

Snyder Webb

Trying the Toxic-Tort Case

Simplifying Complex Issues for Jurors

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Toxic-tort cases, which are always complicated, can be made simple and clear. The lawyer's choice of witnesses, language, and analogy makes the difference.

Highly technical issues in toxic-tort cases can be presented simply and understandably to juries. Although no single idea works in every case, some approaches tend

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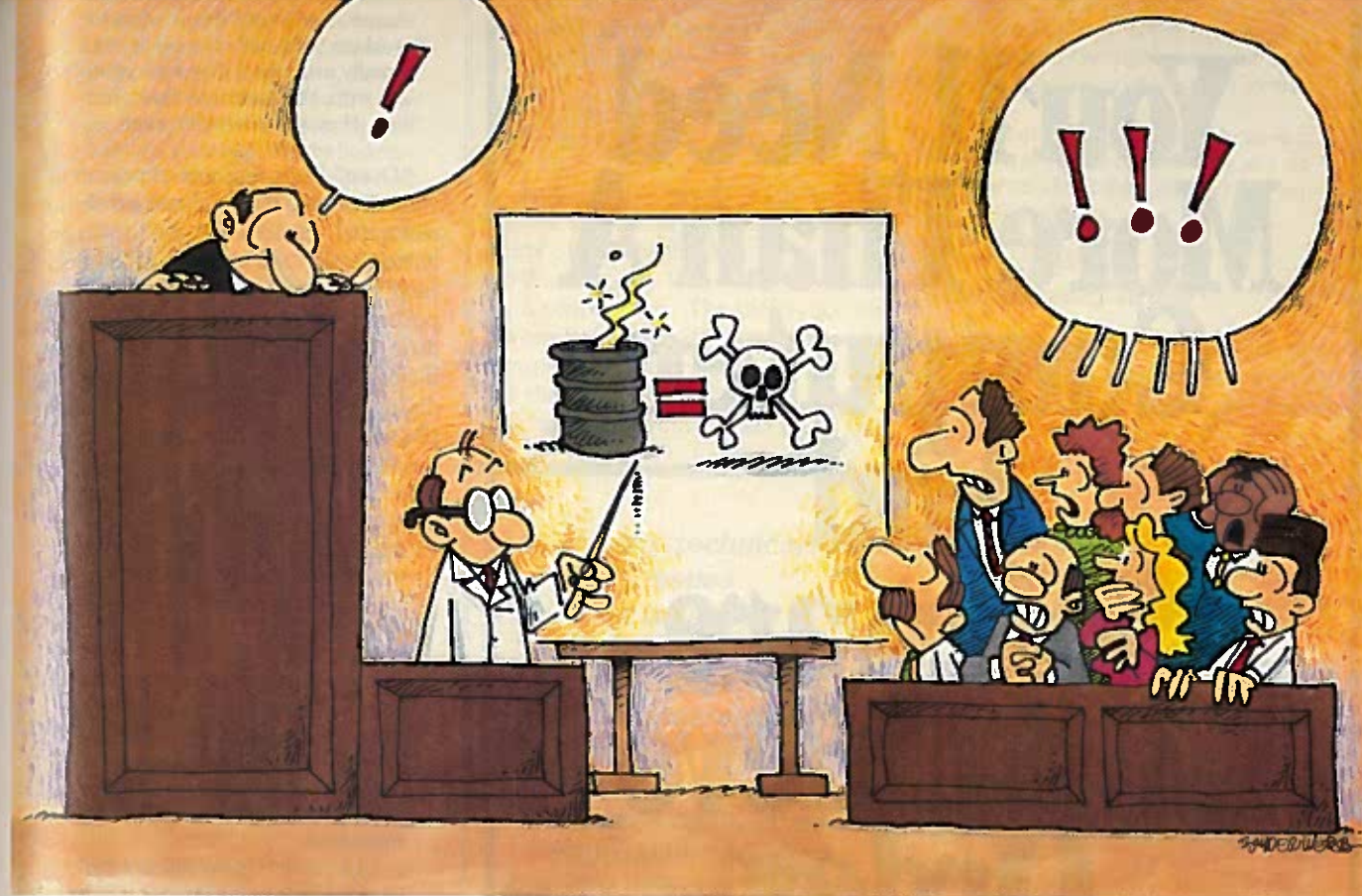
to simplify difficult problems of proof. Each lawyer will solve these problems differently, but the important point is to overcome the conceptual hurdle that toxic-tort cases are just too complicated to handle and try. The task is to learn about the complex issues and keep them from interfering with the trial of the case. In other words, keep it simple.

Witnesses

One way to simplify is to make as many points as possible through lay witnesses.¹ Fact witnesses are better

than expert witnesses. First, jurors relate to fact witnesses. An honest fact witness with no ax to grind will help prove your case, while expert witnesses, who often use jargon, may confuse the jury. Choosing a fact witness over an expert is often a preference for the familiar over the foreign, the simple over the complex, the specific over the general, and the understandable over the technical.

Second, if you use experts, they should explain everything in simple and practical terms. For example, give the state-of-the-art expert who bolsters your fact witnesses a concrete prob-



lem to solve. Rather than asking for an opinion about what should have been known at some point, ask the expert to solve hypothetically a problem that defendants ignored or handled poorly in the past.

The Theme

Like any other tort case, the toxic-tort case is a story with a theme—"an injury that need never have occurred" or "the abdication of corporate responsibility."² Use your theme to present your client's story.

This is a paint-poisoning case. The evidence will establish that the injuries suffered by Jack and Mary Smith need not, and should not, ever have happened.

Let me set the stage for you. The evidence will show that Jack Smith graduated from Riverside High School. He played football. He wrestled. He had no health problems in high school. Physically, he was a very fit fellow.

He graduated from high school in 1967. He then began working part-time at a place called Acme

Auto. It was there that he began spray-painting cars for the first time. When he began work he had no health problems. Jack Smith's first health problem occurred in 1972, after he began spray-painting cars.³

Introducing Scientific Terms

Although you want to avoid using complex terms, they are part of a toxic-tort case, so explain them early in everyday terms. Jurors will understand the case better, and they will be grateful to you for explaining the terms to them.

Three important toxicological terms are "exposure," "dose," and "response." "Exposure" refers to the amount of poison your client had near him. When you have no hard data to quantify exposure, you must convince the jury of the exposure from what your client and fellow workers saw and smelled and how they physically reacted at the time of exposure, or shortly after.

Here is an example from an opening that I gave to a rural and suburban jury:

"Toxicology." I will just write it up here [writing on a board]. "Ology" means study, and "toxic" means poison. The term is Latin.⁴

We are going to talk about how these chemicals get from the paint in the workplace to inside the body, and then, once they are inside the body, how they damage the body and what type of damage they do [using arrows to point to a diagram of a worker in a work area].

So part of toxicology deals with two concepts—exposure and dose. When you walk through a cloud after workers have sprayed for mosquitoes, you are getting exposed.⁵

The workers—Jack's fellow workers—are going to talk about what it was like at Acme Auto. They are going to tell you that the place was very foggy sometimes from the paint operations. When you walk through the fog or you breathe the fog, you get an exposure.

Now it is not only when you see fog that a place can be dangerous. Poisonous fumes are in the air all the time. Sometimes you can just smell them and not see them. Sometimes you can't even smell them, but they are there.

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But if you walk into a place like Acme Auto—and this is what the workers will tell you—you can usually smell what they were painting with, the American Star product. They were being exposed.

"Dose" is the amount of poison in your client. If you anticipate a defense claim that the dose was too low to be harmful, you may have to explain to jurors that equal intake of an exposure does not mean an identical dose and that the poisonous dose differs among similarly exposed individuals, depending on individual physiological variables. Again, from the same opening:

The "dose" is how much gets inside of you to do damage. That is what the toxicologists are going to tell you. Dose means the intake. So if you and a friend go to an ice cream parlor and three sundaes are put in front of the two of you, you both have an equal exposure to three sundaes. If you eat one and your friend eats two, your dose is one-half of your friend's. Exposure, then, doesn't necessarily equal dose.

"Response" is how that dose affects the individual. That is a nice way of saying what the health damage, the harm, caused by a particular dose is. Equal doses may produce different responses depending on a host of factors, including the individual's age, sex, genetic predisposition, and activities.

Once the dose gets into the body, people have different metabolisms. You all have a friend who eats three ice cream sundaes and doesn't get fat. You look at one, take a tiny taste, and you put on five pounds. Different intakes, different doses, can produce different responses. In other words, your friend has a different dose-response than you do.

Proof of exposure follows not only from the presence of the chemical as sensed by your client and coworkers, but also from the immediate adverse impact the dose caused in your client. This exchange with the plaintiff's expert in *Sterling v. Velsicol Chemical Corp.* illustrates the point:

Q. On Steve Sterling, assuming that there is evidence in the record, and that he so testified, or you have heard him testify, or at least read his testimony, that he had such

things as skin being dry, itching and flaking, that he had an irritated throat, when he breathed the air in his home in the bathroom, that he had coughing, that he had a raw feeling in his lungs, that he had burning of the eyes, that he had nervousness, headaches and numbness of the arm and leg. Assuming those facts to be true, do you have an opinion based upon reasonable medical certainty as to whether or not there is a cause and effect relationship between those symptoms and exposure to these chemicals?

A. I do have an opinion. For those effects which people have described as immediately following exposure, the feeling of fatigue or lassitude or some anxiety, of headache, or burning in the eyes, perhaps blurring of vision in some cases—those are all, and several others, are quite characteristic of exposure to carbon tetrachloride, and, in fact, some of the other chemicals as well. Considering the circumstances here in which we had a demonstration of exposure and those symptoms which people have described, there is reason to believe—I forget exactly the phrase you asked—is there reasonable medical certainty? Yes, there is—that these immediate effects were a consequence of this exposure.⁸

Similarly, linking exposure to an adverse reaction causally may associate the two for the jury and may graphically illustrate the dangerous potential of the chemical.

Jack is going to testify—and his co-workers will testify—that a lot of the time they were working, the paint would be all over them, in their noses. And they had spray guns, and the guns would sort of shoot back on their arms. They get a lot of paint on them that way.

The testimony will be that after Jack started working at Acme Auto for the first time, he started getting a red hand, welts, rashes, and lots of other kinds of ugly eruptions on the skin. That means these chemicals were getting into his body.

Plaintiff's counsel may in the course of a toxic-tort trial need to address synergism. The exposure to two chemicals will produce an effect that is much greater than the additive impact. For example, the ordinary statistical risk that an asbestos worker will contract asbestosis increases syn-

ergistically if he is also a smoker.⁷ One way to illustrate the idea of synergism simply to the jury—

100 + 100 = 200 : ADDITIVE
100 x 100 = 10,000 : SYNERGISTIC

Instead of having experts talk about synergism versus additive effects of chemicals, use this equation to illustrate that the synergistic impact is a serious one. The difference between 10,000 and 200 makes the point simply and sharply and with less risk of the defendant's diverting the jurors' attention from the fact that a syn-

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ergistic impact is one of kind, not of degree.

You can make these same points about synergism and potentiation in your opening:

The easiest way to explain synergism is by saying, imagine one chemical is number two [using the board]. Then add another chemical, which is three. Instead of five, you get six. The effect of the two is more than the result of just adding up the two.

The additive, of course, is two plus three is equal to five. That means all you get is what each of the individual chemicals would produce.

When you have synergism—and we are going to argue there was synergism in this case—you get a bigger effect. It can be six, or it can be six thousand.

Potentiation is a little different. This means that a certain chemical by itself in isolation would be harmless, but if you add another one,

then all of a sudden you get a ten. Zero plus two is ten because this previously harmless thing got activated or potentiated by this second one.

Antagonism is when you have a two plus a three, and they sort of cancel each other out, and you get a four.

Proving What Defendants Knew

In virtually every toxic-tort case, defendants will try to argue something that approximates to a state-of-the-art defense: No one knew the chemical was dangerous back then, and the defendant just did what everyone else was doing.

Before hiring an expert to prove that defendants and their industrial colleagues should have known about the danger, consider looking for the facts or fact witnesses that prove that defendants did know. Lawyers spend so much money in the battle of experts that we forget that finding the fact witness or hot document is not only cheaper than hiring an expert but ultimately more persuasive to the jury.

For example, if a company is alleged to have improperly dumped hazardous chemicals onto the ground in the 1950s and 1960s, you need to establish that chemicals in fact went into the ground and did so in quantities greater than "minor spills." You could have a soils engineer construct a theoretical model that shows the quantities released on the basis of current degradation models, soil chemistry, and other variables (this will likely be subject to rigorous cross-examination) or you could find former employees who do not have an ax to grind to tell it like it was, preferably with some high points saved for cross-examination:

Defendant Counsel: You threw chemicals through the cyclone wire fence outside the door of the lab?

The Witness: Yes, sir.

Defense Counsel: That was not the prescribed method of disposal, that is, prescribed by the management of Technix?

The Court: You can answer that.

Plaintiff's Counsel: Well—

Defense Counsel: You didn't understand that was the prescribed method, did you?

The Witness: The prescribed

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method of disposing of TC—I don't—

The Court: In other words, did anyone ever tell you that the rules required you to go over to that fence and throw the TCE through the holes?

The Witness: No one ever told me to do that, no.

The Court: You just thought it was convenient to do it that way?

The Witness: Sure was.

Defense Counsel: You did that—you did that as a matter of your own convenience, not because you had any direction from anybody to do it, is that—

The Witness: Me and several hundred other people.

Defense Counsel: Well, I'd move to strike the "several hundred other people."

The Court: No, the motion to strike is denied.

Plaintiff's Counsel: When you say "several hundred other people," isn't it a fact that in the hydrolab where you were working there was only, what, about ten people?

The Witness: On my shift?

Plaintiff's Counsel: Yeah.

The Witness: It all depends on what shift I was on. I worked them all.

Plaintiff's Counsel: But when you worked on any given shift, you're only talking about other people working in the hydrolab with you, aren't you?

The Witness: On day shift, 10 to 15. If I was on swing shift, 10 to 15 sometimes. It depended on what year you are talking about. Hundreds of people is what I said, and it's exactly what I said. . . .

Anticipating that defendants will try to write off even these "hundreds" as having run amok, tie in the bosses.

Q: Can you tell us whether or not any of your supervisors were in a position to see the dumping on the ground of TCE?

A: Yes.

In fact, the supervisors used to be workers who engaged in scandalous dumping.

Q: Sir, can you tell us whether any of the supervisors ever were present when you dumped TCE on the ground?

A: Yes, they were.

Q: Did you ever observe any of the supervisors themselves dumping TCE on the ground?

A: Not when they were in super-

visory positions. But before they were supervisors, yes, I did see them.

This is a slightly different argument in the sense that what you are saying is that the supervisors must have known dumping was going on, because they did it before they were supervisors. This is one way to start the climb up the corporate ladder.

Defendant probably never mentioned the wonderful corporate policy manual that always seems to turn up after litigation begins:

Q: Can you tell us, please, whether or not any of your supervisors ever told you *not* to dump TCE on the ground?

A: No.

Q: Can you tell us what instructions, if any, you received from Technix company officials as to the disposal of the TCE you worked with?

A: None.

Nevertheless, very often, the policy manual gives a good standard of care to hold the company against. Corporate inaction may be highly probative in light of the foreseeable risk of harms that gave rise to the policy manual in the first place.

Of course, sometimes you can actually nail a supervisor who has encouraged wrongful conduct:

Q: Can you tell the jury whether or not you were concerned about dumping TCE down these drains and into the gully and into the ponds?

A: When I first began work, no, I wasn't too concerned about it because I thought most of it evaporated. In fact, I was shown how it would evaporate when—

Q: How were you shown?

A: By a building foreman. I believe it was on my first day at work. Where a bucket of this TCE was thrown onto the dirt and rocks and before my eyes I saw the ground dry up, and I was led to believe that there was no harm there, that it was evaporating.

Consider proving knowledge through actions that normally rest on knowledge of risk of harm.

Q: Okay. Mr. Jones [a fellow worker], did you ever have occasion to drink water at Technix?

A: Yes.

Q: Okay. What kind did you drink?

A: Bottled water.

The Court: Was there tap water available?

The Witness: There was.

The Court: And did that come out of the faucet?

The Witness: Out of a pipe, out of a faucet.

The Court: Out of a faucet?

The Witness: Uh-huh.

The Court: Who told you that you should use something other than that?

The Witness: I believe it was on my very first day there.

The Court: One of your supervisors?

The Witness: (No audible response.)

The Court: All right. You may respond. You were told not to drink the—

The Witness: I was told not to drink the water.

The Court: All right.

The Witness: The water was unfit for human consumption.

Also, the company may have tried to protect its own workers from known dangerous properties of the chemicals. This shows awareness of the risk of harm:

Q: What preventive measures or protective devices did you use while you were in the chambers cleaning with a rag and the five-gallon bucket?

A: We covered—

Defense Counsel: I object on grounds it is irrelevant.

The Court: Overruled.

A: We wore coveralls, and, to protect ourselves, we would tape up our sleeves, our pant cuffs, collar around the neck, and then we would wear a mask, and then have an air line blowing directly into the chamber.

Q: What effect, if any, did the TCE have on the rubber gloves that you used?

Defense Counsel: Your Honor, I object to this as irrelevant.

The Court: Overruled.

Q: You may answer.

A: We used heavy-duty industrial rubber gloves, and after a period of washing about, oh—I would say about 10 minutes—a pair of those gloves would turn into almost like jelly, and you'd have to change gloves.

Q: Was there anything else you observed while you used the TCE that led you to believe that it was

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potentially harmful to humans?

Defense Counsel: Object to that as leading, your Honor.

The Court: Overruled.

A: Yeah, I personally suffered ill effects from it. Many times I would have headaches, nausea, nauseated feelings. Oftentimes I would have to get out, go outside and get some air before I could continue the project.

Second Defense Counsel: If the Court please, I submit by way of an objection that the effect of pure TCE on the health of workers is irrelevant to this case.

The Court: Objection overruled.

Another way to show corporate awareness of ill effects is by showing that the chemicals are affecting other organisms and systems at the site. If the chemicals are killing living matter on site, defendant is on notice that they could do the same thing to living matter off site.

Q: And what did the pond look like? Was it lined or unlined?

A: It was unlined, a natural pond.

Q: How far was the pond from the cleaning slab?

A: Umm—the beginning edge of it was right down at the bottom of the gullywash there. Perhaps 20 feet or so from the slab.

Q: Can you describe any changes you observed in the pond during the time you were employed?

A: Yes. When I first began work, I observed ducks on the pond, green turtles, fish, frogs. Vegetation died. Frogs died. Fish, belly-up, and no ducks.

Defendants generally try to obfuscate these cases. You should not help in this process; your goal is to promote clarity to assist in the administration of justice. ■

Notes

- ¹ See, e.g., Loftus, *Psychological Aspects of Courtroom Testimony*, 347 ANNALS N.Y. ACAD. SCI. 27 (1980) (jurors tend to place more trust and reliance on lay testimony than expert testimony); Austin, *Jury Perceptions on Advocacy: A Case Study*, LITIGATION, Summer 1982, at 16 (juror skepticism of experts as part of the natural distrust of the unfamiliar). Competing experts offering conflicting opinions may well debase the mystique of objective science and be ignored as irrelevant. E.g., Silfen, *Trial Attorney as Juror: Through the Looking Glass*, Legal

Times, July 11, 1983, at A6. This is not to deny that in some situations, since "science" is often [uncritically] accepted in our society as synonymous with truth, there is a substantial risk of overwhelming by the jury." State *ex rel.* Collins v. Superior Court of Arizona, 644 P.2d 1266, 1285 (Ariz. 1982) (citing 1 M. UDALL & J. LIVERMORE, LAW OF EVIDENCE §102 (2d. ed. 1982); accord, State v. Cavallo, 443 A.2d 1020, 1024-25 (N.J. 1982); cf. United States v. Downings, 753 F.2d 1224, 1241 n.22 (3d Cir. 1985) ("added caution" applies to scientific evidence proffered by criminal prosecutor). Rather what divides these two seemingly different responses to the expert witness may be whether jurors perceive of the proffered expert as a purveyor of irrelevant abstractions or as a helpful scientist. This perception varies depending on many factors, including the type of scientific evidence involved. E.g., Downings, 753 F.2d 1224, 1239.

- ² See, e.g., Colley, *Opening Statement in Products Liability Cases*, 1981 SOUTHERN METHODIST UNIVERSITY PRODUCT LIABILITY INSTITUTE, 6-9 (V. Walkowiak, ed. 1981) (referring to Scott Baldwin opening); Philo, *Torts, Common Sense and the Empathetic Juror*, in THE TRIAL MASTERS 503 (B. Warshaw ed. 1984). ("The essential purpose of tort law is accident prevention".)
- ³ Unless otherwise indicated, the examples are drawn from my own cases. Although I disguise names of clients and adversaries, I use real or slightly edited transcripts to illustrate a technique. Styles differ, of course, and you cannot count on a cooperative or predictable adversary.
- ⁴ See, e.g., Perlman, *Preparation and Presentation of Medical Proof*, in THE TRIAL MASTERS 520-28 (B. Warshaw ed. 1984). ("Explanation of technical language should be done in advance of any medical testimony in the form of a large chart or tablet containing the major medical terms involved in the case and their definitions".)
- ⁵ For assistance in the use of analogy in advocacy, see, generally, Read, *Analogical Reasoning in Social Judgment: The Importance of Causal Theories*, 46 J. PERSONALITY & SOC. PSYCHOLOGY 14, 14-25 (1984).
- ⁶ 647 F. Supp. 303, 454 (W.D. Tenn. 1986).
- ⁷ E.g., Mehaffy, *Asbestos-Related Lung Disease*, 16 FORUM 341, 344-45 (1980) (statistics showing synergistic effect of smoking and asbestos exposure).

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