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A Dose of Reality for the NYC Asbestos Litigation

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In 1965, Ralph Nader's "Unsafe at Any Speed: The Designed-In Dangers of the American Automobile" was published, raising the public's conscientiousness of the auto industry's disregard for safety in favor of profits. The book's title was purposefully provocative, and its hyperbole was effective in grabbing the public's attention. But in the world of toxic torts, "unsafe at any level" is insufficient to establish a prima facie case of liability in most jurisdictions in the United States. See, e.g., Lawrence G. Cetrulo, Toxic Tort Litigation Guide Appendix 33-A, Court Decisions re: "Single Fiber Theory" (November 2018).

While New York also requires some proof of "dose" to bottom an expert's opinion on causation in toxic tort cases (*Parker v. Mobile Oil*, 7 N.Y.3d 434 (2006); *Cornell v. 360 W. 51st St. Realty*, 22 N.Y.3d 762 (2014)), until recently, asbestos cases seemed to have been the exception to this requirement. *Lustenring v. AC&S*, 13 A.D.3d 69 (1st Dep't 2004), lv. den. 4 N.Y.3d 708 (2005). But this past November, the New York Court Appeals affirmed the setting aside of an $11 million verdict in an asbestos case against Ford Motor Company for, what they said, was insufficient proof of causation. *Matter of NY City Asbestos Litig. (Juni v. A.O. Smith Water Products)*, __ N.Y.3d __, 2018 Slip Op 08059 (Nov. 27, 2018). The court affirmed the First Department's holding that a plaintiff who seeks damages for contracting mesothelioma based on exposure to a defendant's asbestos-containing products must satisfy the standards expressed in *Parker v. Mobil Oil* and *Cornell v. 360 W. 51st St. Realty*, by offering evidence that, if it does not provide an exact mathematical quantification of that exposure, it at least provides some "scientific expression" (*Parker*, 7 N.Y.3d at 449) of the level of exposure to toxins in defendant's products that was sufficient to have caused the disease. *In re New York City Asbestos Litig.,* 148 A.D.3d 233, 48 N.Y.S.3d 365 (1st Dep't 2017), aff'd sub nom. *Matter of New York City Asbestos Litig.*, ____ N.Y.3d ___, 2018 Slip Op 08059 (Nov. 27, 2018). Rejected by the trial court and the First Department was the plaintiff's attempt to rely upon the notion that asbestos is "unsafe at any level."

> The opinions in 'Juni' present a sea change in the presentation of evidence on the issue of causation in New York asbestos cases.

NY's Evolving Position on Requiring Proof of Dose

In what would become a significant precedent in the development of New York's toxic tort case law, the U.S. District Court for the District of Massachusetts held in a benzene exposure case called *Sutera v. The Perrier Group of America, Inc.*, 986 F. Supp. 655 (D. Mass. 1997) that the plaintiff had failed as a matter of law to establish that his exposure (from trace amounts revealed by testing and prompting an FDA recall) caused his Acute Myeloid Leukemia (AML).

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Sutera offered the expert opinion of an oncologist: that Sutera's AML was more likely than not caused by benzene exposure based on the then popular methodology known as the "unsafe at any level" or the "non-linear threshold" models. As would be summed up by the Second Department's decision in *Parker v. Mobil Oil Corp.* several years later: "In layman's terms, this approach, referred to as a linear non-threshold model, assumes that if a lot of something is bad for you, a little of the same thing, while perhaps not equally bad, must be so in some degree. The model rejects the idea that there might be a threshold at which the neutral or benign effects of a substance become toxic." *Parker v. Mobil Oil*, 16 A.D.3d 648, 652 (2d Dept. 2005), *aff'd on other grounds*, 7 N.Y.3d 434 (2006) (internal quotes and citations omitted). The District Court Judge in Massachusetts held that the oncologist's opinion was (following an analysis under *Daubert*) inadmissible, concluding that it was not based on reliable scientific evidence, and generally rejecting the overall reliability of the "unsafe at any level" model. *Sutera*, 986 F. Supp. at 662. The *Sutera* court noted that the plaintiff's expert's methodology (i.e., unsafe at any level) fails *Daubert's* requirement that it be "generally accepted" by the scientific community and the opinion was based on studies where the victims or subjects had a significantly higher level of exposure, both in the dosage level and the duration of exposure, than Sutera did from drinking Perrier. Id. at 662-63. Therefore, the court found that there was no support for the notion that the low dose of benzene in Perrier's water was itself a substantial factor in causing Sutera's illness. Id. at 662.

The rejection of the "unsafe at any level" model first started to gain traction in New York courts in the Second Department's decision in *Parker v. Mobil Oil*, where the plaintiff alleged he had contracted AML from exposure (via inhalation and skin contact) to benzene in gasoline while working as a gas station attendant for nearly two-decades. *Parker*, 16 A.D.3d at 648. Relying in part on *Sutera*, the Second Department reversed the trial court's denial of the defendants' motion for summary judgment and held that the plaintiff had failed to establish causation because his causation expert's opinion was based on the "unsafe at any level" model. Notably, Parker's expert never even quantified Parker's level of exposure to benzene, thus making it impossible to establish that his level of exposure was a significant cause in developing AML. Id. at 652. The Court of Appeals affirmed the Appellate Division's reversal and the exclusion of Parker's expert's opinion, agreeing that Parker's expert had failed to demonstrate how Parker's specific exposure caused him to develop AML. It is here where New York's "scientific expression" standard for toxic tort cases was born; a plaintiff's expert is not required to pinpoint the plaintiff's exposure to the toxin with exact precision, "an opinion on causation should set forth a 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)." *Parker*, 7 N.Y.3d at 448. Assertions, for example, that the plaintiff was "frequently exposed to excessive amounts" of the toxin without more specificity are insufficient to meet this standard. Id.

The *Parker* "scientific expression" standard played a key role in the Court of Appeal's decision in *Cornell v. 360 West 51st Street Realty,* where the plaintiff sued her landlord alleging that she suffered personal injuries from mold exposure in her apartment, and held that plaintiff's expert's failure to make any effort to quantify the level of exposure and identify the disease-causing agent rendered the opinion insufficient on the issue of causation. *Cornell*, 22 N.Y.3d at 784-86.

Presenting Exposure in NY Asbestos Cases

Largely due to the fact that mesothelioma is a "signature" injury of asbestos exposure, asbestos plaintiffs in New York, historically, had a relatively low burden to establish causation, and could almost always establish liability, in essence, by presenting the following: (1) the plaintiff worked on a site where there were products containing asbestos; (2) the asbestos products released a cloud of dust when they were manipulated or handled by the plaintiff or others working close by on the site; and (3) the plaintiff inhaled the dust. As illustrated by the First Department's 2004 decision in *Lustenring v. AC&S*, 13 A.D.3d 69 (1st Dep't 2004), lv. den., 4 N.Y.3d 708 (2005), affirming a multi-million dollar jury verdict for two dockworkers who developed

mesothelioma, the court summed up the necessary proof to establish liability: "both plaintiffs worked all day for long periods in clouds of dust raised specifically by manipulation and crushing of defendant's packing and gaskets, which were made with asbestos, and valid expert testimony indicated that such dust, raised from asbestos products and not just from industrial air in general, necessarily contains enough asbestos to cause mesothelioma." Id. at 69. Typically, plaintiff will present the testimony of a qualified expert who will opine that the presence of visible dust is a scientifically recognized way of identifying the presence of air-borne asbestos in amounts generally recognized with the scientific community as toxic to humans, and that it is the "cumulative exposure" to asbestos that increases the risk of contracting mesothelioma. Further demonstrating just how embedded this formulaic, and very generalized, approach to proving causation was in New York jurisprudence, the court even denied the defendants' request for an evidentiary hearing to challenge the conclusions of the plaintiffs' expert, finding that the defendants' presentation of alternative ways for the plaintiffs to have contracted mesothelioma to be of no moment. Id. at 70.

Bringing NY Asbestos Cases in Line With Other Toxic Torts

Judge Jaffe's decision *In the Matter of New York City Asbestos Litigation* (*Juni*), 48 Misc.3d 460 (Sur. Ct., NY County 2015), may signify a massive shift in what New York courts will require for an asbestos plaintiff to establish causation. In *Juni*, the plaintiff developed, and later died from, mesothelioma as a result from his exposure to asbestos while working with various brakes, clutches and gaskets (collectively, brakes or brake products) manufactured by Ford, over the course of his long career as an auto mechanic. Id. at 461-62.

In support of their case, the plaintiffs (the decedent's estate and widow) offered two experts. One expert was charged to establish general causation (i.e., that the dust from Ford's brake products contained harmful asbestos), and the other to prove specific causation (i.e., that the asbestos dust that the plaintiff inhaled caused him to develop mesothelioma). Id. at 464-68. The trial court held that both expert opinions, which both generally employed a variant of the "unsafe at any level" model, were inadmissible, set aside an $11 million jury verdict in the plaintiffs' favor, and ultimately ordered that judgment be entered in favor of Ford. Id. at 491.

Before ruling that the plaintiffs' experts' opinions were inadmissible, the trial court set forth a detailed history of New York's case law on toxic tort causation, focusing particularly on *Parker*, *Cornell*, and *Lustenring* (and its progeny). Judge Jaffe was quite critical of *Lustenring* and it progeny, noting that in none of these cases did the court actually explain its finding that the plaintiff, through his or her expert, had established causation. *In re: New York City Asbestos Litig.*, 48 Misc.3d at 478. Ultimately, the court held that *Parker* and *Cornell*, and not *Lustenring*, are controlling precedent in deciding whether the opinion of plaintiffs' experts are sufficient to prove causation as a matter of law in *all* toxic tort matters, including asbestos cases. Judge Jaffe would go on to hold that both plaintiffs' experts failed to meet this "new" standard.

Starting with the plaintiffs' general causation expert, the court noted that the studies he relied on merely showed an "association" between garage mechanics and mesothelioma, and under New York law, "association" does not equate to "causation." Id. at 482-83. Likewise, the general causation expert failed to identify a single study that established that asbestos contained in brake products can cause mesothelioma. Id. at 484. To the contrary, the expert's report referenced, and (unsuccessfully) tried to refute, 21 studies that found that there was no increased risk of developing mesothelioma from occupational exposure to break products. Id. This could perhaps be because, as conceded by the expert, "during the brake manufacturing process, when asbestos fibers are mixed with certain resins, they become 'nonrespirable', and the 'vast majority' of studies assessing the composition of debris formed from work on brakes reflects that 99 percent of the asbestos is converted to a non-toxic substance during the process." Id. at 486. Due to these deficiencies and others, the trial court held that the plaintiffs had failed to establish general causation. Id. at 485.

The plaintiffs' specific causation expert fared no better. Particularly, the expert failed the "scientific expression" of dose requirement in *Parker*.

Id. The trial court was also critical of the fact that the expert did not even analyze the dust that the plaintiff was said to have inhaled, and therefore was unaware if it actually contained asbestos or not, and if so, what level. Id. As a result, not only did the expert fail to quantify the plaintiff's level of exposure but could not compare the plaintiff's level of exposure to asbestos to other case studies finding a particular level of exposure necessary to significantly contribute to the development of mesothelioma. Id. at 485-86.

Significant to asbestos practitioners is that aspect of Judge Jaffe's decision that rejects the "cumulative exposure" theory, which is based on the notion that every single exposure to asbestos (an established dangerous substance) constitutes a significant contributing factor to developing disease. Id. at 487-91. Notably, the court found that such an approach is irreconcilable with the well-recognized scientific requirement that causation be established based on consideration of the amount, duration and frequency of the plaintiff's exposure (i.e., a "dose-response" relationship). Id. at 487.

The Appellate Division affirmed Judge Jaffe's decision, and further confirmed that *Parker* and *Cornell* are controlling in asbestos cases. *In re New York City Asbestos Litig. (Juni)*, 148 A.D.3d at 235-36. Likewise, the Appellate Division agreed with the rejection of cumulative exposure theory. Id. at 239. On Nov. 27, 2018, the New York Court of Appeals, in a 4-1 memorandum opinion, affirmed the Appellate Division's application of *Parker* and *Cornell* to this asbestos case and agreed that the plaintiffs had failed to meet their burden of proof for causation. *Matter of New York City Asbestos Litig. (Juni)*, 2018 Slip Op. 08059 at *1. Chief Judge DiFiore and Judges Stein, Fahey and Wilson joined the majority's opinion. Judge Rivera dissented. Judges Garcia and Feinman took no part. In a separate concurring opinion, Judge Wilson commented that although the proof was "more than sufficient to establish that [Juni's] exposure to asbestos caused his [mesothelioma] and death," plaintiffs did not produce an expert to rebut Ford's argument "that the physical properties of the asbestos in Ford's friction products had been so radically altered as to render conventional asbestos toxicology irrelevant." Id. (Wilson, J., concurring). As such, Judge Wilson saw this as "simply a gap in proof as to the toxicity of the products at issue." Id., citing *Parker*, 7 N.Y.3d at 449-50. The dissent, by Judge Rivera, stated that it was error for the trial court to set aside a jury verdict in which it was clear that the jury did not credit Ford's proof of the inert nature of its friction products and that Ford failed to meet its burden of showing that the verdict was "utterly irrational." Id. (Rivera, J., dissenting), citing *Killon v. Parrotta*, 28 N.Y.3d 101, 108 (2016), quoting *Campbell v. City of Elmira*, 84 N.Y.2d 505, 510 (1994). Judge Rivera noted with significance that internal Ford documents revealed that its friction products "overexposed" mechanics to carcinogenic asbestos fibers and that Ford took steps to protect its own employees from exposure to dust from these products. Id. The solo dissent, however, did not carry the day and the trial court's vacatur of the jury's verdict was left undisturbed.

Conclusion

The opinions in *Juni* present a sea change in the presentation of evidence on the issue of causation in New York asbestos cases. Plaintiffs will need to evaluate their proof on this issue to ensure that it meets the requirements of *Parker* and *Cornell*. Defendants would do well to learn from Ford's defense team's presentation of evidence calling into question the actual contents of the dust allegedly inhaled by the plaintiff or the decedent. Both sides will need to factor this development into their evaluation of the defendant's liability exposure and the pros and cons of resolving the action by settlement or trial.

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