Personal Injury/Workers' Compensation

A Theoretical Solution for Endometrial Cancer Claims to the VCF

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On July 29, 2019, President Trump ratified the Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victims Compensation Fund (hereinafter, "VCF").[1] This law countered the financial deficit underlying the fifty to seventy percent reduction in the compensatory awards paid out on victim claims due to an insufficiency of funds. Under the statute the VCF may compensate for a list of conditions that have been established as certifiable conditions by the World Trade Center Health Program and the National Institute for Occupational Safety and Health ("NIOSH").[2]

However, there are a group of 9/11 survivors that are being denied compensation under this statute and those are victims who have been diagnosed with endometrial cancer. On September 24, 2019, the WTC Health Program published their response to Petition 23, which requested to add endometrial cancer to the list of certifiable 9/11 related conditions. The petition was denied due to a finding of insufficient evidence that endometrial cancer was 9/11 related.[3] Here we analyze a theoretical solution to the problem.

The Denial of Endometrial Cancer Claims

Petition 23 petitioned that endometrial cancer be added to the list of 9/11 conditions referencing a 2002 study by Lioy et al.[4] and a 2017 study by McElroy et al.[5] These studies provided a scientific basis showing a causal link between toxic cadmium exposure and an increased risk of developing endometrial cancer; however, because neither study was a peer-reviewed, published, epidemiological study of endometrial cancer in a 9/11-exposed population, neither study was considered relevant or given further consideration.[6]

The WTC Health Program, in their response to Petition 23, then conducted a search for relevant peer-reviewed case studies and in one such study, *Report on Carcinogens*[7] published by the National Toxicology Program, cadmium was listed among 39 toxic agents present in World Trade Center toxic dust that were either known or reasonably anticipated to be human carcinogens. However, it was concluded that the link between these 39 carcinogenic substances and the causation of endometrial cancer was insufficient, primarily because there were not enough studies to show a consistent result of endometrial cancer development.[8]

Consequently, 9/11 victims with endometrial cancer are often denied compensation by the VCF. Unfortunately, the process of filing a VCF claim includes a general waiver against any future lawsuits for 9/11 damages.[9] Once the claim is filed, the general waiver operates as a trapdoor that prevents seeking a court remedy after the claim has been denied. This result is in direct contravention to the overall purpose of the VCF statute which is to "provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001."[10]

The truth of the matter is that epidemiological studies are virtually ineffective when it comes to understanding the causes of conditions that fall on the outskirts of the standard deviation bell curve where data numbers tend to decrease. That is an approach that helps identify conditions that plague the vast majority of affected members, not the minority. The VCF however is still tasked with the duty of compensating all those individuals who were injured by 9/11 or its aftermath, not just the ones where the causal link is verifiable by large-scale studies.

In a typical case where a VCF claimant has filed a claim seeking compensatory recovery for endometrial cancer, their case will be inevitably denied because the condition has not been deemed a certifiable 9/11 condition. The claimant will then be offered an opportunity to appeal the decision. At the appeal hearing, the claimant will be faced with the impossible task of trying to establish a causal link between their exposure to World Trade Center toxic dust and the development of their endometrial cancer. The VCF will have no other choice under the current policy but to maintain their denial of the claim until such time that the condition is deemed certifiable by NIOSH.[11]

A similar problem was faced by the Veteran plaintiffs in *In re Agent Orange*.[12] In that matter, Veteran plaintiffs in a class action suit charged the U.S. Government and several chemical corporations with the injuries and deaths believed to be caused by exposure to the chemical compound "Agent Orange" used during the Vietnam War.[13] The evidence put forth by the plaintiffs was regarded at best as inconclusive due in part to the weakness in proof of causal relationship as demonstrated in the epidemiological studies relied upon.[14] The court reasoned that "it is likely that because of the epidemiological nature of much of the evidence, no individual plaintiff would be able to prove that his or her particular adverse health effects are due to Agent Orange exposure."[15] While the court in this matter noted several obstacles to the plaintiff's recovery, it ultimately held that the plaintiffs should recover under a reasonable settlement agreement.[16]

Similarly, here provisions for recovery should be made for plaintiffs that struggle with the factual impossibility of adequately proving causation. Minority victims suffering from endometrial cancer may not have the luxury of being able to benefit from an epidemiological decision in their favor years from now. They may have already passed away from their conditions. Even those that survive will continue to endure severe losses in other areas of their lives such as loss of gainful employment opportunities, friends, services or intimacy with a significant other, and general loss of quality of life well into their remaining years. Cancer is inherently life threatening, and it poses this lethal threat

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Nassau County Bar Association and Suffolk County Bar Association Joint Meeting

NYS Chief Administrative Judge Lawrence K. Marks addressed the Board of Directors of the Nassau County Bar Association and Suffolk County Bar Association at a joint meeting on January 14. Other dignitaries present included District Administrative Judges C. Randall Hinrichs and Norman St. George and NYSBA President Hank Greenberg. (L-R) Suffolk County District Administrative Judge C. Randall Hinrichs, SCBA President-Elect Hon. Derrick J. Robinsom, SCBA President Lynn Poster-Zimmerman, NYSBA President-Elect Scott Karson, NYSBA President Henry Greenberg, Chief Administrative Judge Lawrence K. Marks, NCBA President Rick Collins, NCBA President-Elect Dorian Glover, and Nassau County District Administrative Judge Norman St. George.

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regardless of where it develops. Even when cancer appears to be gone, victims remain in fear of a possible recurrence.

A Theoretical Solution

There is however a theoretical solution to the problem. Yes, theoretical in the sense that this theory has not yet been fully tested with favorable results in the VCF arena but has the potential for working nonetheless. Many courts of appeals have held that "that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong of the Rule 702 inquiry."[17] "Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated."[18]

Generally, the *reliability* of the differential diagnosis stems from the due diligence demonstrated by a testifying expert in eliminating the alternative causes of a condition. The diagnosis must be "conducted with intellectual vigor."[19] "Its underlying integrity requires professional thoroughness, and it must at least take serious account of other potential causes."[20] "A medical expert's opinion based upon differential diagnosis normally should not be excluded because the expert has failed to rule out every possible alternative cause of a plaintiff's illness. In such cases, the alternative causes suggested by a defendant normally affect the weight that the jury should give the expert's testimony and not the admissibility of that testimony. Furthermore, depending on the circumstances, a temporal relationship between exposure to a substance and the onset of a disease or a worsening of symptoms can provide compelling evidence of causation."[21]

The Second Circuit, in *Zuchowicz v. United States,* reasoned that "causation may be proved by circumstantial evidence, and that the causal relation between an injury and its later physical effects may be established by a physician's opinion."[22] In that case, the United States appealed from a decision where they were held liable for overprescribing danocrine to a woman who later developed a rare lung condition and died. The Court of Appeals reaffirmed the lower courts decision holding that while the defendant's negligence may not be established as the "but for" cause, under a preponderance standard the differential diagnosis from an expert witness was sufficient.[23]

The endometrial cancer issue at hand is a fitting circumstance where "differential diagnosis" should be applied. Under this method, a medical expert testifying as an appeal witness on behalf of a denied claimant would have the burden of proving the following indicia to support a reliable differential diagnosis: (a) a thorough physical examination; (b) review of patient's complete medical history; (c) review of the results of any clinical or laboratory testing; (d) did the doctor consider other facts regarding exposure, duration, etc.; (e) did the doctor consider all other causes; (f) did the doctor sufficiently explain why each of the other causes should be ruled out.[24]

In the situation where a claimant were able to establish that they were in good health prior to 9/11, with no genetic predisposition to cancer, no signs of developing cancer in their medical history, then it stands to reason that cancer would not ordinarily develop in such an individual absent a major insult to their health. If endometrial cancer has developed and there is no other major toxic exposure that can be identified other than 9/11 toxic dust exposure, then that differential diagnosis should be regarded as sufficient proof of causation that 9/11 was the likely cause of that cancer.

Conclusion

Any claimant that has had their claim denied should be advised to retain a medical expert to help them at their appeal hearing and do their best to argue differential diagnosis. It cannot be emphasized enough that this is purely a theoretical solution to the problem, and it is still possible that the VCF will maintain their denial. The VCF has demonstrated a clear preference to enforce bright line rules. However, it has been demonstrated to work in the courtroom. The call to action here is to argue differential diagnosis at the VCF appeal hearings using the same format that was used in these court cases. This is the best argument that can be made under the circumstances.

The Amistad Case: A Reenactment of the Landmark Case

The Diversity & Inclusion Committee of the Nassau County Bar Association and the Nassau County Office of Youth Services joined forces to support the youth of Jack & Jill Nassau County in their presentation of *The Amistad Case: A Reenactment of the Landmark Case.* This is the second time that DOMUS has hosted a reenactment of a civil rights case with Jack & Jill in honor of Dr. Martin Luther King, Jr. on the King National Holiday. Photo by Hector Herrera

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1. September 11th Victim Compensation Fund: About the Fund, available at https://bit.ly/35QoEJm.
2. September 11th Victim Compensation Fund: Policies and Procedures, 7, available at https://bit.ly/2u69m5V.
3. *World Trade Center Health Program; Petition 023 – Uterine Cancer, Including Endometrial Cancer; Finding of Insufficient Evidence,* 84 Fed. Reg. 185, 49954-9 (Sept. 24, 2019).
4. Lioy PJ *et al.*, *Characterization of the Dust/Smoke Aerosol that Settled East of the WTC in Lower Manhattan after the Collapse of the WTC11 September 2001,* Environ. Health Perspect. 110(7), 703–14.
5. McElroy JA, Kruse RL, Guthrie J, Gangnon RE, Robertson JD [2017], *Cadmium Exposure and Endometrial Cancer Risk: A Large Midwestern U.S. Population-Based Case Control Study,* PLoS ONE 12(7): e0179360.
6. *World Trade Center Program;* Petition 023, 84 Fed. Reg. 185, 49954-9 (Sept. 24, 2019).
7. National Toxicology Program, HHS (2016), *Report on Carcinogens,* 14th Ed. (Research Triangle Park, NC), *https://ntp.niehs.nih.gov/go/roc14.*
8. International Agency for Research on Cancer [1976], *IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Man: Cadmium, Nickel, Some Epoxides, Miscellaneous Industrial Chemicals and General Considerations on Volatile Anesthetics,* Volume 11; Lyon, France.
9. 28 C.F.R §104.61(a).
10. Air Transp. Safety and System Stab. Act, Pub.L. 112–10 (Apr. 15, 2011) § 403; 49 U.S.C. § 40101.
11. September 11th VCF: Policies and Procedures, 7, available at https://bit.ly/360W3Bn.
12. In re "*Agent Orange*" Prod. Liab. Litig., 597 F. Supp. 740. (1984).
13. *Id.* at 746.
14. *Id.* at 747.
15. *Id.*
16. *Id.* at 861.
17. *Kennedy v. Collagen Corp.,* 161 F.3d 1226 (9th Cir. 1998).
18. *Westberry v. Gislaved Gummi AB,* 178 F.3d 257, 262–63 (4th Cir. 1999).
19. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999).
20. *Fitzgerald v. Smith & Nephew,* 11 Fed. Appx. 335, 340 (4th Cir. 2001)(citing *Westberry,* 178 F.3d at 265).
21. *Doe v. Northwestern Mut. Life Ins. Co.*, 2012 U.S. Dist. LEXIS 60441, *1, 2012 WL 1533104.
22. *Zuchowicz v. United States,* 140 F.3d 381, 383 (1998).
23. *Id.* at 392.
24. *Westberry,* 178 F.3d at 262.

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it. The statewide rule also expanded the categories of cases that fell within its compass; while the Second Department rule only applied to negligence actions, the statewide rule applies to "any action for personal injury."

One of the critical differences between the old rule and the new one is that under the new rule, bifurcation is no longer the default position. Nevertheless, despite the fact that the statewide rule did not contain the presumption in favor of bifurcation that was the hallmark of the former Second Department rule, courts within the Second Department have continued to apply that presumption and have "inflexibly" required bifurcation in nearly all cases.[13]

Overturning Precedent

The *Castro* Court recognized that the advantage of bifurcation "is that if the liability issue is determined in the defendant's favor, there is no need to try damages, which can involve expensive expert witnesses and other proof."[14] However, the court noted that if the same experts would have to give testimony on both liability and damages, bifurcation would result in expensive experts having to testify twice, thereby undercutting the cost-savings that bifurcation is supposed to encourage.[15]

And, even though "evidence of the gravity of the plaintiff's injuries may engender sympathy for the plaintiff and thereby pose a risk of prejudice to the defendant,"[16] the Second Department, citing the Court of Appeals' decision in *Bennetti v. New York City Transit Authority,*[17] declared that a limiting instruction to the jury suffices to dispel this potential prejudice.[18]

In fact, the *Castro* Court noted that bifurcation can serve to prejudice the *plaintiff's* case. Since a verdict in favor of the defendant on liability means that jury service will end earlier, the court recognized that knowledge of that fact "might improperly incentivize at least some jurors" to find for the defense on the issue of liability.[19]

The Second Department also emphasized that its trial courts' "strict[ ] and inflexibl[e]" rule in favor of bifurcation[20] contrasts with the approach adopted by the other departments and with the standard set forth in Section 202.42.[21]

In light of this, the *Castro* Court directed that the trial courts must abandon their prior rigid approach, and, guided by the standard set forth in the statewide rule, exercise discretion in determining whether a trial should be unified or bifurcated.[22]

Bifurcation, said the Court, is "not an absolute given," and "it is the responsibility of the trial judge to exercise discretion in determining whether bifurcation is appropriate in light of all [the] relevant facts and circumstances."[23]

Applying the New Rule

Applying this standard, the Second Department held that the trial court had failed to "exercise its available discretion" when it denied Castro's motion for a unified trial due to its rigid insistence that "a bifurcated trial was strictly required by the Second Department's rules."[24]

Here, the issues of liability and Castro's injuries were intertwined, and by prohibiting Castro's treating neurologist from testifying about the results of diagnostic testing of his brain, the trial court prevented the expert from explaining how the nature and extent of Castro's brain injuries supported the opinion that Castro had sustained his injuries from a fall and not by lifting wooden planks.[25] Bifurcation in this instance did not bring about "a fair resolution of the action," as required by Section 202.42, but instead deprived Castro of a fair trial.

Accordingly, the *Castro* Court reversed the judgment of the lower court, set aside the verdict, granted Castro's motion for a unified trial, and remanded the case for a new trial.

Conclusion

Castro eliminates any question as to whether the presumption of bifurcation contained in the former Second Department rule still exists. It does not, and a bifurcated trial in personal injury actions in the Second Department is no longer the "default" position. Trial courts in the Second Department now must consider all of the relevant facts and circumstances to determine whether bifurcation will (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action. Only if both prongs are established will bifurcation be appropriate.

A deeper current also runs through the decision. *Castro* serves as a clarion call to trial courts that knee-jerk rulings based on a county's past customary practice rather than on careful adherence to the specific dictates of CPLR and the Uniform Rules can constitute reversible error. Both aspects will significantly affect the landscape of personal injury trial practice in the years ahead.

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1. 177 A.D.3d 58 (2d Dept. 2019).
2. *Id.* at 61.
3. *Id.*
4. *Id.* at 62.
5. *Id.*
6. CPLR 603.
7. CPLR 4011.
8. 22 NYCRR § 699.14(a) (repealed and superseded by 22 NYCRR § 202.42).
9. *Id.*
10. *Curry v. Moser,* 89 A.D.2d 1, 9 (2d Dept. 1982).
11. *Schwartz v. Binder,* 91 A.D.2d 660, 660 (2d Dept. 1980).
12. 22 NYCRR § 202.42.
13. *Castro,* 177 A.D.3d at 65.
14. *Id.* at 64 (citing *Siegel & Connors, New York Practice* § 130 (6th ed. 2019 Update)).
15. *Id.*
16. *Id.* (*citing Patino v. County of Nassau,* 124 A.D.3d 738, 740 (2d Dept. 2015)).
17. 22 N.Y.2d 743 (1968).
18. *Castro,* 177 A.D.3d at 64.
19. *Id.*
20. *Id.* at 60.
21. *Id.* at 65.
22. *Id.*
23. *Id.* at 66.
24. *Id.* (internal quotation marks omitted).
25. *Id.*