

Toxic Torts: Designation For Causation

Law360, New York (November 09, 2011) -- It is often said that toxic torts are won or lost on the strength of the evidence proffered to prove medical causation. Finders of fact are not typically permitted to intuit causation themselves from bare facts and raw data. Rather, "causation must be proven within a reasonable medical probability based upon competent expert testimony[.]"[1]

This is so for the facially obvious reason that carcinogenesis and other complex disease etiologies are the province of specialists and, as such, simply not susceptible to lay problem-solving. As one court trendsetting case put it, "[a]lthough juries are normally permitted to decide issues of causation without guidance from experts, 'the unknown and mysterious etiology of cancer' is beyond the experience of laymen and can only be explained through expert testimony."[2]

Consequently, in toxic torts, great attention is paid to causation experts. This is to be expected, as cases since the Bendectin and breast-implant litigations of the late 1970s and 1980s culminated in the Daubert standard, and what is now a sophisticated body of law for testing the scientific credibility of scientific testimony and otherwise governing its admissibility.

Indeed, the individual offering ultimate causation opinions typically sits at the evidentiary apex of supporting experts, including contaminate fate and transport and dose reconstruction modelers, to name a couple.

There is, however, a class of medical expert ubiquitous to toxic torts litigation that does not fit within the confines of a party-designated causation expert: the treating physician. Setting aside healthy toxic tort claimants, such as those alleging fear of cancer or instances where "the diagnoses were essentially manufactured on an assembly line"[3], a toxic tort plaintiff will often have consulted with or sought treatment from a physician prior to ever claiming that the defendants' substance caused his or her malady.

Treating-physician testimony spans a range of evidentiary utilities. For the plaintiff, it may show the existence of the claimed disease or plaintiff's diligence in seeking treatment, or substantiate claims of pain and suffering. For the defendant, such testimony may support statute-of-limitations defenses, refute the severity likelihood of recurrence of the claimed illness or provide evidence of alternative causes of that illness.

The relationship between treating-physician testimony and the core issue in toxic tort, causation, is a tense one.

Under Rule 26(a)(2) of the Federal Rules of Civil Procedure, a party must designate and provide a written report from a treating physician “if that physician was ‘retained or specially employed to provide expert testimony,’” which is deemed to be the case with “a treating physician who is offered to provide expert testimony as to the cause of a plaintiff’s injury, but who did not make that determination in the course of providing treatment[.]”[4]

This, however, does not categorically foreclose causation testimony. While it is generally the case that “when a treating physician opines as to causation, prognosis or future disability, [he] is going beyond what he saw and did and why he did it”[5], there are times when “a treating physician may be required to form an opinion about the cause of an injury in order to properly treat it.”[6]

Applying this threshold, courts have consistently stymied toxic tort plaintiffs’ efforts to offer causation opinion through treating physicians by finding the undertaking to violate the expert-report requirements of Rule 26(b)(2).[7]

While a toxic tort defendant is unlikely to premise its causation defense on a treating physician’s opinion that the substance at issue cannot, or did not, cause the plaintiff’s claimed illness, causative testimony from a treating physician has its worth for the defendant.

Take a community-exposure case alleging that a given substance in the groundwater has caused an epidemic of lung cancer in a locality. The testimony of an impartial long-practicing pulmonary oncologist who has not noted an increase in lung cancer rates, or heard any tell of the alleged epidemic in treatment or professional circles, is helpful general causation evidence for the defense.

Likewise, the testimony of that same treating physician that the area is noted for high radon background levels, or that she unsuccessfully attempted to dissuade the plaintiff from smoking for many years could tend to show an alternative cause of the plaintiff’s lung cancer.

Yet, under the recent decision of *Schutter v. Wyeth Inc.*, Case No. 1:05-cv-0998 (N.D. Ill. Sept. 28, 2011), a defendant could be foreclosed from introducing such testimony unless it designated the treating physician as an expert under Rule 26(b)(2).

In that hormone-replacement therapy/breast-cancer case, the trial court took the unusual step of striking causally related deposition testimony from three of the plaintiff’s treating physicians because “a treating physician who has not been designated as an expert may not offer opinions about causation.”

The case is atypical both in striking unoffered deposition testimony and in doing so in favor of the plaintiff, since most cases that address the issue of whether a treating physician can speak to causation do so in the context of a plaintiff affirmatively seeking to offer that testimony in their case-in-chief.[8]

Unlike such cases, the treating oncologist in Schutter did not purport to have discovered the cause of the plaintiff's cancer. Rather, they testified generally on risk factors for breast cancer, whether hormone-replacement therapy was among them, and whether it was "a potential cause of breast cancer[.]"

These exclusions do not logically follow from the general rule that undesignated treating physicians may not offer causative opinions outside the scope of treatment because no affirmative causation opinion was sought. A toxic tort plaintiff must, through expert testimony, prove "to a reasonable degree of medical probability" that "exposure to a substance was a but-for cause of the injury[.]"[9] It is an exacting burden subject to scrutiny under Daubert, and requiring the plaintiff to prove "the harmful level of exposure to a chemical" necessary to cause the claimed illness and that he was "exposed to such quantities[.]"[10]

While a defendant may choose to offer affirmative opinion evidence of a competing cause or that the chemical did not cause the plaintiff's claimed illness, it is under no compulsion to do so. It can prevail when "the proximate cause of plaintiff's condition remains unknown and unproved"[11], without ever proving etiology of the disease generally or of the plaintiff's illness specifically.

There is thus a principled distinction to be drawn between the sort of generalized background causative opinions addressed in Schutter and affirmative causation opinions that a plaintiff must offer to meet his burden of proof.

The former is not a causation opinion in and of itself, but rather a piece of evidence that may be considered in reaching or rebutting such an opinion. Thus, trial courts have found against plaintiffs on causation when "none of the treating physicians even mentioned [the chemical at issue] in the Plaintiffs' medical records, much less concluded that [the chemical] caused any illness." [12]

The Schutter ruling dismisses the distinction by stating that "[r]egardless of whether causation is cast in the positive ('does X cause cancer') or the negative ('does Y not cause cancer'), the result is the same: opinion testimony based on general medical knowledge regarding the reason [plaintiff] developed breast cancer."

But in rebutting the distinction, the statement undoes it. The difference between general background information on risk factors that might just as easily be found from the American Cancer Society or National Cancer Institute[13], and affirmative causation testimony subject to Daubert is not a matter of phraseology but of fundamental sort. And while it may be true that background information from treating physicians on risk factors could be called opinions "regarding" causation, the same could be said of purely diagnostic opinions from treating physicians.

The fact that a given breast cancer plaintiff may, for example, be BRCA-mutation positive proves a great deal about causation since "[w]omen with BRCA mutations ... face a cumulative risk of between 50 to 80 percent of developing breast cancer[.]"[14] Yet under Schutter, related treating-physician testimony could be considered objectionable.

Whether or not the Schutter order is correct, its occurrence counsels in favor of obtaining prospective agreement or guidance on the treatment of causally relevant treating-physician testimony or giving consideration to designating such individuals as nonretained experts under Rule 26(b)(2)(C).

That amendment, effective Dec. 2010, provides for “summary disclosures in place of complete expert reports, of the opinions to be offered by expert witnesses who were not retained or specially employed to give expert testimony.”[15] One district court has held that this amendment allows causative testimony from treating physicians when summary disclosure is made and the “treating physicians were [not] sought for any purpose except treatment.” *Id.* at 645. Other courts, however, continue to preclude causation testimony from treating physicians following the amendment.[16]

Treating-physician testimony can be a useful tool in refuting causal assertions outside the mainstream. As nonparty experts that the plaintiff presumably chose and trusted for significant health decision, they are difficult for a plaintiff to dismiss as “hired guns.”

Moreover, they can add a real-world dimension to medical causation, which can at times be an esoteric debate to a trier of fact. This they do by giving the perspective of an individual who deals with the diseases claimed in the locality allegedly affected. Care should be taken to see that such perspective is not lost on procedural grounds.

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[1] *Jones v. Ortho Pharmaceutical Corp.*, 163 Cal. App. 3d 396 (1985)

[2] *Id.* at 403; *Savage v. Union Pac. R.R.*, 67 F. Supp. 2d 1021, 1030 (E.D. Ark. 1999) (causation analysis “start[s] with the fundamental proposition that the existence of a causal connection between exposure to a certain chemical and an alleged injury requires specialized expert knowledge and testimony since such matters are not within the common knowledge of lay persons.”)

[3] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 633 (S.D. Tex. 2005)

[4] *Montes v. Union Pac. R.R. Co.*, 2011 U.S. Dist. LEXIS 38712 (D. Neb. Apr. 8, 2011)

[5] *Griffith v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 233 F.R.D. 513, 518 (N.D. Ill. 2006)

[6] *Scholl v. Pateder*, 2011 U.S. Dist. LEXIS 67031 (D. Colo. June 22, 2011)

[7] See e.g. *Brooks v. Union Pac. R.R.*, 620 F.3d 896, 900 (8th Cir. 2010); *Principi v Survivair, Inc.* 231 FRD 685 (2005, MD Fla); *Phillips v Am. Honda Motor Co.*, 438 F. Supp. 2d 1328 (2006, SD Ala)

[8] See e.g., *Scholl v. Pateder*, 2011 U.S. Dist. LEXIS 67031 (D. Colo. June 22, 2011); *Downey v. Bob's Discount Furniture Holdings Inc.*, 633 F.3d 1, 7 (1st Cir. 2011)

[9] *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1169 (10th Cir. N.M. 2010)

[10] *Seaman v. Seacor Marine LLC*, 564 F. Supp. 2d 598, 602 (E.D. La. 2008)

[11] *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 404 (1985)

[12] *In re Paoli R. Yard PCB Litigation*, 1992 U.S. Dist. LEXIS 18433 (E.D. Pa. Oct. 21, 1992)

[13] See NCI, *Breast Cancer: Prevention, Genetics, Causes*
<http://www.cancer.gov/cancertopics/prevention-genetics-causes/breast> (last visited Oct. 30, 2011);
ACS, *Breast Cancer Overview: Causes, Risk Factors, and Prevention*
<http://www.cancer.org/Cancer/BreastCancer/OverviewGuide/breast-cancer-overview-what-causes> (last visited Oct. 30, 2011)

[14] *Ass'n for Molecular Pathology v. United States PTO*, 653 F.3d 1329 (Fed. Cir. 2011)

[15] *Coleman v. Am. Family Mut. Ins. Co.*, 274 F.R.D. 641, 645 (N.D. Ind. 2011).

[16] See e.g., *Nagle v. Mink*, 2011 U.S. Dist. LEXIS 97781 (D. Colo. Aug. 29, 2011); *Scholl v. Pateder*, 2011 U.S. Dist. LEXIS 67031 (D. Colo. June 22, 2011)