

PART ONE

Elements of Toxic Tort Litigation

CHAPTER 1

Introduction

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Even in the highly litigious society in which we live, toxic tort cases are viewed as one of the types of litigation with the highest stakes. Releases of toxic substances from a single incident, ingestion of toxins from the distribution of a single product, or long-term exposure to contaminated environmental media are often alleged to cause injuries and in some cases death to hundreds and even thousands of unsuspecting people. Toxic tort actions may threaten the financial ability of a company and even an entire industry. Announcements that companies and whole industries are teetering on the brink of bankruptcy from lawsuits arising out of toxic releases are now received without any measure of surprise. What is it that makes the litigation of toxic tort cases so critical yet so different from other forms of litigation? We need to start with what toxic torts are and what they are not.

What Toxic Torts Are and What They Are Not

Broadly defined, toxic torts involve some claim of harm, physical or psychological, caused by exposure to a hazardous substance. Often, toxic tort actions involve claims for both property damage (diminution in value) and personal injury (cancer) as a result of the exposure. Frequently, these actions are brought by large numbers of plaintiffs, either as a group by way of joinder or in the form of a class action. Whole communities allegedly impacted by airborne releases or groundwater contamination from nearby industrial facilities are the paradigm. Just as frequently, exposures to hazardous substances with long latency periods in the workplace have generated substantial litigation. But actions alleging serious injuries by single plaintiffs in isolated instances of exposure to toxic substances are not uncommon.

It is difficult to date with any certainty the inception of toxic tort litigation. Many would say that toxic tort law could not have proceeded without the English court precedent of

*Rylands v. Fletcher*¹ and cases from the early 1900s that adapted sometimes antiquated legal doctrines to the needs of the Industrial Revolution. But technological, scientific, and medical advances almost certainly would have compelled the law to make adjustments. As the modern era of scientific and technological advances surged forward, the byproducts of industry found their way into the streams, groundwater, and air. Many years later, hazards from historical operations have manifested themselves in sometimes catastrophic and deadly ways.

The Legacy of Significant Actions

Prior to Agent Orange, Love Canal, Dalkon Shield, Bhopal, Times Beach, and countless others, courts rarely dealt with the phenomenon that we now call “mass torts.” Occasional mass disasters in the mid- to late twentieth century involving air crashes tested the ability of the courts and lawyers to resolve large numbers of personal injury and wrongful death cases arising out of the same incident.

The late twentieth century sensitized the public to mass tort litigation. These more recent mass tort cases have arisen largely out of exposure to toxic substances. Their history has not always been free from controversy. No doubt, many lawsuits have been brought for imagined harm, and some plaintiffs have filed lawsuits using the leverage of their numbers to extort settlements from innocent defendants seeking to avoid the crushing cost of mass tort litigation. On the other hand, some recalcitrant defendants with clear liability may have fought the litigation onslaught with all of their resources to avoid, or at least to delay, any finding of culpability. That is especially true in this era of copycat litigation when settlement with an initial group of plaintiffs can encourage the filing of new cases by others.

Causation Is King

Perhaps the overriding issue in all toxic tort cases is causation. While causation plays a significant and sometimes determinative role in other tort litigation, causation is a chief battleground in toxic tort cases. The plaintiff has the burden of demonstrating that he or she was exposed to a toxic substance, that he or she suffered physical harm, and most important, that there is a legally sufficient causal link between the exposure and the harm suffered (i.e., whether exposure to the hazardous substance could cause the alleged injury and whether it actually did so in this case). Carrying that burden, when exposures may not produce harm until years and sometimes decades later, can often prove to be

1. 3 L.R. 330 (H.L. 1868). When defendant’s construction of a water reservoir caused water to flow through an abandoned mine and flood plaintiff’s active mine, the trial court in *Rylands* exonerated the defendant on the ground that negligence could impose no liability on a defendant ignorant of the risky conditions. The appellate court reversed and was affirmed by the House of Lords, creating the doctrine of strict liability for otherwise lawful activities that pose an extraordinary risk of harm.

an insurmountable task. Further complicating the burden is the fact that in our modern society the plaintiff may have difficulty identifying with particularity the specific source of the harm or trace with clarity and certainty the injury to the harmful source. New comment *c* to Section 28 of the *Restatement (Third) of Torts* is likely to generate a great deal of debate on the requirements of causation proof for exposure, and for general and specific causation.²

The Evolution of Traditional Tort Theories

Perhaps in no other field of the law have traditional theories undergone such adaptation to rapid technological and scientific change. The reasons are at least twofold.

First, our understanding of “the nature and extent of harm created by toxins in our environment” continues to evolve.³ Each day our major news media bring us startling claims of yet another product that if ingested over time is linked to cancer or some other horrible disease. It is not surprising that we either become leery of any exposure to new substances and new products or we grow numb to the seemingly endless parade of horrors and warnings of hazards lying in wait for us. But science and technology will not allow a respite from the task of identifying harmful substances in our environment, and our justice system will not allow unjustified harm to go unredressed.

Second, the traditional tort doctrines imposed obstacles to recovery because of requirements for proof, causation, and manifestation of injuries.⁴ Over the years, toxic tort plaintiffs have relied upon numerous traditional theories including trespass, public and private nuisance, strict liability for abnormally dangerous activity, negligence, products liability, and intentional infliction of emotional distress, among others.⁵ Those theories have sometimes been stretched and expanded to accommodate the harms occasioned by exposure to toxic substances.

Take, for instance, the venerable doctrine of trespass. Originally, trespass was based upon the unauthorized entry of a person upon the land of another. *Blackstone’s Commentaries* declare that each such entry “carries necessarily along with it some damage or other; for, if no other special loss can be assigned . . . the words of the writ itself specify

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2. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 28, cmt. *c* (2010). Comment *c* is a noble effort to distill decades of precedent on causation in toxic tort cases into a manageable form. Among other things, its authors conclude that general and specific causation may be used as tools to inform a court’s analysis but are not formal elements of a cause of action. See generally Joseph Sanders, *The Controversial Comment c: Factual Causation in Toxic-Substance and Disease Cases*, 44 WAKE FOREST L. REV. 1029 (2009); Steve C. Gold, *The “Reshaping” of the False Negative Asymmetry in Toxic Tort Cases*, 37 WM. MITCHELL L. REV. 1507 (2011).
 3. Michael Axline, *Theories of Liability*, in 1 A GUIDE TO TOXIC TORTS § 3.01[1] (1993).
 4. Robert Blomquist, *Emerging Themes and Dilemmas in American Toxic Tort Law*, 18 S. ILL. U. L.J. 1, 25 (1993).
 5. *Id.* at 26; Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation*, 35 U. RICH. L. REV. 875, 881 n.31 (2002).

one general damage, viz.: the treading down and bruising [of] his herbage.”⁶ To evolve and accommodate an unauthorized entry of a physical object or substance that was not cast directly onto the injured party’s property, the *Restatement (Second) of Torts* acknowledged that “it is not necessary that the foreign matter should be thrown directly and immediately upon the other’s land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.”⁷ And now many jurisdictions no longer require the entry of a visible, tangible object so that trespass may lie upon the authorized invasion of the property by invisible particles.⁸

Damage theories also have expanded in scope at times to accommodate the uniqueness of toxic tort actions. Injured parties have brought claims and sought damages based on post-traumatic stress disorder, decreased quality of life, property damage, emotional distress, increased risk, fear of injury, and medical surveillance/monitoring.⁹ Consequently, certain courts have permitted plaintiffs to proceed on theories that only a decade ago were relatively unknown to tort litigation.¹⁰

Long latency periods can make it difficult for a plaintiff to establish a causal nexus between the harm suffered and the source of the harm. Because the plaintiff has the burden of proof, a toxic tort suit may flounder because documentary evidence no longer exists and witnesses have disappeared. At the same time, long latency periods may be equally detrimental to the defense of toxic tort cases when an accused company is unable to locate witnesses or produce documents that may defeat liability or reduce damages.¹¹ Additionally, where once plaintiffs were denied relief because the latency of a disease permitted the statute of limitations to expire, many courts have responded with the “discovery rule,” which, in some jurisdictions, forestalls the running of the statute of limitations until the plaintiff knew or should have known of the injury or facts forming the basis of the plaintiff’s claim.¹²

6. 2 WILLIAM BLACKSTONE, COMMENTARIES *210–11.

7. RESTATEMENT (SECOND) OF TORTS § 158, cmt. *i* (1965), cited in Philip E. Karmel & Peter R. Paden, *Trespass as a Toxic Tort*, 47 CHEM. WASTE LITIG. REP. 343 (Feb. 2004).

8. *Id.* at Reporters Notes; see also *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959) (a pivotal case holding that a trespass would lie where invisible particulates of fluoride emitted by defendant’s plant invaded plaintiff’s property).

9. Lisa Heinzerling & Cameron Powers Hoffman, *Tortious Toxics*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 67, 69 (2001).

10. *Id.* Decisions early in the twentieth century broke ground for the most recent damages theories. For instance, in what must have been the earliest “cancerphobia” case, *Alley v. Charlotte Pipe & Foundry Co.*, the court held that the probability of developing cancer “must necessarily have a most depressing effect upon the injured person” and entitled the plaintiff suffering from burns to compensation for mental distress. 74 S.E. 885, 886 (N.C. 1912).

11. Conway-Jones, *supra* note 5, at 879.

12. See, e.g., *Brown v. Dow Chem. Co.*, 875 F.2d 197, 200 (8th Cir. 1989); *Joseph v. Hess Oil*, 867 F.2d 179, 181 (3d Cir. 1989); *Cornell v. E.I. DuPont deNemours & Co.*, 841 F.2d 23, 24 (1st Cir. 1988); *Hildebrandt v. Allied Corp.*, 839 F.2d 396, 398 (8th Cir. 1987); *Blanton v. Cooper Indus., Inc.*, 99 F. Supp. 2d 797, 801 (E.D. Ky. 2000); *Peterson v. Instapak Corp.*, 690 F. Supp. 697, 698 (N.D. Ill. 1988); *Schiro v.*

Preview of the Following Chapters

In chapter 2, “Theories of Liability and Damages,” we explore both the traditional theories of liability in toxic tort actions as well as the new evolving theories of liability. Damages theories are covered, including personal injury, medical monitoring, fear of disease, punitive damages, as well as property damage theories such as stigma and diminution in value. In chapter 3, “Common Defenses,” we consider the unique aspects of the statutes of limitation and repose in toxic tort cases, preemption, jurisdictional defenses, defenses to common law claims, government contractor and government agent, product identification, and a host of others. Chapter 4, “The Use of Scientific and Medical Evidence,” is devoted to traditional and emerging science, medicine, and technology, including developments in geology, hydrology, meteorology, toxicology, and epidemiology, among others. Chapter 5, “Causation and the Use of Experts,” addresses one of the most important elements of any toxic tort pretrial and trial. Chapter 6, “Case Strategy and Trial Management,” describes the selection and strategies utilized in naming parties, forum selection, class actions, discovery, case management devices, motions, and the trial of toxic tort cases. In chapter 7, “Settlement Considerations,” we cover the methods used to resolve toxic tort cases short of trial. In chapter 8, “Emerging Areas of Litigation and Significant Legal Issues,” we hit the latest topics in the field including hydraulic fracturing, workplace exposures, climate-based actions, medical monitoring, and others. Finally, in chapters 9 to 12, we survey the law of causation in personal injury toxic tort cases by region and state covering the standards for general and specific causation as well as specific topics that impact causation analysis such as the use of animal evidence and risk assessments.

We hope you will find that this book helps you to fight the toxic tort wars and better serve your clients.

