scapa Dryer Fabrics v. Knight

Georgia Supreme Court

July 5, 2016

In the Supreme Court of Georgia

Decided: July 5, 2016

S15G1278. SCAPA DRYER FABRICS, INC. v. KNIGHT et al.

BLACKWELL, Justice.

Scapa Dryer Fabrics, Inc. is a textile manufacturer, and in the late 1960s and early 1970s, it produced dryer felts at a manufacturing facility in Waycross. Some of the pipes and boilers in that facility were insulated with material containing asbestos, and Scapa used yarn containing asbestos in some of its manufacturing processes. Between 1967 and 1973, Roy Knight worked on multiple occasions at the Waycross facility as an independent contractor. Almost forty years later, Knight was diagnosed with mesothelioma, a cancer most commonly associated with the inhalation or ingestion of asbestos fibers. After his mesothelioma was diagnosed, Knight and his wife sued Scapa, claiming that Scapa negligently exposed him to asbestos at the Waycross facility and caused his mesothelioma.<sup>1</sup> The case was tried by a Ware County jury, which returned

<sup>1</sup> Knight was employed as a sheet-metal worker, and between 1967 and 1973, he worked on a number of projects at the Waycross facility. It is unclear, however, how much

- **Georgia Code; tracks FRE 702**
- **Jerrold Abraham**
- **Trial court and Court of Appeals permitted the expert testimony**
- **Court: Abraham did not undertake to estimate the extent of exposure in any meaningful way, and he did not qualify his opinion on causation by limiting it to such an estimate of exposure**
- **NOTE: “This is not to say that expert testimony premised upon a cumulative exposure theory could never be relevant”**

## Boudreaux v. Bollinger Shipyard

Louisiana Fourth Circuit Court of Appeal

June 22, 2016

- Dr. Gerald Liuzza, pathologist
- Upheld trial court's exclusion of the specific causation opinion of Dr. Liuzza because there was no underlying evidence of the dosage of asbestos Mr. Boudreaux received from occupational exposure to asbestos.
- Dr. Liuzza's methodology for attributing Mr. Boudreaux's lung cancer to asbestos exposure is therefor premised entirely upon his reading of Mr. Thibodeaux's deposition testimony."
- Abuse of discretion standard
- No support for the proposition that his methodology was used by other practicing pathologists.
- "In the usual case, a plaintiff's pathologist will rely upon the opinion of an industrial hygienist when forming his opinion on causation."
- Dr. Liuzza conceded that he would have to defer to an industrial hygienist regarding work-related factors that could impact exposure.

## Dugas v. 3M

USDC MD Florida

June 21, 2016

- Dr. William Longo, materials analyst
- EPON 934 two-part adhesive
- The Court permitted Dr. Longo to testify that sanding and filing of EPON 934 releases significant levels of asbestos, but excluded any opinion on the quantity of asbestos fibers Mr. Dugas may have encountered while working with EPON 934.
- The Court excluded Dr. Longo's video demonstrative evidence as unfairly prejudicial because "Dr. Longo's many deviations make it clear that his work-studies are not substantially similar to those Mr. Dugas encountered."
- Further "the video does not capture or consider the environmental conditions which may have affected the manner in which asbestos fibers were released."

Dugas v. 3M  
USDC MD Florida  
June 21, 2016

- Dr. William Longo, materials analyst
- Blow-down study on asbestos-containing clamps
- “Dr. Longo’s clamp study deviated significantly from the only accepted scientific protocols, such that Dr. Longo admits that his deviations altered his results.”
- “In accordance with the accepted standards for applying NIOSH 7400 and 7402, the clamp studies failed to yield detectable amounts of asbestos fibers. Undeterred, Dr. Longo modified the detection criteria to the level where asbestos is detectable.”

Dugas v. 3M  
USDC MD Florida  
June 21, 2016

- Dr. Longo's clamp studies, continued
- "Dr. Longo fails to explain why he failed to follow OSHA guidelines in obtaining a representative air sample."
- Dr. Longo did not dispute that he engaged in practices that "inflated the amount of asbestos released."
- "Dr. Longo still could not detect asbestos without modifying the only acceptable methods for occupational exposures to make the asbestos detectable."

Dugas v. 3M  
USDC MD Florida  
June 21, 2016

- Dr. Longo's surface sample extrapolation from abandoned A-7 airframe
- ASTM D5755
- Indirect preparation with sonication is not reliable method for quantifying the concentration of asbestos
- D5755 standard specifically disavows any appropriateness for use in establishing a relationship between asbestos-containing dust measured by the test and the potential for exposure to airborne asbestos.
- "All of Dr. Longo's opinions regarding or deriving from the surface sample taken from the abandoned A-7 airframe are EXCLUDED."

## Arbogast v. A. W. Chesterton

USDC Maryland

June 6, 2016

- R. Leonard Vance, Industrial hygienist
- Westinghouse Micarta
- Factual evidence indicates the Micarta board was non-asbestos-containing
- Dr. Vance acknowledged that some grades of Micarta contained asbestos and some did not.
- Dr. Vance could not opine to a reasonable degree of scientific certainty that Arbogast ever encountered a grade of Micarta that contained asbestos.
- “The Court concludes his opinion rests only upon unwarranted assumption rather than “sufficient facts or data,” as required by FRE 702(b)

# Schwartz v. Honeywell

## Court of Appeals of Ohio

### May 26, 2016

[Cite as *Schwartz v. Honeywell Internatl., Inc.*, 2016-Ohio-3175.]

### Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION  
No. 103377

MARK SCHWARTZ, INDIVIDUALLY AND AS  
EXECUTOR OF THE ESTATE OF KATHLEEN  
SCHWARTZ, ET AL.

PLAINTIFFS-APPELLEES  
CROSS-APPELLANTS

vs.

HONEYWELL INTERNATIONAL, INC., ET AL.

DEFENDANTS-APPELLANTS  
CROSS-APPELLEES

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**JUDGMENT:**  
AFFIRMED IN PART,  
REVERSED IN PART, REMANDED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-14-819582

**BEFORE:** S. Gallagher, J., Keough, P.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** May 26, 2016

- Evidence Rule 702; based on *Daubert*
- Carlos Bedrossian; Joseph Guth
- Trial court held an evidentiary hearing and allowed the expert testimony
- Court of Appeals affirmed: testimony was relevant, the criteria of Evid.R. 702 were met, and court adequately performed its gatekeeping function; no abuse of discretion

# Watkins v. Honeywell

## Court of Appeals of Ohio

### May 5, 2016

MAY 05 2016

**Court of Appeals of Ohio**  
EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102538

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BARBARA WATKINS, INDIVIDUALLY AND AS  
EXECUTOR OF THE ESTATE OF  
GLENN F. WATKINS, DECEASED

PLAINTIFF-APPELLEE

vs.

AFFINIA GROUP, ET AL.

DEFENDANTS

[Appeal By Honeywell International, Inc.]

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**JUDGMENT:  
REVERSED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-12-780871

BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: May 5, 2016

CV12780871 94003327



- Evidence Rule 702; based on *Daubert*
- Arthur Frank; James Strauchen
- Trial court did not hold an evidentiary hearing and allowed the expert testimony
- Court of Appeals reversed: trial court could not independently determine whether the causation theories were supported by sufficient data or based on reliable principles and methods
- Trial court did not properly execute its gatekeeping function

McIndoe v. Huntington Ingalls Inc.

United States Court of Appeals, Ninth Circuit

2016 WL 1253903

March 31, 2016

- Dr. Allen Raybin
- Upheld District Court's rejection of Dr. Raybin's opinion that every exposure above a threshold level is a substantial factor in the contraction of asbestos disease.
- "Significantly above ambient asbestos levels"
- "Dr. Raybin's testimony aims more to establish a legal conclusion than to establish the facts of [plaintiff's] own injuries."

McIndoe v. Huntington Ingalls Inc.  
United States Court of Appeals, Ninth Circuit  
2016 WL 1253903  
March 31, 2016

- Allowing causation to be established through testimony like Dr. Raybin's would "permit imposition of liability on the manufacturer of any [asbestos-containing] product with which the worker had the briefest of encounters on a single occasion." citing *Lindstrom*.
- This is precisely the sort of unbounded liability that the substantial factor test was developed to limit.

# Davis v. Honeywell

Court of Appeals of California (2d Appellate District)

March 3, 2016

Filed 3/3/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

NICKOLE DAVIS, as Personal  
Representative, etc.,

Plaintiff and Respondent,

v.

HONEYWELL INTERNATIONAL  
INC.,

Defendant and Appellant.

B256793

(Los Angeles County  
Super. Ct. No. JCCP4674/BC469472)

APPEAL from a judgment of the Superior Court for Los Angeles County,  
Victor E. Chavez, Judge. Affirmed.

Perkins Coie, Brian F. McMahon, Aaron R. Goldstein; Horvitz & Levy, Lisa  
Perrochet and Robert H. Wright for Defendant and Appellant.

Karst & Von Oiste and George H. Kim for Plaintiff and Respondent.

- *Sargon* analysis
- James Strauchen
- Court affirms: “we conclude the [every exposure] theory is the subject of legitimate scientific debate”; court does not resolve scientific controversies , it is for the jury

## Boyer v. Weyerhaeuser

USDC WD Wisconsin

February 19, 2016 and May 5, 2016

- Frank Parker, Industrial hygienist
- Dr. Henry Anderson, occupational medicine
- Dr. Jerrold Abraham, pathologist
- Non-occupational exposure
- “A substantial factor means something more than a possible cause”
- Court found causation opinion of significant non-occupational exposure reliable for three mesothelioma plaintiffs who lived less than 1.25 miles from the plant.
- Court excluded causation opinion for three mesothelioma plaintiffs who lived outside of that limit.
- Non-occupational exposure opinions for lung cancer plaintiffs
- excluded

## Walashek v. Air Liquid

USDC SD California

February 16, 2016

- Dr. Michael Fishbein, pathologist
- Immunohistochemical stains at issue
- Rare focally positive stains for WT1, calretinin, CK 5/6 and D2-40
- “Importantly, the focus of the court’s gatekeeping inquiry “must be solely on principles and methodology, not the conclusions they generate”
- Court found Dr. Fishbein’s scientific methodology was reliable.
- Further, the Court found that Dr. Fishbein’s opinion was also based on clinical and radiological information
- “Defendant’s disagreement with Dr. Fishbein’s conclusions is not a basis to exclude his opinion.”

Walashek v. Air Liquid  
USDC SD California  
February 16, 2016

- Dr. Edwin Holstein, internal medicine and occupational medicine
- “The Court does not agree that Dr. Holstein endorses an “every exposure” theory.
- The Court accepted the distinction between “every exposure” and “every significant exposure.”
- “This Court joins the courts that have held that a causation expert’s inability to identify a precise threshold for safe exposure goes to weight not admissibility of the expert’s testimony.”

Walashek v. Air Liquid  
USDC SD California  
February 16, 2016

- Dr. Edwin Holstein, continued
- The Court rejected defendant's argument that Dr. Holstein's opinion was unreliable because he failed to perform a comparative analysis of Walashek's claimed exposures to determine their significance.
- "Rutherford does not contain any requirement that a comparative analysis be conducted."
- The Court also concluded that Dr. Holstein did not need to carry out precise calculations regarding the fibers-per-cc-years that Walashek was exposed in connection with defendant's products.

## Mortimer v. A. O. Smith

USDC ED Pennsylvania

October 23, 2015

- Dr. Arthur Frank
- The Court permitted Dr. Frank to testify regarding his general causation opinion that renal cell carcinoma is caused by exposure to asbestos
- The Court distinguished Dr. Frank's "cumulative exposure" opinion from "any exposure" opinion
- The Court excluded Dr. Frank's specific causation opinion due to "lack of fit" because he could not state whether the amount of asbestos exposure in this case would have been sufficient to cause plaintiff's injuries.

Mortimer v. A. O. Smith  
USDC ED Pennsylvania  
October 23, 2015

- Dr. Scott Bralow
- The Court permitted Dr. Bralow to testify regarding general causation, noting that plaintiffs represented he would not offer any specific causation opinions.

# Yates v. Ford and Honeywell

Eastern District of North Carolina (Western Division)

June 29, 2015

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

NO. 5:12-CV-752-FL

GRAHAM YATES and BECKY )  
YATES, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
FORD MOTOR COMPANY and )  
HONEYWELL INTERNATIONAL, )  
INC., successor-in-interest to Bendix )  
Corporation f/k/a Allied-Signal, Inc., )  
 )  
Defendants. )

ORDER

This matter comes before the court on motion of defendant Honeywell International Inc. ("Honeywell") to preclude evidence suggesting that brake dust causes pleural mesothelioma or that "every exposure counts," (DE 380), together with motion of defendant Ford Motor Company ("Ford") to exclude testimony of plaintiffs' experts Eugene Mark, M.D. ("Mark") and Arnold Brody, Ph.D. ("Brody"). (DE 382). Each defendant has joined in the motion of the other, (DE 384, 385), both of which are ripe for consideration. For the reasons that follow, these motions are granted in part and denied in part.

#### STATEMENT OF THE CASE

Plaintiffs bring claims for personal injury and loss of consortium related to allegations that plaintiff Graham Yates contracted mesothelioma from defendants' brake products. Remaining for

- Evidence Rule 702; based on *Daubert*
- Eugene Mark; Arnold Brody
- *Daubert* evidentiary hearing conducted
- Motion granted: Plaintiff failed to show that Mark's testimony will be helpful to the jury, is based on sufficient facts or data, is the product of reliable principles and methods, or that he has reliably applied these principles and methods to the facts of the case





The Voice of the  
**Defense** Bar

Kevin Greene

Forrest Ren Wilkes