Litigating Toxic Torts

Rhon E. Jones[1]

Mark Englehart[2]

I. INTRODUCTION[3]

A toxic tort is a civil wrong arising from exposure to a toxic substance.[4] Litigating such a case can be intimidating, because of the complex issues involved. Notwithstanding these highly technical issues, toxic tort cases contain themes that can be clear and understandable. Thus, to be effective, counsel should try to frame the debate in terms of these simple issues, to avoid overwhelming and confusing the jury. Lawyer Allan Kanner offers an analogy. On one hand, toxic tort lawyers are builders, compiling information to construct a case. On the other hand, they are sculptors, chipping away extraneous information that clouds the argument. "The key is to find the perfect balance between information and presentability." [5]

II. CHARACTERISTICS OF TOXIC TORT CASES

A. Distinctive Injury

A traditional personal injury case involves a traumatic or acute injury – a broken leg, for example. But in toxic tort cases, the injuries are different:

- The injury may be difficult to determine.
- The injury may be slow to develop.
- Diagnosing the injury, and connecting the injury and the cause, may be difficult.

For those taking on a toxic tort case, these key differences present specific challenges for proving medical causation.

B. Medical Causation

A successful toxic tort plaintiff must establish legal and medical causation.[6] To prove legal causation, plaintiff must show a defendant breached a duty to the plaintiff that resulted in an injury to the plaintiff. In turn, medical causation is the probability that the suspected source caused or exacerbated plaintiff's injury.[7]

Plaintiff's exposure and subsequent disease must be causally related and not simply a coincidence.[8] Thus, a plaintiff must offer proof that the exposure to the toxin was a substantial factor in causing or exacerbating plaintiff's disease. Did the asbestos inhaled by the plaintiff cause her lung cancer? Did the PCB exposure cause his lymphoma? Did the toxic mold worsen his upper respiratory irritation?[9]

Establishing medical causation is challenging. Typical problems include dealing with long latency periods between exposure to a toxic substance and the onset of illness or injury, identifying the source of contamination or the defendant(s), and identifying the specific toxin.[10] Causation in toxic tort cases can be hard to prove for other practical reasons as well, such as: [11]

- The toxic properties of the chemical may not have yet been studied;
- Information on the frequency, duration and amount of past exposures to the chemical may not be adequate;
- Individuals may react differently to similar exposures to disease-producing agents;
- Exposures to other substances in various contexts may contribute to or be a primary cause of the injury;
- The scientific literature on causation may be underdeveloped.

Alabama's standard for establishing medical causation requires a showing of probable, rather than possible, cause, or at least that exposure to the substance more likely than not caused the injury.[12] However, Alabama law does not require that the toxic agent be the sole cause of plaintiff's illness or death; instead, it suffices that the agent was a contributing cause. In *Ex parte Valdez*,[13] a workers' compensation case, the Alabama Supreme Court addressed the standard for medical causation. The action was brought by

the widow and children of an industrial painter who died of lung cancer.[14] Albeit a smoker, plaintiffs argued that the deceased's cancer was caused by his occupational exposure to coal-tar epoxy, a known carcinogen.[15] The Court held that the painter was not required to show that occupational exposure to coal-tar epoxy was the direct or sole cause of the cancer, but only that it was a contributing cause.[16] The Alabama Supreme Court analyzed the *Valdez* holding in *Ex parte Vongsouvanh*:[17]

> The [*Valdez*] record indicated the employee had had other nonoccupational hazards, including tobacco use and a genetic predisposition. No medical expert could conclusively say whether exposure to coal-tar epoxy, or any other particular factor, had caused the employee's cancer. The trial court in *Valdez* held that because the plaintiffs had failed to prove that the claimed occupational hazard directly or proximately caused the employee's illness and death, they could not collect benefits. The Court of Civil Appeals affirmed, applying the same standard. We reversed the judgment and remanded the case, holding that both the trial court and the Court of Civil Appeals had used the wrong analysis. **Recognizing that multiple factors may have caused the employee's cancer, we held that the correct standard was whether exposure to the occupational hazard was a contributing cause of the employee's illness and resultant death.** In this case, as in *Valdez*, multiple factors caused the problem at issue. . .. Thus, the trial court should have applied the "contributing-cause" standard set forth in *Valdez*. If the court had used this standard, the evidence in the record would have been sufficient for the court to conclude that Vongsouvanh's physical injuries were a contributing cause of his mental disorders. [18]

The difficulty of proving medical causation in a toxic tort case cannot be ignored. Thus, in determining whether or not to accept such a case, counsel must thoroughly investigate its feasibility.

III. CASE SELECTION AND DEFINITION

Meticulous screening is crucial to determining the viability of any case. Because

toxic tort actions require an enormous commitment of both time and resources, screening is even more important.[19] "[F]ailure to perform a thorough investigation can prove disastrous, if crucial facts are either overlooked or not discovered until trial."[20]

Lawyers should extensively discuss the prospective case with the client and thoroughly investigate the facts and the relevant law.[21] Counsel should begin with the obvious, by asking the client to identify his or her problem. Often, the answer will be a series of related issues, with different solutions. Not all of them involve litigation. Pollution problems, for example, may require a political solution, such as determining a local zoning approach.

Assuming liability appears plausible, an initial evaluation involves at least three main considerations. First, can a causal connection be established with existing medical and scientific data? Second, who should be a plaintiff? Finally, can the responsible defendants be identified? Answering these difficult questions demands time and focus.

The availability of medical and scientific proofs will govern the ability to establish a causal connection, which is critical to the success of a toxic tort action. The causation analysis begins with a review of the scientific and medical literature, and consultation with qualified experts. Physicians (including occupational and internal medicine specialists), toxicologists, pharmacologists, epidemiologists, industrial hygienists, and pathologists are often used. In most toxic torts, expert testimony will be necessary in order to prove both legal and medical causation. Notwithstanding suspicious circumstances strongly suggesting a causal relationship, the reality is that medical science in many areas has simply not caught up with the tort system.[22] Consequently, there may be legitimate claims that unfortunately remain, for the time being, immature. Many asbestos claims, for example, were lost initially until the science advanced enough to support a causal connection between asbestos exposure and the development of specific injuries. Thus, counsel generally is wise to focus upon taking cases that can be proved under the "state of the science" now.

Assuming a substance is shown to be capable of causing a specific toxic injury (or, stated differently, that "general causation" can be established as to that type of injury), counsel must determine whether the substance caused the specific injury suffered by a particular plaintiff (also known as "specific causation"). There are some substances

for which no level of human exposure is acceptable, and that can cause injury even at low doses. Under these circumstances, all exposed parties who suffer an injury of a type linked to that substance could be proper plaintiffs. But, counsel will generally encounter issues of safe versus unsafe levels of exposure. Data on exposure (the level of contact with the substance by swallowing, breathing or touching the skin) and dose (the amount of the substance actually absorbed into the body), for example, as shown by the level found in an exposed person's blood, are essential in determining whether a potential client has been exposed beyond tolerable limits known as thresholds. How a particular person responds to the toxic substance is also important in assessing whether specific causation can be shown. The nature of a potential client's response to the dosage must correlate with existing literature. These factors must be addressed when screening potential plaintiffs.

Finally, linking a particular defendant to the exposure is critical. Since multiple manufacturers can place the similar or identical products on the market, unless a client can provide solid product identification and can tie a particular defendant to the plaintiff's specific exposure, an otherwise valid claim may be unsuccessful.

The ability to evaluate plaintiffs, identify defendants and tie them to the relevant events is only part of counsel's task. Although an obvious consideration, making sure a target defendant is financially solvent or insured is a must. Solvency is even more important when litigating a toxic tort, where defendant's financial resources and policy limits could easily be exhausted. Before committing to a case of this magnitude, it is prudent to consider the viability of a defendant, or, at the very least, to make an early determination of available insurance coverage.

IV. EFFECTIVE CASE MANAGEMENT

Toxic tort litigation can be extremely complex. The number of actual or potential claimants, the highly technical subject matter, and the necessity of numerous expert witnesses require meticulous case management. The attorney studying a prospective toxic tort case should consider the cost of financing the case and the possibility of

combining forces with other counsel. This will allow law firms to share information and possibly spread their risk, thereby multiplying resources, saving time and lowering costs.

Case management includes selecting the means through which to bring the toxic tort action. In addition to individual tort actions, counsel may choose to pursue mass joinder of plaintiffs in a single case or small number of cases, file a class action, prosecute a citizen suit, or participate in consolidated pretrial proceedings in multidistrict litigation. Both federal and state courts and some state legislatures have tightened the requirements for certification of class actions, especially for personal injury claims. Still, for certain types of claims, when a considerable number of plaintiffs are involved, a class action may be more suitable, because of its economic benefits. In return for the economy, the individual injured plaintiff may not be able to maximize his recovery. However, the alternative for many plaintiffs is not to pursue an action at all.

In order to determine whether a class action is appropriate for a specific toxic tort, a thorough evaluation of the elements of class certification is necessary, because of the enormous amount of resources that class actions consume.[23] A detailed analysis of a class claim involves four phases: (1) investigating liability -- whether there is enough proof that defendants participated in the alleged conduct; (2) assessing damages – whether the damages can be quantified, and if so, whether they are sufficient to make the case economically feasible; (3) determining collectibility -- whether defendant(s) are solvent; and (4) evaluating the case using the Rule 23 standards of class definition, numerosity, commonality, typicality, predominance, and superiority of class treatment to other forms of adjudication. Obviously, most of those considerations apply to the evaluation of claims other than potential class claims as well.

Another possibility counsel may consider is to bring a citizen suit. The Alabama Supreme Court expounded on the purpose of citizen suits in *Apex Coal Corp. v. Alabama Surface Min. Com'n*: [24]

> Legislative history concerning these citizen suit provisions makes clear that the provisions are designed to allow private individuals to prod the agency into acting against violators, or to allow private individuals themselves to bring actions against violators.[25]

Many environmental statutes contain citizen-suit provisions. Violations may be easier to prove, depending on the claim; and relevant evidence may be available from federal and state governments.

Additionally, counsel should evaluate the possibility that any case filed in, or removable to, federal court will wind up in consolidated proceedings before a different federal court in multidistrict litigation. Congress created the Judicial Panel on Multidistrict Litigation to coordinate or consolidate pretrial proceedings when "civil actions involving one or more common questions of fact are pending in different districts".[26] The Panel is comprised of seven court of appeals and district court judges, appointed by the Chief Justice of the United States Supreme Court. Under the authority of 28 U.S.C. § 1407, the Multidistrict Consolidation Statute, the panel transfers cases in different courts arising out of the same facts and presenting the same issues.

V. IDENTIFYING THE DEFENDANTS[27]

There is no "one-size-fits-all" answer as to who should be sued. If avoidable, resist the temptation to list as a defendant every party for which you may have a viable claim or theory. Additional parties can complicate the management and trial of a case. In some instances, however, suing all defendants who have potential liability is necessary. Because of mass marketing of similar products, the nature of waste disposal from multiple sources, or agreements transferring responsibility, joint liability issues may surface. In this case, it is advisable to include all possible defendants. The following are possible theories on which to join multiple defendants.

A. Joint and Several Liability

Joint and several liability arises when the tortious acts of two or more defendants produce an indivisible injury. "Damages are not apportioned among joint tort-feasors in Alabama; instead, joint tort-feasors are jointly and severally liable for the entire amount of damages awarded."[28] Once causation has been established, the burden shifts to the defendants to show the portion of the harm for which each one is responsible. If the defendants are unable to show any reasonable basis for division, they are jointly and severally liable for the total damages.

B. Market Share Liability

The theory of market share liability purports to hold each defendant liable for damages in proportion to its respective market share of a particular product. According to the Eleventh Circuit:

> The market share theory of liability permits a plaintiff to bring an action in such cases without requiring the plaintiff to allege or prove that a particular defendant produced or marketed the precise DES taken (in this case) by the plaintiffs' mother.[29]

The adoption in some jurisdictions of market share liability stems from the injured plaintiff's inability to identify the actual seller of the toxic product, through no fault of his or her own, thereby warranting relaxation of traditional burdens of proof in order to preserve a remedy for that plaintiff in certain circumstances.[30]

C. Industry or Enterprise Liability

This theory has been applied when an injury is caused by one of several known manufacturers, and the precise manufacturer is not capable of being identified. Under this theory, a plaintiff can either show an explicit agreement or joint action among the defendants (a concert of action theory), or a tacit agreement by proof of the defendants' parallel behavior or adherence to industry-wide standards that showed joint control of the risk involved. If such a showing is made, the burden shifts to the defendants to disprove their liability.[31]

Neither Alabama appellate courts nor federal courts in the Eleventh Circuit have addressed the availability of the market share or enterprise theories of liability against defendants in tort claims under Alabama law, so the applicability of both those theories remains an open question. The market share theory has gained far greater acceptance than the enterprise theory from other courts, although even market share liability has not been adopted universally.

D. Civil Conspiracy

In order to succeed on a civil conspiracy claim, a plaintiff must prove a concerted action by two or more people that achieved an unlawful purpose or a lawful end by unlawful means.[32] Civil conspiracy may be inferred "from the nature of the acts complained of, the individual and collective interests of the alleged conspirators, the situation and relation of the parties at the time of the commission of the act, and generally all of the circumstances proceeding and attending culmination of the claimed conspiracy."[33] The conspiracy itself does not provide any cause of action; the gist of the action is the wrong committed.[34]

VI. THEORIES OF LIABILITY

The plaintiff's complaint reveals the lawyer's mastery of the case.[35] Too much of a "shotgun" approach to liability tells the court that counsel is not well-prepared, and gives the defense the opportunity to exploit the case. Certain theories of liability can actually open doors that might not otherwise be available for defendant. For example, a negligence claim, as opposed to a strict liability claim, makes a contributory negligence defense possible. Thus, it is paramount that counsel analyze the consequences of each potential theory of liability before including it in the complaint.

Available theories of liability in a toxic tort case may include common law negligence, nuisance, trespass, fraud, misrepresentation and deceit, outrage or intentional infliction of emotional distress, strict liability, assault and battery, violations of RICO and CERCLA cost recovery actions, among others. Below is a brief overview of each.

A. Common Law Grounds

"Most toxic tort cases are based on common law theories of liability because environmental statutes generally restrict the amount and type of recovery available to injured plaintiffs."[36] Defendants may be liable for personal injury and property damage caused by environmental problems under long-established common law theories of negligence, wantonness, trespass, nuisance, strict liability, outrage, fraud, and assault and battery.[37]

1. Negligence

Negligence encompasses "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." [38] It is the failure to exercise reasonable or ordinary care, *i.e.*, such care as a reasonably prudent person would have exercised under the same or similar circumstances.[39]

A toxic tort can differ from the typical negligence case because the issues of fact and questions of law may be more complex and proof may be more difficult. The traditional elements of negligence, however, still apply to toxic tort cases. A cause of action for negligence consists of the following elements: (1) existence of a duty owed by the defendants to a foreseeable plaintiff or a class of persons including plaintiffs, (2) breach by the defendants of that duty, (3) a causal relationship linking the defendants' conduct to the plaintiffs' injuries, and (4) resulting injury to the plaintiffs.[40]

One particular type of negligence claim is a claim for breach of a duty to warn.[41] As applied to a toxic substance, the elements of such a claim are: Did the defendant owe a duty to plaintiffs or the community to warn them of the existence and hazards of the substance? Did the defendants breach that duty? And, did that breach cause injury to the plaintiffs?

2. Gross Negligence, Recklessness, Wantonness

Wantonness is statutorily defined as "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others."[42] The Alabama Supreme Court has clarified that wantonness is "the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result."[43] It is not necessary "to prove that the defendant entertained a specific design or intent to injure the plaintiff" in order to make out a cause of action for wantonness.[44] To be "reckless" is to be "'careless, heedless, inattentive; indifferent to consequences,' 'marked by lack of proper caution: careless of consequence, 'having no regard for consequences; uncontrolled; wild.'"[45]

Wantonness is distinguished from negligence by the presence of a mental state in the defendant where the defendant acts or fails to act with knowledge of danger or with consciousness that such act or omission is likely to result in harm.[46] Willfulness, in turn, is distinguished from wantonness by the defendant's purpose, intent or design to inflict injury.[47]

3. Trespass

Trespass is an interference with the plaintiff's interest in the exclusive possession of property. "The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another."[48] For there to be a trespass, the defendant must either intentionally enter land in the possession of another or intentionally cause some "substance" or "thing" to enter upon another's land.[49] A plaintiff is not required to prove that defendant inflicted the trespass directly upon his land. Instead, it is enough for the plaintiff to show that the act is done "with knowledge that it will to a substantial certainty result in the entry of the foreign matter."[50]

In *Borland v. Sanders Lead Co.*,[51] the Alabama Supreme Court eliminated the historical requirement that the entry upon plaintiff's land be by direct force and loosened the intent requirement. The *Borland* court defined the elements for recovery for an indirect trespass as follows: to establish liability, the plaintiff must show 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the res.[52] The requisite intent is "the intent to do the act, not the intent to actually trespass."[53]

4. Nuisance

A nuisance consists of any substantial and unreasonable interference with the use and enjoyment of another's land.[54] The causes of action and remedies for trespass, which is concerned with invasion of the possessor's interest in exclusive possession of property, and nuisance, which is concerned with invasion of the possessor's interest in use and enjoyment of property, are not mutually exclusive; and may coexist under particular

factual circumstances.[55] Indeed, "the same conduct on the part of a defendant may, and often does, result in the actionable invasion of both interests."[56]

"The term 'nuisance' refers 'to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion."[57] In order to constitute nuisance, the interference with the plaintiff's use of his property must be both substantial and unreasonable due to the nature, duration, or extent of interference with the plaintiff's use and enjoyment of land.

The Code of Alabama § 6-5-120 provides a broad definition for "nuisance":

> A "nuisance" is anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary reasonable man.[58]

Accordingly, a nuisance "may consist of conduct that is intentional, unintentional, or negligent. Indeed, it may even consist of activities that are conducted in an otherwise lawful and careful manner, as well as conduct that combines with the culpable act of another, so long as it works hurt, inconvenience, or damage to the complaining party."[59] To establish a nuisance under the Code, "the plaintiff must show conduct, be it intentional, unintentional, or negligent, on the defendant's part, which was the breach of a legal duty, and which factually and proximately caused the complained-of hurt, inconvenience, or damage."[60] Whether defendant had a duty under the circumstances depends on whether the consequences of the defendant's course of conduct or the circumstances that defendant allowed to exist were reasonably foreseeable.[61]

There are two types of nuisance claims: public nuisance and private nuisance.[62] "Although the two categories often overlap, there is an important, and often misunderstood, distinction between the two. Public nuisance actions arise when there has been an unreasonable interference with a property right 'common to the general public,' such as when an improperly managed hazardous waste site violates the public's right to a safe environment. Private nuisance actions, on the other hand, involve unreasonable interferences with an individual's use and enjoyment of his property, such as when a

neighboring landowner discharges hazardous substances onto the property of the complaining landowner."[63]

Although a public nuisance usually does not provide a private right of action and instead must be abated by the state,[64] a private plaintiff may assert a claim for public nuisance if he has suffered damages different in degree and kind from those suffered by the general public.[65] The special injury necessary to support a private claim based on a public nuisance need not be unique to the plaintiff, and indeed the injury's similarity to that suffered by others is not fatal to a finding of special injury; it merely needs to be different from that suffered by the public generally.[66] Usually, plaintiffs who own land contaminated by pollution should be able to identify distinct damages even from a public nuisance, and thereby have a private right of action for public nuisance.[67] In determining whether an action constitutes a nuisance, the courts generally weigh the utility and public acceptability of the activity with the extent of harm or cost of compensation for the injury to the complaining party's property.[68]

e. Ultrahazardous Activity/Strict Liability

"Under this common law theory, one is liable without regard to fault for carrying on an ultrahazardous activity that causes injury to others."[69] This remains the default choice in many toxic tort cases. Several courts have applied the doctrine of strict liability for "ultrahazardous" or "abnormally dangerous" activities to cases involving personal injuries or property damage caused by the handling, disposal or release of hazardous chemicals.

Alabama recognizes a hybrid theory of strict liability, when bringing a product liability action under the AEMLD, as stated in *Pitts v. Dow Chemical Co.*:[70]

> While the AEMLD has much in common with the doctrine of strict liability in tort found in § 402A of the Restatement (Second) of Torts (1965), it is more accurately described as a hybrid of strict liability and traditional negligence concepts. *Casrell [v. Altec Industries, Inc.*, 335 So.2d 128, 132 (Ala. 1976)]; *Atkins [v. American Motors Corp.*, 335 So.2d 134, 139 (Ala. 1976)]. On the one hand, the AEMLD is akin to strict liability because selling an unreasonably dangerous product--that is, a defective product--is deemed

> to be negligent as a matter of law: "[l]iability ... attaches solely because the defendant has exposed expected users of a product not reasonably safe to unreasonable risks." *Atkins*, 335 So.2d at 139. On the other hand, in contrast to the purely "no-fault" version of strict liability found in the Restatement, the AEMLD retains various affirmative defenses, including contributory negligence, assumption of the risk, and, under certain circumstances, the lack of a causal relation. *Casrell*, 335 So.2d 134; *Atkins*, 335 So.2d at 143.[71]

Moreover, Alabama state and federal courts have recognized the propriety, under certain circumstances, of imposing strict liability without regard to fault upon a defendant for engaging in ultrahazardous or abnormally dangerous activities, including those giving rise to toxic torts.[72] The Alabama Supreme Court has adopted the Restatement (Second) of Torts, §§ 519-524A, which provides for strict liability for abnormally dangerous activities.[73] To determine whether an activity is abnormally dangerous, the following factors are considered:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.[74]

While all of these factors are to be weighed, not all of them need be present in order to find the danger to be abnormal.[75] Applying these factors, an Alabama federal court has held that plaintiffs sufficiently stated a strict liability claim for abnormally dangerous activities in defendants' storage of gasoline in underground tanks.[76]

6. Intentional Infliction of Emotional Distress/Tort of Outrage

"Emotional distress claims resulting from exposure to toxic substances have increased dramatically in recent years. Not only has the number of such claims been on the increase, but the size of verdicts has increased as well. Courts are increasingly faced with claims for emotional distress based on mental anguish, cancerphobia, fear of future

disease, and other related psychological injury."[77] It is well-established that damages for mental anguish are recoverable in connection with certain tort claims. Under some circumstances, the intentional infliction of emotional distress can give rise to an independent cause of action (the tort of outrage).

The Alabama Supreme Court, in *National Sec. Fire & Cas. Co. v. Bowen*,[78] stated that "[o]ne who by conduct so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency to be regarded as atrocious and utterly intolerable in a civilized society, intentionally or recklessly causes another person emotional distress so severe that no reasonable person could be expected to endure it is subject to liability for such distress."[79]

Section 46 of the Restatement (Second) of Torts, cited favorably by the Alabama Supreme Court, outlines the contours of liability for the tort of outrage:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.[80]

Stated differently, the tort of outrage contains the following elements: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of its conduct; (2) the conduct was extreme and outrageous; (3) defendant's actions caused the plaintiff's distress; and (4) the emotional distress suffered by the plaintiff was severe.[81] To be sure, the Alabama courts have been hesitant to expand the tort of outrage beyond certain limited circumstances, such as the mishandling of corpses and extreme sexual harassment. But, faced with egregious misconduct, at least one Alabama circuit court jury has returned a verdict finding

defendants liable for outrage in the manufacture, handling, release and dispersal of hazardous chemicals.

7. Fraud, Misrepresentation, and Deceit

Under Alabama law, the elements of fraudulent representation can be summarized as follows:

> (a) [A] false representation [usually] concerning an existing material fact;
>
> (b) … which (1) defendant knew was false when made, or (2) was made recklessly and without regard to its truth or falsity, or (3) was made by telling plaintiff that defendant had knowledge that the representation was true while not having such knowledge;
>
> (c) reliance by the plaintiff on the representation and that he was deceived by it;
>
> (d) reliance which was justified under the circumstances;
>
> (e) damage to the plaintiff proximately resulting from his reliance.[82]

To sustain a claim of suppression, the following elements must be met: (1) a duty on the part of the defendant to disclose facts; (2) concealment or non-disclosure by the defendant of material facts; (3) inducement of plaintiff to act or refrain from acting by defendant's concealment or non-disclosure; and (4) damage to the plaintiff as a proximate result.[83]

The common law principles concerning liability for fraudulent misrepresentation, suppression of facts, and deceit have been codified into statute at §§6-5-100 through 6-5-104 of the Alabama Code (1975).[84] Section 6-5-100 of the Code provides that fraud, accompanied with damage to the party defrauded, gives a right of action. Alabama Code § 6-5-101 defines legal fraud as the misrepresentation of a material fact made either willfully to deceive, or recklessly without knowledge, and acted on by the other party, or made by mistake and innocently, and acted on by the other party. Thus, § 6-5-101 encompasses the three forms of legal fraud: intentional fraud, reckless fraud, and

innocent fraud.[85] Fraud is also addressed in Code § 6-5-102 as the suppression of a material fact that the party is under an obligation to communicate. Deceit is identified in section 6-5-103 as the willful misrepresentation of a material fact, made to induce another to act, and upon which he does act, to his injury, giving a right of action. Similarly, section 6-5-104 states that one who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable. Notwithstanding the particularities stated in the Alabama Code, liability for fraud and deceit is determined by whether the elements for misrepresentation are present, without distinguishing among the four statutory definitions of fraud and deceit.

Where a toxic tort defendant has made false or misleading statements, spoken some but not all of the truth, or failed to disclose material facts in the face of a duty of disclosure based on superior knowledge or other circumstances, fraud or suppression may provide additional avenues by which a plaintiff may hold the defendant liable.[86]

8. Assault and Battery

Assault and battery are intentional torts that arise when someone has intentionally exposed another person or another person's property to a hazardous substance.[87] "A toxic tort based on a theory of battery requires merely that the actor know with a substantial certainty that his actions will cause another, directly or indirectly, to come into contact with a foreign substance in a manner that a reasonable person would regard as offensive."[88]

B. Environmental Laws and Regulations

"There are a number of non-common law causes of action applicable to toxic tort cases. Toxic tort claims are primarily predicated on common law theories of recovery; however, violation of a relevant environmental law statute or regulation by a potential defendant in a toxic tort case may provide a basis for civil or criminal liability if (1) the statute or regulation explicitly provides for a private right of action by an individual harmed by another's violation of the statute or regulation; (2) the statute or regulation implicitly or impliedly provides for a private right of action; and (3) the violation of the statute or regulation may be used by the plaintiff to prove either negligence or strict

products liability."[89]

1. CERCLA Cost Recovery

CERCLA greatly expanded liability beyond that provided by the common law, imposing liability for cleanup costs.[90] It requires the statutorily responsible parties to pay for site response costs without respect to tort "fault" concepts.[91] The Eleventh Circuit presented an overview of CERCLA in *National Solid Wastes Management Ass'n v. ADEM*,:[92]

> In 1980, the United States Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601- 9675 (1982 & Supp. V 1987) ("CERCLA"), designed to accomplish the cleanup of hazardous waste sites. CERCLA established liability standards for persons responsible for unsafe hazardous waste sites and created "Superfund," a fund that the federal government can use when responsible parties do not conduct the cleanups. *See* 42 U.S.C. § 9607. CERCLA provides for two types of cleanup actions: *remedial* actions, which are generally long-term or permanent containment or disposal programs, 42 U.S.C. § 9601(24); and *removal* efforts, which are usually short-term cleanup arrangements of a more immediate nature, 42 U.S.C. § 9601(23). "A critical step in the implementation of a rational, safe hazardous waste program is the creation of new [hazardous waste disposal] facilities." 132 Cong.Rec. S14,924 (daily ed. Oct. 3, 1986) (statement of Sen. Chafee).[93]

The elements of a prima facie claim for cost recovery under CERCLA are as follows: (1) the site in question is a "facility" as defined in section 101(9) of CERCLA, 42 U.S.C. § 9601(9); (2) the substance at issue (for example, PCBs) is a hazardous substance; (3) a release or threatened release of that hazardous substance has occurred; (4) the release or threatened release of that substance has caused plaintiff to incur response costs consistent with the "national contingency plan"; and (5) defendant is a

"covered person" or responsible party under section 107(a) of CERCLA, 42 U.S.C. § 9607(a).[94]

2. RICO

The civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. § 1964(c)(1984 & Supp. 1993), provides that "[a]ny person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." To recover on a civil RICO claim, the plaintiffs must prove, first, that § 1962 was violated; second, that they were injured in their business or property; and third, that the § 1962 violation caused the injury.[95] A violation of § 1962 occurs when one engages in, or aids and abets another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)).

VI. ANTICIPATING DEFENSES

Anticipating tactics used by defendants' counsel is a necessary strategy for a successful plaintiff. Recurring defenses that plaintiffs may encounter include state of the art, statutes of limitation, inadequate identification of defendants, lack of causation, the government contractor defense, contributory negligence, comparative negligence (in states other than Alabama), and assumption of risk, and a defendant with risk of significant damage exposure may threaten or play the "trump card" of bankruptcy. [96]

Most likely, defendants will use an argument resembling a state-of-the-art defense: no one knew it was dangerous back then, and we did what everyone else did. Another recurring problem in toxic tort litigation is demonstrating that the upper and middle management knew or should have known what was going on at the lower levels.

Traditionally, companies have argued that nothing went wrong, and if it did, the company never knew. They very often point to policy manuals and employee handbooks as evidence of the company's good intentions.

Defendants will also avail themselves of the defense of "lack of causation". They may allege that plaintiff has failed to introduce adequate evidence of exposure, or that the presence of potential alternate causes or scientific uncertainties about the causal connection between the exposure (or level of exposure) and the alleged illness or injury precludes liability.

Statutes of limitation are also a core concern in litigating toxic torts. Too many lawyers file lawsuits for every possible cause of action, even if scientific support for this suit is lacking for fear that the limitations period has run on certain causes of action. This "shotgun approach" is frowned upon. A better approach may be to advise the client of the law and recommend a course of conduct, based upon the state's statute(s) of limitation and discovery rules. In some jurisdictions (or on specified claims within that jurisdiction), the statute of limitations begins to run at exposure; in others, whenever the injury is discovered.

In cases involving the release of a hazardous substance, pollutant or contaminants from a facility into the environment (as opposed to a release into a workplace[97]), CERCLA provides a "federally required commencement date" that creates a federal "discovery rule" for personal injury and property damage claims brought under state law. This provision preempts state law accrual rules that would impose an earlier date for accrual of the state law claim.[98] Where applicable, CERCLA's "federally required commencement date" will prevent the state law claim from accruing until the date plaintiff knew or reasonably should have known that his or her personal injury or property damages were caused or contributed to by the hazardous substance – thereby saving many a state law claim that would have been time barred in the absence of the federally mandated "discovery rule."[99]

VIII. WITNESSES

Due to their scientific nature, toxic tort cases often require the assistance of expert consultants.[100] For example, experts may be needed to identify the particular toxin involved, give opinions as to the propriety of the handling of the substance, and connect the toxic exposure to the illness or injury. One way to locate experts is to contact various professional organizations. Experts may also be found through inquiries to colleges and government agencies. Legal colleagues and other experts are often excellent sources of information.

Although expert witnesses demonstrate many aspects of the case better than lay witnesses, many jurors find factual testimony to be simpler and more believable. Jurors are comfortable assessing the credibility of fact witnesses. An honest fact witness – particularly a former employee of the defendant -- can be more effective than an expert witness. Where the law does not require use of an expert witness, choosing a fact witness over an expert results in a cost-effective preference for the familiar over the foreign, the simple over the complex, the specific over the general, and the understandable over the technical. Thus, instead of immediately hiring an expert to prove that defendants should have known that a certain chemical was toxic, consider looking for facts or fact-witnesses that can testify as to defendant's actual knowledge. A "battle of the experts" is not only more expensive, but also may not be as effective and persuasive as a hot document or "smoking gun." And, regardless of whether plaintiff is required or chooses to use an expert, counsel must prepare – beginning with the selection of an expert with the "right" qualifications – to beat back the inevitable "*Daubert* challenge" to the admissibility of that expert's testimony.[101]

Despite the fact that simple testimony may be more believable, we cannot ignore the importance of expert testimony from the opposing side. When the defense presents an expert witness, the plaintiff's job is both to eliminate the defense expert's aura of objective competence, such as by attacking bias, and to affirmatively counteract the defense expert's testimony with concrete proof. The use of an employee lay witness to describe defendant's actual practices may be the best way to accomplish this.

IX. THE USE OF PUBLIC RECORDS

The lawyer should compile as much information as possible prior to suit and outside of discovery. Informal discovery can occur by obtaining publicly available information, especially other similar lawsuits and records and data submitted to regulatory agencies; studying relevant scientific and technical literature; conducting exposure testing on clients and environmental sampling of property within the clients' control; and sharing information with lawyers handling similar claims against the same or other defendants. Also, in certain cases involving possible impact on human health, the government may have conducted investigations. Adverse administrative findings and government studies may be useful.

X. THE JURY

Jury selection will dramatically influence the outcome of your case. Indeed, "there is nothing more important than the selection of the men who will decide your case." [102]

XI. OPENING STATEMENTS

Use concrete themes to simplify the case and to provide reference points around which jurors can organize the evidence they will hear. Anticipate expected defense arguments or "excuses." Explain any technical language that you know the jury will hear from expert witnesses. Prepare jurors for medical testimony by telling them why you have called doctors to court, identifying who these experts are, and summarizing the gist of their testimony. Some important toxicological terms counsel should address are "exposure", "dose" and "response."

XII. CLOSING ARGUMENTS

Counsel should emphasize the importance of the jury's responsibility, explain the standards of proof in a civil action, and briefly discuss damages.[103] Using the themes set out in opening statement and reinforced throughout the presentation of witness testimony, counsel should stress the "bullet points" why the defendants should be held accountable for the harm they caused. Relevant statutes and case law should be reviewed and applied to the evidence presented. Defendants' lack of causation arguments should be anticipated and directly addressed, by emphasizing the jury's ability to draw inferences from the facts presented. The rebuttal should be a concise statement pointing out the weaknesses of the defense, and reemphasizing the strengths of the plaintiff's case.

---

1 Shareholder and head of Toxic Torts Section, Beasley, Allen, Crow, Methvin, Portis & Miles.

2 Shareholder and member of Toxic Torts Section, Beasley, Allen, Crow, Methvin, Portis & Miles.

3 A substantial contribution was made to this article by Juliana Teixeira Dean, an LL.M. graduate of the University of Alabama Law School and current law clerk at Beasley, Allen, Crow, Methvin, Portis & Miles, now preparing to sit for the Alabama Bar.

4 BLACK'S LAW DICTIONARY 1497 (7th ed. 1999).

5 For a detailed analysis of a toxic tort action, *see generally* ALLAN KANNER, ENVIRONMENTAL AND TOXIC TORT TRIALS (2001).

6 Christopher Callahan, *Establishment of Causation in Toxic Tort Litigation*, 23 ARIZ. ST. L. J. 605, (1991).

7 Elizabeth A. Stundtner, *Proving Causation in Toxic Tort Cases: T-Cell Studies as Epidemiological Particularistic Evidence*, 20 B C ENVTL. AFF. L. REV. 335 (1993)

8 Andrew A. Marino and Lawrence E. Marino, *The Scientific Basis of Causality*, 21 U. DAYTON L. REV. 1 (1995).

9 *Id.*

10 Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines* 35 U. RICH. L. REV. 875 (2002).

11 KANNER, *supra* note 5, § 1.02 [B].

[12] Julie S. Elmer, *A Fungus Among Us: The New Epidemic of Mold Claims*, 64 ALA. LAW. 109 (2003). *See also* Tidwell v. Upjohn, 626 So. 2d 1297, 1301 (Ala. 1993); Ex parte Diversey, 742 So.2d 1250, 1254 (Ala. 1999).

[13] 636 So. 2d 401 (Ala. 1994).

[14] *Id.* at 402.

[15] *Id.* at 402-3.

[16] *Id.*

[17] 795 So. 2d 625 (Ala. 2000).

18 *Id.* (emphasis supplied) (citations omitted).

[19] Brian Drazin, *Screening Potential Cases Involving Mass Torts or Class Actions* (last visited October 24, 2003) <http://www.drazinandwarshaw.com/publishing/BA_Drazin-a.htm>.

[20] Mark S. Dennison and Warren Freedman, *Handling Toxic Tort Litigation*, 57 AMJUR TRIALS 395 (2003).

[21] KANNER, *supra* note 5.

[22] *Id.*

[23] Nikole M. Davenport and William Thomas Lacy, Jr., *Evaluating and Initiating the Class Action Suit* (last visited October 24, 2003) < http://classlaw.com/FSL5CS/articles/articles22.asp>.

24 843 So. 2d 170 (Ala. Civ. App. 2001), *rev'd on other grounds*, 843 So.2d 180 (Ala. 2002).

[25] *Id.*

[26] KANNER, *supra* note 5, § 13.03.

[27] KANNER, *supra* note 5.

[28] Matkin v. Smith, 643 So. 2d 949, 950 (Ala. 1994).

[29] Wood v. Eli Lilly and Co., 131 F.3d 1447 (11th Cir. 1997).

[30] *E.g.*, Conley v. Boyle Drug Company, 570 So.2d 275, 283 (Fla. 1990); Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d. 924, 936, 163 Cal.Rptr. 132, 144 (1980).

[31] Hall v. E.I. DuPont de Nemours & Co., 345 F.Supp. 353 (E.D.N.Y. 1972); *but see* Sindell, 607 P.2d at 933.

[32] Singleton v. Protective Life Ins. Co., 2003 WL 860663 at *11 (Ala. March 6, 2003).

[33] Nicolet v. Nutt, 525 A.2d 146, 148 (Del. 1987).

[34] Singleton, 2003 WL 860663 at *11.

[35] KANNER, *supra* note 5, § 6.00.

[36] Dennison, *supra* note 20, at § 7.

[37] *Id.*

[38] KANNER, *supra* note 5.

[39] *See* Alabama Pattern Jury Instructions: Civil (APJI) 28.01 (2nd ed. 1993). *Id.*; *see also, e.g.*, Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 n.2 (5th Cir. 1974).

[40] *See* Smith v. Atkinson, 771 So.2d 429, 432 (Ala. 2000); Lance, Inc. v. Ramanauskas, 731 So.2d 1204, 1208 (Ala. 1999).

[41] *See, e.g.*, Mixon v. Houston County, 598 So.2d 1317, 1318-19 (Ala. 1992); Avery v. Geneva County, 567 So.2d 282, 286 (Ala. 1990); Brown v. Whitaker Contracting Corp., 681 So.2d 226, 229 (Ala.Civ. App. 1996); *see also* Industrial Chemical & Fiberglass Corp. v. Chandler, 547 So.2d 812, 831 (Ala. 1988) (the greater the danger involved in the defendant's activity, the greater the degree of care required in carrying it out).

[42] Code of Alabama § 6-11-20 (1975, as amended).

[43] Alpha Mut. Ins. Co. v. Roush, 723 So. 2d 1250, 1256 (Ala. 1998).

[44] *Id.*

[45] Berry v. Fife, 590 So. 2d 884, 885 (Ala. 1991) (internal citations omitted).

[46] *E.g.*, Lynn Strickland Sales and Service, Inc. v. Aero-Lane Fabricators, Inc., 510 So. 2d 142, 145-46 (Ala. 1987) *overruled by* Alfa Mut. Ins. Co. v. Roush, 723 So.2d 1250 (Ala. Sep 11, 1998) (NO. 1950232); APJI 29.01.

[47] *E.g.*, Reed v. Brunson, 527 So. 2d 102, 119-20 (Ala. 1988); APJI 29.01.

[48] Dennison, *supra* note 20, at § 8.

[49] Born v. Exxon Corp., 388 So.2d 933, 934 (Ala. 1980).

[50] W.T. Ratliff Co., Inc. v. Henley, 405 So.2d 141, 145 (Ala. 1981).

[51] 369 So. 2d 523 (Ala. 1979).

[52] Id. at 529; *accord, e.g.*, W.T. Ratliff Company, Inc. v. Henley, 405 So. 2d 141, 145 (Ala. 1981); *see also, e.g.*, APJI 31.74.

[53] W.T. Ratliff Co., 405 So.2d at 146.

[54] Huff v. Smith, 679 So. 2d 259 (Ala. Civ. App. 1996).

[55] Borland, 369 So.2d at 527, 529-30.

[56] *Id.* at 527.

[57] City of Birmingham v. City of Fairfield, 375 So. 2d 438, 441 (Ala. 1979).

[58] Code of Alabama § 6-5-120; *see also, e.g.*, APJI 31.50.

[59] Hilliard v. City of Huntsville Electric Utility Board, 599 So.2d 1108, 1112 (Ala. 1992).

[60] *Id.* at 1113.

[61] Tipler v. McKenzie Tank Lines, 547 So.2d 438, 440-41 (Ala. 1989).

[62] Dennison, *supra* note 20, at § 9.

[63] *Id.*

[64] Code of Alabama § 6-5-121.

[65] City of Birmingham, 375 So.2d at 441.

[66] Monsanto Chemical Co. v. Fincher, 133 So.2d 191, 194 (Ala. 1961).

[67] *See, e.g., id.*; Stone Container Corporation v. Stapler, 83 So.2d 283, 287 (Ala. 1955).

[68] Dennison, *supra* note 20, at § 9.

[69] Dennison, *supra* note 20, at § 10.

[70] 859 F.Supp. 543 (M.D.Ala. 1994).

[71] *Id.* at 550. The Alabama Supreme Court has recently confirmed that the AEMLD did not abrogate and does not subsume causes of action for negligence, wantonness, and other common law claims. Tillman v. R.J. Reynolds Tobacco Co., 2003 WL 21489707 at *4 (Ala. June 30, 2003); Spain v. Brown & Williamson Tobacco Corp., 2003 WL 21489727 at **3-9 (Ala. June 30, 2003).

[72] *E.g.*, Peters v. Amoco Oil Co., 57 F.Supp.2d 1268, 1285-87 (M.D.Ala. 1999).

[73] Harper v. Regency Dev. Co., 399 So.2d 248, 252 (Ala. 1981).

[74] Peters, 57 F.Supp.2d at 1285 (quoting Restatement (Second) of Torts § 520)..

[75] Peters, 57 F.Supp.2d at 1285.

[76] *Id.* at 1285-87; *but see* E.S. Robbins Corp. v. Eastman Chemical Co., 912 F.Supp. 1476, 1489-91 (N.D.Ala. 1995) (defendants' transportation and off-loading of certain chemicals used in manufacturing held not abnormally dangerous under the circumstances).

[77] Dennison, *supra* note 20, at § 12.

[78] 447 So. 2d 133 (Ala. 1983).

[79] *Id.* at 141.

[80] RESTATEMENT (SECOND) OF TORTS, Section 46; see, e.g., American Road Service Co. v. Inmon., 394 So. 2d 361 (Ala. 1980) (adopting Restatement (Second) of Torts § 46); Travelers Indemnity Co. of Illinois v. Griner, 809 So. 2d 808, 810 (Ala. 2001) (evidence sufficient to support jury verdict of outrage); Woodley v. City of Jemison, 770 So. 2d 1093, 1096 (Ala.Civ.App. 1999) (trial court erred in dismissing outrage claim on summary judgment); APJI 29.05.

[81] U.S.A. Oil, Inc. v. Smith, 415 So.2d 1098, 1100 (Ala.Civ.App. 1982).

[82] MICHAEL L. ROBERTS & GREGORY S. CUSIMANO, ALABAMA TORT LAW HANDBOOK § 20.0, at 647-8 (2001). (quoting Army Aviation Center Federal Credit Union v. Poston, 460 So. 2d 139, 141-3 (Ala. 1984)) (internal citations omitted); *see generally* APJI 18.01-18.04.

[83] *E.g.*, *Ex parte* Walden, 785 So. 2d 335, 338 (Ala. 2000); *see also, e.g.*, *Ex parte* Liberty National Life Ins. Co., 797 So. 2d 457, 465 (Ala. 2001); APJI 18.05.

[84] MICHAEL L. ROBERTS & GREGORY S. CUSIMANO, ALABAMA TORT LAW HANDBOOK § 20.0, at 645 (2001).

[85] Hornaday v. First Nat'l Bank, 65 So. 2d 678 (Ala. 1952).

[86] *E.g.*, Peters, 57 F.Supp.2d at 1281-84.

[87] Dennison, *supra* note 20, at § 8.

[88] Carl B. Meyer, *The Environmental Fate of Toxic Waters*, 19 Envtl. L. 321 (1988).

[89] Dennison, *supra* note 20, at § 18.

[90] *See* 42 U.S.C. § 9607 (1988).

[91] Thompson v. Taracorp, 684 So.2d 152, 161 (Ala.Civ.App. 1996).

[92] 910 F. 2d 713 (11th Cir. 1990).

[93] *Id.*

[94] *E.g.*, Blasland, Bouck & Lee, Inc. v. City of North Miami, 283 F.3d 1286, 1302 (11th Cir. 2002); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496-97 (11th Cir. 1996); U.S. v. Mountain Metal Company, 137 F.Supp.2d 1267, 1273 (N.D.Ala. 2001).

[95] Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991), cited in Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994).

[96] KANNER, *supra* note 5.

[97] Becton v. Rhone-Poulenc, Inc., 706 So.2d 1134, 1141 (Ala. 1997).

[98] 42 U.S.C. § 9658; Freier v. Westinghouse Corp., 303 F.3d 176 (2nd Cir. 2002); Tucker v. Southern Wood Piedmont Co., 28 F.3d 1089, 1091-93 (11th Cir. 1994).

[99] 42 U.S.C. § 9568(b)(4)(A); Tucker, 28 F.3d at 1091.

[100] KANNER, *supra* note 5.

[101] Daubert v. Merrel Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993).

[102] KANNER, *supra* note 5, citing FRANCIS WELLMAN, DAY IN COURT OR THE SUBTLE ARTS OF GREAT ADVOCATES (1926).

[103] KANNER, *supra* note 5.