



**MCLE ARTICLE AND SELF-ASSESSMENT TEST**

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by Michael B. Gurien

# Taking it **Home**

Recent court cases have aligned California with other states in reaffirming factors found in *Rowland v. Christian* determinative of asbestos tort liability

**FOR** several decades, asbestos-related personal injury claims have been an active area of litigation nationwide, including in California. To this day, courts across the country continue to decide issues of importance in this area of the law, often with ramifications beyond asbestos litigation. Recent appellate decisions in California, including by the California Supreme Court, have addressed a variety of issues in the context of asbestos injury claims: liability for injuries from secondary or “take-home” exposure to asbestos, the scope and operation of the sophisticated intermediary doctrine as a product liability defense, and proof of causation.

In recent years, courts in California and elsewhere have addressed “whether employers or landowners owe a duty of care to prevent secondary exposure to asbestos.”<sup>1</sup> This type of “exposure, 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.”<sup>2</sup>

The first published California appellate decision to address this issue in the asbestos context was *Campbell v. Ford Motor Company*<sup>3</sup> in 2012. In *Campbell*, plaintiff Eileen Honer alleged that she developed “mesothelioma as a result of her exposure to asbestos from laundering her father’s and brother’s asbestos-covered clothing during the time they worked with asbestos as independent contractors hired by Ford [Motor Company] to install asbestos insulation at its Metuchen, New Jersey plant.”<sup>4</sup> On appeal following a jury verdict and judgment in Honer’s favor, Ford argued that “it owed Honer no duty as a matter of law because a ‘property owner is not responsible for injuries caused by the acts or omissions of an independent contrac-

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tor unless the property owner controlled the work that allegedly caused the injury, or failed to warn of a known pre-existing concealed hazardous condition on the property.”<sup>5</sup> Honer countered that “[a] premises owner who knows or reasonably should know of a condition on the premises, that the owner should foresee exposes persons to an unreasonable risk, and who has no basis for believing that others will discover the condition or realize the risk involved, is under a duty to exercise ordinary care—either to make the condition reasonably safe for others’ use or to give a warning adequate to enable

the defendant, a manufacturer of asbestos-containing brake linings. Relying on *Campbell*, the trial court ruled that the defendant did not owe a duty of care to Kesner and granted a nonsuit for the defendant. The First District Court of Appeal reversed the judgment, holding that there was a duty of care.

In reaching its decision, the court of appeal acknowledged “that the prospect of ‘indefinite liability’ places a limitation on those to whom the duty of exercising reasonable care may extend.”<sup>12</sup> The court also “recognize[d] the difficulty in articulating the limits of that duty and the different con-

clusion that an employer responsible for exposing its employees to a toxin such as asbestos, or for failing to warn or take reasonable protective measures, bears no responsibility to *any* nonemployee foreseeably affected by exposure to the toxin.”<sup>18</sup>

Shortly after *Kesner*, the Second District Court of Appeal issued a divided opinion on the take-home duty issue in *Haver v. BNSF Railway Company*.<sup>19</sup> In *Haver*, Lynne Haver died from mesothelioma allegedly caused by exposure to asbestos carried home by her husband from his employment with the defendant railroad. Relying on *Campbell*, the defendant demurred to the plaintiffs’ complaint, arguing that it did not have a duty to protect Haver from exposure to asbestos used in its business operations. The trial court agreed and sustained the demurrer without leave to amend.

Finding no basis to distinguish or disagree with *Campbell*, the majority held that the defendant did not owe Haver a duty of care and affirmed the judgment. Similar to *Campbell*, the majority expressed concern about “the consequences of extending employers’ liability too far.”<sup>20</sup> The majority also distinguished *Kesner* on the ground that *Kesner* involved a claim for products liability, not premises liability, which was the claim in *Haver*. The dissent disagreed, finding that the defendant had a duty to protect Haver from asbestos exposures resulting from its negligent use of asbestos in its business. The dissent found that the defendant’s “duty arises from Civil Code section 1714, subsection (a), which makes everyone responsible for injuries caused by his or her negligence,” that the *Rowland* factors did not support a categorical exception to this fundamental duty rule for take-home asbestos injury claims, and that *Kesner* was correctly decided and indistinguishable.<sup>21</sup>

To resolve the discrepancy between *Kesner* and *Haver*, the California Supreme Court granted review in both cases and consolidated them for argument and decision. Concluding that the *Rowland* factors did not justify a categorical no-duty rule, but instead called for a limitation on the class of persons to whom a duty of care is owed, the court said:

We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to

## A defendant asserting the sophisticated intermediary doctrine must do more than simply show “that the user is an employee or servant of the sophisticated intermediary.”

others to avoid the harm.”<sup>6</sup>

Beginning its duty analysis with the general duty of care in Civil Code Section 1714(a), that ““[e]veryone is responsible...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,””<sup>7</sup> the court of appeal considered whether there was justification for a categorical exception to this fundamental duty rule for take-home asbestos injury cases under the factors identified in *Rowland v. Christian*.<sup>8</sup> Finding that an exception was warranted, the court 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.”<sup>9</sup> In reaching its decision, the court found that two of the *Rowland* factors—the burden to the defendant and the consequences to the community—“weigh[ed] heavily against” a duty of care because “it is hard to draw the line between those non-employee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed,” and because “[t]he gist of the matter is that imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope.”<sup>10</sup>

Two years after *Campbell*, two court of appeal decisions reached divergent conclusions on the take-home duty issue. In *Kesner v. Superior Court*,<sup>11</sup> Johnny Kesner developed and died from mesothelioma allegedly caused by exposure to asbestos carried home on his uncle’s clothing from his employment with

conclusions that courts throughout the country have reached when considering claims for secondary exposure to toxics, particularly asbestos, emanating from the workplace.”<sup>13</sup> These considerations, however, did not justify a categorical no-duty rule under the *Rowland* factors. While “the duty of care undoubtedly does not extend to every person who comes into contact with an employer’s workers,” the court held that “the duty runs at least to members of an employee’s household who are likely to be affected by toxic materials brought home on the worker’s clothing.”<sup>14</sup> Although Kesner “was not a member of his uncle’s household in the normal sense, he was a frequent visitor, spending several nights a week in the home.”<sup>15</sup> Balancing these circumstances under the *Rowland* analysis, the court held that “the likelihood of causing harm to a person with such recurring and non-incidental contact with the employer’s employee...[wa]s sufficient to bring Kesner within the scope of those to whom the employer...owes the duty to take reasonable measures to avoid causing harm.”<sup>16</sup>

The court of appeal in *Kesner* distinguished *Campbell* because *Campbell* involved a claim for premises liability “based on Ford’s passive involvement as owner of the plant in which an independent contractor was installing asbestos insulation.”<sup>17</sup> In contrast, the claim in *Kesner* arose out of the defendant’s own use of asbestos in its manufacturing operations, a distinguishing circumstance that resulted in a different balance under the *Rowland* factors. That balance, the court concluded, did “not lead to the

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1. Under California law, there is a general duty of care under which a person is responsible for injuries caused by his or her negligence.

True.

False.

2. The factors identified in *Rowland v. Christian*, 69 Cal. 2d 108, 112-13 (1968), are used to determine whether there has been a breach of the duty of care in a negligence action.

True.

False.

3. Secondary or "take-home" exposure to asbestos, in the context of asbestos personal injury litigation, generally refers to a person's exposure to asbestos from physical proximity to or contact with another person who was exposed to asbestos in the course of that person's work activities.

True.

False.

4. Under California law, employers and landowners owe a duty of care to prevent take-home exposure to asbestos.

True.

False.

5. Under California law, the duty of care to prevent take-home exposure to asbestos extends to all persons injured from such exposure.

True.

False.

6. Whether a person is a member of a worker's household, for purposes of the duty of care to prevent take-home exposure to asbestos, depends solely on whether the person has a traditional family or biological relationship with the worker.

True.

False.

7. California is the only state that recognizes a duty of care to prevent take-home exposure to asbestos.

True.

False.

8. The sophisticated intermediary doctrine addresses the circumstances under which a product supplier can discharge its duty to warn end users about the hazards of its product by conveying warnings to an intermediary purchaser or by selling to a sophisticated purchaser.

True.

False.

9. The sophisticated intermediary doctrine is an affirmative defense that the product supplier has the burden of proving.

True.

False.

10. To discharge its duty to warn under the sophisticated intermediary doctrine, a product supplier must always provide an adequate warning to the intermediary purchaser about the product's particular hazards.

True.

False.

11. To discharge its duty to warn under the sophisticated intermediary doctrine, a product supplier is only required to show that it provided an adequate warning to the

intermediary purchaser or sold to a sophisticated purchaser.

True.

False.

12. In a claim for injury by an employee of an intermediary purchaser, a product supplier can establish a defense under the sophisticated intermediary doctrine based solely on evidence that the purchaser-employer was sophisticated.

True.

False.

13. Either direct or indirect (circumstantial) evidence can be used to prove the reliance element of the sophisticated intermediary doctrine.

True.

False.

14. Under the sophisticated intermediary doctrine, whether a product supplier actually and reasonably relied on an intermediary to convey warnings to end users typically raises questions of fact for the jury to determine.

True.

False.

15. To prove causation in an asbestos-related injury case, the plaintiff must first prove some exposure to asbestos from the defendant's product and must then prove that the exposure was, in reasonable medical probability, a substantial factor in bringing about the injury.

True.

False.

16. To establish causation in an asbestos-related cancer case, the plaintiff is required to prove that asbestos fibers from the defendant's product were the fibers, or among the fibers, that actually started the process of malignant cellular growth.

True.

False.

17. Causation in an asbestos-related cancer case can be proven by competent expert testimony that every exposure to asbestos contributes to the risk of developing the disease.

True.

False.

18. To prove causation in an asbestos-related injury case, the plaintiff must provide an estimate of the dose of asbestos received from the defendant's product.

True.

False.

19. In determining causation in an asbestos-related injury case, the jury is required to consider the length, frequency, proximity, and intensity of exposure from the defendant's product, the particular properties of the product, and any other potential causes of the injury.

True.

False.

20. Only the testimony of a medical doctor can establish causation in an asbestos-related injury case.

True.

False.



## TAKING IT HOME

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4.  True  False

5.  True  False

6.  True  False

7.  True  False

8.  True  False

9.  True  False

10.  True  False

11.  True  False

12.  True  False

13.  True  False

14.  True  False

15.  True  False

16.  True  False

17.  True  False

18.  True  False

19.  True  False

20.  True  False

premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs.<sup>22</sup>

Repeating arguments that the courts in *Campbell* and *Haver* found persuasive, the defendants claimed "that a finding of duty in these cases would open the door to an 'enormous pool of potential plaintiffs,'" resulting in "great costs and uncertainty" and "voluminous and frequently meritless claims that will overwhelm the courts."<sup>23</sup> While acknowledging that these arguments "raise legitimate concerns regarding the unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus," the California Supreme Court held that they did not "clearly justify a categorical rule against liability for foreseeable take-home exposure."<sup>24</sup> Rather, these "concerns point to the need for a limitation on the scope of the duty here," which, as noted, the court limited "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."<sup>25</sup> The court explained that "[t]his limitation comports with our duty analysis under *Rouland*," because it "strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims."<sup>26</sup>

As to the question of who is, and is not, a member of a worker's household, the supreme court offered guidance by explaining that "[b]eing 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."<sup>27</sup> The court also observed that, "in other legal contexts, the term 'household' refers to persons who share "'physical presence under a common roof'"<sup>28</sup> or to "relationships aimed at common subsistence."<sup>29</sup> Additionally, the court recognized that "[t]he cause of asbestos-related diseases is the inhalation of asbestos fibers; [and that] the general foreseeability of harm turns on the regularity and intimacy of physical proximity, not the legal or biological relationship, between the asbestos worker and a potential plaintiff."<sup>30</sup>

Accordingly, based on the supreme court's decision in *Kesner*, California now "stand[s] in harmony" on the take-home duty issue with other states "that have adopted a general principle of tort liability analogous to section 1714 or that allow recovery, as...in *Rouland*, for foreseeable categories of injury regardless of the relationship of the parties."<sup>31</sup> Litigation on this subject will undoubtedly continue, including as to foreseeability and household member status,<sup>32</sup> but the existence of a duty of care in this context is now settled law in California.

### Sophisticated Intermediary Doctrine

A recurring question in asbestos injury litigation over the past several years has been whether a product manufacturer or supplier can satisfy its duty to warn ultimate users of the hazards of its product by conveying warnings to an intermediary purchaser or by selling to a sophisticated intermediary. This issue was recently addressed by the California Supreme Court in *Webb v. Special Electric Company, Inc.*<sup>33</sup>

In *Webb*, plaintiff William Webb developed mesothelioma from exposure to asbestos-cement pipe manufactured by Johns-Manville Corporation using raw asbestos supplied by defendant Special Electric Company, Inc. Webb and his wife filed suit against Special Electric and others alleging, among other theories, that Special Electric was liable for failing to warn Webb of the dangers of the asbestos it supplied. During trial, Special Electric moved for nonsuit and a directed verdict on plaintiffs' failure-to-warn claims on the ground "that it had no duty to warn a sophisticated purchaser like Johns-Manville about the health risks of asbestos."<sup>34</sup> Construing the motions as a posttrial motion for judgment notwithstanding the verdict, the trial court granted the motions and entered judgment for Special Electric. The court of appeal reversed the judgment, holding that "the entry of JNOV was improper because substantial evidence demonstrated that Special Electric breached a duty to warn Johns-Manville and foreseeable downstream users like Webb about the risks of asbestos exposure."<sup>35</sup>

In the supreme court, the court phrased the issue as follows: "[W]hen a company supplies a hazardous raw material for use in making a finished product, what is the scope of the supplier's duty to warn ultimate users of the finished product about risks related to the raw material?"<sup>36</sup> As the court explained, the answer to that question "implicates a defense known as the sophisticated intermediary doctrine,"<sup>37</sup> which the court examined, adopted, and applied to affirm the judgment of the court of appeal.

The supreme court began its analysis of the sophisticated intermediary doctrine by

first looking at several other product liability defenses. Next, it reviewed the doctrine's origins in the *Restatement (Second) of Torts*,<sup>38</sup> its prior application in California case law, and its most recent iteration in the *Restatement (Third) of Torts*.<sup>39</sup> The court then formally adopted the doctrine as an affirmative defense and articulated a two-part test for its application:

We now formally adopt the sophisticated intermediary doctrine as it has been expressed in the Restatement provisions just discussed. Under this rule, a supplier may discharge its duty to warn end users about known or knowable risks in the use of its product if it: (1) provides adequate warnings to the product's immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger, and (2) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product. Because the sophisticated intermediary doctrine is an affirmative defense, the supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably relied on the intermediary to transmit warnings.<sup>40</sup>

To satisfy the doctrine's first prong, the supreme court held that "generally the supplier must have provided adequate warnings to the intermediary about the particular hazard."<sup>41</sup> As a "limited exception," the court recognized that "[i]n some cases the buyer's sophistication can be a substitute for actual warnings, but this...only applies if the buyer was so knowledgeable about the material supplied that it knew or should have known about the particular danger."<sup>42</sup> If "[t]his narrow exception" applies, "the seller is not required to give actual warnings telling the buyer what it already knows."<sup>43</sup> In all other instances, however, the supplier must provide the buyer with adequate warnings of the product's specific dangers.

To satisfy the doctrine's second prong, the supreme court made clear that a product supplier cannot simply show that it warned or sold to a sophisticated intermediary. "To establish a defense under the sophisticated intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users."<sup>44</sup> "Several factors are relevant in deciding whether it is reasonable for a supplier to rely on an intermediary to provide a warning," including "the gravity of the risks posed by

the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.”<sup>45</sup> Whether there was actual and reasonable reliance “will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed.”<sup>46</sup>

In applying the doctrine to the case at issue, the supreme court first noted that Special Electric “arguably forfeited the sophisticated intermediary defense by failing to present it to the jury.”<sup>47</sup> “Assuming the defense was preserved,” the court held that “the record d[id] not establish as a matter of law that Special Electric discharged its duty to warn by reasonably relying on a sophisticated intermediary.”<sup>48</sup> The court observed that the evidence was in dispute as to whether Special Electric provided consistent warnings to Johns-Manville; that while the evidence showed that Johns-Manville had knowledge “of the risks of asbestos *in general*,” it did not establish that Johns-Manville “knew about the particularly acute risks posed by the crocidolite asbestos Special Electric supplied”; and that “the record d[id] not establish as a matter of law that Special Electric actually and reasonably relied on Johns-Manville to warn end users like William Webb about the dangers of asbestos.”<sup>49</sup> As to the reliance requirement, the court explained that although “direct proof of actual reliance may be difficult to obtain when, as in the case of latent disease, the material was supplied to an intermediary long ago[,]...actual reliance is an inference the factfinder should be able to draw from circumstantial evidence about the parties’ dealings.”<sup>50</sup> The trial record, however, was “devoid of evidence supporting such an inference.”<sup>51</sup>

Finally, when the defendant supplies a raw material to the purchaser for use in manufacturing a finished product, as was the case in *Webb*, the supreme court noted that, “[i]n addition to users of finished products incorporating the raw material, employees of the purchaser may also encounter the raw material in their work,” and that “[t]he question there is whether the supplier’s duty to warn extends to its customers’ employees.”<sup>52</sup> Although the *Webb* court did not express any view on the application of the sophisticated intermediary doctrine in that context, it did cite and quote with approval from *Pfeifer v. John Crane Inc.*,<sup>53</sup> another asbestos case that directly addressed the doctrine’s application to a claim by an employee of an intermediary purchaser.

In *Pfeifer*, the court of appeal held that a defendant asserting the sophisticated intermediary doctrine must do more than simply show “that the user is an employee or servant of the sophisticated intermediary.”<sup>54</sup> There

must also be proof that the defendant had reason to believe that the intermediary would act to protect the employee from the hazards of defendant’s product. As the court stated:

Accordingly, to avoid liability, there must be some basis for the supplier to believe that the ultimate user knows, or should know, of the item’s hazards. In view of this requirement, the intermediary’s sophistication is not, as a matter of law, sufficient to avert liability; there must be a sufficient reason for believing that the intermediary’s sophistication is likely to operate to

## “The substantial factor standard [requires] only that the contribution of the individual cause be more than negligible or theoretical.”

protect the user, or that the user is likely to discover the hazards in some other manner. The fact that the user is an employee or servant of the sophisticated intermediary cannot plausibly be regarded as sufficient reason, as a matter of law, to infer that the latter will protect the former. We therefore reject JCI’s contention that an intermediary’s sophistication invariably shields suppliers from liability to the intermediary’s employees or servants.<sup>55</sup>

Under *Webb* and *Pfeifer*, suppliers of asbestos or asbestos-containing products can assert the sophisticated intermediary doctrine as an affirmative defense to product liability failure-to-warn claims, provided they can satisfy its elements. Those elements, however, are fact-intensive and, in most instances, will raise questions of fact for the jury to determine, assuming the defendant has presented sufficient evidence for an instruction on the doctrine.

Almost 20 years ago, in *Rutherford v. Owens-Illinois, Inc.*,<sup>56</sup> the California Supreme Court established the standard for proving causation in asbestos-related injury cases:

In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant’s defective asbestos-containing products, *and* must further establish in reasonable medical probability that a particular exposure or series of exposures was a ‘legal cause’ of his injury, i.e., a *substantial factor* in bringing about the injury.<sup>57</sup>

As to “asbestos-related cancer case[s],”

the court held that the plaintiff is not required to “prove that fibers from the defendant’s product were the ones, or among the ones, that actually began the process of malignant cellular growth,” but may instead “meet the burden of proving that exposure to defendant’s product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff’s or decedent’s risk of developing cancer.”<sup>58</sup> The court explained that “[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be

more than negligible or theoretical,”<sup>59</sup> and it cautioned that “[u]ndue emphasis should not be placed on the term ‘substantial.’”<sup>60</sup>

Since *Rutherford*, numerous appellate cases have addressed the type and quantum of evidence that is sufficient to satisfy the *Rutherford* causation standard, including several decisions in the last few years. In *Izell v. Union Carbide Corporation*,<sup>61</sup> published in 2014, defendant Union Carbide Corporation argued that the testimony of plaintiff’s medical expert—that “[a]ll of the asbestos together contributes to cause mesothelioma”—was insufficient to establish causation under *Rutherford* because it “improperly conflates a threshold showing of exposure with proof of legal causation.”<sup>62</sup> According to Union Carbide, because, under the expert’s testimony, “every exposure contributes to the overall increase in risk,” this means that “proof of exposure automatically equates with proof that the exposure constituted a “substantial factor,”” effectively transforming *Rutherford*’s two-step causation test into a one-step test limited to exposure.<sup>63</sup>

Rejecting Union Carbide’s argument, the court of appeal initially observed that “proof of exposure establishes legal causation only if the jury accepts Dr. Mark’s expert medical testimony that all exposures constitute a substantial factor contributing to the risk of developing mesothelioma.”<sup>64</sup> More importantly, the court held that the expert medical testimony was “not inconsistent with *Rutherford*’s two-step causation test.”<sup>65</sup> As the court explained:

Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the

effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the “every exposure” and “insignificant exposure” camps, and recognizes that the conflict is one for the jury to resolve.<sup>66</sup>

Additionally, the court found that Union Carbide’s argument “ignores the distinction Dr. Mark drew between significant exposures that contributed to Mr. Izell’s risk of contracting the disease and ‘trivial exposures’ that would not have been substantial factors increasing his risk.”<sup>67</sup>

In *Davis v. Honeywell Int’l Inc.*,<sup>68</sup> decided less than two years after *Izell*, the defendant, Honeywell International Inc., argued that the trial court should have excluded expert medical testimony based on the every exposure theory under *Sargon Enterprises, Inc. v. University of Southern California*,<sup>69</sup> because the testimony was “speculative,” “devoid of evidentiary and logical support,” and “contrary to California causation law as set forth in *Rutherford*.”<sup>70</sup> After “review[ing] much of the commentary and scientific literature cited in support of and against the ‘every exposure’ theory,” the court of appeal held that the trial court did not err in allowing the testimony because “the theory is the subject of legitimate scientific debate.”<sup>71</sup> Explaining that “the trial court ‘does not resolve scientific controversies’” in determining the admissibility of expert testimony, the court held that “it is for the jury to resolve the conflict between the every exposure theory and any competing expert opinions.”<sup>72</sup>

### ‘Every Exposure’ Theory

With respect to *Rutherford*, Honeywell argued that “the ‘every exposure’ theory does not satisfy the supreme court’s direction in *Rutherford* that a causation analysis must proceed from an estimate concerning how great a dose was received.”<sup>73</sup> Rejecting this argument, the court held that:

*Rutherford* does not require a “dose level estimation.” Instead, it requires a determination, to a reasonable medical probability, that the plaintiff’s (or decedent’s) exposure to the defendant’s asbestos-containing product was a substantial factor in contributing to the risk of developing mesothelioma. The *Rutherford* court itself acknowledged that a plaintiff may satisfy this requirement through the presentation of expert witness testimony that “each exposure, even a relatively small one, contributed to the occupational ‘dose’ and hence to the risk of cancer.”<sup>74</sup>

Finally, Honeywell argued that the trial court erred in refusing its proposed instruction

on causation “because the instruction set forth ‘the requirement in *Rutherford* that causation be decided by taking into account “the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed.””<sup>75</sup> The court disagreed, explaining that “*Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff’s exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion.”<sup>76</sup> “While Honeywell was free to discuss during its closing argument the factors set forth in its proposed instruction as factors the jury might consider in assessing the credibility of Dr. Strauchen’s opinion testimony, instructing the jury on those factors was not required.”<sup>77</sup>

In *Hernandez v. Amcord, Inc.*,<sup>78</sup> the trial court granted the defendant’s motion for nonsuit, finding that the plaintiff had failed to present evidence establishing substantial factor causation in accordance with *Rutherford*. One of the plaintiff’s medical experts, Dr. Richard Lemen, had a “degree of Ph.D., rather than M.D.,” but according to the trial court, *Rutherford* requires “a doctor of some kind, somebody with an M.D. after his name,” to establish substantial factor causation.<sup>79</sup> The trial court “also expressed concern that Dr. Lemen used the words ‘reasonable scientific certainty’ and did not ‘utter the words “reasonable degree of medical probability.””<sup>80</sup>

Disagreeing with the trial court, the court of appeal held that *Rutherford* does not “mandate[] that a medical doctor must expressly link together the evidence of substantial factor causation.”<sup>81</sup> Nor did *Rutherford* “create a requirement that specific words must be recited by appellant’s expert” or “that the testifying expert in asbestos cases must always be ‘somebody with an M.D. after his name.’”<sup>82</sup> Explaining that *Rutherford*’s “reference to “medical probability” in the [causation] standard “is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence,”” the court held that “medical evidence does not necessarily have to be provided by a medical doctor.”<sup>83</sup>

Accordingly, although established by the California Supreme Court almost 20 years ago, the scope and operation of the *Rutherford* causation standard remains a subject of frequent litigation in California. Because of the decades-long latency ordinarily associated with asbestos-related diseases, asbestos injury litigation is likely to continue for a number

of years, and the questions of causation, take-home asbestos injury liability, and the sophisticated intermediary defense are some of the key issues that courts in California and across the nation will continue to address in this area of the law. ■

<sup>1</sup> *Kesner v. Superior Ct.*, 1 Cal. 5th 1132, 1140 (2016); see *id.* at 1161-65 (discussing non-California cases).

<sup>2</sup> *Id.* at 1140.

<sup>3</sup> *Campbell v. Ford Motor Co.*, 206 Cal. App. 4th 15 (2012), *disapproved in Kesner*, 1 Cal. 5th at 1156. An earlier case, *Oddone v. Superior Ct.*, 179 Cal. App. 4th 813 (2009), *disapproved in Kesner*, 1 Cal. 5th at 1156, also addressed the issue of take-home exposure liability, but not in the asbestos context. The alleged exposures in *Oddone* involved toxic chemicals used in processing motion picture film. *Id.* at 815-16.

<sup>4</sup> *Campbell*, 206 Cal. App. 4th at 19-20.

<sup>5</sup> *Id.* at 29.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 26 (quoting *Cabral v. Ralphs Grocery Co.*, 51 Cal. 4th 764, 771 (2011)).

<sup>8</sup> *Rowland v. Christian* 69 Cal. 2d 108 (1968). In *Rowland*, the California Supreme Court explained that “[a] departure from this fundamental principle [in Civil Code section 1714(a)] involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.” *Id.* at 112-13. The court has instructed that, “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.’” *Cabral v. Ralphs Grocery*, 51 Cal. 4th 764, 771 (2011) (quoting *Rowland*, 69 Cal. 2d at 112).

<sup>9</sup> *Campbell*, 206 Cal. App. 4th at 29-34.

<sup>10</sup> *Id.* at 32-33 (quoting *Oddone v. Superior Ct.*, 179 Cal. App. 4th 813, 822 (2009)).

<sup>11</sup> *Kesner v. Superior Ct.*, 226 Cal. App. 4th 251 (2014), *vacated and remanded to Kesner v. Superior Ct.*, 1 Cal. 5th 1132, 1165 (2016).

<sup>12</sup> *Kesner*, 226 Cal. App. 4th at 254.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; see *id.* at 256-61 (court’s analysis of *Rowland* factors).

<sup>17</sup> *Id.* at 258.

<sup>18</sup> *Id.* at 258-59 (emphasis in original).

<sup>19</sup> *Haver v. BNSF Ry. Co.*, 226 Cal. App. 4th 1104 (2014), *rev’d and remanded sub nom.*, *Kesner v. Superior Ct.*, 1 Cal. 5th 1132, 1165 (2016).

<sup>20</sup> *Haver*, 226 Cal. App. 4th at 1110 (quoting Meghan E. Flinn, *A Continuing War with Asbestos: The Stalemate Among State Courts On Liability for Take-Home Asbestos Exposure*, 71 WASH. & LEE L. REV. 707, 711 (2014)).

<sup>21</sup> *Haver*, 226 Cal. App. 4th at 1112.

<sup>22</sup> *Kesner*, 1 Cal. 5th at 1140; see *id.* at 1145-58 (court’s analysis of *Rowland* factors).

<sup>23</sup> *Id.* at 1153.

<sup>24</sup> *Id.* at 1154.

<sup>25</sup> *Id.* at 1154-55.

<sup>26</sup> *Id.* at 1155. The supreme court disapproved *Campbell* and *Oddone* “to the extent they are inconsistent with this opinion” in *Kesner*. *Id.* at 1156.

<sup>27</sup> *Id.* at 1155 (quoting *People v. Jeffers*, 43 Cal. 3d 984, 992 (1987)).

<sup>28</sup> *Kesner*, 1 Cal. 5th at 1155 (quoting *People v. Wutzke*, 28 Cal. 4th 923, 939 (2002)).

<sup>29</sup> *Kesner*, 1 Cal. 5th at 1155 (citing *Safeco Ins. Co. of Am. v. Parks*, 122 Cal. App. 4th 779, 792 (2004)).

<sup>30</sup> *Kesner*, 1 Cal. 5th at 1155.

<sup>31</sup> *Id.* at 1165.

<sup>32</sup> For example, the supreme court's remand of the *Kesner* case "for further proceedings...includ[ed], if appropriate, a remand to the trial court for the parties to submit additional evidence on whether Johnny Kesner was a member of George Kesner's household for purposes of the duty we recognize here." *Id.* at 1165.

<sup>33</sup> *Webb v. Special Elec. Co., Inc.*, 63 Cal. 4th 167 (2016).

<sup>34</sup> *Id.* at 178.

<sup>35</sup> *Id.* at 179.

<sup>36</sup> *Id.* at 176.

<sup>37</sup> *Id.*

<sup>38</sup> RESTATEMENT (SECOND) OF TORTS, §388, cmt. n.

<sup>39</sup> RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY, §2, cmt. i (1998) [hereinafter RESTATEMENT (THIRD)].

<sup>40</sup> *Webb*, 63 Cal. 4th at 187 (emphasis in original) (footnote omitted); *see also id.* at 176-77.

<sup>41</sup> *Id.* at 188.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* In *Stewart v. Union Carbide Corp.*, 190 Cal. App. 4th 23 (2010), the court stated that the sophisticated intermediary doctrine, "where it applies at all, applies only if a manufacturer provided adequate warnings to the intermediary." *Id.* at 29. The supreme court in *Webb* disapproved that statement in *Stewart*, based on its conclusion that, "[a]lthough in most cases a warning to the intermediary will be necessary, warnings are not required if the intermediary was so sophis-

ticated that it actually knew or reasonably should have known about the potential harm." *Webb*, 63 Cal. 4th at 188.

<sup>44</sup> *Id.* at 189.

<sup>45</sup> *Id.* at 190 (quoting RESTATEMENT (THIRD), *supra* note 39); *see also Webb*, 63 Cal. 4th at 177.

<sup>46</sup> *Webb*, 63 Cal. 4th at 189-90.

<sup>47</sup> *Id.* at 192.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 192-93 (emphasis in original).

<sup>50</sup> *Id.* at 193.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 185 n.9.

<sup>53</sup> *Pfeifer v. John Crane Inc.*, 220 Cal. App. 4th 1270 (2013).

<sup>54</sup> *Id.* at 1296-97.

<sup>55</sup> *Id.* (footnote omitted); *see also id.* at 1280 ("We hold that when a manufacturer provides hazardous goods to a 'sophisticated' intermediary that passes the goods to its employees or servants for their use, the supplier is subject to liability for a failure to warn the employees or servants of the hazards, absent some basis for the manufacturer to believe the ultimate users know or should know of the hazards."); *Webb*, 63 Cal. 4th at 189 (quoting *Pfeifer*, 220 Cal. App. 4th at 1296-97).

<sup>56</sup> *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953 (1997).

<sup>57</sup> *Id.* at 982 (emphases in original) (footnote omitted).

<sup>58</sup> *Id.*; *see also id.* at 957-58.

<sup>59</sup> *Id.* at 978; *see also Bockrath v. Aldrich Chem. Co.*, 21 Cal. 4th 71, 79 (1999) ("a very minor force that does cause harm is a substantial factor," citing *Rutherford*).

<sup>60</sup> *Rutherford*, 16 Cal. 4th at 969; *see Jones v. John Crane, Inc.*, 132 Cal. App. 4th 990, 999-1000 (2005)

("We heed the admonition in *Rutherford* to be wary of the misapplication of the substantial factor test") (footnote omitted).

<sup>61</sup> *Izell v. Union Carbide Corp.*, 231 Cal. App. 4th 962 (2014), *rev. denied* Feb. 18, 2015, S223511.

<sup>62</sup> *Id.* at 976.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 976-77.

<sup>65</sup> *Id.* at 977.

<sup>66</sup> *Id.* (citing *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 984-85 (1997)).

<sup>67</sup> *Izell*, 231 Cal. App. 4th at 977.

<sup>68</sup> *Davis v. Honeywell Int'l Inc.*, 245 Cal. App. 4th 477 (2016), *rev. denied* May 25, 2016, S233753.

<sup>69</sup> *Sargon Enters. Inc. v. University of S. Cal.*, 55 Cal. 4th 747 (2012).

<sup>70</sup> *Davis*, 245 Cal. App. 4th at 480.

<sup>71</sup> *Id.*; *see id.* at 486-94 (court's analysis of issue).

<sup>72</sup> *Id.* at 480 (quoting *Sargon*, 55 Cal. 4th at 772).

<sup>73</sup> *Davis*, 245 Cal. App. 4th at 492.

<sup>74</sup> *Id.* at 492-493 (citations omitted).

<sup>75</sup> *Id.* at 495.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 497.

<sup>78</sup> *Hernandez v. Amcord, Inc.*, 215 Cal. App. 4th 659 (2013), *rev. denied* July 31, 2013, S211028.

<sup>79</sup> *Id.* at 668.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 675.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; *see also Paulus v. Crane Co.*, 224 Cal. App. 4th 1357, 1364 (2014) ("Although proof must be made to a reasonable medical probability, a medical doctor need not expressly link together the evidence of substantial factor causation. Nor is there a requirement that 'specific words must be recited by [plaintiffs] expert.'") (citation omitted).

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