

RESOLVING A TOXIC TORT

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I. Introduction

Toxic tort cases are both famous and infamous. We are all familiar with them, or at least Hollywood's version of them. *Erin Brockovich*¹ depicted a real estate case turned toxic tort that resulted in a \$333M settlement, a famous case. *A Civil Action*² depicted a lawyer turned crusader who refused a \$20M settlement and eventually accepted an \$8M offer, an infamous case. These two cases have something in common. Both attorneys faced bankruptcy due to the expense and time involved in litigating the cases. To intentionally misquote; with the promise of great reward comes great risk.

To successfully resolve a toxic tort case, a lawyer must combine legal and technical skill, compassion and dispassionate analysis, and enough resources to see it through to the end. A strong case is only the beginning.

II. Case Identification

As with all cases, the first step is case identification. One of the easiest ways to find these cases is simply to be aware as you and your staff review traditional cases. Look for community-wide patterns and underlying causes. Another way is to concentrate on where contamination exists, identify areas of contamination and then look for viable defendants and traceable injuries. Finally,

¹ Based on the case of *Anderson, et al. v. Pacific Gas & Electric Co.*

² Based on the case of *Anderson v. Cryovac, Inc.*

monitor other cases, both on-going and completed. Look for places where the plaintiff class excludes contaminated areas. Key sources of information are news articles covering allegations of pollution or related legal actions, neighborhood activists or leaders who often gather the grassroots information which reveal the patterns, legal sources for type-specific cases, and environmental sources for contamination. The internet is an immensely powerful tool and the Right-to-Know laws have made a significant amount of information accessible.³

III. Case Selection

Armed with how to find potential cases, a critical step is determining which cases are viable. With cases routinely costing \$1M and more (much more) to prepare for trial, case selection becomes a primary consideration. You must consider the number of plaintiffs you expect to seek your representation. Will it

³ Some sites of interest:

- Google Scholar, available at <http://scholar.google.com/schhp>, searches "peer-reviewed papers, theses, books, abstracts and articles, from academic publishers, professional societies, preprint repositories, universities and other scholarly organizations. Google Scholar helps you identify the most relevant research across the world of scholarly research".

- Environmental news - Environmental Link available at <http://www.envirolink.org/categories.html?do=shownews>.

- Right-to-Know (EPA) - List of numerous data access points available at <http://www.epa.gov/epahome/r2k.htm>.

- Right-To-Know (Private) - A network funded by several philanthropic and government agencies (including EPA) and jointly operated by two nonprofit organizations: Unison Institute and OMB Watch. Includes information on many EPA programs, regulations and tools and is the site for the RTK-Net LEPC/SERC Network. Available at <http://www.rtknet.org/>.

- Chemicals - Environmental Protection Agency's Toxics Release Inventory (TRI) available at <http://www.epa.gov/tri/>.

- The Environmental Defense Fund's Chemical Scorecard summarizes information about health effects, hazard rankings, industrial and consumer product uses, environmental releases and transfers, risk assessment values and regulatory coverage. Available at <http://www.scorecard.org/>.

- Compliance and Enforcement (EPA) - List of data access points available at <http://www.epa.gov/Compliance/data/systems/index.html>.

be enough to support your costs? Does it comprise a significant portion of the prospective defendant's problem? If it is a large number of people, are they organized and co-located so as to make the logistics of managing the case feasible?

You must consider the contaminant. Is its toxic character sufficient to support your claim? Is there sufficient scientific evidence to support that character? Are there tests to determine levels and/or exposure? Have there been other cases involving the contaminant and to what end? Can you prove it was released by the prospective defendant? Can you prove that no one else released it?

You must consider the suspected site. Has it been identified by government authorities? Are there other contaminants in the area? Are they also attributable to the prospective defendant? Has the site been the subject of previous litigation?

Each of these issues must be dispassionately assessed before committing yourself and your firm to the battle. No matter how passionately you want to help the people involved, starting something which cannot be successfully completed does not do them any favors and risks the financial future of your firm.

IV. Preparing the Case

A. Case Management

Due in large part to the expense of pursuing these cases, attorneys are often required to take on a large number of clients to support them. In one of our own landmark cases, *Tolbert v. Solutia*, better known as *Monsanto*, our client-base grew from 1,500 to over 15,000 clients. Just the logistics of handling this many clients required a large number of office resources. All of the traditional client contact is still required: consent forms, fee agreements, affidavits, questionnaires, and the steady stream of answering client calls and producing and mailing client update letters.

Due to time, space, communication, and computer resources, we had three dozen additional people, working both day and evenings, to speak with clients and gather their information. They were divided into three groups: answering client calls, gathering client information, and data entry. We had to allocate substantial office space, additional phone lines, computers with network connectivity, and server space. Two of our attorneys did nothing but work this case for two solid years, much of their time spent with management issues versus legal issues. Client management alone took a coordinated effort by a staff approaching 50 people, and this case was settled early in trial preparation.

The legal logistics are added to these client management hurdles. Class actions can look very appealing, but certification can be difficult, especially in Alabama. However, as more judges become familiar with multi-plaintiff actions,

hereinafter mass actions, they become a more viable and attractive alternative. Experienced judges are often more willing to allow the use of Bellwether plaintiffs which can provide some of the benefits traditionally available only to class action cases. With the difficulties of certifying a plaintiff class taken into consideration, mass actions do not necessarily take longer to litigate. And by filing as a group, the mass action plaintiffs maintain the same strength in numbers as a class action enjoys. One benefit for filing for class certification, however, is that it arguably tolls the status of limitations.

B. Common Themes

Two common themes by the defendants seem to run in these cases. By being diligent as the case progresses, however, they can be defeated. The first is in response to their releases. Pollution comes from one of three areas; it is a raw material, a by-product, or a product. Most defendants will argue both to the media and the jury that it doesn't make sense for them to intentionally lose valuable resources. They pay for raw materials, by-products can be recycled into something of value, and product is why they are in business to begin with. Why would they intentionally incur these losses if they could prevent them? The second is that they currently use either the best available technology to control their pollution or that their technology is approved by the state or federal government.

The first argument is a business argument and is defeated as such. Take as an example, a gasoline underground storage tank. These are typically made from

steel or fiberglass. If you take a steel tank, bury it in the ground, and leave it for 25 years, you expect that it will rust and leak. Even fiberglass tanks will be breached. The ground beneath us is not static; it moves and shifts in response to various pressures and changing weather. These shifts will cause the tank to crack and leak. Every manager knows that his tanks will leak; it is only a matter of time. However, being a manager, he will likely look at this from an economic perspective. At some point the manager realizes he is leaking gasoline. Let's say he is losing three gallons from his tanks per week. He will compare the cost of lost product to the thousands of dollars to repair or replace the tanks. Based on these numbers, it is not financially sound to repair the tanks. The depreciation on the tanks alone probably outweighs the cost of the lost product. Until the problem outweighs the cost of the solution, the businessman does not have an incentive to act.

As you go through the millions of pages of documents that will be produced by the defendant, keep your eye out for the one that compares the cost of maintenance, upgrade, or replacement of equipment to the pollution releases. It may start with capital expenditure requests and may take repeated efforts to uncover. However, somewhere there was a manager or an engineer that wrote a memorandum that discussed the cost of the acquisition versus the potential environmental benefit. It is a simple and well worn moral – follow the money.

The second argument is that the defendant uses the best available technology or his technology is government approved; that they can't run it any

cleaner than they do. We have analogized this to “But I have BACT (best available control technology).” A defendant will always claim to have BACT, but you do not know whether that is true unless you perform extensive discovery. Again, as you go through the mountain of documentation, be on the lookout. Did they actually have the BACT? Were the pollution control systems properly maintained? Were they overloaded? Did the company expand the production of the plant and not the pollution control systems?

One great example of how to beat this came in our recent case against Continental Carbon Company. They claimed they had BACT and that they couldn’t run the plant any cleaner than they did. However, pictures can say a thousand words. We were able to obtain photographs of their plant in Taiwan, where their corporate offices are also located. That plant was pristine, the white was white and the blue sparkled. Those photographs were shown to the jury side-by-side with the photographs of their plant in Phenix City, Alabama. That plant was covered in grime. There was no white, only gray. Inside, their BACT was held together, literally, with duct tape and vice gripes.

As these themes will be present in the defense, they need to be present throughout your case. Often our eyes will glaze over as we go through the mountain of paperwork that is disclosed. However, keeping these themes in mind can alert you to the potential importance of a seemingly innocuous acquisition request or managerial email.

Every litigator knows that most juries find for the side they like, or against the side they dislike. These stories are sound ways to emotionally align the jury with your client. Is it any wonder that an American jury found against the company that claimed they couldn't run their plant any cleaner when the one in company's backyard was so strikingly clean?

These stories also make great punitive damages arguments. If the company had done the right thing and maintained/upgraded/replaced the systems, they wouldn't have made X profit. Does it really seem fair to allow them to keep that profit when they intentionally decided to put those profits before the wellbeing of people?

C. Proving the Case - Time, Expense, and Risk

You will find yourself faced with experienced, knowledgeable, and well-funded defense teams. These suits must be brought against defendants able to satisfy the judgment, and defendants that well funded can mount a substantial defense. You must expect that even relatively simple things can become long and arduous affairs.

1. Document Discovery

Document discovery can be a marathon effort. Many cases will produce millions of pages of documentation. Keeping the themes just discussed in mind can help you pare down the mountain. But just because the defendant produced the mountain does not mean that all you asked for was produced. While the new

rules of civil procedure afford some protection, it does not mean that you won't have to seek judicial enforcement.

A recent case of ours is a prime example. That case resulted in a multi-million dollar judgment. We had been stonewalled by the defendant for almost two years. By stonewalled, I do not mean that they refused to disclose anything. They disclosed box after box of documentation. However, they frequently claimed they didn't understand our requests or denied things we believed to be true. Thankfully, we received some key documents from former employees. These documents proved the defendants had failed to produce as required and had, on occasion, produced altered documents.

This case was one reason why I recommended keeping your eye out for capital expenditure requests. We received copies of the requests from the former employees which referred to our lawsuit and potential liability for pollution in the justification section. The ones which were disclosed did not mention pollution, environmental impacts, or our suit. While the full breadth of their misconduct was not revealed until after the trial, pre-trial discovery required no less than eight motions seeking the court's intervention.

2. Personal Injury Claims

Any personal injury case can be fraught with causation and liability issues. Where the injury is acute, possible causes can be limited by proximity in time and place. However, toxic tort cases normally involve injuries that do not manifest until years after the exposure. This impedes your ability to prove your

case. A lawyer litigating a personal injury toxic tort case must show the quantity and timing of all exposure, that the toxin at issue can cause injuries like the plaintiff's, that the plaintiff's injury was not caused by other events or exposures, and that the defendant was responsible for the exposure. These issues of causation are the most expensive portion of the case to litigate, and can be the riskiest.

The first element that must be proven is the exposure to the toxin. Part of this is the requirement to quantify the exposure and pinpoint the timing of the exposure. This will require you to find an expert who can scientifically recreate the past and estimate (sufficient to legally prove) historic doses and pathways. Additionally, any subsequent or continuing exposures must also be shown.

The next step is to show that this toxin at this dose causes this illness; general causation. This is made easier if the illness is a signature disease of the toxin. An easy example of this is asbestos and Mesothelioma. Only those exposed to asbestos will develop Mesothelioma. Asbestos is definitely NOT representative of the normal toxin. Even where there is a signature disease, say the toxin is a known carcinogen, showing the plaintiff developed the illness, e.g. cancer, is not normally sufficient. The plaintiff must show a causal connection between the toxin and the type and location of the cancer at bar. Part of this causation will entail a showing that the level and timing of exposure suffered by plaintiff can cause this specific type of illness.

Specific causation requires you to go one step further. You must now show that this defendant was responsible for this dose received by this plaintiff and caused this illness. Some advances in medicine have allowed doctors in some limited instances to test specific cells to determine whether the illness is caused by exposure to certain chemicals or, more likely, a certain class of chemicals. Even this, standing alone, will be insufficient. You must be prepared to rule out other probable and reasonably likely alternate causes. These may include exposures to the toxin but attributable to another party, exposure to other toxins, lifestyle choices especially smoking and alcohol use, family history, and other diseases or health issues.

These causation issues are the most expensive portion of the litigation. They also represent a substantial risk. You must prove, or disprove, every piece of the above puzzle to carry your burden. In order to do this, you will rely heavily on your experts. And still you may struggle.

A prime example of this is one of our ongoing cases based on radiation exposure and plaintiffs suffering from thyroid diseases and cancers. In this case, the company had built housing for its workers and their families, as well as other amenities of a small town (such as a general store, laundry, and community swimming pool) almost next to and surrounding the company's uranium milling plant. The workers and their families were exposed to radiation via air emissions from the plant and some other sources, including the byproduct fill the company had used in the houses' foundations. When we began the lawsuit, the mine had

been closed for approximately twenty years and the town (except for two buildings) literally torn down, dug up, and hauled off to a hazardous waste dump. However, the former workers and their families were becoming ill from the exposure they suffered while living and working in the town.

Our specific causation experts, two highly-credentialed medical specialists, had concluded the radiation was a “substantial factor” in causing our clients’ illnesses. However, during summary judgment, the court had ruled the standard of proof for causation was both “substantial factor” and “but for,” contrary to most of the case law. One of our experts did not believe his prior analysis would support both standards and was not willing to testify as to both. Unless we can prevail on appeal, a case filed in the beginning of 2004 will end close to five years later in a judgment for the defendant. If we prevail, some additional expert work, and the associated costs, may be needed.

3. Expert Testimony

I’m sure that it is no surprise that expert fees often comprise the largest of the plaintiff’s expenses. While some experts may charge as “little” as \$100 to \$175 per hour, it is not uncommon for an expert to charge \$300-\$900 per hour, and we’ve had several charge more. In a pure property case, a case may be tried with as few as two or three experts, although that likely would be pretty “bare bones.” However, when pursuing personal injury cases, it’s not unusual to add at least one expert for every category of disease suffered by your plaintiffs. We have used as many as thirteen experts in a single case. In addition to your

experts, you generally need to factor in deposing the defense experts, even if for strategy or logistical reasons you decide to forego some of those depositions. You can reasonably expect the defense to call twice the number of experts in order to cover roughly the same areas. However, every rule has its exception. In a pending case, our seven experts face 30 defense experts at the liability phase of the case.

Once your experts have reviewed the case and provided the necessary reports, you must still get those experts and their methods certified by the court. The old rule was based on whether the methods were generally accepted by the scientific community and whether the expert employed those methods and had sufficient education and experience to speak to them.⁴ The Federal Rules of Evidence now rely heavily on the *Daubert* factors⁵ to determine the sufficiency of the expert and his or her methods. Note, however, that some states, including Alabama, have yet to adopt these factors and still follow the old rule. Regardless of the test employed, there is always a risk that the expert or evidence will be excluded and the plaintiff will need to re-accomplish this expensive and time-consuming work. These risks are higher in federal court as the new rule under *Daubert* is higher and more discretionary.

⁴ See *Frye v. U.S.*, 293 F. 1013 (D.C.Cir.1923).

⁵ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (testing, peer review, error rates, and acceptability in the relevant scientific community were identified in *Daubert*. However, *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), clarified that these were examples and that trial courts should employ whatever factors were relevant in determining the reliability of either the underlying technique or the expert's conclusions).

4. Property Only Claims

Pursuing property claims in tangent with personal injury claims can provide some insurance against the risks of personal injury alone. However, no case is without risk. In an ongoing mercury case, we saw some of our plaintiffs excluded during pre-trial. Our experts had identified a mercury zone of contamination which the court agreed with as to summary judgment.

IV. Management of Recovery: Beyond the Money

Regardless of whether you settle your case or win a judgment, that recovery will need to be managed. While injunctive relief may be had for continuing problems, the bulk of your recovery will be monetary. How do you apportion the recovery? How do you resolve challenges? Each of these must be addressed and agreed to.

Where you are seeking settlement, you have an opportunity to structure the recovery to best suit your clients' needs. Tax consequences, bankruptcy proceedings, and similar financial considerations have been written about and discussed. But what about helping the client and the community? In the *Monsanto* case we were given an opportunity to make a difference.

Our efforts involved getting the defendant to act and getting ourselves to act. Among other things, the defendant funded a local clinic to provide medical services for those they had endangered. But another part of the recovery was to work with the community to grow their future. Each of the plaintiff firms involved in this and the companion case donated fees to create a large trust. That

trust is managed by the Alabama Civil Justice Foundation (ACJF). Through this trust, the ACJF has worked with the community and other programs. They have developed and implemented a community-wide plan to prepare young children for school. This year, 120 children are being served by this effort. They are providing parents with the information and training they need not only to prepare their children for school, but to keep them in school and off drugs. They established the College Gateway Center designed to assist high school students in finding and obtaining college financing. This service is expanding to four separate centers and now includes tours of Alabama colleges for the students. The fund has even worked with Citizens Against Pollution to provide 100 adults with technical job-training classes in areas associated with pollution control and cleanup. With our initial endowment, the ACJF has successfully pooled both private and government resources to make a substantial impact on the community, and additional funding has been raised to ensure that the programs will continue to support the recuperation and growth.

VI. Conclusion

Toxic tort cases are complex and expensive, but they serve a vital role in the deterrence of would-be polluters. Recovery may be the only way these plaintiffs can meet the financial demands created by their exposure to the toxins. With appropriate resources, diligence, and persistence they can be won.