Legal Backgrounder

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TEXAS HIGH COURT HEIGHTENS SCIENTIFIC EVIDENCE STANDARDS

by

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Plaintiffs in toxic tort cases typically seek to recover damages for illnesses they allege are caused by the defendants' release of a substance into the environment. Proving that the substance caused injury to the plaintiff inevitably requires expert testimony. Because of their nature, toxic tort cases present unique opportunities for abuse and reinforce the court's role as guardian of the truth and gatekeeper for sound scientific evidence. Texas courts have served this guardian/gatekeeper role well in recent years, faithfully adhering to the stringent standards set forth by the Texas Supreme Court in *Merrell Dow Pharms. v. Havner*.[1]

On June 8, 2007, the Texas Supreme Court issued its unanimous opinion in *Borg-Warner Corp.*, now known as *Burns Int'l Servs. Corp. v. Flores*,[2] bolstering *Havner* and heightening the causation standard for negligence and strict liability causes of action by requiring "substantial-factor causation." The Court reiterated that, in Texas, causation is an "essential predicate to liability." Hence, evidence of "some" exposure to asbestos was legally insufficient to prove causation. Indeed, it is even insufficient

[1] 953 S.W.2d 706, 716 (Tex. 1997). 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 for 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/Attorneys/Attorney_Bio/?id=646 .

[2] __ S.W.3d __, 2007 WL 1650574, 50 Tex. Sup. Ct. J. 851 (June 8, 2007)

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evidence that a person is exposed to "some" respirable fibers from a product containing asbestos made by a particular defendant. Instead, the *Borg Warner* Court required evidence of the "approximate" dose to which a plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease – and, most importantly, the evidence must be specific regarding each defendant's product or premises that allegedly caused the harm.

The case presented familiar facts to Texas jurisprudence. Mr. Flores alleged that he suffered from asbestosis caused by working with brakes for more than three decades. Mr. Flores was an automotive mechanic from 1966 until 2001, and he testified that he handled several brands of brake pads, including those of Borg-Warner, on the twenty brake jobs he completed a week. At the week-long trial, Flores presented two experts, Dr. Bukowski, a pulmonologist, and Dr. Castleman, Ph.D., a consultant in toxic substance control. Dr. Bukowski supplied the diagnosis of Flores' asbestosis based on his work as a mechanic, despite Mr. Flores's 50-pack-a-year smoking history. Dr. Castleman's testimony reviewed the literature relating to asbestos as a hazard to brake mechanics and provided commentary on friable asbestos fibers in the ambient air. By contrast, Borg-Warner presented Dr. Hale, a pulmonologist, who testified that Flores did not have asbestosis at all and his x-rays did not show "any asbestos disease." She further reviewed the literature, including epidemiological studies and testified that she had not seen any articles indicating that mechanics suffered an increased risk of cancer or mesothelioma. Despite this conflicting evidence about even the mere existence of a disease constituting a legal injury at all, at the close of arguments, a jury found for Mr. Flores and apportioned 37% of the liability against Borg-Warner, the manufacturer of brake pads used by Flores. The court of appeals affirmed the judgment holding that there was legally sufficient evidence of negligence. The Texas Supreme Court granted Borg-Warner's petition for review.

The Texas Supreme Court was urged to adopt the *Lohrmann v. Pittsburgh Corning Corp.*[3] standard of proving causation in asbestos cases: the "frequency, regularity, and proximity" test. The Court agreed with *Lohrmann* that a "frequency, regularity and proximity" test is appropriate, but stated that this test by itself does not "capture the emphasis our jurisprudence has placed on causation as an essential predicate to liability." The Court held that "[p]roof 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 Supreme Court found that courts in Texas must also determine whether the "asbestos in the defendant's product was a substantial factor in bringing about the plaintiff's injuries."

Quoting the oft-cited phrase, "the dose makes the poison," the Court noted that asbestosis is a dose-related disease. As such, there must be evidence of 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. In analyzing the legal sufficiency of Plaintiff's claim in *Borg-Warner,* the Supreme Court stated that the appellate court erred in holding that the plaintiff had met its burden of proof "if there is sufficient evidence that the defendant supplied *any* of the asbestos to which the plaintiff was exposed." Instead, the Court rejected this rationale and held that "any" evidence of working around defendant's product will not suffice; rather a plaintiff must prove that the defendant's product was a substantial factor in causing the alleged harm. The Court stated that 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

[3]782 F.2d 1156 (4th Cir. 1986).

how much asbestos Mr. Flores might have been exposed to or what percentage of asbestos might have originated in Borg-Warner products. Accordingly, there was insufficient testimony to establish that Borg-Warner brake pads were a substantial factor in causing Flores's illness.

Interestingly, the Court also cited *Havner* and noted that, although they are not necessary to prove causation, there were no epidemiological studies showing that there was a doubling of the risk of asbestosis as to brake mechanics. Consistent with *Havner*, the Court noted that the "requirement of more than doubling of the risk strikes a balance between the needs of our legal system and the limits of science." In fact, in most toxic tort cases, direct evidence of causation is often not available due to the significant latency between the alleged exposure and the development of disease. Thus, epidemiology is required as a practical matter since direct evidence of causation is scientifically questionable in mass torts. ("Such a theory concedes that science cannot tell us what caused a particular plaintiff's injury"). In *Borg-Warner*, the Court concluded that the literature relied upon as evidence of causation did "not cite epidemiological studies showing a doubling of the risk in brake mechanics" and therefore it "does not provide evidence of causation."

The Court acknowledged the difficulties for providing proof in asbestos cases but nonetheless held that "Defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease" is required. In essence, the Court rejected the single-fiber theory which teaches that exposure to a single fiber can cause asbestosis; if this were true, then everyone would be susceptible. The Court did note that the proof of causation *may* differ depending on the product, but a plaintiff must prove that the particular defendant's product was a substantial factor in causing the alleged harm.

Ultimately, the Court reversed the judgment and rendered judgment in favor of Borg-Warner holding that without evidence of the contents of the dust, including the amount of asbestos to which Mr. Flores was exposed, the evidence of causation was legally insufficient. In so doing, the Court bolstered *Havner* and re-emphasized that in Texas, causation is an "essential predicate to liability" – one which requires presentation of reliable scientific evidence *regarding each defendant* of a dose sufficient to cause the illness alleged. 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 remains to be decided.

Shortly after the Texas Supreme Court's issued *Borg-Warner*, the First Court of Appeals in Houston weighed in on the opinion's scope and breadth in *Georgia Pacific v. Stephens*.[4] While *Borg-Warner* raised the proof bar for plaintiffs in Texas toxic tort cases, it left open some debate of whether the new proof levels governed only claims of asbestosis. On the issue of whether the holdings in *Borg-Warner* are limited to the causation evidence of the particular disease at issue in that case (asbestosis) or should be interpreted broadly, the First Court of Appeals said that *Borg-Warner* does apply broadly, including to cases of mesothelioma (a very rare and deadly form of cancer related to asbestos). The Court of Appeals ruled that the plaintiff's expert testimony was legally insufficient to support the jury's causation finding. As a result, it reversed a large award and rendered a decision for the defendant. Interestingly, the Texas asbestos MDL Judge Mark Davidson likewise reached the same conclusion, unequivocally applying *Borg-Warner* to all asbestos cases, stating "[a]s a policy matter, I cannot divine a reason the Court would have trial courts apply

[4] ___ S.W.3d ___, 2007 WL 2137801 (Tex. App.—Hous. [1st Dist.] July 26, 2007).

a different standard of causation in one asbestos-related disease and not another."[5]

One of the great myths of asbestos litigation is that they are "exceptional" controversies which justify special procedures and "shorthand" approaches to management and disposition.[6] As many commentators have chronicled, however, these procedures created vastly more problems than they solved, especially when caseloads became so massive that their "solutions" were motivated more by economic considerations, rather than justice.[7] *Borg Warner's* allegiance to the scientific rigor required by the *Havner* decision has dispelled a great myth of traditional asbestos litigation, namely, that evidence of "cumulative" exposure can support *individual* liability. As a result, each defendant's liability can now be assessed according to its own contribution, if any, to causing a plaintiff's injury.

But *Borg Warner*'s reasoning 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 who allegedly were responsible for causal exposures. In the absence of evidence that specifically shows 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 upon 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.

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[5] *See* Rulings on Summary Judgment Motion, *available at* http://www.justex.net/JustexDocuments/1/Judges%20Orders/Post%20Borg%20Warner%20 MFSJ.pdf (discussing the requisite standard of proof in toxic tort cases in Texas, post *Borg-Warner*).

[6] *See generally,* Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945 (2003).

[7] *See, e.g., id.*; Victor E. Schwartz, et al., *Congress Should Act to Resolve the National Asbestos Crisis: The Basis in Law and Public Policy for Meaningful Reform*, 33 S. TEX. L. REV. 839 (2003).

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