

The Past, Present And **Future** of Mold Litigation

The 2004 'Damp Indoor Spaces and Health' publication most importantly **concluded** that there was 'inadequate or insufficient evidence of an association' between damp or moldy indoor spaces and the **more serious health effects** that most lawsuits had alleged.

BY ERIC S. STROBER

PERHAPS IT CAN BE traced to the \$32 million *Ballard* verdict¹ in Texas in 2001 and all of the media attention that followed. Whatever the cause, beginning in the early 2000s, "toxic mold" cases were threatening to be "the next big thing" in environmental tort litigation.

Advertisements for mold remediation companies promised to "Rid Your House of Deadly Toxins." Ed McMahon, Erin Brockovich and Bianca Jagger filed million dollar claims.

It was claimed in many lawsuits that "toxic mold," including but not limited to the dreaded *stachybotrys chartarum*, was causing not only respiratory injury, but also permanent immune damage, thyroid damage, cancer and neurocognitive injury.

Remediation companies multiplied. Lectures abounded. Lawyers advertised. Carriers excluded.

By 2002, mold litigation was threatening to be "the next asbestos." It didn't happen.

Why not? Might it come back in the future?

The answers to both of these questions may lie in the 2004 publication of "Damp

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Indoor Spaces and Health" by the Institute of Medicine of the National Academies and its use and interpretation by the courts. Now that six years have passed since its publication there are cases from New York and elsewhere that may offer guidance and perhaps a glimpse into the future of "toxic" mold litigation.

In 2004, the Institute of Medicine published "Damp Indoor Spaces" in response to the questions and concerns surrounding the growing "toxic mold" phenomenon. The Institute assembled a committee of medical doctors, toxicologists, environmental specialists, epidemiologists and academics to review all available literature and research on the health effects of damp indoor spaces, molds and mycotoxins.

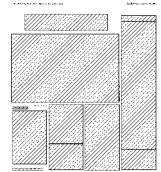
The publication is long and detailed.

The authors' goal was to analyze all of the health effects claimed to be caused by mold or mycotoxin exposure using what are generally known as the Bradford-Hill criteria. Using these criteria, the committee issued its conclusions as to where it found sufficient evidence of a causal relationship; sufficient evidence of an association; limited or suggestive evidence of an association; or inadequate or insufficient evidence of an association between damp or moldy indoor spaces and adverse health effects.

To conclude that there was "sufficient evidence of causation" of adverse health effects as a result of mold exposure, the committee required satisfaction of the Bradford-Hill criteria, namely strength of association, biologic gradient, consistency of association, biologic plausibility and coherence, and a temporally correct association. For the committee to find "sufficient evidence of an association," it required observable outcomes in studies in which chance, bias and confounding factors could be ruled out with reasonable confidence. The committee found "limited" or "suggestive" evidence of "association" when those factors could not all be ruled out with confidence.

Based on its analysis of all available information and literature as applied in the framework of the Bradford-Hill criteria, the committee concluded that it could not find any health outcomes for which there was "sufficient evidence of a causal relationship" from exposure to damp or moldy indoor spaces. The committee concluded that there was "sufficient evidence of an association" of upper respiratory symptoms in all exposed people and asthma symptoms in already sensitized asthmatic people.

The study found "limited evidence of an association" between exposure and shortness of breath, lower respiratory illness in otherwise healthy children and the development of asthma. Most importantly, the IOM committee concluded that at the time of publication there was "inadequate or insufficient evidence of an association" between damp or moldy



indoor spaces and the more serious health effects that had been alleged in most lawsuits, namely, pulmonary disease, rashes, gastrointestinal effects, fatigue, neuropsychiatric symptoms, cancer and immune disease.

Clearly, the results of this study were problematic to plaintiffs' claims of serious and permanent injuries both in *Frye* and *Daubert* jurisdictions. It is, however, critical to point out that while the study found insufficient evidence of causation of these most serious health effects, a careful reading of the study reveals that the committee found some evidence of potential relationships between mycotoxin exposure and pulmonary hemorrhage, immunosuppression, neurotoxicity, respiratory and dermal responses.

However, without sufficient data on the dose required to elicit such responses and without long-term inhalation studies, conclusions of association or causation could not be drawn. The studies on mycotoxin exposures available at the time were based primarily on massive exposures, such as in agricultural settings, and thus could not be said to be representative of more common exposures in damp indoor spaces. The committee recommended additional study on appropriate exposures before any additional conclusions could be drawn.

In short, the 2004 IOM publication study threw a bit of a "damper" on plaintiffs' pursuit of serious injury cases as a result of mold exposure. Under both *Frye* and *Daubert* analyses, this comprehensive study was going to make it difficult for plaintiffs' experts to render opinions of medical causation above and beyond the conclusions of the IOM committee.

The IOM study did not, however, put an end to mold litigation or claims of personal injuries as a result of mold or mycotoxin exposure. Property damage and constructive eviction type claims continued, often accompanied with claims of less serious, allergic type injuries. Some plaintiffs continued to pursue more serious injury claims.

In the New York Courts

Since the IOM study was published, courts have had the opportunity to hear from experts and examine the publication in the context of *Frye* and *Daubert* challenges raised by defendants in cases alleging serious injuries as a result of mold or mycotoxin exposure.

In the case of *Fraser v. 301-52 Tounhouse Corp.*, 831 N.Y.S.2d 347 (Sup. Ct. N.Y. Cty. 2006), Judge Shirley Kornreich conducted a *Frye* hearing that included testimony of two well known experts in mold litigation, Dr. Eckhardt Johanning² and Dr. Ronald Gots, and an in-depth review of the IOM study. Judge

Kornreich discounted the testimony of the experts as subjective advocacy on both sides of the issue, but relied heavily on the IOM study and its conclusions in precluding the plaintiff from introducing opinions linking their claimed health problems with indoor mold exposures. The court also highlighted the shortcomings in sampling indoor air and thus human exposure during the relevant time periods.

Plaintiff's counsel in *Fraser* moved to renew the motion, supported by an affidavit of Dr. Harriet Ammann, a senior toxicologist for the State of Washington and a member of the IOM committee that authored the 2004 study. It was Dr. Ammann who wrote the chapter on the toxicity of fungi, bacteria and most importantly, mycotoxins produced by some molds under certain conditions.

In her affidavit, Dr. Ammann found major fault with the trial court's decision and argued that the court incorrectly confused a strict finding of epidemiological causation (satisfying all Bradford-Hill criteria) with the concept of medical causation used in the everyday practice of medicine. She argued that there were several medical conditions that the IOM committee found to have a sufficient causative relationship with damp indoor spaces to warrant medical intervention.

She also claimed that the imperfections in the techniques for testing environmental mold exposures should not lead to the conclusion of an absence of medical causation. She was additionally very critical of the court's dismissal of peer-reviewed literature on the basis of a perceived bias, and urged the court to realize that it is generally accepted in the medical field that human exposures to mold, mycotoxins and other products of damp indoor environments can and do lead to adverse health effects.

The Appellate Division, First Department, affirmed Judge Kornreich's preclusion of plaintiff's medical experts on *Frye* grounds in a 3-2 decision with a lengthy and vigorous dissent. Dr. Ammann's affidavit was not considered.

The majority highlighted the difference between "association" and "causation" in ruling that there was no general acceptance of causation of the injuries claimed by the plaintiff. The court additionally ruled that the plaintiffs' experts' use of a differential diagnosis³ was insufficient to establish specific causation.

The majority decision also specifically held that the plaintiffs would have been required to specify a level of exposure necessary to cause the claimed illnesses and reliable testing of the subject premises to demonstrate sufficient exposure. The majority cited evi-

dence submitted by the plaintiffs indicating that accurate exposure assessment should be based on sampling three times per day for three consecutive days, but stopped short of making this the standard. The court found that the plaintiffs' submission of two indoor samples taken within a short time span on the same day was insufficient to reliably establish the plaintiffs' exposure.

The Court of Appeals declined to hear the case.

Recently, in December 2009, Judge Marcy Friedman in New York County Supreme Court addressed a claim of personal injuries in a mold exposure case and conceded that the court was "constrained" by the First Department's *Fraser* ruling and dismissed claims of personal injuries caused by mold exposure.⁴ In so ruling, Judge Friedman noted the significant disagreement among appellate courts in allowing personal injury mold cases to proceed to a jury.

She also highlighted the vigorous dissent in *Fraser* and the minority's belief that there was sufficient epidemiological evidence to support a finding of association strong enough to allow the case to go to a jury. However, given the *Fraser* ruling, Judge Friedman conceded that she was "mandated to dismiss the personal injury claims."

The *Fraser* ruling may not, however, be the final word. Preceding Judge Friedman in the 2008 case of *Friedman v. Madison 40 Associates LP* (2008 N.Y.Misc. LEXIS 3532), Judge Howard Silver of Supreme Court, Bronx County, also citing to the 2004 IOM Report, Dr. Johanning and the use of a differential diagnosis, declined to preclude Dr. Johanning from testifying as to a causal connection between mold exposure and hypersensitivity pneumonitis, mucus membrane irritation, skin irritation and chronic rhinitis-sinusitis.

Significantly, in response to the *Frye* challenge, plaintiff withdrew claims of neuropsychological impairment and other more serious illnesses. In opposition to the defendant's challenge, the plaintiff submitted Dr. Harriet Ammann's affidavit that was initially drafted for the motion to renew and reargue the *Fraser* motion.

Judge Silver, relying on the affidavit, declined to follow the Appellate Division's *Fraser* ruling and declined to preclude Dr. Johanning from testifying at trial as to medical causation of the injuries cited above. The case was subsequently resolved so it remains unknown how the First Department would address Dr. Ammann's affidavit and the causation of the specific remaining injuries in the *Friedman* case.

Even more recently, the Second Department affirmed a Kings County decision deny-

ing summary judgment in a mold injury case, citing only to the conflicting expert opinions in refusing to grant summary judgment on the issue of causation.⁵

In Other Jurisdictions

In December 2008, the Court of Appeals of Michigan reversed a trial court's preclusion of causation evidence that had relied heavily on the IOM report and the distinction between causation and association, especially in a *Daubert* inquiry.⁶

The appellate court found that the trial court relied too heavily on the "general acceptance" test rather than the more expansive tests and requirements of *Daubert* and Model Rule of Evidence/Federal Rule of Evidence 702. Although the outcome is not published, this decision draws a distinction » Page 510 in the implication of the IOM study under *Frye* versus *Daubert*.

Also in 2008, the U.S. District Court in the Eastern District of Louisiana, relying on the IOM study and the *Fraser* decision, precluded plaintiffs' experts from testifying as to the causation of injuries as a result of mold exposure on *Daubert* grounds, noting an absence of support for the proposition of general causation.⁷ A similar finding was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in 2009.⁸

What's Left and What's Next?

The 2004 IOM study confirmed an "association" between damp indoor spaces and various respiratory illnesses most commonly associated with an allergic response, rather than a toxic response.

However, the chapter on the toxic effects left open the possibility that additional studies could provide sufficient data to allow a conclusion of a connection between exposure to the toxins produced by mold, importantly the satratoxins produced by *stachybotrys*, and more serious adverse health effects. Studies on these effects continue, including the search for dose response, consistency and temporality data.

Biologic plausibility does not seem to be an issue. As Dr. Ammann pointed out in her affidavit, many studies on this subject continue and may establish some of the missing pieces needed for a finding of association or causation of some of the more serious health effects previously claimed in mold case.

As this research continues, at any time a study may provide support for the proposition that damp indoor spaces, mold, mycotoxins, bacteria or volatile organic compounds (VOCs) cause more serious injuries than previously confirmed based upon non industrial

exposures. As demonstrated by the *Friedman* decision of Judge Silver and the 2010 Second Department decision in *Rashid*, the 2004 IOM study is not necessarily the last word on personal injuries attributed to molds and mycotoxins despite the weight and credence given to it in cases past.

Until such time as additional studies on mycotoxin effects at measurable doses are done and sampling measures are done to correctly assess exposure, it is likely that the injuries claimed in "toxic mold" litigation will be limited to the respiratory system symptoms generally associated with allergic response as opposed to toxic.

Further, the Appellate Division's decision in *Fraser* was only based in part on the state of medicine with regard to general causation at the time. It was also based on what the court found to be specific deficiencies in the plaintiff's environmental testing and exposure assessment. Thus, if a case came before a trial or appellate court with new epidemiological studies regarding toxic effects at known doses and/or better specific exposure assessment of the plaintiff, it could be enough to distinguish it from the *Fraser* holding and thus, merit a different conclusion under a *Frye* analysis.

Thus, while *Fraser* is the current established precedent, at any time, epidemiological support and/or better testing for exposure assessment could warrant a different appellate result, and thus, pull back some of that wet blanket cast by "Damp Indoor Spaces and Health."

1. *Mary Melinda Ballard & Ronald Allison v. Fire Insurance Exchange, et al.*, 98 S.W.3d 227; 2002 Tex. App. LEXIS 8957. This was a case brought by a homeowner against the homeowner's carrier. The verdict included large components of punitive damages and fees. It was reduced on appeal to \$4 million and subsequently settled. Preceding trial, plaintiffs' medical experts, who were going to testify as to injury causation, were precluded on *Daubert* grounds.

2. Dr. Johanning was one of the experts precluded from testifying in the *Ballard* case on *Daubert* grounds.

3. A differential diagnosis is defined as a process of weighing the probability of one disease versus that of other diseases possibly accounting for a patient's illness. It is a process of balancing and ruling out various possible causes of a patient's signs and symptoms in an effort to arrive at a conclusion on the etiology of an illness.

4. *Cornell v. 360 West 51st Street Realty, LLC, et al.*, 2009 N.Y. slip op. 527070; 2009 N.Y. Misc. LEXIS 5379

5. *Rashid v. Clifton Hill Apartments, et al.*, 2010 N.Y. slip op. 1631; 2010 N.Y. App. Div. LEXIS 1573

6. *Trace v. Oakland Development L.P.*, 2008 Mich. App. LEXIS 2484.

7. *Jenkins et al. v. Shdella LLC*, 2008 U.S. Dist. LEXIS 49204; 76 Fed. R. Evid. Serv. (Callaghan) 1063 (2008)

8. *Young v. Burton*, 2009 U.S. App. Div. LEXIS 23419 (2009).



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