

Toxic Torts: The Defense Perspective

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August 24, 2009

Part I Causation
The Model for Toxic Torts:
Asbestos

One issue requires further consideration by the District Court. There is some evidence tending to show that after September 11 a number of COD claims were paid out of the general account into which the COD account balance had been transferred. While we intimate no view on the merits, the Bank points out that if it is required to turn over the amount that was in the COD account on the basis that it was held in trust for a certain class of creditors, then it is entitled to consideration of a credit against that amount to the extent that the trust funds thus improperly transferred into the general account, or other funds subsequently advanced by the Bank to the general account, were used to pay members of the class of beneficiaries of the trust. See also 11 U.S.C. § 96(a)(8), (c). The District Court is the proper forum for exploration of this problem.

Affirmed in part and remanded for further proceedings not inconsistent with this opinion. Costs are taxed against the Bank.



Clarence BOREL, Plaintiff-Appellee,

v.

FIBREBOARD PAPER PRODUCTS CORPORATION et al., Defendants-Appellants,

National Surety Corporation,
Intervenor-Appellee.

No. 72-1492.

United States Court of Appeals,
Fifth Circuit.

Sept. 10, 1973.

Rehearing and Rehearing En Banc
Denied May 13, 1973.

Action by insulation worker against certain manufacturers of insulation materials containing asbestos to recover for

injuries caused by defendants' alleged breach of duty in failing to warn of dangers involved in handling asbestos. The United States District Court for the Eastern District of Texas, at Beaumont, Joe J. Fisher, Chief Judge, entered judgment in favor of plaintiff, and defendants appealed. The Court of Appeals, Wisdom, Circuit Judge, held that danger from inhaling asbestos dust was not, as a matter of law, sufficiently obvious to asbestos insulation workers to relieve manufacturers of duty to warn, that defendants, each of whom was cause in fact of some injury to plaintiff, could be held jointly and severally liable for total damages, under Texas law, and that plaintiff was entitled to go to jury with question whether his consent to incur risk was voluntary or was product of duress of circumstances and unreasonable, under Texas law.

Affirmed.

1. Courts ¶359(2)

Where federal jurisdiction is based on diversity of citizenship, substantive law of forum state controls.

2. Products Liability ¶8

Sales ¶427

Under Texas law, a manufacturer of a defective product may be liable to a user or consumer in either warranty or tort.

3. Products Liability ¶8

Under Texas law, one who sells any product in a defective condition unreasonably dangerous to the user or consumer is subject to liability for physical harm thereby caused to the ultimate consumer or user.

4. Products Liability ¶8

For a product to be unreasonably dangerous, it must be so dangerous that a reasonable man would not sell the product if he knew the risk involved.

5. Products Liability ¶14

A seller is under a duty to warn of only those dangers that are reasonably foreseeable.

Borel v. Fibreboard

A Map to Liability

...it is impossible ...to determine with absolute certainty which particular exposure to asbestos dust resulted in injury...

...each exposure may result in an additional and separate injury....
[t]herefore ... the jury could find that each defendant was the cause in fact of some injury...

Borel v. Fibreboard, 493 F.2d 1076 (5th Cir. 1973)

Enhancing Recovery

There's no safe level

Every fiber/molecule is causative

They knew it all along

A Map for All Torts

Herbicides

Silica

Benzene

Breast implants

Vinyl Chloride

Chromium VI

Attacking Junk Science

The Problem

“It’s my medical judgment that exposure to benzene caused his lymphoma. Benzene damages your DNA and we all know that once your DNA is damaged anything can happen.”

– Southeast Texas M.D. Trial Testimony (circa 1988)

The Solution

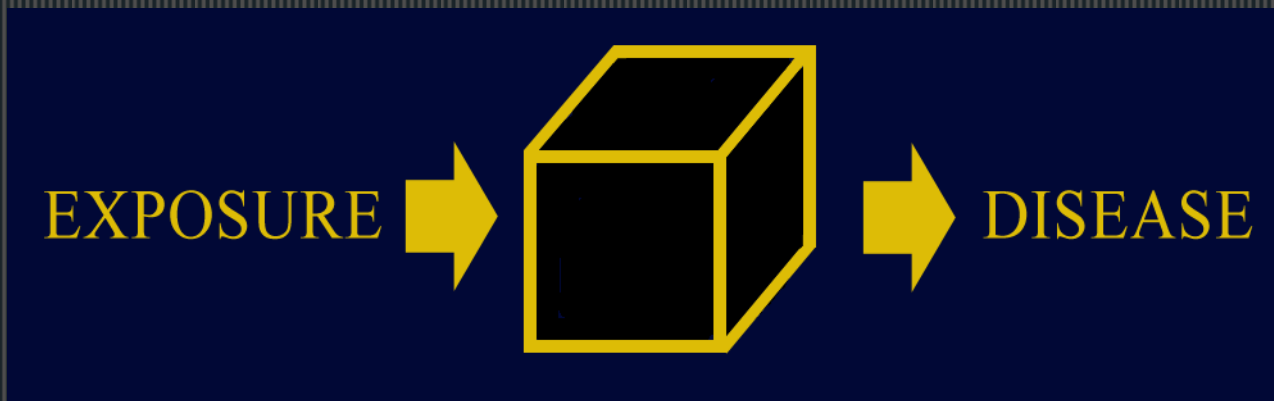
The courts needed to be educated about the fact that there were well recognized methods of assessing claims of causality.

For claims of so-called general causation epidemiology offered one such method.

1964 – The Rise of Black Box Epidemiology

Without the tools necessary to see what was going on inside cancer cells a method for inferring causation was needed. Epidemiology filled that need. In 1964 Sir A. Bradford Hill, who justified his conclusion through the use of a list of causal criteria, demonstrated that smoking was a cause of lung cancer.

A Paradigm for Public Health



The belief arose that it wasn't necessary to know what was going on inside the body (the black box) in order to determine the cause of cancer.

In short order, black box epidemiology coupled with the use of the Ames test, lead to the widespread belief that 90% or more of all cancers were caused by the environment; and “the environment” was taken to mean unnatural and man-made contamination, pollution, etc.

1994 – Black Box Epidemiology Reaches its Zenith

Lawyers argue and some courts agree that epidemiology is required to prove causation in toxic tort cases.

Others argue causality can be split into “general” and “specific” causes and that epidemiology provides the answer to both.

Victories in The War on Junk Science

Daubert

Robinson

Havner

Embracing Epidemiology – A Pyrrhic Victory?

By the time the law began to embrace epidemiology, science (and society) was seeing its flaws and looking for something better.

Health Panics

Black box epidemiology and animal testing lead to baseless but increasingly numerous health panics. Widespread suspicion and distain for many public health investigations followed. The nearly two-decade long series of studies purporting first to show that coffee causes cancer; then that it doesn't; then that it actually prevents cancer being one notorious example.

Cancer Clusters

Following pervasive media reporting on cancer and the environment the public began raising suspicions of cancer clusters in increasing numbers reaching well over one thousand annually. The overwhelming majority of these alleged cancer clusters have been found, using epidemiology, not to be genuine cancer clusters; leading to anger, suspicion and confusion among the general public.

Black Box Epidemiology is Not Science

“Risk factor epidemiology is an ancillary methodology, which, if governed by rigorous scientific principles, may provide testable hypotheses of causality. It cannot ‘contradict’ pertinent scientific data, and it ignores them only at its peril.”

– Petr Skrabanek, The Emptiness of the
Black Box. *Epidemiology*. (September 1994)

Epidemiology – Is It Time to Call It a Day?

An aspect of epidemiology which has received much criticism is the apparently indiscriminate identification of particular aspects of daily life as dangerous to health.

George Davey Smith and Shah Ebrahim
- *Epidemiology – is it time to call it a day?* (2001)

Back to 1964

When A. Bradford Hill was attributing lung cancer to cigarette smoking, R.A. Fisher was asking an important question. That question, what if the cause of lung cancer is not cigarette smoking but instead is whatever causes the nicotine craving that causes smoking, couldn't be answered by the available science.

Genetic Link Tied to Smoking Addiction

Washington (AP) – Scientists have pinpointed genetic variations that make people more likely to get hooked on cigarettes and more prone to develop lung cancer – a finding that could someday lead to screening tests and customized treatments for smokers trying to kick the habit.

The New York Times
April 2, 2008

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Texas sharpshooting became all the rage

Data dredging a new sport

And arguing to judges about confidence
intervals like counting the number of angels
on the head of a pin

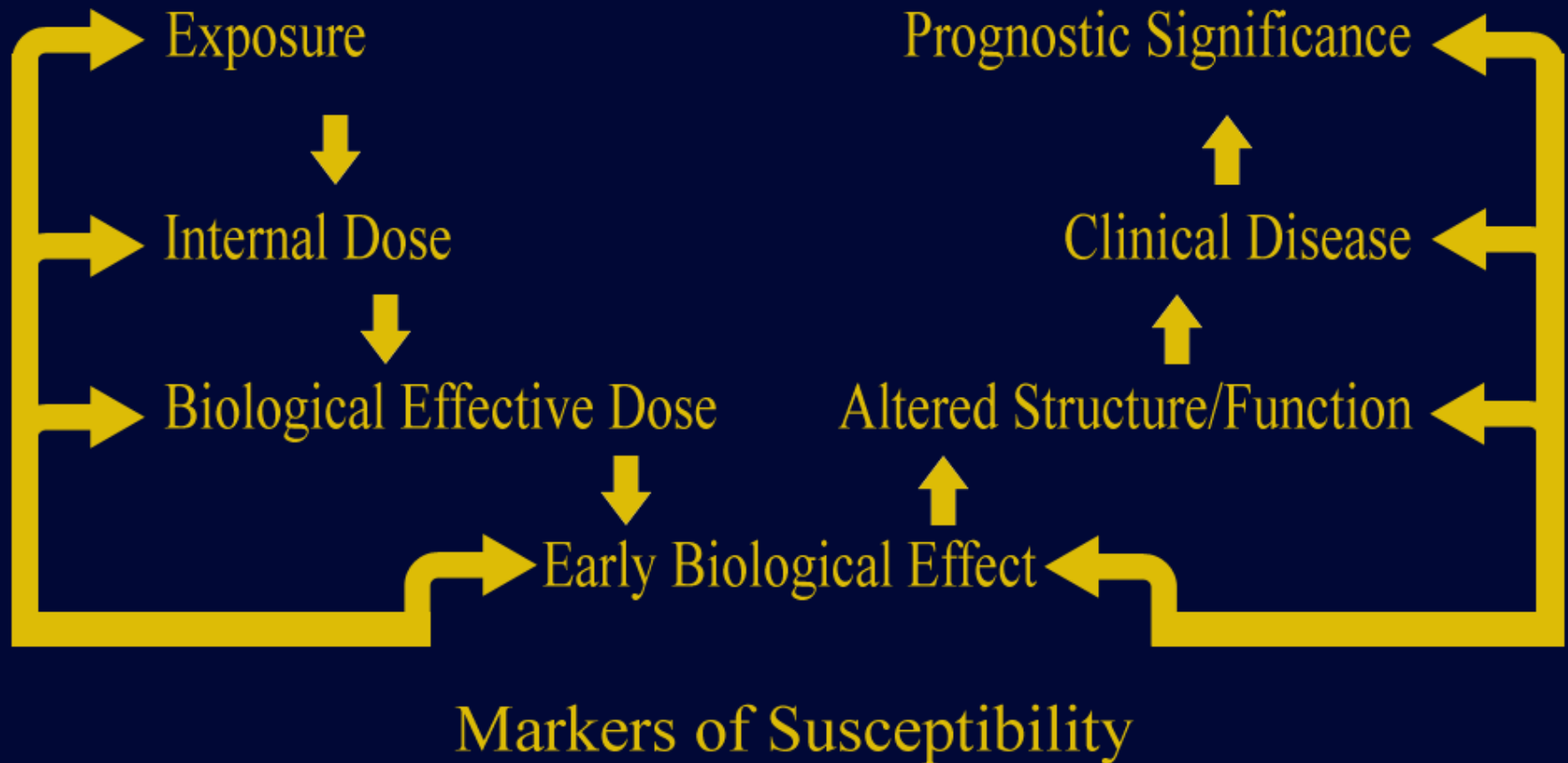
It became apparent that the only way forward was to look inside the black box.

Unfortunately the harder scientists looked the more complex cancer causation became.

MOLECULAR EPIDEMIOLOGY

Markers of Exposure

Markers of Disease



Assessing and attributing causation amongst a host of recently identified mechanisms, and a seemingly endless stream of new ones, has made things a whole lot harder. Dealing with causation is going to require the use of some pretty sophisticated probabilistic reasoning tools.

A New Method of Causal Judgment

Predictions made from probabilistic, or means Bayesian, calculations drawn from multiple sources of data are already proving their worth in the clinical setting and are increasingly doing more and more of the heavy lifting in generating testable hypotheses for molecular biologists.

An Ancient Scourge Upon A Pale Horse

Back to 1884

Robert Koch formulated his postulates as a way of attributing pestilence to bacteria. The Bradford Hill causal criteria may fairly be said to have been derived from Koch's postulates.

Yet one of the most notorious failures of epidemiology was its inability to detect *helicobacter pylori* as the cause of peptic ulcer disease.

Thanks undoubtedly to the prevailing paradigm that chronic illness was caused by human agency, epidemiology said that smoking, drinking, eating spicy foods and emotional stress caused ulcers.

It wasn't until 1994 that the National Institutes of Health recognized that *h. pylori*, commonly afflicting those with ulcers, was in fact the cause of those ulcers.

Robin Warren and Barry Marshall won the Nobel Prize in 2005 for discovering the role of *h. pylori* in ulcer disease.

Today, *h. pylori* is an established cause of stomach cancers and gastric lymphoma and is a suspect in several other cancers. Human papillomavirus, established as a cause of cervical cancer, is now suspected in lung, head and neck cancers.

We seem to be at one of those moments described by Thomas Kuhn when a paradigm has suddenly shifted.

Bacteria, viruses, fungi, mollicutes and prions are now the focus of a wave of new research into the causes of cancer including a number of diseases like lymphoma and lung cancer that have been the subject of mass tort litigation.

Assessing causation, and thus liability, will henceforth require a complex analysis of multiple potential causes both man-made and natural, known and unknown, preventable and unpreventable, and assigning blame based upon the risk imposed by each.

Part II Risk
Apportioning Liability
in a World of
Inevitable Risks