

# TRANSPORTATION

JULY 2020

## IN THIS ISSUE

*This article addresses causation issues for expected COVID-19-related toxic tort claims in an FELA (Federal Employers Liability Act) context. It is intended to give the practitioner some practice pointers with fall-back legal authority honed over decades of toxic tort litigation.*

## FELA Second-Hand “Take Home” Claims in the Era of Corona

### ABOUT THE AUTHOR



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**Quick Answer:** A plaintiff suffering from a COVID-19 illness should be able to proceed with an FELA-based claim for second-hand exposure, also known as a “take home” claim, but the causative proof required to prevail will hinge likely upon presentment of factually sufficient rather than legally sufficient evidence; consequently, the burden of proof will be converse to that required in a traditional toxic tort take home claim.

**Read More:** Practitioners defending traditional FELA toxic tort claims are accustomed to complex arguments over the sufficiency of the scientific evidence supporting the claim, which is typically weighed for admissibility and causation purposes under a legally sufficiency standard. It is the old “the dose makes the poison” argument. These legal sufficiency determinations are frequently fought out within the analytical framework of *Daubert* or expert sufficiency challenges. That is the legal landscape to which we are accustomed. As with life in general, however, COVID-19 will change the formerly familiar causation terrain.

In cases brought under the FELA, the plaintiff’s burden of proof has been referred to as a “featherweight” burden. See *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506-07, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998). Still, a plaintiff must prove causation and causation in a toxic tort setting historically requires scientific proof; proof that requires expert testimony. Accordingly, the lower burden under which

an FELA plaintiff may prevail has not been applied generally to the admissibility of expert testimony. *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 503 (9<sup>th</sup> Cir. 1994); *Savage v. Union Pacific R.R. Co.*, 67 F.Supp.2d 1021, 1029 (N.D. Ark. 1999). And in an FELA case, the *Daubert* standard of admissibility of expert evidence “extends to each step in an expert’s analysis all the way through the step that connects the work of the expert to the particular case. *In re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 743 (3<sup>rd</sup> Cir. 1994); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Moreover, in a secondhand setting, a plaintiff’s claim rises or falls on his or her ability to marshal sufficient evidence that non-occupational exposure was a substantial contributing factor to his or her disease diagnosis for a reasonable jury to find the **causation** element satisfied. See *Kilty v. Weyerhaeuser Co.*, 317 F.Supp.3d 1027, 1037 (W.D. WI 2018), emphasis supplied.

Causation in toxic tort cases is discussed in terms of general and specific causation. *Merrill Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). “General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual’s injury. *Id.*; *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347, 351 (5<sup>th</sup> Cir. 2007). Evidence concerning specific causation in toxic tort cases is admissible only as a follow-up to admissible general

causation. *Raynor v. Merrell Pharm.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997). Thus, there is a two-step process in examining the admissibility of causation evidence in toxic tort cases. First, the court must determine whether there is general causation. Second, if it concludes there is admissible general-causation evidence, the court must determine whether there is admissible specific-causation evidence. *See Cano v. Everest Minerals Corp.*, 362 F.Supp.2d 814, 824 (W.D. Tex. 2005).

Typically, general causation is a given. That is, defendants do not contest that a substance such as asbestos is capable of causing mesothelioma. The battle line is drawn more frequently over specific causation, which then invokes the “substantial factor” analysis as applied per jurisdiction but typically under a strong legal sufficiency analysis. Where a plaintiff relies on proof of exposure to establish that a product was a substantial factor in causing injury, the plaintiff must show a high enough level of exposure that an inference that the substance was a substantial factor in the injury is more than conjectural. *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6<sup>th</sup> Cir. 2005). It is not a sole cause analysis, and, accordingly, the court should consider “the frequency, regularity, and proximity of exposure in determining whether the injured party’s exposure to a substance was a substantial factor in causing the alleged injury.” *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7<sup>th</sup> Cir. 1992). *See also Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772 (Tex. 2007) (citing *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4<sup>th</sup> Cir. 1986)).

**Read a Little More:** This is where the tables have turned in a COVID-19 secondhand exposure FELA case. One can anticipate *de facto*, for lack of a better term, proof of general **and** specific causation. Direct exposure to an invisible germ, regardless of the amount, will infect the exposed person. Whether or not that infection manifests itself into a tangible disease is another analysis altogether and goes to the defense of negation.

According to The Centers for Disease Control, the best way to prevent the spread of the COVID-19 virus is to avoid being exposed to the virus. Exposure occurs between people who are in close contact with one another through respiratory droplets produced when an infected person coughs, sneezes or **talks**. These droplets can land in the mouths (gross) or noses of people who are nearby or possibly inhaled into one’s lungs. Social distancing and sanitization are keys to prevention. And that is the blueprint to a solid defense: negation.

If there are possible causes of the condition, those causes should be negated. *Missouri Pacific R.R. Co. v. Navarro*, 90 S.W.3d 747, 758 (Tex. App.—San Antonio 2002, no pet.); *Havner*, 953 S.W.2d at 720. Negation is the defense, and, frankly, it is a strong one. Unlike a typical asbestos or other toxic tort case, including secondhand exposure claims, where courts have routinely rejected as legally insufficient a theory of causation that “any exposure” to asbestos (or toxic substance) can cause the resulting disease, and courts have adhered to the *Lohrman*

“frequency, regularity, and proximity” test. *Flores*, 232 S.W.3d at 771; *Union Carbide Corp. v. Torres*, No. 13-10-00325-CV, 2019 WL 6905229 (Tex. App.—Corpus Christi 2019, pet. filed). In the COVID-19 setting, one may assume if a plaintiff presents symptoms, there was exposure, however small and regardless of frequency. The causation (exposure equals disease) has been met under both a general and specific analysis.

**Read More for Defenses:** So, how does a practitioner defend the railroad against the claims Mrs. Smith’s estate brings because she died from COVID-19, an exposure Mr. Smith allegedly brought home after being infected while working as an engineer for Alphabet Soup Railroad? Negation is key. Is there any evidence Mr. Smith was exposed somewhere else? Perhaps the take away drive through daiquiri hut he visited on his way home, or the dipped cone he received from the Dairy King employee who did not practice safe workplace exposure prevention? Is there any evidence Mrs. Smith was exposed the one time she left her home to buy groceries at Market Basket? Did Mr. Smith wear a proper face mask at work? Did he practice safe social distancing? Was it known throughout the yard that Mr. Smith was one of those people who never washed his hands after he used the toilet? Was the Smiths’ teenage son, Johnny, exposed while at a secret backyard beer bash with his high school buddies down the street, and he then infected his mom? Was Mrs. Smith obese? Did she suffer from respiratory illness due to a lifetime of

smoking unfiltered Camels? Was Mrs. Smith a diabetic?

These may sound silly or grounded in common sense, but these examples, arguably, are where the defenses are going to rest. The old, complicated, scientific rebuttal of specific causation is likely gone in secondhand COVID-19 FELA cases. While some medical health negation may require expert testimony, legal sufficiency will likely be replaced by factual sufficiency, and in-depth investigation and interviews will be key to a proper defense.

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