

**The Changing World of Causation –
Recent Decisions and Trends
Affecting Exposure and Cause**

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The Changing World of Causation

The trend in recent asbestos litigation is to require a plaintiff to prove that exposure to a particular product is sufficient to be a substantial factor in causing his injury. It may seem odd to consider this a “new” trend when it is actually old law. How did exposure proof and specific causation lose its way? This paper addresses that question as well as looks at causation standards in certain key states.

I. What Happened to Causation?

While the law establishing the criteria for causation has not changed significantly in the last few decades, its application has. In the late 1960s the *Borel v. Fibreboard* case (493 F2d 1076 (5th Cir. 1973) cert. denied, 419 U.S. 869 (1974)) applied strict products liability to manufacturers of asbestos-containing materials. In such cases, the evidence required to establish exposure to a product was often circumstantial, but was not difficult to elicit because the early plaintiffs generally worked directly with traditional insulation materials. The extent and specificity of that evidence varied from jurisdiction to jurisdiction. Restatement 2d of Torts, §431 set out that to be a cause of an injury, an actor’s conduct must be a substantial factor in bringing about an injury. But what defined “substantial factor” remained murky.

Once strict liability was applied to asbestos cases, the number of cases grew from a few to hundreds in a limited number of states with Texas, the home of *Borel*, one of the favored jurisdictions. The early defendants were primarily manufacturers of insulation materials, and they defended each case vigorously on the facts specific to each plaintiff. *Borel* made the defense more challenging and some large verdicts began to accumulate. In 1982, the insulation industry and the participants involved in the growing litigation were stunned by the bankruptcy filing of Johns-Manville Corporation. In reaction to the bankruptcy of this industry leader, many remaining defendants tried to resolve the increasing number of lawsuits by entering into broad settlement agreements which required only general exposure evidence to qualify for payment.

Instead of solving the litigation problem, this practice simply made filing larger numbers of cases more attractive. Hundreds of cases pending in the early 1980s increased to thousands by the middle of that decade. The dramatic increase in cases also encouraged judicial activism to attempt to move the cases through the legal system. Courts implemented creative methods such as offensive use of collateral estoppel, mass consolidations and class actions, arbitrations, bifurcations, and summary jury trials, to name a few, to encourage settlements.

Lost in these attempts to resolve large numbers of cases were the requirements to prove: impairment in non-malignancy cases; general causation in smoking lung cancer and “other” cancer cases; and the specific exposure of an

individual plaintiff to individual defendant's products. While many jurisdictions required proof that exposure to each product was a substantial factor in causing the disease, most case management schemes ignored the value of requiring individual proof and looked at the "big picture" which involved accelerating dockets with the idea that exposure in large groups of cases would balance out. If a case or group of cases were tried, many courts allowed proof of minimal amounts of exposure to submit a case to a jury and allowed testimony from experts to the effect that "every exposure" however slight contributed to the cumulative dose, and therefore was harmful.

Many courts grew irritated with a defendant that demanded its right to a jury trial and made the courtroom a very uncomfortable place. Any given Monday could result in as many as 100 cases being set for trial in a variety of "rocket dockets" throughout the country. The faster cases moved, the more cases were filed. Forum shopping was rampant and saw filings in states such as Texas, Mississippi, West Virginia, California and others increase dramatically. The later 1980s and 1990s saw bankruptcies of many traditional product manufacturers and the continued explosion of claims by "bystanders." Plaintiff's counsel broadened the search for claimants and defendants to the point that by the end of the century, the litigants bore little resemblance to the original parties to the litigation. Defendants were much more peripheral, often having little to do with traditional insulation materials, and plaintiffs seldom had performed hands on work with insulation materials. The relaxed standards of proof of causation added to the influx of peripheral defendants, many of whose products were likely to produce low to non-existent exposures to asbestos fibers.

The litigation moved from a relatively small number of insulators and related craftsmen to bystanders to household members then to huge numbers of individuals who had little or at best questionable exposure to non-traditional asbestos-containing materials such as drywall, gaskets and other encapsulated materials. The great increase in these filings resulted in greater scrutiny of unimpaired non-malignancy cases. Many initiatives throughout the country converged to make the screening and filing of these cases less attractive.

After the turn of the century, federal and state legislation was considered as an attempt to move asbestos cases out of the traditional court settings and into a more orderly claims process attempting to move impaired or malignancy cases to the front of the line. Screenings sponsored by attorneys, unions and others had long existed, but were becoming increasingly suspect. Several states such as Texas, and later Mississippi and Illinois, passed or enforced legislation to address filings by out of state plaintiffs. States such as Texas, Georgia, and Florida developed and passed legislation establishing mandated medical criteria that especially addressed non-malignancy cases. A medical criteria bill in Texas worked in conjunction with a newly created state asbestos MDL to provide consistent rulings for a state-wide litigation. It is likely that other states will follow. Federal legislation has come very close to establishing a comprehensive

approach to resolving the asbestos problem, but to date has not had sufficient congressional support to become law. State legislation has brought focus to cancer and impaired cases and away from the large number of unimpaired non-malignancy cases. As the litigation moved again from the general to the specific, the focus moved to the facts of specific cases and the legal requirements for proof.

These recent trends have resulted in fewer non-malignancy cases. With a greater focus on individual claims, courts are re-examining the issue of causation. “General” causation evidence no longer suffices to establish that a particular plaintiff’s disease can be caused by exposure to a particular product or products. “Specific” causation evidence is now required to prove that exposure to a specific product was a substantial factor in causing this plaintiff’s disease. How much exposure is enough exposure? What evidence is required to be sufficient to support “substantial factor” causation? How can these requirements be proven? These are the new questions being asked.

II. Substantial Factor Causation – Texas style

A. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex.2007), *reh’g denied* (Oct. 12, 2007)

The Texas Supreme Court recently took a giant step forward in putting causation back in its proper place in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex.2007), *reh’g denied* (Oct. 12, 2007). *Borg-Warner* changed the law that had been followed in Texas the past two decades by overruling a line of Courts of Appeals cases dealing with asbestos personal injury matters and holding that the law in Texas had long been the “substantial factors” analysis outlined in *Union Pump Co. v. Allbritton*, 898 S.W.2d 773(Tex.1995). The court determined that much of the exposure proof and causation testimony in asbestos cases was speculative, imprecise, and insufficient to support a verdict. This opinion attempted to reestablish the standard for causation. *Borg-Warner* actually bolstered the widely-cited causation standard in asbestos cases throughout the country, the “frequency, regularity and proximity” test established in *Lohrmann v. Pittsburgh Corning Corp.* *Id.* at p. 769 (citing *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986)); *see also Slaughter v. S. Talc Co.*, 949 F.2d 167, 171 (5th Cir.1991) (noting that *Lohrmann* is “[t]he most frequently used test for causation in asbestos cases” and applying *Lohrmann* to an asbestos claim governed by Texas law). However, the Texas court concluded that a “frequency, regularity and proximity” analysis, while useful, did not “capture the emphasis our jurisprudence has placed on causation as an essential predicate to liability.” *Borg-Warner Corp.* at p. 770.

The *Borg-Warner* court in its opinion did not restrict its analysis to the “frequency, regularity and proximity” factors, but it also expressly agreed that the Restatement (Second) of Torts, Section 431, requires exposure to asbestos to be a “substantial factor” in causing the disease complained of. *Id.* at p. 770 (citing

Lohrmann v. Pittsburg Corning Corp., 782 F.2d 1156 (4th Cir. 1986). Restatement (Second) of Torts, section 431 and its “substantial factor test” has long been a part of the court’s causation analysis. See *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); see also *Union Pump Co. v. Albritton*, 898 S.W.2d 773, 775-777 (Tex. 1995). In other contexts, the court recognized that “causation in fact,” which includes the requirement “that the defendant’s conduct or product be a substantial factor in bringing about the plaintiff’s injuries” is a part of both proximate cause and of producing cause. *Union Pump*, 898 S.W.2d at 775. And, it has written that:

“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 the so-called ‘philosophic sense,’ which includes every one of the great number of events without which any happening would not have occurred.”

Lear Siegler, 819 S.W.2d at 472 (quoting Restatement (Second) of Torts § 431).

So how does the “substantial factor” requirement fit into the realm of toxic torts? The Texas Supreme Court declined to establish a “bright line” standard. Instead, it stated that while substantial-factor causation “need not be reduced to mathematical precision,” given the prevalence of asbestos in many industrial work environments and given the dose-related nature of most asbestos-related disease, “[d]efendant-specific evidence relating to the approximate dose to which plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease will suffice.” *Borg-Warner*, 232 S.W.3d at 773. The *Borg-Warner* case raised several causation issues. Was Flores exposed to sufficient asbestos to cause his disease? Were friction products the type of material to emit fibers enough to cause disease? Would Chrysotile asbestos cause the disease? (A question left for another day).

One of the experts in the *Borg-Warner* case admitted that he had not done any research concerning the Borg-Warner products in question and he did not “have any more detailed knowledge about the company.” *Id.* However, he also opined that “brake mechanics can be exposed [to asbestos] by grinding of brake pads or brake shoes and by-in the case brake lining blowing out the accumulated dust in the brake-in the brake housing in doing a brake servicing/brake repair job.” He further testified that, though the publication of articles reporting the development of asbestos-related disease by mechanics and the contents of industry publications, the “hazards to brake mechanics were effectively accepted” by the makers of asbestos products. *Id.*

Borg-Warner petitioned the Texas Supreme Court for review after the Corpus Christi Court of Appeals affirmed the trial court’s judgment. The record

on appeal did not contain evidence of how many asbestos fibers were inhaled by plaintiff, what percentage of that unknown amount originated in Borg-Warner product, the asbestos content of the other brake products and the percentage of that unknown amount came from grinding new pads as opposed to blowing out old ones. Nor did the record contain any epidemiological evidence or studies that brake mechanics “faced at least a doubled risk of asbestosis.” *Id.* at 772 (citing *Merrell Dow Pharm., Inc., v. Havner*, 953 SW2d 706, 720-21 (Tex.1997)).

In addition to *Lear Siegler, Inc., v. Perez*, 819 S.W.2d 470, 471 (Tex.1991) and *Union Pump Co. V. Albritton*, 898 S.W.2d 773, 775-777 (Tex.1995), the court looked to the California Supreme Court’s decision in *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (Cal, 1997) to attempt to clarify the meaning of “substantial” in “substantial factor.” Like the *Borg-Warner* court, the *Rutherford* court acknowledged that the term “substantial factor” did not have a specific judicial definition, especially when considered in light of the long latency periods associated with asbestos-related diseases and the scientific difficulty of proving direct causation based on the unknowable path that any given asbestos fiber might actually take. *Id.* at 1214, 1218. Nevertheless, the *Rutherford* court held that such causation can be proved in cases of asbestos-related cancer if some “threshold (or ‘dose’) exposure to the defendant’s products can be established. *Id.* at 1219.

As stated above, the “substantial factor” test adopted by the *Borg-Warner* court need not be reduced to “mathematical precision.” The court specifically rejected the reasoning of the underlying court of appeals that “[i]n the context of asbestos-related claims, if there is sufficient evidence that the defendant supplied *any* of the asbestos to which the plaintiff was exposed, then the plaintiff has met his burden of proof.” *Id.* (citing 153 S.W.3d at 213) (*emphasis in original*). The Court specifically rejected speculative testimony such as “some asbestos,” “any exposure,” “a lot of exposure,” “everyone is exposed,” and “asbestos is in the air” as support for required dose evidence. It further held that absent evidence of dose, the jury cannot evaluate the quantity of respirable asbestos the plaintiff might have been exposed to. *Id.* at 774. The court also acknowledged that the required proof of causation may differ depending upon the product at issue: “[i]n some products, the asbestos is embedded and fibers are not likely to become loose or airborne, [while] [i]n other products, the asbestos is friable.” *Id.* at 773 (citing *In re Ethyl Corp.*, 975 S.W.2d 606, 617(Tex.1998)); *see also Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129,1145 (5th Cir.1985) (noting that “all asbestos products cannot be lumped together in determining their dangerousness”). When it applied the “substantial factor” test that it had just adapted to the negligence and strict liability causes of action asserted by Flores, the court found that both causes of action were lacking proof of substantial factor causation. As such, the judgment of the court of appeals was reversed and judgment rendered for Borg-Warner.

B. *Georgia-Pacific Corp. v. Fred Stephens and Betty Stephens*, No. 01-05-00132-CV, 2007 WL 2343882 (Tex.App.Houston[1st Dist.] Aug. 13, 2007, no pet.h)

Shortly after the *Borg-Warner* opinion was released, the Court of Appeals of Texas, First District, issued an opinion that attempted to apply the principles set out in *Borg-Warner*. *Georgia-Pacific Corp. v. Fred Stephens and Betty Stephens*, No. 01-05-00132-CV, 2007 WL 2343882 (Tex.App.Houston[1st Dist.] Aug. 13, 2007, no pet.h), applied the “substantial factor” test to the claims of plaintiff with a mesothelioma diagnosis. *Borg-Warner* was an asbestosis case and required “a heavy exposure to asbestos...in the range of 25 to 100 fibers per cc year.” at *Id.* *5. Fred Stephens alleged exposure to asbestos and asbestos-containing products as a result of over 30 years spent in the United States Navy (1944 -1946), working on the Grand Coulee Dam (1946 – 1954), and working as commercial painter, both for a contractor and himself (1954 -1977.) As a result of his work as a painter, Stephens worked around others who mixed, sanded and applied joint compounds. He would sweep up the dust from the walls and floors after the sanding was done, and he occasionally mixed and sanded joint compounds himself. *Id.* at *13.

At the trial, the jury found Georgia-Pacific and five of the ten settling defendants liable for both marketing defects and negligence. Georgia-Pacific appealed asserting that the evidence at trial was legally insufficient to support a finding of specific causation. Georgia-Pacific stated that Stephens did not prove which asbestos-containing product caused the mesothelioma or contributed to Mr. Stephens’ increased risk of the disease. Instead, they relied on expert testimony that “any exposure” to asbestos contributes to mesothelioma. Specifically, GP challenged plaintiffs’ expert evidence under *Havner* criteria and the “substantial factor” requirements under Texas law.

The court applied what it refers to as a *Lohrmann/Havner* substantial-factor causation standard, citing *Borg-Warner, Corp. Id.* at *4-5. The court considered both the lay and the expert testimony in the case and found it to be lacking. The court reiterated that “a fundamental principle of traditional products liability law is that the plaintiff must prove that the defendant supplied the product which caused the injury.” *Id.* at *4 (citing *Gaulding v. Celotex Corp.*, 772 SW2d 66, 68 (Tex.1989)). While *Gaulding* had correctly expressed the law of causation in asbestos cases, several Courts of Appeals in Texas had been able to distinguish it. In *Celotex Corp. v. Tate*, 797 SW2d 197 (Tex.App.Corporus Christi 1990, writ dism’d by agr) the Court determined that “evidence of any exposure to a defendant’s product, no matter the amount was legally sufficient to support a causation finding.” Texas declined to adopt the *Lohrmann* standard, but used its analysis to find evidence of causation in *Keene Corporation v. Gardner*, 837 SW2d 224, 227 (Tex.App. Dallas 1992, writ denied). See *Click v. Owens-Corning Fiberglas Corp.*, 899 SW2d 376 (Tex.App. Houston [14th District] 1995, no writ).

Borg-Warner, and subsequently, *Stephens*, clarified the standard for the type of exposure required to be a substantial “factor.” The *Stephens* court recognized what many other courts had struggled with and that was to strike an appropriate balance between competing concerns – the difficulty of plaintiffs to prove exposures that occurred many years before the disease manifests itself and the defendants right to due process. *See Havner*, 953 S.W.2d at 718.

The Texas Supreme Court in *Borg-Warner* had adopted a *Lohrmann/Havner* causation standard with an emphasis on proof of dose. The *Stephens* court reiterated that for a plaintiff to prove specific causation by relying on epidemiological studies, he must show that the frequency and regularity of exposure is comparable to or greater than that of individuals within the studies. *Stephens*, 2007 WL 2343882 at *5. The Court held that without quantitative evidence of exposure and evidence of minimum dose necessary to cause mesothelioma, plaintiff’s evidence fails.

Because the Texas Asbestos MDL was formed in 2004 and one MDL judge was appointed to handle all pre-trial activities in all cases transferred to the MDL, the new standards for substantial factor causation had a very interested audience of one. The MDL judge, the Honorable Mark Davidson, had the challenge of immediately applying these standards to cases already moving through the MDL process toward trial. In many of these cases, much of the pre-trial discovery had been completed and motions for summary judgment had been filed. Since July, 2007, the Court has considered a number of motions for summary judgment on “Borg-Warner” issues. *See* letter opinion, Judge Mark Davidson, July 18, 2007, Cause No. 2004-3964, *In Re: Asbestos, et al.* The type of evidence, the specificity of testimony, and the opinions of experts have been the subject of long detailed hearings and thoughtful deliberation on the part of the court. A real difference in the Texas analysis of causation and that of other states appears to be that Texas had required a legal sufficiency test rather than a factual sufficiency one. The court becomes a gatekeeper, and the plaintiffs must satisfy the court of the sufficiency of the evidence to be able to proceed to the trier of fact.

IV. Other Significant Causation Opinions

A. *Lohrmann v. Pittsburgh Corning Corporation*

One of the most widely cited and applied standards for causation in asbestos cases has been the so-called “frequency, regularity and proximity” test articulated in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). In that opinion, the United States Court of Appeals, Fourth Circuit wrote that “[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.” *Id.* at 1162, 1163. In reaching this decision, the court

cites both *Robin Express Transfer, Inc. v. Canton R.R.*, 26 Md.App. 321, 338 .2d 335 (1975) and the *Restatement (Second) of Torts* for the proposition that a plaintiff must present evidence that would allow a jury to reasonably conclude that it is more likely than not that a defendant's conduct was a substantial factor in bringing about the harm. *Robin Express Transfer, Inc. v. Canton R.R.* at 343; *Restatement (Second) of Torts § 43* (1965).

The court focused on Comment (a) to Section 431 when stating what it meant by the word "substantial." That Comment provides:

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 a popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense" which included everyone of the great number of events without which any happening would not have occurred. *Restatement (Second) of Torts § 43, comment(a)* (1965).

As such, the court rejected the notion that a plaintiff has established causation simply by presenting any evidence that a company's asbestos-containing product was at a workplace while a plaintiff was also at that workplace.

B. Mississippi

Texas was by no means the first state to address the causation issue in the context of asbestos litigation. The Supreme Court of Mississippi considered causation issues in *Gorman-Rupp Company v. Bobby G. Hall, et al*, 908 So.2d 749 (Miss.2005) a case which arose out of alleged asbestos exposure which took place at International Paper's Natchez, Mississippi facility. The court adopted the *Lohrmann* test as the appropriate causation standard for asbestos cases, writing that "we find that the "frequency, regularity and proximity" test discussed herein is the correct test to be applied in asbestos litigation and is hereby adopted by this Court."

C. Illinois

The "frequency, regularity and proximity" test had been previously adopted by the Illinois Supreme Court as the causation standard for asbestos cases in that state. *Thacker v. UNR Industries, Inc.*, 151 Ill.2d 343, 359, 177 Ill.Dec.379, 603 N.E.2d 449, 457 (1992), dealt with the claims of a widow whose husband, a "pipe coverer" who worked for UNARCO at its Bloomington, IL plant, developed both lung cancer and asbestosis. He was a non-smoker. The court further held that once a plaintiff has met this standard as to a particular defendant's product, that product is presumed to be a proximate cause of the plaintiff's asbestos-related injury. *Nolan v. Weil-McLain*, 365 Ill.App.3d 963, 851

N.E.2d 281, 286 (2006) (citing *Thacker* 603 N.E.2d at 457). Once this occurs, Illinois then requires that the trier of fact “independently evaluate whether the exposure was a substantial factor” in causing plaintiff’s asbestos-related injury. *Nolan v. Weil-McLain*, 365 Ill.App.3d 963, 851 N.E.2d 281, 286 (2006) (citing *Spain v. Owens Corning Fiberglas Corp.*, 304 Ill.App3d 356, 237 Ill.Dec. 898, 710 N.E.2d 528 at 535(1999)).

D. South Carolina

South Carolina’s Supreme Court recently adopted the “frequency, regularity and proximity test” for determining if an exposure to asbestos-containing products is actionable in that state when the issue of causation was before it on appeal in *Henderson v. Allied Signal, Inc.*, 644 S.E.2d 724 (2007). That case arose from Mr. Henderson’s mesothelioma which was attributed to his exposure to asbestos-containing products while working at various industrial sites in South Carolina as boilermaker, sheet metal worker and pipefitter. Mere “presence in the vicinity of static asbestos is not exposure to asbestos.” *Henderson v. Allied Signal, Inc.*, 644 S.E.2d at 725.

E. Washington

Washington uses a somewhat different causation analysis. Under its jurisprudence, where a plaintiff in an asbestos case is not able to show that his or her injury was caused by one event or exposure, the substantial factor test for causation is used. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 31, 935 P.2d 684 (1997). This mechanism permits causation to be established by showing that a defendant’s product was a substantial factor in causing the injury, even though the injury would have occurred without the exposure to that product. *Id.* at 28. Asbestos plaintiffs are allowed to establish exposure to a particular defendant’s product(s) through circumstantial evidence.

The factors the trial courts must consider in determining if there is sufficient evidence for a jury to find that causation has been established were set out in *Lockwood v. AC&S, Inc.*, 109 Wn2d 235, 744 P.2d 605 (1987), an asbestosis case. Those factors are: 1. plaintiff’s proximity to the asbestos product when the exposure occurred; 2. the “expanse” of the job site where the asbestos fiber were supposedly released; 3. the amount of time that the plaintiff was exposed to the asbestos product; 4. what types of asbestos products the plaintiff was exposed to; 5. how the plaintiff handled and used those products; 6. expert testimony on the effects of inhalation of asbestos on human health generally and on the plaintiff’s health in particular; and 7. evidence of any other substances [such as tobacco smoke] that could have contributed to the plaintiff’s disease (and expert testimony as to the combined effect of exposure to all possible sources of the disease.) *Lockwood v. AC&S, Inc.*, 109 Wn2d at 248 – 249.

F. Maryland

Maryland's causation analysis focuses on the interrelationship between the use of a defendant's product at the work site and the plaintiff's activities at the work site. In *Eagle-PicherIndustries, Inc. v. Balbos*, 326 Md 179, 604 A.2d 445 (1992), a shipyard worker mesothelioma case, the Court of Appeals stated that, in this context, the factors to be evaluated in the causation analysis include: the nature of the product, the frequency of its use, the proximity, in distance and in time, of the plaintiff to the use of the product, the regularity of the exposure of that plaintiff to use of that product in addition to the evidence presented as to medical causation of the plaintiff's particular disease. *Eagle-PicherIndustries, Inc. v. Balbos*, 326 Md at 460.

G. Delaware

Delaware has put off to another day the decision as to the quantum of evidence required to make a *prima facie* case for proximate cause, but in *In Re Asbestos Litigation*, 911 A.2d 1176 (2006), her Superior Court did address other causation issues. This *In Re* proceeding was one in which Plaintiffs alleged that they had contracted, or would in the future contract, a variety of asbestos-related diseases as a result of exposure to various of Chrysler's brake and clutch products. Chrysler responded by filing *Daubert* challenges to Plaintiffs' causation experts. As pointed out above, Chrysler left for another day the issue of "specific causation" choosing instead to focus on Plaintiffs' "general causation" case.

In its analysis, the court points out that Delaware law recognizes that there may be more than one proximate cause of an injury. *Money v. Manville Corp. Asbestos Disease Comp. Trust Fund*, 596 A.2d 1372, 1375 (Del.1991)(citing *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del.1991)). To prevail, a plaintiff must show that there was a causal relationship between each of the various defendants' products and the injury complained of. That is, but for the plaintiff's exposure to the defendant's asbestos product, the plaintiff's injury would not have occurred. *Money v. Manville Corp. Asbestos Disease Comp. Trust Fund*, 596 A.2d at 1375. A plaintiff need not use epidemiological evidence to support his general causation case; other sufficiently reliable and relevant scientific evidence may be sufficient. *In Re Asbestos Litigation*, 911 A.2d at 1209.

H. Washington, DC

Claytor v. Owens-Corning Fiberglas Corp., 662 A.2d 1374 (D.C.1995) set out the standard for causation. *Claytor* required that the defendant's product was the cause of his or her injury. The D. C. Courts had also adopted the "substantial factor" test in the Restatement Second. This standard was addressed in *Weakley v. Burnham Corp.*, 871 A.2d 1167 (D.C.2005), an appeal from the granting of summary judgment in favor of several defendants. In citing *Claytor* and *Alliegro v. ACandS, Inc.*, 691 A2d 102 (D.C.1997), the Court reiterated the "same place at

the same time” standard. The Court did not adopt *Lohrmann* as the law of that jurisdiction. The Court felt that the *Lohrmann* standard was too exacting especially where there was expert testimony that “every” encounter with an asbestos product contributes significantly to the contracting of asbestosis. The Court held in balancing the competing interests and especially on summary judgment that the standard would be too onerous at the summary judgment stage of the case.

I. California

The causation issue is squarely addressed by the California Supreme Court in *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 941 P.2d 1203 (Cal.1997). *Rutherford* arose from the claims of the administrator of the estate of a sheet metal worker and engineering technician who worked at the Mare Island Naval Shipyard for over 40 years. Rutherford, a 30+ pack year cigarette smoker, developed lung cancer which was alleged to have been caused by exposure to asbestos and, later, brain cancer. The *Rutherford* court ruled that in cases involving asbestos-related latent injuries, “the plaintiff must first establish some threshold *exposure* to the defendant’s defective asbestos-containing products, *and* must further establish in reasonable medical probability that a particular exposure or series of exposures was a “legal cause” of his injury, i.e., a *substantial factor* in bringing about the injury. *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th at 982 (emphasis in original). In cases involving asbestos-related cancers, “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.” *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th at 982 (emphasis in original).

This “substantial factor” test has also been applied to claims involving asbestosis. In that context, relevant considerations include the frequency, regularity and proximity of exposure, as well as the type of asbestos product to which Plaintiff was exposed, the type of injury suffered and other potential causes or sources of the injury. *Lineaweaver v. Plant Insulation Co.*, 31 Cal.App.4th 1409, 37 Cal.Rptr.2d 902 (1995). More simply put a plaintiff in an asbestos case must establish that his exposure to a defendant’s product was, to a reasonable medical probability, a substantial factor in contributing to his asbestos-related disease. *Andrews v. Foster Wheeler LLC*, 138 Cal.App.4th 96, 102 (1 Dist., 2006).

J. Ohio

At one point, Ohio had specifically rejected the *Lohrmann* test for causation in asbestos cases. In *Horton v. Crane*, 653 N.E.2d 1196 (Ohio 1995), an asbestosis case, the Ohio Supreme Court wrote that by applying the “frequency, proximity and regularity” test the trial court “usurps the traditional role of the medical or scientific expert” and is required “to take judicial notice that an asbestos-containing product can cause injury only when someone works in close proximity to the product on a regular basis over an extended period of time.” *Id.* at 1200. The court further found the temporal aspect of the *Lohrmann* test to be “scientifically dubious” and the proximity aspect to be “scientifically disputed.” *Id.*

In 2004, the Ohio legislature passed asbestos legislation contrary to the *Horton* case and adopted the *Lohrmann* standard as a criteria for proof that exposure to a particular product was a substantial factor in causing the plaintiff’s injury or loss. Title XXIII. Ohio Revised Code Annotated, Chapter 2307. In doing so, Ohio recognized that this standard had been adopted by most jurisdictions and that this standard would provide more reliability for exposure testimony.

III. Utah refuses to apply *Borg-Warner* standard

At the time of this paper, Utah was the first state to be asked to adopt the *Borg-Warner* standard articulated by the Texas Supreme Court for causation, and has declined to do so. See *In Re: Asbestos Litigation, Memorandum Decision*, September 6, 2007. Prior to the *Sortor* decision, (filed March 13, 2006 in the District Court of the Third Judicial District, Salt Lake County, State of Utah), parties alleged that there was no causation standard in Utah for asbestos cases. In *Sortor*, defendants requested the Court adopt the *Lohrmann* standard of “regularity, frequency and proximity.” Defendants contended that *Lohrmann* or something similar had been overwhelmingly adopted in the majority of federal and state courts which had addressed the causation issue.

Plaintiffs in *Sortor* disagreed that the *Lohrmann* standard especially in mesothelioma cases should be applied. Plaintiffs contended that it “is generally accepted that mesothelioma can be caused by very low, infrequent and irregular exposures to asbestos and that there is no safe threshold of exposure.” *In Re: Asbestos Litigation, Memorandum Decision* at p. 3. Plaintiffs proposed that with mesothelioma there was strong legal precedent to support the standard “of whether there is evidence presented that the plaintiff was exposed to asbestos dust from a defendant’s product.” *Id.*

The Utah court in *Sortor* found that the “issue of causation is very fact sensitive, and accordingly, each case must stand on its own.” *Id.* at 4. The court did not reject a *Lohrmann* analysis, but it did not find it necessary in each case. The court found that plaintiffs have burden of proving injury, exposure to an asbestos-containing product manufactured by defendant, and that exposure was a substantial factor in causing the injury at *Id.* at 4. The court further held that the applicability of the *Lohrmann* analysis would vary from case to case.

Subsequent to the *Sortor* opinion, defendants requested clarification of requirements for substantial factor causation. After initial briefs were filed, the Texas Supreme Court released the *Borg-Warner Corp. v. Flores* opinion. The Utah court considered the briefs and arguments of parties in light of *Borg-Warner* opinion. Defendants argued that with regard to “substantial factor” proof, plaintiffs must provide defendant specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing disease citing *Borg-Warner Corp. v. Flores*. Plaintiffs argued that “this position ignored the realities of the nature of asbestos and its deadly potential to cause disease even with minimal exposure.” *Id.* at 4.

The court after considering the record, briefs, argument of counsel and relevant case law reaffirmed its position set forth in *Sortor* – “that the issue of causation is very fact sensitive and, consequently, each case must stand on its own.” The court stated that arguments regarding dosage in connection with “substantial factor” analysis would be expected at trial. The court further stated that considerations such as “nature of the disease, quality of the evidence, types of asbestos involved, the location, how products were handled and whether fibers were released in air” among others are relevant to dose. The court concluded that “there is no argument regarding dosage requirements which can be quantified with mathematical precision. Dose requirements are subject to expert dispute...” *Id.* at 6. The Utah court agreed that dose would be part of the evidence at trial, but it refused to infringe upon the trier of fact. *Id.* at 6.

VI. Conclusion

Since the Restatement Second of Torts, many jurisdictions have adopted the substantial factor test for causation. The difference comes in the application of that standard. The most common view in context of asbestos litigation adopts a criteria similar to that set out in *Lohrmann* in determining the type of evidence needed to prove causation. It is well accepted that much of the exposure evidence is circumstantial. Most jurisdictions have not gone as far as Texas in requiring exposure plus a dose calculation even if not “mathematically precise.” Dose evidence must be much more precise than general statements that had previously sufficed. Many jurisdictions have considered the standard for evidence of exposure and causation to be one of factual sufficiency. It remains to be seen whether other states will follow Texas to a standard of legal sufficiency.

The days appear to be over when causation was virtually assumed once “any” exposure to an asbestos-containing material was shown. Testimony that each and every exposure contributed to an injury and exposure to a “single fiber” is harmful is considered speculative and insufficient to impose liability. Greater precision is required. The exact precision while “not mathematical” is being determined.