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Plaintiffs continue to ask courts to revisit the boundaries of traditional tort law by addressing cases involving toxic exposure without any resulting discernible injury or disease, say attorneys Jim Langlais and Doug Arnold. While attempts to recognize toxic trespass as a viable cause of action have largely been rebuffed in the past, the authors discuss recent cases where courts have shown a willingness to let toxic trespass claims proceed and predict a proliferation of such claims in the future.

Toxic Trespass Claims: The Elephant in the Room

BY JIM LANGLAIS
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Perhaps in no other area of the law have the courts been asked to stretch and expand the traditional theories of recovery more than in the area of toxic torts. Courts have been asked by plaintiffs, for instance, to recognize a cause of action for the presence of chemicals or other man-made substances in their body without any discernible injuries or disease. Similarly, plaintiffs who have been exposed to chemicals or toxins, but again with no discernible injury or disease, have also asked the courts for compensation. These requests typically come in the form of ''toxic trespass'' or ''toxic battery'' claims.[1] The central premise behind these claims is that the defendant intentionally exposed the plaintiff to a chemical or toxin without that plaintiff's knowledge or consent. The claim asserts that the exposure itself is an actionable harm regardless of whether an injury or disease resulted.

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Although most courts continue to refuse to recognize toxic trespass as a viable cause of action, plaintiffs have not been deterred. In fact, as a result of certain recent developments in biomonitoring at both the federal and state levels, the frequency of these types of claims seems to be rising. Also, legislatively created causes of

[1] Whether styled ''toxic trespass'' or ''toxic battery'' the cause of action itself is predicated on the nonconsensual touching of the person's body, an essential element of a battery claim. *See, e.g., City of Prichard v. Box*, 396 So. 2d 58, 60 (Ala. 1981) (assault and battery are trespass to the person).

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action for toxic trespass are starting to emerge. This article examines the impact of these developments.

I. Toxic Trespass Cases

Two recent cases—*Cotroneo v. Shaw Environmental & Infrastructure Inc.* and *Palmer v. 3M Co.*—highlight the elements and defenses to a claim for toxic trespass.

In *Cotroneo*, Shaw Environmental (and its predecessor company) was hired by the federal government to decontaminate a nuclear site in Webster, Texas.[2] Plaintiffs, subcontractors of Shaw who worked on the project, sued Shaw for health problems allegedly caused by exposure to radiation (i.e., Americium-241 (Am-241)) and other toxic materials.[3] Plaintiffs' theories of recovery included negligence, gross negligence, negligence per se based on violation of federal standards, and two types of assault and battery: (1) intentionally, knowingly, or recklessly causing bodily injury to another person (''*bodily injury* assault and battery''); and (2) intentionally or knowingly causing physical contact with another when the person knows or should reasonably believe that the other person will regard the contact as offensive or provocative (''*offensive contact* assault and battery'').[4]

Shaw moved for summary judgment on all of plaintiffs' assault and battery claims.[5] The court granted summary judgment only with respect to plaintiffs' *bodily injury* assault and battery claim. In dismissing that claim, the court held that although the presence of AM-241 in the plaintiffs' urine was evidence of exposure, it was *not* evidence of causation. Specifically, plaintiffs had failed to establish that the radiation had ''in fact'' caused their bodily injuries, i.e., their injuries were ''more likely than not'' caused by exposure to AM-241.[6] Further, the court also held that plaintiffs had failed to eliminate or negate other possible causes for their injuries.[7] The court, however, denied Shaw's summary judgment motion on plaintiffs' *offensive contact* assault and battery claim, noting that ''by its own terms, this form of assault does *not* require *bodily injury*, but merely 'offensive or provocative' contact.''[8] The court also noted at least one Texas appellate court had allowed such an action to proceed.[9] Therefore, the court held the issue of whether the plaintiffs' exposure to radiation ''offended the dignity'' of the plaintiffs was a question for the jury and was not appropriate for summary judgment. The case is still pending.

The *Palmer* case is a putative class action that is pending against 3M Co. in a state district court in Minnesota.[10] The putative class claims property damage and bodily injury from alleged exposure to perfluorooctane sulfonate (PFOS), perfluorooctanoic acid (PFOA), and other perfluorinated chemical compounds at, originating from, and/or otherwise attributable to 3M.[11] The plaintiffs have asserted, among other theories of recovery, trespass and battery claims to the bodies of the putative class members.[12] Specifically, the class claims that ''the presence and continuing presence of PFOS, PFOA, and/or other PFCs in Plaintiffs' properties and bodies constitute a continuing trespass.'' The class also claims, ''the presence and continuing invasion, contact, and/or presence of PFOS, PFOA, and/or other PFCs with, onto, and/or into Plaintiffs' bodies constitute a continuing battery.''[13]

In opposition to plaintiffs' attempt to certify the class, 3M has argued that, even assuming toxic trespass type claims are recognized by Minnesota law, each plaintiff must prove at a minimum that (i) his or her blood contains PFCs; (ii) the asserted unlawful entry resulted from 3M's plant operations or waste disposal practices, and not from occupational or other environmental exposures to PFCs[14]; (iii) 3M intended for its PFCs to enter his or her blood; and (iv) he or she has incurred actual and substantial harm, i.e., the level of PFCs in his or her blood is harmful.[15]

With respect to plaintiffs' battery claim, 3M has argued again that, even assuming the claim is actionable under Minnesota law, each plaintiff must prove that (i) 3M intended to cause a harmful or offensive contact; (ii) an offensive contact actually resulted; and (iii) the of-

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[2] *Cotroneo v. Shaw Envtl. & Infrastructure Inc.*, No. H-05-1250, 2007 WL 3145791 (S.D. Tex. Oct. 25, 2007).

[3] *Id.*

[4] In addition to the two types of assault and battery claims alleged in *Controneo*, Texas also recognizes a third type of assault and battery claim: intentionally or knowingly threatening another with imminent bodily injury (''*imminent contact* assault and battery''). *Hall v. Sonic Drive-In of Angleton Inc.*, 177 S.W.3d 636, 649-50 (Tex. App., 1st Dist., 2005), *pet. denied*. In *Cotroneo*, plaintiffs conceded *imminent contact* assault and battery did not fit the allegations of the case.

[5] Shaw's initial summary judgment motion did not separately address plaintiffs' assault and battery claims, arguing that all of plaintiffs' claims had been subsumed by the Price Anderson Act claim and that a favorable ruling on causation in that claim would negate other such tort claims. The court disagreed but granted the parties the opportunity to file supplemental briefs on the separate viability of the assault and battery claims.

[6] Tex. Penal Code Ann. § 1.07(a)(8). In Texas, the definition of assault and battery is the same, whether in a civil or criminal proceeding. *Forbes v. Lanzi*, 9 S.W.3d 895, 900 (Tex. App., 3d Dist. 2000); *Hall*, 177 S.W.3d at 649.

[7] *Forbes*, 9 S.W.3d at 900; *Hall*, 177 S.W.3d at 649.

[8] *Cotroneo*, 2007 WL 3145791, * 6 (emphasis added) (citing *Moore v. Lillebo*, 722 S.W.2d 683, 685 (Tex. 1986); *Fisher v. Carrousel Motor Hotel Inc.*, 424 S.W.2d 627, 630 (Tex. 1967); *Swope v. Columbian Chem. Co.*, 281 F.3d 185, 196 (5th Cir. 2002) (recognizing battery claim under Louisiana law based on exposure to excessive ozone)).

[9] *Id.* (citing *Kielwein v. Gulf Nuclear Inc.*, 783 S.W.2d 746, 747 (Tex. App., 14th Dist., 1990), *no petition* (holding employee's assault and battery claim alleging anxiety, mental pain and anguish, and insomnia arising out of an incident involving radioactive material at the Gulf Nuclear site not barred by workers' compensation coverage; reversing summary judgment in favor of employer due to fact issues as to employer's intent)).

[10] *Palmer, et al. v. 3M Co.*, No. C2-04-6309, 2007 WL 2708536 (Minn. Dist. Ct., Aug. 30, 2007).

[11] Third Amended Complaint and Demand for Jury Trial, *Palmer*.

[12] *Id.*

[13] *Id.* at Para. 114.

[14] Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification, *Palmer*. PFCs in human blood may be the result of exposure to products not directly attributable to 3M, including exposure to firefighting foams, floor polishes, shampoos, paper and food containers, and nonstick cookware. *Id.*

[15] *Id.* By discussing the individualized nature of the trespass-to-person claim, the defendants were not acknowledging that such a claim can be asserted under Minnesota law. Indeed, although not an issue in the plaintiffs' motion, 3M questions whether such a claim is even recognized by Minnesota law. *Id.*

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fensive contact caused actual damages.[16] Plaintiffs countered, however, that the mere presence of PFCs in the plaintiffs' blood *is* enough to constitute an ''offensive'' contact. The validity of both claims is still pending before the court.

II. Legislative Initiatives

A. Toxic Trespass Ordinances

In the last few months at least two municipalities, the Town of Halifax in Halifax County, Va. and the Mahanoy Township in Schuylkill County, Pa. have enacted ordinances that seek to establish liability and impose penalties for corporate chemical bodily trespass. Both ordinances were drafted by the Community Environmental Legal Defense Fund (CELDF), a Pennsylvania-based nonprofit law firm.[17]

On Feb. 7, 2008, Halifax, Va. became the first municipality in the United States to pass a ''chemical trespass'' ordinance banning corporate chemical bodily trespass.[18] The stated purpose of the ordinance is:

> . . .to protect the health, safety, and welfare of the residents of The Town of Halifax, the soil, groundwater and surface water, the people's cultural heritage, the environment and its flora and fauna, rural quality of life, and democratic self-government within the Town. . .to hold strictly liable those corporations, persons, and governmental agencies who are culpable for the deposition of toxic and potentially toxic substances in the bodies of residents of the Town.[19]

Under the ordinance, corporations are prohibited from depositing ''toxic substances or potentially toxic substances within the body of any resident of the Town of Halifax. . . .''[20] Such ''depositions'' are declared under the ordinance to be a ''form of trespass.''[21] ''Deposition'' or the placement of toxic substances is ''assumed'' under the ordinance ''if a toxic substance or potentially toxic substance is detected within the body of the person'' regardless of whether the person has any discernible injuries.[22] Moreover, a violation of the ordinance is deemed a class 3 criminal misdemeanor which carries possible imprisonment for individuals if convicted.[23] A violating corporation may also be liable for compensatory damages and punitive damages and may be subject to a permanent injunction.[24]

On Feb. 21, 2008, following the lead of Halifax, the Board of Supervisors for Mahanoy Township in Pennsylvania enacted a similar ordinance.[25] Like the Halifax ordinance, the Mahanoy Township law purports to define liability and impose penalties for chemical bodily trespass.[26] According to the CELDF, several more municipalities are actively considering similar legislation.[27]

[16] *Id.*
[17] www.celdf.org/.
[18] Corporate Mining, Bodily Trespass and Community Self-Government Ordinance, Halifax, Va. (Feb. 20, 2008).
[19] *Id.* at § 30-153.
[20] *Id.* at § 30-157.13 (*Bodily Trespass*).
[21] *Id.*
[22] *Id.* at § 30-155.
[23] *Id.* at § 30-159.2.
[24] *Id.* at § 30-157.14.
[25] http://www.celdf.org/Default.aspx?tabid=507.
[26] *Id.*
[27] Discussion with Ben Price, Projects Director, Community Environmental Legal Defense Fund (April 10, 2008).

B. Biomonitoring

In the wake of recent advances in analytical techniques, along with growing media coverage and increased awareness about ''body burden,'' new regulatory initiatives are emerging that focus on the detection and monitoring of chemicals in the human body, i.e., biomonitoring.[28]

At the federal level, biomonitoring data has been used for years as a marker for exposure to environmental chemicals.[29] For example, the Environmental Protection Agency Office of Research and Development sponsors studies assessing the general population's exposure to chemicals.[30] In the 1990s, EPA sponsored the National Human Exposure Assessment Survey (NHEAS) which studied exposures of people to metals, pesticides, volatile organic compounds and other chemicals.[31] Additionally, in 2000, the EPA Office of Pollution Prevention and Toxics implemented a pilot program known as the Voluntary Children's Chemical Evaluation Program (VCCEP), which collected and analyzed biomonitoring data for 23 chemicals believed to pose risks to infants and children.[32]

In June 2007, the EPA Office of Research and Development released a report entitled the *Human Health Research Contributions Report*, which summarizes the significant milestones accomplished by the program over the last five years.[33] Additionally, this report sets out the program's direction and goals for the *next* five years.[34]

These goals include:

- Developing integrated physiological models to predict the relationship between exposure and effect based on available biological data and extrapolation of knowledge within chemical classes;
- Developing a framework for using emerging genomic and proteomic approaches to prioritize chemicals or chemical classes for subsequent screening and testing;
- Utilizing valid biomarkers to facilitate assessment of exposure to multiple chemicals via multiple pathways and to evaluate the effectiveness of risk management decisions;
- Identifying and developing exposure assessment methods and models that can be used for community-based risk assessments; and
- Identifying exposure and biological factors that will help identify who is at greater risk and why and promoting increased protection of these subpopulations.[35]

[28] The Centers for Disease Control and Prevention (CDC) defines ''biomonitoring'' as the ''direct measurement of environmental chemicals in the human body, specifically in blood, urine, serum, saliva or tissues.'' An ''environmental chemical'' is defined as a ''chemical compound or element in air, water, soil, dust, food or other environmental media.''
[29] http://www.cdc.gov/biomonitoring/about.htm.
[30] http://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract/753.
[31] http://www.epa.gov/heasd/edrb/nhexas.htm.
[32] http://www.epa.gov/oppt/vccep/.
[33] *Human Health Research Contributions Report,* EPA, Office of Research and Development (EPA/600/R 07/011) (June 2007), p. 3. Available at *http://www.epa.gov/hhrp/fileshuman-health-research-report.pdf*.
[34] *Id.* at 25-26.
[35] *Id.*

On Sept. 24, 2007, the EPA announced it was awarding nearly $4 million in grants to five institutions for biomonitoring research to ''obtain information about how the levels of chemicals in people's bodies may affect their health.''[36] The grants, known as ''Science to Achieve Results (STAR)'' grants, will be used to develop computer models with the ability to match biological exposure or dose measurements of several chemicals, including carbaryl, chlorpyrifos, diazinon, parathion, PFOA and PFOS.[37]

Additionally, the Centers for Disease Control (CDC) Environmental Health Laboratory continues to conduct the National Biomonitoring Program (NBP) which monitors people's exposure to toxic substances in the environment by measuring the substances or their metabolites in blood and urine.[38] In the late 1990s, a joint biomonitoring venture was formed by the CDC, EPA, the Food and Drug Administration and the National Institutes of Health.[39] This joint biomonitoring venture provides ''an ongoing assessment of the U.S. population's exposure to environmental chemicals using biomonitoring.'' The results of this venture are released through the CDC *National Report on Human Exposure to Environmental Chemicals*.[40] In 2001, CDC released the first *National Report*, which tracked 27 chemicals.[41] The second *National Report*, issued in January 2003, tracked 116 chemicals.[42] The third *National Report* was issued in June 2005 and tracked 148 chemicals.[43]

More recently, in 2006, the CDC funded environmental health (EH) tracking programs in 17 states, including California.[44] The goal of these EH tracking programs is to bring together health and environmental data systems nationwide.

Also, in late 2006, California became the first state to legislate a biomonitoring program.[45] The new law, known as The California Environmental Contaminants Biomonitoring Program, established a biomonitoring program that systematically collects and archives blood and other human biological samples from selected volunteers.[46] These samples are analyzed for the presence and concentration of ''designated chemicals.''[47] ''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. . . .''[48] The objectives of California's biomonitoring program include: (i) the establishment of baseline levels of environmental contaminants in a representative sample of Californians; (ii) the establishment of temporal trends in contaminant levels; and (iii) the assessment of the effectiveness of public health efforts and regulatory programs to reduce exposures of Californians to specific chemical contaminants.[49]

In 2007, the Minnesota Legislature allocated funds to the Minnesota Department of Health to initiate an Environmental Health Tracking System and a Biomonitoring Pilot Program.[50] The Department of Health Environmental Health Tracking System is designed to integrate, analyze, interpret, and disseminate data about environmental hazards, exposure to environmental hazards (e.g., biomonitoring), and potential health effects related to exposure to environmental health hazards.[51] The Department of Health Biomonitoring Pilot Program is designed to collect biospecimens and analyze the samples for specific chemicals, including arsenic, mercury and perfluorinated chemicals such as perfluorobutanoic acid.[52]

In late January 2008, the Department of Health held public meetings to discuss its proposed plans for the biomonitoring of PFCs in the bodies of Minnesota residents.[53] In addition to analysis of their blood samples, program participants will complete a brief questionnaire to determine their age, length of time living at their current residence, current drinking water source, current use of alternative water supplies and/or water treatment devices, gender, ethnicity, and potential occupational exposure to PFCs.[54] Once completed, the Department of Health will analyze the results, compare them to the available national averages for PFC concentrations, and will make recommendations to the Minnesota Legislature for additional research that may be necessary, e.g., more in-depth surveys of exposure, expansion of biomonitoring to other community groups such as children, follow up testing, or studies about the health effects of exposure.[55]

III. Conclusion

While most courts have refused to recognize the viability of ''toxic trespass'' claims—whether styled as toxic trespass, civil battery, or invasion of privacy—a small minority of courts have shown a willingness to let

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[36] The Bureau of National Affairs Inc. (BNA), Toxics Law Daily, ISSN 1533-1415 (Sept. 26, 2007). Available at *http://subscript.bna.com/SAMPLES/tld.nsf/bbd048c35d1b5db085256d0100766b4f/92c59ad0d30049c085257361007c7b28?OpenDocument*. The five institutions receiving the grants are the Hamner Institutes, Clark University, Colorado State University, the LifeLine Group Inc. and the University of Buffalo.

[37] *Id.* These chemicals are used to kill pests, retard fires, and repel water and grease. *Id.*

[38] *http://www.cdc.gov/biomonitoring/*.

[39] *Id.*

[40] *Id.*

[41] *First National Report on Human Exposure to Environmental Chemicals*, Department of Health and Human Services Centers for Disease Control and Prevention (March 2001).

[42] *Second National Report on Human Exposure to Environmental Chemicals*, Department of Health and Human Services Centers for Disease Control and Prevention (January 2003).

[43] *Third National Report on Human Exposure to Environmental Chemicals*, Department of Health and Human Services Centers for Disease Control and Prevention (July 2005).

[44] http://health.state.mn.us/divs/eh/tracking/factsheet.pdf.

[45] California Health and Safety Code, §§ 105440 et seq. (West 2006).

[46] *Id.* Program participants are selected to comprise a representative sample of Californians (2000 participants over 2-year cycles). The participants are to be selected from communities that would be ''reflective of the economic, racial, and ethnic composition of the state.'' Participants may also be selected based on so-called nongeographical communities—that is, people who may share a common chemical exposure because they have similar jobs or lifestyles. *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See* Minnesota Statutes 2007, Sections 144.995 to 144.998.

[51] *Id.* at Section 144.996.

[52] *Id.* at Section 144.997.

[53] http://www.health.state.mn.us/divs/eh/tracking/pfcqacommmtgs.pdf.

[54] *Id.*

[55] *Id.*

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the claims be pursued for discovery purposes. Despite setbacks, plaintiffs continue to ask courts to revisit the boundaries of traditional tort law by addressing cases involving toxic exposure without any resulting discernible injury or disease. As a result of certain recent developments in biomonitoring activities at both the federal and state level, the frequency of these types of claims will likely rise. Similarly, legislatively created causes of action for toxic trespass, under which corporations are held strictly liable for the presence of chemicals within a person's body, are starting to emerge. It remains to be seen whether these ''chemical trespass'' ordinances will pass constitutional muster. In the meantime, more local and state governments are likely to follow suit, especially in jurisdictions where the courts refuse to recognize toxic trespass as actionable.