

CLIENT ALERT

How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation

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We announce today the fourth article in the series, entitled: [“How Much Is Enough: A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation.”](#) Our attorneys have published three leading law review articles on those court opinions, the most recent in 2016.

The article updates the case law but also provides a comprehensive analysis of how courts are addressing these low-exposure causation theories. The article describes the steps courts need to take to ensure that causation testimony is based on scientific principles and a sound legal and factual basis. Some of the key points include:

- The “every exposure” theory, sometimes referred to as the “cumulative exposure” theory, has for decades dominated asbestos litigation in the US, and it is spreading to other types of toxic tort and product litigation. Plaintiff experts in these cases typically assert that every identifiable exposure to a carcinogen is a cause of the disease, regardless of the actual dose, as long as the exposure is different from “background” exposure. This form of causation testimony typically captures even the most minimal of exposures and threatens defendants with a jury trial if courts do not deem the testimony inadmissible or insufficient to support causation.
- Since 2005, many courts have rejected the every exposure approach to causation testimony due to its unscientific and speculative nature. In particular, many courts have pointed to the experts’ failure to demonstrate that the degree of exposure received (the “dose”) was sufficient to cause disease.
- The science behind latent disease like mesothelioma relies heavily on epidemiology to document whether past exposures in a given population were sufficient to produce excess disease in that population. Courts should require experts to follow a similar approach – *i.e.*, a dose assessment of the plaintiffs’ claimed exposures compared to epidemiology studies of similar populations.
- Most of the courts to consider the “every exposure” form of testimony have held that these experts are not relying on scientific or generally accepted methodologies or principles and have ruled the testimony inadmissible or insufficient for causation. Those courts include the highest courts of New York, Texas, Georgia, Ohio, and arguably Virginia and Pennsylvania; the Sixth, Seventh, and Ninth Circuit federal courts of appeals; and many federal trial and state trial and intermediate appellate courts.
- In light of multiple exclusions of “every exposure” testimony, Plaintiffs’ experts have rebranded their testimony “cumulative exposure.” There are no real differences between the two versions of this theory. In effect, both approaches include every identifiable workplace or home exposure and exclude no exposures other than background. Several courts have now excluded both versions as two sides of the same coin.
- Regardless, some courts are permitting such testimony to proceed or are “splitting the baby” in a way that does a disservice to the fundamental principle that “the dose makes the poison.” The primary error made by these courts is the

lack of rigor with which individual judges or appellate courts are willing to look behind the self-serving statements of the experts.

- Courts should follow a basic three-step process in assessing low-dose exposure cases: (1) Define the nature of the exposure properly, e.g., if the case is about a service station attendant, then the exposure is to *gasoline* with benzene in it, and not to pure benzene; (2) require the experts to develop a scientifically-based estimate of the exposure rather than refer to “dust” or “fumes” or terms like “significant;” and (3) require proof that the exposures match up with epidemiology studies documenting excess disease in populations exposed to similar amounts of the relevant material.

The article concludes with a plea for courts to “sharpen their gatekeeping focus” to prevent our courts from being flooded with increasingly minimal exposure litigation and speculative causation claims. The article may assist defendants in cases challenging expert testimony based on *every* or *cumulative* exposure causation testimony.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

William L. Anderson

Partner – Washington, D.C.

Phone: +1 202.624.2942

Email: wanderson@crowell.com

Kieran J. Tuckley

Associate – Washington, D.C.

Phone: +1 202.624.2618

Email: ktuckley@crowell.com