NEW YORK COURT OF APPEALS REVERSES MULTIMILLION DOLLAR VERDICT

Hodgson Russ Product Liability & Complex Tort Alert
May 10, 2022

New York's highest court, the Court of Appeals, reversed a multimillion dollar jury verdict in a wrongful death trial involving allegations of asbestos exposure because the plaintiff failed to meet the threshold for proving causation. The decision, *Nemeth v Brenntag N. Am.*, 2022 WL 1217464 (Ct. App. NY Apr. 26, 2022), clarifies that all toxic tort plaintiffs - even those alleging asbestos exposure - bear the burden of specifically quantifying their exposure from the defendant's product and proving that such exposure is sufficient to cause their illness. The majority opinion authored by Judge Garcia acknowledges that the standard may be difficult to satisfy in some asbestos cases, but nonetheless, emphasizes that the standard must be met.

Florence Nemeth was diagnosed with peritoneal mesothelioma in 2012 and died from the disease in 2016. The plaintiff-husband alleged in his wrongful death suit that Mrs. Nemeth was exposed to asbestos in a variety of ways over several decades. The only issue at trial, however, was her alleged exposure resulting from her daily application of Desert Flower talcum powder between 1960 and 1971.

Plaintiff relied on two experts to prove that this exposure was the proximate cause of Mrs. Nemeth's diagnosis and death. Plaintiff's expert geologist opined that Mrs. Nemeth's daily application of Desert Flower talcum powder must have exposed her to "thousands to millions of fibers, billions and trillions when you add it up through repeated use." (*Id.* at 1). He based these findings on a "glove box test" involving the "agitat[ation of] a vintage sample of Desert Flower within a small, sealed plexiglass chamber . . . in an effort to target[ ] the actual exposure." (*Id*).

The Plaintiff's expert physician, in turn, characterized mesothelioma as a "sentinel health event" — meaning that a mesothelioma diagnosis automatically signals exposure to asbestos. Relying on the geologist's opinion, she testified that Mrs. Nemeth's exposure to asbestos from Desert Flower was "at levels at which multiple studies have shown elevated rates of mesothelioma." (*Id.* at 2). Against this backdrop, she opined that Desert Flower was "a substantial contributing factor" to Mrs. Nemeth's illness. (*Id*).

The jury returned a multimillion dollar verdict in favor of the plaintiff and the Appellate Division affirmed the trial court's holding concerning causation. On April 26, 2022, the Court of Appeals reversed and directed the dismissal of the plaintiff's complaint.

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Judge Garcia's majority opinion holds that the plaintiff failed to satisfy the required test for proving causation in a toxic tort case. The test, as stated in the seminal case of *Parker v Mobil Oil Corp*., 7 NY3d 434 [2006], provides that an "opinion on causation should set forth plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)." (*Nemeth* at *3 (quoting *Parker* at 448)). In other words, the plaintiff bears the burden of establishing sufficient exposure to the toxin at issue through expert testimony based upon generally accepted methodologies.

In analyzing *Parker* and its progeny, the majority articulated two rules concerning causation opinions in toxic tort matters. First, testimony concerning causation must provide a "scientific expression" of the plaintiff's exposure. While a precise quantification is not required, testimony using generalities such as "excessive" or "far more than others" does not satisfy *Parker*. (*Nemeth* at *3).

Second, testimony that "merely links a toxin to a disease or 'work[s] backwards from reported symptoms to divine an otherwise unknown concentration' of the toxin to prove causation is insufficient." (*Id*). Thus, the fact that asbestos has been linked to mesothelioma is not enough for a determination of liability against a particular defendant. Rather, a plaintiff's causation expert must establish that the plaintiff was exposed to sufficient levels of the toxin from the defendant's products to have caused the disease.

Applying these rules, the majority found that the physician's opinion that Desert Flower was a "substantial contributing factor" to Mrs. Nemeth's development of peritoneal mesothelioma was not based on sufficient evidence.

The decision is highly critical of the studies that were relied upon by plaintiff's experts. These studies used terms such as "low level exposure," "significant asbestos exposure," and "higher levels of exposure" without quantifying the amount of exposure necessary to cause disease. This gap in proof seemed to strike the Court as particularly significant in this case since peritoneal mesothelioma, as opposed to the most common type of disease (pleural mesothelioma), is generally associated with higher levels of asbestos exposure.

The decision also found that the geologist's "glove box test" could not be relied upon to quantify Mrs. Nemeth's exposure to asbestos because it did not provide a basis to estimate the number of asbestos fibers Mrs. Nemeth inhaled. Therefore, the test did not provide a scientific expression concerning decedent's actual exposure to asbestos. The decision noted that the plaintiff could have addressed this gap in proof by having an industrial hygienist estimate Mrs. Nemeth's inhalation levels based upon an exposure test performed in a bathroom the size of Mrs. Nemeth's bathroom.

The decision also held that the physician's testimony that mesothelioma is a "sentinel health event" was insufficient to establish that Desert Flower caused Mrs. Nemeth's illness. The majority stated that the "sentinel health event" testimony "is no different than conclusory assertions of causation that we have held were insufficient to meet the *Parker* requirements." (*Id*. at *4). Thus, causation cannot be established by working backwards from a diagnosis.

Judge Rivera was the sole dissenter. In her lengthy and passionate dissenting opinion, she argues that the majority "essentially adopted an impossible standard for plaintiffs" that "effectively deprive[s] the toxic tort plaintiffs of their day in court." (*Id*. at 15).

Takeaways: This decision is significant because it clarifies that plaintiffs in an asbestos exposure case bear the burden of quantifying their exposure from the defendant's product and proving that the quantity to which they were exposed is sufficient to cause their illness. Given the latency between exposure to asbestos and the onset of illness, this burden will be very difficult to satisfy in many cases. In cases where it is theoretically possible to quantify exposure, the testimony of an industrial hygienist will likely be necessary to support causation. Companies involved in toxic tort litigation should speak with counsel to determine how this significant decision from the Court of Appeals impacts their case.

If you have questions regarding whether this recent decision impacts any of your organization's operations and activities, please contact Christopher Massaroni (518.433.2432), Christian J. Soller (518.433.2445), Ryan J. Lucinski (716.848.1343), or Michael D. Zahler (518.433.2429).