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Theories of liability in toxic tort litigation can change quickly, say attorneys Michael E. Waller, and Joanne Roman Jones. In this Analysis & Perspective article, the authors discuss changes in toxic tort legal theory and liability, focusing on changes in the duty of care of a premises owner under New Jersey law, and the duty to warn in Washington and California. The authors urge toxic tort attorneys to monitor pleadings and local rulings for ''novel theories of liability and decisions that may signal or establish a limitation of liability.''

Life Comes At You Fast—Changing Theories of Liability in Mass and Toxic Torts

By Michael E. Waller, Esq., and Joanne Roman Jones, Esq.

I. Introduction

Mass torts and toxic torts generally deal with the exposure of (often) large groups of people to hazardous materials. The parameters of the litigation and resulting liability are defined by the claimed toxic material at issue, the jurisdiction, and, to some extent, by the motivations of the parties and counsel involved. Theories of liability and the definition of compensable personal exposure, in the various and varied arenas of toxic torts, run the imaginable (and sometimes un-imaginable) gamut.

eIn the recent past, several decisions in different areas of the country highlight the almost ever changing landscape of mass and toxic tort theories of liability. In some cases, liability is being expanded, in others, traditional tort theories are being reiterated, but to new products and materials and in the face of new theories advocated by the plaintiffs' bar. Across the country, theories of liability are being tested by counsel for plaintiffs and defendants and, in some jurisdictions, have been recently defined or modified in ways that significantly impact liability under toxic tort and product liability law.

The following article details recent and different changes in various jurisdictions involving toxic tort legal theory and liability, most specifically the changes in the duty of care of a premises owner in New Jersey and

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the duty to warn as clarified in Washington and California.

II. Where a Duty Has Expanded: The Duty of Care of a Premises Owner

In the relatively recent past, in a case that has redesigned the landscape of personal liability actions based on exposure to harmful chemicals in New Jersey, the New Jersey Appellate Division held—for the first time—that a defendant who merely owns a site where exposure occurs can be liable to previously unforeseen plaintiffs. In *Olivo v. Exxon Mobil Corporation*, 377 N.J. Super. 286 (App. Div. 2005), plaintiff, on behalf of himself and his deceased wife (''decedent''), sued 32 defendants that manufactured, supplied, or installed asbestos products, or owned premises where asbestos products were used. During the course of the expansive litigation, all defendants settled with plaintiffs, except defendant Exxon Mobil Corporation (''Exxon Mobil''). The trial court granted Exxon Mobil's motion for summary judgment, finding Exxon Mobil owed no duty to the decedent. The Appellate Division reversed.

In *Olivo,* the decedent was allegedly exposed to asbestos when laundering the plaintiff's clothing. The Appellate Division held that Exxon Mobil owed a duty of care to the decedent. By holding Exxon Mobil liable for the decedent's death, the court effectively broadened all landowners' liability, not just liability grounded in asbestos exposure. Traditionally, a landowner's duty of care was dependent upon the visitor's status as trespasser, licensee, or business invitee. *Sussman v. Mermer*, 373 N.J. Super. 501, 504 (App. Div. 2004).

However, as a result of the Appellate Division's decision in *Olivo*, the law governing premises liability changed dramatically. Now, in New Jersey, to determine whether a landowner owes a duty to the plaintiff, the first issue the court must answer is whether the plaintiff was a ''foreseeable plaintiff.''

After this determination is made, a court will then engage in a balancing test to determine if liability in the present matter is warranted. The court will look to such factors as: (1) the relationship between the parties, (2) the nature of the attendant risk, (3) the opportunity and ability to exercise care, and (4) the public interest in the proposed solution. In *Olivo*, after finding that household members of an individual exposed to asbestos are, in fact, ''foreseeable plaintiffs,'' and after applying the above-mentioned balancing test, the Appellate Division, found that Exxon Mobil owed a duty to decedent.

In applying the balancing test, the Appellate Division in *Olivo* held that Exxon Mobil was in the best position to prevent the harm. The court declared that the company was fully aware of the potential for contaminating a worker's home with industrial chemicals and the steps that could have been taken to reduce this risk. Exxon Mobil could have warned plaintiff of the harms associated with asbestos exposure and the steps that he and his family could have taken to limit their exposure. Alternatively, the company could have provided changing rooms and/or showers to the employees so as to limit exposure to asbestos. Plainly, such a decision can have far reaching ramifications, as potentially extending liability for injuries from on-premises exposures to shopkeepers, gas station attendants, or even people such employees may pass on the street on their way home.

Toxic tort and products liability practitioners must be alert to such changes in the law and be particularly vigilant to spot expansion of liability that may affect their clients. For example, the recent expansion of premises liability caused by the *Olivo* decision will, at a minimum, cause corporate premises owners to (1) identify all possible sources of exposures (which they may already do under existing environmental regulations); (2) creatively consider all possible routes of exposure; (3) identify the types of potential on-premises plaintiffs; (4) determine if there are potential off-premises parties that can be affected by on-premises exposures; and (5) develop safety policies, perhaps with an industrial hygienist, to limit or prevent the initial exposure to those on-site (which a company may already do), and the means to prevent further off-site exposures (for example, by publishing guidelines aimed at exposures, providing uniforms, changing rooms, and showers for those on-site to prevent exposures to others on-site or off-site).

III. Where a Duty Has Been Limited: Duty to Warn

The scope of a manufacturers' duty to warn, particularly in toxic tort cases, is another example of a theory of liability that holds many facets and whose landscape has currently been changing. The duty to warn issue, often litigated and seemingly static in application, is currently being addressed with different results in different jurisdictions.

In asbestos litigation, there appears to be a growing disagreement among parties and some courts as to which parties the duty to warn should extend. By way of only one example from New York (certainly by no means exclusive of the permutations of the duty to warn in toxic tort cases), the Court of Appeals (the highest Court in New York) specifically ''decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of another manufacturer.'' *Rastelli v. Goodyear Tire & Rubber*, 79 N.Y.2d 289, 297-98 (1992).

Despite this succinct declaration of products liability law, trial courts adjudicating asbestos-liability claims have inferred, using scant reasoning, just such an existing duty to warn demanded of the equipment manufacturer, for asbestos insulation applied by the others. *Berkowitz v. A.C.& S.*, 288 A.D.2d 148 (1st Dep't 2001). *Berkowitz* held, in part: ''Nor does it necessarily appear that [the defendant equipment manufacturer] had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps.'' *Id*. At 149.

Relatively recently, the Supreme Court of the State of Washington has held quite differently regarding the duty to warn in asbestos toxic tort cases. Two recent decisions by the Supreme Court of Washington State have clarified this duty. *Simonetta v. Viad Corp.*, 165 Wash.2d 341 (Wa. 2008), held that a product manufacturer was not liable in common law products liability or negligence for not warning of the hazards of asbestos from another manufacturer's insulation applied to its equipment, after the sale of the equipment to the Navy.

Braaten v. Saberhagen Holdings, 165 Wash.2d 373 (Wa. 2008), similarly held that product manufacturers owed no duty to warn of the hazards of asbestos from

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asbestos insulation that was manufactured and supplied by a third party, nor did the product manufacturer owe a duty to warn of the hazards of asbestos from replacement packing and gaskets.

The court in both of these decisions found that equipment manufacturers, who supplied equipment that the U.S. Navy installed on Navy ships, had no duty to warn regarding the hazards of asbestos insulation applied to the equipment by the U.S. Navy. *Cf., Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, 496 (6th Cir. 2005) (No issue of fact created, as evidence established that asbestos containing products used in connection with the equipment was not manufactured by the pump manufacturer, but rather by another company. ''[The manufacturer] cannot be held responsible for the asbestos contained in another product.'') (*distinguished by the Washington Supreme Court as discussing/analyzing cause, as opposed to duty*). This holding by the Supreme Court of Washington evidences the fact that even firmly established, and well-versed, theories of liability adjust and can be reasserted with changing analyses and litigation.

California has also recently followed these decisions by the Supreme Court of the State of Washington. The holding of *Braaten* was applied in a closely analogous factual context by the Court of Appeal of California, First District. *Taylor v. Elliott Turbomachinery*, 171 Cal. App. 4th 564, 90 Cal. Rptr. 3d 414, *appeal denied*, (2009). The *Taylor* Court found that the law did not ''impose a duty to warn upon a manufacturer where the manufacturer's product did not cause or create the risk of harm.' '' *Id*. at 583, 90 Cal. Rptr. 3d at 428-29 (citation omitted). Furthermore, these particular issues as addressed in *Taylor* are being raised in other appellate courts across the United States.[1]

In addition to remaining aware of decisions that serve to expand a corporate defendant's toxic tort or product liability, a practitioner in this area of law is well served by monitoring pleadings and case decisions in his or her local jurisdiction to spot novel theories of liability and decisions that may signal or establish a limitation of liability. In particular, a practitioner must remain cognizant of the available, and increasing, court decisions limiting liability and the real tension resulting from attempts to prescribe such decisions by plaintiffs' lawyers.

IV. Conclusion

Regardless of which side of the courtroom one stands, mass tort and toxic tort counsel must remain vigilant of the various jurisdictions wrestling with the numerous, complex mass and toxic tort claims that are currently being litigated. Courts are constantly redefining parties and exposure and reevaluating liability. New theories are not necessarily moribund, simply because they have not been accepted before. Counsel should also be bold in either reminding judges of well established theories of tort liability and how they should be applied to seemingly new classes of toxic tort claims or alerting jurists of the development of new theories of liability. As the class of plaintiffs and defendants change and, indeed, as does time, the theories of liability in toxic tort litigation are challenged and can change, often faster than expected.

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[1] *See e.g., Anderson v. Asbestos Corp., et al.*, 2009 Wash. App. LEXIS 1708 (unpublished opinion) (prior decision remanded for reconsideration in light of the Washington Supreme Court rulings in *Braaten* and *Simonetta*; finding, under recent Washington Supreme Court case law, that a manufacturer does not have a duty to warn about the potential danger of asbestos-containing material that could be later added to its product after sale).