

Alternative Burdens May Come With Alternative Causes

Law360, New York (October 17, 2012) -- A fundamental issue in many toxic tort cases is whether a plaintiff's personal injuries were caused by something other than the defendant's alleged misconduct. Defendants often raise this question in several ways — did the plaintiff's causation expert properly consider potential alternative causes in reaching the offered opinion? Did the plaintiff meet his or her burden to prove causation when there are potential alternative causes? And is there a basis for apportioning fault among additional parties who are responsible for those alternative causes?

These questions share the common factual issue of what actually caused the plaintiff's injury. Even so, recent decisions in several jurisdictions suggest that the way this question is raised may result in different legal standards of proof that must be met by the defendant. Those decisions also point out that in addressing this issue, courts may, in effect, shift the burden of proof on causation to defendants when there are issues of alternative causation. Recent decisions in California and Florida illustrate both ends of the spectrum on this issue.

Florida Decision: *R.J. Reynolds Tobacco Co. v. Mack*

The Florida Court of Appeal recently examined the propriety of requiring a heightened standard of proof before allowing a defendant to present evidence of alternative causation and found that this improperly shifted the burden of proof as to causation to the defendant. In *R.J. Reynolds Tobacco Co. v. Mack*, the personal representative of a decedent filed suit against a tobacco company seeking damages for the decedent's laryngeal cancer and chronic obstructive pulmonary disease (COPD), both of which were allegedly caused by the decedent's long history of smoking cigarettes manufactured by the tobacco company.[1]

The plaintiff filed motions in limine to exclude any reference, argument, question or testimony insinuating that the decedent's illnesses were caused by any occupational and environmental hazards he faced while working as an Air Force aircraft mechanic or as an automobile mechanic, as well as to exclude any reference to the decedent's family history of cancer.[2] The trial court granted these motions to exclude, subject to a proffer by the tobacco company that the "fact exists" and that the "evidence supports the conclusion [the tobacco company] intends to draw from the existence of the fact." [3]

The tobacco company's subsequent proffer included excerpts of deposition testimony from a fellow Air Force aircraft mechanic who worked with the decedent, the former service manager at the car dealership where the decedent worked as a service technician and one of the decedent's employees at a gas station, all of whom testified that the decedent was exposed to various toxic chemicals, including asbestos, during each of his jobs.[4]

The tobacco company also submitted expert affidavits and deposition transcripts to establish that there was a sufficient basis to conclude that the decedent's occupational exposures increased his risk for laryngeal cancer.[5]

The experts also opined that the decedent's extensive family history of nonsmoking-related cancers increased his risk for laryngeal cancer independently of smoking.[6] In addition, the tobacco company submitted numerous published articles that described a link between certain occupational and environmental exposures, including asbestos and laryngeal cancer.[7]

At trial, during a proffer before the judge, one of the tobacco company's experts testified that the decedent's family history of cancer "was much more important in causing his laryngeal cancer as compared with his smoking" and that the decedent had a "very significant asbestos exposure." [8]

When the trial judge asked the expert whether he could testify before the jury "with any reasonable degree of medical certainty" as to what caused the decedent's cancer, the expert replied, "Well, I can say this: It had — it had more of a role than his declining risk of tobacco." [9]

On cross-examination during the proffer, he testified that "he was not saying to a degree of medical certainty that any 'of these things' caused the decedent's cancer." [10] Instead, he was opining "that it was possible that they did." [11]

The trial judge stated that "[t]his is an expert opinion and expert opinion has got to say that, you know, this is more likely than not within a reasonable degree of probability of medical certainty that this is the cause." [12] Based on this standard, the trial judge only allowed the expert to testify in front of the jury about the "general causes [of laryngeal cancer] based on experience." [13]

The defendant was not permitted to present any evidence "regarding the decedent's occupational exposures, and none of [the tobacco company's] experts testified regarding the effect those exposures had on the decedent." [14] The jury returned a verdict in the plaintiff's favor, and the tobacco company appealed. [15]

The Florida Court of Appeal reversed the judgment because of the trial judge's improper exclusion of this alternative causation evidence. The court stated that it was the plaintiff who held the burden of proof with regard to the causation of the decedent's illnesses. [16]

When the trial judge excluded this alternative causation evidence because the defendant's experts could not testify to a reasonable degree of medical probability, "the trial court improperly shifted the burden of proof as to causation to [the defendant]." [17] Notably, the Court of Appeal stated that contrary to the trial court's reasoning, the defendant was not attempting to prove that something else caused the decedent's laryngeal cancer, but was instead attempting to diminish the plaintiff's expert testimony that smoking was the probable cause of the cancer by introducing other possible causes that were pertinent to the decedent's situation. [18]

California Decision: Chakalis v. Elevator Solutions Inc.

A recent decision in California faced similar issues but with a very different outcome. In *Chakalis v. Elevator Solutions Inc.*, a plaintiff suffered injuries when the elevator in her apartment building gave way and fell six floors to the ground. [19] The plaintiff received treatment at a hospital and subsequently sought special treatment from a physician for issues relating to alleged hydraulic oil poisoning from the elevator fall. [20]

The plaintiff's condition ultimately worsened after going through much of this treatment. The plaintiff's lawsuit did not name this particular doctor as a defendant. Instead, the plaintiff sued the elevator maintenance company, the home owners association that owned and controlled the building, the property manager and the property manager's agent.[21]

The cause and extent of the plaintiff's injuries were vigorously disputed at trial, with conflicting evidence on the issues.[22] The defendants asserted the affirmative defenses of comparative fault and intervening and superseding acts.[23] The defendants introduced expert witness testimony that was highly critical of the physician's diagnosis and treatment of the plaintiff.[24] The jury thereafter returned a special verdict, finding the plaintiff 8 percent at fault, the defendants a combined 40 percent at fault and the non-party physician 52 percent at fault.[25]

On appeal, the California Court of Appeal reversed and remanded the case for a new trial based on the finding that the verdict was not supported by substantial evidence and was against the law because the jury allocated fault to a physician without expert testimony establishing that his alleged medical malpractice was a substantial factor in causing the plaintiff's injuries.[26]

The court stated that apportionment of fault among doctors under California Civil Code Section 1431.2 requires evidence of actual medical malpractice, as opposed to mere error of judgment, and is measured by the standard of care within the medical community.[27] This is required to apportion fault not only as to named defendants but also as to nonparty doctors.[28]

Relying on the decision, *Wilson v. Ritto*, the Court of Appeal found that that burden of apportioning fault to the plaintiff's physician fell squarely on the defendants and required that they prove that he breached the medical standard of care.[29] The element of breach in a medical malpractice claim can generally only be proven with expert testimony.[30] Turning to causation, the court noted:

Wilson focused on the element of breach. It did not specifically address the other elements, including causation. In our view, the logic and reasoning of *Wilson* should be applied to the other elements. If, for example, a doctor's medical malpractice did not proximately cause any harm to the plaintiff, the trier of fact cannot apportion fault to that doctor pursuant to Civil Code section 1431.2.[31]

Thus, if a doctor's medical malpractice was not shown to be the proximate cause of harm to the plaintiff "within a reasonable medical probability based upon competent expert testimony," then the trier of fact cannot apportion fault to that doctor pursuant to Section 1431.2.[32]

Based on this standard of proof, the Court of Appeal held that the defendants failed to satisfy this requirement.[33] Despite the defendants introducing evidence that the plaintiff's pain and suffering were caused by the physician's alleged malpractice, they failed to meet their burden of proof by not introducing expert testimony on causation.[34] The court summed up the problem as follows:

The fatal flaw with defendants' argument is that there was no expert testimony regarding the element of causation. While defendants' experts were critical of Dr. Dahlgren's treatment and discussed the dangers and risks associated with it, they did not actually offer an expert opinion that it was a substantial factor in causing plaintiff's injuries within a reasonable medical probability. Defendants therefore failed to meet their burden of showing Dr. Dahlgren was comparatively at fault for plaintiff's damages for purposes of Civil Code section 1431.2.[35]

Reconciling Reynolds and Chakalis in Presenting Evidence on Alternative Causation

How does one reconcile the diverging approaches on alternative causation from the Reynolds and Chakalis decisions? One distinction is that Chakalis involved a party asserting affirmative defenses of comparative fault and intervening, superseding acts that involved alleged medical malpractice, while Reynolds does not appear to have involved any affirmative defenses.[36]

At the same time, where Reynolds found that evidence of alternative causes was being offered merely to poke holes in plaintiff's own causation theory, Chakalis found that it was the defendants' burden of proof to demonstrate the alternative cause of plaintiff's injuries. Would the defendants in Chakalis have been successful in upholding the jury verdict had they not asserted affirmative defenses and instead asserted that evidence of the plaintiff's physician's medical malpractice was merely being offered to "attempt[] to diminish [the plaintiff's evidence as to causation] by introducing other possible causes that were pertinent to the [plaintiff's] situation?"[37]

Furthermore, if a defendant was able to show sufficient evidence of an alternative cause of a plaintiff's harm, such evidence is arguably a sufficient basis for a complete defense verdict. Is something less than this sufficient to at least allow a jury to apportion blame based on the evidence, such as what occurred in the trial court in Chakalis? Recent decisions in other jurisdictions provide potential answers to these questions.

In *Benkendorf v. Advanced Cardiac Specialists Chartered*, an Arizona appellate court recently held that "an expert witness called by the defense to testify about causation in a medical malpractice case may testify about 'possible' causes of the plaintiff's injury." [38]

The court, noting that the plaintiff carries the burden of proof on causation, held that a defendant in such a case need not prove another cause for plaintiff's injury but may testify as to alternative causes tending to undercut the plaintiff's contention that the defendant's alleged negligence more probably than not caused the injury.[39] This court did note, however, that its opinion did not address affirmative defenses in which the burden of proof is with the defendant, thus not necessarily making it inconsistent with Chakalis, which involved the affirmative defenses of comparative fault and intervening, superseding acts.[40]

In *Williams v. Eighth Judicial District Court of the State of Nevada*, the Nevada Supreme Court recently addressed a similar issue and found that the relevant inquiry in determining whether the alternative cause must be established by expert testimony to a "reasonable degree of medical probability" depends on the purpose for which the defense is offering the testimony.[41]

Expert testimony introduced for the purpose of establishing "an independent alternative causation theory" must meet this heightened standard of probability.[42] However, "when a defense expert's testimony is used to contradict a plaintiff's causation theory by comparing that theory to other plausible causes, each additional cause does not need to be stated to a greater-than-50-percent probability" — otherwise it "could result in an unfair shifting of the burden of proof to the defendant." [43]

These decisions demonstrate that a critical issue in presenting evidence of alternative causation is how this evidence is presented to the court. If the defendant frames the alternative causation evidence as simply being offered to rebut the plaintiff's evidence of causation and argue that the plaintiff failed to meet its burden of proof, then the defendant should not be limited to evidence of alternative causes that are "more likely than not" and can instead offer mere alternative "possibilities."

If, however, the defendant asserts affirmative defenses and offers evidence of alternative causation to establish these defenses as a complete bar to liability, in whole or in part, then it likely will be limited to presenting evidence that establishes these alternative causes are “more likely than not.” Thus, how a defendant raises the issue can make all the difference in the burden the defendant must carry and, as a result, the admissibility of alternative cause evidence.

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[1] R.J. Reynolds Tobacco Co. v. Mack, Case No. 1D11-2448, 2012 Fla. App. LEXIS 9568 at *2-3, 92 So. 3d 244, 37 Fla. L. Weekly D 1379 (Ct. App. June 13, 2012).

[2] Id. at *3.

[3] Id.

[4] Id. at *3-4.

[5] Id. at *4-5.

[6] Id.

[7] Id.

[8] Id. at *5-6.

[9] Id. at *6.

[10] Id. at *7.

[11] Id.

[12] Id. at *7-8.

[13] Id. at *8.

[14] Id. at *8-9.

[15] Id. at *9.

[16] Id. (citing *Clampitt v. D.J. Spencer Sales*, 786 So. 2d 570, 573 (Fla. 2001).)

[17] Id. at *9-10.

[18] Id. at *10.

[19] *Chakalis v. Elevator Solutions, Inc.*, 205 Cal. App. 4th 1557, 141 Cal. Rptr. 3d 362 (Ct. App. 2012).

[20] Id. at 1563.

[21] Id. at 1561.

[22] Id. at 1566.

[23] Id.

[24] Id.

[25] Id. at 1568.

[26] Id. at 1573.

[27] Id. at 1569.

[28] Id.

[29] Id. at 1570 (citing *Wilson v. Ritto*, 105 Cal. App. 4th 361, 129 Cal. Rptr. 2d 336 (Ct. App. 2003).)

[30] Id.

[31] Id. at 1572.

[32] Id.

[33] Id.

[34] Id.

[35] Id. at 1572-73.

[36] Id. at 1566.

[37] *R.J. Reynolds Tobacco Co.*, *supra*, at *10.

[38] *Benkendorf v. Advanced Cardiac Specialists Chtd.*, 228 Ariz. 528, 532 (Ct. App. 2012).

[39] Id.

[40] Id. at 532, n.6.

[41] *Williams v. Eighth Judicial Dist. Court of Nev.*, 262 P.3d 360, 368 (Nev. 2011).

[42] Id.

[43] Id. at 369.