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Review of Expert Testimony Leads N.Y. Court to Reject "Single Fiber" Asbestos Liability Theory

by Michael Hoenig

On April 13, 2015 New York County Supreme Court Justice Barbara Jaffe issued a bombshell ruling in one of many cases that are part of a special docket called New York City Asbestos Litigation (NYCAL). The decision and order in *Juni v. A.O. Smith Water Products*[1] set aside a jury verdict totaling $11 million awarded against Ford Motor Company in favor of a mesothelioma plaintiff, a motor vehicle mechanic who assisted in brake and clutch repairs.

Justice Jaffe's opinion is a measured study of the clash between experts' hypotheses, as opposed to accepted "good" science. The result rejects the notion that a "single fiber" of any type of asbestos causes disease cumulatively and, therefore, becomes a substantial factor in causing the illness. Single-fiber advocacy has been rejected by a growing number of appellate courts outside New York too.[2]

The term "asbestos," derived from the Greek word meaning "inextinguishable" (reflecting one of its principal characteristics: fire resistance), is a popular generic designation; however, the various minerals actually have widely divergent toxicities and risk factors.[3] Thus, for example, defect and causation evidence regarding physical, chemical, and toxicological behavior of "amphibole asbestos" (*e.g.*, actinolite, amosite, anthophyllite, crocidolite and tremolite) is not applicable to "serpentine asbestos" (chrysotile). Chrysotile was the dominant form of asbestos used in motor vehicle brakes and in certain gaskets which defendants and scientists argue is not harmful to brake workers.[4]

Epidemiological studies have reported findings showing no increased risk of mesothelioma among auto mechanics, a world-wide worker population one would expect to abundantly reflect the disease if exposure to chrysotile were causal. Examination of these studies finds no reliable evidence that working in automotive repair with friction products causes mesothelioma.[5] Justice Jaffe's *Juni* decision mentions 21 such studies yielding no evidence of an increased risk of developing an asbestos-related disease from brake workers' exposure to chrysotile.[6]

Indeed, in a Pennsylvania Supreme Court appeal involving the reliability of the "any fiber" causation theory, 11 distinguished scientists (none of whom received funding from or testified as experts for any of the parties in the case) filed an *amicus curiae* brief criticizing the methodological errors committed by the "any exposure" expert.[7]

Justice Jaffe analyzed plaintiff's expert testimony in *Juni*. She held that the reliability of their opinions and the underlying methodologies were governed by the admissibility standards articulated in *Parker v. Mobil Oil Corp.*[8] and *Cornell v. 360 W. 51st St. Realty*.[9] Accordingly, she analyzed each decision, specifying the salient principles.

The basic rules seem simple enough. If "novel" scientific evidence is involved, the New York court applies the *Frye* "general acceptance" test to determine "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally."[10] If the answer is "no," the testimony has failed and must be precluded or excluded. If the answer is "yes," the proponent of the novel scientific testimony still has to

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Michael Hoenig is a Member of the law firm Herzfeld & Rubin, P.C., of New York City, specializing in products liability and complex litigation. Mr. Hoenig authors a regular Complex Litigation column for *New York Law Journal*, the May 11, 2015 installment of which was an extensive analysis of the *Juni* decision.

get past the admissibility "gate." The proffered scientific evidence must then meet a second, "foundational reliability" inquiry applicable to all expert testimony, not just to "novel" scientific evidence.

The plaintiff presented Dr. Steven Markowitz, an internal and occupational medicine physician, to establish general causation. He testified that all instances of asbestos exposure are "viewed as a whole," cumulatively contributing to and causing the illness. He stated that "every part of that exposure" acts as a contributing factor. No exposure may be discounted, no matter how remote the occurrence, as "it's the cumulative exposure that matters." He opined that chrysotile fibers in friction products (*e.g.*, brakes, clutches and gaskets) can cause mesothelioma.[11]

Dr. Jacqueline Moline, an expert in internal, occupational and environmental medicine, was plaintiff's expert on specific causation. She testified that decedent's cumulative asbestos exposure caused his mesothelioma; that it is not possible to separate out or exclude any particular exposure; and that "all" of Juni's asbestos exposure in and around work on brakes and clutches constituted "substantial contributing factors in causing his disease."[12]

Dr. Moline conceded that she did not know the amount, duration, or frequency of plaintiff's exposure to products with asbestos-containing dust sold or distributed by defendant. She "could not and did not establish a dose-response relationship or even minimally quantify Juni's exposures." Yet, *Parker* requires such quantification. The "every single exposure" argument is "irreconcilable" with the well-recognized scientific requirement that the "amount, duration and frequency of exposure" be considered in assessing the sufficiency of an exposure to increase the risk of developing a disease. As *Parker* and *Cornell* made clear, "associations" are not enough.[13] Studies cited by a plaintiff's expert that speak merely in terms of "risk," "linkage" and "association" of a toxin with a disease do not prove causation.[14]

Accordingly, the experts' opinions flunked the *Parker* and *Cornell* admissibility standards. This proof insufficiency required the verdict to be set aside and judgment to be entered for defendant. *Juni* is a major development and is consistent with case law in other jurisdictions that has rejected the so-called "cumulative exposure" theory and its variant, the "each and every exposure" theory.

Endnotes

[1] 2015 N.Y. Misc. LEXIS 1168 (N.Y. Co. April 13, 2015). NYCAL is a special docket with assigned judges to handle numerous asbestos cases.

[2] See *Juni*, 2015 N.Y. Misc. LEXIS 1168, at *54-*60 (citing five law review articles and case law from Texas, Virginia, Pennsylvania, Nevada, Georgia, the U.S. Court of Appeals for the Sixth Circuit and others).

[3] *Case v. Fibreboard Corp*., 743 P.2d 1062, 1065 (Okla. Sup. Ct. 1987); *Mullen v. Armstrong World Industries*, 246 Cal. Rptr. 32, 36, 37 (Cal. App. 1988); *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. Sup. Ct. 1985).

[4] See *Amicus Curiae* Brief of 11 Noted Scientists filed in the Supreme Court of Pennsylvania in *Betz v. Pneumo Abex*, Apr. 25, 2011, 2010 PA S. Ct. Briefs 82010; 2011 PA S. Ct. Briefs Lexis 5, at *19-*21, *29-*30, *34, *39-*40 (citing numerous studies and sources). The *amici* scientists included physicians, chemists, geologists, physicists, epidemiologists and toxicologists.

[5] *Amicus Curiae* Brief, *supra* n. 4, LEXIS at *30-*31, *39-*43, *47-*50.

[6] *Juni*, 2015 N.Y. Misc. LEXIS 1168, at *44-*46.

[7] *See Amicus Curiae* Brief, *supra* n. 4.

[8] 7 N.Y. 3d 434 (2006).

[9] *Cornell v. 360 W. 51st St. Realty*, 22 NY3d 762 (2014).

[10] The "*Frye* test" stems from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[11] *Juni*, 2015 N.Y. Misc. LEXIS 1168, at *7-*11. The court listed the sources upon which Markowitz based his opinion.

[12] *Id*., LEXIS, at *12-*14.

[13] *Id*., LEXIS at *47-*53.

[14] *Juni*, LEXIS at *30, citing and quoting from Federal Courts' Reference Manual on Scientific Evidence, at 566 (3d ed. 2011) ("an association does not necessarily mean that there is a cause-effect relationship").

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