

The Starstruck Medical Causation Trend

Law360, New York (May 22, 2013) -- In the technical sense, medical causation answers whether it is more likely than not that an accused substance or collection of them brought about some alleged disease or set of them. As a litigation matter, it is “won or lost on the strength of the scientific evidence presented to prove causation,”[1] principally, the credible and well-studied expert.

But rarely are the central causal allegations in major toxic torts purely courtroom affairs. Publicity and politics drove early Bendectin and breast implant litigation, with plaintiff verdicts begetting more publicity[2] and so on. That trend has, if anything, escalated.

Now, some toxic tort actions now include full-length movies,[3] sometimes with the proponent of causation themselves declaring the primacy of politics and public campaigning.[4] Consequently, defense counsel should not presume that the only audience deciding a causation contest is judicial and should be prepared to answer causation charges in the public sphere.

One unique challenge can be countering what I refer to as entertainment causation or causation arguments packaged as or presented through entertainment. It can take multiple forms. Celebrities may endorse a particular causal grievance. They can magnify its media profile either directly through expanded earned media or indirectly through political coverage.

While not limited to causal propositions, “celebrity entertainers testified before the United States Congress on social issues unrelated to their professions 507 times in front of 539 congressional committees and subcommittees”[5] mostly on health-related topics.[6] For instance, Meryl Streep testified in 1989 on the dangers of Alar apples[7] and repeated the same at a host of media events.[8] More recently, other big-name actors implicated vaccines in autism etiology.[9] And causal advocates are not necessarily limited to preexisting celebrity endorsees; new ones can be recruited[10] or even hired.[11]

Proponents of a particular causal grievance may also seek to turn themselves into minor celebrities via sponsored or collaborative films. The New York Times reported, “Alliances between filmmakers and lawyers are becoming increasingly common, with recent films tied to cases involving Dole Food, Coca-Cola and Unocal.”[12]

To that could be added *Crude*, which garnered legal notoriety in 2010 when the “release of many hours of the outtakes has sent shockwaves through the nation’s legal communities, primarily because the footage shows, with unflattering frankness, inappropriate, unethical and perhaps illegal conduct.”[13]

Entertainment causation can present a significant challenge to the defense practitioner confronted with it. A low-information celebrity interview indicating a substance for causes disease is likely to command much more media attention than a high-quality epidemiological study refuting the claim.

Compounding the star-power advantage is the fact that anthropogenic causation makes for more convincing entertainment. Individual antidotes, emotion and personal conviction — all antithetical to scientific causation inquiry[14] — makes for much easier watching than a description of explanatory confounding would.

A lack of rigor should not be mistaken for unimportance. Publicity, including that based on allegations of having caused disease, is a frequent feature in the “shareholder activism” front and other pressure tactics in major toxic tort lawsuits.[15] Even setting that aside, allegations of having caused death and disease are understandably upsetting and so can represent a client concern beyond litigation impact.

So how is the defense practitioner confronted with it to counter entertainment causation? While no single action will fit all circumstances, history has shown that adjudicating the scientific credibility of causation pretrial can itself be an answer.

The tort litigation culminating in *Daubert* began with celebrity personal injury lawyer Melvin Belli[16] and an inflammatory October 1979 article the *National Enquirer* published after a story it received from Melvin Belli blaming the morning sickness pill for birth defects.[17] The chief scientific proponent of causation, Dr. William McBride, held quasi-celebrity status as the “Father of Teratology” for having been “prominent in discovering the dangers of Thalidomide[.]”[18]

Breast implant litigation owed much of its origin and persistence to publicity, including an inflammatory special by then-NBC personality Connie Chung calling silicone “an ooze of slimy gelatin that could be poisoning women.”[19] The alleged link between vaccines and autism had in its corner celebrity couple Jim Carrey and Jenny McCarthy, who have made numerous national media appearances advocating the link.[20]

None of these casual assertions have been unrun from the public sphere — according to a survey, around 20 percent of Americans still believe that vaccines are linked to autism.[21] But that puts it at the lower end of the conspiracy-acceptance continuum between the 21 percent who “believe a UFO crashed at Roswell in 1947” and the 15 percent who believe the government controls minds through TV.[22]

In any event, it would be difficult to call causal claims for Bendectin, breast implants and vaccines mainstream, and in each case, their demise tracks closely to authoritative judicial rejection of them. Bendectin claims died out with Daubert itself and breast implant claims when Judge Pointer's Rule 706 panel found "that there is no meaningful or consistent association between breast implants or silicone gel-filled implants and any of the conditions studied." [23]

In 2008, both presidential candidates professed belief that vaccines caused autism. [24] Following through and widely followed opinions from the vaccine court rejecting the theory, [25] a similar comment in the 2012 election drew sharp rebuttals from the media. [26]

Pretrial challenge of speculative causation theories is now widely available. All federal and most state courts follow Daubert. [27] Indeed, Hollywood's home — California — recently moved sharply toward this group. [28]

A second lesson from these experiences — and particularly vaccine claims — is the importance of critically evaluating the potential harm that the causal allegations, if believed by the public, could bring. That backlash played prominently in the vaccine debate and to a lesser extent, with the rehabilitation of Bendectin. [29] Not many claims will have the obvious public health implications of allegations that vaccines, a medical advance that, according to UNICEF, saves "approximately 9 million lives a year worldwide," [30] cause brain damage. But disinformation on the cause of a disease — particularly preventable ones — can be harmful too.

Take a foreign-based, high-media profile case claiming that cervical cancer, "the leading cause of cancer deaths among women in Latin America and the Caribbean," [31] is caused not by the HPV virus but by a company the case targets. The better the case's public messaging, the worse will be public health.

Communities or individuals persuaded that oil, pesticides, solvents or some other litogen is the true cause of cervical cancer have little incentive to screen or vaccinate against HPV or control its spread. Public health education on cervical cancer prevention, a cornerstone of any genuine effort to curb cervical cancer, [32] is necessarily undermined in those circumstances.

Concerns of that type will of course not be implicated by all toxic tort-type allegations. Rather, the point is that there can be more common ground between challenging speculative causation, and serving public health than may be traditionally appreciated.

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[1] Rider v. Sandoz Pharms. Corp., 295 F.3d 1194, 1197 (11th Cir. 2002)

[2] J. Sabovich, Petition Without Prejudice: Against The Fraud Exception To Noerr-Pennington Immunity From The Toxic Tort Perspective, 17 Penn St. Env'tl. L. Rev. 1 (Fall 2008) available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jim_sabovich

[3] See e.g., Crude: The Real Price of Oil (2009); Bananas: On Trial for Malice (2009)

[4] Crude: The Real Price of Oil (2009)

[5] L. Demaine, Navigating Policy by the Stars: The Influence of Celebrity Entertainers on Federal Lawmaking, 25 J. L. & Politics 83, 90 (2009).

[6] Id. at 93.

[7] Susan Gilbert, America Tackles the Pesticide Crisis, N.Y. Times, Oct. 8, 1989, at GH22; Robert W. Hahn, Toward a New Environmental Paradigm, 102 Yale L.J. 1719, 1745 n.147 (1993) (Observing that "[t]he Natural Resources Defense Council received substantial publicity when it orchestrated the ban on Alar with the help of actress Meryl Streep.").

[8] Id.

[9] See e.g., Larry King Live, Jenny McCarthy and Jim Carrey Discuss Autism; Medical Experts Weigh In (April 3, 2009) available at <http://transcripts.cnn.com/TRANSCRIPTS/0904/03/lkl.01.html>; Jenny McCarthy & Jim Carrey, My Son's Recovery from Autism, CNN (April 4, 2008), available at <http://www.cnn.com/2008/US/04/02/mccarthy.autismtreatment/index.html>.

[10] The film Crude, for example documents a plaintiff attorney recruiting the wife of Sting, Trudie Styler.

[11] See e.g., A. Karni, Cuomo's ex Kennedy stands to make \$40M in secret anti-oil deal, NY Post (Jan. 15, 2012) available at http://www.nypost.com/p/news/local/cash_kerry_in_rain_forest_3zYGnmDnsQ1Qyv536irIWL

[12] J. Schwartz, Scenes Cut from Film Find New Role in Court, NY Times (Jan. 2, 2011) available at <http://www.nytimes.com/2011/01/03/us/03crude.html>

[13] In re Chevron Corp., Case No. 10-MC-21JH/LF, 2010 U.S. Dist. LEXIS 119943, *6 (D.N.M. Sept. 1, 2010)

[14] Claar v. Burlington N. R.R. Co., 29 F.3d 499, 503 (9th Cir. 1994); McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1253 (11th Cir. 2005).

[15] J. Drimmer, Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions, 29 Berkeley J. Int'l L. 456, 474-477 (reviewing plaintiff side out-of-court tactics in transnational cases).

[16] Korcok M (November 1980). "The Bendectin debate". Canadian Medical Association Journal 123 (9): 922-8. PMC 1704894. PMID 7437993.

[17] Michael D. Green, Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation, 106-108 (1996)

[18] McBride v. Merrell Dow & Pharmaceuticals, 255 U.S. App. D.C. 183 (D.C. Cir. 1986)

[19] David E. Bernstein, The Breast Implant Fiasco, 87 Cal. L. Rev. 457, 467 (1999).

[20] See e.g. A. Allen, Say It Ain't So, O, Slate (May 6, 2009) available at http://www.slate.com/articles/health_and_science/medical_examiner/2009/05/say_it_aint_so_o.html; see also K. Greenfeld, The Autism Debate: Who's Afraid of Jenny McCarty?, Time (Feb. 25, 2010) available at <http://www.time.com/time/magazine/article/0,9171,1968100,00.html>

[21] Public Policy Polling, Democrats and Republicans Differ on Conspiracy Theory Beliefs (April 2, 2013) available at http://www.publicpolicypolling.com/pdf/2011/PPP_Release_National_ConspiracyTheories_040213.pdf

[22] Id.

[23] Norris v. Baxter Healthcare Corp., 397 F. 3d 878, 881 (10th Cir. 2005).

[24] Gordon Shemin, Mercury Rising: The Ominous Autism Proceeding and What Families Should Know Before Rushing Out of Vaccine Court, 58 Am. U.L. Rev. 459, 480 (2008).

[25] James Sabovich, Sara Mayhew, Bendectin's Revenge: The Fall of Vaccine-Autism Litigation to Judicial Scrutiny, BNA Tox. L Rptr, Vol. 25, No. 16 (April 2010) available at http://news.bna.com/txIn/TXLNWB/split_display.adp?fedfid=17008210&vname=tlrnotallissues&fn=17008210&jd=a0c2u7h8y8&split=0

[26] See S. Mnookin, Michelle Bachmann: Public health spokeswoman, Rick Perry strategist, partisan

peace-maker, PLOS Journals (Sept. 14, 2011) available at <http://blogs.plos.org/thepanicvirus/2011/09/14/michelle-bachmann-public-health-spokeswoman-rick-perry-strategist-partisan-peace-maker/> (detailing articles criticizing candidate comments on vaccines and retardation).

[27] M. Kaufman, *The Status of Daubert in State Courts*, Atlantic Legal Foundation (March 31, 2006) available at <http://www.atlanticlegal.org/daubertreport.pdf>

[28] *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747, 770 (2012)

[29] James Sabovich, Sara Mayhew, *Bendectin's Revenge: The Fall of Vaccine-Autism Litigation to Judicial Scrutiny*, *BNA Tox. L Rptr*, Vol. 25, No. 16 (April 2010) available at http://news.bna.com/txIn/TXLNWB/split_display.adp?fedfid=17008210&vname=tlrnotallissues&fn=17008210&jd=a0c2u7h8y8&split=0

[30] UNICEF, *Immunization: the story so far* (1996) available at <http://www.unicef.org/pon96/hevaccin.htm>

[31] Luciani, *A Pan American Health Organization strategy for cervical cancer prevention and control in Latin America and the Caribbean*, *Reprod Health Matters*, 2008 Nov 16(32):59-66 ("Cervical cancer is the leading cause of cancer deaths among women in Latin America and the Caribbean, and disproportionately affects poorer women. Mortality rates in the region are seven times greater than in North America.").

[32] *Id.*

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