

# Asbestos

COMMENTARY

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## 'Some' Is No Longer Enough in Texas Toxic-Tort Cases

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All too often in toxic-tort cases, the best evidence a plaintiff can provide that he was injured while working on a defendant's property or while using a defendant's product is that he inhaled "some" fumes, fibers or other physical/chemical agent.<sup>1</sup> While this may be sufficient in an acute exposure case involving a single product at a single premises, more often than not, toxic-tort cases involve many exposures to substances or fumes from many products, occurring at many premises over many years. Sometimes the plaintiffs claim that exposures to two or more different products (*i.e.*, the infamous "toxic soup") eventually injured them. In the end, courts and juries were left with vague and ambiguous descriptions of events that occurred decades ago upon which to decide whether a plaintiff adequately proved causation.

The job of causally proving that a plaintiff was injured as a result of exposure to a particular defendant's product or while working on a defendant's premises inevitably requires expert testimony. This results in a battle of the experts, and Texas courts realized that this situation presented unique opportunities for abuse. As a result, courts were forced to assume the role of guardian of the truth and gatekeeper for sound scientific evidence.<sup>2</sup> Over the years, the U.S. and Texas Supreme Courts have given guidance to Texas' trial courts on how to fulfill their roles.<sup>3</sup>

Before these cases were decided, plaintiffs in toxic-tort cases had little difficulty retaining "experts" who were willing to testify that the target substances caused the plaintiffs' medical problems. Such "experts" typically offered sweeping opinions that the substance caused the plaintiff's illness or injury even though there was absolutely no valid scientific support for their conclusion. These decisions, however, changed the legal landscape by providing trial courts with guidance on how to determine when an expert's opinion is well-grounded in

scientific fact as opposed to being conclusory or based on speculation.<sup>4</sup>

Despite these developments, courts have continued to struggle with causation-related questions as scientific evidence evolves. This is particularly true in asbestos litigation. Over the past decade the number of illnesses plaintiffs claim are linked to asbestos has grown. Likewise, there is increasing evidence that not all asbestos fiber types are equally toxic. While asbestos-related science has continued to evolve, plaintiffs' memories about what they worked with and around during the 1950s, 1960s and 1970s has not improved.

So how does a plaintiff prove causation as memories dim and co-workers die or move away? How is exposure to a defendant's product established when records on the type and nature of materials used at a workplace are incomplete or missing? For years, many plaintiffs' counsel have rallied around the "one-molecule" or "one-fiber" theory. Under this theory, plaintiffs argue that any exposure to a toxic substance (including asbestos), however slight, is a causal factor in producing disease because the harmful effects are "indivisible" and the alleged exposures are "cumulative." In the context of asbestos-related claims, they argue that liability could be imposed if a defendant supplied *any* of the asbestos to which a plaintiff was exposed or if the plaintiff was exposed to *any* asbestos at a particular premises.

The Texas Supreme Court unanimously rejected this expansive theory June 8 in *Borg-Warner Corp. v. Flores*.<sup>5</sup> In *Borg-Warner* the court reiterated that causation is an "essential predicate to liability." To separate the speculative from the probable, the court adopted the "substantial factor" test for causation. Under this test, plaintiffs must provide defendant-specific evidence showing the "approximate"

dose to which the plaintiff was exposed. They must also show that the dose was a “substantial factor” in causing the injury. Most importantly, the evidence must be specific on each defendant’s product or premises that allegedly caused the harm.<sup>6</sup>

Hence, evidence that a plaintiff merely had “some” exposure to asbestos is legally insufficient to prove causation, even if the plaintiff is able to identify a specific defendant’s product. Thus, the court flatly rejected the “one-molecule” or “one-fiber” theory. Since there are practically no statistically significant epidemiology studies showing that such minimal exposures cause disease, the court’s decision effectively relegates the argument to the dustbin of toxic torts.

Although the *Borg-Warner* decision noted that epidemiological studies are not absolutely necessary to prove causation if there is direct, scientifically reliable proof of causation,<sup>7</sup> direct evidence of causation is often unavailable due to the significant latency between the alleged exposure and the development of disease. Thus, as a practical matter, epidemiology will almost always be necessary.<sup>8</sup> Moreover, consistent with *Merrell Dow Pharmaceuticals Inc. v. Havner*, the court noted that if a plaintiff wants to rely on epidemiology studies to establish causation, the studies must show a doubling of the risk of disease because the “requirement of more than doubling of the risk strikes a balance between the needs of our legal system and the limits of science.”<sup>9</sup>

The court also adopted the standard of proving causation in toxic tort cases developed in *Lohrmann v. Pittsburgh Corning Corp.*<sup>10</sup> The court agreed that *Lohrmann’s* “frequency, regularity and proximity” test is appropriate, but said the test by itself did not “capture the emphasis our jurisprudence has placed on causation as an essential predicate to liability.” The court held that “proof of mere frequency, regularity and proximity is necessary, but not sufficient,” since “it provides none of the quantitative information necessary to support causation under Texas law.” Thus, in addition to the *Lohrmann* factors, the court instructed trial courts to determine whether the “[Toxic substance] in the defendant’s product was a substantial factor in bringing about the plaintiff’s injuries.”

The *Borg-Warner* case presented a typical toxic-tort fact pattern upon which the Texas Supreme Court embedded a new evidentiary requirement. Plaintiff Auturo Flores alleged that he developed asbestosis while working as an automobile brake mechanic from 1966 until 2001. When asked to describe his exposure history, the best Flores could do was to testify that he handled several brands of brake pads, including those of Borg-Warner, on the

20 brake jobs he completed per week. At his week-long trial, Flores’ experts testified that he developed asbestosis from his work as a mechanic and that his work as a brake mechanic caused his asbestosis. By contrast, Borg-Warner Corp.’s expert testified that Flores did not have asbestosis or “any asbestos disease.” Its expert also opined that the medical literature, including epidemiological studies, did not show any evidence (*i.e.*, articles) that mechanics had an increased risk of cancer or mesothelioma. Despite this conflicting evidence, the jury eventually found for Flores and apportioned 37 percent of the liability against Borg-Warner, the manufacturer of brake pads Flores used. The appeals court affirmed the trial court’s holding that there was legally sufficient evidence of negligence. The Texas Supreme Court granted Borg-Warner’s petition for review.

Quoting the oft-cited phrase “the dose makes the poison,” the court noted that asbestosis is a dose-related disease.<sup>11</sup> As such, there must be evidence of the dose so the jury can evaluate the quantity of respirable asbestos to which a plaintiff might have been exposed and whether the dose was sufficient to cause asbestosis. Analyzing the legal sufficiency of Flores’ claim in *Borg-Warner*, the Supreme Court rejected his argument that he met his burden of proof by providing evidence that Borg-Warner had supplied some of the asbestos that allegedly injured him. The court held that “any” evidence of working around the defendant’s product would not suffice; rather, a plaintiff must prove that the defendant’s product was a substantial factor in causing the alleged harm.<sup>12</sup> The court said there is no question that mechanics could be exposed to respirable asbestos fibers, but in this case there was no evidence in the record as to how much asbestos Flores might have been exposed to or what percentage of asbestos might have originated in Borg-Warner products. The court also noted that the literature Flores relied upon as evidence of causation did “not cite epidemiological studies showing a doubling of the risk in brake mechanics” and therefore “does not provide evidence of causation.” Accordingly, there was insufficient testimony to establish that Borg-Warner brake pads were a substantial factor in causing Flores’ illness, the court said.<sup>13</sup>

In *Borg-Warner* the Texas Supreme Court bolstered *Havner* and re-emphasized that in Texas, causation is an “essential predicate to liability,” one that requires presentation of reliable scientific evidence on each defendant of a dose sufficient to cause the illness alleged. The court also rejected the single-fiber theory and by proxy the single-molecule theory, which says exposure to a single fiber of a toxic substance can cause disease. If this were true, then everyone would be susceptible, the court said, adding that no longer will the concepts of “cumulative dose” or “indivisible injury” be sufficient to sustain causation.

Instead, plaintiffs must demonstrate the causal responsibility of each defendant individually. Exactly what type of proof will suffice to show an “approximate” dose sufficient to cause an asbestos-related disease has not been decided. However, the court did note that even though proof of causation *may* differ depending on the product at issue, a plaintiff still must prove that the particular defendant’s product was a substantial causal factor of the alleged harm.

Shortly after the Texas Supreme Court issued *Borg-Warner*, Texas’ 1st District Court of Appeals weighed in on the scope and breadth of the decision in *Georgia Pacific v. Stephens*, 2007 WL 2137801 (Tex. App., Houston, 1st Dist. July 26, 2007). While *Borg-Warner* raised the proof bar for Texas plaintiffs in toxic-tort cases, it left open some debate of whether the new proof levels governed asbestosis claims only. As to whether *Borg-Warner’s* holdings are limited to the causation evidence of the particular disease at issue in that case (asbestosis) or should be interpreted broadly, the 1st District said *Borg-Warner* applies broadly, even to cases involving mesothelioma (a rare, deadly form of cancer linked to asbestos exposure). The Court of Appeals ruled that the plaintiff’s expert testimony was insufficient to support the jury’s causation finding. It reversed the large award and ruled for the defendant. Interestingly, Texas asbestos multidistrict litigation Judge Mark Davidson likewise reached the same conclusion, unequivocally applying *Borg-Warner* to all asbestos cases.

“As a policy matter, I cannot divine a reason the court would have trial courts apply a different standard of causation in one asbestos-related disease and not another,” he said. See Rulings on Summary Judgment Motion, available at <http://www.justex.net/JustexDocuments/1/Judges%20Orders/Post%20Borg%20Warner%20MFSJ.pdf> (discussing the requisite standard of proof in toxic-tort cases in Texas, post *Borg-Warner*).

One of the myths in toxic-tort cases is that they are “exceptional” controversies that justify special procedures and “shorthand” approaches to management and disposition.<sup>14</sup> As many commentators have chronicled, however, these procedures created vastly more problems than they solved. *Borg Warner’s* allegiance to the scientific rigor required by *Havner* has dispelled a great myth in traditional asbestos litigation, namely that evidence of “cumulative” exposure can support *individual* liability. Thus, each defendant’s liability can now be assessed according to its own contribution, if any, to a plaintiff’s injury.

*Borg Warner’s* reasoning, however, applies far beyond the asbestos arena. If there is no reason to carve out an

“asbestos exception” to the rules of causation, there is surely no reason to create exceptions for any other toxic substances, such as benzene, vinyl chloride or any other potentially harmful substance. In such cases, it is likewise common to sue multiple manufacturers and premises owners allegedly responsible for causal exposures.

In the absence of evidence specifically showing that a harmful dose was sustained to each defendant’s product or on each defendant’s premises, there is no basis for imposing liability on anyone. Requiring less rigor substitutes a *policy* judgment that favors plaintiffs’ recovery over a *legal* mandate that protects defendants from judgments based on speculative evidence. As a result, the entire judicial process is transformed into an exercise more closely related to economics, as opposed to jurisprudence. In a society that prides itself on individual rights and liberties, *Borg-Warner* is a powerful reminder that our system is dedicated to providing *justice* to all parties — not merely economic results.

## Notes

<sup>1</sup> See *Rutherford v. Owens-Illinois Inc.*, 941 P.2d 1203, 1218 (Cal. 1997) (acknowledging that lengthy latency periods “mean that memories are often dim and records missing or incomplete regarding the use and distribution of specific products” and in some cases, many different products containing the same harmful chemical/physical agent were used in the same time periods and workplaces).

<sup>2</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993) (placing special obligation upon a trial judge to ensure that scientific testimony is not only relevant, but reliable); *E.I. du Pont de Nemours & Co. Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (holding that the Texas Rules of Evidence require a proponent of scientific expert testimony to demonstrate that such evidence is relevant and reliable before it can be admitted).

<sup>3</sup> See e.g., *Daubert*, 509 U.S. 579 (1993) (setting forth the standard for admission of expert scientific evidence testimony under Federal Rules of Evidence); *Robinson*, 923 S.W.2d 549 (Tex. 1995) (setting forth the factors a trial court may consider in making a threshold determination of admissibility); *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706 (Tex. 1997) (describing the types and adequacy of proof needed to establish general and specific causation in toxic-tort cases through direct evidence or statistically significant epidemiology evidence that shows more than a doubling of the risk).

<sup>4</sup> A comprehensive review and discussion of the history and efficacy of the *Havner* standard in Texas can be found in an *amicus curiae* brief we recently filed on behalf of the American Chemistry Council. See *Amicus Curiae Brief of the American Chemistry Council in Support of Relators’ Brief on the Merits*, 2007 WL 1034104, *In re Garlock Sealing Technologies LLC*, No. 06-0881, 2007 WL 1306333, orig. proceeding [*mand. pending*] available at [http://www.gardere.com/Content/hubbard/tbl\\_s31Publications/FileUpload137/1648/Amicus\\_Epidemiology.pdf](http://www.gardere.com/Content/hubbard/tbl_s31Publications/FileUpload137/1648/Amicus_Epidemiology.pdf) (last visited July 23, 2007).

<sup>5</sup> \_\_\_ S.W.3d \_\_\_, 2007 WL 1650574, 50 Tex. Sup. Ct. J. 851 (June 8, 2007)

<sup>6</sup> *Id.* at \*12. (adopting the substantial factor test described in *Rutherford*, 941 P.2d at 1219).

<sup>7</sup> *Id.* at \*11; see also *Havner*, 953 S.W.2d at 716 (“In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of a particular injury.”)

<sup>8</sup> *Havner*, 953 S.W.2d at 716 (“Such a theory concedes that science cannot tell us what caused a particular plaintiff’s injury”).

<sup>9</sup> *Borg-Warner*, \_\_ S.W.3d at \*11.

<sup>10</sup> 782 F.2d 1156 (4th Cir. 1986).

<sup>11</sup> *Borg-Warner*, \_\_ S.W.3d at \*8-\*9 (noting that dose “refers to the amount of chemical that enters the body”).

<sup>12</sup> *Id.* at \*10-\*11.

<sup>13</sup> *Id.*

<sup>14</sup> See, generally, Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945 (2003).

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