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What an expert needs to know to testify on causation

Take your cues from CACI and appellate rulings like *Etherton*, and don't be afraid of the eggshell plaintiff

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The concept of legal causation within the context of personal-injury litigation can often be confusing to medical experts. While they are likely well-versed in medical jargon and analysis, few experts are comfortable applying their knowledge to California's legal standards on medical causation. As the attorney, it is your job to use the proper language when questioning causation witnesses to ensure that your expert or treating doctor's answers meet the legal standards required under California law.

The Judicial Council of California Civil Jury Instructions (CACI) are where you should look for the proper language for your questioning. You need to ask questions related to the topics covered under the instructions, and it is a best practice to use the language directly from the instructions.

By the weight of a feather

You can start with CACI 200, which addresses the burden of persuasion in civil cases. Pick your favorite metaphor for "more likely than not." Maybe you like the often-cited image of balanced scales holding equal weights, only to be shifted by a single feather. These authors like to keep it simple. During civil trials, jurors hear competing versions of events. If a juror believes a plaintiff's version with 51 percent confidence, they must vote for the plaintiff. That is what is meant by a probability. You can also use definition by negation. Most Americans have heard the criminal standard of "beyond a reasonable doubt." Contrast this standard with the lower civil standard.

With that out of the way, it's time to define legal causation. CACI 430 defines a substantial factor as one that a reasonable person would consider to have contributed to the harm. A substantial factor must be more than a remote or trivial factor, but need not be the only cause of the harm. The "substantial factor test" for causation subsumes and includes the "but-for" test for causation, in which a defendant's conduct is a cause of the injury if the injury would not have occurred "but for" that conduct. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968-969)

You will also want to go over CACI 431 before drafting your questions for the expert. Depending on the factual scenario, it is likely your expert will be asked if other factors were the "real" cause of plaintiff's harm. Explain to your expert that the law recognizes that one's negligence can combine with another's to cause harm. Remind your expert of the substantial factor definition. Explain that just because another person, condition, or event was also a substantial factor in causing harm does not mean defendant can escape liability. Once understood, this lesson will help your expert parry cross-examination questions and stay focused on defendant's negligence.

Torts 101: The eggshell plaintiff

Your client may have a prior medical condition that left them more susceptible to injury than the regular person walking the street. If that is the case, review CACI 3928 with your expert. Remember the eggshell plaintiff from law school? Let your expert know "the tortfeasor takes the person he injures as he finds him. If, by reason of some pre-existing condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability." (*Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471) This is the concept of the eggshell plaintiff.

Relatedly, your client may have a preexisting physical or mental condition that was exacerbated by the incident. CACI 3927 establishes that this exacerbation due to defendant's wrongful conduct *must* be awarded fair and reasonable damages. "A tortfeasor may be held liable in an action for damages where the effect of his negligence is to aggravate a preexisting condition or disease. Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act." (*Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 168.)

Explanation and definition only go so far. Ultimately, you will want your expert to apply these lessons in their causation testimony. Showing them an example of how to successfully testify on causation will help.

Drafting questions for your expert: *Etherton*

We recommend reviewing *Etherton v. Owner Ins. Co.* (2016) 829 F.3d 1209 when drafting your questions for your expert. This case from the United States Court of Appeals for the Tenth Circuit involved an underinsured motorist claim resulting from a car accident that caused plaintiff to undergo three back surgeries. During trial, the medical causation expert applied a three-part test to establish causation. On appeal, defense argued plaintiff's medical causation expert's methodology was unreliable and, therefore, should not have been admitted under *Daubert*.

The expert in *Etherton* applied a three-step approach to injury causation. The first step is plausibility. The expert asked if the incident could have caused

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the injury. In making this determination, the expert reviewed the severity of the incident. In doing so, the expert developed a scientific explanation of the risk of injury within an epidemiological framework.

The second step is temporality. The expert asked if the symptoms of injury started shortly after the incident. The expert reviewed the plaintiff's history of injury, medical records, and deposition testimony.

Thirdly, the expert asked if there is a more likely alternative causal explanation. What is the chance plaintiff would have been injured but-for the incident? Relatedly, the expert considered the risk of the same injury during the same timeframe in a non-trauma population of folks comparable to plaintiff.

Then-Circuit Court Judge Neil Gorsuch joined the opinion that approved this method of analysis. If one of the nation's top conservative justices approves this method, we think it is worth considering in your cases.

The expert in the *Etherton* case was Michael D. Freeman, MedDr, PhD, MPH. Dr. Freeman is a tenured associate professor of forensic medicine and epidemiology at Maastricht University Medical Center and a joint clinical professor of psychiatry and public health and preventative medicine at Oregon Health & Science University School of Medicine. He is a fellow of the American College of Epidemiology and the American Academy of Forensic Sciences, as well as a former Fulbright Fellow with the U.S. Department of State.

The attorney's job is to simplify what can seem like a mystifying process. You can do this by properly tailoring your questions to comply with the model jury instructions. If you can do that for your causation expert, you are sure to increase the odds that their testimony will ultimately aid the trier of fact.

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