

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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In Re: New York City Asbestos Litigation

This Decision Relates To:

	<u>Index Nos.</u>
EDWIN DE JESUS	116431/04
ALFRED D’ULISSE	113838/04
WILLIAM EICHNER	106095/04
CHARLES HAUCK	112713/04
JESSE LEVINE	113396/04
JAMES NORMANLY	113839/04
DONALD PIEPER	116451/04
GERARD ROSATO	111735/04
DESMOND SMYTH	104860/03

Plaintiffs,

-against-

A.C.& S., ET AL,

Defendants.

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LOUIS B. YORK, J.:

Introduction

These actions were assigned to me for trial. They are part of the November 2004 and May 2005 accelerated trial cluster of asbestos cases.

Plaintiffs originally moved for joint trials in all of these cases. Subsequently, plaintiffs’ counsel informed the Court by letter that he did not wish to proceed at this time with the Gerard Rosato matter. Accordingly, the Court will not join Rosato with the other cases for joint trial.

Plaintiffs move for joint trials in the remaining eight cases on the ground that there are common questions of law and fact. The defendants oppose, arguing that individual differences predominate over common ones. For the reasons that follow, the Court joins the following actions. Joint trials are granted for DeJesus, D’Ulisse, Normanly, Hauck, and

Smyth. Thus, out of the original nine cases, five are joined for trial.

Discovery

Some of the defendants have complained about discovery not having been completed. Under the Court's Case Management Order, all discovery, and in fact, all pre-trial motions are to be brought before the Special Master and Justice Freedman, who coordinates the trials of these matters before the undersigned judges in the asbestos group.

There are now approximately 30,000 asbestos cases that are assigned to this court. Every six months in May and November 200 of them are put on the extremis docket to be tried as quickly as possible with a schedule set for the following six months. The extremis docket consists of the most dire cases - those where the plaintiffs have died or suffer from an asbestos disease that is fatal. These cases came out of the November, 2004 and May, 2005 extremis docket; meaning that when they came to me, all discovery and other pretrial activities were to be concluded. My job was to try the case and deal with trial issues such as scheduling trial, deciding motions in limine and dealing with trial matters. Since discovery is not one of them, I will not entertain any discovery matters. I remind the litigants that it is now nearly approximately two months since these cases have been assigned to me. One would expect that given the exigency of the situations, whatever discovery was left would have been concluded by now and the parties would be preparing for trial, not dealing with discovery. Only if Justice Freedman or Ms. Pacheco, the Special Master, were inclined to ask the Court for a delay, however, to complete discovery, would I give an adjournment that serious consideration.

Facts

The remaining eight plaintiffs were exposed at different sites. They are all represented by Weitz & Luxemberg. They all suffer from the same fatal disease - mesothelioma - derived from asbestos exposure. Many of their exposures overlap while some don't. DeJesus, D'Ulisse, Hauck, and Smyth shared exposure in the '60's. Only Levine and Normanly were not exposed in the '60's. Levine was exposed in the early '40's to middle '40's. Normanly was exposed in the late '80's. DeJesus, Smyth and Normanly were exposed in the '70's. DeJesus, Hauck and Smyth are dead. D'Ulisse and Levine are alive.

Discussion

The Eichner and Pieper matters have not been joined because they involve exposure at sea. That brings into play the maritime law with its own rules of liability, damages and evidence. In a joint trial, two completely independent sets of such standards would be too cumbersome for the jury to cope with. Levine is not being joined because his early exposure in the 1940's was not shared by any other plaintiffs. The state-of-the-art evidence reaching all the way to the 1980's could result in prejudice to Levine as the jury could fail to disassociate all of the knowledge that was accumulated from the '40's to the '80's.

CPLR 602 provides that whenever there are common questions of law and fact in actions before the Court, it may order joint trials in order to avoid "unnecessary costs or delay." In mass torts cases such as this, the Court of Appeals has stated:

It requires little imagination to recognize that without consolidation, the Courts are simply incapable of handling litigation of such volume. The waste of time and expense involved in empaneling separate juries to decide the same sorts of questions over and over again is staggering. This is all the more true when one recognizes that each successive jury must be educated by expert witnesses to understand the toxicity of asbestos fibers, the etiology of asbestos - induced diseases, the state-of-the-art regarding the industry's knowledge of these dangers through the years, and the economic issues involving loss of services and future income that recur so frequently in these cases.

Consorti v Armstrong World Industries, 72 F3rd 1003, 1006 (2d Cir 1995), vacated on other grounds 518 US 1031 (1996) Some of the defendants have argued that cases where plaintiffs have died should not be combined with trials where plaintiffs are still alive because of the prejudice that results from combining deceased plaintiffs with ones still living. First, the Court can see no reason that the plaintiffs are prejudiced because some of them have already died. Here, all the plaintiffs have mesothelioma, thereby minimizing any potential prejudice since all the plaintiffs' symptoms are similar and the same fate - death, awaits the plaintiffs still living. In *Malcolm v National Gypsum*, 995 F2d 346, 161 USLW 2735, a case cited by both plaintiffs and defendants, the magnitude of 48 cases that were tried together resulted in reversal. Here, only a mere five cases are being tried together.

Workable guidelines to adjudicate these types of cases with no factor being more important than any others was set forth in *Malcolm* at 995 F2d 350-351. They were (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease,

whether plaintiffs are living or deceased; (5) status of discovery; (6) whether all plaintiffs were represented by the same counsel and; (7) type of cancer.

The Court has already shown that the disease and type of cancer are the same, and all plaintiffs were represented by the same attorneys. Whether plaintiffs are living or dead is not a factor here, as it may have been in *Malcolm*, since here, unlike *Malcolm*, all the plaintiffs suffered from the same fate and discovery is substantially concluded for most and should have been concluded by the others.

Much time can be saved by all sides and the Court by trying these cases together. For instance, the experts needed to describe the state-of-the-art during plaintiffs' exposures can be greatly diminished by having that testimony accomplished in one trial than by having it repeated over and over in multiple trials. The same is true for pathology and etiology testimony as well as savings in the use of economists and other experts.

The crushing burden that would be placed on the Court by trying these cases one at a time should be avoided where possible. While trying multiple cases at the same time is a formidable challenge, it has been met by this Court and others. Note taking in trial notebooks in which plaintiffs in each case are separated out from each other, together with curative and clarifying instructions by the Court should remove defendant's objections that joint trials are too confusing for the jury. It may not be easy, but it can be done.

The Court has considered other arguments raised by defendants and finds them to be without merit.

This constitutes the Order and Decision of the Court.

Dated: January 9, 2006

Louis B. York, J.S.C.