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California justices make reasonability important part of asbestos rulings

Early last month, the California Supreme Court held that employers and premises owners have a duty to exercise ordinary care in their use of asbestos, including preventing offsite exposure due to fibers carried by clothing of onsite workers.

In *Kesner v. Alameda County*, No. S219534 (CA Dec. 1, 2016), and *Haver, et al. v. BNSF Railway Co.*, No. S219919 (CA Dec. 1, 2016). The court found it was reasonably foreseeable behavior that workers would carry asbestos on their clothing to household members and that the employer has a duty to take reasonable care to prevent transmission.

The plaintiffs alleged asbestos exposure by transmission contributed to their family members' deaths and that the worker's employers or premises owners had a duty to prevent the exposure. The decedent in *Kesner* allegedly contracted mesothelioma by being exposed to clothing of his uncle who worked for Abex manufacturing brake shoes.

The decedent's husband in *Haver* was employed by BNSF Railway Co.; the decedent was exposed to asbestos pipe insulation carried on her husband's clothes. After time, she contracted cancer.

The two cases never reached a jury. In *Kesner*, Abex moved for and was granted by the trial court a nonsuit ruling in light of *Campbell v. Ford Motor Co.*, 206 Cal.App.4th 15, 34 (2012) (disapproved by this opinion), which held that "a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos." The appeals court reversed.

In *Haver*, BNSF demurred to the complaint based on *Campbell*. The trial court sustained and the appeals court distinguished *Kesner* as being based on negligence versus *Haver's* premises liability which *Campbell* rejected. In light of these two cases, the California Supreme Court granted review and consolidated to decide what duty was owed.

The court considered whether there should be an exception to the general duty to exercise ordinary care under Civil Code Section 1714.

The factors to weigh in favor of finding such an exception are "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved" (citing *Rowland v. Christian*, 69 Cal.2d 108, 113 (1968)).

From the *Rowland* factors, the court found that exposure of household members to asbestos is generally foreseeable and that the defendants have not shown that categorically barring these claims is justified by policy. The court held that a reasonable person making industrial use of asbestos during the 1970s would take into account the possibility that asbestos fibers could become attached to an employee's clothing and thereby reach other persons who lived in their home.

In analyzing the first *Rowland* factor of foreseeability, the court found regulations at the time identified potential health risks of asbestos traveling outside a worksite.

This included the Occupational Safety and Health Administration, which set precautions for airborne asbestos exposure while contemplating protecting third parties from asbestos traveling outside of a worksite on an employee's clothing.

Additionally, the Labor Department recommended those employees working with toxins have facilities to shower before leaving the workplace to prevent contaminating families. Lastly, OSHA's published standard gave notice of reasonable foreseeability of such harm.

TOXIC TORT TALK



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For the second *Rowland* factor, the degree of certainty the plaintiff suffered injury, the court found certainty in the fact the decedents in *Kesner* and *Haver* died from mesothelioma and cancer.

The third *Rowland* factor, the closeness between conduct and injury, the court found the intervening conduct that workers returned home, without adequate precautions, and brought asbestos dust was entirely foreseeable. The third party's actions of the family members were derivative of the defendants' allegedly negligent conduct and thus did not diminish the closeness.

The nexus led back to the employer's failure to control the movement of asbestos fibers through the predictable behavior of their employees returning home.

The court then considered the remaining *Rowland* policy factors. For the factor of preventing future harm, the court concluded imposing tort liability in the 1970s would have prevented future harm when looking at the numerous regulations previously referenced. For the factor of moral blame, the court stated it has assigned moral blame where plaintiffs are unsophisticated or the defendants exercised greater control over the risks as seen here.

For the availability of insurance, the court found insurance was available despite policies declining with decreasing asbestos use. Although the defendants claimed the scope of potential liability would exceed policy limits and allowing liability would increase litigation, the defendants did not offer precise terms or estimates to support that conclusion.

Additionally, the court stated that "shielding tortfeasors from the full magnitude of their liability for past wrongs is not a proper consideration."

Neither did the defendants claim that precautions to prevent transmission would unreasonably interfere with business operations. The court did consider the floodgate of litigation argument and limited the scope of the duty to only members of a worker's household, persons they live with and are thus foreseeably in close sustained contact with the worker over a significant period.

The court further disregarded the argument differentiating premises owners by stating mere possession and right to control conditions on the premises is sufficient basis for an affirmative duty to act with the same standard of care applied in negligence.

The court has never held physical boundaries to define the scope of landowner's liability. Additionally, the theory surrounding duty was based on the decedent's contact with asbestos fibers from the defendant's property where clothing was a carrying vector. Such liability for harm caused by substances that escape an owner's property is well-established in California law.

Looking beyond California, the court made note that courts that have addressed take-home exposure factually comparable, while applying tort law commensurate with California's, have reached the same conclusion.

Based on the above considerations, the California Supreme Court reversed in *Haver*, vacated the judgment in *Kesner* and remanded both cases for further proceedings.