

Requiring Causation Proof In Foreign Recognition Actions

Law360, New York (July 7, 2011) -- With the increasing attention on foreign judgments in toxic tort actions and similar cases, it is worth briefly considering the impact of what has proven to be their chief moderator in the United States: the requirement that causation be proven by credible, reliable scientific evidence.

"[A]s is universally the case, a [toxic] tort plaintiff must demonstrate the defendant's actions caused the plaintiff's injury," meaning the plaintiff must prove "to a reasonable degree of medical probability" that "exposure to a substance was a but-for cause of the injury[.]"[1]

The injuries alleged can be eclectic. In one notable California case, a subdivision of plaintiffs "seem[ed] to link to the [defendant] every physical infirmity or malady that they had suffered since becoming connected to the subdivision — headaches, dizziness, bronchitis, breathing problems, skin rashes, eye irritation, sinus problems, lack of energy, throat irritation, insomnia, muscle aches and cramps, stomach problems, diarrhea, ear infections, arthritis, and chronic colds and flu."[2]

One puzzling whether it is medically true that the same substance can cause "lack of energy" in one person and "insomnia" in another, and perhaps whether there is such a thing as the later alleged and ominous sounding "environmental acquired immune deficiency syndrome," has hit on both the United States legal system's experience with toxic torts and its answer to them.

Cases like the above and the societal traumas of Bendectin and Breast Implant Litigations, where decade-long waves of cases were brought based on medically false causal assertions, make up the maturing experience. The Eleventh Circuit's characterization that now "[t]oxic tort cases ... are won or lost on the strength of the scientific evidence presented to prove causation[,]"[3] is the antidote.

In the case before it, the Eleventh Circuit went on to critically evaluate the plaintiffs' expert evidence that a particular substance caused their harm and found that evidence wanting. The court excluded the expert evidence at a pretrial Daubert exclusion hearing.

Because in the United States “causation must be proven within a reasonable medical probability based upon competent expert testimony”[4] and because plaintiffs had no expert testimony that met that standard, they lost.[5] Similarly, the sick subdivision plaintiffs in Cottle lost when they could not produce *prima facie* evidence that “to a degree of reasonable medical probability, their injuries had been caused by exposure to chemicals.”[6]

This scenario and outcome has reoccurred in courts across the country during the last three decades. Whether couched as a Daubert challenge under the Federal Rules, an evidentiary challenge in state court, or a Cottle or Lone Pine case management order requiring a *prima facie* showing of causation, it can be fairly said that the United States judicial system requires scientifically credible evidence of but-for causation before its toxic tort plaintiffs may recover.

Those found lacking should, and often do, lose long before trial regardless of the case equities, plaintiff credibility, or the severity of a plaintiff’s ailment allegedly attributable to the defendant’s bad conduct. Put differently, toxic tort claims lacking credible causation evidence are, as a general policy, disfavored and targeted for elimination by the United States judicial system.

This is not necessarily the case in all foreign jurisdictions. Nicaragua, for example, has on the books a law that “creates several irrebuttable presumptions regarding intent, causation, liability, and damages”[7] in a particular type of politically charged toxic tort case. Foreign jurisdictions that allow toxic tort plaintiffs substantial verdicts absent credible scientific evidence of causation pose a paradox for the United States legal system in the recognition and enforcement context.

Take, for example, a hypothetical but substantial foreign toxic tort verdict. Assume the foreign tribunal finds, based on anecdotal lay witness testimony and evidentiary presumptions, that a substance scientifically known to be innocuous has caused a broad range of cancers in residents. Properly decided, such a case would be lost in the United States due to any number of independently fatal deficiencies.

In terms of classes of evidence, “‘the unknown and mysterious etiology of cancer’ is beyond the experience of laymen and can only be explained through expert testimony,”[8] which these hypothetical plaintiffs lack. The individual anecdotes they have, even if in the form of peer-reviewed case studies, “ordinarily cannot prove causation.”[9]

Then there are the elemental deficiencies. Plaintiffs cannot prove “the harmful level of exposure to a chemical” necessary nor that they were “exposed to such quantities” — both of which are among the “minimal facts necessary to sustain the plaintiff’s burden in a toxic tort case.”[10] They are left without evidence that the substance can cause even a single form of cancer let alone their particular type of cancer,[11] and they cannot show specific causation or rule out alternative causes.[12]

The question then becomes whether plaintiffs can enlist the same legal system that would almost certainly find their case frivolous for lack of credible causation to enforce the judgment from it. Put differently, can toxic tort plaintiffs end-run the United States credible causation requirement by importing foreign judgments that do not require such proof?

A case-specific answer might turn in part on a complex interplay of case-specific facts and procedure, principles of international comity, Recognition and Enforcement law, foreign jurisdiction conditions and independence, and the like. But enforcement, as a general matter, also arguably depends on the importance of the credible-causation requirements to United States toxic tort jurisprudence, since judgments offensive to the policies of a State or the United States, or the due process they afford, may be denied enforcement here.[13]

A brief historical examination and current accounting of toxic torts and the credible causation standard leaves little doubt that the latter was a policy largely standardized with Daubert and meant in significant part to reign in the excesses of the former. Daubert itself was a Bendectin case — a class of litigation that has been called “the single most criticized piece of large-scale litigation of all time.”[14] It began in earnest in 1979, following a dramatic National Enquirer story on the popular morning sickness medication that allegedly caused deformities, and proliferated during the 1980s.

By the late 1980s, however, it became evident that this causal assertion was scientifically invalid. Later, it would learned that the initiating research had been faked. While no uniform Daubert standard existed at that time, this line of cases was nonetheless systematically ended for want of causation evidence. Further, even where expert causation testimony was admitted, verdicts were commonly reversed for want of substantial evidence.[15]

Others times, the Frye general acceptance standard was used to exclude the testimony,[16] while still other courts employed a pre-Daubert reliability analysis.[17] When the United States Supreme Court decided the Daubert case in 1993, the next mega toxic tort, the breast implant cases, already crowded United States dockets with over 12,000 individual lawsuits.

As with Bendectin, the central causal assertion was false: the National Academy of Science, investigating in response to what was originally a causation question assigned from a consolidated breast implant case, found “there was not ‘even suggestive evidence’ that silicone breast implants caused systemic disease.”[18] This largely ended the litigation in the late 1990s.

Against this backdrop, the emphasis placed upon vetting causal assertions in toxic torts for scientific credibility is not surprising.[19] Of all the types of cases involving experts, two of the three cases that make up the Daubert trilogy[20] were toxic torts and in each, the central issue was the lack of credible causation evidence. In the United States “the general principle [is] that causation evidence in toxic tort cases must be in the form of expert scientific testimony.”[21]

The federal system and nearly all states provide an opportunity for a meaningful reliability check on that testimony. While most do so under Daubert, others use the Frye general acceptance test, or particular evidentiary sections, to a similar effect.[22]

With causal assertions being scrutinized, courts have been urged to allow the plaintiffs to meet their evidentiary burden with correspondingly weaker causal assertions. *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1169 (10th Cir. N.M. 2010), is typical both in terms of the complaint and judicial response. Plaintiffs argued that the “requirement to show but-for causation will cut off virtually all relief for toxic tort plaintiffs,” and the bench retorted that there is to be no “toxic-tort exception to its general rule of but-for causation.”

With our hypothetical case, the difference between the substantial verdict from the foreign jurisdiction and what would very likely have been a dismissal of the same case if brought in almost any United States court is a fundamental one. Properly decided, a defendant in the United States cannot be held liable in a toxic tort absent scientifically reliable / credible evidence that it caused the plaintiff's injury.

In the hypothetical jurisdiction it can. While the operant legal rules yielding that divergent result could be called procedural, their import is clearly substantive — and not on a side issue. Rather, it is on the bedrock question of when one may invoke the coercive power of the State to take from another as compensation for illness. The United States answers "when the defendant probably caused it," while the hypothetical foreign jurisdiction responds "whenever." It is a difference, we would submit, of due process and of policy.

Notably, the Eleventh Circuit, which previously stated that toxic tort suits stand or fall "on the strength of the scientific evidence" of causation, recently applied that paradigm to an imported toxic tort judgment in *Osorio v. Dow Chem. Co.*, 635 F.3d 1277, 1279 (11th Cir. 2011), holding that the judgment was not due recognition and enforcement under the Florida Recognition Act.

The Eleventh Circuit also recently affirmed a holding that the United States Constitution and "international due process norms ... do not permit awarding damages, especially of the magnitude awarded here [(average of \$650,000 per plaintiff)], without proof of causation." *Sanchez Osorio v. Dole Food Co.*, 665 F.Supp.2d 1307, 1335 (S.D. Fla. 2009).

--By James M. Sabovich, Heather Hearne and Christopher Spiker, Gibson Dunn & Crutcher LLP

James Sabovich is a senior associate, and Heather Hearne and Christopher Spiker are associates, in the Orange County, Calif., office of Gibson Dunn. They are members of the firm's environmental litigation and mass torts practice group.

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[1] *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1166, 1169 (10th Cir. N.M. 2010).

[2] *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1374 (1992).

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

[4] *Jones v. Ortho Pharmaceutical Corporation*, 163 Cal. App. 3d 396, 402 (1985).

[5] *Cottle*, 3 Cal.App.4th at 1387-88.

[6] *Id.* at 1385.

[7] *Shell Oil Co. v. Franco*, Case No. CV 03-8846 NM (PJWx) 2004 U.S. Dist. (C.D. Cal. May 18, 2004).

[8] Jones, 163 Cal.App.3d at 403 (quoting *Parker v. Employers Mutual Liability Ins. Co. of Wis.*, 440 S.W.2d 43, 46 (Tex. 1969)).

[9] *McClain v. Metabolife Int'l Inc.*, 401 F.3d 1233, 1254 (11th Cir. 2005).

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

[11] *Valentine v. PPG Indus.*, 158 Ohio App. 3d 615, 638 (2004) (“it is generally well understood that carcinogens cause specific types of cancer”).

[12] *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 610 (D.N.J. 2002) (“In order to properly assess the specific cause of an individual's illness, a quantitative risk assessment must be undertaken, which assesses the risk that a particular exposure caused a particular illness.”)

[13] Uniform Foreign Money-Judgments Recognition Act (UFMJR), § 4.

[14] “Almost all scholarly accounts describe the Bendectin litigation as an extreme example of legal pathology,” Gary Edmond, *Whigs in Court: Historical Problems with Expert Evidence*, 14 Yale J.L. & Human 123, 160 (2002), and those that have studied it most say “Bendectin is the Taj Mahal of horror stories about the tort system.” Id.

[15] *Richardson v. Richardson-Merrell, Inc.* 649 F. Supp. 799 (D.D.C. 1986); *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 709-10 (Tex. 1997); *Blum v. Merrell Dow Pharms., Inc.* 564 Pa. 3, 5-6 (Pa. 2000).

[16] *Daubert v. Merrell Dow Pharmaceuticals*, 951 F.2d 1128, 1130 (9th Cir. 1991) vacated 509 U.S. 579 (1993).

[17] *Ealy v. Richardson-Merrell Inc.*, 897 F.2d 1159, 1162-63 (D.C. Cir. 1990).

[18] *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005)(quoting Committee On The Safety Of Silicone Breast Implants, Institute of Medicine, *Safety of Silicone Breast Implants*, 432 (1999)).

[19] Reference Manual on Scientific Evidence, 32

[20] See *Daubert*, 509 U.S. 579; *General Electric v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

[21] *Meade v. Parsley*, 2010 U.S. Dist. LEXIS 125217, at *23 (S.D. W.Va. Nov. 24, 2010).

[22] Edward K. Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 VA. L. REV. 471, 472-73 (2005).