

September 2008

Contact

Brian V. Otero

200 Park Avenue
New York, NY 10166-0136
212-309-1020
botero@hunton.com

Stephen R. Blacklocks

200 Park Avenue
New York, NY 10166-0136
212-309-1052
sblacklocks@hunton.com

Courts Remain Divided on Duties to Remote Claimants

Two recent decisions illustrate an important division between courts on the question of how to define defendants' duties to injured parties with whom they are not directly related. In *Satterfield v. Breeding Insulation Co.*, the Tennessee Supreme Court held an employer had a duty to prevent the daughter of an employee from being exposed to asbestos brought home on the employee's clothes. 2008 WL 4135605 (Tenn. Sept. 9, 2008). Just days before that decision, the Maryland Court of Appeals took a much more restrictive view of a defendant's duties to remote claimants, holding in *Gourdine v. Crews* that a drug manufacturer had no duty to a man killed by a person who allegedly lost control of her car after suffering an adverse reaction to the defendant's insulin. 2008 WL 4068177 (Md. Sept. 4, 2008).

In holding the drug manufacturer owed no duty to the decedent, the *Gourdine* court noted first that under Maryland law, a defendant has no duty to protect someone from the actions of another absent a special relationship between the defendant and the injured party. *Id.* at *14. The court concluded that because the decedent did not actually use the defendant's insulin, the defendant owed him no duty.

The court further stated that the foreseeability of harm was not sufficient to justify imposing a duty on the defendant. Maryland law holds that the determination of whether a duty exists is a policy question, and while the foreseeability of harm is relevant to this inquiry, it is only one factor to consider. *Id.* at *15. The court allowed that there may be circumstances where foreseeability alone might create a duty, but denied that this was such a case.

The *Satterfield* court conceived of the defendant's actions and the role of foreseeability in defining duty quite differently. Instead of thinking of the defendant's alleged conduct as nonfeasance, i.e., a failure to protect one person from the actions of another, it conceived of it as misfeasance, i.e., as conduct creating the risk to the injured party. Under Tennessee law, this difference has a dramatic effect on the court's analysis of the defendant's duties. Defendants accused of nonfeasance have duties only to those parties with which they have a special relationship, such as that between employer and employee. Those accused of misfeasance, however, have much broader duties that are defined by a balancing test in which foreseeability takes on "paramount importance." *Id.* at *12.

As described by the *Satterfield* court, foreseeability plays two roles in determining whether a duty exists. It is first used by the court as a threshold consideration to decide whether the likelihood of harm was sufficient to make a reasonable person take precautions against it. *Id.* If that threshold is met, the court then balances various policy factors such as the value and importance of the defendant's activity, the potential magnitude of harm, the feasibility of safer alternative conduct, and the "foreseeable probability" of harm to decide if the defendant owed a duty to the injured party. Applying this two-step test in this case, the court held that (1) the risk of exposure to the injured party from her father's clothes was foreseeable, and (2) the balance of policy

factors supported finding the defendant had a duty to the employee's daughter.

As the *Satterfield* court recognized, there is a "pronounced split of authority" on whether employers have a duty to nonemployees injured by take-home asbestos exposure. In jurisdictions in which foreseeability does not play a central role in defining duties, employers have generally been held not to have a duty to nonemployees. For instance, in a case factually similar to *Satterfield*, the New York Court of Appeals recently held in *Holdampf v. A.C. & S., Inc.* that employers have no such duty. 5 N.Y.3d 486 (N.Y. 2005). In so holding, the *Holdampf* court stressed that under New York law, foreseeability defines the scope of a duty; it does not determine whether or not a duty exists. *Id.* at 493. It also presumed that

the employer's conduct in such a case should be treated as nonfeasance, i.e., a failure to control its employee's going home with asbestos-contaminated clothes, rather than as conduct creating the risk of harm. *See id.* at 493-94.

The contrast between the *Gourdine* and *Satterfield* decisions indicates that this split in authority is not limited to the narrow issue of secondary asbestos exposure, but arises generally in cases involving injuries to remote claimants. These two cases suggest that whether a court will recognize a defendant's duty to such a claimant will depend on its view of how foreseeability relates to a defendant's duties and whether it conceives of the defendant's conduct as creating a risk of harm or merely failing to control another person.