

Recent Developments in the Law

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In **Bahura , et al v. S.E.W. Investors et al.** D.C. Super Ct Civil Action No 90 - CA - 10594, decided November 29, 1995 and reported in the Daily Washington Law Reporter on March 4, 1996, Judge Rufus J. King III, granted the Defendants' Motion for Judgment NOV in a suit claiming damages from exposure to organic compounds in the indoor mall of an office building where the Plaintiff's symptoms were intermittent and unpredictable and the Plaintiff's injuries were not serious and verifiable.

The five Plaintiffs at all relevant times were employees of the EPA whose offices are located in the Mall, a complex of buildings located at 401 M Street, S.W. Washington, D.C. In 1987 & 1988 renovations, including the installation of new carpeting, were being conducted in the Mall. Each Plaintiff offered evidence that symptoms were physical in nature and were caused by exposure to airborne chemicals.

In addition to temporary respiratory and eye irritations, all Plaintiffs claimed permanent injury, which they experienced as recurring headaches, dizziness, fatigue, and other neurological and respiratory symptoms suffered whenever they were exposed to moderate levels of common organic pollutants. Plaintiffs contended this heightened sensitivity culminated in Toxic Encephalopathy, an organic brain disease causing neurological physical injury.

Plaintiffs attributed their injuries to two negligent operations at the Mall. One was inadequate ventilation in the building generally, and the other was the constructive work during renovations were insufficiently isolated.

The jury was specially verdict as to whether (1) The Plaintiffs were physically injured and (2) whether the Plaintiffs believed they were physically injured. The jury returned a verdict indicating that Four of the Five Plaintiffs were not physically injured and that they believed that they were injured. (Somatization). The Plaintiff's asserted that they were psychologically injured as a result of the defendants' conduct. The court noted that no treating physician or medical expert testified that the Brain abnormalities were linked to the emotional distress or psychological injury. The court indicated that the jury verdict indicated that the Plaintiffs' coughing, wheezing, headaches, dizziness and other symptoms did not amount to verifiable permanent injury and held that on the record, the Plaintiffs' injuries were not serious and verifiable within the meaning of Jones and Sowell.

The Court held that since psychological causes are the basis for recovery for four of the five Plaintiffs, judgement NOV should be granted in favor of the Defendants as to the four Plaintiffs. The Court concluded that somatization is not a compensable injury in the circumstances existing and indicated that there must be medical testimony causally connecting the belief of injury to the acts of the Defendants.

The significance of this case is that the court held that the Plaintiffs' claims of somatization in the context of a "sick building" case are not serious and verifiable and for such injuries to be compensable in the absence of physical contact or physical injury , the Plaintiff must be in the zone of danger of physical impact. The disadvantage to the general applicability of the ruling , is that it is a decision largely confined to the particular facts of the case and is a decision of the Superior Court of the District of Columbia , rather than an Appellate Court. Nonetheless, it is a decision which can be asserted in environmental claims of a broad nature.

In **Bunn v. Urban Shelters and Health Care Systems, Inc.** D.C. App. Nos. 94-CV-903 & 94-CV-959 , decided February 29, 1996 The Appellate Court held that a Directed Verdict for a defendant was proper where there was no evidence as to the cause of injury to a nursing home resident and Res Ipsa Loquitur did not apply because the injury ordinarily may occur without negligence.

The Court indicated that before Res Ipsa Loquitur can be held to apply to a happening or accident a Plaintiff must demonstrate that: (1) An event would not ordinarily occur in the absence of negligence; (2) the event was caused by an instrumentality in defendant's exclusive control; and (3) there was no voluntary action or contribution on Plaintiff's part. The Court indicated that in the instant case, which involved an injury to an elderly resident the Plaintiff failed to establish that an event would not ordinarily occur in the absence of negligence and that the mere happening of an accident does not give rise to any inference of negligence. The Court indicated that it could not imply negligence in the instant case based solely on the fact that an adverse result occurred during a total care patient's residence in a nursing facility.

The significance of this holding is the fact that the court followed the strict dictates of the Res Ipsa Loquitur rule and refused to imply negligence merely because an accident had occurred. The Court ruled that the three under pinnings of the rule must be established before a Plaintiff can rely upon its application and that it is the Plaintiff's burden to do so.

The **D.C. Court of Appeals in the case of Claytor, et al v. Owens-Corning Fiberglass Corporation, et al**, D.C. App. No. 92-CV-39 ruled in an asbestosis case that Summary Judgement was properly granted defendants in a suit claiming injury from Defendants' asbestos products where the Plaintiffs could not show that Defendants' products were the substantial cause of the injury. The Court applied the "substantial factor" test and held that there was no evidence that products manufactured or supplied by them caused their injuries or even prove that their products were a "substantial factor" in causing the alleged injuries. The court further indicated that it is incumbent upon the Plaintiff in any products liability action to show that the Defendants' product was the proximate cause of his or her injuries. The Court further held that although the issue of proximate cause is often an issue for the jury, that it can also be a question of law for the Court to decide in the first instance, before the case even goes to a jury. In the event there is insufficient evidence for a reasonable jury to find that the defendant's conduct caused harm to the Plaintiff, the court must direct a verdict for the defendant. The question becomes one of law when the evidence will not support a rational finding of proximate cause. In addition, if the Court determines that a certain chain of events appears highly extraordinary in retrospect, the case should also be taken from the jury. The Court further held that it is the duty of the Court, to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.

The significance of this case is the strong language used by the Court to justify those instances when the Plaintiff has failed to sustain the burden of proof and the corresponding duty of the Court to either grant a summary judgement or a directed verdict in order to prevent jury speculation. This case is viewed as a far reaching decision which can and should be used by Defense counsel in vigorously asserting an issue which should be decided as a matter of law in the Defendant's favor.