

Client Alert

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Dose Matters: Texas Supreme Court Refines Causation Standard For Multisource Toxic Tort Cases

Causation in science and law has always had some curious distinctions, but the legally created concept of “substantial factor” causation has become often enigmatic in trials and appeals. On July 11, 2014, in a closely watched asbestos case on the issue of causation, the Texas Supreme Court vacated a nearly \$12 million verdict and confirmed the importance of proving dose in all toxic tort cases. Courts around the country have often grappled with causation in cases involving exposure to asbestos as well as other toxic substances. Now, the Texas Supreme Court has offered a clarity of vision in the case of *Bostic v. Georgia-Pacific Corporation* on the substantial factor causation standard in Texas, and it could serve as a model for other jurisdictions where the standard is unsettled.

In the process, the court’s opinion soundly rejected the theory that “any exposure” to asbestos above background levels is sufficient to prove causation for mesothelioma. The court held that a plaintiff must have some scientifically reliable evidence quantifying the dose of exposure to a particular defendant’s products before liability can be imposed. This is a critical “threshold” concept, no pun intended.

The Background

In 2003, Timothy Bostic’s estate sued 40 defendants, alleging that asbestos in their products had caused Bostic’s death from mesothelioma. Georgia-Pacific was the only defendant remaining in the case when it was tried in 2006. At the trial, the plaintiffs contended that on a handful of occasions Bostic had been exposed to chrysotile asbestos in drywall joint compound made and sold by Georgia-Pacific between 1965 and 1977.

Evidence at trial showed that Bostic was exposed to asbestos from multiple other products, including from occupational and secondary exposures. The plaintiffs’ causation experts testified that each and every exposure to asbestos would be a “significant contributing factor” to the development of mesothelioma. Based on this testimony, the jury found Georgia-Pacific 75 percent liable and a nonparty, Bostic’s former employer, 25 percent liable. On appeal, the Texas Court of Appeals reversed the trial court, indicating that the plaintiffs were required to prove that “but for” Bostic’s exposure to Georgia-Pacific’s products he would not have contracted mesothelioma. See *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588, 595 (Tex. App. 2010). Initially, the Texas Supreme Court rejected the plaintiff’s petition to review the decision, but granted a motion for rehearing and accepted the appeal in 2013.

Balancing Causation Standards: Impossible to Lose vs. Impossible to Prove

“The pathological peculiarities of mesothelioma should not render a plaintiff’s claim almost impossible to prove or almost impossible to lose.” Justice Eva Guzman

Asbestos plaintiffs have long argued that “any exposure” to an asbestos-containing product, regardless of amount, is sufficient to prove causation because science has been unable to establish a dose below which the risk of disease disappears. In *Bostic*, the court rejected this marked deviation from traditional

causation principles because it would impose absolute and automatic liability on product manufacturers, without regard to their actual contribution to a plaintiff's exposure.

The court also criticized the "any exposure" approach because of its arbitrary treatment of background levels of asbestos, even though those levels can vary by location. The court found it illogical "to exclude higher than normal background levels as the cause of the plaintiff's disease, but accept that any exposure from an individual defendant, no matter how small, should be accepted as a cause in fact of the disease." The court noted that a plaintiff could claim a "background dose of 20 does not cause cancer" while also claiming that a "defendant's dose of 2 plus a background dose of 5 does."

The *Bostic* opinion was not a total loss for asbestos plaintiffs. The court could have applied the far stricter "but for" standard embraced by the Texas Court of Appeals for multisource exposure. Because asbestos-related diseases develop over decades, few plaintiffs could ever establish a particular product actually caused the disease. The supreme court found that "but for" causation "yields to the more general substantial factor causation in situations where proof of but for causation is not practically possible."

Proving Substantial Factor Causation Through Epidemiological Studies

Although an exact quantification of a dose is not required under Texas law, *Bostic* made clear that a reasonable quantification of dose attributable to a defendant is necessary. If quantification is established through reliable expert testimony, a plaintiff can then prove specific causation indirectly with evidence typically used to prove general causation.

In cases where multisource exposures have occurred, scientific evidence of a statistically significant link between a dose and a disease can be used to prove substantial factor causation. This means "scientifically reliable evidence in the form of epidemiological studies showing that the defendant's product more than doubled the plaintiff's risk of injury" can suffice.

The court emphasized that the studies used to prove causation must meet the traditional indicia of scientific reliability. The plaintiff must also lay a foundation that his or her history of exposure to a particular product closely corresponds to the conditions of the studies. This similarly would include: (1) proof that the plaintiff was exposed to the same substance as those in the study; (2) proof that the plaintiff's exposure or dose levels were comparable to or greater than those in the studies; and (3) an onset of injury consistent with that of those in the study.

The court, however, made clear that reliable evidence showing a defendant's product doubled a plaintiff's chances of contracting a disease is not conclusive on causation and is only a starting point for a jury. A plaintiff must also quantify his or her total dose from other sources. If other sources of the toxin significantly increased the risk of disease above the defendant's contribution, then a jury could find the defendant's product was not a substantial factor in causing the disease. Following *Bostic*, a plaintiff's ability to quantify dose and to marshal congruent studies will be critical to his or her success in asbestos litigation.

What's Next?

Bostic is a major case development for not only asbestos cases, but also, potentially, all toxic tort cases where the elusive label of "substantial factor causation" has eroded established scientific concepts of causation. It will be important to see how this ruling is applied in other such cases.

The other development to watch is how the courts apply the Texas Supreme Court's requirement that substantial factor causation is still valid where "proof of but for causation is not practically possible." What does that mean, and what does it require? Those will be the next critical stages in this important development to bring the causation concepts in law and science in closer harmony.

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