Appellate Reports

Kesner v. Superior Court – *The most comprehensive discussion of the analysis of legal duty in negligence law, specifically as regards asbestos but applicable to all negligence claims where duty is an issue*

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Kesner v. Superior Court

(2016) __ Cal.4th __, 2016 WL 7010174 (Cal. Supreme)

Who needs to know about this case? Lawyers litigating take-home asbestos claims; all lawyers litigating negligence claims where "duty" is in dispute.

Why it's important: The California Supreme Court holds that employers *and* landowners owed a duty to the members of their employees' households (and *only* to members of their household) to prevent exposure to asbestos fibers that the employees carried home on their person or clothing, disapproving contrary appellate authority. The opinion sets forth what appears to be the most comprehensive discussion of the analysis of legal duty in California negligence law.

Synopsis: Secondary exposure to asbestos, sometimes called domestic or take-home exposure, occurs when a worker who is directly exposed to a toxin carries it home on his or her person or clothing, and a household member is in turn exposed through physical proximity or contact with that worker or the worker's clothing. The plaintiffs in these consolidated cases were Johnny Kesner, Jr., who claimed that his uncle brought home asbestos fibers from his job, and that this exposure caused him to contract mesothelioma; and the heirs of Lynn Haver, who had died of mesothelioma. Her heirs claimed that she was exposed to asbestos fibers brought home on the clothes of her former husband. The defendants included the employers of Kesner's uncle and Haver's former husband.

Kesner's lawsuit was dismissed on nonsuit, based on *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 34, which held that "a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business." Haver's suit was dismissed on demurrer, also based on *Campbell*.

The core issue in the case was duty – here, whether the defendants had a legal duty to prevent the injuries alleged by the plaintiffs as a result of the take-home exposure to asbestos fibers. "Duty is a question of law for the court, to be reviewed de novo on appeal." (*Cabral v. Ralphs Grocery Co*. (2011) 51 Cal.4th 764, 770.) "California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others. (Civ. Code, § 1714, subd. (a).)" (*Id*. at p. 768.) Civil Code section 1714, subdivision (a) provides in relevant part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."

Courts invoke the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act. The conclusion that a defendant did not have a duty constitutes a determination by the court that public policy concerns outweigh, for a particular category of cases, the broad principle enacted by the Legislature that one's failure to exercise ordinary care incurs liability for all the harms that result. In the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where clearly supported by public policy.

In determining whether policy considerations weigh in favor of such an exception, the courts weigh the factors described in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112. Because a judicial decision on the issue of duty entails line-drawing based on policy considerations, the *Rowland* factors are evaluated at a relatively broad level of factual generality. In applying the *Rowland* factors, the court asks not whether they support an exception to the general duty of reasonable care on the facts of the particular case before the court, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.

Here, because the general duty to take ordinary care in the conduct of one's activities applies to the use of asbestos on an owner's premises or in an employer's manufacturing processes, the issue is also properly stated as whether a categorical exception to that general rule should be made exempting property owners and employers from potential liability to individuals who were exposed to asbestos by way of employees carrying it on their

clothes or person. In answering that question, the Court's task is to determine whether household exposure is *categorically* unforeseeable and, if not, whether allowing the possibility of liability would result in such significant social burdens that the law should not recognize such claims.

The *Rowland* factors fall into two categories. Three factors – foreseeability, certainty, and the connection between plaintiff and defendant – address the foreseeability of the relevant injury, while the other four – moral blame, preventing future harm, burden, and availability of insurance – take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief.

The Court unanimously concluded that, the exposure of household members to take-home asbestos is generally foreseeable and that the defendants have not shown that categorically barring take-home claims is justified by clear considerations of policy. Accordingly, the defendants owed the plaintiffs a duty of ordinary care to prevent take-home exposure.

The Court's analysis of these factors was as follows:

***Foreseeability*:** At the time George Kesner and Mike Haver worked for defendants, broadly applicable regulations identified the potential health risks of asbestos traveling outside a worksite. In June 1972, the federal Occupational Safety and Health Administration (OSHA) published its first permanent regulations for employers using asbestos. Under the regulations, employers were required to provide their asbestos-exposed employees with special clothing and changing rooms. Employers were required to inform launderers of asbestos-exposed clothing of the asbestos contamination and to transport asbestos-exposed clothing "in sealed impermeable bags, or other closed, impermeable containers" that were appropriately labeled as containing asbestos. Moreover, employers were required to provide "two separate lockers or containers for each employee, so separated or isolated as to prevent contamination of the employee's street clothes from his work clothes."

In addition, well before OSHA issued the 1972 standard, the federal government and industrial hygienists recommended that employers take measures to prevent employees who worked with toxins from contaminating their families by changing and showering before leaving the workplace. In 1952, the United States Department of Labor's standards for federal contractors provided that "[w]orkers who handle or are exposed to harmful materials in such a manner that contact of work clothes with street clothes will communicate to the latter the harmful substances ... should be provided with facilities which will prevent this contact."

Accordingly, a reasonably thoughtful person making industrial use of asbestos during the time periods at issue in this case (i.e., the mid-1970's) would take into account the possibility that asbestos fibers could become attached to an employee's clothing or person, travel to that employee's home, and thereby reach other persons who lived in the home.

The Court rejected the argument that the connection between defendants' conduct and plaintiffs' illness was "indirect and attenuated" because it "relies on the intervening acts of a defendant's employee to transmit the alleged asbestos risk to the plaintiff." The Court explained that, it is well established that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person. In determining whether one has a duty to prevent injury that is the result of third-party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct. The relevant intervening conduct here – that workers returned home at the end of the day and, without adequate precautions, would bring asbestos dust home – is entirely foreseeable. An intervening third-party's actions that are themselves derivative of defendants' allegedly negligent conduct do not diminish the closeness of the connection between defendant's conduct and plaintiff 's injury for purposes of determining the existence of a duty of care.

But foreseeability alone is not sufficient to create an independent tort duty. The existence of a duty depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability. A duty of care will not be held to exist even as to foreseeable injuries where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability. In making this evaluation, courts weigh the need for prevention of future harm, moral blame, the availability of insurance, and the burden that a finding of duty would impose on the defendants and on society.

***Need to prevent future harm*:** The defendants argued that the future risk of the particular injury at issue –mesothelioma resulting from exposure to airborne asbestos fibers – has largely been eliminated through extensive state and federal regulation and reduced asbestos usage. Hence, they argued, imposing a duty to prevent secondary exposure is unlikely to alter the behavior of current asbestos-using businesses, and there is accordingly little prospective benefit to finding a duty here.

The Court rejected this view. "But whether or how the imposition of liability would affect the conduct of current asbestos users, our duty analysis looks to the time when the duty was assertedly owed. Just as we look to the availability of scientific studies to assess the foreseeability of injury due to take-home asbestos exposure at the time Lynne and Johnny

were exposed, the relevant question for this factor is whether imposing tort liability in the 1970's would have prevented future harm from that point." The defendants pointed to no countervailing state policy promoting the use of asbestos to outweigh the general presumption in favor of incentivizing reasonable preventative measures.

***Moral blame*:** This factor can be difficult to assess in the absence of a factual record. But the Court previously assigned moral blame, relied in part on that blame in finding a duty, in instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue. Similar considerations apply here, as commercial users of asbestos benefitted financially from their use of asbestos and had greater information and control over the hazard than employees' households. Negligence in their use of asbestos is morally blameworthy, and this factor weighs in favor of finding a duty.

***Availability of insurance*:** The defendants noted that insurance for asbestos-related injuries is no longer widely available because the insurance industry has revised its standard commercial general liability policies to exclude asbestos. But the relevant insurance policies are those that were available to defendants at the time of exposure, even if the availability of such policies declined along with the dramatic drop in the use of asbestos.

Defendants also argued that the scope of potential liability for take-home exposure would exceed policy limits, and that even if defendants could limit the size of judgments against them by defeating plaintiffs' claims of causation or injury, the burdens of participating in discovery and defending a case up to and through a jury trial would overwhelm insurers and defendants alike. The Court framed the argument this way: "At its core, this argument regarding the availability and cost of insurance merges with the main policy consideration urged by Abex and BNSF: Allowing tort liability for take-home asbestos exposure would dramatically increase the volume of asbestos litigation, undermine its integrity, and create enormous costs for the courts and community."

In evaluating these concerns, the Court began by observing that the relevant burden in the analysis of duty is not the cost to the defendants of compensating individuals for past negligence. To the extent defendants argue that the costs of paying compensation for injuries that a jury finds they have actually caused would be so great that we should find no duty to prevent those injuries, the answer is that shielding tortfeasors from the full magnitude of their liability for past wrongs is not a proper consideration in determining the existence of a duty. "Rather, our duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care."

Neither the defendants nor the courts that have rejected a duty for take-home exposure have suggested that preventing take-home exposure to asbestos was unreasonably expensive, or that the costs would have impeded defendants' ability to carry out an activity with significant social utility. In general, preventing injuries to workers' household members due to asbestos exposure does not impose a greater burden than preventing exposure and injury to the workers themselves. Defendants do not claim that precautions to prevent transmission via employees to off-site individuals – such as changing rooms, showers, separate lockers, and on-site laundry – would unreasonably interfere with business operations.

Defendants further argue that a finding of duty here will result in increased insurance costs and tort damages, and ultimately impose a burden on consumers and the community. But the tort system contemplates that the cost of an injury, instead of amounting to a "needless" and "overwhelming misfortune to the person injured," will instead "be insured by the defendant and distributed among the public as a cost of doing business."

BNSF argued that because the market for asbestos products has contracted significantly in the decades between Johnny's and Lynne's exposure and the current suits, the costs of these suits will be borne by entities other than the companies that directly benefitted from the past use of asbestos. The Court retorted that, "this is a concern that applies to *all* asbestos injuries. It does not provide a basis for discriminating between those plaintiffs who experienced on-site exposure to asbestos and those plaintiffs who experienced take-home exposures."

The Court noted that, "Defendants' most forceful contention is that a finding of duty in these cases would open the door to an "enormous pool of potential plaintiffs." BNSF argues there is no logical way of distinguishing between Lynne and anyone else who may have been exposed to asbestos carried by their on-site employees, such as "innumerable relatives, friends, acquaintances, service providers, as well as babysitters, neighbors, carpool partners, fellow commuters on public transportation, and laundry workers." According to defendants, such an unlimited duty imposes great costs and uncertainty, and invites voluminous and frequently meritless claims that will overwhelm the courts.

But recognizing a duty with respect to one set of potential plaintiffs does not imply that *any* plaintiff may make a similar claim. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured. Although defendants raise legitimate concerns regarding the unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus, these concerns do not clearly justify a categorical rule against liability for foreseeable take-home exposure. Instead,

the concerns point to the need for a limitation on the scope of the duty here.

To mitigate that duty, the Court held that, "an employer's or property owner's duty to prevent take-home exposure extends only to members of a worker's household, i.e., persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time." In making this rule, the Court rejected the defendants' suggestion that the duty be limited solely to "immediate family members." But extending the duty to household members, not just immediate family members, more closely tracks the rationale for the existence of the duty. Being a household member refers not only to the relationships among members of a family, but also to the bonds which may be found among unrelated persons adopting nontraditional and quasi-familial living arrangements. As used in other legal contexts, the term "household" refers to persons who share a physical presence under a common roof.

***Premises liability*:** Defendants argued that even if employers have a duty to prevent employees from exposing members of their household to asbestos by carrying fibers home on their clothing, property owners do not have a similar obligation with respect to workers on their premises. They argue that to hold that property owners owe a duty of ordinary care to persons who have never set foot on the premises "would take the 'premises' out of premises liability and unsettle the tort law that applies to all property owners in this state." The Court disagreed.

The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury. The duty arising from possession and control of property is adherence to the same standard of care that applies in negligence cases. In determining whether a premises owner owes a duty to persons on its property, the Court applies the *Rowland* factors.

The Court has never held that the physical or spatial boundaries of a property define the scope of a landowner's liability. The Courts of Appeal have repeatedly concluded that a landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur offsite if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite.

The defendants argued that these cases are distinguishable on the ground that the relevant off-site injuries were due in part to the plaintiff's proximity to the defendant's property, a fact that implicitly establishes a self-limiting principle for finding such liability. But liability for harm caused by substances that escape an owner's property is well established in California law. The Court has held that landowners have a duty to prevent hazardous natural conditions arising on their property from escaping and causing injury to adjacent property. The plaintiff's claim fits this framework. "The Havers' claim of negligence focuses on an allegedly hazardous condition created and maintained on BNSF's property and BNSF's alleged failure to contain that hazard as a reasonable property owner would have done in the mid-1970s. This claim is readily attributable to a specific condition, natural or artificial, on BNSF's property."


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