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Using Jury Research to Help Overcome the Challenges of Commonsense Causation

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The issue of causation is at the core of most product liability trials. The challenge for litigants, particularly defendants, is that jurors often find commonsense notions of causation more persuasive than those based on complex or scientific evidence, even though the latter may be more accurate or correct. Commonsense causation arguments are simple arguments that are consistent with lay jurors' everyday experiences. Indeed, commonsense notions of causation are correct in most of our day-to-day activities. Accordingly, jurors come to trust their commonsense notions of causation, and find it disconcerting when those notions are challenged by trial counsel. The result is that jurors who are presented with competing theories of causation are often likely to prefer the commonsense theory, even if it is not correct or plausible from the perspective of science or engineering. This is especially true of jurors who are not motivated to carefully and thoughtfully consider and integrate a large volume of complex evidence.

In products litigation, one side often has the advantage of a commonsense theory of causation, while the other side must counter that commonsense theory with complex scientific evidence that may be counterintuitive to jurors.

In products litigation, trial consultants can help identify when and where commonsense notions of causation are likely to pose obstacles to their clients' arguments and can assist the trial team with crafting and testing arguments to overcome the challenges of commonsense causation. Well-researched psychological principals suggest a number of particular characteristics of an event that are likely to bolster commonsense notions of causation. Consider how many of your cases involve one or more of the following characteristics.

Spatial proximity.

Where an injured person was spatially proximate to an alleged causal factor, commonsense notions of causation, right or wrong, are usually bolstered. For example, in toxic tort litigation, a plaintiff often argues that her home or place of employment is in close proximity to a particular (often an unusual or prominent) environmental factor and, therefore, medical conditions she suffers are due to the environmental factor. Even where the alleged causal mechanism is not biologically plausible, the commonsense notions of causation that flow from spatial proximity can be difficult to overcome. We have witnessed the commonsense causation challenges arising from spatial proximity not only in toxic tort litigation, but also in other products cases, such as fire litigation, where a device that is spatially proximate to the origin of the fire will, due to commonsense causation, be wrongly assumed to be the cause of the fire.

Temporal proximity; last intervening event.

Where a person is healthy (or at least does not have a particular condition) prior to exposure to a product and becomes ill subsequent to exposure to the product, commonsense notions of causation kick in and can be difficult to overcome. We see this pattern in many types of products litigation, particularly pharmaceutical and medical device litigation. Commonsense causation is also often bolstered when the alleged causal mechanism is the last intervening event before an injury occurred. The plaintiff becomes injured and concludes that some event or action that occurred just prior to the injury must be the cause of the injury. This argument can be particularly persuasive to jurors when the pre-injury event is unusual or unexpected.

Incidence rates.

When multiple plaintiffs have experienced similar injuries, commonsense notions of causation are also bolstered. Psychological research has shown that four or more plaintiffs alleging the same causal mechanism in a single trial often results in significant challenges to the defense compared to the exact same arguments being presented by the three or fewer plaintiffs.

Similarities to another established causal connection.

Where an injured plaintiff does not have direct evidence of causation, but does have evidence of causation under similar (or at least apparently similar) conditions, commonsense notions of causation are often bolstered and jurors will generalize, often inappropriately, from one context to another. We have seen this commonsense causation challenge arise in many areas of products litigation, including chemical exposure litigation. For example, suppose chemical X has been found to cause lung cancer. Chemical Y shares certain properties with chemical X. Commonsense causation often leads to the conclusion that chemical Y must also cause lung cancer, even in the face of evidence that such a causal mechanism is biologically implausible.

Rejection of the concepts of chaos, randomness, or coincidence.

Often, notions of commonsense causation are further bolstered in the minds of jurors who tend to believe that “everything happens for a reason.” Convincing such jurors that an idiopathic cause is the most plausible cause can be a significant challenge.

Defending Against Commonsense Causation

In products litigation, one side often has the advantage of a commonsense theory of causation, while the other side must counter that commonsense theory with complex scientific evidence that may be counterintuitive to jurors. Further, jurors may not be motivated to expend the extra energy needed to understand and thoroughly consider complex and detailed causation evidence, making reliance on commonsense notions of causation an easy default. The challenge is to find ways to effectively educate your jury about causation evidence, to help them integrate it with minimal effort, and to consider it as a plausible alternative to the arguably incorrect commonsense notion of causation.

Finding strategies that will work to overcome powerful commonsense notions of causation often requires systematically testing, in a valid and reliable manner, multiple strategies for educating and persuading a jury. Trial consultants with expertise in social science research methodologies and data analysis can help a trial team to develop a program of research that will help ensure that the trial team selects the best possible strategies for overcoming commonsense causation. For example, focus group studies can be conducted to evaluate mock jurors’ reactions to and understanding of various causation themes or arguments. Focus groups can also be used to test and refine demonstrative exhibits that might be presented in conjunction with these arguments. The efficacy of an expert’s “tutorial” intended to educate jurors about scientific or complex evidence can be examined with the help of a jury simulation study in which some jurors receive the “tutorial” and other jurors do not. This type of exercise can also help the trial team understand the potential consequences of failing to educate jurors about the relevant issues. Trial consultants can also assist with witness preparation and increasing the likelihood that expert witnesses communicate clearly and effectively to the jurors regarding issues of causation.

Overall, the best way to know how your causation arguments will resonate with jurors at trial is to test those arguments in advance on a representative sample, using valid and reliable methods for conducting the testing. With that information in hand, a trial team is then in a position to hone and refine its arguments in a manner that will best meet the challenges of defending against commonsense notions of causation.

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