

THE TERMINIX CASE: CAUSATION IN MASS TORT LITIGATION

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On August 27, 2004, the Fifth Circuit Court of Davidson County in Nashville, Tennessee entered final judgment for Terminix International in a nine-plaintiff toxic-tort personal injury lawsuit. *Ballentine v. Terminix Int'l Co.*, No. 98C-836 (Aug. 27, 2004 Order). The case demonstrates the use of a challenge to the admissibility of plaintiffs' causation evidence to dismantle a multi-plaintiff - or mini-mass tort claim from a single toxic exposure, and it illustrates the importance to both sides of getting the scientific evidence right from the outset. The approach to a mini-mass tort involving injuries from a single exposure need be no different from that used in a single plaintiff's claim.

The plaintiffs, workers in a USAir reservation center at the Nashville airport, claimed that they suffered pulmonary and/or vocal cord injuries from an application at the center of the insecticide Gold Crest Vectrin 0.5%. The basis for the judgment was the court's determination that plaintiffs had not presented reliable scientific testimony to support their allegations that Vectrin *could* cause such injuries or *had* done so in the plaintiffs. Entry of judgment came after a long and unsuccessful series of attempts by plaintiffs to rehabilitate their science case. The case presented complex medical causation issues which were further complicated by the presence in the same case of multiple plaintiffs.

The Facts

On the night of August 11-12, 1994, a pesticide applicator applied 23 ounces of Vectrin in a 57,000-cubic-foot space in the reservation center. Vectrin is composed of the active ingredient resmethrin, carried, like most pesticides, in a base composed mainly of kerosine constituents. The application took place around midnight. The workers arrived the next morning and throughout the day (some plaintiffs that afternoon). Some employees complained of the smell

(like most insecticides, Vectrin has a kerosene carrier, which has a distinctive smell) and left work early. Seven days later, a state inspector obtained wipe samples from five locations in the reservation center, four of which showed no detectable level of resmethrin. The fifth showed resmethrin levels just above the threshold of detectability.

Nine days after the Vectrin application, an "air freshener" was applied to the facility through the HVAC system by the Metropolitan Nashville Airport Authority. The workers, smelling the substance, reacted immediately, overturning chairs, gagging, choking, and fleeing the building. Eight of the nine plaintiffs first sought medical treatment after the air freshener episode; one had done so before. All nine eventually sued Terminix in state court in Tennessee, alleging that they had incurred chronic respiratory problems or vocal cord injuries due to the application of Vectrin. The complaint alleged the usual array of product liability theories. The plaintiffs filed action in a single lawsuit

The Assessment of the Case

The case presented obvious issues of medical causation, with additional complexities caused by the presence of multiple plaintiffs claiming injuries from the same event. On the medical causation front, the first issue is always general causation (whether the product in question *can* cause the injuries claimed); the second issue is specific causation (whether it *did* so in these particular cases). With regard to general causation, the fact that was most obvious from the start was that resmethrin is a remarkably safe product. For example, the Extension Toxicology Network ("Exttoxnet") states that resmethrin is a "slightly toxic to practically non-toxic compound." There were no previous lawsuits about resmethrin remotely

similar to this one, no case reports in the literature of injuries from resmethrin like those claimed by the plaintiffs, and the national and international agencies that create pesticide standards all classified resmethrin in a very low category of toxicity.

With regard to specific causation, there were serious problems with plaintiffs' case as well. First, there was no evidence of actual exposure to resmethrin at levels that could even theoretically cause any sort of harm at all. The pesticide would have been completely or almost completely dissipated by the time the plaintiffs arrived at work, and testing of the facility found no resmethrin. There was no evidence that the plaintiffs had been exposed to *any* resmethrin, much less a quantity that might even arguably be capable of causing harm. An alternative hypothesis was that the plaintiffs, smelling an unfamiliar smell in their workplace, fell victim to mass hysteria, as is reported several times per year in this country when a crowd of people in a school, factory, or public gathering is exposed to an unfamiliar (and harmless) smell. (Such episodes, of course, normally involve a good-faith belief by those who are involved that they are genuinely ill due to some external event, rather than as a result of their own psychosomatic activity.)

Another problem with specific causation was the preexisting medical condition of the plaintiffs. Each plaintiff was a woman with a medical history – sometimes a long medical history – of complaints very similar or somewhat similar to those claimed as injuries from the pesticide exposure.

On the other hand, the plaintiffs' case had two strengths. First, there was clearly at least a superficial plausibility to plaintiffs' temporal story: they were exposed to the product, and then sought medical

treatment and were diagnosed with various ailments. *Post hoc ergo propter hoc* is a fallacy listed in textbooks on logic, but it is nevertheless very persuasive to most people. Combined with the desire to attribute any injury to some simple, identifiable cause and the desire to provide compensation for any misfortune, the bare bones of plaintiffs' case deserved very careful attention.

The second aspect of the case working in plaintiffs' favor was that they had brought the case collectively, turning it into a miniature mass-tort. This tremendously increased the seeming plausibility of their causation arguments because each plaintiff can be made to serve in the minds of the jury as evidence of causation on behalf of each of the other plaintiffs. Where there is smoke, there is fire, and where there are *nine* people who all say the same thing happened to them because they were exposed to something, it must be true. This argument is generally made explicit at some point by plaintiffs' counsel – often in closing argument – and is psychologically difficult to refute.

Terminix chose to mount its primary attack on the weakest point of plaintiffs' case – the science – and the best time to do so was clearly by motion practice prior to trial. Tennessee applies a *Daubert*-like test to the admissibility of allegedly scientific evidence. *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997). This challenge – ultimately fatal to plaintiffs' case – took a long and tortuous path to final resolution.

The Medical Causation Case/The First Round

Plaintiffs' initial expert witnesses were a pulmonologist, Dr. Brevard Haynes, and an otolaryngologist, Dr. Robert Ossoff. Both Drs. Haynes and Ossoff provided expert reports diagnosing the plaintiffs with various respiratory and vocal-cord disorders and opining, chiefly based on temporal proximity to the Vectrin application, that Vectrin was the cause

of the alleged injuries. The defense argued that Drs. Haynes and Ossoff did not attempt to identify the specific substance responsible for plaintiffs' alleged injuries and did not point to any scientific evidence that Vectrin was capable of causing such injuries. In addition, the defense noted that the doctors did not rule out the "air freshener" episode as a possible cause of the injuries (indeed, they thought it could have been contributory, given the nature of their opinion, which was almost entirely an inference from the temporal association between exposure and injury). Finally, the doctors failed to account for or rule out various preexisting conditions the plaintiffs had.

Plaintiffs' response to this attack was unusual, but certainly not unprecedented: they sharply changed course. They brought in a new expert, Dr. Edward Calabrese, a toxicologist. Dr. Calabrese submitted an affidavit putting together some scientific evidence in an attempt to establish a causal link between Vectrin and plaintiffs' injuries. The most dramatic shift was from blaming Vectrin generally to blaming the *kerosine carrier* in Vectrin for the injuries. This move presumably seemed advisable, given the absence of evidence that the *insecticide* in Vectrin can harm humans.

Plaintiffs also presented a causation argument explicitly based on the fact that there were multiple plaintiffs: Dr. Calabrese argued in his affidavit that the fact that multiple plaintiffs were claiming similar injuries from the same event made it more likely that they had in fact been injured by the exposure to Vectrin.

The Medical Causation Case/The Second Round

Plaintiffs' attempt to rehabilitate their case represented their recognition that they needed to couch the science part of their case in appropriate *Daubert/McDaniel* terms, which they had not explicitly done before. Thus Dr. Calabrese's affidavit listed scientific studies, explicitly endorsed a particular methodology (differential

diagnosis), and purported to link a specific substance to specific injuries by scientific steps and reasoning. Dr. Calabrese also purported to have taken into consideration, and properly ruled out, plaintiffs' various preexisting conditions.

Terminix could have continued the *Daubert/McDaniel* briefing with the hope that the court would reject plaintiffs' attempt to salvage the case by changing direction, but decided instead to pause in order to take discovery. Terminix deposed Dr. Calabrese on his opinions and worked that deposition into a renewed motion to exclude the evidence. Drs. Haynes and Ossoff had essentially been abandoned in plaintiffs' briefing (they were scarcely mentioned, much less defended), so the controversy focused on Dr. Calabrese. Terminix further made the decision to focus on general causation and not on identifying flaws in Dr. Calabrese's analysis of each individual plaintiff. This was primarily because of Terminix's concern with presenting the argument against Dr. Calabrese as clearly and simply as possible: General causation was the best battleground.

Terminix made the following points in attacking Dr. Calabrese's testimony: Dr. Calabrese identified no scientific evidence linking Vectrin to the sorts of injuries claimed by the plaintiffs. With regard to one of the two types of injury claimed by the plaintiffs – vocal cord injury – he identified no evidence pointing to *any* substance as a possible cause of such injuries.

The scientific evidence that Dr. Calabrese did rely on involved kerosine-containing products, and purported to show (generally anecdotally) pulmonary injury from exposure to such substances. Terminix argued that these kerosine studies were flawed as evidence of *Vectrin's* toxicity for multiple reasons:

- The case reports and studies often involved levels of exposure or modes of exposure very different from that alleged to have happened with the plaintiffs. For

example, one involved pulmonary injury from drinking kerosine.

- As Dr. Calabrese admitted in his depositions, different kerosene-containing substances may have very different toxicities because of toxicologically-important differences between them. Dr. Calabrese raised this argument in order to explain the absence of evidence that Vectrin is toxic – perhaps, he hypothesized, some batches of Vectrin are safe and others are not because of differences in the kerosine constituents. This hypothesis, Terminix argued, obviously applied much more powerfully to explain why studies involving very different substances – such as jet fuel – were inapplicable to Vectrin.
- Vectrin itself – of course including its kerosine constituents – has been very widely used, and yet no study or case report points to respiratory injury from it.
- Most of Dr. Calabrese’s studies involved exposure to jet fuel fumes. The plaintiffs – who worked at the airport – obviously would be exposed to jet fuel fumes, and yet his analysis made no attempt to rule these out as a possible cause of their problems. Dr. Calabrese admitted that the plaintiffs were exposed to jet fumes, and that he could not compare their exposure to kerosine constituents from that source to their exposure to kerosine constituents from Vectrin.

The Medical Causation Case/The Remaining Rounds

What followed this *Daubert/McDaniel* attack on Dr. Calabrese’s testimony was another *five* rounds of briefing. Though the details are too tedious to relate, the general picture is simple: Plaintiffs kept finding and adding additional evidence over and over again, hoping to push past the threshold of admissibility. Among the newly-presented evidence was some

additional (though not particularly recent) anecdotal evidence of injuries from kerosine constituents. The plaintiffs even tried to bring resmethrin back into the picture as a possible cause of injury, offering a study in which insecticides in the same class (not including resmethrin itself) were studied in humans, but even that study failed to show any adverse pulmonary or vocal cord effects.

Plaintiffs continued to present additional evidence at every stage – beyond a sur-reply stage in the *Daubert/McDaniel* briefing, again in their motion for reconsideration of the judge’s order excluding their expert causation evidence as unscientific, and one last time in the briefing over whether Terminix should be granted summary judgment because of plaintiffs’ lack of admissible expert testimony. This strategy by plaintiffs was surely an attempt to survive a very dangerous (and ultimately successful) *Daubert/McDaniel* challenge. It also had the potential advantage of loading the appellate record with evidence that could be used to try to persuade another court that their causation evidence should not be excluded.

The strategy was not without cost to plaintiffs’ case, however. Courts have consistently held that “coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method.” *Claar v. Burlington Northern R.R.*, 29 F.3d 499, 502-03 (9th Cir. 1994). Terminix of course pointed this out in its briefing of the various motions. In addition, the repeated attempts to gild the record were rhetorically counterproductive. In his June 25 Order striking plaintiffs’ causation evidence, Judge Walter Kurtz wrote that he “view[ed] these supplemental affidavits as an attempt to rescue Dr. Calabrese’s testimony,” and noted that “[h]ere, Dr. Calabrese formed his opinion and only when the weakness and, perhaps, scientific invalidity of his opinions were exposed in the deposition did he do any serious research. It is too little, too late to convince the Court of his reliability.”

Judge Kurtz entered final judgment for Terminix on August 27, 2004. The decision was not appealed.

Conclusions

The main lesson of the *Ballentine v. Terminix* case for plaintiffs is that a toxic torts case must be brought with great attention not only to such things as the selection of plaintiffs and jurisdiction, but also to the scientific causation case. Where the link between an allegedly dangerous substance and the plaintiffs’ injuries is not well-established in the scientific literature (or, as here, is entirely unsupported), it is important to present a powerful scientific case from the outset. Dr. Calabrese or some other such expert should have been presented from the outset of plaintiffs’ expert case, and he should have been armed before his expert report and deposition with all of the evidence that could be relevant and helpful. Although Terminix would most likely have prevailed in this case even if the plaintiffs had done these things, their failure to do so was surely counterproductive to them.

The main lesson for defendants is that a lawsuit by multiple plaintiffs claiming similar injuries from a single exposure need not be much more daunting than a single-plaintiff case when handled intelligently and with a sophisticated understanding of the science. Where the scientific evidence does not support plaintiffs’ case, an attack on that basis can and should succeed even where plaintiffs explicitly point to one another as evidence of causation. The law (in most jurisdictions, at least) requires that there be scientifically reliable proof that a particular substance can cause a particular injury before the science case may be presented to the jury – where the evidence is lacking, summary judgment is available.

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