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N.Y. Court Requires Parties to Address Degree of Exposure in Toxic Tort Cases

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Under an eagerly awaited ruling by New York's highest court, plaintiffs and defendants in cases alleging injuries caused by chemical exposure will need to carefully assess the amount of the chemical to which the plaintiff was exposed.

In *Parker v. Mobil Oil Corp.*, 2006 WL 2945397 (N.Y., Oct. 17, 2006), the Court of Appeals refused to require a plaintiff to prove the exact quantity of his exposure, but made clear that there must be a concrete scientific foundation for proof that the chemical caused his injuries. The court held that expert opinions that are "subjective" or "conclusory," or that are not based on "a scientific expression" of the plaintiff's exposure, are not sufficient to prove that the chemical caused the claimed injuries.

In *Parker*, the plaintiff alleged that during his employment as a gas station attendant over 17 years, he was

exposed to benzene through inhalation of gasoline fumes and dermal contact with gasoline and that he contracted acute myelogenous leukemia (AML) as a result.

Defendants moved to preclude plaintiff's expert testimony that his leukemia was caused by benzene and for summary judgment dismissing plaintiff's claims. In support of the motions, defendants submitted affidavits by experts who acknowledged that workers exposed to large amounts of benzene exhibit an increased risk of AML, but opined that the level of exposure to benzene resulting from work at a service station is below the amount necessary to cause leukemia. The defense experts relied on a federal study of exposure of gas station employees to benzene as well as studies of petroleum workers and European service station workers exposed to gasoline with higher concentrations of benzene that did not show an increased risk of AML.

Plaintiff submitted reports from two experts in opposition to defendants' motions. One cited studies that linked benzene exposure to leukemia, including a study of rubber-plant workers. He opined that the plaintiff's exposure to gasoline was "extensive" and that he had



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“abundant opportunity” for exposure to benzene. *Parker v. Mobil Oil Corp.*, 16 A.D.3d 648 (App. Div. 2d Dep’t 2005). Plaintiff’s other expert relied on a study purporting to show a link between leukemia and benzene exposure in refinery workers. He claimed that the plaintiff had “far more” exposure to benzene than refinery workers, but did not specify how.

The trial court denied the defendants’ motions, but the Appellate Division reversed. It ruled that the plaintiff had failed to quantify his exposure to benzene, and therefore, it was “impossible to determine whether [the plaintiff] exceeded the threshold” level of exposure proven to cause AML. The Appellate Division held that plaintiff’s expert opinions were “purely speculative” because there was no basis to conclude that the plaintiff’s exposure to benzene “was substantial enough” to cause AML.

The Court of Appeals affirmed this ruling, because plaintiff’s experts’ opinions lacked the necessary foundation. The court explained that it is necessary to assess the “specific reliability” of the procedures used by experts to arrive at their opinions and to determine whether the procedures establish a foundation for admission of their opinions at trial. This requirement was not met, because plaintiff’s experts did not quantify his exposure to benzene.

The court was careful to reject any notion that the plaintiff in a toxic tort case must prove the exact amount of his chemical exposure. The court noted that it may be difficult, or impossible, to quantify a plaintiff’s exposure “by pinpointing an exact numerical value.” Because such a requirement could pose an “insurmountable standard” that would effectively prevent recovery, the court stated that “it is not always necessary for a plaintiff to quantify exposure levels precisely” Instead, the court advocated a “balance” between the establishment of unduly harsh standards for the admission of expert testimony and the exclusion of speculative evidence of causation. Nevertheless, it made clear that a plaintiff must prove not only that he was exposed to a chemical and that the

chemical is capable of causing the alleged injury but “that [the] plaintiff was exposed to sufficient levels of the [chemical] to cause the illness.”

Thus, it was not enough for the plaintiff in *Parker* to show that there is a relationship between benzene exposure and AML. Rather, the court said, the key inquiry “is the relationship, if any, between exposure to gasoline containing benzene as a component and AML” (emphasis in original).

Although plaintiff’s experts cited studies showing an increased risk of leukemia in refinery workers, there was no foundation for their claim that the plaintiff’s exposure to benzene was greater than the refinery workers’ exposure. Their assertions fell short, the court ruled, because they did not specify how the plaintiff’s exposure to benzene exceeded the amount of benzene to which the refinery workers were exposed; their assertions were “conclusory” and “subjective” and lacked “scientific expression.”

Finally, the court rejected plaintiff’s argument that the amount of benzene in gasoline exceeds current federal workplace standards applicable to refineries, because “standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation.”

The ruling in *Parker* highlights the need for parties in toxic tort cases to be prepared to address the amount of the plaintiff’s chemical exposure. Precise quantification of the exposure will not be necessary, but plaintiffs will need to present evidence in scientific terms showing that the amount of the exposure exceeds the amount shown to cause the illness in question. Conclusory or subjective assertions will not suffice. Defendants, on the other hand, should be prepared to contest plaintiffs’ attempts to quantify the exposure.