

# LegalNewslne.com

<http://www.legalnewsline.com>

10/31/2011

## **The science of asbestos: The arguments for juries**

by Michael P. Tremoglie

WASHINGTON (Legal Newslne) - With so much at stake for businesses weighted down by litigation costs, can juries in asbestos cases be trusted to render fair and just verdicts?

While there is general agreement on some pieces of the scientific puzzle - for example there's no dispute that amphibole fibers cause mesothelioma - there are differences among highly regarded scientists about the effects of chrysotile fibers.

Two Philadelphia lawyers, one a plaintiffs attorney the other a defense attorney, were asked how they address asbestos science in the courtroom.

Plaintiff attorney Benjamin Shein of the Shein Law Center has been practicing since 1985 and is solely devoted to personal injury cases.

He has settled hundreds of asbestos cases and has garnered several multimillion-dollar jury verdicts in asbestos and product liability cases.

Shein also is a renowned expert in mesothelioma and asbestos, according to his website biography - "he lectures to doctors, other lawyers, insurance industry representatives and union leaders on asbestos exposure and disease."

He was asked about differing scientific opinions regarding asbestos and how those differences are communicated to juries.

"You go in with the premise that all asbestos causes mesothelioma including chrysotile," Shein said. "This is the premise that is supported by the Environmental Protection Agency, National Institute for Occupational Safety and Health, World Health Organization and by all international and governmental health organizations."

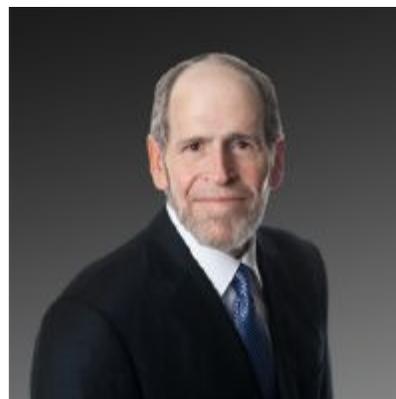
According to Shein, one also looks at an individual's exposure. The state of Pennsylvania does not require dose reconstruction. Exposure is determined by the testimony of a witness or plaintiff.

Shein is a member of Asbestos Victims of America and Victims Against Default and Delay, the American Association for Justice and Trial Lawyers for Public Justice. He also belongs to the Million Dollar Advocates Forum for obtaining settlements, verdicts and awards in excess of \$1 million.

Shein said courts in Pennsylvania have ruled that one or two exposures is not sufficient enough to cause or create liability.



Shein



Levy

And when it comes to strategy employed by defense attorneys, Shein contends they tend to use the same experts over and over and usually try to argue that exposures were too small and too long ago.

Shein shoots down those theories by pointing to federal safety standards that maintain that any exposure greater than background is unsafe.

Defense attorney I. Steven Levy of White and Williams LLP, who has lectured extensively on "junk science" issues in litigation and the proper role of epidemiology on tort law causation, takes exception to some of Shein's arguments.

According to Levy, authorities from Canada and the U.S. are now able to show that the potential risk from chrysotile asbestos is not the same as other types of asbestos.

"Asbestos is a naturally occurring mineral," Levy said. "If there were no safe level then people would be getting asbestos related diseases because of the natural occurrence. It is known that mesothelioma occurs more often with heavy exposure."

Levy's clients include product and chemical manufacturers, construction companies, pharmaceutical entities and hospitals and health care providers.

His firm has been in existence since 1899. He concentrates on areas of civil trial practice involving science and technology, including environmental, toxic tort, products liability, healthcare, construction and premises liability matters. He also serves as a national litigation counsel to corporations which are party to thousands of lawsuits nationwide.

Levy noted a town in Quebec where chrysotile is mined. He said studies show the incidence of asbestos-related diseases is no greater in that town than the general population.

"When the relationship between mesothelioma and asbestos was first established, it was documented in places where there was not chrysotile," Levy said. "The fact is the science is not settled. We do not know why some people get it and some people do not."

"When I go to trial I will present my expert to the jury that this type of asbestos does not cause mesothelioma. A lot of it depends on how much exposure there is involved. If the plaintiff has a lot of exposure then that will be a successful case for the plaintiff. But if there is not a lot of exposure then we must establish that the cause was something else."

"There is no set level of exposure. What must be satisfied is that whatever the amount is sufficient per the expert to cause the disease. Almost all of the experts the plaintiffs' attorneys will use say that any level causes the disease."

According to Levy, the defense must point out that his clients' product was not the one that caused the disease. He will make the jury aware that his product would have, say, one or two percent asbestos. Simply put, he does not claim that it was not that asbestos did not cause the disease, but rather that the specific type of product did not cause it.

He used the example of brake shoes, which have been a target of asbestos plaintiffs attorneys. Many will say the asbestos in brake shoe linings is not friable and therefore it does not become airborne. This could not lead to a disease like mesothelioma.

Levy summed up the problem attorneys who defend companies in asbestos cases face.

"Anytime you get into an area of disputed scientific evidence when sympathies are involved," he said, "they are difficult cases for defense lawyers because the key is to be able to present in an organized cohesive fashion your version of the true science."

Presenting a version of the true science in an area where the experts differ on some important issues presents a challenge. It could be even more difficult when sometimes those in the medical field have been known to be influenced by the money that is at stake.

Bill Peacock an analyst at the Texas Public Policy Foundation, an Austin, Texas-based research institute. He wrote an article in April 2005 about the problems Texas was having with asbestos litigation.

At the time, 40 percent of all U.S. asbestos lawsuits were filed in Texas.

He noted that there were significant discrepancies in findings by doctors.

Peacock wrote, "The use of mass screenings is symptomatic of both silica and asbestos litigation... However, these are not medical screenings meant to identify patients with diseases needing treatment, but rather legal screenings seeking to identify potential litigants. When evaluating the x-rays and patient histories produced in these screenings, doctors generally make diagnoses that satisfy legal, not medical, standards. The result is most people meeting the legal standards to proceed in court do not meet the medical standards necessary to produce a correct diagnosis... one study using independent radiologists identified the presence of lung abnormalities in only 4.5 percent of x-rays used in asbestos litigation, in contrast... doctors employed by trial lawyers... found abnormalities in 96 percent..."

Robert I. Field, professor of law at the Earle Mack School of Law at Drexel University in Philadelphia and a nationally recognized expert on health policy and public health law, said that the legal system is set up to give both sides a chance to be heard.

Alternative methods, such as science courts - modeled after drug courts, for instance - have been proposed to handle these types of complex scientific issues.

"The tort litigation system is very expensive and time consuming and often can be difficult in dealing with complex scientific information," Field said. "Asbestos cases are often dealing with probabilities there has been an exposure so one does not know yet the extent and existence of damage."

Field also holds a joint appointment as professor of health management and policy at the Drexel School of Public Health.

"One idea is to have science courts that have the specific expertise to understand the information being contested," Field said. "Although the idea has been proposed it has not caught on."

---

Filed Under: *none*