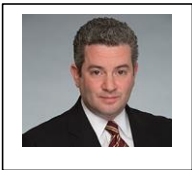


TOXIC AND HAZARDOUS SUBSTANCES LITIGATION*June 2016***IN THIS ISSUE**

In this issue, Josh Leader discusses the New York Court of Appeals' latest decision in a line of cases following its landmark decision in Parker v. Mobil Oil Corp., affirming the courts' gatekeeper role in toxic tort cases and holding, once again, that plaintiffs must provide proof of sufficient exposure based upon generally accepted methodology to establish specific causation.

New York Courts Continue Raising the Bar for Plaintiffs' Proof of Causation

ABOUT THE AUTHOR

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Recent decisions by New York courts continue the jurisdiction's trend of more stringent adherence to general and specific causation requirements, including proof of sufficient exposure to establish specific causation, along with enforcement of the courts' gatekeeper function in precluding expert testimony that is not based upon generally accepted methodology when attempting to establish such causation. This precedent should be encouraging to defendants facing novel causation theories and/or flimsy evidence of exposure and should provide further basis to preclude expert testimony that fails to satisfy these reaffirmed requirements.

In its February 2016 decision in *Sean R. ex rel. Debra R. v. BMW of North America, LLC*, 26 N.Y.3d 801, 28 N.Y.S.3d 656 (N.Y. 2016), the New York Court of Appeals, in the high court's latest ruling in a line of cases¹ following its landmark decision in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 824 N.Y.S.2d 584 (N.Y. 2006),² affirmed the court's gatekeeper role and held inadmissible plaintiff's experts' causation testimony on

the grounds that it was not generally accepted in the scientific community.

In *BMW of North America*, plaintiff was born with "severe mental and physical disabilities, which he attributed to *in utero* exposure to unleaded gasoline vapor caused by a defective fuel hose in his mother's BMW." *BMW of North America*, 26 N.Y.3d at 805. The question before the court was whether the trial court and Appellate Division properly precluded two of plaintiff's expert witnesses from testifying on the issue of causation.

Plaintiff sought to offer testimony of two experts, including Linda Frazier, M.D., M.P.H., to establish that his birth defects were allegedly the result of his *in utero* exposure to gasoline vapor. *BMW of North America*, 26 N.Y.3d at 807. Since plaintiff did not have data concerning the actual levels of gasoline vapor to which he alleged exposure, Dr. Frazier relied on reports of controlled studies, which found that for symptoms of acute toxicity to occur, such as those allegedly suffered by plaintiff's mother,

¹ See, e.g., *Cleghorne v. City of New York*, 99 A.D.3d 443, 952 N.Y.S.2d 114 (1st Dep't 2012) (granting summary judgment where plaintiffs' expert failed to identify the level of exposure necessary to establish causation for the injury alleged); *Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y.3d 762, 986 N.Y.S.2d 389 (N.Y. 2014) (failure to establish specific causation warranted summary judgment in favor of defendant; holding that evidence of an association between exposure to a toxin and certain medical conditions does not establish general acceptance that such toxin causes the alleged conditions); *In re New York City Asbestos Litigation*, 48 Misc.3d 460, 11 N.Y.S.3d 416 (N.Y. Cty. Sup. 2015) (granting

motion to set aside \$11 million verdict where plaintiff did not properly establish general or specific causation); *Kendall v. Amica Mut. Ins. Co.*, 135 A.D.3d 1202, 23 N.Y.S.3d 702 (3d Dep't 2016) (affirming summary judgment where plaintiff failed to demonstrate specific causation).

² The *Parker* decision established the current New York standard for expert opinions on causation: "It is well-established that 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.

there had to be at least a 1000 parts per million (ppm) concentration of gasoline vapor. *Id.* Because plaintiff's mother alleged such symptoms, Dr. Frazier worked backward to estimate exposure levels, and thus, opined that plaintiff's mother must have had exposure by inhalation of at least 1000 ppm of gasoline vapor. *Id.*

Dr. Frazier further opined that "unleaded gasoline vapor is capable of causing the types of birth defects plaintiff suffered based on the link between exposure to the constituent chemicals of gasoline and adverse birth outcomes," and concluded that plaintiff's mother's "high peak exposure[]' to gasoline vapor during the first trimester of her pregnancy was the most likely cause of plaintiff's injuries." *Id.*

In analyzing plaintiff's experts' opinions, the Court of Appeals explained, as it had previously established in its *Parker* decision, that "in toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation) (*see Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448, 824 N.Y.S.2d 584, 857 N.E.2d 1114 [2006])." *BMW of North America*, 26 N.Y.3d at 808. The Court of Appeals further held, again reiterating a prior ruling, that

[a]lthough it is "not always necessary for a plaintiff to quantify exposure

levels precisely" (*id.*), we have never "dispensed with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect" (*Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 784, 986 N.Y.S.2d 389, 9 N.E.3d 884 [2014]). "At a minimum, ... there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm that the plaintiff claims to have suffered" (*id.*, quoting *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 [8th Cir.1996]).

BMW of North America, 26 N.Y.3d at 808-809.

The Court of Appeals did not stop there, however, and made clear once again that in attempting to establish the requisite exposure, the expert "must do so through methods 'found to be generally accepted as reliable in the scientific community' (*Parker*, 7 N.Y.3d at 449, 824 N.Y.S.2d 584, 857 N.E.2d 1114)," *BMW of North America*, 26 N.Y.3d at 809, reaffirming New York's reliance on the *Frye* test. *Id.* While the court did not refute "the scientific validity of controlled studies or their ability to measure symptoms in response to a given exposure," it did take issue with Dr. Frazier's methodology, pointing out that "Plaintiff and his experts have not identified any text, scholarly article or scientific study, however, that approves of or applies this type of methodology, let alone a "consensus" as to its reliability." *Id.*

Indeed, the Court of Appeals held that “those controlled studies do not support the inverse approach Dr. Frazier employed in this case—working backwards from reported symptoms to divine an otherwise unknown concentration of gasoline vapor. Dr. Frazier has not identified on this record any study, report, article or opinion that admits or employs such a methodology.” *BMW of North America*, 26 N.Y.3d at 810.³

Plaintiff also relied on the opinion of Shira Kramer, M.H.S., Ph.D., who opined that gasoline vapors and/or specific “chemical constituents of gasoline vapor are “causally related to an elevated risk of birth defects.” *Id.* at 807. She then relied on Dr. Frazier’s finding of 1000 ppm vapor concentrations to conclude that plaintiff’s exposure to gasoline vapors was a “substantial causative factor in plaintiff’s birth defects.” *Id.* Although the Court of Appeals’ decision did not specifically analyze Dr. Kramer’s opinion that “‘gasoline vapors and/or [the] specific chemical constituents of gasoline vapor’ ... are ‘causally related to an elevated risk of birth defects,’” in affirming the preclusion of Dr. Kramer’s opinion, it affirmed the lower court findings, which did. *Id.*

In fact, Justice York of the New York County Supreme Court found that Dr. Kramer’s “conclusion about general causality”⁴ was

problematic in several respects. First, it is not a statement on general causation in the case at bar. Relevant to Sean Reeps’ case would be an unambiguous statement that exposure to gasoline vapor in the early gestation period is causally related to spastic quadriparesis (or cerebral palsy in general), microcephaly, cardiac disorders of the type Sean Reeps has, or any other of his diagnosed diseases. The expert’s imprecision on this point is not accidental. Dr. Kramer concedes that “studies which fail to identify an association between gasoline or solvent exposure and specific birth defect(s) typically have very lower (sic) power because of small sample sizes for individual birth defects, and do not address the overall teratogenic potential of the exposure.” (emphasis in the original, at ¶129). She adds: “Failure to detect a statistical association does not establish that there is no association between an exposure and an outcome” (*id.*). At issue in this case are the specific birth defects found in Sean Reeds [sic], and

³ The Court also differentiated Dr. Frazier’s approach from a “true ‘odor threshold’ analysis that has been admitted in other toxic tort cases.” *BMW of North America*, 26 N.Y.3d at 810.

⁴ Dr. Kramer opined that “To a reasonable degree of scientific certainty, the overwhelming majority of studies regarding the effects of gasoline, toluene, and other organic solvents on human health support

the conclusion that exposure to gasoline vapor and its chemical constituents is causally related to increased risk of birth defects and adverse birth outcomes.” *Reeps v. BMW of North America, LLC*, 2012 WL 6729899, 2012 N.Y. Slip Op. 33030(U), No. 100725/08, *7 (N.Y. Sup. Dec.16, 2012).

the burden to prove a cause-and-effect relationship between exposure to gasoline and these birth defects falls on the plaintiffs. Intentional inhalation of toluene, a minor component of gasoline vapor, but a substantial part of sprays and lacquers, is not comparable to accidental inhalation of gasoline. The expression “exposure to gasoline vapor and its chemical constituents” is misleading: it conceals that existing studies do not conclusively establish a connection between exposure to unleaded gasoline and birth defects.

Reeps v. BMW of North America at *7.

The Court of Appeals, thus, affirmed the preclusion of plaintiff’s experts, holding that plaintiff failed to establish that either expert employed generally accepted methodologies to establish the that “plaintiff was exposed to a sufficient amount of a toxin to have caused his injuries,” *BMW of North America*, 26 N.Y.3d at 812.

In so holding, the New York Court of Appeals took yet another step forward in making clear that plaintiffs must establish general and specific causation through generally accepted methodologies. Failing to do so should result in the preclusion of the testimony and dismissal of plaintiff’s claims.

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