Developing Theories Of Recovery In Toxic Tort Litigation

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Commentary

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I. Introduction

Traditional tort law doctrines function best when a plaintiff seeks compensation for a discernible present injury or illness allegedly caused by a defendant’s act or omission. In the context of toxic torts, however, courts are being asked by plaintiff’s bar to extend traditional tort law to address a new type of claim: toxic trespass. The basis for this claim is that the exposure itself is an actionable harm regardless of whether an injury or disease results then or later.

This article examines this developing theory of recovery. The article also discusses recent legislative initiatives that (i) seek to impose strict liability on chemical manufacturers for the presence of chemicals in the body; (ii) establish biomonitoring programs; and (iii) require more comprehensive health and safety information for chemicals used in consumer products.

II. Toxic Trespass

The central premise behind a toxic trespass claim is that the defendant intentionally exposed the plaintiff to a chemical or toxin without that plaintiff’s knowledge or consent. A majority of the courts have declined to accept this as an actionable claim. For instance, in In re: Manbodh Asbestos Litigation Series v. Hess Oil, Shell supplied a pelletized catalyst in production activities to its St. Croix refinery. During the production process, employees allegedly inhaled the catalyst dust. These employees sued Shell and others for injuries allegedly stemming from exposure to dust through, among other theories, civil battery.

The court granted Shell’s motion for summary judgment on this claim because the plaintiffs failed to show that Shell intentionally exposed plaintiffs to the dust. In reaching its decision, the court noted that “[a] harmful contact, such as an exposure to a toxic substance, alone, will not be enough for legal cause, without the corresponding intent for that contact or the apprehension of that contact.” The Manbodh court however found no evidence to suggest that Shell had affirmatively concealed the dangers and risks of exposure to the dust and, moreover, that “[a]ny failure
to convey the true health risks associated with catalyst, if such a failure existed, was not done intentionally."

Similarly, in Major v. AstraZeneca, plaintiffs claimed personal injuries from exposure to solid and/or hazardous waste, hazardous substances and petroleum compounds allegedly dumped on their neighbor’s property by defendants.6 Plaintiffs and defendants submitted a proposed joint civil management plan, which stated that “[t]he factual basis for Plaintiffs’ claims include the acts or omissions of Defendants, in whole or in part, for the contamination of Plaintiffs’ real properties and toxic exposures to Plaintiffs.”7 Among other claims, the plaintiffs asserted claims for civil battery and medical monitoring, fear of future disease.

The court granted summary judgment to defendants with respect to plaintiffs’ battery claims on the grounds they presented no evidence that defendants intentionally caused any physical contact the plaintiffs, even though it was undisputed that defendants had disposed of wastes on properties adjacent to the plaintiffs and there was a strong likelihood of off-site migration.8 The court found it instructive that plaintiffs, in their briefs to the court, attempted to rely upon the doctrine of transferred intent — an implicit admission they had no evidence that defendants intended to cause the chemicals to physically touch the plaintiffs.9 Indeed, to establish transferred intent, plaintiffs still must prove, at a minimum, that defendants intended to physically contact someone.10 Because plaintiffs could not meet this burden, no transferred intent could be found.

Conversely, in Schwan v. CNH America, the court refused to dismiss plaintiffs’ claim for civil battery.11 In that case, approximately 189 plaintiffs asserted claims on behalf of 261 individuals (including minors and decedents) against eight companies for personal injuries, deaths, and property damage allegedly caused by 40 years of pollution at an industrial site in Grand Island, Neb. Among other personal injury claims, plaintiffs brought claims for “civil battery,” asserting that the defendants intentionally and without their consent: “(1) discharged Contaminants into the plaintiffs’ water, soil, and air with the intent that the plaintiffs would come into contact with the contaminated water, soil, and air; (2) discharged Contaminants into an unlined pond and unlined pits with the intent that such Contaminants would migrate off-site into the plaintiffs’ water, soil, and air supply and with the intent that the plaintiffs would come into contact with the contaminated water, soil, and air; (3) withheld information from the plaintiffs about the defendants’ intentional discharge of Contaminants into the plaintiffs’ water, soil, and air; (4) withheld information from the plaintiffs about the defendants’ intentional discharge of Contaminants into an unlined pond and unlined pits on the Property, despite knowledge that these contaminants would migrate into the plaintiffs’ water, soil, and air; and (5) chose not to remediate contamination they knew existed on the Property, despite knowledge that these Contaminants were migrating from the Property and into the plaintiffs’ water, soil, and air.”12

The court held this civil battery claim was viable “insofar as the plaintiffs have alleged that the defendants intended for them to come into contact with hazardous waste.”13 In reaching its decision, the court noted “intent” could be shown if defendants disposed of toxic material with the intent to cause an offensive or harmful contact with plaintiffs or knew such contact was substantially certain to occur.14

III. Legislative Initiatives

During the last year, local, state and federal lawmakers introduced legislation that would (a) make chemical manufacturers strictly liable for the presence of chemical in the body; (b) establish biomonitoring programs; and (c) require manufacturers to provide additional health and safety information about chemicals in consumer products.

At the local level, for example, the Community Environmental Legal Defense Fund, a Pennsylvania non-profit law firm, has drafted a model ordinance titled Chemical Trespass Ordinance for consideration by Pennsylvania communities to confront alleged chemical trespass by chemical corporations and the directors of those corporations. Under the ordinance, chemical manufacturers would be strictly liable for chemicals found within the bodies of individuals.15 The stated purpose of the ordinance is:

[T]o recognize that it is an inviolate, fundamental, and inalienable right of each person residing within the Township of Liberty to be free from involuntary invasions
of their bodies by corporate chemicals. The Board of Supervisors of Liberty Township declares that persons owning and managing corporations that manufacture chemicals and chemical compounds trespassing on the bodies of residents of the Township must be held liable for those trespasses. The Board of Supervisors also declares that the failure and refusal of the United States’ government and the government of the Commonwealth of Pennsylvania to ensure that corporate chemicals do not trespass on the residents of Liberty Township makes them jointly and severally liable for those trespasses.¹⁶

Under the proposed ordinance, culpable parties would be strictly liable if one of their toxic or potentially toxic chemical or chemical compounds is discovered within the body of a township resident.¹⁷ There would also be a potential penalty of up to $1,000 per violation per day. To date, however, no Pennsylvania municipalities are known to have adopted the ordinance.

At the state level, California Governor Arnold Schwarzenegger signed into law the Biomonitoring Act, SB 1379, Sept. 29, 2006.¹⁸ The new law establishes what is now called the California Environmental Contaminant Biomonitoring Program, which is designed to monitor the presence and concentration of “designated chemicals” in Californians.¹⁹ “Designated chemicals” are broadly defined to include “those chemicals that are known to, or strongly suspected of, adversely impacting human health or development, based upon scientific, peer-reviewed animal, human, or in vitro studies …” and consist of only those substances including chemical families or metabolites that are included in the federal Centers for Disease Control and Prevention studies that are known collectively as the National Reports on Human Exposure to Environmental Chemicals program and any substances as specified pursuant to subdivision (c) of Section 105449.

Finally, at the federal level, Senators Frank Lautenberg (D-NJ) and James Jeffords (I-VT) introduced a bill to amend the Toxic Substances Control Act (TSCA) to reduce the exposure of children, workers, and consumers to toxic chemical substances titled the Child, Worker, and Consumer Safe Chemicals Act.²⁰ The bill would require manufacturers to provide certain health and safety information prior to distributing a chemical in consumer products.²¹ An initial priority list of 300 chemical substances would be developed for safety determination.²² The legislation also seeks to create a safety standard with a ten-fold factor of safety used for infants and children.²³ For chemicals produced in amounts above 1 million pounds or for which there is exposure concern, the bill would require a biomonitoring study to be conducted.²⁴

IV. Conclusion

Courts are being asked to revisit the boundaries of traditional tort law by addressing cases involving toxic exposure without any resulting discernible injury or disease. Although most courts have declined the invitation to treat such claims as actionable — whether styled as toxic trespass, civil battery, or invasion of privacy — at least a few have shown a willingness to let the claims be pursued for discovery purposes. Recent legislative initiatives in this area, such as California’s new biomonitoring program, may be an indicator about how courts, the legislature, and indeed the public, may view and handle these types of toxic tort claims in the future.

Endnotes

2. Id.
3. Id. at *12-13.
4. Id. (citing RESTATEMENT (FIRST) OF TORTS, Section 13 (1934)).
5. Id.
7. Id.
8. Id. at *20.
9. Id.


12. Id. at *1.


14. Id.


16. Id. at Section 4.

17. Id. at Section 11.


19. See Biomonitoring Act, California (September 29, 2006).


21. Id. at Section 2(b)(2)(B).

22. Id. at Section 2(c)(2).

23. Id. at Section 501.

24. Id. ■