TOXIC TRESPASS: LEAD US NOT INTO LITIGATION

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Since the chemical revolution began to unfold in the 1950s, people have ingested hundreds of toxic substances—knowingly or not. Our bodies carry chemicals found in the products and processes we use or to which we are exposed. Many toxins take up residence in body fat, where they may remain for decades; others are absorbed into the body and quickly metabolized and excreted. Winds and water currents can carry persistent chemicals thousands of miles until they find a home in our bloodstreams. Just by living in an industrialized society, we all carry a sampling of the chemical cocktail created by our surroundings.

As modern science advances, biomonitoring data is able to detect the presence of specific toxins. But science cannot always inform us about how the chemicals were introduced, how long they have been there, or whether they pose a legitimate health risk. If not for recent developments in detection, we might never know that our bodies harbor such chemicals. Nevertheless, creative litigants are forcing courts to deal with a new wave of toxic tort claims seeking to make chemicals in a person's bloodstream an actionable offense. This cause of action is known as "toxic trespass." Courts must decide whether the mere presence of chemicals in an individual gives rise to civil liability when the individual has no diagnosed injury and the causal link between the exposure and the potential disease is weak at best. Common sense and legal precedent tell us the answer should be no, but the fight against such suits is just beginning.

### LEGISLATIVE EFFORTS TO LEGITIMIZE TOXIC TRESPASS THEORIES

With the advent of sophisticated biomonitoring techniques that permit detection of trivial levels of substances, the public expects that any amount of toxin can be measured. Influenced by modern crime dramas and sensationalized media accounts, the public is often led to believe that even minute levels of toxins are harmful to their health. Not surprisingly, an effort is afoot to turn toxins in the bloodstream into civil and criminal liability.

California was the first state to establish a biomonitoring program. Recognizing that modern life exposes Californians to thousands of chemicals every day, in September 2006, California enacted the California Environmental Contaminant Biomonitoring Program, which requires the California Department of Public Health and the California Environmental Protection Agency to establish a statewide program to monitor the presence and concentration of designated chemicals via surveys of Californians. See Cal. Health & Saf. Code \$\$ 105440–105459 (2008). Under the code, the designated state agencies must make their biomonitoring findings public and notify surveyed individuals if the data suggests exposure to a known health risk. The first report is required by January 1, 2010, and will no doubt stir publicity and litigation against the indicted chemicals.

Recently, special-interest groups have promoted legislation that would make chemical manufacturers strictly liable for the simple detection of chemicals in the body. Strict liability generally applies in situations where the defendant causes injury in the course of an activity characterized as abnormally dangerous or ultrahazardous. When strict liability applies, the plaintiff need not prove that the defendant's conduct was unreasonable. Restatement (Second) of Torts, *supra* n. 104, § 520. The Community Environmental Legal Defense Fund ("CELDF") has proposed a strict-liability model ordinance to local legislators that recognizes "that it is an inviolate, fundamental, and inalienable right of each person... to be free from involuntary invasions of their bodies by corporate chemicals." Corporate Chemical Trespass Ordinance, http://www.celdf.org/ Ordinances/CorporateChemicalTrespassOrdinance/tabid/257/ Default.aspx (web sites last visited February 6, 2009).

CELDF's "Corporate Chemical Trespass Ordinance" declares the "deposition of toxic chemicals or potentially toxic chemicals within the body" as "a form of trespass." *Id.* It deems corporations (and the people who own or manage them) that manufacture or generate toxic or potentially toxic chemicals detected in a person's body as culpable parties liable for "trespass damages, compensatory damages, punitive damages, and the instatement of permanent injunctive relief." *Id.* Under the ordinance, culpable parties are held strictly liable if one of their toxic or potentially toxic chemicals or compounds is discovered within the body of a resident. *Id.* By putting the duty on the municipality to initiate litigation against culpable parties, the ordinance aims to turn chemical trespasses into quasi-statutory violations. Local governments are following CELDF's lead.

For example, on February 7, 2008, the Halifax, Virginia, Town Council unanimously approved a "Corporate Mining and Chemical and Radioactive Bodily Trespass" ordinance drafted by CELDF. "Halifax 1st in Virginia to adopt 'chemical trespass' defense," *The Gazette-Virginian*, February 20, 2008, *available at* http://www.wpcva.com/articles/2008/02/20/brookneal/ news/news02.txt. The action, prompted by concerns over a proposed uranium mine and milling operation, prohibits corporations from interfering with the civil rights of residents and holds the corporation and governing officials permitting the uranium operation liable to the town for chemical trespass. *Id.* According to CELDF project director Ben Price, the ordinance "is a first shot across the bow to let [corporations] know the people have the right to govern." *Id.* It is hardly the first shot— Halifax is the 10th U.S. municipality to adopt such an ordinance.

While these legislative acts do not sanction individual lawsuits, plaintiffs have seized upon violations as grounds for tort claims. Either in add-on claims in putative environmental class actions or in stand-alone individual suits, plaintiffs allege that corporate trespasses violate individual liberties and give rise to civil liability. Even in circumstances where the exposure is below the "safe" threshold level designated by the U.S. Environmental Protection Agency, lawsuits are springing up, based on simple detection of such substances. As the frequency of legislation like that sponsored by CELDF increases, it is expected that the number of toxic trespass claims based on the detection of chemicals in a person's body will increase as well. Fortunately, old-school litigation strategies can be used to defend against new-school toxic trespass claims.

# **INTENT AS A HURDLE FOR PLAINTIFFS**

Defendants can successfully challenge plaintiffs' ability to establish the intent necessary to commit a battery. "[T]he tort of battery requires intent by the actor 'to bring about a harmful or offensive contact.... [It is] confined to intentional invasions of the interests in freedom from harmful or offensive contact.' " *Janelsins v. Button*, 648 A.2d 1039, 1042 (1994) (quoting Fowler V. Harper, 1 *The Law of Torts* § 3.3, at 272–73, 276 (2d ed. 1986)). Accidental contact does not constitute a battery

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## **CIVIL BATTERY: A PRIMA FACIE CASE**

Plaintiffs base their toxic trespass claims on the allegation that defendants intentionally interfered with their bodies by introducing chemicals into their systems. Tort claims such as these for intentional exposure to hazardous substances are predicated on the theory of battery. A "battery" is a harmful or offensive physical contact to the plaintiff's person through intentional contact by the tortfeasor and without the consent of the victim. Restatement Second. Torts § 13. The harmfulness and offensiveness are judged by a reasonable-person standard, contact can be direct or indirect, and intent exists if the actor intends to cause a harmful or offensive contact with the person or the imminent apprehension of such contact. Id. To establish causation, a plaintiff typically must show that a particular defendant's substance more likely than not causes the kind of injury from which the plaintiff suffers and more likely than not caused the plaintiff's injuries.

because "[w]here an accident occurs,... the actor would not have *intended* to invade the other's interest." *Janelsins*, 648 A.2d at fn. 5. The defendant must have done some affirmative act and must have known that an unpermitted contact was substantially certain to follow from that act. Indeed, it is this intent that separates battery from mere negligence.

In Pechan v. DynaPro, Inc., 622 N.E. 2d 108, 111 (III. App. 1993), the plaintiff alleged that her former employer was liable for her exposure to secondhand cigarette smoke in the work-place. The appellate court affirmed the dismissal of the plaintiff's battery count, finding that the employer could not, as a matter of law, have had the intent necessary to commit a battery. *Id.* at 118. The *Pechan* court reasoned that "[s]moking is a legal activity and not an act of battery because, generally, smokers do not smoke cigarettes with the intent to touch nonsmokers with secondhand smoke." *Id.* 

Thus, to the extent that a defendant is engaged in a legal activity and lacks intent to harm the public, a plaintiff's civil battery claim should fail.

Similarly, in *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539, 548 (D. Md. 1997), the plaintiff argued that the intent requirement of the battery claim was satisfied by Brown & Williamson's intentional manufacture, marketing, and distribution of cigarettes, on the basis that such acts "set[] in motion the inevitable series of events leading to [the plaintiff's] injuries." The court disagreed, finding that while Brown & Williamson may have had knowledge that secondhand smoke would reach some nonsmokers, such generalized knowledge was insufficient to satisfy the intent requirement for battery. *Id.* The court stated that a finding that Brown & Williamson had committed a battery by manufacturing cigarettes "would expose the courts to a flood of farfetched and nebulous litigation concerning the tort of battery." *Id.* 

As applied to toxic trespass cases, the reasoning in civil battery decisions shows the difficulties plaintiffs will face in proving intent. While a defendant may know that its toxins could reach people in the community, unless the plaintiff can prove that the defendant intended to cause *harmful* contact with those toxins, this requisite element of a battery claim will be lacking. Accidental exposure or contact will not support the intentional tort of battery.

## NO PRESENT INJURY—NO LIABILITY?

Even if intent could be established, plaintiffs face other problems. In many instances, a plaintiff bases her cause of action on the fact that biomonitoring revealed a measurable level of chemical even though the plaintiff is asymptomatic and otherwise healthy. This raises the question: Does the mere presence of chemicals in the body or the remote possibility of future harm from such exposure equal an actual injury?

Courts have taken a variety of approaches to the requirement that a plaintiff must exhibit an actual injury—such as personal physical illness, the presence of disease, or death to recover on a hazardous substance tort claim, but they tend to answer the question in the negative. In most cases, the injury requirement has been strictly applied. See Paz v. Brush Engineered Materials, Inc., 2007 WL 14891 (Miss. 2007) (rejecting plaintiffs' claims for medical monitoring where plaintiffs claimed to have been exposed to beryllium but did not suffer from any current illness or physical injury); *Lowe v. Philip Morris USA, Inc.*, 207 Or. App. 532 (Or. 2006) (rejecting smoker's claim for medical monitoring where she suffered no actual physical harm); *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 852 (Ky. 2002) (rejecting medical monitoring on the grounds that "[a] cause of action does not exist until the conduct causes injury that produces loss or damage"). However, in select cases, courts have shown a willingness to overlook the injury requirement, depending on the nature of the particular case. *Sinclair v. Merck & Co., Inc.*, 389 N.J. Super. 493 (N.J. Super. Ct. App. Div. 2007) (ruling that it was premature to dismiss plaintiffs' claims for medical monitoring where they had an increased risk of myocardial infarction due to their use of Vioxx but claimed no present injury).

The judicial trend of rejecting liability where there is no discernible injury should apply to toxic trespass cases. Many courts have concluded that allowing a claim for a mere increase in the possibility of future harm would be inconsistent with the fundamental premise that the plaintiff must have suffered actual, physical harm. *Lowe*, 207 Or. App. at 539. The court in *Lowe*, *supra*, also expressed concern that allowing a claim for increased risk of future harm would create liability that was "virtually limitless" and that there would be "no basis on which to separate spurious or speculative claims from legitimate ones." *Id.* at 553. With so many chemicals and so many ways to detect them, opening the door to toxic trespass cases presents similar concerns.

With new developments in biomonitoring and environmental testing, plaintiffs' counsel may attempt to offer quantitative "proof" of an "injury." Scientific advancements are increasingly able to show that an individual's blood contains chemicals previously unknown or undetectable, such as polychlorinated biphenyls, organophosphates, pesticides, bisphenols, and phthalates. Whether courts will relax the injury requirement to entertain suits where toxins are present at levels above what regulatory agencies have deemed "safe" or, worse yet, where toxins are present in the body at any level, remains to be determined. In any event, defendants will have a strong defense based on the lack of a present injury.

#### CAUSATION: AN INSURMOUNTABLE BARRIER

In addition to injury and intent, a plaintiff must be able to establish causation to prevail. For a toxic trespass claim, this means proving that the defendant caused the chemical exposure, that the exposure can cause human disease, and that the exposure caused the plaintiff's disease or risk thereof. The latter two prongs are referred to as "general causation" and "specific causation."

To establish general causation, the plaintiff must prove that human exposure to the toxic agent at issue is capable of causing or exacerbating an identifiable disease from which the plaintiff suffers. This showing generally requires scientific data in the nature of epidemiological studies demonstrating a statistical association between exposure to the substance and an increase in the incidence of the plaintiff's disease. Jeffry D. Cutler, "Implications of Strict Scrutiny of Scientific Evidence: Does Daubert Deal a Death Blow to Toxic Tort Plaintiffs?" 10 J. Envtl. L. & Litig. 189, 214 (1995). For cases in which the plaintiff can offer no scientific evidence of an association between exposure to the defendant's agent and a disease of the sort suffered by the plaintiff, the plaintiff would take nothing, no matter how culpable the jury believed the defendant's conduct to be. This should be the outcome for substances in which there is no recognized association between exposure to the defendant's substance and any disease.

To establish specific causation, the plaintiff must prove that her exposure to the toxic material caused her particular injury. This showing typically requires expert testimony regarding the extent to which the plaintiff was exposed to the toxic agent at issue and that the plaintiff's particular affliction was more likely than not caused by the plaintiff's exposure to the substance at issue. If the plaintiff is not able to prove sufficient exposure to the chemical in question, that she suffers from the alleged disease, or that the exposure was sufficient to cause her injury, her claim should be rejected.

Specific causation has frequently proved to be an insuperable barrier in toxic tort cases because of the long latency periods that often exist between the exposure to a toxic substance and the onset of disease. *Cutler*, *supra*, at 199. Given all of the other exposures the plaintiff will have encountered during that time period, the defendant has ample opportunities to suggest alternative explanations for all but the clearest of signature diseases, thereby casting doubt on the plaintiff's expert's testimony on specific causation. Margaret A. Berger, "Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts," 97 Colum. L. Rev. 2117, 2121–22 (1997). Indeed, the plaintiff's own lifestyle or genetic makeup is likely to have contributed to her disease.

Causation is a stumbling block that has precluded compensation for all but the most clearly understood environmentally caused diseases. Jonathan Haar's widely read account of the Woburn litigation painted a dramatic, and loosely accurate, picture of the legitimate legal hurdles a plaintiff faces in attempting to recover damages for physical harm allegedly caused by exposure to environmental contaminants. See Jonathan Haar, A Civil Action (First Vintage Books, 1996). More recently, a Texas judge in the district court in Hidalgo County dismissed a \$437 million product liability suit accusing Levi Strauss & Co. and others of exposing workers to toxic dust in garment factories across the Rio Grande Valley, Nelia G. Alanis et al. v. Allison Manufacturing Co. et al., Case No. C-1691-03-H (2008). The defense in that case successfully took the position that plaintiffs had not sufficiently demonstrated that their ailments resulted from their alleged exposure to formaldehyde and other chemicals at the factories. The decision sends the message that legal proofs will not yield to cinematic story lines in even the most liberal jurisdictions.

Even if a plaintiff can prove some direct exposure attributable to the defendant, the defendant can still argue that there are numerous other sources of these chemicals in the environment that could have directly contributed to the level found in the plaintiff's body. For example, what environmental exposures surround the plaintiff's neighborhood? Has he used household products, such as cleaning solvents or cosmetics, containing phthalates and other chemicals? Is his drinking water polluted? What environmental and industrial exposures has he had during his employment? The number of potential sources of contamination is endless—which makes it difficult for a plaintiff to definitively prove a particular source and cause of his injury. For ubiquitous exposures and speculative causal chains, a defendant has multiple options for challenging a plaintiff's ability to demonstrate causation.

#### THE *DAUBERT* STANDARD

In addition to challenging the elements themselves, a defendant can attack the mouthpiece the plaintiff uses to attempt to satisfy the elements. The admissibility of scientific evidence of causation is governed by the Federal Rules of Evidence and Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). Under *Daubert*, a court must rule on the admissibility of expert scientific testimony by conducting a two-part inquiry. First, the court must determine whether an expert's testimony reflects "scientific knowledge," whether the findings are "derived by the scientific method," and whether the work product is "good science." *Daubert*, 509 U.S. at 590, 593. Second, the court must determine whether the expert's testimony is "relevant to the task at hand." *Id.* at 597. This gatekeeping function is important, because "due to the difficulty of evaluating their testimony, expert witnesses have the potential to be both powerful and quite misleading." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (quoting *Daubert*, 509 U.S. at 595) (internal quotation marks omitted). Nowhere is gatekeeping more important than in monitoring novel causes of action like toxic trespass.

Federal Rule of Evidence 702 ("FRE 702") provides that:

if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Daubert* and related cases, the U.S. Supreme Court has elucidated a number of factors for courts to consider when determining whether to admit expert testimony under FRE 702.

For example, the U.S. Supreme Court stated in *Daubert* that courts may consider the following: whether the theory or technique employed by the expert is generally accepted in the scientific community; whether it has been subjected to peer review and publication; whether it can be and has been tested; whether the known or potential rate of error is acceptable; and the existence and maintenance of standards and controls. *Id.* at 593–95. These factors are neither exclusive nor dispositive. Since *Daubert*, the U.S. Supreme Court and lower courts have identified additional factors that may be considered, such as whether an expert has unjustifiably extrapolated an unfounded conclusion from an accepted premise, see *GE v. Joiner*, 522 U.S. 136, 146 (1997); whether an expert has adequately accounted for obvious alternative explanations, see *Claar v. Burlington N. R.R.*, 29 F.3d 499, 502 (9th Cir. 1994); or whether experts are proposing to testify about matters "growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (*Daubert II*).

Always a trusty arrow in defense counsel's quiver, *Daubert* remains an important consideration in attacking toxic trespass claims. With barely detectable exposures and unproven causal relationships, opinions offered by experts in support of plaintiffs' theories of causation may not meet the requirements for admissibility under FRE 702 and *Daubert*. At such low or arbitrary levels of exposure, defendants can argue that the causative risks are not recognized by traditional, reliable scientists, effectively excluding the plaintiffs' causation evidence.

## CONCLUSION

The ever-advancing tide of science has fostered a new wave of toxic tort claims. Spurred by legislative initiatives such as California's biomonitoring program, efforts are on the rise to create new sources of liability based on detectable levels of chemicals in the body. While the plaintiffs' bar attempts to broaden traditional tort law to include new theories such as toxic trespass, defendants must master and understand the new scientific developments and use traditional defense strategies to expose the flaws of plaintiffs' theories.

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