



JUDGE MARK DAVIDSON
301 FANNIN, ROOM 211
HOUSTON, TEXAS 77002

January 20, 2004

Re: Cause No. 2004-03964; In Re: Asbestos Litigation

Dear Counsel:

The court has concluded a three day hearing (exclusive of watching the videotaped testimony and review of briefs) of the motion of Daimler-Chrysler to strike expert testimony by all plaintiffs' witnesses in Multi-District Asbestos Litigation that mesothelioma can be caused by exposure to brake linings in automobiles and trucks. Ford Motor Company has joined in the motion and participated in the evidentiary hearing in support of the motion. The motion was opposed by Plaintiffs represented by the firms of Barron and Budd and by the firm of Waters and Kraus. All parties in any MDL hearing were notified of the hearing. Many attorneys attended the hearing as spectators. Some attorneys, including attorneys representing Plaintiffs making claims against Daimler-Chrysler and Ford, chose neither to attend nor participate. All attorneys present (approximately 100 of them) were invited to participate, but chose not to. At the conclusion of the hearing, the court invited and received substantial briefing by counsel for many parties.

The motion is granted in part, and denied in part. The motion is granted, with modifications set out in this letter, as to epidemiological evidence and medical evidence. The motion is denied as to biological evidence. While normally I believe trial judges should rule as succinctly as possible, since this ruling affects a number of cases, I will set forth my ruling in detail and state the grounds for the ruling so that any party may seek an appellate remedy,

The ruling of the court on the motion is governed by the interpretation of the opinion of the Texas Supreme Court in *Merrell Dow v. Havner*, 953 S.W. 2d 706 (Tex. 1997). ("*Havner*")¹. This case is, of course, significantly different. One difference is that this ruling directly affects thousands of Plaintiffs. Another is that while there was only one Defendant in *Havner*, there are dozens of defendants in the MDL.

¹ If it were up to me, I would call it the *Merrell Dow* case. If I did that, however, no one would know what I was talking about. I will therefore, conform to what the rest of the world calls the case.

There is one more claimed difference that may, depending on how one reads *Havner*, be dispositive of the motion. Plaintiffs in this case claim that they can present fiber samples taken from either biopsies or autopsies of plaintiffs which show the kind of asbestos which was inhaled. Defendants claim this is irrelevant, since, they say, *Havner* sets a requirement in mass tort cases that epidemiological evidence be presented establishing causation to be at least twice as likely as a control group within a ninety-five percent certainty. In other words, Defendants claim that proving specific causation is legally insufficient, and must be supplemented with evidence of general causation in the form of an epidemiological testimony.

The dual requirements of specific and general causation seem to have had their genesis in *Minnesota Min and Mfg. Co. v. Atterbury*, 978 S.W.2d 183, 203 (Tex. App.—Texarkana 1998, pet. denied), where the court stated, without citation to authority, that "a plaintiff must prove both general and specific causation." 978 S.W.2d at 203. In *Atterbury*, the plaintiffs claimed injuries from silicone breast implants manufactured and distributed by defendant Minnesota Mineral and Manufacturing Company (3M). The *Atterbury* court rendered judgment in favor of 3M and held that in breast implant cases, it was necessary to prove both general causation and specific causation. The court concluded, without stating authority, that "a plaintiff must prove that the agent he or she alleges caused injury or illness 1) could do so in the general population, and 2) did so to him or her specifically." Preceding this conclusion was a discussion of causation in the context of *Havner*, where the *Atterbury* court summarized portions of the *Havner* decision, rather quoting directly from the text. According to *Atterbury*, the *Havner* court "held that scientifically reliable epidemiological studies that suggest the risk of injury or condition is more than doubled is [sic] sufficient evidence of general causation to pass a legal sufficiency review" and held that a plaintiff "must introduce other credible evidence to support specific causation." (citing *Havner*, 953 S.W.2d at 718). In *Havner*, the portion of text summarized by *Atterbury* stated that "[o]ther factors must be considered" beyond a finding of relative risk or a single epidemiological test showing an association. 953 S.W.2d at 718. However, in the same paragraph, the *Havner* court also noted that "even if a particular study shows a low, relative risk, there may in fact be a causal relationship."

Similarly, the Fourteenth Court of Appeals in *Frias v. Atlantic Richfield Co.*, 104 S.W.3d 925, 928 (Tex. App.—Houston [14th Dist.] 2003, no pet. h.), relied on the *Havner* decision to reach the conclusion that toxic tort cases require both general and specific causation. In *Frias*, the estate of a deceased employee sued the employer, alleging that the employee's exposure to benzene at the refinery caused aplastic anemia. *Frias*. *Frias* was problematic because it did not convey the *Havner* decision within its complete context. In *Havner*, the Texas Supreme Court acknowledged in the paragraph immediately prior to the citation in *Frias*, that the standard of evidence necessary in toxic torts cases was subject to considerable debate and that only "[s]ometimes, causation in toxic tort cases is discussed in terms of general and specific causation." The Court then cited page 514 of *Havner* for that proposition. No reading of that page has enabled me to find the basis for that legal conclusion. However, the *Havner* court did say on page 514 of their opinion that in some instances, specific causation evidence will not be available and that because science "cannot tell us what caused a particular plaintiff's injury,"

policy allows a person who has been injured and exposed to a substance that elevates risk, to raise the issue of causation.

The First Court of Appeals has discussed the *Atterbury* court's construction of *Havner* in *Coastal Tankships USA, Inc. v. Anderson*, 87 S.W.3d 591 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The Court found that the expert testimony was insufficient to prove that exposure to the chemical naphtha was the specific and general cause of injury. The plaintiff's husband served as ship crew on a tanker that was twice-loaded with naphtha and was exposed to the strong chemical fumes of naphtha for 11 days. Of 29 crew members, only the plaintiff's husband became ill. The court, citing *Havner* and *Atterbury*, wrote that "[t]he supreme court recognizes that it is possible that a toxic-tort plaintiff may not be able to find reliable direct evidence of specific causation," and that "a plaintiff in such a situation may be able to prove specific causation circumstantially by taking general-causation evidence, such as epidemiological studies, and showing he is similar to the studies' subjects." General causation "if properly adapted, may possibly be used to prove both general and specific causation," but nevertheless the court reiterated the rule that "both aspects of causation must still be proved." In a concurring opinion, Justice Brister² pointed out that this new rule adopted by the court of appeals required that the plaintiff prove both general and specific causation, contrary to the fact that "[t]he Texas Supreme Court has never stated such a rule." *Id.* at 616 (Brister, J., concurring). Brister wrote that "*Havner* notes only that plaintiffs 'sometimes' offer general causation evidence when they cannot present reliable evidence of specific causation." *Id.*

Not all courts have construed *Havner* as a mandate requiring both general and specific causation; for example, the court in *Neal v. Dow Agrosciences, LLC*, 74 S.W.3d 468, 472 (Tex. App.—Dallas 2002, no pet.) ruled in favor of the manufacturer in a pesticide poisoning simply because the studies used by the plaintiff did not establish an association between the substance and the injury suffered by the child. In *Neal*, the plaintiff's apartment became infested with ants and was sprayed several times over a five month period. The plaintiff, who was pregnant at the time of the sprayings, later gave birth to a child who was developed a malignant brain tumor and subsequently died. The plaintiff sued the pesticides manufacturer alleging that the pesticide contained a chemical that caused the newborn child's brain injury and death. The court, also citing *Havner*, wrote that "[i]n the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury." In cases where there is no "direct, scientifically reliable proof of causation" — that is, specific causation — the finder of fact may infer that general causation exists nevertheless.

In conclusion, the *Havner* progeny have developed a requirement that the plaintiff prove both specific and general causation. Yet in at least one line of cases, evidence of general causation may also be evidence of specific causation. The court's opinion in *Havner* does not state that both must be proven and acknowledges that in some instances evidence

² I note that Justice Brister wrote this concurring opinion before he became either the Chief Justice of the Fourteenth Court of Appeals or a Justice of the Texas Supreme Court.

of specific causation will not be available and that as a matter of policy, general causation should be allowed to "raise the issue of causation." The dual requirement of specific and general causation first emerged in the *Atterbury* decision, where the court stated, without citation to authority, that both must be proven for a plaintiff to recover in a toxic tort case. Since my ruling has statewide effect on thousands of cases, I am reluctant to adopt a rule without more guidance from the Texas Supreme Court that would have the effects the ruling Chrysler is asking me to take. Instead, I am adopting the rule that which *Havner* intimates and that which Justice Brister describes in his concurrence in *Coastal Tankship*, which is that general causation **may serve as a substitute** for specific causation when it is impossible to procure evidence of specific causation, due to the nature of toxic tort cases. The cases that equate general causation with specific causation have extracted that rule from interpretations of the *Havner* case that I cannot find support for. The result is a bifurcated test that skews the original holding of *Havner* and unfairly burdens asbestos plaintiffs. If I have misread the intent of the Texas Supreme Court in *Havner*, I am aware that I am inviting and expecting reversal.

This legal ruling is not dispositive of the motion before the court, however, for it leads to a further question: Does modern science, complying with *Robinson* standards, enable a qualified expert witness to present direct evidence of causation of mesothelioma in a specific individual, as opposed to the circumstantial epidemiological evidence discussed in *Havner*, on the basis of lung fiber samples? If so, the motion will be denied in all cases before the MDL. If not, the motion will be granted in all cases before the MDL on grounds not stated in the motion.

The Plaintiffs called three expert witnesses to the stand to establish causation: Richard Lemen, an epidemiologist, Eugene Mark, a pathologist, and Ronald Dodson, a cell biologist. The credentials of the three experts were not challenged, but rather either their methodology or their reasoning. Under the progeny of *Robinson* and *Havner*, of course, the bare assertion of a conclusion by a qualified expert does not make the testimony admissible. Hence, an examination of the testimony of each of the experts is necessary.

Dr. Lemen candidly admitted that there is not an epidemiological cohort study that says that workers who work around friction products have a relative risk of two or greater to develop asbestos disease, (Record - Vol II, p. 33). He further testified that the epidemiological studies are equivocal as to causation of asbestos disease in those workers. Given that it is the Plaintiff's burden to establish the reliability of scientific testimony, the testimony of Doctor Lemen does not establish a causation link, and the motion of Daimler Chrysler as to epidemiological testimony is granted.³

Dr. Eugene Mark testified as a physician who specialized in pathology. Dr. Mark's testimony can be summarized as saying that any exposure to asbestos, however slight, can be a causation factor in asbestos related disease. He candidly admitted that it is impossible under any circumstances to split up causation between various defendants

³ I reiterate that the effect of this finding will be to mandate the granting of the motion and, eventually, the dismissal of all claims against the moving Defendants if my reading of *Havner* is incorrect.

(Record - Vol. III, p. 272), and that the basis of his testimony was that all asbestos was a cause of asbestos related disease. He candidly admitted that chrysotile asbestos (the kind used in friction products) was much less likely to cause asbestos disease than was crocidolite or amosite asbestos products. (Record - Vol. III, p. 262). He also acknowledged that the half-life of chrysotile asbestos fibers in the lungs was less than other types. My conclusion from his testimony is that while it is true that any exposure to an asbestos product increases risk of mesothelioma or some other asbestos disease, the extent to which any type of asbestos does so is not measurable nor is it scientifically verifiable. I therefore conclude that Dr. Mark's testimony fails to meet the standards necessary to qualify as expert testimony as to these defendants.

Dr. Dodson's testimony was very different. He established that one could determine, within scientific certainty, in many cases the type of asbestos that was contained in a lung, based on either a post-death autopsy or a sample taken from a biopsy. While it is not always possible to determine the type, it can be done in cases in which there is a heavy dose of those fibers that have not been eliminated naturally. I found his testimony both scientifically provable, measurable, peer reviewed and credible. I will therefore deny the motion of the Defendants to the extent to which it could exclude testimony of the nature of asbestos fibers in lungs being from products that they manufacture or design.

Regrettably, since the court is unable to find that either a total granting or denial of the motion is possible on this record, it will therefore be necessary to take a case-by-case review of the occupational history of each Plaintiff, together with a review of the pathology, to determine whether there is a scientific basis to admit any evidence of causation as to any Defendant's product as to any particular plaintiff. Epidemiological evidence may well be offered by either side in future cases to assist the court, as a gatekeeper of evidence, to determine each such case. The Plaintiff may only do so, however, at such a time in the future that this court (or my successor as MDL judge) concludes that there is admissible epidemiological evidence.

By way of example, if a plaintiff worked for forty years as a brake mechanic, and an autopsy showed chrysotile fibers in his lungs, there could well be a scientific basis for allowing such testimony to be considered by a jury. If on the other hand, a plaintiff worked as a general mechanic for a week in the context of a forty-year work career as an attic insulator, there may not be a sufficient scientific basis for the admissibility of such testimony.⁴ In short, I am afraid that I, as MDL judge, or my successor, will have to hear individual challenges to the testimony of each such case before trial.

In summary, the Motion is denied, without prejudice to a determination, on a case-by-case basis, that the specific evidence offered on behalf of a plaintiff is legally insufficient to constitute admissible testimony. Barring new studies, however, epidemiological testimony in support of a plaintiff's case is excluded. Dr. Mark is excluded as a witness on causation of chrysotile asbestos cases.

⁴ Even Dr. Mark said he was uncertain that a plaintiff in a hypothetical similar to this one could be said to have had an asbestos-related disease caused by the brake linings.

Counsel is invited to prepare an order should anyone choose to seek appellate review of this ruling.

Respectfully submitted,

MARK DAVIDSON