

Best's Insurance Law Podcast

[Navigating Toxic Tort Litigation - Episode #234](#)

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Hosted by: John Czuba, Managing Editor

Guest Expert: Ernest Chiodo of [Ernest Chiodo P.C.](#)

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John Czuba: Welcome to Best's Insurance Law Podcast, the broadcast about timely and important legal issues addressing the insurance industry. I'm John Czuba, manager of Best's Insurance Professional Resources.

Very pleased to have with us today expert service provider, Dr. Ernie Chiodo of [Ernest Chiodo P.C.](#) Dr. Chiodo is a physician, attorney, toxicologist, certified industrial hygienist, and former medical school and law school professor.

Dr. Chiodo formerly taught toxic tort law in two law schools in Chicago, John Marshall and Loyola. Today, he's going to be speaking about what the law needs to know about toxic tort litigation. First off, Dr. Chiodo, we're very happy to have you with us again today.

Dr. Ernie Chiodo: Well, thank you, John. I appreciate it. You call me Ernie, please.

John: For our first question, what is toxic tort litigation?

Dr. Chiodo: Toxic tort litigation is any litigation that involves a claim of injury to humans due to exposure to any toxic substance. The toxic substance could be a chemical like lead, or it could be a biological substance like mold or a bacteria like Legionella bacteria.

John: Dr. Chiodo, what are the three elements that the plaintiff must prove in toxic tort litigation?

Dr. Chiodo: Yes. That's important. Plaintiff has to prove three important elements. That's important for any plaintiff attorney that may be listening to this podcast, but also important to any defense attorney listening to the podcast. First off, what is the exposure to the claimed toxic substance?

An expert that's claiming that somebody got sick due to the substance, it'll be a physician ultimately claiming, giving a medical causation opinion, has to have some reasonable understanding about what the exposure was. May not have to have exact data but should have a reasonable understanding of what the exposure was. Next issue is what's called general causation.

Was the exposure to the toxic substance sufficient to have caused the claimed injury? Then third, and this is important because plaintiffs many times mess up on this, and many times defense do not push this issue, is what's called specific causation.

Even if you have an exposure that could cause a particular harm or injury, unless that exposure is the only possible cause of the claimed injury or illness, then a doctor has to consider other likely causes.

Through a process of elimination, eliminate those other likely causes before the doctor can say more likely than not, that is to a reasonable degree of medical certainty, that the cause of the person's problem, plaintiff's problem, was the exposure to the chemical versus some other issue or exposure.

For example, say somebody has been exposed to a type of pulmonary irritant, some type of toxic gas or dust that could cause irritation of the airways and cause an asthma-like condition, and that's possible, but are there other possible causes like gastroesophageal reflux disease?

Many people are obese; they have gastroesophageal reflux disease. They aspirate little bits of acid material from their stomach into their airway when they're sleeping at night, and that can cause asthma.

If a claimant is claiming that they have asthma due to exposure to an irritating toxic substance, a substance that can cause irritation to the lungs, the doctor that is saying that the person is sick due to the gas or chemical in the air has to also exclude gastroesophageal reflux disease.

That's an example of specific causation. By the way, to arrive at that, the doctor formulates a differential diagnosis of etiology, and that happens to be a methodology that satisfies Daubert, which is very important in Daubert jurisdictions and all that.

John: Dr. Chiodo, what types of experts are necessary for either plaintiffs or the defense to make their case?

Dr. Chiodo: Yes. First off, you really need experts covering the three areas. The exposure expert is typically not any type of medical doctor. It is an engineering specialty called a certified industrial hygienist.

Certified industrial hygienist is the engineering specialty board certification where a certified industrial hygienist figures out how much of the chemicals in the air in parts per million, whether or not the ventilation in the plant was sufficient to keep somebody from being exposed.

Certified industrial hygienist is also the professional that should determine whether or not a building is actually contaminated with mold because there's mold everywhere, but there's no mold contamination everywhere. There's about 6,600 certified industrial hygienists in the world. Only about 5 to 10 of those 6,600 certified industrial hygienists are physicians.

I happen to be one of those small handful of physicians, certified industrial hygienists. It's important that if plaintiff is trying to claim that somebody got sick due to an exposure, they should have an exposure expert, a certified industrial hygienist, not just a physician that is not a certified industrial hygienist, and the same thing applies for defense.

Then, the next issue comes down to general causation. Can the exposure to the chemical actually cause the problem? That is really a toxicology opinion. You need a toxicologist to render a toxicology opinion. Now, I will describe this a little further later on in this interview, this podcast, but just being a physician does not make a physician qualified to give a toxicology opinion.

There's only two medical specialties that are qualified to give a toxicology opinion in court. You will need a toxicologist, either a PhD or master's level toxicologist, or a physician board-certified in one of the two medical specialties that makes a physician a toxicologist in order to talk about general causation. What could the chemical or the substance actually cause?

Then finally, the third step has to be a physician, the specific causation, that determination of the differential diagnosis of etiology, where a doctor thinks of other possible causes and excludes those other possible causes, is a medical methodology.

Only a physician can perform a differential diagnosis of etiology in order to give an opinion that satisfies Daubert or Frye as to a specific causation. Those are the three experts that are really three areas of expertise. Sometimes you can get into one person, but usually it's three different experts that the both plaintiff and defense need in toxic tort cases.

John: Dr. Chiodo, what authority can be used in court in the battle of the experts?

Dr. Chiodo: This is very important because it always comes down to the battle of the experts. Who is a jury going to believe? Is it the plaintiff's doctor or is it the defense doctor? It may come down to how they look like. That's really not how you want to be handling these toxic tort cases. You have to find some treatise that is beyond question.

Some treatise that would corroborate your expert's opinion and impeach the opinion of the opposition. That is, again, whether you're a plaintiff, attorney handling these cases, or defense attorney. Really the only treatise that I'm aware of that's right on point on this is called the "Reference Manual on Scientific Evidence -- Third Edition."

If you put that into a Google search, and you put PDF after all that, you can download that 1,034-page book free of charge from Stanford University's Law School Library because it is public domain, because it's the United States' federal government publication. What is that publication? That is a joint publication by the Federal Judicial Center. That is the think tank of the federal courts.

Chief Justice Roberts of the United States Supreme Court is the chairman of the Federal Judicial Center. Sounds like a credible organization. It is also a joint publication by the National Research Council. That is the National Academies of Science, National Academies of Engineering, and the Institute of Medicine, also very credible.

What that book is, it is not a legal treatise, it is a medical and scientific treatise. The copyright for the book is not through the Federal Judicial Center, it's through the National Research Council, and the book has gone through the thorough peer-review process of the National Academies of Science.

What the book is, it is a medical and scientific book, but with a primary target audience of federal court judges and state court judges so they can size up scientific testimony for its merit and worth.

That is a very important treatise because being a joint publication by the Federal Judicial Center and the National Research Council, if somebody disagrees with it, they will tend to, in my opinion, lose some credibility.

John: My next question is related to the reference manual. Does the reference manual support what you have indicated about the experts needed for plaintiffs and defendants to make their cases?

Dr. Chiodo: Yes. It does. Very importantly it mentions, and I'm going to give you the page numbers. On page 25 of the reference manual, it talks about exposure. In essence, it says, "Although exact data is not required, an expert should have a reasonable explanation as to the exposure and that it can cause the claimed injury or illness."

Basically, plaintiff's expert has to have a reasonable explanation as to the exposure. Next page that's very important is as to specific causation. That is on page 690 of the reference manual, where it talks about the methodology that satisfies Daubert is a differential diagnosis. It comes to an opinion as a specific causation.

Also, on page 613, footnote 194, the reference manual does describe the issue about the importance of a differential diagnosis and coming to an opinion concerning specific causation, but it also discussed the importance of knowing that the exposure could actually cause the claim harm and that is general causation.

Then on pages 675 to 679, the reference manual describes what makes somebody qualified to give a toxicology opinion in court. As I said before, just being a physician does not, according to the reference manual, qualify a physician to give a toxicology opinion in court unless they're board-certified in one of two medical specialties.

One of the medical specialties is medical toxicology. They tend to be emergency room doctors. They deal with acute intoxications, things like Tylenol overdoses. The other specialty that is involved, that the reference manual indicates that by virtual board certification makes a physician qualified to give a toxicology opinion in court, is occupational medicine.

Those are the medical doctors that tend to deal with the toxin exposures in a toxic tort case. How much of the chemicals are in the air and what could those chemicals cause? Mold issues, what Legionella issues, those are occupational medicine doctors.

If you are going to hire a doctor that is going to testify as to whether or not somebody did or did not get sick due to some claimed toxin exposure, you better hire, or shouldn't hire, retain a doctor board-certified in either medical toxicology or occupational medicine.

Really, unless it's an acute intoxication, it should be occupational medicine and not medical toxicology. Why is that important?

Because you don't want to sit down there and look completely foolish to your client when the opposition has a deposition of your expert and they pull up the reference manual and they open it up to page 675 to 679 and they say, "Doctor, show me how you're qualified to give a toxicology opinion" and your doctor should be able to say, "I am board-certified in medical toxicology."

Or "I am board-certified in occupational medicine," or "I have a graduate degree in toxicology," or "I have been elected into membership in the Society of Toxicology." If they can't point out on page 675 to 679 how they're qualified to give a toxicology opinion, they're going to be embarrassed, but the lawyer that hired them is going to be very embarrassed.

By the way, let me mention that I happen to be board-certified in occupational medicine. I am a certified industrial hygienist. I do have a graduate degree in toxicology, and I have been elected into the society of toxicology. I deal with these issues very frequently.

It's very important to hire the right type of expert. Just if you have, say, a lung problem, don't just hire a pulmonologist because they may not qualify as a toxicologist. In fact, they don't.

John: Dr. Chiodo, one final question today. Are you available to speak with attorneys having toxic tort cases?

Dr. Chiodo: Yes, I am. I'm one of the few doctors that feels any need to give professional courtesy to lawyers, because I happen to be one myself up in Michigan and Illinois and pro hac vice and a number of different states.

Any attorney, plaintiff or defense, that wants to call and pick my brain can feel free to call me. My phone number is area code (586) 746-1761. Again, (586) 746-1761. Feel free to call and pick my brain, no obligation to hire me as an expert.

John: Dr. Chiodo, thanks so much for joining us today.

Dr. Chiodo: Thank you, sir. Bye-bye.

John: You just listened to qualified member expert service provider, Dr. Ernest Chiodo of [Ernest Chiodo P.C.](#), who practices nationwide and also internationally. Special thanks to today's producer, Frank Vowinkel.

Thank you all for joining us for Best's Insurance Law Podcast. To subscribe to this audio program, go to our web page, www.ambest.com/professionalresources. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com.

I'm John Czuba, and now this message.

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