California Supreme Court Recognizes a Duty of Care to "Take-Home" Plaintiffs

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Last month, the California Supreme Court issued a ruling on two coordinated “take-home” asbestos exposure cases, in which it held that employers using asbestos in the workplace have a duty of care to protect an employees' household members from exposure to asbestos through off-site contact with employees who carry asbestos fibers on their work clothing and/or persons, also referred to as “take-home” exposure plaintiffs. The Court noted that the duty of care existed regardless of whether the plaintiff states a claim for general negligence or premises liability. This ruling helps clarify the law in California on the duty of care owed to “take-home” exposure plaintiffs, and in doing so further establishes California as a plaintiff-friendly state in asbestos litigation.

The Court's opinion was premised on two “take-home” asbestos cases. In one matter, the plaintiff filed suit against various defendants alleging that they exposed him to asbestos and caused his peritoneal mesothelioma. Among the defendants was Pneumo Abex, LLC. The plaintiff alleged that his uncle worked and was exposed to asbestos in a Pneumo Abex plant, which he then took home on his clothes and person and to which the plaintiff was subsequently exposed to during the 1970s. In the other matter, the plaintiffs filed a wrongful death lawsuit against various defendants, alleging that their mother passed away from mesothelioma after also having been exposed to asbestos. Among other defendants, the plaintiffs alleged that BNSF Railway Company employed and exposed the decedent's husband to asbestos fibers, which he then brought home to the household he shared with the decedent, thereby exposing her to asbestos as well.

The Supreme Court set out to determine whether an employer or premises owner using asbestos has a duty to protect individuals secondarily exposed to asbestos through the clothing and persons of individuals either employed by the defendant or on the defendant's premises. **After evaluating the facts and law, the Court held that “[w]here it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission,” and that the duty applies to employers and “also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners.” However, the Court noted that this duty extends only to members of a worker's household, regardless of whether they are a relative.**

In reaching this holding, the California Supreme Court first noted that California Civil Code section 1714 “establishes a general duty to exercise ordinary care in one's activities,” thereby meaning that the issue is not whether a *new* duty should be established, but rather whether the Court should create an *exception* such that employers and premises owners would *not* owe a duty of reasonable care towards a workers' household members secondarily exposed to asbestos. California law requires that courts consider the factors outlined in *Rowland v. Christian*, 69 Cal. 2d 108 (1968) to evaluate whether a situation warrants a duty of care. Under *Rowland*, a Court must consider 1) whether the injury in question is foreseeable; 2) the degree of certainty that the plaintiff has suffered an injury; 3) the closeness between the defendant's conduct and the injury suffered; 4) moral blame of the defendant; 5) whether a duty of care would prevent future harm; 6) the burden to the defendant; and 7) availability of insurance for the type of injury suffered. After considering all of these factors, the Supreme Court concluded that the injury suffered by the plaintiffs, i.e. mesothelioma resulting from exposure to asbestos, was a foreseeable result in light of the OSHA standards in place at the time of the plaintiffs' alleged exposure to asbestos, as well as other publications during that time frame documenting the risks of asbestos exposure. Accordingly, the Court held that because an increased risk of

contracting mesothelioma was a characteristic harm resulting from the use of asbestos-containing materials, and because it can be reasonably assumed that a worker exposed to asbestos during the workday returns home at the end of the day, it was reasonably foreseeable that such workers would expose their household members to the asbestos fibers they worked with and around, thereby increasing their risk of contracting mesothelioma. While the defendants argued that there was no scientific consensus regarding the risks of asbestos during the time in which the plaintiffs were allegedly exposed, the Court noted that there is no authority for the proposition that a scientific consensus is required to establish foreseeability in the context of duty analysis.

In addition to the foreseeability of the injuries sustained by the plaintiffs in this case, the Court further held that public policy considerations also supported a finding that employers and premises owners owed a duty of care to a worker's household members. The Court noted that the defendants financially benefited from their business activities involving the use of asbestos, and that preventing workers' household members' from being exposed to asbestos would not have imposed "a greater burden than preventing exposure and injury to the workers themselves."

Despite recognizing a duty of care owed to individuals secondarily exposed to asbestos, the defense was able to successfully argue that a blanket duty could lead to tenuous claims by an unlimited number of plaintiffs, thereby overburdening defendants and the courts. In light of this concern, the Court held that this duty of care only extends "to members of a workers' household, i.e., persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time," thereby limiting "potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm."

The Court further held that this duty extends to both employer defendants as well as defendants sued under premises liability theory. While the defense argued that recognizing a duty of care owed to "take-home" plaintiffs when a defendant is sued under premises liability "would take the 'premises' out of premises liability and unsettle the tort law that applies to all property owners," the Court disagreed, noting that California courts have repeatedly held that a landowner's duty of care to avoid exposing others to risk of injury is not limited to injuries that occur on the premises, but rather extends to risks of injury off the landowner's premises, if the property "is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site." Given that the plaintiffs' injuries were allegedly sustained through contact with asbestos fibers originating from the defendants' worksites, the Court felt a duty of care was appropriate.

This decision will undoubtedly have many repercussions. While California is already a popular jurisdiction for asbestos litigation, this holding will likely encourage more asbestos lawsuits, given that this holding will help shield many plaintiffs from demurrers and summary judgment motions, thereby increasing plaintiffs' bargaining power. This can subsequently result in higher settlements and larger plaintiffs' verdicts. However, the Court's holding did offer some limitations of which defendants should be mindful:

+ Household Foreseeability Limitation - The Court established only a duty of care for members of the same household as individuals exposed to asbestos in their workplace. The Supreme Court was unwilling to extend the duty of care to *all* individuals who may have been exposed to asbestos through an employer's clothing and person, as the Court noted that while it is foreseeable for members of an individual's household to be exposed to asbestos from a workplace, it is less foreseeable for individuals not living in the same household as the worker to be exposed to measureable amounts of asbestos.
+ Premises Defendant Exceptions - The Court noted that while this duty extends to premises liability defendants, various fact-specific defenses may still be applicable. For instance, premises defendants are not liable to third parties for injuries caused by a contractor's negligence in performing work, based on a lack of control, unless the premises owner is aware of a hazardous condition the contractor did not know about and was unaware of. *Kinsman v. Unocal Corp.*, 37 Cal. 4th 659, 675 (2005).
+ Product Defendants – The Court noted that product defendants are distinguishable from employer or premises defendants based on the level of control the defendant has over the use of asbestos: "[T]ake-home asbestos

> cases against employers or premises owners allege that the defendants had direct knowledge as to how fibers were being released and circulated within their facilities and failed to prevent those employees from leaving workplaces owned or controlled by the defendants with asbestos on their clothing or persons. Product liability defendants, by contrast, have no control over the movement of asbestos fibers once the products containing those fibers are sold." Accordingly, the Court suggests that this holding does not extend to product manufacturers, as their control ends when the product is sold, thereby making any "take-home" exposure attenuated and difficult to foresee.

While the ultimate repercussions of this decision remain to be seen, defendants should be mindful that it only helps to further solidify California as a popular jurisdiction for asbestos litigation.

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