

5-15-2007

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Recommended Citation

Steven D. Wasserman, Michael L. Fox, Michael C. Scanlon, Sunny C. Shapiro, and Anne Cherry Barnett *Asbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 4 (2007)

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Asbestos Litigation in California: Can it Change for the Better?

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I. INTRODUCTION

Asbestos litigation in California continues to grind along at a slow and expensive pace. In the jurisdictions where most of the asbestos litigation is concentrated—the Superior Courts of San Francisco, Alameda, Los Angeles, and Orange counties—the courts have tried various approaches to managing their asbestos dockets by coordinating and consolidating thousands of cases, holding meetings with counsel to develop and implement customized case management procedures, and investing hundreds of hours in case management. Despite these valiant efforts by courts at the local level to manage the litigation, asbestos cases still remain an enormous burden on the California legal system. While some jurisdictions have been arguably more

aggressive in their efforts to curtail the flood of asbestos litigation,¹ California courts have yet to adopt some of the most significant recent developments.² With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state.

This Article examines several defining aspects of asbestos litigation in California, both to assess the current state of the applicable law and to evaluate what might be done to make the handling of these cases more effective, efficient, and fair. Specifically, this Article will suggest:

- using forum non conveniens motions to transfer cases to appropriate jurisdictions
- bringing back the “substantial” in the substantial factor test
- adopting *Daubert* or other preliminary assessments for the adequacy of the foundation for an expert’s opinions and the reliability of such testimony
- educating the jury on the ramifications of joint liability to ensure that the award reflects the respective fault assessed
- ensuring fairness in the way in which settlement credits are calculated for purposes of off-setting economic damages post verdict

II. MANY ASBESTOS CASES BEING FILED IN CALIFORNIA SHOULD BE TRANSFERRED UNDER THE DOCTRINE OF FORUM NON CONVENIENS

Every year numerous asbestos-related personal injury or wrongful death actions are filed in California despite the fact that the plaintiffs often have no meaningful connection to the state. Many of these plaintiffs have lived most of their lives outside of California and their alleged exposures to asbestos

1. For example, many courts have adopted inactive dockets to address claims brought by unimpaired claimants. See Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253, 262 (2005). The Ohio and Michigan Supreme Courts have recently acted to prevent the joinder of asbestos-related claims. See OHIO R. CIV. P. 42(A)(2); Admin. Order No. 2006-6, Prohibition on “Bundling” cases (Mich. Aug. 9, 2006).

2. See Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1, 4 (2004).

took place elsewhere. Hundreds of asbestos cases filed by out-of-state plaintiffs are pending in the California courts. In many instances, these filings name California companies as defendants, regardless of the merits of the claims against those companies. The California defendants are named simply to try and keep the cases in the California courts. These filings occur for a number of reasons, including the geographic convenience to plaintiffs' counsel, the well-established and understood case management procedures in certain counties with historically high-volume asbestos dockets, the perception that California law is "plaintiff friendly," and the potential for large awards.

Judges in California have acknowledged the ever-increasing burden placed on the judicial system by the state's asbestos docket. At a symposium hosted by the University of San Francisco School of Law, several judges expressed concern that the city's juror resources were being used improperly because the residents were forced to sit as jurors in cases that had nothing to do with them.³

Other jurisdictions faced with significant numbers of asbestos claims have taken steps to address the problems of out-of-state filings. For example, in 2004, the judge overseeing asbestos litigation in Madison County, Illinois, ordered the transfer of an out-of-state mesothelioma case, noting that

As much as this judge, or any judge with any compassion whatsoever, would like to do anything to assist such a litigant, with expedited schedules and to accommodate him in any way possible; such accommodation must be reasonable in following the law. The court must consider, not only how many jury trials actually occur out of this docket; but, also what would happen if every case or even a similar percentage of these cases to all other types of civil jury lawsuits were to go to trial

If large numbers of these cases did actually go to trial, then this docket would no longer be the "cash cow." Such circumstances would place an astronomical burden upon the citizens of Madison County to serve as jurors; would require more trial judges, courtrooms, clerks, bailiffs and other necessary accommodations than could be handled. It is one thing to make such efforts to accommodate the citizens of Madison County and others whose cases bear some connection or other reasons to be here.

3. *Judges Roundtable: Where Is California Asbestos Litigation Heading*, COLUMNS: ASBESTOS, 2, 67 (July 2004).

But when, as in the case being considered, there is no connection with the county or with this state; the trial judge would probably be required to apply Louisiana law (another factor not only of difficulty to the trial judge but a consideration of local problems being decided locally); the treating physicians are all from Louisiana; there is a similar asbestos docket with expedited trial settings for persons similarly situated to the plaintiff herein; the distance from the home forum and the area of exposure is in excess of 700 miles and this county has such an immense docket; the case should be transferred.⁴

Similarly, the court in Cuyahoga County, Ohio, which oversees tens of thousands of asbestos claims, ruled in 2002 that it would no longer set cases for trial unless the plaintiff is a resident of Ohio, was a resident of Ohio during the period of alleged exposure, or was employed in Ohio at the time of the alleged exposure.⁵ The Mississippi Supreme Court also has issued a series of recent rulings to address the problem of forum shopping by nonresident plaintiffs.⁶

It is not appropriate, let alone legally necessary, for cases presenting little or no contact with California to remain on local dockets. Many of these cases should be transferred to more appropriate venues under the doctrine of forum non conveniens.

A. The Doctrine of Forum Non Conveniens and the Current State of California Law

California Code of Civil Procedure § 410.30 codifies the doctrine of forum non conveniens and can be utilized as a tool in asbestos-related actions to have cases with little or no contact with California dismissed and brought in a more appropriate forum.⁷

4. *Palmer v. Riley Stoker Corp.*, No. 04-L-167 (Madison County Cir. Ct., Ill. Oct. 04, 2004). See also *Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269, 280 (Ill. 2005) (according plaintiff's choice of forum less deference when plaintiff is not from Madison County and the action giving rise to the litigation occurred elsewhere because "the residents of Illinois should not be burdened with jury duty given the fact that the action did not arise in, and has no relation to, Illinois").

5. See *In re Asbestos Master Case*, No. CV-073958, Notice of Electronic Filing of Case Management Order (Oct. 11, 2002).

6. See, e.g., *Culbert v. Johnson & Johnson*, 883 So. 2d 550, 553 (Miss. 2004) (transferring in-state cases to the proper county and dismissing out-of-state plaintiffs).

7. California Code of Civil Procedure § 410.30 provides,

[w]hen a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall

The seminal decision on this doctrine is the California Supreme Court's decision in *Stangvik v. Shiley Inc.*,⁸ which involved plaintiffs who resided in Norway and Sweden who filed tort actions against a defendant California corporation and its parent company for heart valve implants which allegedly failed and caused the deaths of plaintiffs' decedents.⁹ The defendants contended that the cases would be more appropriately tried in Norway and Sweden—the countries where plaintiffs lived, where the products were sold, where decedents' medical care was received, and where substantially all of the evidence to be introduced at trial was located.¹⁰ The trial judge granted defendants' motion to stay subject to certain conditions, finding that the foreign jurisdictions were appropriate jurisdictions and that the balance of public and private interests favored defendants' request that the action not proceed in California.¹¹ This decision was upheld on review.¹²

The *Stangvik* court described forum non conveniens as an "equitable doctrine invoking the discretionary power of a court" to decline jurisdiction of a case, even when the requirements of general venue had been met.¹³ The court ruled that the plaintiffs had unfairly or unreasonably invoked the jurisdiction of an inconvenient forum.¹⁴ Simply stated, if a case would be more conveniently, efficiently, and fairly tried in the forum in which it arose and it would be oppressive or inconvenient, or an unwarranted extra burden on the courts of the forum, it should be tried in the more convenient forum, rather than the forum of plaintiffs' choice.

When considering a motion to dismiss or stay an action in California based upon the doctrine of forum non conveniens, the courts weigh whether there is a suitable alternative forum and the private and public interests involved.¹⁵

B. Is the Alternative Forum Suitable?

The threshold question in a motion for forum non conveniens is whether a suitable forum exists.¹⁶ A suitable forum is one where plaintiff's claims are not barred by the statute of limitations in the alternative jurisdiction and where the defendants are amenable to service of process.¹⁷ If a defendant is

stay or dismiss the action in whole or in part on any conditions that may be just.

8. 819 P.2d 14, 14 (Cal. 1991).

9. *Id.* at 16.

10. *Id.*

11. *Id.*

12. *Id.* at 25-26.

13. *Id.* at 17.

14. *Id.* at 16.

15. See *Hansen v. Owens-Corning Fiberglas Corp.*, 59 Cal. Rptr. 2d 229, 232-33 (Ct. App. 1996).

16. See *Stangvik*, 819 P.2d at 17.

17. See *id.* at 18.

not subject to jurisdiction in the alternative locality, the forum will not be deemed suitable.¹⁸ Either of these deficiencies, however, can be cured if the defendant stipulates to service of process in the alternative forum or waives a statute of limitations defense.¹⁹ A court must find that a forum is suitable if there is jurisdiction and no statute of limitations bar to hearing the matter.²⁰ This determination is not discretionary.²¹

By nature, asbestos-related litigation involves numerous defendants. Defendants are typically manufacturers, suppliers, or contractors who allegedly sold, distributed, or installed an asbestos-containing product to which the plaintiff was exposed and which allegedly contributed to the plaintiff's condition. Generally, the central argument in opposition to defendants' motions for forum non conveniens is that a case cannot be dismissed to an alternative jurisdiction because the moving party has failed to show that all defendants are amenable to service of process in the alternative forums.

For example, the plaintiffs in *Hansen v. Owens-Corning Fiberglas Corp.* argued that it would be improper to stay the action in California because it could not be shown that three of the defendants in the California action would be amenable to service of process and the jurisdiction of the Montana courts.²² The appellate court upheld the trial court's granting of a defendant's motion to dismiss or stay and determined that in asbestos cases with numerous defendants it was unreasonable to expect the moving defendant to probe whether all defendants are subject to jurisdiction in the alternative forum.²³ The court explained, "we are aware of no authority that a moving defendant must show all defendants are subject to jurisdiction in a particular alternative forum."²⁴

18. *See id.*

19. *See id.*

20. *See Am. Cemwood Corp. v. Am. Home Assurance Co.*, 59 Cal. Rptr. 2d 229 (Ct. App. 2001); *Chong v. Super. Ct.*, 68 Cal. Rptr. 2d 427, 430 (Ct. App. 1997); *Shiley Inc. v. Super. Ct.*, 6 Cal. Rptr. 2d 38, 41 (Ct. App. 1992).

21. *See Chong*, 68 Cal. Rptr. 2d at 430; *Shiley*, 6 Cal. Rptr. 2d at 41.

22. *See Hansen*, 59 Cal. Rptr. 2d at 232.

23. *See id.* at 234.

24. *Id.* at 232. *See also* *Budgery v. Lorillard Tobacco Co.*, 2003 WL 21652278 (Cal. App. 2 Dist.) (July 14, 2003) (unpublished) (forum non conveniens stay affirmed where plaintiff was a life long resident of Michigan and was employed in California for less than two years). *But see Oster v. Borg-Warner Corp.*, 2003 WL 1991988 (Cal. Ct. App. Apr. 30, 2003) (unpublished) where the court distinguished *Hansen* and vacated the forum non conveniens stay because the moving defendant had not shown that all defendants were amenable to jurisdiction in the alternative forum. The court noted that in *Oster* there were "only" thirty remaining asbestos defendants and "only two of these were the primary focus of dispute" regarding jurisdiction. *Id.* at *2. Thus the case remained in California even though: "Oster's alleged exposure to asbestos in North Dakota, New York, Illinois,

Courts have expressed concern about dismissing a case in favor of an alternative forum when a co-defendant in the action is not subject to jurisdiction in that alternative forum.²⁵ The appropriate remedy, then, is to grant the defendant's motion to stay with the qualification that plaintiffs could have the stay lifted at a later date if, after filing suit in the alternative forum, they could conclusively show that any defendant or defendants were not subject to jurisdiction in the alternative forum.²⁶

C. *Balancing of Private and Public Interests*

Once the court determines that the alternative forum is suitable, it must use its discretion to balance the private interests of the litigants versus the public's interest in retaining the action for trial in California.²⁷ The private interest factors that a court must consider include those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive (such as the ease of access to sources of proof), the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses.²⁸

In asbestos cases, the court evaluates the residency of the plaintiff, sites of asbestos exposure, and location of witnesses and evidence.²⁹ Courts generally will find that private interests favor the alternate forum and the moving party has met its burden when the plaintiff has lived mostly in the alternate forum, almost all of the alleged asbestos exposure occurred in the alternate forum, and almost all witnesses and evidence are from the alternate forum.³⁰ The public and private factors must be applied flexibly by the hearing judge with less deference to a non-resident plaintiff.³¹

The public interest factors include a desire to avoid placing unwarranted burdens on local courts with congested calendars, protecting the interests of local jurors who will be called to be a trier of fact in a case that does not involve issues pertinent to their state of residence, and evaluating the competing interests of California and the alternate jurisdiction.³²

The California Supreme Court in *Stangvik* considered and rejected the argument that choice of forum should be afforded weight in deciding

Iowa and on board a U.S. Navy ship." *Id.* "The sole alleged contact with California consisted of the claim that asbestos-containing products had been installed on the U.S.S. Bennington while it was docked in San Francisco several years before decedent was stationed aboard the vessel." *Id.* at *1.

25. *See Stangvik v. Shiley, Inc.*, 819 P.2d 14, 18 (Cal. 1991).

26. *See id.*

27. *See id.* at 17.

28. *See id.*

29. *See Hansen*, 59 Cal. Rptr. 2d at 233.

30. *See id.* at 232-34.

31. *See Stangvik*, 819 P.2d at 18.

32. *Id.* at 17-18.

whether California should retain jurisdiction.³³ The court also considered and rejected the argument that California should retain jurisdiction in a case where California law is more favorable to plaintiff's theories of liabilities than in the alternative jurisdiction.³⁴ Specifically, the court said the fact that California may have more favorable law is not entitled to any weight in deciding a motion based on forum non conveniens, provided that some remedy is available in the alternative jurisdiction.³⁵

D. Application of Forum Non Conveniens Doctrine by California Courts

The suitability of the alternative forum is a legal question reviewed de novo on appeal.³⁶ Once the court determines that the alternative forum is suitable, however, the balancing of private and public interests is a task within the discretion of the trial court.³⁷ Frequently, the challenging analysis in a motion for forum non conveniens is not whether the alternative jurisdiction is "suitable," but rather the final determination with regard to the balance of public and private interests. The California trial courts have great latitude in ruling on whether to transfer cases to an alternative forum when a plaintiff has minimal contacts with California, because the decision is up to the discretion of each individual judge.³⁸

Some California courts appear willing to transfer cases where the plaintiff is a resident of another state and where all (or almost all) of the plaintiff's work and residential history occurred outside of California. Other courts, however, have been less willing to do so. In general, California courts appear less willing to dismiss where the plaintiff served in the armed forces and was exposed to asbestos-containing materials in California for some period of time. To date, no court has promulgated any type of threshold of time for the purposes of defeating a motion. Overall, the forum non conveniens doctrine in asbestos cases has been applied inconsistently.

Unfortunately, some courts have been willing to simply deny defendants' motions to dismiss where plaintiffs have alleged asbestos exposure in California, even if the exposure was only for a limited amount of time or a disproportionately small length of time when viewed in terms of a plaintiff's entire work history.

33. *Id.* at 19-20.

34. *Id.*

35. *Id.* at n.5.

36. *See Am. Cemwood Corp. v. Am. Home Assurance Co.*, 104 Cal. Rptr. 2d 670, 674 (Ct. App. 2001).

37. *See id.*; *see also Stangvik*, 819 P.2d at 17-18.

38. *See Stangvik*, 819 P.2d at 17-18.

For example, in *Westerlind v. Allied Packing*,³⁹ in San Francisco, Judge Ronald E. Quidachay denied a motion for forum non conveniens brought by defendants against an eighty-year old plaintiff who was a Massachusetts resident his entire life, except for the three years he spent in the U.S. Navy from 1943 to 1946.⁴⁰ Mr. Westerlind's service aboard naval vessels overhauled and ported on the Pacific Coast constituted the only contacts he had with California over a forty-year exposure period.⁴¹ Nonetheless, the court ruled that his action was properly venued in California and that the defendants failed to meet their burden to move the case.⁴² The court reasoned that both plaintiffs' counsel and non-Navy defendants would likely focus on 1943 to 1946 as a significant period of amphibole asbestos exposure.⁴³ Therefore, San Francisco continues to be a popular venue for out of state plaintiffs who served in the Navy, shipping into and out of Bay Area ports like Hunter's Point, Alameda and Mare Island.

While trial courts are increasingly reluctant to transfer a case to an alternate venue, a recent appellate court case has made it easier for a defendant moving to transfer venue, by recognizing that a motion for inconvenient forum may be appropriate even after significant discovery has taken place. The recent opinion in *Morris v. AGFA Corp*⁴⁴, provides that there is no time limit for filing a motion to stay based on inconvenient forum.⁴⁵ *Morris* was brought by the family members of a deceased worker who was allegedly exposed to toxic substances which caused decedent's leukemia and death. Plaintiffs were residents of Texas and the decedent spent the last 20 years of his life in Texas.⁴⁶ The trial court held that the motion to transfer was timely even though it was brought almost one year after the filing of the Complaint, after significant written discovery had occurred.⁴⁷

The Court also held that the plaintiffs' home state of Texas was a suitable alternative forum even though Mr. Morris worked as a pressman for various commercial printing companies in California where he was allegedly

39. No. CGC 05- 446842 (S.F. Super. Ct. filed Nov. 17, 2005).

40. *Id.*

41. *Id.*

42. *Westerlind v. Allied Packing*, No. CGC 05- 446842 (S.F. Super. Ct. filed Nov. 17, 2005) (Order Denying Motion for Forum Non Conveniens by Judge Ronald E. Quidachay). In another example, Judge Ronald M. Sohigian denied a motion for forum non conveniens in *LaFollette v. Auto Zone, Inc.*, No. BC344891 (L.A. Super. Ct. filed July 10, 2006) and cited as one reason "California has an interest in regulating asbestos exposure."

43. *Westerlind v. Allied Packing*, No. CGC 05- 446842 (S.F. Super. Ct. filed Nov. 17, 2005) (Order Denying Motion for Forum Non Conveniens by Judge Ronald E. Quidachay).

44. 51 Cal. Rptr. 3d 301 (2006).

45. *Id.* at 307-08.

46. *Id.* at 304-05.

47. *Id.* at 307-08.

exposed to toxic substances for six years.⁴⁸ Mr. Morris lived and worked in Northern California for only six of his twenty-five year career as a pressman in commercial printing, but spent the last twenty years of his life living and working in Texas. Also supporting their holding was the fact that pleadings and discovery indicated that decedent's physicians and percipient witnesses were located outside California.⁴⁹

Despite the recent holding in *Morris*, Judge Paul Alvarado of the San Francisco Superior Court recently denied a Motion to Stay And/Or Dismiss for Inconvenient Forum in the *Stubblefield v. A.W. Chesterton Co., et al.* case on the grounds that the motion was untimely. The court noted that although plaintiffs had just responded to written discovery after many months of meeting and conferring, the motion was untimely because the trial date was three months away.⁵⁰ In *Stubblefield*, plaintiffs were lifelong residents of Washington and Idaho and the decedent worked and lived nearly his entire life in Washington, Idaho and Oregon except for the approximately two years he served in the U.S. Navy in various Southern California ports. Although the Court recognized that California was an inconvenient forum it denied the motion because defendants were unable to prove that all defendants were amenable to service in the proposed alternative fora.

Decisions like *Westerlind* and *Stubblefield* have led to a reluctance by defendants to bring forum non conveniens motions. As more and more out-of-state asbestos cases are filed in California, there should be a greater willingness by California courts to dismiss those cases so that they can be heard in appropriate jurisdictions and reduce the unfair burden on California jurors who have to take time off from work or be away from home to sit for and decide such cases.

III. THE "SUBSTANTIAL FACTOR" TEST FOR ESTABLISHING CAUSATION IN ASBESTOS CASES: HOW CAN A STANDARD THAT SOUNDS SO GOOD IN THEORY BE SO BAD IN APPLICATION?

In *Rutherford v. Owens-Illinois, Inc.*,⁵¹ the California Supreme Court established the "substantial factor" test for determining causation in asbestos

48. *Id.* at 304, 311-12.

49. *Id.* at 312.

50. *Stubblefield v. A. W. Chesterton Co., et al.*, No. CGC 05-443078 (S.F. Super. Ct. filed July 13, 2005) (Order Denying Motion to Stay And/Or Dismiss for Inconvenient Forum by Judge Paul H. Alvarado).

51. 941 P.2d 1203 (Cal. 1997).

personal injury litigation.⁵² This test has been much quoted, interpreted, and misapplied to the point that any exposure to asbestos, however insubstantial, seems to be sufficient for a plaintiff to defeat summary judgment. The following analysis addresses recent decisions from the California Courts of Appeal applying the substantial factor test in low dose or *de minimis* exposure cases. It also analyzes recently adopted jury instructions and California Supreme Court decisions limiting liability based on public policy considerations, and the potential application of those instructions and decisions in low dose or *de minimis* exposure cases.

A. *The Substantial Factor Test*

The California Supreme Court first adopted the substantial factor test for cause-in-fact determinations in *Mitchell v. Gonzales*,⁵³ a wrongful death case brought by the parents of a boy who drowned.⁵⁴ The defendants were friends of the decedent; they had taken him to a lake, and the boy, who could not swim, drowned after his friend rocked the paddleboard on which they were playing, and the paddleboard tipped over.⁵⁵ The trial court refused the plaintiffs' request for a substantial factor instruction on causation.⁵⁶ Instead, the court instructed using a "but for" instruction, as set forth in BAJI No. 3.75.⁵⁷ The jury concluded that the defendants were negligent but that the negligence was not the cause of death.⁵⁸ The appellate court reversed, finding that the trial court erred in refusing to give the substantial factor instruction⁵⁹ and the California Supreme Court affirmed.⁶⁰

The California Supreme Court definitively adopted the substantial factor test for cause-in-fact determinations, because the court found that it generally produces the same results as the "but for" rule of causation while reaching beyond it to satisfactorily address other situations, such as independent and concurrent causes in fact.⁶¹ The court was attempting to avoid any misunderstanding engendered by the term "proximate cause" in such determinations, which seemed to cause jurors "to focus improperly on the cause that is spatially or temporally closest to the harm."⁶² In touting the

52. *Id.* at 1214.

53. 819 P.2d 872 (Cal. 1991).

54. *Id.* at 873.

55. *Id.* at 873-75.

56. *Id.* at 873.

57. "A proximate cause of [injury] [damage] [loss] [or] [harm] is a cause which, in natural and continuous sequence, produces the [injury] [damage] [loss] [or] [harm] and without which the [injury] [damage] [loss] [or] [harm] would not have occurred." BAJI No. 3.75 (7th ed.).

58. *Mitchell*, 819 P.2d at 875.

59. *Id.* at 873.

60. *Id.*

61. *Id.* at 878-79.

62. *Id.* at 878.

superiority of the substantial factor test, the court noted that it was “sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms”⁶³ for “[i]f the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries.”⁶⁴ Then came asbestos litigation, with its multiple defendants and potential concurrent causes in fact. The “substantial factor” test somehow became less “substantial.”

For instance, in *Rutherford v. Owens-Illinois, Inc.*,⁶⁵ a products liability case brought by the estate of a worker who had been exposed to asbestos-containing products and subsequently died of lung cancer, the trial court instructed the jury pursuant to a local general order that shifted the burden to the defendant to prove that its products were not a legal cause of the worker’s cancer.⁶⁶ The California Supreme Court rejected the trial court’s general order and, in its discussion of the proper jury instructions on causation to be given when multiple potential causes of harm exist, set forth the controlling standard in California for proving causation in an asbestos-induced personal injury case: “[T]he 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.”⁶⁷ The court went on to state:

In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant’s product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may 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.⁶⁸

63. William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 379 (1950).

64. *Mitchell*, 819 P.2d at 878-79 (quoting *Douppnik v. General Motors Corp.*, 275 Cal. Rptr. 715, 721 (Ct. App. 1990)).

65. 941 P.2d 1203 (Cal. 1997).

66. *Id.* at 1206.

67. *Id.* at 1223.

68. *Id.*

Put another way, the critical question is whether a “plaintiff’s exposure to [a] defendant’s asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer.”⁶⁹

The California Supreme Court acknowledged that there could be multiple “substantial” factors causing a plaintiff’s illness:

Ultimately, the sufficiency of the evidence of causation will depend on the factual circumstances of each case. Although the plaintiff must, in accordance with traditional tort principles, demonstrate to a reasonable medical probability that a product or products supplied by the defendant, to which he became exposed, were a substantial factor in causing his disease or risk of injuries, he is free to further establish that his particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a “substantial factor” that contributed to his risk of injury.⁷⁰

Factors to consider in determining whether inhalation of fibers from the particular product should be deemed a “substantial factor” in causing the cancer include “the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed (*e.g.*, other asbestos products, cigarette smoking), and perhaps other factors affecting the assessment of comparative risk”⁷¹

In *Rutherford*, the California Supreme Court recognized that “a force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor,” but warned that

Undue emphasis should not be placed on the term “substantial.” For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the “but for” test, has been invoked by defendants whose conduct is clearly a “but for” cause of plaintiff’s injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test “undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.”⁷²

69. *Id.* at 1219.

70. *Id.* at 1206-07 (internal citation omitted).

71. *Id.* at 1218.

72. *Id.* at 1214 (quoting *Mitchell*, 819 P.2d at 879).

Seizing on this language, plaintiffs routinely assert that a substantial factor is anything which is not negligible, theoretical, or infinitesimal. Courts and juries that have agreed with this interpretation have reduced California's causation standard from a substantial burden to a minimal one. While perhaps unintended by the California Supreme Court, the *Rutherford* decision equated *risk* with *cause*, thereby allowing juries to render liability on parties whose conduct or products were merely *possible* causes of the plaintiff's injuries.⁷³

B. Courts Have Held That De Minimis Exposure Can Satisfy the Substantial Factor Test

The recent case of *Jones v. John Crane, Inc.*⁷⁴ applied the *Rutherford* substantial factor test to a defendant's assertion that *de minimis* exposure to its asbestos-containing product was insufficient to cause the decedent's lung cancer.⁷⁵ Plaintiff was exposed to the asbestos-containing products of many defendants during his twenty-seven year naval career.⁷⁶ Most of the defendants settled before trial, and the case proceeded to jury trial against John Crane, Inc. ("Crane").⁷⁷ The jury returned a special verdict in plaintiff's favor, finding that Crane's products were defective and that Crane was negligent.⁷⁸ The jury apportioned 1.95% of the fault for plaintiff's injuries to Crane.⁷⁹

On appeal, Crane argued that there was no substantial evidence that its products were a substantial factor in causing plaintiff's cancer.⁸⁰ Crane conceded that the plaintiff met the threshold showing under the substantial factor test that he had been exposed to Crane's asbestos-containing products.⁸¹ Instead, Crane argued that "fiber releases from its product were comparable to ambient levels of asbestos in the community at large and cannot be found to have increased [plaintiff's] risk of cancer."⁸²

73. See *Rutherford v. Owens-Illinois, Inc.*, 914 P.2d 1203, 1206-07 (Cal. 1997).

74. 35 Cal. Rptr. 3d 144 (Ct. App. 2005).

75. *Id.* at 149.

76. *Id.* at 148.

77. *Id.*

78. *Id.* at 149.

79. *Id.*

80. *Id.*

81. *Id.* at 150.

82. *Id.* at 151. The occurrence of such "background" or "ambient" exposure from environmental or man-made sources is well-documented in scientific and medical studies. In fact, the following observation has been made:

Exposure to asbestos in the ambient indoor and outdoor environments results from many

In reiterating and applying *Rutherford*'s substantial factor test, the Court of Appeal rejected Crane's argument.⁸³ The court held that substantial evidence supported the jury's verdict and said, "[t]he testimony of the experts provided substantial evidence that [plaintiff's] lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors contributing to his risk of injury."⁸⁴ While attempting to "heed the admonition in *Rutherford* to be wary of the misapplication of the substantial factor test," the court indicated, in rather unfortunate language, that "a level of exposure that is equivalent of that which one might be exposed in the ambient air over a lifetime is not necessarily insignificant," and that "[t]he mere fact that comparable levels [of asbestos fibers] could be found in ambient air does not render the exposure 'negligible or theoretical.'"⁸⁵

In *Hoeffler v. Rockwell Automation, Inc.*,⁸⁶ a recent unpublished decision from the First District (Division Two) of the Court of Appeal, the court followed *Jones* and reached the same conclusion.⁸⁷ *Hoeffler* involved alleged exposure to asbestos from electrical components manufactured by Rockwell's predecessors, which plaintiff claimed caused his mesothelioma.⁸⁸ The jury found that 5 % of plaintiff's harm was caused by defendant Rockwell. Rockwell appealed, claiming that substantial evidence was lacking because there was no expert testimony "quantifying, or even

sources, both natural and man-made. Chrysotile asbestos, which accounts for 90% of the asbestos used in the United States, has become a ubiquitous contaminant of ambient air. It has been noted that asbestos fibers can be found in the lungs of almost everyone in the American population.

Gary N. Greenberg & Dennis J. Darcey, *Occupational and Environmental Exposure to Asbestos*, in *PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES* 19, 25-26 (Victor L. Roggli et al., eds., 1992). Asbestos is a naturally occurring mineral that can be found in soils, rocks, and water throughout the United States—particularly in urban environments. As a result, exposure to asbestos occurs in non-occupational or environmental settings such that everyone in the general population has some asbestos in their lungs. See Andrew Churg & Martha L. Warnock, *Asbestos Fibers in the General Population*, 122 AM. REV. RESPIRATORY DISEASE 669, 669-677 (1980). This exposure constitutes "background" or "ambient" exposure. It is well-documented that such exposure occurs, and that everyone has some asbestos in their lungs.

83. *Jones*, 35 Cal. Rptr. 3d at 150-51.

84. *Id.* at 151. The court responded to Crane's argument that the fibers released from its products were no greater than the ambient level of asbestos in the atmosphere by citing contradictory testimony from plaintiff's expert industrial hygienist and other studies showing far higher exposure ranges for packing materials. *Id.*

85. *Id.* at 151-52 (citation omitted). Referring to the testimony of plaintiffs' expert pathologist, the court noted that "if a person were exposed to six different products, each with a release level similar to the asbestos levels recorded in ambient air, the combined concentration in the total dose would contribute substantially to the increased risk of cancer." *Id.* at 151.

86. No. 413073, 2006 WL 185479 (Cal. App. Dist. 1 Jan. 26, 2006) (unpublished).

87. *Id.* at *4-7. *Hoeffler* cannot be cited as precedent per Cal. Rules of Court 8.1115 (2007), but the opinion provides an example of the scope and extent of evidence deemed sufficient by a San Francisco trial court and appellate court to satisfy the substantial factor test.

88. *Id.* at *2.

characterizing, [plaintiff's] exposures to asbestos" from Rockwell products, and that "[w]ithout such expert testimony, [plaintiff] is unable to prove legal causation."⁸⁹ The court disagreed, finding that "there was substantial evidence from which the jury could conclude that exposure to Rockwell's asbestos-containing products 'was a substantial factor in contributing to the aggregate dose of asbestos plaintiff inhaled or ingested, and hence to the risk of developing asbestos-related cancer.'"⁹⁰

Plaintiff's alleged exposure to Rockwell's asbestos-containing products stemmed from two incidents.⁹¹ In one, plaintiff helped clean up electrical components smashed by a gyroscope; the components allegedly contained asbestos.⁹² In the second, plaintiff supervised the clean up of broken electrical panel boxes.⁹³ Plaintiff's experts testified that broken components could "emit" fibers and that "every" exposure contributes to the cumulative, allegedly causative dose.⁹⁴ The court concluded that "[t]here was substantial evidence from which the jury could conclude that Hoeffler's exposure to asbestos was more than negligible or theoretical, and a substantial factor in contributing to his aggregate dose of asbestos and hence to his risk of developing mesothelioma."⁹⁵

The applications of *Rutherford* by the courts in *Jones* and *Crane* demonstrates that, at least for some courts, any evidence of increased risk is deemed sufficient evidence of causation, thus illustrating how low the bar has dropped.

C. Injecting "Substantial" Back Into the Substantial Factor Test

Neither *Jones* nor *Hoeffler* discuss the applicable jury instructions for the substantial factor test, and neither opinion adequately addresses the applicability of "but for" causation with regard to exposure claims. The recently adopted standard instruction for the substantial factor test, however, and the California Supreme Court's recent endorsement of "but for" causation in a non-asbestos case may help to resolve plaintiffs' claims in low dose or *de minimis* exposure cases. Furthermore, certain policy limitations

89. *Id.* at *5.

90. *Id.* at *6 (quoting *Rutherford*, 941 P.2d at 1219).

91. *Id.* at *2.

92. *Id.*

93. *Id.*

94. *Id.* at *6.

95. *Id.* at *3. Rockwell also claimed that plaintiff's experts' testimony amounted to a "one fiber" theory of causation and bad policy given the volume of asbestos litigation and asbestos filings. The court responded that it "is not in a position to dictate public policy any more than it can dictate scientific realities." *Id.* at *7, n.6.

embodied in the concept of proximate cause may limit liability for *de minimis* exposure as a matter of law.

1. The New Jury Instructions

Asbestos claims require proof that exposure to a manufacturer's products or resulting from a defendant's conduct was a substantial factor in causing a plaintiff's alleged injuries.⁹⁶ Notwithstanding the California Supreme Court's admonition in *Rutherford* to avoid undue emphasis on the term "substantial,"⁹⁷ the court in *Bockrath v. Aldrich Chemical Co.*,⁹⁸ noted that a force that is "infinitesimal," "negligible," or "theoretical" cannot satisfy the substantial factor test.⁹⁹

California's new standard jury instructions,¹⁰⁰ issued after *Rutherford* and *Bockrath* were decided, also define "substantial factor" in CACI 430:

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]¹⁰¹

As the use notes indicate, this instruction incorporates Comment *a* of the Restatement (Second) of Torts § 431, which provides, in part:

The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense" which includes every one of the great number of events without which any happening would not have occurred.¹⁰²

96. *Id.* at *2.

97. *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal. 1997).

98. 980 P.2d 398 (Cal. 1999).

99. *Id.* at 403-04.

100. CACI 430, 431, and 435, discussed herein, replace BAJI 3.76, 3.77, and 3.78. The juries rendered their verdicts in *Jones* and *Hoeffler* before the Judicial Council approved the new jury instructions. Neither appellate court discussed the instructions used by the trial courts. Presumably, the trial courts utilized the BAJI instructions.

101. CACI 430.

102. CACI 430, Sources and Authority (quoting RESTATEMENT SECOND OF TORTS § 431 cmt. a (1965)).

The notes also direct use of CACI 431 for cases of multiple concurrent causes:

A person's negligence may combine with another factor to cause harm. If you find that [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm, then [name of defendant] is responsible for the harm. [Name of defendant] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [name of plaintiff]'s harm.¹⁰³

CACI 435, following the specific mandate of *Rutherford*, further explains the role of the substantial factor test in asbestos-related cancer cases:

[Name of plaintiff] may prove that exposure to asbestos from [name of defendant]'s product was a substantial factor causing [his/her/[name of decedent]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure contributed to [his/her] risk of developing cancer.¹⁰⁴

As noted in *Lineaweaver v. Plant Insulation Co.*:¹⁰⁵

Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. *Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. Additional factors may also be significant in individual cases, such*

103. CACI 431.

104. CACI 435. A similar and consistent version of this instruction was approved by the First District (Division Five) in *Grahn v. Exxon Mobil Corp.*, No. A098818, 2004 WL 2075571 (Cal. Ct. App. Sept. 17, 2004) (unpublished). The California Supreme Court granted review to consider premises liability issues, but transferred the matter back to the appellate court with directions to vacate its decision and to reconsider the case in light of *Kinsman v. Unocal Corp.*, 123 P.2d 931, 940-42 (Cal. 2005), which held that a premises owner who knows, or should know, of a latent or concealed preexisting dangerous condition on its property may be liable to an employee of an independent contractor hired to work on the premises if the contractor neither knew nor should have known of the danger.

105. 37 Cal. Rptr. 2d 902 (Ct. App. 1995).

as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury.¹⁰⁶

In an asbestos action, the length, frequency, regularity, proximity, and intensity of plaintiff's alleged exposure to asbestos, coupled with the type of fibers at issue, might very well establish that such exposure was no greater or different than background or ambient exposure and that such exposure was nothing more than "one of the great number of events without which any happening would not have occurred."¹⁰⁷ *De minimis* exposure may be nothing more than a "remote or trivial" contribution to the plaintiff's risk of developing cancer.¹⁰⁸ If, for example, the alleged exposure, extended over a lifetime, would be insufficient to cause disease, then it cannot possibly have contributed to other exposures to cause the disease. Indeed, if the plaintiff had the same minimal risk of developing cancer without exposure to the products, the manufacturer's conduct was not a substantial factor.

The United States Court of Appeals for the Ninth Circuit reached this result in *Kennedy v. Southern California Edison, Co.*¹⁰⁹ where the plaintiff alleged that he brought home microscopic particles of radioactive materials known as fuel fleas, which caused his wife to develop leukemia.¹¹⁰ The Ninth Circuit affirmed a jury verdict in favor of the defendant, concluding that the district court committed harmless error in refusing to give an instruction based on *Rutherford*.¹¹¹ The court explained that *Rutherford* applied in contexts in which a plaintiff develops a medical injury with multiple possible causes, but held that the failure to instruct the jury pursuant to *Rutherford* was harmless error.¹¹² The appellate court said:

At trial, the defendants introduced uncontroverted expert testimony that, even if Mrs. Kennedy was exposed to "fuel fleas" as under Kennedy's exposure scenario, there is only a one in 100,000 chance that her [leukemia] was caused by the exposure. Indeed the testimony went further—even assuming that we knew for certain that Mrs. Kennedy's [leukemia] was caused by radiation (rather than some other source), there would only be a one in 30,000 chance that "fuel flea" radiation would have been the actual cause. On these facts, the contribution of the "fuel fleas," even assuming exposure and ingestion and with full knowledge that the person in

106. *Id.* at 906-07 (emphasis added) (internal citations omitted).

107. CACI 430, Sources and Authority (quoting RESTATEMENT SECOND OF TORTS § 431 cmt.a).

108. CACI 430.

109. 268 F.3d 763 (9th Cir. 2001).

110. *Id.* at 766.

111. *Id.* at 771-72.

112. *Id.* at 767, 770.

question actually developed [leukemia], only played “an ‘infinitesimal’ or ‘theoretical’ part in bringing about [Mrs. Kennedy’s] injury.” Because no reasonable jury could have found that the “fuel fleas” were a “substantial factor” in causing Mrs. Kennedy’s [leukemia], the failure to give a *Rutherford* instruction was harmless error.¹¹³

In *Whiteley v. Phillip Morris, Inc.*,¹¹⁴ the First District (Division Two) of the Court of Appeal reached a similar result in a smoker’s action against tobacco companies.¹¹⁵ A jury rendered a verdict in favor of the plaintiff finding, in part, that the companies’ negligent design of their cigarettes was a cause of plaintiff’s lung cancer.¹¹⁶ The Court of Appeal reversed, finding that plaintiff’s evidence of defendants’ negligence in failing to implement known technologies to reduce the carcinogen dose to which smokers were exposed was a substantial factor contributing to plaintiff’s cancer was insufficient to support the finding that such negligence was a “cause” of her injuries.¹¹⁷ While the defendants did not “dispute that plaintiff had adequately shown that [her] exposure to each defendant’s cigarette products ‘in reasonable medical probability’ was a substantial factor in contributing to the aggregate dose of [carcinogens she] inhaled or ingested, and hence to the risk of developing [lung] cancer,” the court nonetheless found that, from the expert testimony presented, “[t]he jury could only speculate that the design, manufacture and marketing of ‘safer’ cigarettes would have resulted in plaintiff ingesting fewer carcinogens or quitting smoking altogether.”¹¹⁸

In *Kennedy* and *Whiteley*, mere evidence of exposure, slight or extensive, was insufficient to satisfy *Rutherford*.¹¹⁹ These cases demonstrate the importance of developing evidence that the defendant’s product or conduct was in *reasonable medical probability* a substantial factor contributing to the plaintiff’s disease, or even to the risk of developing the disease.

113. *Id.* at 770-71 (emphasis added) (internal citation omitted).

114. 11 Cal. Rptr. 3d 807 (2004).

115. *Id.* at 864.

116. Following the trial court’s ruling that federal law preempted strict liability on a consumer expectations theory, plaintiff withdrew her remaining strict liability design defect claim based on a risk-benefit theory and proceeded solely on a theory of negligence in design. *See id.* at 856 n.29.

117. *Id.* at 863.

118. *See id.* at 862-63.

119. *See Kennedy*, 368 F.3d at 770-71; *Whiteley*, 11 Cal. Rptr. 3d at 863.

2. Buttressing “But For” Causation

As noted above, the second paragraph of CACI 430 states that “[c]onduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.”¹²⁰ The Directions for Use state:

The “but for” test does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. Accordingly, do not use this instruction in a case involving concurrent independent causes.

The court should consider whether the bracketed language is appropriate under *Viner*. The bracketed language may be used in addition to the substantial factor instruction except in cases of concurrent independent causes.¹²¹

As discussed above, in *Mitchell v. Gonzales*,¹²² the California Supreme Court disapproved of instructing a jury regarding “proximate cause” because it improperly focused the jury “on the cause that is spatially or temporally closest to the harm.”¹²³ In so holding, *Mitchell* did not abandon or repudiate the requirement that the plaintiff must prove that, but for the alleged negligence, the harm would not have happened. Rather, the court stated that jury instructions in such cases should use the substantial factor test which “subsumes the ‘but for’ test.”¹²⁴ The court further stated, “[i]f the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries.”¹²⁵ Thus, *Mitchell* emphasizes the importance of compelling the plaintiffs to establish that a defendant’s conduct had something to do with the production of the plaintiff’s injuries, or, in the context of an asbestos-related cancer case, a reasonable medical probability that the conduct contributed to the risk of developing cancer.

In *Viner v. Sweet*,¹²⁶ a legal malpractice action involving transactional work, the California Supreme Court determined that the client must prove that the attorney’s acts or omissions caused the client to suffer harm or loss according to the “but for” test, meaning that the harm or loss “would not

120. CACI 430.

121. CACI 430, Directions for Use (citation omitted).

122. 819 P.2d 872 (Cal. 1991).

123. *Id.* at 878.

124. *Id.* (emphasis added).

125. *Id.* (internal citation omitted) (internal quotation marks omitted).

126. 70 P.3d 1046 (Cal. 2003).

have occurred without the attorney's malpractice."¹²⁷ The court noted that the "but for" causation does not apply when the defendant's negligence was a concurrent independent cause of the harm, explaining that "these forces operated in combination, with none being sufficient to bring about the harm, they are not concurrent *independent* causes."¹²⁸

In *Jones v. John Crane, Inc.*,¹²⁹ Crane argued "that *Viner* required plaintiffs to show that defendant's product 'independently caused plaintiff's injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.'"¹³⁰ Of course, this argument misconstrues the application of the substantial factor test in asbestos cases and the First District rejected Crane's argument.¹³¹ The court noted that "*Viner* is consistent with *Rutherford* in so far as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer."¹³²

To add some teeth back to the substantial factor test, consistency with *Mitchell*, *Viner*, and *Rutherford* may warrant modification of the bracketed language of CACI 430 and inclusion after CACI 435. Such modification could be as follows: Plaintiff may prove that exposure to asbestos from defendant's product was a substantial factor causing his illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure contributed to his risk of developing cancer. Defendant's conduct is not a substantial factor in contributing to plaintiff's risk of developing cancer if the plaintiff was subject to the same or similar risk without that conduct.

Like the courts in *Kennedy* and *Whitely*, a jury instructed in this manner may justifiably conclude that *de minimis* exposure to a manufacturer's product or resulting from a defendant's conduct was not a substantial factor in causing a plaintiff's illness.

3. A Return to Proximate Cause

As stated above, the California Supreme Court in *Mitchell* disapproved of instructing a jury regarding "proximate cause," because the language improperly focused the jury "on the cause that is spatially or temporally

127. *Id.* at 1048.

128. *Id.* at 1051.

129. 35 Cal. Rptr. 3d 144 (Ct. App. 2005).

130. *Id.* at 149.

131. *See id.* at 149 n.3.

132. *Id.* at 150 n.3.

closest to the harm.”¹³³ As noted by at least three subsequent California Supreme Court decisions, however, *Mitchell* left intact the *public policy limitations* of the proximate cause analysis to be applied by courts as a matter of law. As the court noted in *Viner*, “[c]ausation analysis in tort law generally proceeds in two stages: determining cause in fact and considering various policy factors that may preclude imposition of liability.”¹³⁴ *Viner* only involved the cause in fact element.¹³⁵

In *PPG Industries, Inc. v. Transamerica Insurance Co.*,¹³⁶ the California Supreme Court held that, although the insurer’s negligence in failing to settle an action against its insured was the cause in fact of a punitive damages award against the insured, the insurer’s negligence did not proximately cause the award, based on three public policy factors.¹³⁷ In reaching this conclusion, the court held that “three policy considerations . . . strongly militate against allowing the insured, the morally culpable wrongdoer in the third party lawsuit, to shift to its insurance company the obligation to pay punitive damages resulting from the insured’s egregious misconduct in that lawsuit.”¹³⁸ First, allowing the insured to shift to its insurer “its responsibility to pay the punitive damages in the third party action would violate the public policy against reducing or offsetting liability for intentional wrongdoing by the negligence of another.”¹³⁹ Second, allowing the insurer to assume liability for punitive damages premised on the egregious conduct of its insured would defeat the public policies underlying these damages.¹⁴⁰ Finally, requiring the insurer to pay punitive damages incurred by its insured would violate “the public policy against indemnification for punitive damages.”¹⁴¹

In *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*,¹⁴² the California Supreme Court similarly held that public policy reasons foreclosed recovery of lost potential punitive damages in a legal malpractice action, notwithstanding proof that attorney malpractice was a cause in fact of the loss.¹⁴³ The court stated the rationale for the public policy limitation as follows:

133. *Mitchell v. Gonzales*, 819 P.2d 872, 878 (Cal. 1991).

134. *Viner v. Sweet*, 70 P.3d 1046, 1048 n.1 (Cal. 2003) (citations omitted).

135. *See id.*

136. 975 P.2d 652 (Cal. 1999).

137. *See id.* at 656.

138. *Id.* (footnote omitted).

139. *Id.*

140. *See id.* at 656-57.

141. *Id.* at 658 (footnote omitted).

142. 69 P.3d 965 (Cal. 2003).

143. *Id.* at 969.

Detriment is a loss or harm suffered in person or property. For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment *proximately caused* thereby, whether it could have been anticipated or not. Thus, an attorney's 'liability, as in other negligence cases, is for all damages directly and proximately caused by his negligence.'

Proximate cause involves *two* elements. One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event. Whether defendant's negligence was a cause in fact of plaintiff's damage . . . is a factual question for the jury to resolve.

By contrast, the second element focuses on public policy considerations. Because the purported causes of an event may be traced back to the dawn of humanity, the law has imposed additional limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy. Thus, proximate cause is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.¹⁴⁴

The court listed several public policy considerations strongly militating against allowing a plaintiff to recover lost punitive damages in a legal malpractice action, including "permitting recovery . . . would violate the public policy against speculative damages,"¹⁴⁵ "allowing recovery . . . would hinder the ability of trial courts to manage and resolve mass tort actions" and "may adversely impact the overall ability of courts to manage their caseloads by making settlement more difficult,"¹⁴⁶ and "allowing recovery . . . may exact a significant social cost."¹⁴⁷

Asbestos personal injury cases, including low dose or *de minimis* exposure claims, invoke many of these same policy considerations. The "cumulative dose" or "one fiber theory" necessarily shifts responsibility to less culpable or nonculpable parties; the contribution of *de minimis* exposure to overall risk and harm is speculative; the vast web of parties with at most a

144. *Id.* (internal quotation marks omitted) (citations omitted).

145. *Id.* at 971.

146. *Id.* at 972.

147. *Id.*

tenuous connection to the harm makes case management, resolution, and settlement burdensome for the courts and the parties; and the significant social and societal costs of asbestos litigation are well known (e.g., bankruptcies).¹⁴⁸ Therefore, notwithstanding a jury's determination that *de minimis* exposure was a cause in fact of a plaintiff's injury, a court's prudent consideration of these various policy factors may preclude imposition of liability as a matter of law.

Other courts have struggled with similar issues concerning substantial factor in the asbestos litigation context.¹⁴⁹ For example, courts have often recognized that infrequent exposures simply do not suffice to show substantial cause, particularly on a record where long term, frequent exposures to other products are apparent and fully explain the condition in question.¹⁵⁰ Thus, even where an expert asserts baldly that all of the plaintiff's exposures were substantial factors in causing plaintiff's mesothelioma, such conclusory statements should not suffice. As one court stated, "[i]f an opinion such as [the expert's] would be sufficient for plaintiff to meet his burden, the . . . 'substantial factor' test would be meaningless."¹⁵¹

IV. SHOULD THE CALIFORNIA SUPREME COURT ADOPT *DAUBERT* OR SOME OTHER STANDARD TO RAISE THE BAR FOR ADMISSIBILITY OF EXPERT TESTIMONY?

Much of the focus in asbestos cases centers on the admissibility of expert testimony. In particular, given the very limited contact many plaintiffs have with various defendants' products, and the attenuated and inflammatory nature of some of the expert testimony offered by certain plaintiffs' experts, admissibility of expert testimony is a major battleground. Adoption of the standard set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁵² would require a trial court

148. See Joseph E. Stiglitz, et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. BANKR. L. & PRAC. 51, 76, 83 (2003); JESSE DAVID, THE SECONDARY IMPACTS OF ASBESTOS LIABILITIES (Nat'l Econ. Research Assocs., Jan. 23, 2003); see also Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001); Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, (2002), available at <http://www.nlcp.org/books/pdf/Vol6Number6June2002.pdf>.

149. See *Jeter v. Owens-Corning Fiberglass Corp.*, 716 A.2d 633, 638 (Pa. Super. Ct. 1998) (holding that the trial court erred in instructing the jury to use "the dictionary definition of 'substantial' to define 'substantial factor'").

150. See *Torrejon v. Mobil Oil Co.*, 876 So. 2d 877, 894 (La. Ct. App. 2004); *Thomas v. A.P. Green Inuds.*, 933 So. 2d 843, 867-69 (La. Ct. App. 2006). Cf. *John Crane, Inc. v. Jones*, 604 S.E.2d 822, 826 (Ga. 2004) (refusing to apply the "substantial contributing factor" test).

151. *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 493 (6th Cir. 2005).

152. 509 U.S. 579 (1993).

to assess the sufficiency of the data, ensure that the testimony is the product of a reliable method and that the expert has, in fact, applied the methods reliably to the particular facts of the case—all prior to that expert's testimony being heard by the jury.¹⁵³

To date, the California Supreme Court has rejected *Daubert* and declared its belief that the tests stated in *Frye v. United States*¹⁵⁴ and *People v. Kelly*,¹⁵⁵ (“*Kelly-Frye*”) represent the better standard for determining whether expert testimony based on novel scientific methods has a sufficient scientific basis such that it should be admitted into evidence.

For instance, in *People v. Leahy*,¹⁵⁶ the California Supreme Court opined that *Daubert* offers no compelling reason for abandoning *Kelly* in favor of the more “flexible” approach outlined in *Daubert*. The court reasoned that the requirements of California Evidence Code Sections 720 and 801,¹⁵⁷ *Kelly*, and *Frye* have acted well to keep unreliable evidence from the jury.¹⁵⁸ In fact, nineteen states, in addition to California, have adopted a reliability test without embracing the *Daubert* standard.¹⁵⁹

Justice Lucas' opinion in *Leahy* addressed the California standards for admissibility of scientific evidence in light of *Daubert*. He noted that the California Evidence Code was enacted in 1965 and the “pertinent provisions,” such as Sections 210, 350, 720, and 801, have never been amended.¹⁶⁰ He commented that, “[n]o significant relevant developments have occurred in [California] since *Kelly* was decided to justify abandoning its conclusions.”¹⁶¹ Notably in *Leahy*, however, both the defendant and the

153. See David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 21-27 (2003).

154. 293 F. 1013 (D.C. Cir. 1923).

155. 549 P.2d 1240 (Cal. 1976).

156. 882 P.2d 321 (Cal. 1994).

157. California Evidence Code § 801(b) provides that an expert witness may testify to an opinion, where the opinion is “based on matter . . . perceived by or personally known to the witness . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . .” CAL. EVID. CODE § 801(b) (West 2004). Evidence Code § 803 further provides that “the court may, and upon objection, shall exclude testimony in the form of an opinion that is based in whole or in significant part on a matter that is not a proper basis for such an opinion.” *Id.* at § 803.

158. *People v. Leahy*, 882 P.2d 321, 331 (Cal. 1994).

159. These states are Colorado, Hawaii, Idaho, Indiana, Iowa, Maine, Maryland, Michigan, Missouri, Minnesota, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Tennessee, and Virginia.

160. *Leahy*, 882 P.2d at 327.

161. *Id.* at 328.

People urged the court to preserve the “cautious” and “conservative” approach taken in *Kelly*.¹⁶²

Amici briefs urging the adoption of *Daubert* were submitted and ultimately rejected by the *Leahy* court; these were submitted by District Attorneys and the Attorney General’s office and were concerned exclusively with DNA testing. The briefs argued that if the court were inclined to keep *Kelly-Frye*, it should clarify the standards by which to determine whether something has gained “general acceptance.”¹⁶³ The court admitted that, “improving or ‘fixing’ the *Kelly* rule may well have merit, but the present case is not a good vehicle for addressing them.”¹⁶⁴

The *Leahy* court went on to say that the critics of *Kelly-Frye* focus on its “conservative nature,” marked by an undefined period of testing and study before a new technique may be deemed generally accepted.¹⁶⁵ *Frye*, however, and its “rigidity,” only governs testimony regarding a new scientific method. *Frye*’s limited holding and application were not addressed by the *Leahy* Court. In short, the court showed no inclination to adopt *Daubert*. Nevertheless, with the passage of time, perhaps a different outcome—at a minimum, improvements to the *Kelly* rule—is advisable.

A. Federal Rule of Evidence 702 and *Daubert*

Admissibility of expert opinion testimony in federal courts is governed by Federal Rule of Evidence 702.¹⁶⁶ In *Daubert*,¹⁶⁷ the United States Supreme Court held that Rule 702 imposes on the trial court the obligation to ensure that proffered scientific expert testimony is “not only relevant, but reliable.”¹⁶⁸ The Court subsequently clarified that this basic gatekeeping obligation applies to all expert testimony.¹⁶⁹ The Court explained that, “[t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether

162. *Id.*

163. *Id.* at 328-29.

164. *Id.* at 329-30.

165. *Id.* at 330.

166. Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of *reliable principles and methods*, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702 (emphasis added) (as amended in 2000, based upon rulings subsequent to *Daubert*).

167. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

168. *Id.* at 589.

169. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

that reasoning or methodology properly can be applied to the facts in issue.”¹⁷⁰

The initial step is to determine if the proposed expert is qualified to testify before considering the other *Daubert* indicia of reliability.¹⁷¹ An expert must be qualified to offer opinion testimony with respect to the medical/scientific issues presented.¹⁷² Defendants often argue that even considering the reliability requirements set forth in *Daubert* and its progeny, plaintiffs should be required to make a showing of reliability for their experts’ testimony as to each defendant. Defendants look for important facts such as whether or not there is an opinion specific to a defendant, and reliance upon documents relevant to that defendant in rendering expert opinions. Otherwise, arguments can be made to exclude the testimony as irrelevant and prejudicial.

B. California Evidence Code and Kelly-Frye

Pursuant to California Evidence Code Sections 720(a), 801(b), and 803, and the holdings in *Kelly*,¹⁷³ *Leahy*,¹⁷⁴ and their progeny, a party may move a court for an order excluding from evidence the testimony and opinions of an opposing party’s expert.

Under these statutes an expert’s opinion must be rigorously scrutinized. As the court of appeal explained, “the law does not accord to the expert’s opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert’s opinion is no better than the facts upon which it is based.”¹⁷⁵ “When an expert bases his or her conclusions on assumptions not supported by the record, on matters not reasonably relied on by other experts, or on factors that are remote, speculative, or conjectural, then his or her opinion lacks evidentiary value.”¹⁷⁶

When experts base their opinions on new scientific techniques, such as complex data gathering and calculations, the California Supreme Court has adopted the well-known test for admissibility first enunciated in *Frye*.¹⁷⁷

170. *Daubert*, 509 U.S. at 592-93.

171. See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994).

172. CAL. EVID. CODE § 801 (West 2004).

173. 549 P.2d 1240 (Cal. 1976).

174. 882 P.2d 321 (Cal. 1994).

175. *Kennemur v. State*, 184 Cal. Rptr. 393, 402 (Ct. App. 1982).

176. See *Wanland v. Los Gatos Lodge, Inc.*, 281 Cal. Rptr. 890, 896 (Ct. App. 1991).

177. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

The *Frye* test regarding admissibility of expert testimony, as enunciated in *Kelly*, is concerned with and seeks to mitigate the “dangerous tendency of lay jurors to give considerable and often undue weight to scientific evidence presented by experts with impressive credentials.”¹⁷⁸ The California Supreme Court has noted that such scientific procedures “are invested with a ‘misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature.’”¹⁷⁹

In determining when to apply the rule, the California Supreme Court looks to its “salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods.”¹⁸⁰ Indeed, the court cautioned in *Kelly* that “there is ample justification for the exercise of considerable judicial caution in the acceptance of evidence developed by new scientific techniques,”¹⁸¹ and noted that “[t]here has always existed a considerable lag between advances and discoveries in scientific fields and their acceptance as evidence in a court proceeding.”¹⁸² The court further indicated that the test was designed to “retard . . . admissibility until the scientific community has had ample opportunity to study, evaluate and accept [the technique’s] reliability.”¹⁸³

The California Supreme Court has made clear that these concerns regarding sufficient scientific evaluation determine whether a scientific technique is “new” for purposes of applying the *Kelly* test. For example, in *People v. Shirley*,¹⁸⁴ the Attorney General argued that *Kelly* did not apply to testimony assisted by hypnosis because hypnosis was an age old practice and not a new scientific technique.¹⁸⁵ The California Supreme Court rejected that view as an “unduly narrow” reading of *Kelly*, given its salutary purpose.¹⁸⁶

Likewise, in *People v. Leahy*,¹⁸⁷ the court held that a sobriety test was a new scientific technique within the scope of the *Kelly* rule, even though the test had been used by officers in the field for almost thirty years.¹⁸⁸ *Leahy* held that in determining whether a scientific technique is “new” for *Kelly* purposes, “long-standing use by police officers seems less significant a

178. *People v. Shirley*, 723 P.2d 1354, 1375 (Cal. 1982).

179. *Id.* (quoting *People v. Kelly*, 549 P.2d 1240, 1245 (Cal. 1976)).

180. *Id.* (citing *Kelly*, 549 P.2d at 1244-45).

181. *Kelly*, 549 P.2d at 1244.

182. *Id.* at 1245 (quoting *People v. Spigno*, 319 P.2d 458, 464 (Cal. Ct. App. 1957)).

183. *Id.* at 1251 (citing *United States v. Addison*, 498 F.2d 741, 743 (D.C. Cir. 1974)).

184. 723 P.2d 1354 (Cal. 1982).

185. *Id.* at 1374.

186. *Id.*

187. 882 P.2d 321 (Cal. 1994).

188. *Id.* at 331-32.

factor than repeated use, study, testing and confirmation by scientists or trained technicians.”¹⁸⁹

Under the *Kelly* test, the admissibility of expert testimony depends on a three-step analysis: (1) the scientific method upon which the expert testimony is based must be “reliable,” which in this context means showing that the technique has “gained general acceptance in the particular field in which it belongs;” (2) the witness must be qualified as an expert to give an opinion in the area; and (3) the correct scientific procedures must be used.¹⁹⁰ The proponent of the evidence bears the burden of showing that the scientific technique at issue satisfies the requirements of *Kelly*.¹⁹¹ Courts have been emphatic in declaring that the testimony of the single witness is rarely sufficient to meet the burden of proof placed upon the proponent of the testimony.¹⁹²

Failure to satisfy even one prong of the test should result in exclusion of the opinion. Techniques which are not accepted within the relevant, qualified scientific community (the first prong of the *Kelly* test) are subject to exclusion.¹⁹³ Likewise, even if a methodology is generally accepted, if the proper scientific procedures for implementing it are not followed, the opinion should be excluded.¹⁹⁴

The first prong of the *Kelly* test requires the court to determine whether, in reaching his opinion, Mr. Brown relied upon a scientific technique “sufficiently established to have gained general acceptance in the particular field in which it belongs.”¹⁹⁵ In determining whether the process or technique has gained “general acceptance” plaintiff must show that a substantial number of scientists in the community accept the technique as reliable.¹⁹⁶ The California Supreme Court has indicated that in analyzing this factor, courts should be willing to “forego admission of such techniques

189. *Id.* at 332.

190. *Id.* at 324-25 (quoting *People v. Kelly*, 549 P.2d 1240, 1244 (Cal. 1976)).

191. *Shirley*, 723 P.2d at 1375-76. *See also* *People v. Ashmus*, 209 Cal. Rptr. 503, 508 (Ct. App. 1991).

192. *See Leahy*, 882 P.2d at 336. *See also* *People v. Dellinger*, 209 Cal. Rptr. 503 (Ct. App. 1984).

193. *Wanland v. Los Gatos Lodge, Inc.*, 281 Cal. Rptr. 890, 896 (Ct. App. 1991).

194. *See, e.g., Dellinger*, 209 Cal. Rptr. at 509-10 (excluding testimony where underlying test was based on flawed procedures); *People v. Barney*, 10 Cal. Rptr. 2d 731, 746-77 (Ct. App. 1992) (*Kelly*’s “correct scientific procedures” requirement is not merely a question of weight but is an element of the *Kelly-Frye* admissibility determination.).

195. *Kelly*, 549 P.2d at 1244.

196. *Leahy*, 882 P.2d at 336 (quoting *People v. Guerra*, 690 P.2d 635, 656 (Cal. 1984)) (“[T]he test is met if use of the technique is supported by a clear majority of the members of that community.”).

completely until reasonably certain that the pertinent scientific community no longer views them as experimental or of dubious validity.”¹⁹⁷ This all-or-nothing approach was adopted in *Kelly* in full recognition that there would be a “considerable lag” between scientific advances and their admission as evidence in a court proceeding.¹⁹⁸

C. Using the Use of the Correct Scientific Procedures

In *People v. Venegas*,¹⁹⁹ the California Supreme Court emphasized that the *Kelly-Frye* standard has three separate components, and to satisfy the third prong, “the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.”²⁰⁰ The court noted that the use of statistical probabilities to link a criminal defendant’s DNA to a particular crime was not a new scientific technique and indeed had previously been approved by the court as generally accepted.²⁰¹ Nonetheless, *Kelly* was employed to determine whether the statistical evaluation, as applied in a particular case, was in accordance with accepted protocols for the method.²⁰² The court stated: “[The third prong] assumes the methodology and technique in question has already met that requirement. [I]t inquires into the matter of whether *the procedures actually utilized in the case* were in compliance with that methodology and technique, as generally accepted by the scientific community.”²⁰³

The court then made clear that such methodological imperfections go to the admissibility of the evidence. “Our reference to ‘careless testing affect[ing] the weight of the evidence and not its admissibility’ . . . was intended to characterize shortcomings other than the failure to use correct, scientifically accepted procedures such as would preclude admissibility under the third prong of the *Kelly* test.”²⁰⁴

The court then reviewed the test performed in that case to analyze whether it had followed “correct, scientifically accepted procedures.”²⁰⁵ The court concluded that the FBI did not use such procedures in that instance and excluded the opinion from evidence.²⁰⁶ It also cautioned:

197. *Id.* at 330 (quoting *People v. Stoll*, 783 P.2d 698, 710 (Cal. 1989)).

198. *Id.*

199. 954 P.2d 525 (Cal. 1998).

200. *Id.* at 545 (quoting *Kelly*, 549 P.2d at 1244).

201. *Id.* at 546.

202. *Id.* at 545.

203. *Id.* (citing *People v. Barney*, 10 Cal. Rptr. 2d 731, 746 (Ct. App. 1992)).

204. *Id.* at 546 (internal citations omitted).

205. *Id.* at 547.

206. *Id.* at 554.

To . . . leave it to jurors to assess the current scientific debate on statistical calculation as a matter of weight rather than admissibility, would stand *Kelly-Frye* on its head. . . . The result would be predictable. The jury would simply skip to the bottom line—the only aspect of the process that is readily understood—and look at the ultimate expression . . . without competently assessing the reliability of the process²⁰⁷

Recently, however, a number of courts of appeal have examined the breadth and application of the California evidence codes. The cases most scrutinized on this point are the *Lockheed Litigation Cases*, *Lockheed I*²⁰⁸ and *Lockheed II*.²⁰⁹

D. Roberti, Lockheed and the Future of Daubert in California

Widely reported as the would-be bellwether of California expert reliability analysis and admissibility standards, *Lockheed II* has been granted review by the California Supreme Court. *Lockheed II* will determine whether California will require a trial court to undertake a meaningful preliminary analysis of foundational reliability before allowing an expert to offer an opinion based on non-novel scientific evidence.

Lockheed II was preceded by another case which stands for the proposition that California's *Kelly-Frye* standard applies exclusively to new scientific techniques. The Second District Court of Appeal, Division Four, in *Roberti v. Andy's Termite & Pest Control, Inc.*²¹⁰ held that the trial court applied a threshold admissibility test to plaintiff's expert testimony regarding the dangers of exposure to pesticide and development of autism, which was akin to the federal rule of *Daubert*, and not applicable under California law.²¹¹ The court reasoned that Roberti's experts did not rely upon any new scientific technique, device, or procedure that had not gained general acceptance in the relevant scientific or medical community, but

207. *Id.* at 548-49 (quoting *Barney*, 10 Cal. Rptr. 2d at 742).

208. 10 Cal. Rptr. 3d 34 (Ct. App. 2004).

209. 23 Cal. Rptr. 3d 762 (Ct. App. 2005). The California Supreme Court has agreed to review this case and as such, its ruling has been superseded. See *Lockheed Litigation Cases*, 110 P.3d 289 (Cal. 2005).

210. 6 Cal. Rptr. 3d 827 (Ct. App. 2003).

211. *Id.* at 831.

rather, the proffered evidence presented a new theory of medical causation, which was not subject to *Kelly-Frye*.²¹²

In *Lockheed I*, however, the Second District Court of Appeal, Division Three, upheld an exclusion of the medical causation opinion of an expert on the connection between solvent exposure and cancer.²¹³ The witness's opinion was excluded on the grounds that the increased risks of cancer on which he relied for his opinion were not tied to the chemicals in controversy and the surveys did not show a sufficient increase in the incidence of the particular kinds of cancers which were at issue.²¹⁴ The Court of Appeal upheld exclusion of the witness's opinions because the underlying studies upon which he relied did not isolate the five chemicals in controversy, relied upon exposure to other known carcinogens, and were therefore "based on conjecture and speculation as to which of the many substances to which the study subjects were exposed contributed to the greater incidence of cancer."²¹⁵

In *Lockheed II*, again the court granted motions in limine to exclude the opinions of the same witness on the grounds that the epidemiology studies, animal studies, case reports, treatises and registries relied upon were either irrelevant, unreliable, or causationally tenuous.²¹⁶ As noted above, the California Supreme Court has granted review of *Lockheed II*. On review, the court will rule on whether or not Evidence Code Sections 801(b) and 803 require trial courts to weed out all expert testimony for reliability before reaching the jury or if the courts may only apply the *Kelly-Frye* test as to "new scientific" methods.

Should the California Supreme Court decide to require preliminary screening, it may choose to look to *Daubert* as a model for assessing if the testimony is based on sufficient facts, reliable principles, and supported by applying the principles and methods to the facts. California has historically allowed the trier of fact to be the final arbiter of the weight given to expert testimony, but the court must now realize that this is not incongruous with the role of the trial judge in excluding testimony that lacks proper foundation. In fact, the preclusion of unreliable expert testimony allows the trier of fact the opportunity, free of misleading "junk science," to most accurately evaluate each side's evidence and decide what, if any, credence to give it.

212. *Id.* at 831-32.

213. *Lockheed I*, 10 Cal. Rptr. 3d at 38.

214. *See id.* at 36.

215. *Id.* at 37-38.

216. *Lockheed II*, 23 Cal. Rptr. 3d 762, 767-70 (Ct. App. 2005).

V. SHOULD THE EFFECT OF JOINT LIABILITY BE EXPLAINED TO JURIES?

Prior to 1986, both economic and non-economic damages in California were subject to joint liability: Proposition 51, which was adopted by California voters in 1986,²¹⁷ was intended to help remedy the inequities of the “deep pocket rule” by providing for “fair share,” or several, liability for non-economic damages.²¹⁸

Proposition 51, however, did not alter the fact that plaintiff may recover from any solvent defendant the total amount of any economic damages.²¹⁹ The plaintiff can select which and how many of the alleged tortfeasors to name as defendants. Whatever unfortunate defendant remains in the case at trial may bear the cost of the plaintiff’s entire economic loss, regardless of how little the defendant may have contributed to the loss. A minimally at-fault defendant may still be saddled with a large damage award mainly attributable to the fault of others.

Asbestos cases typically involve multiple defendants—frequently more than twenty and often more than thirty. By the time these cases reach a courtroom for trial, however, usually only one or, at most, a couple of defendants remain. At the conclusion of the trial, when juries are asked to determine the percentage liability to assign to the particular defendant(s) before them, a compelling case can be made that the jury should understand the consequences of its decision under the law of joint liability. If jurors knew that the impact of even a 1% finding of liability might be enough to make a 1% defendant liable for the full amount of economic damage, they may reach a different, and arguably correct, outcome for admittedly remote and tangential defendants.²²⁰

Thus, for example, a jury might find in a particular case that the plaintiff has suffered \$1 million in economic damages, but conclude that a particular defendant should bear only 5% of the proportionate liability for that claim. The jury no doubt would believe that its 5% finding of liability would translate into a \$50,000 assessment of economic damages against that defendant. Unfortunately, given the current state of California law, that is not necessarily the case. If there are no other defendants—or at least no other solvent defendants—the 5% defendant may end up having to pay the entire \$1 million judgment for economic damages.

217. See CAL. CIV. CODE § 1431.2 (West 2004).

218. See *id.*

219. See *id.*; *Buttram v. Owens-Corning Fiberglas Corp.*, 941 P.2d 71, 75 (Cal. 1997).

220. See Steven B. Hantler et al., *Moving Toward the Fully Informed Civil Jury*, 3 GEO. L.J. & PUB. POL’Y 21 (2005).

There is good reason to believe that jurors are, at the very least, distressed, and frequently appalled to make a determination similar to the example above and then learn the true economic consequences of their decision after they have been discharged. The non-economic damages assessed against a defendant may reflect the jury's evaluation of proportionate liability, but the economic damages award would not.

Juries should be informed about the impact of joint liability. This is not a novel proposition. For example in *Kaeo v. Davis*,²²¹ the Hawaii Supreme Court noted in an automobile accident case that,

We believe the trial court, if requested and when appropriate should inform the jury of the possible legal consequence of a verdict apportioning negligence among joint tortfeasors. An explanation of the operation of the doctrine of joint and several liability in that situation would be consistent with our directive in HRCP 49(a) that "[t]he court shall give to the jury such explanation and instruction concerning the matter . . . submitted as may be necessary to enable the jury to make its findings upon each issue."

More recently, in an asbestos case in Alameda County, *Horr v. Allied Packing*,²²² Judge Stephen Allen Dombrink provided the jury with an explanation of how economic damages are applied in a joint and several manner in contrast to non-economic damages:

The question comes up why economic damages are treated differently from economic damages. You may wonder why do we ask you to separate the two. Each defendant that is found liable will be held responsible for the total amount of the economic damages that the jury awards. All right. But as to non-economic damages, each defendant is responsible only for the percentage of the total that the jury finds is justified by the evidence. So that's the difference, and that's why we need to have the amounts separately.²²³

221. 719 P.2d 387, 396 (Haw. 1986). See also *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61, 64-65 (Idaho 1987); *DeCelles v. State*, 795 P.2d 419 (Mont. 1990); *Reese v. Werts Corp.*, 379 N.W.2d 1 (Iowa 1985); *Coryell v. Town of Pinedale*, 745 P.2d 883, 884-86 (Wyo. 1987).

222. No. RG-03-104401 (Alameda County Sup. Ct., July 1, 2003). See also *Mikul v. Bondex International Case No. BC332247* (Los Angeles County Sup. Ct., November 22, 2006).

If you find a Defendant liable for any percentage of fault, that defendant will be responsible to pay for its proportionate share of any noneconomic damages you may award. With respect to economic damages, that defendant will be responsible for the full amount of those damages, less a proportionate share of any settlements that may have been made by other Defendants.

Id.

223. *Mikul v. Bondex International Case No. BC332247* (Los Angeles County Sup. Ct.,

If jurors are not advised of the legal consequences of joint and several liability for economic damages, a compelling argument can be made that the legal outcome of a given verdict is flatly at odds with their intent. Given the general trend towards giving the contemporary jury a stronger understanding of its decisions, the legal principles attendant to those decisions, and the legal effect of their determinations and conclusions, the time has come for all California courts to advise jurors regarding the operation of joint liability for economic damages.²²⁴

VI. SETTLEMENT CREDITS: AVOIDING MANIPULATION OF SETTLEMENTS TO REDUCE THE AMOUNT OF SET-OFFS FOR REMAINING DEFENDANTS

California Code of Civil Procedure § 877 provides that when a plaintiff, acting in good faith, gives a release or dismissal to one of two or more alleged joint tortfeasors, that release operates to reduce the claims against the remaining alleged joint tortfeasors in the amount stipulated by the release or the amount of the consideration paid for it, whichever is greater.²²⁵ In cases applying Proposition 51, however, the settlement set-off is applied only against the plaintiff's economic damages.²²⁶

For example in *Hoeffler v. Rockwell Automation, Inc.*,²²⁷ the jury found that 5% of plaintiff's harm was caused by defendant Rockwell, 3% by the Navy and 6% by "all others."²²⁸ The jury had awarded \$2,999,543 to the plaintiff, which was comprised of \$599,543 in economic damages and \$2,400,000 in non-economic damages.²²⁹ Rockwell had a judgment entered against it for \$720,000 which represented the \$600,000 in economic damages plus \$120,000 in non-economic damages (5% of the \$2,400,000).²³⁰ Thus, although Rockwell was only found to be minimally liable, the company was actually responsible for almost one-quarter of the total verdict. In order to offset this obvious inequity, defendants can look to set-offs from prior settlements to reduce the economic damages.

November 22, 2006); Transcript of Proceedings at 123, Feb. 15, 2006.

224. Another approach would be for the California courts to abolish joint liability in asbestos cases. See Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203 (2003).

225. CAL CIV. PROC. CODE § 877 (West 2004).

226. *Greathouse v. Amcord, Inc.*, 41 Cal. Rptr. 2d 561, 564 (Ct. App. 1995).

227. 2006 WL 185479 *1 (S.F. Super. Ct. Jan. 26, 2006) (unpublished).

228. *Id.* at *3.

229. *See id.*

230. *See id.*

Set-offs are calculated using the formulas set forth in *Greathouse v. Amcord, Inc.*²³¹ and *Espinoza v. Machonga*.²³² In *Greathouse*, plaintiffs settled with nineteen of twenty defendants for a total of \$284,000.²³³ The jury awarded plaintiff \$289,174.10 in economic damages and \$100,000 in non-economic damages with the jury assigning 2% of the fault to the remaining defendant Amcord, and another 2% of liability was assessed to the plaintiff himself.²³⁴ As a result, 74.3% of the total verdict went to economic damages and 25.7% to non-economic damages. In a post-trial motion, Riverside was granted a set-off of only \$56,800, leaving it responsible for \$232,374.10 of the economic damages.²³⁵ This paltry set-off represented less than 20% of the actual settlements received and was based solely on the allocations provided in the plaintiff's settlement agreements between economic and non-economic damages.²³⁶ The *Greathouse* court held that Amcord's share of economic damages was actually only \$72,364.42 (a savings of \$160,009.98),²³⁷ which was calculated by reducing the total economic damages of \$289,174.10 by the percentage fault attributed to the plaintiff, then this remaining total is multiplied by the percentage of economic liability found by the jury, namely 74.3%. This relatively straightforward calculus, however, can be manipulated by plaintiffs' attorneys to reduce available set-offs.

In order to maximize their recovery against a non-settling defendant, plaintiffs shift or allocate settlement payments to reduce the amount of set-offs for remaining defendants by: (1) arguing that the percentages apportioned in the settling defendants' releases control the allocation of set-offs; (2) excluding settlement monies apportioned to the prospective wrongful death action; (3) including a loss of consortium award in the total damages calculation used to determine the ratio of economic to non-economic damages; (4) failing to disclose all settlements; and (5) undervaluing the settlement value for a case that was resolved through a "matrix" agreement, sliding scale, or group settlement for multiple cases.

A. Using Releases to Control Settlement Apportionment

Plaintiffs frequently maintain that the apportionments found within their settlement and release agreements should control when calculating set-offs for non-settling defendants. These releases recite the terms of the settlement and frequently provide an apportionment of the settlement between the

231. 41 Cal. Rptr. 2d 561 (Ct. App. 1995).

232. 11 Cal. Rptr. 2d 498 (Ct. App. 1992).

233. *Greathouse*, 41 Cal. Rptr. 2d at 562.

234. *See id.*

235. *See id.*

236. *See id.* at 564.

237. *See id.* at 566 n.3.

personal injury action, loss of consortium claim, and any future wrongful death action.

For example, a plaintiff may assert an allocation of 60/20/20 (meaning 60% of the settlement is attributed to the personal injury action, 20% to loss of consortium, and 20% to future wrongful death claims), which would *automatically* diminish the available set-offs by 40%. This 40% represents the monies allocated to the loss of consortium claim and the heirs' potential wrongful death suit. Plaintiffs' counsel might allocate as much as possible to the loss of consortium and a future wrongful death claim, because any monies so allocated cannot be used as a set-off.

California courts, however, do not allow plaintiffs to choose their own apportionment of percentages. When calculating the defendant's credit for pretrial settlements, the court must use the jury's allocation rather than that specified in prior settlement agreements.²³⁸ The courts have reasoned that allocating settlements "in the manner suggested by plaintiffs would 'subvert the findings of the trier of fact.'"²³⁹

Where the jury has established a breakdown after reasoned review of the evidence, its apportionment cannot be ignored in favor of plaintiff's determination.²⁴⁰ In *Wilson v. John Crane, Inc.*,²⁴¹ the court of appeals recognized that the plaintiffs have "an interest in allocating as little as possible" of the settlements, because the smaller the allocation, "the less the non-settling defendants can claim as a credit."²⁴² *Wilson* emphasized the importance of evaluating an allocation for reasonableness. Thus, when a defendant has gone to trial, and been subject to a finding of liability, it must be sure the jury's allocation of liability is used to determine settlement credits, as opposed to what may be a self-serving allocation set forth in the plaintiff's release agreements with settling defendants.²⁴³

B. Allocating Settlement Monies to Prospective Wrongful Death Actions

In an effort to reduce set-offs, plaintiffs' counsel sometimes argue that funds allocated to future wrongful death claims should not be included in the calculation of settlement credits. Traditionally, reducing set-offs for monies

238. See *Jones v. John Crane, Inc.*, 35 Cal. Rptr. 3d 144 (Ct. App. 2005).

239. See *id.* at 158.

240. See *id.* Allocations of settlement credits are not based on the settlement allocations found in releases, unless the releases have been approved following an application for good-faith settlement.

241. 97 Cal. Rptr. 2d 240 (Ct. App. 2000).

242. See *id.* at 254.

243. See *id.* ("[T]he allocation of the settlement proceeds according to the proportions recited in a pretrial settlement agreement is inherently suspect.")

allocated to wrongful death damages has been denied. The court of appeal, however, has carved out an exception to that general principle, stating that “if the present judgment included an award for wrongful death damages, we would have no difficulty in holding that the trial court erred by excluding that portion of the settlements from its calculation of the credit against the judgment.”²⁴⁴ In short, the court has allowed for a limited exception where the jury has heard evidence regarding the number of heirs and their relationship to the prospective decedent and has apportioned part of the verdict to future wrongful death claims accordingly.

Where a jury does not make any finding as to the value of a potential loss of consortium claim, a trial court can refuse to allocate any portion of the prior settlements to a potential wrongful death action.²⁴⁵ Trial courts have wide discretion in allocating prior settlement recoveries when they have not been adjudicated at trial.²⁴⁶

In fact, any apportionment of the prior settlements to the prospective wrongful death claim cannot exceed a reasonable assessment of its “ballpark” value.²⁴⁷ The court must take into consideration whether the plaintiff has a spouse or heirs, the age and independence of the heirs, evidence of the closeness of the family, and the presence or absence of any substantial economic damages available in the prospective wrongful death case. A court might determine that the value of any wrongful death case will be greatly increased by the amount of economic damages available based upon the age of the decedent at death and any projected lost earning capacity. The court must take into account the fact that when a plaintiff elects to receive his economic damages in the underlying personal injury action, any subsequent claim for wrongful death will rarely, if ever, result in a verdict exceeding the personal injury recovery. While a potential wrongful death claim may have some value, the value typically cannot reasonably and fairly be estimated as greater than the value of the present personal injury claim, and should be estimated at far less than the value of the present case. Thus, the requirement that the prospective wrongful death claim not exceed its ballpark value serves as another tool to protect set-offs post-judgment by ensuring that the value of such a claim is not artificially inflated.

C. Inclusion of Loss of Consortium Award in Total Damages

Any loss of consortium damages/settlements are to be excluded from calculation of settlement credits.²⁴⁸ According to the court of appeal, all

244. *Id.* at 252 n.15.

245. *Jones*, 35 Cal. Rptr. 3d at 156.

246. *See Hackett v. John Crane, Inc.*, 120 Cal. Rptr. 2d 662, 667 (Ct. App. 2002).

247. *See Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 698 P.2d 159, 163 (Cal. 1985).

248. *Espinoza v. Machonda*, 11 Cal. Rptr. 2d 498, 503-04 (Ct. App. 1992).

damages for loss of consortium must be excluded entirely from the *Espinoza* calculus.²⁴⁹ This means that the loss of consortium damages must be subtracted from the total damages awarded prior to calculating set-offs. Dividing the resulting number by the total damages yields a percentage. This percentage is the percentage of settlement monies that can be applied as set-offs.

It is a well-settled principle that loss of consortium damages cannot be included when calculating total damages, but plaintiffs may, wittingly or unwittingly, include this amount in their calculations.²⁵⁰ The effect of including loss of consortium awards in total damages prior to determining the ratio of economic to total damages is a potential windfall for the plaintiffs. This is best illustrated by an example: If a jury entered a verdict of \$3 million against a defendant made up of \$1 million in economic damages and \$2 million in non-economic damages (\$500,000 of which represents loss of consortium), in order to properly calculate settlement credits, the plaintiffs must subtract \$500,000 from the judgment of \$2 million. Once the loss of consortium damages are removed, the total damages of \$1.5 million is divided by the economic damages of \$1 million. This would result in a percentage of 66.6%. If the \$500,000 were not subtracted, the resulting percentage would only be 50%. These percentages are significant because they represent the percentage of settlement monies that may be allocated to the economic damages. Any defendant would certainly prefer to allocate 66% of the settlement monies, as opposed to 50%, as it could be the difference between hundreds of thousands, if not millions, of dollars. Steps need to be taken to ensure that loss of consortium damages are subtracted prior to calculating the ratio of economic to non-economic damages.

D. Failure to Disclose All Settlements

At the time set-offs are determined, a defendant may discover that plaintiffs have “agreed to agree” on settlement with various defendants or have entered into “informal” settlements with non-parties and bankrupt companies who were never named as defendants and who may be, in fact, wholly unknown to the non-settling defendant. Non-disclosure of settlements is perhaps the most insidious way to reduce set-offs. Unearthing all potential settlements is crucial to obtaining maximum set-offs.

249. See *Wilson*, 97 Cal. Rptr. 2d at 253.

250. See *id.*

Each defendant has a “palpable financial interest” in this information, a fact recognized by the court of appeal:

Each prejudgment settlement affects the ultimate expense borne by each judgment debtor. Absent a prejudgment settlement, all defendants found liable would share pro rata, that is, equally. By settling before verdict, one defendant may acquit himself by contributing something less than his equal share, leaving the other defendants saddled with the entire judgment less *pro tanto* credit for the settlement. The cheaper the settlement, the smaller the *pro tanto* credit. Thus, a non-negotiating defendant has a palpable financial interest in the amount at which the negotiating defendant settles.²⁵¹

Thus, to ensure that maximum set-offs are obtained, defendants must vigorously pursue discovery of all settlements, both those which have been finalized and those which remain inchoate, such as the “agreement to agree” on settlement variety.

E. Understating the Settlement Value of a Case by Using Matrices, Sliding Scales or Group Settlements

Another way to shift monies and reduce set-offs is through the use of matrices, sliding scale recovery agreements, or group settlements between frequently sued defendants and plaintiffs’ counsel. These “matrices,” which allow some defendants to standardize, and in some cases lower, settlement values for cases, could be harmful to non-settling defendants to the extent the “matrix value” does not reflect a fair and reasonable evaluation of the liability in each individual case. Matrices set a dollar value for a type of case, in many cases irrespective of the level of culpability of the particular defendant.

Sliding scale recovery agreements, whereby the recovery against a settling tortfeasor is dependent upon the amount that the plaintiff recovers from non-settling defendants, is equally damaging. A settling defendant’s portion may be substantially lowered as other defendants are pursued and charged with “picking up the slack.” Sliding scale recovery agreements may be admissible at trial to the extent necessary to inform the jury of the biased testimony of the plaintiff and the settling parties’ witnesses.²⁵² This also could be relevant where an expert for a settling defendant testifies on behalf of plaintiffs at trial.

Group settlements often involve one oft-sued defendant and many individual cases in which a “group settlement” is reached. It is left to the plaintiff’s counsel to apportion the funds among their clients.

251. *River Garden Farms, Inc. v. Super. Ct.*, 103 Cal. Rptr. 2d 156, 167 (Ct. App. 1972).

252. *See* CAL. CIV. PROC. CODE § 877.5 (West 2004).

In the cases of matrices, sliding scale or group settlements, a non-settling defendant must stress to the court that an analysis of the releases is necessary to determine if the figures accurately reflect the bargained-for agreement between plaintiffs and the settling party, or if the figures were arrived at by plaintiffs' counsel alone. This step is necessary to protect a non-settling defendant from the possibility of collusion or simply an under-valuation of a given case.²⁵³

A defendant's recourse against such potential abuse is built into the California Code of Civil Procedure. California courts require that prior settlements employ a threshold test of "good faith" in making their determination of the proper allocation between a personal injury case and a prospective wrongful death case not yet filed.²⁵⁴ The party seeking to rely on the allocation "must explain to the court and to all other parties, by declaration or other written form, the evidentiary basis for any allocations and valuations made, and must demonstrate that the allocation was reached in a sufficiently adversarial manner to justify the presumption that a reasonable valuation was reached."²⁵⁵

Paying close attention to calculation of settlement credits can help those defendants who elect to go to trial to achieve substantial set-offs should they suffer the misfortune of an adverse outcome. Indeed, it may well make sense to provide set-off information to remaining defendants *prior to trial* so that the parties will be in a better position to assess whether trial makes sense. This approach also would save judicial resources.

VII. CONCLUSION

Absent a state or federal legislative solution that addresses the burden on the judicial system created by asbestos cases, the public, the parties to asbestos litigation and the judicial system would be well served if California courts were to focus their attention on issues discussed in this Article and other creative approaches so that California asbestos claims can be handled in a more sensible and just manner.

253. See *Abbott Ford, Inc. v. Super. Ct.*, 741 P.2d 124, 133 (Cal. 1987).

254. See *Erreca's v. Super. Ct.*, 24 Cal. Rptr. 2d 156, 167 (Ct. App. 1993). In *Knox v. County of Los Angeles*, 167 Cal. Rptr. 463, 470 (Ct. App. 1980), the court pointed out that "[t]he statutory requirement of good faith extends not only to the amount of the overall settlement but as well to any allocation which operates to exclude any portion of the settlement from the set off."

255. See *Erreca's*, 24 Cal. Rptr. 2d at 170.

