Causation Evidence in Ohio Toxic Tort Litigation

By Melissa L. Korfhage
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Recently the Supreme Court of Ohio accepted for review the case of Terry v. Ottawa County Board of Mental Retardation & Developmental Delay. The Court agreed to consider whether "[e]xpert testimony is required to establish a causal connection between exposure to mold and a subsequent injury." The parties' arguments, however, went far beyond this specific proposition of law, threatening to substantially alter Ohio tort litigation.

In general, Ohio law requires that expert testimony be presented to prove causation unless "the cause and effect is so apparent as to be matters of common knowledge."[1] In a toxic tort case, "a plaintiff must establish (1) that the toxic substance is capable of causing the condition (general causation) and (2) that the toxic substance in fact caused the plaintiff's medical condition (specific causation)."[2] Specific causation is often discussed in terms of a "dose-response relationship," because the plaintiff must show "that he was exposed to the toxic substance and that the level of exposure was sufficient to induce the complained-of medical condition."[3] In most instances, expert testimony is required in order to establish both general and specific causation.

[4] In 2006, the Supreme Court held that expert testimony on causation must correlate to scientific data.

In Valentine v. Conrad,[5] the plaintiff alleged that her husband's exposure to chemicals caused his brain cancer. The expert's general causation testimony was excluded because the only scientifically known cause of brain cancer was radiation. While the Court in Valentine did not directly address the requirements for specific causation, it did state that a differential diagnosis was inappropriate when general causation had not been shown.
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Julie Koehne, Assistant Law Librarian

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While *Valentine* was pending, the Sixth District Court of Appeals decided *Terry*. Fifteen employees brought a negligence action for "sick building syndrome" resulting from moldy conditions at their workplace. They presented an expert report and expert testimony in order to establish causation. The expert testified that poor air quality in the building caused the plaintiffs' health problems. The trial court, however, excluded the expert's testimony on specific causation as unreliable and granted summary judgment (because the employees could not establish proximate cause without such testimony).

The appellate court reversed, despite concluding that the expert's testimony regarding specific causation had been properly excluded (because his differential diagnosis failed to rule out other possible causes of the employees' ailments). It found that the trial court erroneously "threw the general causation baby out with the proximate causation bathwater" when it also excluded the expert's testimony as to general causation. The court stated: "[A]ppellants may yet obtain a relevant and reliable expert opinion on the issue of causation,"[6] allowing plaintiffs an opportunity to find another expert to support their claims.

In dicta, the appellate court further opined that a dose-response relationship "should not be required as proof when no study has been or could be conducted or when the level will always vary from individual to individual." For example, the nature of mold exposure did not permit studies that would establish a dose-response relationship. Therefore, the court held that "an expert may still opine as to specific causation" without "a quantifiable dose-response relationship...". The court also said that a plaintiff "is not always required" to prove both general and specific causation.

In their appeal to the Ohio Supreme Court, plaintiffs did not dispute the proposition that "[e]xpert testimony is required to establish a causal connection between exposure to mold and a subsequent injury" (i.e., expert testimony is needed to establish specific causation). Rather, they focused on defending the reversal of summary judgment. Plaintiffs argued that the appellate court's opinion did not allow them "two bites at the apple." Plaintiffs derided the combination of *Daubert* hearings and summary judgment as a "gotcha situation."

Ultimately, the Supreme Court decided to merely refine the causation evidence standards in Ohio. Rather than drastically altering the standards, the Court adapted the two-step analysis set forth in *Darnell*. It held that the expert's testimony was reliable and relevant with respect to the issue of general causation but unreliable with respect to specific causation.[8] Therefore, the Court reinstated the summary judgment issued by the trial court, finding no material issue of fact with respect to specific causation.[9] Because medical testimony is required to prove the specific cause of an alleged injury, exclusion of the expert's testimony as it pertained to specific causation destroyed the plaintiffs' ability to establish a prima facie case. And the Court, in reinstating the defense judgment, denied the plaintiffs an opportunity for a "do-over" with a newly located expert on specific causation issues.


[3] *Id.* at 627, fn.1.
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**[4]** See Alden v. Phifer Wire Prod., 8th Dist. No. 85064, 2005-Ohio-3014, at ¶19, 2005 WL 1407776; **but see** Olinger v. Pretty Products, Inc. (Nov. 7, 1997), 5th Dist. No. 96CA29, 1997 WL 33814208, *3 (plaintiff need not show general and specific causation in a worker’s compensation case where workplace exposure to toxic chemicals is alleged to have caused lung cancer).


**[6]** Id. (emphasis added).

**[7]** Terry v. Caputo, ____ Ohio St.3d ___, at ¶ 15, 2007-Ohio-5023.

**[8]** Id. at ¶ 29,30.

**[9]** Id. at ¶ 31.

Written by Melissa L. Korfhage, a member of the Product Liability Practice Group at the law firm of Dinsmore & Shohl. Melissa’s practice is concentrated in mass tort and toxic tort litigation. She has experience as local and national counsel in complex litigation. She also has appellate experience in state and federal jurisdictions. She provides general litigation services to both corporate and non-profit organizations. Melissa is a contributing author to the legal treatise Drug Product Liability Reporter.
Tortuous Torts

Glenna Herald, Reference

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Remembrances
By Chuck Kallendorf, Reference

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In April 1872, the Bar Association’s executive committee looked into having its own library and reading room, but only occasional mention of that was later made. C.B. Simrall and S. Dana Horton were among a group of about 25 who had offered to each contribute 200 volumes toward a prospective five thousand volume collection. Publications were ordered and, with the intent of it being a temporary measure, deposited as part of our collection. It turned out to be not so temporary.

For many years the Bar Association has paused to remember those of its membership who had passed away, a tradition categorically held in the County courthouse, followed by a reception in the Law Library. On Thursday, March 27th, we were again honored to partake in that tradition.
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