Toxic Torts in Massachusetts: 2018

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In 2018 three toxic tort cases in Massachusetts made news for the novel application of "old" facts to traditional theories of tort liability. Indeed, in two of these cases, plaintiffs seek application of Massachusetts tort law in ways that arguably invade the Legislative province.

On October 9, 2018, a Suffolk County Superior Court jury returned a verdict of over $40 million against tobacco defendant R.J. Reynolds in Summerlin[1]. The Summerlin case is as notable for its eye-popping compensatory and punitive verdict, which included a $30 million dollar award of punitive damages, as it is for the combination of two traditionally distinct areas of liability. Summerlin, a deceased plaintiff who alleged his lung cancer was caused by the synergistic effects of cigarette smoking and exposure to asbestos, combined claims against both tobacco companies and a manufacturer of asbestos-containing products. While each of the allegedly offending products are capable of causing disease, when combined they create a cocktail of synergistic liability, for which plaintiff apparently presented a powerful argument.

Two Massachusetts cases raised questions implicating the domain of the Legislature: Rafferty (a pharmaceutical product liability case involving a generic drug defense in a failure to warn claim), and Oliver (a certified question from the United States District Court of Massachusetts involving asbestos products and a bare metal defense).[2] Both Rafferty and Oliver raise the question of whether or not court-made extensions of traditional tort liability will usurp the power of the Legislature to define the limits of liability. Massachusetts defense attorneys should familiarize themselves with these three key cases, and should be prepared to advise their clients that defending litigation in Massachusetts is anything but "business as usual."

Summerlin:

In Summerlin, plaintiff's counsel combined asbestos and tobacco defendants in a single case for the first time in the history of Massachusetts Asbestos Litigation, which date to 1978. Plaintiffs' counsel combined two causation factors (asbestos and tobacco) and alleged a single "synergistic" effect between them as the proximate cause of plaintiff's disease. When filed, the case had forty-six asbestos defendants and four tobacco defendants; by the time of trial, there remained one asbestos defendant and two tobacco defendants. The jury in Summerlin did not

return a verdict against the sole asbestos defendant, despite plaintiff's "synergy" argument. The jury returned a verdict against only one tobacco defendant.

Judge Heidi Brieger in the Suffolk County Superior Court presided over the Summerlin trial for over three weeks in September of 2018. Michael Shepard, of Shepard Law, Jerome Block and Robert Ellis of Levy Konigsberg represented Mr. Summerlin's estate. Bill Geraghty of Shook, Hardy and Bacon represented Defendant Philip Morris. Mark Belasic and Katie Kline of Jones Day represented Defendant R.J. Reynolds. David Governo and Vincent DePaulo of Smith Duggan represented Hampden Auto Sales, Inc., a brake man
ufacturer.

Summerlin alleged that cigarettes manufactured by R.J. Reynolds and Phillip Morris, together with allegedly asbestos-containing brake parts manufactured and distributed by Hamden Auto Sales, caused Mr. Summerlin's lung cancer. Specifically, Plaintiff's counsel alleged the "synergistic" effect of exposure to tobacco and asbestos caused Mr. Summerlin's lung cancer, leading to his death. Prior to the Summerlin case, lung cancer plaintiffs in the Massachusetts asbestos litigation have not named both tobacco defendants and manufacturers of products allegedly containing asbestos in any case alleging "synergistic" exposure.

Plaintiffs' counsel contended that the tar and nicotine contained in cigarettes attach to asbestos fibers, which together penetrate the lung tissue and cause disease. Plaintiffs' counsel further asserted that the risks associated with tobacco and asbestos are exacerbated when combined, and thus create an increased risk of asbestos-related disease. Defendants Phillip Morris and R.J. Reynolds defended by alleging that smoking was a personal choice of the plaintiff, responding to the claim of addiction to smoking. Defendant Hamden Auto argued that any asbestos found within its brakes was not a substantial contributing cause of Mr. Summerlin's disease. Traditional tort law allows for more than one proximate cause of injury - here, defendants responded to the idea of synergy by asserting that the plaintiff's argument lacked a scientific basis.

The jury heard closing arguments on Friday, October 5, 2018, and after four days of deliberation, returned a verdict of $42.6 million dollars against R.J. Reynolds-the only defendant found liable. Defendants Hampden and Philip Morris were able to successfully argue against plaintiff's "synergistic" theory, and escaped liability.

Rafferty:

In Rafferty, plaintiff's counsel asked the Massachusetts Supreme Judicial Court ("SJC") to establish a previously-unrecognized duty of name-brand drug manufacturers to warn of potential harms to users of generic versions of their products. Plaintiff Brian Rafferty alleged he suffered negative side-effects after he ingested a generic version of a drug manufactured by Merck Pharmaceuticals, Inc. ("Merck") pharmaceutical. Although Mr. Rafferty did not ingest a Merck-manufactured product, he claimed that Merck owed him a duty to warn about possible side-effects caused by the generic equivalent to its product. Rafferty's counsel asked the SJC to recognize a new duty-i.e., Merck's purported duty to warn a consumer of the potential harms of a generic product not manufactured by Merck.

The Massachusetts Defense Lawyers' Association ("MassDLA"), among others, submitted an amicus brief to the SJC, in which the MassDLA argued that it is not the role of the courts, but rather, that of the Legislature, to create new duties. Specifically, the MassDLA argued that Merck did not, as a matter of law, have any duty to warn Mr. Rafferty of potential side-effects from the generic drug it did not manufacture. The SJC agreed, and held that name-brand manufacturers have no obligation to warn about generic products, unless the name-brand drug manufacturer acts with "reckless disregard of an unreasonable risk of death or grave bodily injury."

Oliver:

Oliver was filed in the United States District Court of Massachusetts. Judge Rya Zobel certified a question to the Massachusetts Supreme Judicial Court, and the matter was fully briefed in the SJC. Arguments are scheduled for Tuesday, December 4th. Plaintiff argues that the Massachusetts Statute of Repose, Mass. Gen. Laws. Ch. 260, § 2B, should contain an unwritten "latent disease" exception, which would preclude the application of the statute of repose against defendants whose products contained asbestos. This is a novel approach, particularly as the judges in the Massachusetts Asbestos Litigation have consistently upheld the application of the Massachusetts statute of repose to cases involving the latent injury characteristic of asbestos-related diseases.

The MDLA, as well as Massachusetts Asbestos Litigation Defendants' Liaison Counsel, Lawrence G. Cetrulo, and Cetrulo LLP, authored amicus briefs. In its amicus brief, Defendants' Liaison Counsel argued that the Court should not recognize any exception to the statute of repose not expressly included in the statute by the Legislature. Like the MassDLA's amicus brief in Rafferty, Defendants' Liaison Counsel argued that it is the role of the Legislature, not of the Courts, to create new law.

Conclusion:

As 2019 approaches, it is clear that the Massachusetts plaintiffs' bar is pursuing an approach that is shoe-horning new fact patterns into traditional theories of tort liability. The Legislature may be in a position to respond to statutorily invasive decisions from the Supreme Judicial Court; similarly, defendants' counsel should be aware of these efforts to change and broaden the scope of litigation in the Commonwealth, and should be prepared to advise their clients regarding the same.

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[1] Summerlin v. Philip Morris USA, No. 1584CV01718 (Mass. Super. Ct. 2018).
[2] Brian Rafferty v. Merck & Co., No. SJC-12347 (Mass. 2018) and Wayne Oliver v. Metropolitan Life Ins. Co., No. SJC-12544 (Mass. 2017).