



Defense Perspectives - Arguing Toxic Tort Cases in California

Tom Meador, Partner
Morgan, Lewis & Bockius LLP
May 7, 2004

Morgan Lewis
C O U N S E L O R S A T L A W

Major Defenses

- Liability
- Statute of limitations
- Medical causation
- No property damage
- Fear of cancer not reasonable

Statute of Limitations

- Two year personal injury
- Three year property damage
- Statute runs when the plaintiff first suffered an appreciable personal injury and knew, or should have suspected, what caused the injury



Pre-trial Publicity

What is the effect of
pre-trial publicity?

McKelvey v. Boeing North America

- General common knowledge
- Longstanding complaints of community action groups
- Reports of public agencies
- Newspaper articles and other media exposure

Pre-Trial Publicity

- California law is unsettled
- McGill v. MJ Brock & Sons
- O'Conner v. Boeing North America



Practical Tip

How to use
Statute of Limitations Motion
to focus
Medical Causation Argument

Medical Causation

What is meant by
Medical Causation?

Medical Causation

- General causation
- Specific causation
- Exposure
- Dose

General Causation

Does the chemical
have the capacity
to cause the disease?

Battle of Experts

How do you avoid
having every case
decided by jury?

The Legal Standard

- Kelly - Frye
- Daubert



Foundational Challenges

Evidence Code Sections 801 & 802

Foundational Challenges

- Evidence Code 801(b)
- A court must determine whether the matter is of a type that an expert can rely

New Cases - Foundational Challenges

- Jennings v. Palomar
- Roberti v. Andy's Termite & Pest Control
- Lockheed Litigation

Foundational Challenges

- **Jennings:** Proffering an expert opinion in a medical malpractice case that there is some theoretical possibility the neglect act could have been a cause-in-fact of a particular injury is insufficient to establish causation

Foundational Challenges

- **Roberti:** Kelly-Frye applies to cases involving novel devices, not to expert medical testimony



Foundational Challenges

- **Lockheed:** The matter relied upon must provide a reasonable basis for the particular opinion offered. Opinion based upon speculation or conjecture is inadmissible.



What is Specific Causation?

Did the chemical cause the disease to a specific plaintiff?

Exposure

- Product identification
- What is the pathway of exposure?

Exposure Cases

- Dumin v. Owens-Corning Fiberglass Corp.
- Lineweaver v. Plant Insulation Co.

Dumin

- There are two approaches to establishing exposure
 - Particularized proof
 - Prove product was at work site

Lineweaver

Particularized proof that
the plaintiff was exposed to a
particular defendant's product

Examples

- LAICO
- Lockheed litigation



Dose

**The poison is in
the dose**

Morgan Lewis
COUNSELORS AT LAW

Dose

- Co-carcinogens, synergistic effects, and single shot theories
- Does low level exposure cause disease?
- Chronic v. acute
- Battle of epidemiologists and toxicologists

Procedural Strategies



How do you narrow case
or obtain pre-trial dismissals?



Demurrer

Bockrath v.
Aldrich Chemical Company

Morgan Lewis
COUNSELORS AT LAW

Case Management

- Cottle v. Superior Court
- Hernandez

Motions for Summary Judgment

- Union Bank v. Superior Court
- “Factually devoid discovery”

Trial Motions

- Motions in Limine
- Evidentiary hearings at trial

What is Standard of Causation at Trial?

- **Jones v. OrthoPharmaceutical:** standard of reasonable medical probability
- **Rutherford v. Owen-Illinois:** Plaintiff must prove defendant was a Substantial Factor



Just Win Baby!

Defense Verdict

Morgan Lewis
COUNSELORS AT LAW



Defense Perspectives

Arguing toxic tort cases in California



*Defense Perspectives -
Arguing Toxic Tort Cases
in California*

Tom Meador

tmeador@morganlewis.com

213.612.2510

Morgan Lewis

C O U N S E L O R S A T L A W