Dose Matters – An Analysis of the New York Court of Appeals' Decision in *Nemeth v. Brenntag North America*

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Yesterday, New York's Court of Appeals issued a seminal decision which will likely change the face of New York's asbestos litigation by raising the bar, and in some circumstances, making it significantly more difficult, for plaintiffs to prove specific causation in low-dose asbestos matters. *See Nemeth v. Brenntag North America,* No. 24, 2022 WL 1217464 (NY Apr. 26, 2022).

In New York, to successfully prosecute a toxic tort case, which includes asbestos matters, plaintiffs are required to prove two levels of causation. First, plaintiffs must prove that exposure to a particular toxin is capable of causing a particular disease (general causation). Next Plaintiffs must prove that a plaintiff was exposed to a sufficient quantity of the toxin to cause the relevant illness (specific causation). *Parker v. Mobile Oil Corp.*, 7 N.Y.3d 434, 448 (2006). The latter prong implicitly comes with its own quantification or "dose" requirement that plaintiff demonstrate the level or dose of the toxin known to cause the disease. The *Nemeth* court determined that the Plaintiff could not establish specific causation and reversed the jury verdict, dismissing Plaintiff's case against Whittaker Clark & Daniels.

Case Background

Plaintiff decedent Florence Nemeth claimed to have used the allegedly asbestos-containing cosmetic talcum powder product, Desert Flower, daily between 1960 and 1971, and as a result contracted peritoneal mesothelioma. Ms. Nemeth and her husband brought suit against several cosmetic talc manufacturers and suppliers, including Defendant, Whittaker Clark & Daniels, who supplied talcum powder to Desert Flower's manufacturer, Shulton. After all other defendants resolved pre-trial, the case proceeded to trial against Whittaker Clark & Daniels, resulting in a jury award of $16.5 million in favor of Plaintiff.

To prove specific causation, Plaintiff relied upon the testimony of geologist Sean Fitzgerald to demonstrate Ms. Nemeth's potential level of asbestos exposure and Dr. Jacqueline Moline to establish that the exposure level found by Mr. Fitzgerald was sufficient to cause peritoneal mesothelioma. To establish decedent's dose of asbestos exposure, Mr. Fitzgerald used what he called a "glove box test" in which he placed an acquired vintage sample of Desert Flower talcum powder in a small chamber and agitated the talc to release fibers and simulate the decedent's exposure. He concluded that the asbestos fibers in the Desert Flower sample were "significantly releasable" and ultimately concluded that decedent would have been exposed to "thousands to millions of fibers, billions and trillions when [added] up though repeated use." Dr. Moline, relying on Mr. Fitzgerald's findings, concluded that decedent's exposure was at levels at which multiple studies have shown elevated rates of mesothelioma.

The Court of Appeals' Decision

In overturning the verdict, the Court of Appeals took issue with both experts' opinions and methodology, and their ultimate conclusions that Ms. Nemeth's exposure to asbestos from Desert Flower was a substantial contributing factor to the development of her peritoneal mesothelioma.

First, the Court dismissed Dr. Moline's opinion that because almost all cases of mesothelioma are related to asbestos exposure that decedent's mesothelioma must therefore have been caused by asbestos exposure. The Court confirmed, as it has in prior decisions, that working backwards from a disease diagnosis to then assume a sufficient concentration of toxin to cause the disease, is improper and insufficient to establish causation.[1] The Court also took issue with the studies Dr. Moline relied upon to establish proximate causation. The first, the Welch article[2], identified only an association between "low levels" of asbestos exposure and peritoneal mesothelioma without defining or quantifying "low levels." The second, the Helsinki Study[3], while finding an association between significant exposures to asbestos and pleural mesothelioma similarly failed to identify what constitutes "significant" exposure or opine on what quantity of asbestos could cause peritoneal mesothelioma specifically. The Court noted that none of the materials relied upon by Dr. Moline set forth an estimate of the minimum level of exposure sufficient to cause peritoneal mesothelioma. The Court additionally noted that Dr. Moline's reliance on OSHA permissible exposure limits is insufficient to establish causation.

The Court also took issue with Mr. Fitzgerald's conclusions. Specifically, the Court noted that while Mr. Fitzgerald's test of Desert Flower might determine how much asbestos could be released from the product into the glove box, he did not and could not offer an estimate as to the amount of asbestos that the decedent would have actually inhaled. Because Mr. Fitzgerald's testing method could not establish or estimate the quantity of asbestos the decedent would have inhaled, it was impermissible for a medical causation expert such as Dr. Moline to rely on Mr. Fitzgerald's quantifications of asbestos in the Desert Flower product.

Takeaways and Potential Impact

First, this decision may indicate a reluctance upon the part of the Court to accept that a plaintiff can establish a causative link between low doses of asbestos exposure and peritoneal mesothelioma. While the decision seemingly accepts that it is generally understood that pleural mesothelioma (the most common form of the disease) is caused by asbestos exposure, the Court highlighted the fact that none of the studies relied upon by Plaintiff's experts set forth any estimate as to the minimum levels of asbestos exposure that could potentially cause peritoneal mesothelioma. Absent additional studies, plaintiffs who allege exposure to asbestos from

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[1] It could appear perplexing for the Court to acknowledge that almost all cases of mesothelioma are related to asbestos exposure, yet at the same time state that a mesothelioma diagnosis is insufficient to prove exposure to asbestos. The critical distinction here, and in all asbestos matters, is that plaintiffs must not simply prove that asbestos exposure caused a plaintiff's disease, but instead must prove that the use of the specific defendant's product caused the plaintiff's disease. The issue is not whether the decedent's mesothelioma was caused by asbestos exposure but rather whether decedent's use of Whittaker Clark & Daniels' product caused her disease.

[2] Laura S. Welch (2007) Asbestos Exposure Causes Mesothelioma, But Not This Asbestos Exposure: An Amicus Brief to the Michigan Supreme Court, International Journal of Occupational and Environmental Health, 13:3, 318-327, DOI: 10.1179/oeh.2007.13.3.318

[3] Tossavainen A., Asbestos, asbestosis, and cancer: The Helsinki criteria for diagnosis and attribution. Scand. J. Work Environ. Health. 1997;23:311–316. doi: 10.5271/sjweh.226

products with propensities to emit low doses of asbestos may have a difficult time ever proving legal causation in a peritoneal mesothelioma case.

Second, the decision's criticism of Fitzgerald's test, specifically its failure to establish what quantity of asbestos would have been inhaled by the decedent (as opposed to simply released by use of the product), confirms that the Court will require Plaintiff experts to specifically opine on the dose experienced by a plaintiff in order to successfully prosecute an asbestos case. This raising of the bar could provide a new, particularly difficult hurdle for plaintiffs to overcome against defendants (especially those infrequently or newly subject to asbestos litigation) whose products have not been subject to exposure studies demonstrating exposure sufficiently similar to those experienced by plaintiffs.

Interestingly, the Court's issue with the sufficiency of Mr. Fitzgerald's testing methodologies may also significantly diminish or eliminate reliance by New York Courts on the First Department's August 2020 decision in the *Robaey* case. *See Matter of New York City Asbestos Litig. V. Air & Liquid Sys. Corp.,* 186 A.D.3d 401 (1st Dept. 2020). In that case, the court, in determining that the plaintiffs had sufficiently proved causation, premised its decision on the fact that the plaintiff's experts testified that the gaskets at issue contained a certain quantity of asbestos in their makeup and that therefore the physical breaking down of the gaskets would necessarily have produced enough asbestos dust to cause the plaintiff's disease. *Id.* at 403-04. Moreover, the *Robaey* court specifically cited to *Lustenring v. AC & S, Inc.*, 13 A.D.3d 69 (1st Dept. 2004) in support of its proposition that simply showing a product would have contained a certain quantity of asbestos in its makeup would therefore necessarily expose a plaintiff to a sufficient quantity of asbestos to cause an asbestos-related disease. The *Nemeth* Court implicitly rejected the analysis used by the *Robaey* court and in fact, went out of its way to expressly state that "Any reliance on…*Lustenring*…to support a theory that working in dust laden with asbestos generated from products containing asbestos, along with expert testimony that that dust…necessarily contains enough asbestos to cause mesothelioma, is incorrect." *Nemeth* at *8, n 3.

In sum, what the *Nemeth* court established is that where Plaintiffs fail to establish or set forth a scientific expression of dose, their case should fail.

For more on *Nemeth* and its impact on the future of cosmetic talc and asbestos litigation in New York, please do not hesitate to reach out to Erich J. Gleber or David E. Freed.