



The essentials of toxic-tort litigation

The questions to be answered at the outset of any toxic-tort action

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Make no mistake, a toxic-tort case is the legal profession's version of the Allies landing at Normandy in WWII. There are known and anticipated risks and hazards you could not possibly have imagined. It will be overwhelming, controversial and isolating, but it will also be intellectually and professionally stimulating and rewarding and can certainly be a complete game changer in terms of your practice. This article is intended to guide lawyers on what to look for before taking on a toxic-tort case and how to "weather the storm" of opposition you will certainly face.

Traditional toxic-tort cases involve a group of people, often a neighborhood, who have been exposed to a toxic chemical through one or more of the following "exposure pathways": air, groundwater, surface water, or soils. Because neither you nor your clients are often aware of the exposure at the time it is occurring, you are not able to sample these exposure pathways for toxins, so you will need to employ experts to analyze and determine which exposure pathways are viable. You will also have to prove the duration of exposure and concentration levels of exposure.

Once you determine which "exposure pathways" are at issue, you must then determine how people were exposed. That is, people can be exposed by inhalation (breathing the chemical, chemical vapors, contaminated dust), ingestion (drinking water, contaminated food), or

absorption through the skin. Depending on the nature of the toxin and the manner of exposure, illness, injury or death can result in a matter of days or depending on the constituent, it could be as long as decades. As in any case, you will have to prove medical causation – that the exposure, at the concentration levels and duration levels determined, can and did cause the harm to your clients. This is infinitely more difficult than an ordinary auto accident or slip-and-fall case because your medical experts will have to perform differential diagnoses to determine that it was the exposure to the toxin, and not some other factor, that caused cancer or other illness. It is also crucial to consider the fact that most toxins have a latency period affiliated with exposure. That is, there is often a period of years, if not decades, during which time illness can manifest. Inherent within these claims is the need to consider medical monitoring for future years and the fear, anguish, and uncertainty a person has to live with knowing that a deadly disease (cancer) could manifest decades later.

Traditional causes of action in toxic-tort cases include negligence, nuisance, trespass, fear of cancer, and/or violations of state and federal statutes and regulations, e.g. the Clean Drinking Water Act, Clean Air Act, CERCLA, RCRA, California's "toxic hot spots" law concerning industrial toxic emissions into the air, Proposition 65, Proposition 64, etc. If you are able to prove these claims, damages can include general damages including fear of cancer and emotional distress, special damages including medical

expenses, future medical monitoring and property devaluation, and depending on the facts of the case, punitive damages. Many of the regulatory claims also include a provision for recovery of attorneys' fees.

Before taking on a toxic-tort case, make sure you have favorable data provided to you by qualified consultants and scientifically reliable evidence acquired through investigative efforts to establish the causes of action alleged. Some of this work can be done by you and your staff, but most of it will require the retention of environmental engineers, geologists, hydrogeologists, air quality experts, toxicologists, risk assessors, medical doctors, epidemiologists, property devaluation experts, and economists. Obviously, this is a very expensive undertaking and not for the faint of heart. The questions you need to ask and get answers to *before* you take on a case like this are as follows:

What is the substance and how harmful is it?

What is the toxic substance that will be the subject of the litigation and how harmful is it based on medical and scientific peer-reviewed studies? It is very important to know everything about the substance that your clients may have been exposed to. Is it considered a toxin and dangerous to human health? Has it been regulated by the state and federal government? What is the EPA's position on the substance? How long has the substance been recognized as harmful to human health? Is it more harmful via inhalation or ingestion? Become familiar with the



toxin, learn everything you can about it, and learn how to pronounce it correctly.

What are the minimum levels of exposure?

What are the minimum levels of exposure necessary to cause serious illness and injury? This is a complicated question and is going to be hotly disputed as you will be caught between different designated and recognized “safe levels” – by those advanced by industry-funded groups and those advanced by environmental groups. You will want to rely on an environmental toxicologist and risk assessor for assistance in clarifying this issue for you so that you can overcome any arguments that the exposure levels were so low that it is unlikely that any harm resulted.

What are the types of illnesses?

What are the types of illnesses, injuries and causes of death that occur as a result of exposure to the subject toxin? This is going to be an issue for you in proving general causation. If the substance is recognized as a harmful substance, then there should be plenty of research and studies discussing the types of illnesses, injuries and harm that can result from exposure. This will allow you to develop information sheets that can be provided to your clients in an effort to get some idea of whether your client pool exhibits the types of illness and injuries recognized by medical science as being related to exposure to this toxin.

Your clients' symptoms

Do your clients exhibit the types of illness, injury or cause of death that is related to exposure to the subject chemical? This is where you are going to need to retain an epidemiologist and conduct effective administration and communication with your client pool in order to acquire necessary information regarding accurate illness history and relevant life styles and work environments that may also have caused the injury. In other words, was the lung cancer caused by exposure and inhalation

of a deadly toxin or from years of smoking? To answer questions like this, you need accurate client information and assistance from medical doctors familiar with the toxin and an epidemiologist to assist you in finding consistency within the client pool of this type of disease or illness.

How did the releases occur?

How did the releases occur? How long did they occur? At what levels? Where did the toxin migrate to? What were the exposure pathways (air, ground water, surface water, soil)? What were the exposure pathways? Did the toxin get into the air, groundwater, or surface water? Have samples been taken? Has air monitoring been done? Is there a risk of contamination of the local drinking water? Do not underestimate this part of the case. It will require scientific evidence that withstands the *Daubert* or *Frye* tests. You will need scientists who may need to employ computer modeling.

How were the plaintiffs exposed?

Were the plaintiffs exposed through ingestion, inhalation or dermal contact? Is the constituent capable of causing harm through that mechanism? Was the drinking water contaminated? Was it the air? Was it just a public waterway where people swim or fish? You will have to nail this down so you can determine if the mechanism of exposure can cause the harm complained of. Depending on the nature of the constituent, it will be next to impossible to prove lung cancer resulted from swimming in a contaminated canal; however, if the air is contaminated too, it will be an easier road to prove medical causation.

Is there a viable defendant?

Who is the source of the releases of the toxin? Is it industrial, governmental, private? Is there a viable defendant? The source of the contamination must be identified early. Where did the pollution come from? Who released the toxin into the environment? Who owned the plant?

Who operated the plant? This is where you need to comb through state and federal records for public information on the source. It is worth checking to see if the Regional Water Quality Control Board, Air Resources Board, or Environmental Protection Agency has a file on the subject facility. Then check to see if the site has been the subject of remediation and regulation. Who has been designated the “responsible party” and “discharger” for purposes of regulation? Who is on title to the real property? This is where you need to pin down the ownership and control over the property and activity that caused the contamination and determine if they are a viable defendant capable of responding to the level of damage they have caused the plaintiffs.

Are you prepared to take this on?

Do you have adequate personnel, both attorneys and administrative staff, to manage a large client base? Are you willing to fully commit yourself to a case for five or more years? Have you figured out how to financially weather the storm? If you have a viable defendant, the odds are that you will be faced with a defendant whose best defense will be to retain an army of lawyers who will bury you in paper and seek to financially destroy you. These cases are not for the faint of heart and usually result in “two lawyers in and one lawyer out” style litigation and they last forever.

There is no question that it is every lawyer’s dream to take on a “career case,” however, most lawyers fail to consider and appreciate what is really involved, the toll it takes, and the full price one pays for tackling this type of litigation. No “once in a life time” case goes without unparalleled opposition and work effort. To achieve a successful result, it will become all-consuming and success is directly related to your level of effort, skill, and coordination of your legal team and staff. This is what you should expect when you pursue a toxic-tort case against a major



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corporation and represent many affected plaintiffs. Nevertheless, these cases offer the opportunity to make a real difference for a lot of people and test your skills as a lawyer like no other type of case.

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