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Howard V. A.W. Chesterton: The Pennsylvania Supreme Court Reminds Us That They Meant What They Said On Toxic Tort Causation

by Eric K. Falk



"I meant what I said, and I said what I meant. An elephant's faithful, one hundred percent!"

Dr. Suess (spoken by Horton the Elephant), *Horton Hatches the Egg*

In May 2012, the Pennsylvania Supreme Court issued what should have been a momentous decision in *Betz v Pneumo-Abex, et al.* 44 A.3d 27 (Pa. 2012). In *Betz*, the Court rejected the often used "every exposure above background counts" theory of causation. Toxic tort practitioners are well aware that the Plaintiffs' bar has attempted to wield this theory as a sword in asbestos and other toxic tort cases. The *Betz* decision finally dealt a blow to this theory with the Supreme Court declaring that the "every exposure above background" theory is not a generally accepted methodology and thus was not in compliance with Pennsylvania's law of substantial factor causation. Now, over one year later, despite this clear and unequivocal ruling, the Supreme Court decided that it was necessary to remind the bar that they "meant what they said."

I. The Landscape After *Betz*

So much of toxic tort history arises out of the early (and in some cases, present day) handling of asbestos cases. And so it is with the "every exposure above background" theory. The early epidemiology studies by Dr. Selikoff of the asbestos insulator cohort laid to rest any doubts about the effects of asbestos exposures in that cohort. But that was and remains the point. It laid to rest doubts about *that cohort, experiencing exposures to those products, at those doses, in those work environments*. Manufacturers of those products therefore became the target defendants during the first 20 to 25 years of asbestos litigation. In reality, those companies had no scientific defenses, and just about the only defense available was whether a particular plaintiff was in fact exposed to their products (along with smoking as the substantial factor cause in lung cancer and certain non-malignancy cases).

However, issues pertaining to the role of the differing fiber types and dose levels, particularly lower doses, were not answered by the early studies. Furthermore, litigation at the time was focused on the high dose, amphibole containing insulation defendants, so there was no need to address persons, and/or cohorts that had lower dose levels, particularly as those levels approached the upper limits of background, ambient levels. Time would be needed for scientists from various fields (i.e. epidemiology, industrial hygiene, toxicology, etc.) to study those issues and begin the publication and subsequent scientific debate on those issues.

Meanwhile, because there was no need for the high dose defendants to address these scientific issues in the litigation, the litigation *as to them*, proceeded on the linear risk assessment model (each step up in dose is marked by a step up in risk), a risk assessment model that indeed fit *those products, those exposure and dose levels, and the epidemiology studies of those products and dose/exposure levels*.

Therein lies the rub. The "every exposure above background" theory is an historical artifact from a risk assessment model that does not fit the science that has emerged in the last 20-30 years studying the role of different fiber types, different fiber sizes, different dose levels, particularly the lower dose levels. The *Betz* decision was the culmination of

judicial reaction to litigation that became more focused on lower dose products *and* persons exposed at lower dose levels.

As with any author developing a plot line, the Pennsylvania Supreme Court previewed its developing thought process on “every exposure above background” in cases leading up to *Betz*. In *Gregg v V-J Auto Parts*, 943 A.2d 216 (Pa. 2007), the Court affirmed summary judgment dismissal of a brake supplier where the plaintiff had only been exposed to that company’s product on three (3) occasions. The plaintiff sought to hold in that defendant by pointing to his expert’s affidavit that “every exposure above background” was a substantial factor. The Court stated:

We recognize that it is common for plaintiffs to submit expert affidavits attesting that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease. However, ...*such generalized opinions do not suffice to create a jury question in a case where exposure to the defendant's product is de minimus*, particularly in the absence of evidence excluding other possible sources of exposure (or in the face of evidence of substantial exposure from other sources). ...

We appreciate the difficulties facing plaintiffs in this and similar settings, where they have unquestionably suffered harm on account of a disease having a long latency period and must bear a burden of proving specific causation under prevailing Pennsylvania law which may be insurmountable. Other jurisdictions have considered alternate theories of liability to alleviate the burden [citations omitted]. Such theories are not at issue in this case, however, and *we do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial factor causation in every "direct evidence" case.*

Id. [emphasis added].

In 2010, while considering the issue of what constituted impairment for the purpose of establishing a compensable claim, the Court decided *Summers v Certaineed Corp.*, 997 A.2d 1152 (Pa. 2010). What is remarkable about this opinion is that while the Court was divided on what constituted impairment, the Court was unanimous in criticizing “every exposure above background”. The majority, concurring, and dissenting opinions each emphasized the point that the “every exposure” theory was disfavored.

So, no one should have been surprised that a unanimous Court in 2012 issued the *Betz* opinion. The Court, after a very lengthy recitation of the history of the case, affirmed the trial court’s ruling on *Frye* grounds that “every exposure above background” was not a generally accepted methodology.

The Court noted that as a matter of science, the “every exposure above background” theory was “in irreconcilable conflict with itself.” *Betz*, 44 A.3d at 56. This was because the disease in question, mesothelioma, was a dose-response disease and the parties agreed background levels could not cause the disease:

Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that the disease is dose responsive. [citation omitted]. Indeed, it is worth repeating the following excerpt from the [Plaintiff’s expert’s] own testimony making the point:

Now, individual exposures differ in the potency of the fiber to which an individual is exposed, to the concentration or intensity of the fibers to which one is exposed, and to the duration of the exposure to that particular material. So those are the three factors that need to be considered in trying to estimate the relative effects of different exposures. But all exposures have some effect.

The any exposure opinion, as applied to substantial factor causation, does not consider the three factors of which [Plaintiff’s expert] himself explains “needs to be considered in trying to estimate the relative effects of different exposures.”

Betz, 44 A.3d at 56.

For these reasons, the Court concluded that the theory was “fundamentally inconsistent with *both science and the governing standard for legal causation*. *Betz*, 44 A.3d at 57 (emphasis added).

II. The Reaction to *Betz*

So with the Supreme Court having twice hinted at how it viewed the "every exposure" theory, then expressly rejecting the theory in *Betz*, one would think that life was forever changed with asbestos litigation in Pennsylvania, right? Unfortunately, that was not the case.

The vast majority of trial courts have been skeptical in applying *Betz*, even when the reports and affidavits of the expert witnesses in question expressly adopted, quoted, and stated that "each and every exposure above background" was a substantial factor in causing the disease. For example, one court has essentially adopted a standard that (1) plaintiff needs only to have a medical expert opine that the disease in question was caused by asbestos; (2) plaintiff need only prove that the exposure to the defendant's product was frequent, regular, and proximate. See e.g. *Blankenbicker, et al. v. Allen Refractories*, No. 2007-0777 (Court of Common Pleas of Cambria County, Pa., 2012). Other courts have held that summary judgment is not the appropriate vehicle to challenge the "every exposure above background theory", despite the Supreme Court's express reference in *Gregg* and *Betz* to the idea that the "every exposure above background" theory did not suffice to create a question of fact, even when the expert report expressly utilized such statements. See e.g. *Brosie v A. W. Chesterton, et al*, No. 2008-6921 (Court of Common Pleas of Washington County, Pa. 2012). Other trial courts, in numerous instances, albeit without opinions, have simply noted that the *Betz* situation involved a very unique set of circumstances—namely that the *Betz* case had been identified as a "test case" for a *Frye* challenge; the parties had stipulated to the relevant facts; and thus the expert in question had "assumed" the facts, instead of "actually" analyzing case specific facts such as deposition testimony, plaintiff and co-worker affidavits, interrogatory answers, etc. Thus, for those particular Courts, the crucial part of *Betz* was that, essentially, there were "no case specific facts."

The treatment of *Betz* by the Pennsylvania Superior Court, has also been uneven. The Superior Court has dealt with *Betz* in three unpublished, memorandum opinions, *Wolfinger v. 20th Century Glove*, No. 1393 EDA 2011 (Opinion issued February 14, 2013); *Nelson v. Airco Welders Supply*, No. 865 EDA 2011 (Memorandum Opinion issued September 5, 2013); and *Campbell v. A.W. Chesterton*, No. 2005 EDA 2012 (Memorandum Opinion issued September 5, 2013). Ironically, the *Campbell* and *Nelson* opinions were issued on the same day, by separate panels, and arrived at opposite conclusions.

The *Wolfinger* Court upheld the use by the expert witness of the "every exposure above background theory." At various points, the Superior Court noted that the expert in *Betz* did not have the "full history of exposure"[1], and that the expert in *Wolfinger* did not use the "every exposure above background" theory *alone*. "Other evidence" was also utilized by the expert, namely the case specific facts of exposure, interrogatory answers, etc.

The *Campbell* and *Nelson* opinions were issued the same day by separate panels, involved two separate trials which, in turn, involved the same plaintiff expert, the same testimony, and the same products/product types to which exposure was claimed. The expert in question testified that "any asbestos fibers" that the plaintiff inhaled "would be involved in the causation". The *Campbell* Court upheld the admissibility of the expert's testimony because *Betz* involved a situation where the expert rendered his opinion "without being prepared to discuss the circumstances of any individual's exposure." In contrast, the expert in question in *Campbell* based his opinion on the "particular facts" of the particular exposure. The *Nelson* Court, in a much more detailed opinion came to the exact opposite conclusion, and held that the same testimony from the same expert, in a case involving similar exposures, was inadmissible in light of *Betz*.

III. Howard v. A.W. Chesterton

The reaction by lower courts to *Betz* is the background for the *Howard* decision. What makes *Howard* extraordinary are the circumstances behind the opinion.

The trial court in *Howard* awarded summary judgment in favor of the defendant, finding that the decedent had failed to establish that "he breathed asbestos containing dust from the products manufactured or distributed by Appellants," *Howard*, 78 A.3d at 607, and also finding that the expert affidavit submitted by the plaintiff "represented an artificial record which attempts to dehor [plaintiff's] observation denying the existence of asbestos dust." Plaintiff appealed to the Superior Court, and the Superior Court reversed. Defendant, in turn, appealed to the Pennsylvania Supreme Court. That's where things got interesting.

While the case was pending before the Supreme Court, plaintiffs filed a brief wherein they *conceded* "that the factual record fails to demonstrate regular and frequent enough exposures during which respirable asbestos fibers were

shed by [appellants] asbestos containing products to defeat summary judgment." *Id.* Plaintiffs also stated in their brief that they:

Recognize that this Court will not allow Plaintiffs to prove that a Plaintiff's exposure to a particular asbestos containing product is substantially causative of disease by the use of affidavits in which the expert's methodology is founded upon a belief that every single fiber of asbestos is causative. In *Gregg*, this Court articulated that the use of a particular product had to be substantial enough when measured against the totality of exposures, that the particular product usage was substantial enough to be a factual cause of the disease.The test for adequacy is the comparison of the particular product exposure(s) to the totality of the person's asbestos exposures.

Id.

Given that concession, the Supreme Court simply could have entered an Order that reversed the Superior Court, and reinstated the judgment of the trial court. Except they did not. The Supreme Court felt compelled to issue an opinion. In that opinion, the Supreme Court stated that it wanted to "reaffirm the following":

- The theory that each and every exposure, no matter how small, is substantially causative of disease may not be relied upon as a basis to establish substantial-factor causation for diseases that are dose-responsive. See *Betz v. PneumoAbex, LLC*, 615 Pa. 504, 44 A.3d 27, 55-58 (Pa. 2012).
- Relatedly, in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions. See *Id.*
- Bare proof of some *de minimus* exposure to a defendant's product is insufficient to establish substantial-factor causation for dose-responsive diseases. See *Gregg v. V-J Auto Parts, Inc.*, 596 Pa. 274, 943 A.2d 216, 225-26 (Pa. 2007).
- Relative to the testimony of an expert witness addressing substantial-factor causation in a dose-responsive disease case, some reasoned, individualized assessment of a plaintiff's or decedent's exposure history is necessary. See *Betz*, 44 A.3d at 55-58.
- Summary Judgment is an available vehicle to address cases in which only bare *de minimus* exposure can be demonstrated and where the basis for the experts testimony concerning substantial-factor causation is the any-exposure theory. See *Betz*, 44 A.3d at

Howard, 78 A.3d at 609.

The Supreme Court majority then took on the Concurring Opinion as to whether or not its ruling was *dicta*. The majority took issue with the idea that this opinion could be *dicta*, noting that the opinion represented "nothing more than a modest elaboration upon [the] very reasoning supplied by the [plaintiffs] themselves in support of their controlling concession." *Id.* The Supreme Court also noted that because of the "intensely protracted nature of this and other asbestos litigation, as well as our own limited resources, we have acceded to Appellant's reasonable request to provide whatever limited guidance we were able to supply under the circumstances." *Id.* The Supreme Court lastly noted that the principles enumerated in the opinion were "now unremarkable propositions", and that it was highlighting this fact because, "we believe, [this] may be of some benefit to Pennsylvania litigants, in terms of crystalizing the essential burdens of proof." *Id.*

IV. The Impact of Howard Moving Forward

It is impossible to look at the *Howard* decision in any light other than the Pennsylvania

Supreme Court stating to litigants in the Commonwealth, "We said what we meant in *Gregg*, *Summers* and *Betz*, and we meant what we said." The extraordinary fact in *Howard* is that the plaintiff conceded that its victory before the Superior Court was in error. The Supreme Court simply could have issued an order that did exactly that.

Instead, the Pennsylvania Supreme Court took the opportunity to reiterate the propositions that it had outlined in its previous decisions, notably *Gregg* and *Betz*. Why would the Supreme Court have done that, if it was not aware and/or otherwise following the application of *Betz* in the lower courts? While some may question that the Supreme Court's opinion is *dicta*, because of the concession by the plaintiff, the fact remains that the Commonwealth's highest court felt compelled to *reiterate* the propositions of law that it had set out in its earlier opinions. One does not ignore a jurisdiction's highest court blithely.

So now that begs the question of, "where to from here?" Notably, two weeks after the Supreme Court issued its opinion in *Howard*, it denied a Petition for Allowance of Appeal in *Wolfinger*, one of the Superior Court decisions which sought to limit *Betz*. Does that mean that the Supreme Court agrees with the *Wolfinger* panel? Or does it mean that the Supreme Court wants to see how lower courts treat the issues in light of *Howard*, particularly given the Supreme Court's own reference in *Howard* to its "limited resources"? In *Nelson*, the Superior Court decision where *Betz* was applied and expert testimony rejected (the same testimony and same expert which was allowed in *Campbell*), the Superior Court has granted re-argument *en banc*, while also withdrawing its opinion. The Superior Court order doing so was issued November 18, 2013, six weeks after the decision in *Howard*. Clearly, the Superior Court *en banc* will be revisiting these issues in *Nelson*, and it will certainly be interesting to see how much affect, if any, the *Howard* decision has in the Superior Court's future handling of *Nelson*.

All of these questions remain unanswered. The Supreme Court has very clearly handed the ball back to lower courts. One can safely assume that the Supreme Court will be following these issues with some interest, in light of its opinion in *Howard*.

All of which takes us back full circle. At this point, we can clearly state that the Supreme Court has gone to the extraordinary length of letting the world know, "We meant what we said and we said what we meant!"

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[1] This writer would disagree with that. *Betz* involved a career lifelong automobile mechanic at a Pittsburgh area Cadillac dealership. There were no other exposures, and the parties did stipulate to that work history, with the exposures that would have come out of that work history.