



Cincinnati Law Library News

A Monthly Newsletter from the Cincinnati Law Library Association

April 2008

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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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Tech Tip: Using the Am Jur Legal Forms by West

Julie Koehne, Assistant Law Librarian

To get started, click the link on the desktop indicating Am. Jur. Legal Forms 2d.

Next, enter your name or initials into the Client ID field and click the Sign On button. If the Westlaw Password field is blank please call for assistance.

You may enter your search in the box provided to the left. However, I have found by using the search box more often than not, the results will have a ton of hits. I find it easier to use the Table of Contents to retrieve the desired form. Click on the Table of Contents link in the upper right corner.

Using the Table of Contents allows you to find all the forms involved within a specific topic. A box with a plus sign indicates that the topic may be expanded to reveal more specific topics and eventually mining through to get to the individual form you desire.

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*.^[7] 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.

[1] *Darnell v. Eastman* (1970), 23 Ohio St.2d 13, 261 N.E.2d 114, syllabus.

[2] *Valentine v. PPG Indus., Inc.* (2004), 158 Ohio App. 3d 615, 626, 821 N.E.2d 580.

[3] *Id.* at 627, fn.1.

[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).

[5] *Valentine v. Conrad* (2006), 110 Ohio St.3d 42, 850 N.E.2d 683.

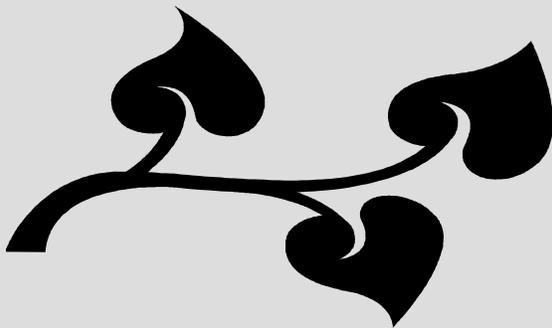
[6] *Id.* (emphasis added).

[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.



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Tortuous Torts

Glenna Herald, Reference

The word “twisted” refers to the subject matter of torts, but it could also be used to describe the arduous process of researching torts.

To help you straighten out the mess of tortuous torts, the library offers our membership the following electronic resources to help you stay current with the twisted, complicated intricacies of Tort law.

Baldwin's Tort Law – Updated annually, this treatise outlines current tort law in Ohio and current attempts by the Ohio Legislature at tort reform.

BNA's Product & Safety Liability Reporter – Updated weekly, this publication helps users stay current by providing analysis of product liability litigation and product safety issues.

Aspen's Personal Injury Law Library – Updated annually, this publication offers searchers the following titles:

- Forms & Checklists
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- Expert Witness Updates

Aspen's Product Liability Law Library – Updated annually, this publication offers users the following titles:

- Forms & Checklists
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- Product Liability Case Digest

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- Product Warnings, Defects and Hazards
- Scientific Evidence and Experts Handbook
- Malingering and Deception in Litigation

CCH Products Liability Reporter – Updated semi-monthly, this database offers users

- Consumer Product Safety Guide Reports
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- Daily Document Updates

These electronic resources should take most of the torture out of researching the law of Torts. Please contact us for more information regarding these and other materials that may be of use to you.



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New on the CLLA LawBlog!

Mary Jenkins, Law Library Director

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POSTED BY CHUCK KALLENDORF AT FRIDAY, MARCH 14, 2008 0 COMMENTS

Hopefully, these features will make it easier for you to keep up and keep in touch. We wouldn't mind an occasional virtual high five, either!

Remembrances

By Chuck Kallendorf, Reference

What could be more symbolic of a life devoted to the pursuit of the practice of law than the majesties of Hamilton County's courthouse or the Law Library?

The Cincinnati Bar Association was founded in 1872. From an association of 75 members then to some 4,500 today, the Bar Association has exemplified the practice of law in the Miami Valley through its presence and that of its members.

The Law Library has been here since 1847, starting out as little more than a bookcase in the courtroom of the Court of Common Pleas. We've grown together.

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.



May we ask?

Do you have comments or suggestions for the Law Librarian? Hopes for the future? Unmet needs? Resources on your wish list? Materials you wish were available for remote access? High praise for services or resources we currently offer? Mary Jenkins would like to hear from you, whether you are a regular on-site or you access the library 100% online. Please contact her at 513.946.5300 or mjenkins@cms.hamilton-co.org. If you prefer, we have a comments link on the CLLA homepage, too. Thanks.



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