ALABAMA STATE BAR
ENVIRONMENTAL LAW SECTION PROGRAM

The Explosion in Toxic Torts

Rhon E. Jones[1]

I. INTRODUCTION

A toxic tort is a civil wrong arising from exposure to a toxic substance.[2] Litigating such a case can be intimidating, due to the complex issues involved. Notwithstanding these highly technical issues, toxic tort cases contain legal themes that can be clear and comprehensible. Thus, a good lawyer should frame the debate in terms of these simple issues, in order to avoid overwhelming and confusing the jury. Author 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". [3]

II. CHARACTERISTICS OF TOXIC TORT CASES

A. Distinctive Injury

A typical 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.

[1] Partner at Beasley, Allen, Crow, Methvin, Portis & Miles, Section Head of the firm's Environmental Litigation Division. I would like to give special thanks to Juliana Teixeira, who was instrumental in preparing this paper.
[2] Black's Law Dictionary 1497 (7th ed. 1999).

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- The injury may be slow to develop.
- Diagnosis may be difficult.

B. Medical Causation

In a toxic tort action, in addition to legal causation, a plaintiff must prove what is known as "medical causation". To establish medical causation, a plaintiff must show that exposure to the toxin was a substantial factor in causing or exacerbating the disease. In Valdez v. Valdez [4], 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. Id. at 402. Albeit a smoker, the plaintiffs argued that the deceased's cancer was caused by his occupational exposure to coal-tar epoxy, a known carcinogen. Id. at 402-3. The Court held that "[t]he standard [for establishing medical causation] is not whether 'such exposure was a direct and proximate cause of Employee's terminal illness,' . . . but whether such exposure was a *contributing* cause of the employee's illness and resultant death." Id. at 403.

The New Jersey Supreme Court, in James v. Bessemer Processing Co. Inc.,[5] laid out an overview of medical causation:

> By far, the most difficult problem for plaintiff to overcome in toxic tort litigation is the burden of proving causation. In the typical tort case, the plaintiff must prove tortious conduct, injury and proximate cause. Ordinarily, proof of causation requires the establishment of a sufficient nexus between the defendant's conduct and the plaintiff's injury. In toxic tort cases, the task of proving causation is invariably made more complex because of the long latency period of illnesses caused by carcinogens or other toxic

[3] Allan Kanner, Environmental and Toxic Tort Trials, § 1.00 (2002).
[4] 636 So. 2d 401 (Ala. 1994).
[5] 714 A.2d 898 (N.J. 1998)

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> chemicals. The fact that ten or twenty years or more may intervene between the exposure and the manifestation of disease highlights the practical difficulties encountered in the effort to prove causation.

James v. Bessemer Processing Co. Inc., 714 A.2d 898 (N.J. 1998).

Causation in toxic tort cases is hard to prove for numerous reasons[6]:

- 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 is not adequate;
- Not all individuals react in the same way to similar exposures to disease-producing agents.
- Multiple exposures in a variety of contexts may contribute to or be a primary cause of the injury.
- The scientific literature on causation may be underdeveloped.

III. CASE SELECTION AND DEFINITION

Meticulous screening is paramount to determining the viability of any case. Lawyers should extensively discuss the prospective case with the client and thoroughly investigate the facts and the relevant law. Counsel should begin with the obvious, by asking the client what his or her problem is. Often, the answer will be a series of related problems, with different solutions. Not all of them involve litigation. Pollution problems, for example, may require a political solution, such as determining a local zoning level.

[6] Allan Kanner, Environmental and Toxic Tort Trials, § 1.02 [B] (2002).

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Because toxic tort actions likely require an exponential commitment of both time and resources, screening is even more important.[7] Assuming liability is patent, an initial evaluation is comprised of at least three main considerations. First, can a causal connection be established with existing medical and scientific proofs? Second, who can be included as 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. Analysis of causation, therefore, begins with a review of the scientific and medical literature, and consultation with qualified experts. Physicians, toxicologists, pharmacologists, epidemiologists, and pathologists are generally consulted. Notwithstanding suspicious circumstances suggesting a causal relationship, the reality is that medical science has simply not caught up with the tort system. Consequently, there may be legitimate claims that unfortunately remain, for the time being, immature. Many asbestos claims, for example, were lost initially until enough medical and scientific evidence was gathered. Thus, counsel should focus upon selecting cases which can be successfully proven at the present time.

Once there is viable causation, the attorney should decide whom to include as a plaintiff. There are some substances for which no level of human exposure is acceptable. Under these circumstances, all exposed parties could be plaintiffs. However, counsel will generally encounter issues of safe versus unsafe levels of exposure. Exposure data is an essential ingredient in determining whether a potential client has been exposed beyond tolerable limits known as thresholds. Response is also a key factor in selecting

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[7] For a comprehensive discussion on this topic, *see* Brian Drazin, New Jersey Lawyer, the Magazine,

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prospective plaintiffs. The nature of a potential client's response to the dosage must correlate with existing literature. These factors must be addressed when selecting potential plaintiffs.

Linking a particular defendant to the exposure is indispensable. Since multiple manufacturers can place the similar or identical products on the market, unless a client can provide solid product identification, 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. A financially solvent or insured defendant should be a major concern in an action. 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, saving time and lowering costs.

Case management includes selecting the vessel through which to bring the toxic tort action. In addition to individual tort actions, counsel may choose to file a class

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Screening Potential Cases Involving Mass Torts or Class Actions 215-JUN N.J. Law. 22 (June, 2002).

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action, a citizen-suit, or be involved in multi-district litigation. 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 a potential class action is necessary, due to the enormous amount of resources that class actions consume.[8] A detailed analysis of a class claim involves four phases: (1) liability investigation - whether there is sufficient proof that defendants participated in the alleged conduct; (2) damages assessment - quantifying the damages; (3) determining collectibility - whether defendant(s) are solvent; and (4) evaluating the case using the Rule 23 standards of class definition, numerosity, commonality, typicality, superiority. Another possibility counsel should 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: [9]

> 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.

Apex Coal Corp. v. Alabama Surface Min. Com'n 2001 WL 333904 (Ala. Civ. App. 2001), *reversed on other grounds.*

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[8] Nikole M. Davenport and William Thomas Lacy, Jr., Evaluating and Initiating the Class Action Suit, Source http://classlaw.com/FSL5CS/articles/articles22.asp.

[9] 2001 WL 333904 (Ala. Civ. App. 2001), *reversed on other grounds.*

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Most environmental statutes contain citizen-suit provisions. Violations are relatively easy to prove, and relevant evidence is available from federal and state governments. Additionally, counsel should evaluate the possibility of facing multi district litigation. Congress created the Judicial Panel on Multi District Litigation to coordinate or consolidate pretrial proceedings when "civil actions involving one or more common questions of fact are pending in different districts".[10] 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 Multi District Consolidation Statute, the panel transfers cases in different courts arising out of the same facts and presenting the same issues.

V. IDENTIFYING THE DEFENDANTS

There is no generally acceptable answer as to who should be sued. If avoidable, resist temptation to list everyone for which you may have a viable claim or theory as a defendant. 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, or the nature of waste disposal from multiple sources, joint liability issues may surface. In this case, it is advisable to include all possible defendants. The following are possible theories on which to enjoin multiple defendants.

[10] Allan Kanner, Environmental and Toxic Tort Trials, § 13.03 (2002).

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A. Joint and Several Liability

Joint and several liability occurs 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." Matkin v. Smith, 643 So. 2d 949, 950 (Ala. 1994). Once causation has been established, the burden shifts to the defendants to show the portion of the harm each one is responsible for. 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. In an explanatory footnote, the Eleventh Circuit stated:

> 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.

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

Thus, market share liability stems from the plaintiffs' inability to identify the actual seller of the toxic product, through no fault of their own.

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C. Industry or Enterprise Liability

This theory exists when an injury is caused by one of several known manufacturers, and the precise manufacturer is not capable of being identified.

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. Singleton v. Protective Life Ins. Co., 2003 WL 860663, *11 (Ala. 2003). 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". Nicolet v. Nutt, 525 A.2d 146, 148 (Del. 1987).

VI. THEORIES OF LIABILITY

The plaintiff's complaint reveals the lawyer's mastery of the case.[11] 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 drafting the complaint.

[11] Allan Kanner, Environmental And Toxic Tort Trials § 6.00 (2002)

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Recognized theories of liability in toxic tort litigation include strict liability, common law negligence, wantonness, recklessness, assault and battery, nuisance, trespass, takings, breach of contract, fraud, misrepresentation and deceit, outrage, unjust enrichment, state statutes, RICO violations and CERCLA. Below is a brief overview of each.

A. Strict Liability

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 Lowe v. Metabolife Intern., Inc.[12]

> As explained in, *Pitts v. Dow Chemical Co.,* [w]hile 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,* 335 So.2d at 132; *Atkins,* 335 So.2d at 139. 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 141. 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 at 134; *Atkins,* 335 So.2d at 143.

[12] 206 F.Supp. 2d 1195, 1199 (S.D. Ala. 2002).

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Lowe v. Metabolife Intern., Inc. 206 F.Supp. 2d 1195 (S.D. Ala. 2002)

B. Common Law Negligence

1. Duty and Standard of Care

Negligence encompasses "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[13] A toxic tort differs from the typical negligence case because the issues of fact and questions of law are more complex and the difficulties of proof are greater. The traditional elements of negligence, however, are still applicable to toxic tort cases:

(1) The existence of a duty to the plaintiff, set by the standard of care
(2) The breach of this duty
(3) Injury to the plaintiff, and
(4) A causal connection between the breach and the duty.

In the area of toxic torts, the following duties have been recognized:

(1) duty to manage, store, protect, and isolate hazardous or toxic materials in a reasonable manner;
(2) duty to truthfully advise, inform, and warn of dangers associated with the hazardous materials;
(3) duty of non-negligent supervision of an independent contractor in handling, storing, treating, or disposing of hazardous materials;
(4) duty of non-negligent selection of such an independent contractor;
(5) non-negligent design of disposal sites.

2. Breach of Duty

Breach of the duty to warn is probably the standard of care relied upon most often in toxic tort cases. It is present in the theories of negligence, warranty, strict liability, and

[13] See generally, Allan Kanner, Environmental And Toxic Tort Trials (2002).

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misrepresentation. According to the Restatement Second of Torts, liability for failure to warn arises when the manufacturer or supplier:

1. Knew or had reason to know that the product is or is likely to be dangerous for the use for which it is intended.
2. Had no reason to believe that those who use the product would have realized its dangerous condition.
3. Failed to exercise reasonable care to inform the user of its dangerous condition or the facts which made it likely to be dangerous.

3. Injury

A major concern with determining toxic tort injuries is that absent physical injury, you might not have a case. Certain jurisdictions do not recognize the mere exposure to toxic chemicals as a physical injury.

4. Causal Connection

Causation refers to the factual and legal relationships that must be established between the alleged tortious conduct and injury. Albeit difficult to establish, causation is not an insurmountable obstacle. A full understanding of the properties of the chemicals can aid in possible routes of exposure. Heller v. Shaw Industries, 1997 WL 535163 (E.D. Pa. 1997). provides a useful outline for demonstrating causation in toxic torts. In toxic torts, plaintiffs must prove general and specific causation. General causation goes to whether products of the same nature as defendant's product are capable of causing the type of injuries alleged. Specific causation addresses whether the defendant's products more likely than not caused plaintiff's injuries. In order to prove specific causation, plaintiffs must prove (1) that the defendant released toxins into the environment, (2) that

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the plaintiffs were exposed to such toxins, (3) that the plaintiffs have an injury, (4) and that the toxins released by defendant caused that injury.

C. Wantonness

"Wantonness" is the doing of some act or omission with reckless indifference to the knowledge that such act or omission will likely or probably result in injury. Joyner v. B & P Pest Control, Inc., 2002 WL 31888156 (Ala. Civ. App., 2002)

D. Assault and Battery

A battery is the intentional invasion of another's personal integrity. The invasion of a person's body by a toxic substance may suffice to make out the claim. Commonwealth v. Stratton, 114 Mass. 303 (1873).

E. Nuisance

The law of nuisance applies when there is interference with use and enjoyment of one's property. Huff v. Smith, 679 So. 2d 259 (Ala. Civ. App. 1996). "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." City of Birmingham v. City of Fairfield, 375 So. 2d 438, 441 (Ala. 1979). 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.

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Public nuisance constitutes an unreasonable interference with a right common to the general public. A public nuisance involves an interference with a place where the public has the right to go.

F. Trespass

The Alabama Supreme Court, in Born v. Exxon Corp.,[14] stated:

> It seems clear . . . that in order for one to be liable to another for trespass, the person must intentionally enter upon land in the possession of another or the person must intentionally cause some "substance" or "thing" to enter upon another's land.

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

G. Takings

In cases in which the defendant of a property damage case is the federal government, plaintiffs may bring constitutional challenges under the Fifth Amendment's Takings Clause.

H. Breach of Contract or Warranty

In the event that toxic damages result from defendants' breach of a contract or covenant with the plaintiffs, full restoration is due. Union Oil Co. v. Bishop, 236 So. 2d 434 (Miss. 1970) damages resulting from defendant's breach of contract with the plaintiffs may render the defendant liable for the full cost of restoration. It may also be

[14] 388 So. 2d 933 (Ala. 1980).

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viable that a plaintiff allege breach of the implied warranties of merchantability and fitness for a particular purpose.

I. Fraud, Misrepresentation and Deceit

Under Alabama law, in order to prove intentional fraud, a plaintiff must show (1) an intentional misrepresentation (2) of a material fact, (3) upon which the plaintiff reasonably relies, and (4) that, as a proximate result of the misrepresentation, the plaintiff suffers actual damage. Bender Shipbuilding & Repair Co., Inc. v. Walley, 2002 WL 3188151 (Ala. Civ. App. 2002). To show the requisite intent to satisfy the first of these elements, a plaintiff must simply show a willful misrepresentation with "knowledge of [the] falsehood or reckless disregard for the truth," not a specific intent to injure. Id. Misrepresentation may be actionable where it is made willfully, recklessly, or mistakenly. LaCoste v. SCI Alabama Funeral Services, Inc., 689 So. 2d 76 (Ala. Civ. App. 1996). "Deceit," under statutes allowing actions for deceit and fraudulent deceit, results from either a willful or a reckless misinterpretation or a suppression of material facts with intent to mislead. Code 1975, §§ 6-5-103, 6-5-104. Hughes v. Hertz Corp., 670 So. 2d 882 (Ala.1995).

J. Infliction of Emotional Distress

According to the Alabama Supreme Court, the tort of outrage was not developed to provide a person with a remedy for the trivial emotional distresses that are common to each person in his everyday life. Such distress is the price of living among people. Restatement (Second) of Torts § 46, Comment j (1965). Thus, in order to prevent the tort

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of outrage from becoming a panacea for all of life's ills, recovery must be limited to distress that is severe. In describing the type of distress that would support recovery our supreme court stated that "[t]he emotional distress ... must be so severe that no reasonable person could be expected to endure it." U.S.A. Oil, Inc. v. Smith, 415 So. 2d 1098 (Ala. Civ. App. 1982).

K. Unjust Enrichment

Unjust enrichment is a form of equitable relief based on the principle that one person should not be unjustly enriched at the expense of another, but should be required to make restitution for property of the benefits received.

L. RICO

RICO makes it unlawful for any person who is employed by or associated with any enterprise affecting interstate commerce to participate in the conduct of such enterprise's affairs through a pattern of racketeering activity.

M. CERCLA

The Eleventh Circuit presented a pertinent overview of CERCLA in National Solid Wastes Management Ass'n v. ADEM, 910 F. 2d 713 (11th Cir. 1990).

> 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

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> 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). Because Congress perceived that few states had developed programs to assure continued disposal capacity in the long run, Congress amended CERCLA in 1986 by enacting the Superfund Amendments and Reauthorization Act ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 10, 26 & 42 U.S.C.). "Congress was concerned that certain states, because of political pressures and public opposition, were not able to create and to permit sufficient facilities within their borders to treat and securely dispose of (or manage) the amounts of wastes produced in those states." Office of Solid Waste and Emergency Response, U.S. EPA, *Assurance of Hazardous Waste Capacity: Guidance to State Officials* [hereinafter "EPA Guidance Doc."], at 2 (Dec.1988). *See* S.Rep. No. 11, 99th Cong., 1st Sess. 22 (1985) ("Pressures from local citizens place the political system in an extremely vulnerable position.... The broader social need for safe hazardous waste management facilities often has not been strongly represented in the ... process [of creating new facilities]. A common result has been ... no significant increase in hazardous waste capacity over the past several years.").

National Solid Wastes Management Ass'n v. ADEM, 910 F. 2d 713 (11th Cir. 1990)

Bringing a lawsuit under CERCLA has its advantages, such as a more beneficial statute of limitations period.

VII. ANTICIPATING DEFENSES

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Anticipating tactics used by defendants' counsel is a necessary strategy for a successful plaintiff. Some of the recurring arguments that defendants may use are state of the art defenses, statutes of limitation, identification of defendants, lack of causation, government contractor defense, contributory negligence, comparative negligence, assumption of risk, and the recourse of bankruptcy.

Be confident that 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". That is, alleging that Plaintiff has failed to introduce adequate exposure data, or that multiple causation or scientific uncertainty preclude 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 they limitations have 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 of limitation and discovery rules. In some jurisdictions, the statute of limitations begins to run at exposure or whenever the injury is discovered.

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VIII. WITNESSES

Due to their scientific nature, toxic tort cases often require the assistance of expert consultants.[15] Experts are needed to identify the particular toxin involved and to give opinions as to the propriety of the handling of the substance. 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 can be more effective than an expert witness. The choice of a fact witness over an expert witness 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 may not be as effective and persuasive as a hot document or smoking gun.

Despite the fact that simple testimony may be more believable, we cannot undermine the importance of expert testimony, due to the seemingly precise nature of statistical proof. Yet, when the defense presents an expert witness, the plaintiff's job is both to eliminate the aura of precision, such as by attacking bias, and to affirmatively

[15] Allan Kanner, Environmental And Toxic Tort Trials (2002).

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attack the problem with concrete proof. The use of an employee lay witness to describe defendant's actual practices is typically 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 studying public records, especially other similar lawsuits, record keeping and disclosure requirements filed with the government agencies. Also, in certain health cases, the government may have conducted the investigations. Adverse administrative findings and government studies may be useful.

X. THE JURY

Jury selection will determine the outcome of your case. Indeed, "there is nothing more important than the selection of the men who will decide your case." [16]

XI. OPENING STATEMENTS

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, who these experts are, and summarize the gist of their testimony. Some important toxicological terms counsel should address are "exposure", "dose" and "response".

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XII. CLOSING ARGUMENTS

According to Kanner[17], counsel should emphasize the importance of the jury's responsibility, explain the standards of proof in a civil action, and briefly discuss damages. 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 reemphasize the strengths of the plaintiff's case.

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[16] F. Wellman, Day in Court 111 (1931).
[17] See generally, Allan Kanner, Environmental And Toxic Tort Trials (2002).

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