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MANAGING THE HAZARDS OF ENVIRONMENTAL TOXIC TORT LITIGATION

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## Expert Can Testify About Causation Despite Statistical Reports That Negate Causation

By Bruce A. Truex

The Court of Appeals affirmed a trial court's decision to allow Plaintiff's expert to testify to causation despite numerous epidemiological reports that negated Plaintiff's causation theory. Epidemiology involves the statistical study of the causes of diseases.

In an asbestos mesothelioma case, the Defendant brake manufacturers brought a motion to exclude Plaintiff's expert's testimony. The Court of Appeals affirmed the trial court's admission of Plaintiff's expert's testimony. However, each member of the three-judge panel wrote a separate opinion. Two opinions affirmed the admissibility of the testimony and the third dissented.

**Davis Opinion** - Judge Davis wrote that the specific question on appeal was whether Plaintiff's expert's opinion was admissible as a matter of law under MCR 702 and MCL 600.2955(1).

Plaintiff's expert, Dr. Richard Lemen, explained that the issue was whether exposure to automobile brake dust can be a causal factor in mesothelioma.

Both the Plaintiff and Defendant experts agreed that the only known cause of mesothelioma was exposure to asbestos, although both agreed that some cases of mesothelioma could not be traced to any known asbestos exposure. It is undisputed that automobile brake mechanics are exposed to airborne chrysotile asbestos fibers from inhaling the dust produced by grinding brake linings, although the average dosage is below OSHA standards.

Both experts testified that the science of epidemiology was concerned with identification of the causes of disease and ways to prevent it. The experts agreed that a number of epidemiological studies have analyzed mesothelioma among automobile brake mechanics and failed to show any association between asbestos-based automobile products and mesothelioma. The primary point of departure between the experts was over how causal connections are created.

Dr. Goodman, Defendant's expert, asserted that association between a pathogen and a disease can only be established through controlled epidemiological studies, never through case reports. Dr. Goodman rejected the case reports relied upon by Plaintiff's expert as irrelevant because they could not be analyzed statistically.

Dr. Lemen conceded that epidemiological studies are the "best" evidence for causation. However, he pointed out that epidemiological textbooks are divided on the issue of whether case controlled studies are the "best" or merely useful tools. Dr. Lemen stated that cause and effect requires looking at many issues, not just epidemiology. Finally, Dr. Lemen indicated that no governmental entity that he is

### SECRET WARDLE NOTES:

Defendant Daimler Chrysler has indicated it is going to seek leave to appeal this decision to the Michigan Supreme Court.

Because the decision consists of three separate opinions, there is no majority opinion that has precedential value. Nonetheless, the case will undoubtedly be cited by plaintiffs making a Defendant's task of excluding "junk science" all the more difficult. Although this case involved asbestos, the opinions will undoubtedly be extended to all cases involving scientific evidence.

#### Criticism

Judge Davis' opinion fails to consider MCLA 600.2955(2) which states: "A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field." Was Dr. Lemen an impartial, disinterested expert and did he have the foundation to testify that epidemiologists would find causation when every known epidemiological study came to a contrary conclusion? His opinion further begs the question when it states that all the evidence other than the epidemiological studies support Dr. Lemen's opinion. The issue to be decided is: what is the admissible evidence? In answering this question, Judge Davis simply assumed that case reports, regulatory studies and governmental standards were scientific evidence without any legal or scientific authority. Finally his reference to the fifteen epidemiological studies as "potentially questionable" based on the statements of Dr. Lemen in the absence of any studies supporting Lemen's theory is neither objective nor fair.

Judge Meter's opinion appears to be a testimonial to the trial judge and suggests that because the judge has handled asbestos cases for over 15 years his decision must be correct. His further suggestion that the defendant's failure to raise this issue in other prior cases says far more about the attitude of the trial judge than it does about the reliability of the scientific evidence. Finally, the fact that Dr. Lemen's opinions are in accordance with government regulations establishes a political standard not an empirical scientific method.

## CONTINUED...

aware of had changed their recommendation on the regulations to eliminate brake workers which is the standard he would go by to say it is not accepted in scientific, regulatory and the medical community.

Essentially, Dr. Goodman's opinion is that the only way to establish causation is by performing analyses that have control groups whereas Dr. Lemen's opinion is that it is proper to look at all sources of data.

Appellate Judge Davis held that a trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence or to resolve genuine scientific disputes. The fact that an opinion held by a properly qualified expert is not shared by all others in the field or that there exists some conflicting evidence supporting and opposing the opinion do not necessarily render the opinion "unreliable." A trial court does not abuse its discretion by admitting the contested expert opinion, so long as the opinion is rationally derived from a sound foundation.

Judge Davis concluded that it appeared that all the evidence other than the epidemiological studies supported Dr. Lemen's opinion. He felt that the case involved strong and undisputed support for Dr. Lemen's position coupled with fairly consistent yet potentially questionable contradictory evidence depending on which expert is to be believed. Consequently the trial court was faced with a disagreement between two experts over the significance of epidemiological studies. Judge Davis opined that was precisely the situation where the trial court is called upon to exercise discretion, and where the Court of Appeals should not thereafter interfere.

**Meter Opinion** - Judge Meter concurred in the result reached by Judge Davis, but wrote his own opinion expressing approval of the "sound analysis" presented by the trial court.

**O'Connell Dissent** - In his dissent, Judge O'Connell held that the sole issue was whether the testimony of Plaintiff's expert, Dr. Lemen, was admissible under the landmark case of *Daubert v Merrill Dow Pharmaceuticals, Inc.*[1]. According to *Daubert*, expert testimony only qualifies as admissible "scientific knowledge" if empirical testing supports the theory on which the expert relied. Stated in another way, Plaintiff's expert's testimony is only relevant and admissible under *Daubert* if Plaintiff can establish, with the aid of empirical studies, that Plaintiff's work as a brake mechanic caused him to contract mesothelioma. The judge noted that Plaintiff failed to point to any scientific studies that demonstrated correlation between mesothelioma and grinding brakes. Both Plaintiff's and Defendant's expert testified that no less than 15 epidemiological studies had been conducted to determine if there was an empirically verifiable correlation between brake linings and mesothelioma. Both experts testified that these studies were conducted in accordance with established scientific principles and that none of these studies established a causal connection between brake grinding and mesothelioma." Pursuant to *Daubert*, Plaintiff bears the initial responsibility to establish that scientific studies support his expert's anticipated testimony. Simply put, other than Dr. Lemen's bare assertion that such a causal relationship existed, the record lacked any scientific evidence suggesting that there is a correlation between brake grinding and mesothelioma.

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[1] 509 US 579; 113 S.Ct. 2786; 125 Lawyer Ed. 2d 469 (1993).

## CONTACT US

### Farmington Hills

30903 Northwestern Highway, P.O. Box 3040  
Farmington Hills, MI 48333-3040  
Tel: 248-851-9500 Fax: 248-851-2158

### Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48083-5651  
Tel: 586-465-7180 Fax: 586-465-0673

### Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917  
Tel: 517-886-1224 Fax: 517-886-9284

### Grand Rapids

2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546  
Tel: 616-285-0143 Fax: 616-285-0145

### Champaign, IL

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183  
Tel: 217-378-8002 Fax: 217-378-8003

[www.secrestwardle.com](http://www.secrestwardle.com)

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## CONTRIBUTORS

### Environmental and Toxic Tort Practice Group

#### Chair

Bruce A. Truex

#### Editor

Julie Gorney

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