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Calif. Asbestos Case Opens Door For Shaky Expert Opinions

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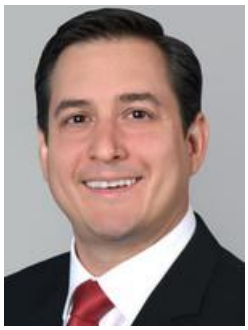
In a recent decision in an asbestos-related cancer case, Davis v. Honeywell, the California Court of Appeal held that the trial court properly admitted expert testimony that "every exposure" to low doses of asbestos — known as the "every exposure" theory — contributed to the plaintiff's risk of developing cancer.[1] The court reasoned that the "every exposure" theory is the subject of legitimate scientific debate, and left it up to the jury to resolve the conflict between this theory and any competing expert opinions.[2]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This decision signals a departure from the seminal case Sargon Enterprises Inc. v. University of Southern California, in which the California Supreme Court held that a trial court has an affirmative duty to act as a "gatekeeper" to carefully screen and exclude speculative expert testimony.[3] It is particularly appropriate for trial courts to "vigilantly exercise their gatekeeping function when deciding whether to admit testimony that purports to prove such claims" in asbestos litigation, since the long latency period of asbestos-related diseases makes it "inherently difficult to reconstruct [the] past."[4]

Despite Sargon's mandate to California trial court judges to closely screen expert opinions at the gate, Davis takes a more lenient view of this gatekeeping duty while allowing the arguably speculative "every exposure" theory to go before a jury. This may open the door for plaintiffs in asbestos cases to rely on expert opinions that may not be as reliable or "grounded in the past" as the Sargon court envisioned in order to prove causation.[5]

In Sargon, the seminal decision on the standards for admissibility of expert witness testimony in California, the California Supreme Court held that trial courts have a "substantial 'gatekeeping' responsibility" to exclude speculative or irrelevant expert testimony.[6] Sargon involved a small dental implant company, Sargon Enterprises Inc., that sued the University of Southern California (USC) for breach of contract for failing to complete clinical testing on a new implant developed and patented by Sargon and approved by the U.S. Food and Drug Administration.

The plaintiff offered expert testimony on lost profit damages, which the trial court excluded because, in part, the opinion was "not based on any historical data from [Sargon] or a comparison to similar businesses."[7] The Supreme Court affirmed the trial court's ruling, holding that the trial court properly excluded the expert's testimony because it was inherently speculative given that the expert "opined that Sargon's market share would have increased spectacularly over time to levels far above anything it

had ever reached," and contained "circular" reasoning that had "no rational basis."[8] In so holding, the Supreme Court held that sections 801 and 802 of the California Evidence Code require the "trial court [to] act[] as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely; (2) based on reasons unsupported by the material on which the expert relies; or (3) speculative."[9]

Sargon empowers trial courts to "inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning."[10] In other words, trial court judges must scrutinize and weed out expert testimony that is unreliable and foundationally flawed before it goes before the jury for consideration. Indeed, "'[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'"[11]

At the same time, Sargon cautioned that a court "must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion;" a court "does not resolve scientific controversies."[12] Rather, a court must conduct a "circumscribed inquiry" to ensure that the matter relied on by the expert provides "a reasonable basis for the opinion" and is not based on a "leap of logic or conjecture" or "assumptions of fact without evidentiary support."[13]

The court of appeal in Davis failed to act as a gatekeeper by requiring the jury to decide whether expert testimony based upon the "every exposure" theory provides sufficient proof of causation. In Davis, the plaintiff presented fact testimony about the decedent performing "brake jobs and home remodeling projects" from the 1960s to 1970s, along with expert testimony in support of the claim that Honeywell International Inc. caused the decedent's mesothelioma.[14] On examination, the expert testified that "mesothelioma can occur with very low doses of asbestos exposure" and that "asbestos exposure is cumulative" with "each exposure add[ing] to the previous exposures."[15]

At the end of his testimony, the expert was asked to "assume" several facts about a person who, for several years, performed brake jobs with brake liners that contained 50 percent asbestos and, in turn, the expert testified that this exposure was "a substantial contributing factor in the causation of that person's mesothelioma" and that he held that opinion to "a reasonable degree of medical certainty."[16] The expert "admitted that he did not perform any calculations or estimates of the dose of asbestos" the decedent may have received.[17]

The trial court admitted the testimony, and the court of appeal affirmed, holding in relevant part that the fact that mesothelioma is dose-dependent did not render the expert's opinion based on the "every exposure" theory illogical, and that scientific literature supported the expert's opinion even though the expert did not rely on any epidemiological studies — which are in "most" instances the "best evidence of causation."[18] In addition, the court held that California Supreme Court precedent "does not require a 'dose-level estimation'" of the plaintiff's exposure to the defendant's asbestos-containing product in order to prove causation.[19] Rather, a plaintiff may rely upon expert testimony that "'each exposure, even a relatively small one'" was a substantial factor in causing a plaintiff's harm, without specifying a dose-level estimation.[20]

Davis further cautioned that despite its reliance on Sargon and the gatekeeping duty it places on trial courts, "the gate tended is not a partisan checkpoint," and trial courts are to exclude "*only* 'clearly invalid and unreliable' expert opinion."[21] This is a striking contrast to Sargon's strong language that trial courts must "vigilantly" screen expert testimony and exclude testimony that is "not grounded in the past."[22]

Despite the decision in Davis, it can be distinguished. First and foremost, Davis's interpretation of the "substantial factor" causation standard is specific to asbestos-related cancer cases.[23] Indeed, in California, "asbestos related cancer cases require[] a different [jury] instruction regarding exposure to a particular product" to prove substantial factor causation.[24] In addition, Davis' holding can be limited to the facts of that case. The court emphasized that its conclusion regarding the admissibility of the expert's testimony should not be read "to imply [that] it is the only conclusion that can be reached regarding low exposures to asbestos"[25] And that is for good reason, since in finding that there is no requirement for a "'dose-level estimation,'" the court casts aside the central tenet of toxicology that "the dose makes the poison."[26]

Finally, the court's analysis of whether the expert's opinion was properly admitted was weak, undermining its persuasiveness in future cases. Except for one brief reference in its case summary of Sargon,[27] nowhere in its discussion of the admissibility of the expert's opinion did the court analyze, interpret or cite the applicable statutory authority underlying Sargon's analysis of the gatekeeping responsibility: California Evidence Code sections 801 and 802.

Further, the court found that the expert properly testified as to causation even though the expert relied on a "hypothetical" set of assumptions instead of the actual facts.[28] That is, the expert never testified that there is a reasonable medical probability that the decedent's exposure was a substantial factor — likely because he "did not perform any calculations or estimates of the dose of asbestos the decedent may have received from any of the activities he engaged in."[29] Most of the time, a plaintiff will offer an expert who provides a specific causation opinion that is based on a dose estimate for the plaintiff at issue. Davis should not lead to change in that strategy because without that causation evidence, a plaintiff will likely face a serious attack on the causation expert who is offered and a credible motion for summary judgment.

Davis punts to the jury the difficult task to evaluate, on its own, whether complex expert testimony based upon each exposure to asbestos — over the course of several decades in most cases — is foundationally strong enough to prove causation. While Davis's holding can (and should) be limited to the specific facts and expert testimony in that case, the decision serves as a warning that California courts may not always vigorously enforce their "substantial 'gatekeeping' responsibility."[30]

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[1] Davis v. Honeywell International Inc., 245 Cal.App.4th 477, 480-481 (2016) (petition for review pending).

[2] Id.

[3] Sargon Enterprises Inc. v. University of Southern California, 55 Cal.4th 747, 753 (2012).

[4] See id.; Izell v. Union Carbide Corp., 231 Cal.App.4th 962, 975 (2014).

[5] 55 Cal.4th at 780.

[6] Id. at 769.

[7] Id. at 767.

[8] Id. at 776, 777-778.

[9] Id. at 771-772.

[10] Id. at 771.

[11] Id. (quoting General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997)).

[12] Id. at 772.

[13] Id. at 770-772.

[14] Davis, 245 Cal.App.4th at 481-483.

[15] Id. at 483.

[16] Id. at 483.

[17] Id.

[18] Id. at 487, 491.

[19] Id. at 493.

[20] Id. (citing Rutherford v. Owens-Illinois Inc., 16 Cal.4th 953, 969 (1997)).

[21] Id. at 492 (emphasis added).

[22] Sargon, 55 Cal.4th at 780-781.

[23] Davis, 245 Cal.App.4th at 479-480 (referring to the plaintiff's burden to prove causation "in an asbestos-related cancer case").

[24] Judicial Council of California Civil Jury Instructions, No. 430, Causation: Substantial Factor (2007) (requiring that a jury be instructed pursuant to CACI No. 435, Causation for Asbestos-Related Cancer Claims, in asbestos-related cancer cases).

[25] Davis, 245 Cal.App.4th at 487.

[26] Id. at 493; see In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., 524 F. Supp. 2d 1166, 1174 (N.D. Cal. 2007) (citations and internal quotation marks omitted).

[27] Davis, 245 Cal.App.4th at 486.

[28] Id. at 493.

[29] Id. at 483.

[30] Sargon, 55 Cal.4th at 769.