

Chapter 9

Advancing Your Strategies for Managing Litigation Risk and Reputation Exposure from Health-Related Allegations

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There is a growing proliferation of unreliable scientific and medical articles being published attempting to link gas development activities to various medical conditions. Property owner claims of personal injury from natural gas development activities require expert testimony concerning the health risks and effects allegedly caused by the alleged exposures. It will be important for counsel defending these claims in litigation to be able to critically analyze the published articles through the use of reliable and well-qualified experts and preclude the admission of the unreliable science through the use of *Daubert* motions.¹

¹ In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1992), the United States Supreme Court held that the trial court must be a gatekeeper to assure that expert testimony is based on sufficient facts or data, is the product of reliable principles and methods, and that the expert has reliably applied the principles and methods to the facts of the case.

Plaintiffs may raise two types of personal injury claims: claims of present injury and claims for medical monitoring of anticipated future injury.

§ 9.01. Proof Required for Personal Injury Claims.

Claims for present injury require proof of causation through expert testimony. A plaintiff must prove general causation, that the exposure to the claimed constituents causes the condition; and specific causation, that the plaintiff's exposure in fact caused her condition.²

[1] — General Causation.

General causation is often established through the use of epidemiologic studies. Epidemiologic evidence identifies agents that are associated with an increased risk of disease in groups of individuals, quantifies the amount of excess disease that is associated with an agent, and provides a profile of the type of individual who is likely to contract a disease after being exposed to an agent. It is important to note that an association is not equivalent to causation. An association identified in an epidemiologic study may or may not be causal. "Assessing whether an association is causal requires an understanding of the strengths and weaknesses of the study's design and implementation, as well as a judgment about how the study findings fit with other scientific knowledge."³

Plaintiffs often attempt to rely on risk assessments which include "worst-case scenario" exposure and toxicity assumptions. In examining expert testimony relying on such risk assessments, courts have recognized that "risk assessments have largely been developed for regulatory purposes and thus serve a protection function in providing a level below which there is no appreciable risk to the general population. They do not provide information about actual risk or causation."⁴ Similarly, case reports and case studies

² See Michael D. Green *et. al.*, *Reference Guide on Epidemiology*, in *Reference Manual on Scientific Evidence* 549, 552 (3d ed. 2011) ("This terminology and the distinction between general causation and specific causation is widely recognized in court opinions."); see also *Soldo v. Sandoz Pharm. Corp.*, 244 F. Supp. 2d 434, 525 (W.D. Pa. 2003).

³ Green *et. al.*, *supra* note 2, at 553.

⁴ *Rhodes v. E.I. DuPont de Nemours & Co.*, 253 F.R.D. 365, 377 (S.D. W. Va. 2008).