

*Garner v. BNSF Railway Co.*  
2023 DJDAR 211

**In a FELA action, exclusion of causation expert testimony regarding diesel exhaust exposure and a specific type of cancer on the grounds that it was unsupported by any specific study due to a lack of scientific research in the area was improper.**

**FACTS**

Melvin Garner worked for the BNSF Railway Company as a trainman for over 40 years. After he retired, he developed non-Hodgkin's lymphoma, a type of blood cancer. This ultimately led to his death in 2014. His son, Gary Garner, sued BNSF for survival and wrongful death actions under the Federal Employers' Liability Act (FELA) for failing to provide Melvin a reasonably safe place to work. Garner alleged that during his father's employment, he was continuously exposed to toxic levels of diesel exhaust and its chemical constituents which allegedly caused him to develop non-Hodgkin's lymphoma.

Garner retained several causation experts to perform a cancer risk assessment and opine on whether diesel exhaust and its constituents are capable of causing cancer; and whether Melvin's workplace exposure more likely than not caused his cancer. BNSF brought a motion for summary judgment on causation. The trial court denied the motion and expert discovery commenced.

The trial court granted BNSF's motions in limine to exclude Garner's causation experts from testifying at trial. The court found that no data, study or testing linked diesel exposure to non-Hodgkin's lymphoma, and under *Sargon Enterprises v. University of Southern California* (2012) 55 Cal.4th 747, the science these experts relied on was inadequate with too great an analytical gap between the data and their opinions. These rulings resulted in the equivalent of a nonsuit and the court entered judgment in BNSF's favor and dismissed the case. Garner appealed.

**FOURTH APPELLATE DISTRICT'S RULING**

The Appellate Court reversed and remanded with instructions to the trial court to enter new orders denying the motions in limine. The Court applied an independent review standard because the rulings were the functional equivalent of granting a nonsuit, as opposed to the abuse of discretion standard typically used under *Sargon* for evidentiary rulings regarding admissibility of expert opinions. Under this standard, the Court resolved all presumptions and inferences in Garner's favor and the judgment could only be upheld if required as a matter of law.

Under *Sargon*, the trial court acts as a "gatekeeper" regarding whether to exclude expert testimony at trial. In doing so, the court is governed by Evidence Code sections 801 and 802 and it must exclude speculative or irrelevant expert opinions, including when there is too great an analytical gap between the opinions and data. The goal is to exclude clearly invalid and unreliable opinions, and trial courts must be cautious in excluding expert testimony.

Under the FELA, railroad employees or their representatives may sue for injury resulting from the railroad's negligence. As opposed to an ordinary negligence standard, the FELA standard is a relaxed one and the employer is liable when its negligence played any part, however small, in the injury or death at issue. The case should go to a jury when there is even the slightest evidence to support the case.

Garner's first causation expert, Dr. Salmon, had over 50 years of experience in the carcinogenic effect of toxic exposure in humans. He opined that someone with Melvin's occupational diesel particulate matter (DPM) exposure would have an estimated excess cancer risk between 2864 and 3875

excess cancers per million persons. Therefore, Melvin's exposure more likely than not caused his lymphoma. Dr. Salmon relied on Melvin's specific exposure information, air sampling data, air modeling studies involving railway workers, and the DPM inhalation cancer potency factor developed by the Office of Environmental Health Hazard Assessment and the California Air Resources Board.

The trial court focused on his inability to point to any specific study stating that diesel exhaust exposure causes non-Hodgkin's lymphoma. The few studies of this potential link have been conducted (the few that have understandably focus on the link between diesel exhaust and lung cancer as opposed to other types of cancer). Primarily citing federal cases, the Appellate Court found that there is no requirement that a causation expert rely on a specific study or other scientific publication expressing the same conclusion. Many cases with limited or inconclusive scientific evidence will inevitably have some analytical gap between the underlying data and the causation opinion. The trial court's limited role as the evidentiary gatekeeper under *Sargon* should not second guess an expert's judgment if his testimony is based on good grounds even if the data is inconclusive.

Dr. Salmon also relied on evidence suggesting a link between diesel exhaust and lung cancer to extrapolate that diesel exhaust must therefore also be linked to other kinds of cancer, including non-Hodgkin's lymphoma. The trial court found this inadequate. Conversely, the Court found that Garner's experts provided objective verifiable evidence, which BNSF did not dispute, regarding the overall risk of cancer and that diesel exhaust acts directly on DNA, causing mutations, and is a multi-organ carcinogen that causes cancer throughout the body. The analytical gap was not too great, and his opinion was not clearly invalid and unreliable.

Garner's second causation expert, Dr. Landolph, a molecular chemical carcinogenesis biologist professor, also had 50 years of experience. He rendered a general causation opinion that diesel exhaust is capable of causing/contributing to the development of tumors in humans, including non-Hodgkin's lymphoma. He also opined that Melvin's calculated dose of exposure according to well-established methodology showed that he experienced a substantial additional risk of cancer well in excess of a level requiring remedial action.

The trial court again found there was an analytical gap in the data. The Court addressed the same argument that he did not rely on a specific study causally connecting diesel exhaust and non-Hodgkin's lymphoma. Nor was the Court persuaded by BNSF's argument that Dr. Landolph could not state with specificity what dose of diesel exhaust is required to cause non-Hodgkin's lymphoma. Dr. Landolph testified that the concept of a threshold dose for toxicity is controversial and has never been substantiated. BNSF did not present contrary evidence. It is outside the trial court's gatekeeping duty to resolve scientific controversies. Dr. Landolph had a reasonable basis for his opinions and BNSF's arguments went to the weight not admissibility.

Garner's third causation expert, Dr. Gale, was a physician specializing in hematology and oncology with substantial experience in statistics and epidemiology. He opined that diesel exhaust and its particulates cause cancer, including non-Hodgkin's lymphoma, in humans. He performed a differential diagnosis based on animal studies and other data to opine that, more likely than not to a reasonable degree of medical probability, Melvin's occupational exposure was sufficiently high to have caused his condition. The Court found his analysis that cancer at one organ site is relevant to other sites was not shown to be scientifically invalid or unreasonable.