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'Each And Every Exposure' Theory — Enough

Law360, New York (May 22, 2009) -- For several decades, courts across the country have admitted expert testimony to establish medical causation in asbestos litigation premised on a rationale that is now being called into question in an increasing number of jurisdictions.

Unlike ordinary negligence or products liability litigation where an injury is typically alleged to have been caused by a specific defective product and where the connection between act and injury is easy to determine, in asbestos-related claims there exist a number of variables that confound the causation issue.

Specifically, inter alia, long latency periods, multiple exposures from various and diverse products, and medical or scientific uncertainty have all played a role in creating a need for expert opinions and a basis for courts to allow such testimony. At the center of the battle over causation in these cases is the admissibility and sufficiency of the expert testimony.

Throughout the many years that asbestos litigation has dominated the toxic tort arena, the level of proof necessary to support a claim has been the subject of much debate.

In many instances, courts have diluted the causation theory to the point where plaintiffs' experts are permitted to opine that "each and every exposure" or "any exposure" is a substantial contributing factor. In doing so, these courts have departed from both well-established causation standards and traditional rules of evidence with regards to experts.

Causation in Toxic Tort Litigation

Typically, in order to establish causation in a toxic tort case, a plaintiff is required to prove both general and specific causation.

General causation hinges on the notion that the substance in question is capable of causing the alleged injury, while specific causation requires the plaintiff to prove that the substance in question actually caused his or her injury.

Stated differently, general causation demonstrates that a certain disease or condition can occur from exposure to a specific substance, while specific causation takes into consideration the "dose" presented by a specific substance.

As set forth in *Lohrmann v. Pittsburgh Corning Corp.*, factors such as the "frequency, regularity and proximity" of the plaintiff's exposure to a particular substance are to be considered. 782 F.2d 1156, 1162 (4th Cir. 1986).

Due to the large number of defendants typically involved in toxic tort litigation, the most significant issue related to causation becomes whether a plaintiff can prove a specific defendant's product was in fact the proximate cause of his or her injury.

Proximate causation requires a plaintiff to demonstrate that it is more likely than not that the conduct of a certain defendant was a substantial factor in bringing about his or her alleged injuries. This is the result espoused by the Restatement (Second) of Torts. RESTATEMENT (SECOND) OF TORTS, § 431 (providing that an "actor's negligent conduct is the legal cause of harm to another if his conduct is a substantial factor in bringing about the harm").

The commentary to section 431 states that "[t]he 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[.]"

Accordingly, causation requires proof beyond "any exposure" and, in order for a plaintiff to prevail, he or she must show that the exposure to a certain substance was more than de minimis. See *Lohrmann*, 782 F.2d at 1162 (stating that "a plaintiff must prove more than a casual or minimum contact with the product"); *Borel v. Fibreboard Paper Prods Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973) (recognizing that "[t]he traditional rule is that a defendant's conduct is the cause of the event if it was a substantial factor in bringing it about").

Expert Testimony

To evaluate the level of a plaintiff's exposure and determine whether it was substantial — more than casual or minimum contact — requires a detailed, fact-specific analysis of the nature of the plaintiff's contacts with the alleged toxic substance. In asbestos litigation and other toxic torts cases, this is accomplished through the use of expert testimony.

Since the United States Court of Appeals for the District of Columbia Circuit decided *Frye v. United States* in 1923, courts have applied stringent rules in their examination of expert testimony. 293 F. 1013, 1014 (D.C. Cir. 1923) (requiring expert opinions to rest

on scientific theories or methodologies that are generally accepted as reliable within the relevant scientific fields); see also *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 592-95 (1993) (recognizing that the trial judge should be the gatekeeper in deciding the admissibility of expert testimony).

For a plaintiff to satisfy his or her burden of proof with regard to the admissibility of expert testimony, courts must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93.

It is this threshold assessment that appears to have been relaxed over the years in asbestos litigation. Generally, medical causation experts are required to support their ultimate conclusions with sound medical reasoning — accepted peer reviewed medical literature, independent research and analysis, or generally accepted medical or scientific principles.

In the world of asbestos litigation, however, where such experts have been allowed to offer the "each and every exposure" opinion, the link between exposure to a specific product and a plaintiff's disease oftentimes appears to be nothing more than a leap in judgment lacking sound medical or scientific support.

This diversion from the basic tenets underlying the evidentiary rules applied to expert testimony has helped to perpetuate the volume of asbestos claims that continue to overwhelm court dockets across the country.

The Theory

In contrast to well-established causation standards typically applied in other cases and those seemingly once espoused by appellate courts in asbestos related claim cases, trial courts have routinely come to allow the opinion that "each and every exposure" to asbestos is a significant exposure, which therefore constitutes a substantial factor in causing asbestos-related disease.

The "each and every exposure" theory conflicts with recognized principles of toxicology and epidemiology. It appears to be premised, at least in part, on the notion that because the precise threshold of exposure that places an individual at risk of disease is unknown, then no exposure, regardless of how de minimis, can be ruled out as a substantial contributing factor when the plaintiff later develops an asbestos-related disease.

Many experts make this leap while acknowledging that there are background or ambient levels of asbestos to which the general public is exposed in everyday life that are not recognized to present a statistically significant increased risk of disease. Many of these same experts will admit that an ambient or background level of asbestos exposure is not a substantial contributing factor to an individual's asbestos-related disease.

Taking into account the ubiquitous nature of asbestos, expert testimony that attempts to show that "any exposure" to the mineral may be a substantial factor, by its very nature, is contrary to the fact-specific inquiry required in toxic tort litigation. Nevertheless, courts have continually admitted testimony from these experts regardless of the level of a plaintiff's exposure.

The World Outside of Asbestos Litigation

An examination of how courts have defined the requisite level of exposure to support a legal claim in other toxic tort matters points out this distinction.

Benzene Litigation

Due to benzene's ubiquitous nature and the uncertainty in the science surrounding the chemical, benzene litigation, which typically involves an allegation that a plaintiff has developed acute myeloid leukemia, has presented courts with many of the same pitfalls found in asbestos litigation.

Benzene courts, nonetheless, have managed to adhere to the general tenets surrounding causation and expert testimony. Benzene is a liquid component in gasoline. It is also, however, like asbestos, a substance found throughout the environment to which all are exposed on a daily basis.

Because it is merely a component and because the scientific studies surrounding the chemical are very complex, establishing causation in benzene cases is a challenge. There are a number of experts in benzene litigation who, like experts in asbestos litigation, propose that because there are background or ambient levels of the chemical and no known safe-threshold level, any demonstrated level of exposure should suffice to allow a plaintiff to establish causation.

While acknowledging there are low levels of exposure to the chemical that may be safe, these experts assert that exposures like those found in an occupational setting and/or occurring over an extended period of time, and even those that result from brief or occasional contact, may be lethal. See, e.g., *Henricksen v. ConocoPhillips Co.*, 2009 WL 361201, at *20-21 (E.D. Wash); *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114, 1117-18 (N.Y. 2006).

Benzene experts, however, have a difficult time quantifying how much of the chemical a plaintiff may have been exposed to and whether that exposure actually caused the alleged injury. Nonetheless, these experts willingly conclude that low-level exposures are a substantial factor in a plaintiff's contraction of leukemia.

These experts, while taking a page out of the asbestos litigation handbook, have not had as much success as their counterparts.

Courts in benzene litigation have refused to take the leap required to establish a connection between low doses of exposure and disease, concluding that such a determination would be impossible without having some measurement of a plaintiff's exposure to the alleged harmful substance. See, e.g., *Henricksen*, 2009 WL 361201 at *31-32; *Parker*, 857 N.E.2d at 1120-21.

Silicone Breast Implant and PCB Litigation

While not as analogous to asbestos as benzene litigation, silicone breast implant litigation and polychlorinated biphenyls ("PCB") litigation have also presented courts with similar causation issues like those found in asbestos litigation.

Experts in silicone breast implant litigation and PCB litigation have been required to have an understanding of, inter alia, toxicology and epidemiology in order to parse through the various complex scientific and medical causation issues involved.

When these experts have ignored epidemiology and offered conclusions based on alternate research methods — specifically rejecting the existing, contradictory epidemiology and relying on methods such as differential diagnoses, case reports and animal studies to support their theories, which, in essence, advance the proposition that a mere correlation between the alleged harmful substance and injury equate to causation — courts have excluded their opinions. See, e.g., *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878 (10th Cir. 2005) (breast implant litigation); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (PCB litigation).

Courts in these cases have found that the analytical gap between the opinions rendered by these experts and the data considered is simply too great. Because a cause and effect relationship is not always found where there is a mere association between exposure and disease and because oftentimes there are numerous confounding factors that may be present, courts in these arenas have refused to automatically find a causal link between the substance and the disease.

There is Still Hope

Only now after decades of asbestos litigation have courts around the country taken a step back to reassess the quandary of causation and expert testimony. Courts in various jurisdictions have criticized the "each and every exposure" theory and have ruled it insufficient to establish causation.

See, e.g., *Gregg v. V-J Auto Parts Inc.*, 943 A.2d 216, 226-27 (Pa. 2007) (stating that it is not "a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation"); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772-74 (Tex. 2007) (holding that exposure to "some" respirable asbestos fibers was insufficient to establish asbestos-containing product as a substantial cause of plaintiff's asbestosis); and cases cited therein.

Implementing the sound application of well-settled causation principles, these courts appear to be attempting to reverse the effects of one of the most substantial departures from the concept of the dose response relationship that is traditionally required in toxic tort cases.

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