

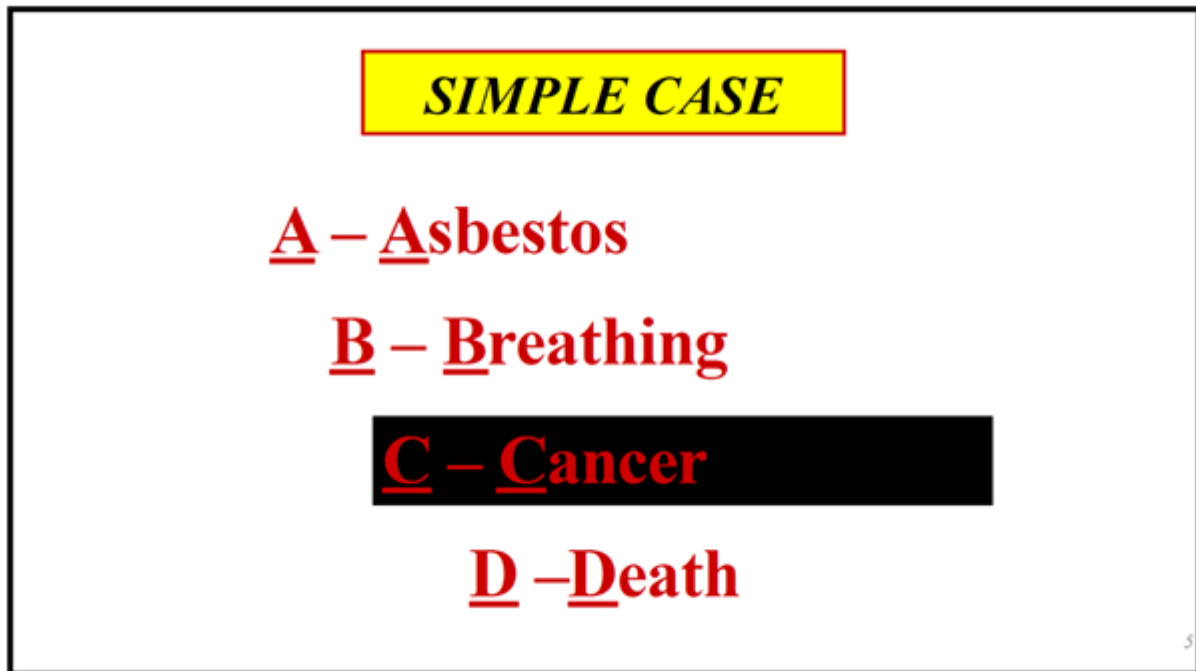
Asbestos: The Devil Is in the Dose II; It's as Simple as A, B, E!

By Edward R. Hugo and Bina Ghanaat

DRI published [Asbestos: The Devil is in the Dose](#) in the July/ August 2023 edition of *The Brief Case*. The Commentary focused on the legal standard for establishing causation in asbestos cases, with an emphasis on the applicable Federal Law:

Under Federal Maritime Law, the seminal case of *McIndoe v Huntington Ingalls, Inc.*, 817 F.3d 1170, 1176 (2016) implemented a “substantial factor” test, holding 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.” (Edward Hugo argued the *McIndoe* case before the United States Court of Appeals, Ninth Circuit, on August 31, 2015).

Fast forward to our last trial, where we objected to plaintiff’s counsel’s submission of the following slide as part of their proposed PowerPoint opening.



We objected, and the Court agreed, that the foregoing was improper argument during opening statement:

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 that 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, 11/6/23, 21:6-22:12

The Court later noted that in addition to being argumentative, the foregoing PowerPoint slide was contrary to the federal causation standard set forth in *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170 (2016):

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

The Judge was on point! And, with a focused and firm cross examination, the critical distinction between exposure to a naturally occurring mineral and the specific *causation* of plaintiff's disease can be made with plaintiff's own experts.

...

"Q. And you told [plaintiff's counsel] that there is no risk, and I want to be clear -- absolutely none, zero, zip, nada -- risk of mesothelioma from background levels of exposure that we as human beings have, correct?"

A. Well, none has ever been measured, let's put it that way. I can't say nada. I can't say it's never happened because there could be some very high-susceptible individuals who have developed mesothelioma, but it wouldn't have been recognized as such. So that -- that's my answer.

Q. There's no measured risk with --

A. As I've said --

Q. -- background exposure to asbestos, true?

A. As I've said.

Q. And you've testified in multiple trials in multiple states that background levels range from 0.03 up to a high of 0.01 fibers per cc, correct?

A. So 0.03 is a very high background. If I've seen that and said so, that's fine. I mean, that can happen outside of a mine or shipyard, but that's not a typical background. The typical backgrounds have two zeros, .003 or 6 up to four or five zeros. So that's much more typical than what you're saying."

Id., 10/27/23, Trial preservation deposition of Arnold Brody, Ph.D., 85:21-86:19

...

Q. Now, with regard to the human body's defense mechanisms, I think you've testified on direct examination that 95 percent of pollutants are removed. But when it comes to asbestos, 98 or 99 percent of asbestos that we breathe in is removed, correct?

A. On the upper airways, that's fine, 95 -- depends on the study but, yeah, 95, 98, 99, that's fine.

Q. And people who live in urban environments like Los Angeles and are adults would have millions or even billions of asbestos fibers in their lungs and are not at any risk of mesothelioma, correct?

A. Yeah, you know, you can get a billion fibers into a thimble, but that's really not a whole lot but, yes, what you say is correct."

Id., 10/27/23, Trial preservation deposition of Arnold Brody, Ph.D., 90:16-91:4

Conclusion

All things are poison and nothing is without poison: the dosage alone makes it so a thing is not a poison. "Die dritte Defension wegen des Schreibens der neuen Rezepte", Septem Defensiones 1538.

A substance's harmful effect within the human body only occurs 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.

SIMPLE CASE

A – Asbestos

B – Breathing

E - Exposure



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.



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. She has drafted numerous motions for summary judgment that have resulted in dismissals of her clients or significantly reduced demands. She has also drafted and argued successful motions for summary adjudication as to punitive damages and various causes of action in asbestos matters venued in San Francisco and Alameda. For those cases in which a dispositive motion has not been viable, Ms. Ghanaat has prepared them for trial in an efficient manner with an emphasis on achieving optimal results for her clients. In Fall 2020, Ms. Ghanaat was co-counsel in one of the first “virtual” trials in Alameda County.