COLUMNS

DECEMBER 2023

Asbestos

Raising the Bar in Asbestos Litigation

HARRISMARTIN

www.harrismartin.com

COLUMNS

December 2023 • Vol. 23, No. 12

Editorial Correspondence
Article submissions and news should be forwarded to Kate McGovern Ferriola, Managing Editor, HarrisMartin Publishing. E-mail: kmcgovern@harrismartin.com

HarrisMartin's *COLUMNS–Asbestos* is published monthly by HarrisMartin Publishing LLC
30 Washington Ave., Ste. D-3
Haddonfield, NJ 08033
$975 print & online annual subscription
$595 print & online 6-month subscription

Questions or subscription requests can be directed to **service@harrismartin.com** or call **(610) 647-5500**.

Advertising Sales
Questions or interest in advertising in *COLUMNS–Asbestos* can be directed to Jeff Andrus at (610) 647-5500.

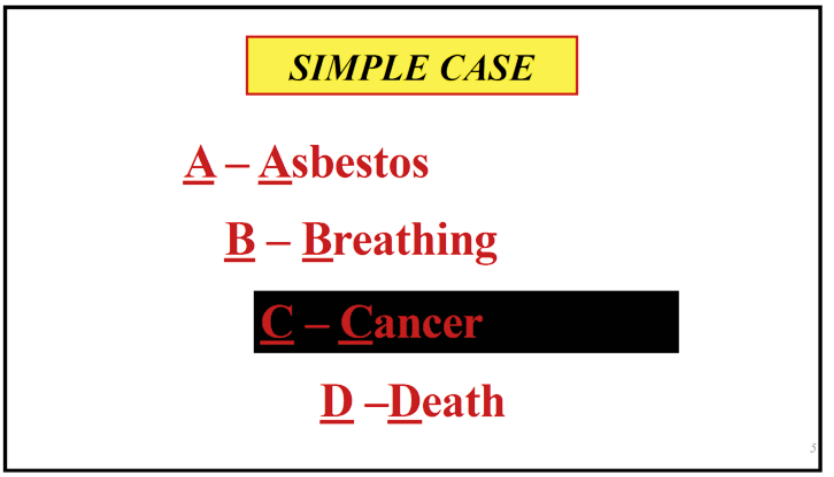
www.harrismartin.com

A + B ≠ C + D: A Commentary on The Federal Asbestos Causation Standard

A Commentary by Edward R. Hugo & Bina Ghanaat

Author bios on page 7

In our last trial, we objected to plaintiff's counsel's submission of the following slide as part of their proposed PowerPoint opening:



"*MR. HUGO:* An example, ABCD, Asbestos Breathing Causes Death. That is one of the slides.

THE COURT: That is an argument.

MR. HUGO: No kidding. That is why I am bringing it to your attention.

THE COURT: I agree with you. If it's a closing argument, you can't make an opening statement in the guise of a closing argument.

MR. FROST: Your Honor, I'm going to be very clear with the Court. The evidence will be asbestos breathing causes cancer and death. That is what the evidence is going to be, that is not an argument. I mean, that is what the evidence will be, and there will be no dispute about this, that asbestos — breathing asbestos causes cancer and death in this case.

THE COURT: That is false. Not every breathing asbestos causes death. There have been millions and millions of people who have been exposed to asbestos, has breathed asbestos and that has not caused their death. So therefore, you are making argument. Counsel, I mean, I'm shocked when you say something of that sort. Maybe that gets you by other judicial officers, I'm not doing that. You can make an argument that in this particular case, we will show that the decedent breathed asbestos, and that is asbestos caused his death. That is fine, but don't make these slogans, don't make these arguments. It's an opening statement. I will allow you to make that argument in your closings, you are not going to be able to do that in an opening statement, period. Is that understood? It should be by now."

Dennis v. Air & Liquid Corp., Case No. CV 19-9343. USDC, Central District of California, 11/6/2023 21:6-22:12

…

"*THE COURT*: Okay. We are here for a lot of stuff before I bring the jury in. First of all, reflecting more on the little – I don't know what you call it, ABCD?

MR. FROST: Yes, Your Honor.

MR. HUGO: Rhetoric.

THE COURT: When you use some abbreviation, the other problem I have, I thought about it some more, that little ABCD is contrary to the holding in *McIndoe versus Huntington Ingles*, 817 F.3d 1170, so I will note that as well."

Dennis v. Air & Liquid Corp. Case No. CV 19-9343. USDC, Central District of California, 11/7/23, 5:12-21 (emphasis added)

The seminal case of *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1176 (2016)[1] implemented a "substantial factor" causation test, requiring that: "Absent direct evidence of causation, a party may satisfy the substantial factor test by demonstrating that the injured person had substantial exposure to the relevant asbestos for a substantial period of time." Despite the foregoing legal causation standard, plaintiffs' attorneys and their retained experts continually offer argument and evidence that "Each," "Any," "Every," "Specific," "Identified" and "All" exposures to asbestos satisfy the legal causation standard.

THE EACH, EVERY AND ALL EXPOSURE THEORIES ARE NOT BASED ON SUFFICIENT FACTS OR DATA AND HAVE BEEN REJECTED AS SUFFICIENT TO SATISFY THE SUBSTANTIAL FACTOR TEST

Courts around the country litigating asbestos cases over the past several decades have examined the admissibility and sufficiency of the "Each, Any, Every, and All" exposure theories advanced by plaintiffs. The Honorable Dee Benson of the United States Court for the District of Utah Central Division took a particularly deep and insightful dive into the subject in *Smith v. Ford Motor Co.*, Case No. 2108-cv-630 (2013). Rejecting the scientific soundness of these theories to sustain legal causation, Judge Benson opined:

> "The every exposure theory does not hold up under careful examination. It is questionable whether it can even properly be called a theory, inasmuch as a theory is commonly described as a coherent collection of general propositions used to describe a conclusion, and while there are ( ) some general propositions used by (plaintiff's pathologist), they fall short of supporting the legal liability he attempts to reach with them. Rule 702 and *Daubert* recognize above all else that to be useful to a jury an expert's opinion must be based on sufficient facts and data. The every exposure theory is based on the opposite: a lack of facts and data. When (plaintiff's pathologist) states that he cannot rule out any asbestos exposure as a possible cause of an individual's mesothelioma he is confirming the fact that there are insufficient facts and data to establish what minimum dosage levels of asbestos are required to cause cancer in a human being. The fact is the medical community at present does not know the answer to the all-important question regarding legal causation, how much is too much?
>
> (Plaintiff's pathologist) seeks to base his causation opinion not on the thin reed that he cannot rule any exposure out, but on the opposite: he rules all exposures "in," boldly stating that plaintiff's mesothelioma "was caused by his total and cumulative exposure to asbestos, with all exposures, and all products playing a contributing role." 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. It is somewhat like a homicide detective who discovers a murdered man from a large family. Based on his and other detectives' training and experience the detective knows that family members are often the killer in such cases. When asked if there are any suspects the detective says he cannot rule out any of the murdered man's relatives. This would be reasonable, but it would not allow the detective to attribute legal liability to every family member on the basis of such a theory.
> . . .
>
> (Plaintiff's pathologist) wants to be allowed to tell a jury that all of the plaintiff's possible exposures to asbestos during his entire life were contributing causes of the plaintiffs cancer, and, therefore, sufficient to support a finding of legal liability as to the manufacturer of each asbestos-containing product, without regard to dosage or how long ago the exposure occurred. Just because we cannot rule anything out does not mean we can rule everything in."

THE "ALL" OR "CUMULATIVE" EXPOSURE THEORIES FAIL FOR THE SAME REASONS

Under the "All" or "Cumulative" Exposure theories, every exposure which contributes to plaintiff's lifetime dose of asbestos exposure is a substantial factor, no matter how trivial, remote or insubstantial.

> "To summarize, the principle behind the "each" and "every" exposure theory and the cumulative exposure theory is the same - that it is impossible to determine which particular exposure to carcinogens, if any, caused an illness. In other words, just like "each and every exposure," the cumulative exposure theory does not rely upon any particular dose or exposure to asbestos, but rather all exposures contribute to a cumulative dose. The ultimate burden of proof on the element of causation, however, remains with the plaintiff. ( ) Requiring a defendant to exclude a potential cause of the illness, therefore, improperly shifts the burden to the defendants to disprove causation and nullifies the requirements of the "substantial factor" test."

Kirk v. Exxon Mobil Corp. 870 F.3d 669, 678 (7th Cir. 2017)

THE NOVEL "SPECIFIC EXPOSURE" AND "IDENTIFIED" EXPOSURE THEORIES FAIL TO SATISFY THE SUBSTANTIAL FACTOR TEST

Experts retained by plaintiffs in asbestos litigation are seeking new ways to subvert courts' rejection of the "each", "every" and "all" theories of legal causation. One such effort is in the form of the recently promulgated "Specific" exposure theory where plaintiff's expert actually opines that the plaintiff was exposed to respirable asbestos attributable to a specific defendant, but still fails to calculate a corollary dose.

This causation theory was recently rejected by the Honorable Michael W. Fitzgerald of the United States District Court, Central District of California in *Carpenter v. 3M Company, et al.*, Case No. CV20-11797-MWF (2022), applying the Maritime Law causation standard.[2]

> "Plaintiffs note that the McIndoe court does not quantify what amount of exposure or period of time is "substantial." Although Plaintiffs do not complete this line of argument, presumably they are suggesting that, because the 9th Circuit failed to quantify what is "substantial," so long as a plaintiff has offered Specific Exposure Evidence attributable to a particular defendant, it is up to the jury to decide what is substantial.
>
> While the Court acknowledges that McIndoe did not involve a case where there was Specific Exposure Evidence, and therefore, did not necessarily answer the question, there is no doubt that *McIndoe* is still instructive on this point. It simply cannot be the case that proffering any evidence of amount, frequency, and duration is sufficient to allow a jury to decide if that exposure is substantial, because, like the "every exposure" theory, it would allow even fleeting exposures to be enough, so long as the plaintiff offered specific evidence. But specific evidence and substantial evidence are not one in the same. See *McIndoe*, 817 F.3d at 1177-78 ("Because the heirs' argument would undermine the substantial factor standard and, in turn, significantly broaden asbestos liability based on fleeting or insignificant encounters with a defendant's product, we too, reject it.") "Causation requires that an expert connect the nature of the asbestos exposure and pair it with a Daubert-approved methodology that can be used to determine whether such an exposure was a substantial cause of the [plaintiff's] injury." Id. at 25.

Another expert recently attempted to differentiate his method of attributing causation from the "each," "any," "every" and "all" methods in the case of *Clarke v. Air & Liquid System Corp., et al.*, Case No. 2:20-cv-00591-SVW-JC (2021) at p. 9, by creating the "identified" exposure method which purports to have four requirements:

> "(1) a known source of asbestos exposure, and (2) a well-characterized activity, that (3) disrupts the source to generate airborne fibers, sufficient to overcome the body's respiratory defenses, which (4) adds to the body's burden of asbestos."

Despite its veneer of scientific rigor, the "identified" exposure theory has the same inherent flaws as the "each," "every" and "all" theories resoundingly rejected by courts. This is because the "identified" exposure theory omits any consideration of frequency, duration, and the sum total of exposures a plaintiff experienced from an individual defendant's asbestos and has not, and cannot be, scientifically tested. The "identified" exposure method has not and cannot be tested." *Clarke v. Air & Liquid System Corp.*, at p. 13. "[T]here is no known or potential error rate." Id. There is "no evidence to suggest that the 'identified exposure' method has been peer reviewed or published, or that it is generally accepted within the scientific community." *Id.* See Advisory Committee Notes, 2000 Amendments, Fed. R. Evid. 720 (noting as additional factor "[w]hether experts are 'proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (*Daubert* II), 43 F.3d 1311, 1317 (9th Cir. 1995)). *Id* at 14.

CONCLUSION

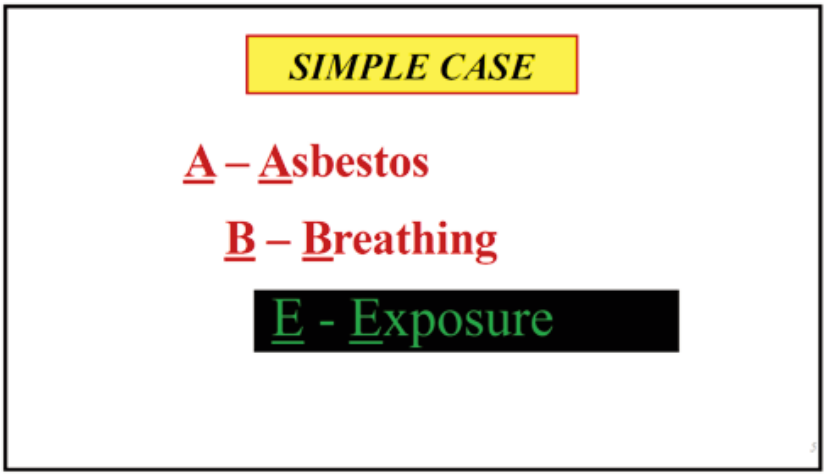
All things are poison and nothing is without poison: the dosage alone makes it so a thing is not a poison.[3] A substance's harmful effect within the human body occurs only when it reaches susceptible cells in a high enough concentration. Although it is a simple concept, from the defense perspective it is critical to distinguish exposure from causation.

ENDNOTES

[1] Edward Hugo argued the *McIndoe* case before the United States Court of Appeals, 9th Circuit, on August 31, 2015.

[2] Hugo Parker LLP filed a Motion for Summary Judgment on October 24, 2022 in the *Carpenter* case challenging plaintiffs' legal causation theories. The court granted summary judgment, issuing the Amended Order Granting Summary Judgment on December 13, 2022.

[3] "Die dritte Defension wegen des Schreibens der neuen Rezepte", Septem Defensiones 1538.



EDWARD R. HUGO is a trial attorney, appellate lawyer, litigator and litigation manager for cases involving products and premises liability, toxic torts, environmental claims, construction defect, personal injury, wrongful death, insurance, professional negligence, sexual molestation and criminal law. He has also been retained as an expert witness and testified in trial, arbitration and deposition regarding: the duties of defense counsel, the effectiveness of defense strategies, the reasonableness of settlement values and defense costs, and insurance coverage issues.
See https://hugoparker.com/edward-hugo/

BINA GHANAAT is a Partner with experience in toxic torts, insurance coverage, bad faith, habitability, and personal injury cases. She manages her cases from inception to resolution, handling discovery, depositions, law and motion, and trial preparation in state and federal courts. Ms. Ghanaat has defended a wide range of clients, including manufacturers, suppliers, contractors, insurance carriers, building owners, and trucking companies.
See https://hugoparker.com/bina-ghanaat/