Trying the Toxic-Tort Case

Simplifying Complex Issues for Jurors

Allan Kanner

---

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 as simply and understandably as stories. Although no single idea works in every case, some approaches tend 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. 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 believes your fact witnesses a concrete problem to solve. Rather than asking for an opinion on 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 obliteration of corporate responsibility." 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, 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.

Introducing Scientifíco Terms

Although you want to avoid using complex terms, they are part of a toxic-tort case, so explain them early in your story. 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 statement that I gave to a rural and suburban jury:

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

We are going to talk about how these chemicals get from the soil in the workplace into the body, and then, once they are in 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 exposure.

The workers—Jack's fellow workers—are going to tell you that it was like 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 air exposure.

Now it is not only when you can 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.
But if you walk into a place like A. E. Staley—and that is where the worst of the manufacturing businesses used to smell what they were getting from, the American Sugar Produc-
ture—they were being exposed.

"Dose" is the amount of poison in your client. If you anticipate a lawsuit claim that the dose was too low to be harmful, you may have to expose jurors to the idea that an equal intake of an ex-
posure does not mean an identical dose. The problem lies in individual physiological variables. From the same opening:

The "dose" is how much you see inside of you to do damage. That is what the toxicologists are going to tell you. Dose means the level. So if you and a friend go to an ice cream parlor and you each put in the wrong end of the two of you, you both have an equal exposure to three hundred. If you eat one and your friend eats two, your dose is one-and-a-half of your friend's expo-
sure, then, doesn't necessarily mean an equal dose.

"Response" is how that dose affects the individual. That is a nice way of saying what the body can stand, the 
harm, caused by a particular dose is. Equal doses may produce different responses depending on a host of factors in-
cluding the individual's age, sex, genomic predispositions, and ac-
tivities.

Once the dose gets into the body, people have different metabolisms. You all have a friend who eats three ice cream sandwiches and doesn't get fat. You look at ces, and you eat an ice cream sandwich and you put on five pounds. Different intakes, different doses can produce different responses. Yet other people work on a different dose-response than you do.

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

Q. On the February Steve Sterling, assuming that there is evidence in the record, and he is not testified, or you have heard him testify, or at least read his testimony, that he had such

Highly technical issues in toxic-tort cases can be presented simply and understandably to jurors. Although no single idea works in every case, some approaches tend to simplify difficult problems of proof.

Empirically, he is also a smoker. 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 ef-
fects of chemicals, use this equation to illustrate that the synergistic impact is a serious one. The difference be-
tween 10,000 and 200 makes the point simply and sharply and with less risk to the defendant's diverting the jur-
ers' attention from the fact that a syn-
geristic impact is one of kind, not of
degree. You can make these same points about synergism and potentiality in your opening:

The easiest way to explain syner-
gism is by saying, imagine one chemical is number two (using the board). Then add another chemi-
cal, 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 the
two plus three is equal to five. That means all you get is what the individual chemicals would produce.

Plaintiff's counsel may in the course of a toxic-tort trial need to ad-
mint synergism. The exposure to two chemicals will produce an effect that is much greater than the additive im-
 pact. For example, the certainty sta-
tistical risk that an asbestos worker will contract asbestosis increases syn-
ergeistically if he is also a smoker. 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 ef-
fects of chemicals, use this equation to illustrate that the synergistic impact is a serious one. The difference be-
tween 10,000 and 200 makes the point simply and sharply and with less risk to the defendant's diverting the jur-
ers' attention from the fact that a syn-
ergistic impact is one of kind, not of

degree. You can make these same points about synergism and potentiality in your opening:

The easiest way to explain syner-
gism is by saying, imagine one chemical is number two (using the board). Then add another chemi-
cal, 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 the
two plus three is equal to five. That means all you get is what the individual chemicals would produce.

Plaintiff's counsel may in the course of a toxic-tort trial need to ad-
mint synergism. The exposure to two chemicals will produce an effect that is much greater than the additive im-
 pact. For example, the certainty sta-
tistical risk that an asbestos worker will contract asbestosis increases syn-
}

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 ex-
erts that we forget that finding the fact witness or document is not only cheaper than hiring an expert but ultimately more persuasive to the jury. For example, if a company is al-
leged 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 quanti-
ties greater than "minimal yields." You could have a soils engineer construct a theoretical model that shows the quantities released on the basis of cur-
rent degradation models, soil chemis-
try, and other variables (this will likely be subject to rigorous cross-examina-
tion) or you could find former em-
ployees 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 closed waste fence outside the door of the lab.
The Witness: Yes.

Defense Counsel: That was not the prescribed method of disposal, that is, prescribed by the manage-
tment of Technique.
The Court: You can answer that.

Plaintiff's Counsel: Well—

Defense Counsel: You didn't un-
derstand that was the prescribed method, did you?
The Witness: The prescribed
method of discipline: TCE

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 hole?

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 right?

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 in fact that 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: Yes. On days when I worked the 10 to 15 shift, sometimes I worked the 10 to 15 shift, and then the 6 to 12 shift, and the 6 to 12 shift.

Anticipating that defendants will try to write off these "hundreds" as having run amok, I cite the boners.

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

A: Yes.

Plaintiff's Counsel: In fact, the supervisors used to be workers who engaged in scandalous dumping.

Q: Sir, can you tell us whether any of the supervisors were present when you dumped the 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-

Q: Okay. What kind did you drink?

A: Bottled water.

The Court: Was there tap water available?

The Witness: There wasn't.

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

The Witness: Out of a pipe.

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 water.

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 has tried to protect its 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 the ground that it is irrelevant.

The Court: Overruled.

A: We wore coveralls, and, to protect ourselves, we would have our sleeves, our pant cuffs, collars 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?

A: It was named "TCE" or "TCE gloves.

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

The Court: Overruled.

A: You may answer.

Q: What care did you take in cleaning the TCE from the gloves?

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

Q: Was there anything else you observed while using the TCE that led you to believe that it was
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, nauseous feelings. Sometimes 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 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 off site, defendant is on notice that they could do the same thing to living matter on 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: Yeah. 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

See, e.g., Laffitte, Psychological Aspects of Courtroom Testimony, 347 ANNALS N. Y. ACAD. SCI. 21 (1980) (“Jurors tend to place more credence in a lay testimony than expert testimony); Austin, Jury Perceptions on Advocacy: A Case Study, LITIGATION, Summer 1982, at 16 (jurors’ skepticism of experts as part of the natural distrust of the unfamiliar). Competing experts offering conflicting opinions may well distort the logics of objective science and be ignored as irrelevant. E.g., Sitten, Trial Attorney as Juror: Through the Looking Glass, Legal Times, July 11, 1983, at A6. This is not to say that some situations, since “science” is often histrionically accepted in our society as synonymous with truth, there is a substantial risk of overweighing by the jury.” State v. Collias, Superior Court of Arizona, 316 F.2d 1266, 1267 (9th Cir. 1963). Cf. United States v. Dowings, 713 F.2d 1224, 1241 n.22 (3d Cir. 1983) (“doubled question”) applies to scientific evidence proffered by criminal prosecution). Rather what divides these seemingly different inquisitors into the expert witness may be whether jurors perceive of the proffered expert as a purveyor of credible observations or as a helpful scientist. This perception varies depending on many factors, including the type of scientific evidence involved. E.g., Dowings, 713 F.2d 1224, 1239.


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.

See, e.g., Perlman, Preparation and Presentation of Medical Proof, in THE TRIAL MASTERS 230-38 (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.”)


Allan Kanner, of the law firm of Allan Kanner & Associates, Philadelphia, represents plaintiff(s) in environmental, toxic tort, and mass disaster cases and class actions, including the In re Louisville Sewer Explosion Litigation and In re Three Mile Island Litigation matters. From 1986 to 1987, he chaired the ATLA Environmental and Toxic Tort Litigation Section.