Blurred Lines: The Interplay of Duty and Foreseeability

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When employees leave for the day, are an employer's worries over? Does the employer need to call ahead to warn others that the employee is on their way home? State courts around the country are overseeing a growing number of lawsuits alleging that an employer or premises owner owes a duty of care to warn individuals—specifically individuals who may have never set foot in the workplace or on the property—of the hazards associated with asbestos. In most of the scenarios popping up around the country, the plaintiff is a spouse or family member exposed from either laundering or other forms of contact with asbestos-contaminated clothing the employee has brought home from work. Employers and premises owners can take comfort from the recent unanimous decision of New York State's highest court, the Court of Appeals, in such a case.

Elizabeth Holdampf, the plaintiff in *In re New York City Asbestos Litigation*, __N.E.2d__, 2005 WL 2777559 (2005), was diagnosed with mesothelioma and alleged the source of her exposure was washing her husband's soiled work clothes over many years. The Court of Appeals has now handed down a detailed and unanimous decision analyzing this issue and ultimately determining that there is no duty of care in this situation. In doing so, the Court reversed the decision of an intermediate appellate court in *In re New York City Asbestos Litigation,* 14 A.D.3d 112, 786 N.Y.S.2d 26 (1st Dep't 2004), reinstated the order of the trial court—which dismissed all causes of action—and found that the employer/landowner had no duty to a plaintiff in Mrs. Holdampf's position.

The central question for the Court was whether the foreseeability of Mrs. Holdampf's exposure and injuries is the starting point to determine if a duty of care exists. The interplay of duty and foreseeability is often blurred and has caused some confusion in recent court rulings. Duty versus foreseeability is a fundamental dichotomy upon which to keep a close eye. Essentially, the argument that one has a duty to prevent a foreseeable injury has now been soundly rejected in New York. Citing its holding in *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 223 (2001), the Court of Appeals reaffirmed that "foreseeability, alone, does not define duty—it merely determines the scope of the duty once it is determined to exist."

The intermediate appellate court had sided with Mrs. Holdampf's citation of the seminal decision *Palsgraf v. Long Island Co.* (citation omitted) in her reasoning that since she fell within the "range of reasonable apprehension" created by the defendant's negligence the employer/premises owner owed her a duty of care. The Court of Appeals restated its common law precedent finding that "[f]oreseeability should not be confused with duty. The principle expressed in *Palsgraf v. Long Island Railroad Co.* (citation omitted) … is applicable to determine the scope of duty – only after it has been determined that there is a duty." *Pulka v. Edelman*, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976).

The Court then addressed the duty owed by both a landowner and employer under the circumstances presented. Pointing to another New York intermediate appellate court decision, *Widera v. Ettco Wire & Cable Corp.*, 204 A.D.2d 306, 611 N.Y.S.2d 569 (2d Dep't 1994), *leave to appeal denied* 85 N.Y.2d 804, 650 N.E.2d 414, 626 N.Y.S.2d 755 (1995), the Court upheld the common law principle that an employer only owes a duty to provide a "safe work place" to its employees and that the employer-defendant in this case did not have sufficient control over Mr. Holdampf to ensure that he would not bring home con-

taminated clothing. The Court also pointed out that the relationship between the employer/premises owner did not warrant the imposition of a duty of care. Relationship imports duty without which, despite the harm, there can be no recovery. The New York Court clearly stressed its reluctance to extend liability to a defendant for failure to control the conduct of others.

Recognizing the national debate, the Court discussed two cases decided by other state courts on the same issue. In the first case, *Zimko v. American Cyanamid*, 905 So.2d 465 (La. Ct. App. 2005), an intermediate Louisiana appellate court completely relied on the now-overturned decision of the New York intermediate appellate court without any independent analysis of its own. In *Zimko*, the court held that a father's employer owed a duty of care to the son in regards to potential asbestos exposure.

The New York Court of Appeals also acknowledged that Georgia's highest state court, the Supreme Court of Georgia, had recently declined to adhere to the reasoning of the New York intermediate appellate court in *CSX v. Transportation, Inc.*, 278 Ga. 888, 608 S.E.2d 208 (2005). Instead, the Georgia court specifically decided to follow the principle of *Widera* by holding that "an employer's duty to provide a safe workplace does not extend to persons outside of the workplace" *Id.* at 892.

Mrs. Holdampf's added theory against the defendant in its capacity as landowner also failed to persuade the Court of Appeals. The Court noted that the landowner at issue was not discharging toxins into the atmosphere so its duty of reasonable care to surrounding areas was not applicable. The Court of Appeals also distinguished the New Jersey intermediate appellate court opinion, *Olivo v. Exxon Mobil Corp.*, 377 N.J. Super. 286, 872 A.2d 855 (NJ Super Ct. App. Div. 2005), *cert. granted* 185 N.J. 39, 878 A.2d 855 (2005). However, as the Court of Appeals pointed out, New Jersey, unlike New York, relies heavily on foreseeability in its duty analysis. Also, the landowner in this matter provided laundry services to Mr. Holdampf whereas, the *Olivo* premises owner, Exxon Mobil Corp. did nothing to prevent workers from bringing home asbestos-contaminated clothing.

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With *In re New York City Asbestos Litigation*, __N.E.2d__, 2005 WL 2777559 (2005), the New York Court of Appeals joins Georgia as the only high state court to decide the duty of care of an employer/landowner for second-hand exposure to hazardous substances. Both New York and Georgia do not recognize such a duty. The New Jersey Supreme Court will be deciding the issue in *Olivo* shortly, but the difference between the role of foreseeability in the duty analysis will likely provide a result inconsistent with New York and Georgia.

Other state intermediate appellate courts will undoubtedly be confronted with the secondary exposure issue and will look to the rapidly developing nationwide jurisprudence. For example, the intermediate level Court of Appeals of Texas, Houston (14th District) will shortly decide this issue for Texas in *Exxon Mobile Corporation v. Altimore*, No. 14-04-01133-CV and, in an interpretative capacity for Michigan, while applying Michigan state law in *Ford Motor Company v. Miller*, No. 14-05-00026-CV. Both cases will analyze employer/landowner duty of care issues in post-trial appeals.

However, the decision by the New York State Court of Appeals has left open the question of whether a product manufacturer or supplier owes a duty to warn an individual who suffers from second-hand exposure to asbestos. Like the employer/landowner duty of care analysis, the product liability analysis will focus on the factors weighed by courts in determining the existence of a duty of care under each states' particular jurisprudence and precedent in that area of law. For instance, in *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844 (10th Cir. 1992), the United States Court of Appeals for the Tenth Circuit, while interpreting Oklahoma product liability law, found that the wife of an insulator who worked with asbestos products was not a foreseeable user for whom manufacturers had a duty to warn about the dangers of exposure to asbestos dust on her husband's clothes. However, this analysis could very easily lead to different results within each state for premises/employment liability cases versus product liability cases.

Intermediate appellate courts in Maryland have found a duty for product manufacturers to warn about the hazards of asbestos in the scenario of second-hand exposure (*Anchor Packing Company v. Grimshaw*, 115 Md.App. 134, 692 A.2d 5 (Md. App. 1997) *vac'd on other grounds* 713 A.2d 962 (Md. 1998), but have also found that an employer owes no duty to non-employees (*Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395, 411, 705 A.2d 58, 66 (Md. App. 1998).

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The challenges are more difficult in the context of strict product liability law with its origins of "liability without fault" and its long-held rationale that "the seller, by undertaking to market his product for use and consumption, has undertaken and assumed a special responsibility to any member of the consuming public who may be injured by it." *Restatement (Second) of Torts* §402A cmt. c (1965) The commentators acknowledge that, for injuries to non-users and non-consumers, courts have not gone beyond allowing recovery to users and consumers. Nonetheless, as they point out, "[t]here may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded other than they do not have the same reasons for such protection as the consumer who buys a marketed product." *Restatement (Second) of Torts* §402A cmt. o (1965)

The duty of care in asbestos second-hand exposure cases, whether in the premises liability, employer liability or product liability arenas, will turn on each individual state's duty of care analysis and the factors weighed to establish a duty in a specific area of law. As a result, a careful analysis into each state law regarding the existence of a duty will have to be made to determine whether a duty of care exists to warn an individual about the hazards associated with second-hand exposure to asbestos.

Although still varying in results, courts are nonetheless showing sensitivity to the consequences of a too expansive view of a duty of care for second-hand exposure claims which could lead to potentially "limitless liability to an indeterminate class of persons conceivably injured." (*Hamilton*, 96 N.Y.2d at 232) Moving beyond the unique world of asbestos, employers, premises owners, and manufacturers should carefully weigh this recent decision in New York and consider its potential wide ranging application to those scenarios in which a "second-hand exposure" plaintiff believes they are entitled to recovery.

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ABOUT THE AUTHORS

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Dwight A. Kern is an associate in Segal McCambridge Singer & Mahoney's New York office. Among Mr. Kern's specialties are toxic tort/hazardous substances litigation, products liability, labor and employment law and insurance. While attending Widener University School of Law, Mr. Kern clerked as a judicial extern for the Hon. J. Curtis Joyner in the United States District Court for the Eastern District of Pennsylvania in addition to serving as Articles Editor for the *Widener Law Review* from 1997-1998. He has considerable experience in all stages of litigation in the state and federal courts throughout New York, New Jersey and Connecticut. Mr. Kern has successfully defended numerous local and national clients through his diverse areas of practice. Recently, Mr. Kern negotiated a favorable settlement after jury selection in a multi-million dollar federal court action where plaintiffs alleged claims for property damage and personal injury, including Kawasaki Syndrome, originating from a petroleum spill. As part of the settlement, all claims for personal injuries were withdrawn and defendants agreed to minimum cleanup costs pursuant to New York State Navigation law. Mr. Kern co-authored the briefs in the *Holdampf* case.