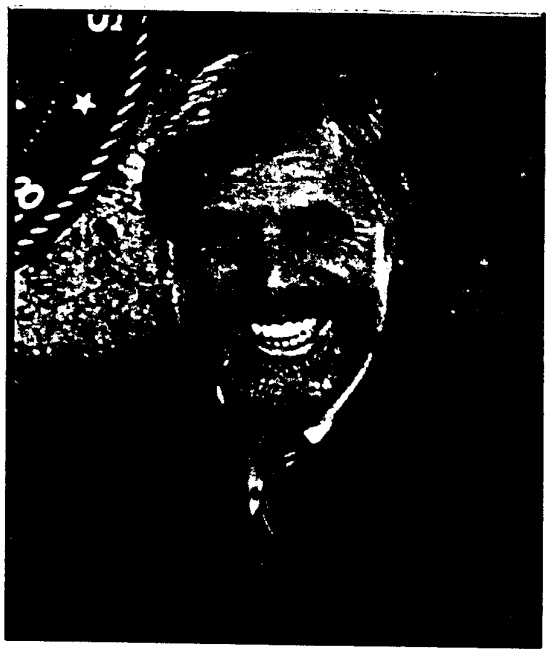
# TRIAL JOURNAL

## OF THE ILLINOIS TRIAL LAWYERS ASSOCIATION

**Justice**
**Thomas R. Fitzgerald**
1st District



**Justice**
**Robert R. Thomas**
2nd District

**Justice**
**Thomas L. Kilbride**
3rd District

VOLUME 3, NUMBER 1 • WINTER 2001

ITLA

# TRIAL JOURNAL

OF THE ILLINOIS TRIAL LAWYERS ASSOCIATION

Vol. 3, No. 1 Winter 2001

## IN THIS ISSUE

### FEATURE ARTICLES



### PRACTICE TIPS



## REGULAR FEATURES



**ON THE COVER** are the three newly elected justices to the Illinois Supreme Court. ITLA would like to congratulate each of them on their outstanding achievement.

### ITLA STAFF

James M. Collins, Executive Director
Linda K. Benedict, Asst. Executive Director
Edward F. Peck, Government Relations
Paula A. Gansbauer, Seminar Services
Julia M. Pierce, Receptionist – Deposition Bank
Tracey A. Tate, Membership Services – ITLA-PAC
Rachel Tribbett, Document Technician

The Trial Journal is the official publication of the Illinois Trial Lawyers Association. Statements and opinions expressed by the Editor and contributing authors are not necessarily those of ITLA. ITLA policy will be stated as such. ITLA intends for this magazine to represent a cross-section of the views of members of the trial bar. ITLA encourages suggestions about and, more importantly, contributions to this magazine. Correspondence and manuscripts should be sent to the Editorial Offices, Illinois Trial Lawyers Association, 110 W. Edwards Street, Springfield, Illinois 62704. For further information, call 800-252-8501.

# TOXIC TORTS 101: A BASIC GUIDE

## by G. Grant Dixon III[1]

### Introduction

Most Illinois Trial Lawyers spend their days fighting for people who were injured by some unsafe action. A car collision, defective product, or some premises defect all give rise to frequent and well-known injuries. Indeed, safety is often the principle concern for us all. But if safety is that hallmark, where is safety more important than in the air we breathe, ground on which we walk, or building in which we work? As Governor Ryan recently stated, "every Illinoisan has the right to a safe and healthy environment."[2]

However, that right is frequently trampled. According to the Environmental Protection Agency, more than 7,000,000,000 pounds of toxic waste products were pumped into the United States environment in 1998.[3] The top 20 chemicals released - some of the most dangerous known - represent about 1/3 of that total.[4] Illinois facilities are usually in the top 25 largest violators in the country for most categories of releases.[5] Indeed, Illinois electrical utilities alone pumped out more than 38,000,000 pounds of toxins in 1998.[6] Thus it is easy to understand why, in the world of torts, few segments have experienced more rapid growth in recent years than that of "toxic torts." These cases have not only been on the cutting edge of the law, their attacks on massive environmental wrongs have resulted in significant compensation for its thousands of well-deserving victims.

For most practitioners, much mystery still surrounds "toxic torts." Many simply don't know what they are, let alone how to analyze and manage these types of cases. It need not be so. This article discusses what a toxic tort is and how to pursue such a case. Finally, it provides resources to pursue the toxic tort matter, whether it is your first or fiftieth case.

### *What* is a toxic tort?

Most of us understand that a tort is some form of societal wrong.[7] With that in mind, the definition of toxic tort turns on the definition of toxic. "The term *toxic* is generally understood to describe substances that by some route of exposure - inhalation, ingestion, or dermal exposure - can cause physical injury or disease."[8]

The meat of a toxic tort case is product liability: that means strict liability and negligence. But toxic torts usually involve more. More comes in the form of ultrahazardous activity and its attendant strict liability. More also comes in the form of more theories like nuisance.

Not unlike most product liability cases, toxic tort cases involve a plethora of experts. But these are not the kind one might encounter normally. These experts are usually epidemiologists, toxicologists, and environmental engineers. And, it is upon the testimony, testing, and opinions of these experts that nearly every toxic tort case will be based.

Toxic tort cases differ in other respects as well. For example, in the toxic tort case, the injury is not a broken bone but often a broken immune system. Thus, symptoms rarely appear immediately and long latency periods - sometimes decades - are common. Additionally, it is unusual for a victim of a toxic tort to suffer a single, clearly defined injury. Complex disease processes often develop and flourish in the victim. The attendant causation problems may surface in litigation. Adding to the confusion, every exposure does not injure everyone and even those affected are not harmed in the same way.

From the perspective of injury, a savvy practitioner will evaluate the case by initially searching for a classification of the disease. In most cases, the toxic exposure will result in one of two categories of disease. "Signature diseases" can be the first and best tip that a truly toxic exposure has occurred. These diseases are often common problems experienced over a wide area at a high rate. For example, a single case of brain cancer might not be indicative of anything amiss. Yet if that same disease process is present in a very high percentage of people, it can mean terrible exposures have occurred for years. Many chemicals have a well-known propensity to cause "signature diseases" in people. Oftentimes a qualified expert can determine to what chemicals a person might have been exposed by knowing the disease from which she suffers.


**ABOUT THE AUTHOR**

**G. Grant Dixon III** is the founder of the DIXON LAW OFFICE L.L.C. in La Grange, Illinois. He represents plaintiffs in a variety of tort fields including automobile, product liability, and toxic torts. Grant has represented victims in such high-profile matters as the crash of United Airlines Flight 232, the 40-car Kennedy Expressway crash, and one of the victims of the string of attacks at the Hyatt Regency Hotel here in Chicago. He has also represented more than a dozen former Amoco Oil Company employees in a case against the company for exposure to toxins at its Naperville facility which resulted in development of a rare cancer. Before starting Dixon Law Office, Grant worked at Corboy & Demetrio for nearly ten years. He is a former judicial clerk to The Honorable Charles R. Norgle, Sr., of the United States District Court for the Northern District of Illinois. He is a widely published author and a frequent speaker.

The second category is "rare disorders." These are often viewed as a litmus test for a true toxic exposure. Unusual diseases - typically cancers - can in fact be indicative of toxic tort exposures. But that need not be so. Many truly hazardous chemicals produce common diseases and disorders.

## *How* do you do it?

The first question asked is often, how? Though the legal theories are mostly the same, toxic tort cases present new challenges for the practitioner. Below are listed some of the causes of action which might be considered in each toxic tort case.

### 1. Product Liability

Lawyers familiar with product liability actions are surprised to learn that very little of toxic torts is different from product liability cases they have managed in the past. The same causes of action can be applied. Strict liability, negligence, and breach of warranty are all common to complaints in toxic tort cases. The same theories and complex engineering questions often arise. However, the key difference is that the product is not a punch press but rather chemical compounds which harm people in often more tragic, life-altering ways.

### 2. Ultrahazardous

An area of Illinois law with which practitioners may have less familiarity is that of ultrahazardous liability. Due to the nature of their activities, most defendants accused of a toxic tort can be held liable without fault for conducting ultrahazardous activities. Liability for ultrahazardous activities has its roots in the Second Restatement, sections 519 and 520. The general principle is stated as follows:

> One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

The strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Thus, the inquiry is not on violation of a duty obligation, but rather on the activity itself. If that activity is determined to be ultrahazardous, the injured party recovers from the defendant.[9] Several factors are used to determine what is an abnormally dangerous activity:

a. the existence of a high degree of some harm to the person, land or chattels of others;

b. likelihood that the harm that results from it will be great;

c. inability to eliminate the risk by the exercise of reasonable care;

d. extent to which the activity is not a matter of common usage;

e. inappropriateness of the activity to the place where it is carried on; and,

f. extent to which its value to the community is outweighed by its dangerous attributes.[10]

No single factor is determinative but every factor need not be present either for the moniker of ultrahazardous to be applied to an activity.[11]

Illinois is a strident follower of the ultrahazardous concept. For example, blasting is ultrahazardous.[12] Likewise, demolition is inherently dangerous.[13] So too is the storing and use of explosives and flammable materials.[14] Importantly though, ultrahazardous activity liability is not unlimited liability. It now seems clear that if the plaintiff was participating in the ultrahazardous activity at the time of her injury, liability will not attach.[15] This can be problematic in the toxic tort case because the very people unknowingly exposed to these substances are often the same people using them as instructed.

### 3. Nuisance

It is time to dust off your old torts notes because nuisance is alive and well in the toxic torts arena. In fact, nuisance is almost always plead in toxic tort cases. The reason is simple: establishing the elements means liability without fault. Below is a summary of nuisance law and its use in Illinois.

As Dean Prosser has said, the term "nuisance" is "incapable of any exact or comprehensive definition."[16] Though Illinois claims to follow the Second Restatement approach,[17] most courts seem to follow a "you-will-know-it-when-you-see-it" approach. In doing so, courts have muddied the waters greatly. Nevertheless, in Illinois and elsewhere, two types of nuisance are generally recognized, public and private.

#### a. Public nuisance

The First District in *City of Chicago v. Commonwealth Edison Co.*,[18] made it clear that the Restatement (Second) of Torts is the rule of law to be followed in public nuisance cases. In that case, the court followed section 821B defining a public nuisance as "an unreasonable interference with a right common to the general public." More recently, the Supreme Court stated that "a public nuisance is the doing of or the failure to do something that injuriously affects the safety . . . of the public."[19] The Second Restatement lists three factors to be reviewed when determining whether an interference with a public right is unreasonable:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, the actor knows or has reason to know, has a significant effect upon the public right.

Typically, the conduct which gives rise to a public nuisance must be illegal or at least wrongful. Additionally, the putative plaintiff must demonstrate extraordinary harm to other members of the public.[20] Indeed, many Illinois statutes define certain activities as public nuisances: air pollution, water pollution, or blocking a highway.

Public nuisance actions, however, are not the best weapons in Illinois tort actions. The primary reason is that the remedy is usually criminal prosecution for the violator, not money damages to the victim.[21] Still, public nuisance actions can be powerful tools in toxic tort cases.

#### b. Private Nuisance

The Restatement (Second) of Torts defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[22] It is a right that is designed to benefit those who have property rights and privileges in respect to the use and enjoyment of land.[23] A significant harm is needed

(cont. on page 18)

**TOXIC TORTS 101**
(continued from page 9)

for the nuisance to be actionable.[24] The conduct of the creator is the real issue in private nuisance cases. This conduct must be intentional,[25] unreasonable,[26] or unintentional and negligent, reckless or abnormally dangerous.[27]

The nuisance-creating activity can be an act or omission.[28] The standard for determining if a particular act constitutes a nuisance is the conduct's effect on a reasonable person.[29] Unlike a public nuisance, the act or omission need not be illegal for it to constitute a nuisance.[30] If the activity is permitted to continue, it creates multiple actions for nuisance.[31] Defenses to private nuisance actions include contributory negligence, assumption of risk, and "coming to the nuisance."[32]

For some time, there was a debate about whether a physical invasion was necessary for a private nuisance cause of action to arise. Though this debate seemed illogical because the Second Restatement's definition requires an "invasion," Illinois' Supreme Court has now settled it. The case of *In re Chicago Flood Litigation*, focused in part on whether those people and businesses that were evacuated because of the flood but not directly flooded had a cause of action in private nuisance. The Supreme Court answered the question with a resounding no.[33]

Examples of valid private nuisance cases abound. Noise can be a private nuisance.[34] Odors, smoke, and dust can also be the basis for private nuisance actions.[35] Even vibrations can create a nuisance.[36]

The two types of nuisance are not mutually exclusive. As the First District stated, "a nuisance may be both public and private if it, at the same time, affects the general public and also inflicts upon a private individual some special injury that is not inflicted upon the general public."[37]

**4. Proximate Cause**

Every toxic tort case involves a debate about proximate cause. It is the nature of the beast. As with any other case, the plaintiff bears the burden of proof on the liability and damage issues. This frequently involves complex medical and scientific issues of exposure (was she really exposed?) and dose (how much did she get?).

Illinoisans have a lighter burden than most in this area because of the case of *La Salle National Bank v. Malik*.[38] In that case, a physician complained of a burning metal smell in her office after defendants installed a medical instrument sterilization machine in the suite next door.[39] This machine used a known toxic chemical to clean the instruments. After the doctor and others suffered neurological problems, they vacated the suite and sued.[40]

Defendants filed a motion to bar plaintiffs experts claiming their opinions were based on mere speculation, guess, and conjecture.[41] In essence, defendants claimed that because there was no testing done to determine the amount of exposure to the plaintiff, the opinions were merely guesses.[42] The trial court agreed and barred the experts and then granted the summary judgment motion that followed.

The appellate court found the trial court abused its discretion in barring the opinions. It held that though a court must critically evaluate the reasoning process of an expert, "a trial court should liberally ***allow the expert to determine*** what materials are reasonably relied upon by those in his field."[43] Moreover, the court noted that defendants' experts admitted that there had been some exposure though they disagreed it was as much as plaintiffs claimed or that it caused harm.[44] The court goes on to provide an excellent discussion of why other Illinois cases barring experts do not apply.

The importance of the *Malik* case cannot be overstated. In a toxic tort case, exposure and dose are difficult and sometimes impossible to precisely establish. Though defense lawyers would have the courts believe otherwise, this case stands for the proposition that experts in Illinois can survive without hard and fast numbers on exposure and dose.[45]

**5. Duty & Breach - Illinois Resources**

As in any tort case, establishing duty and breach can be critical. An often-used source for an allegation of a duty (and violation thereof) is statutes. If one can establish that a statute applies and has been violated, much progress has been made toward a successful recovery for your client.

Illinois practitioners again have more resources than most in this arena. Chances are very good that if a client was exposed to a toxic substance, a violation of one or more State regulations is present. Below are listed only a few of the statutes which can provide a resource for practitioners in this area:

Hazardous and Solid Waste Recycling and Treatment Act (30 Ill. Comp. Stat. 750/3-1);

Illinois Health and Hazardous Substances Registry Act (410 Ill. Comp. Stat. 525/1);

Environmental Protection Act (415 Ill. Comp. Stat. 5/1);

Local Solid Waste Disposal Act (415 Ill. Comp. Stat. 10/1);

Solid Waste Planning and Recycling Act (415 Ill. Comp. Stat. 15/1);

Illinois Solid Waste Management Act (415 Ill. Comp. Stat. 20/1);

Water Pollutant Discharge Act (415 Ill. Comp. Stat. 25/1);

Illinois Groundwater Protection Act (415 Ill. Comp. Stat. 55/1);

Illinois Pesticide Act (415 Ill. Comp. Stat. 60/1);

Hazardous Substances Construction Disclosure Act (415 Ill. Comp. Stat. 70/1);

Environmental Toxicology Act (415 Ill. Comp. Stat. 75/1);

Toxic Pollution Prevention Act (415 Ill. Comp. Stat. 85/1);

Household Hazardous Waste Collection Program Act (415 Ill. Comp. Stat. 90/1);

Illinois Pollution Prevention Act (415 Ill. Comp. Stat. 115/1);

Hazardous Material Transportation Act (430 Ill. Comp. Stat. 30/1);

Hazardous Materials Emergency Act (430 Ill. Comp. Stat. 50/0.01);

Hazardous Material Advisory Board (430 Ill. Comp. Stat. 50/4);

Hazardous Material Emergency Response Reimbursement Act (430 Ill. Comp. Stat. 55/1);

Environmental Protection Act (415 Ill. Comp. Stat. 5/1);

Local Solid Waste Disposal Act (415 Ill. Comp. Stat. 10/1);

Solid Waste Planning and Recycling Act (415 Ill. Comp. Stat. 15/1);

Illinois Solid Waste Management Act

(415 Ill. Comp. Stat. 20/1);

Hazardous Material Advisory Board (430 Ill. Comp. Stat. 50/4);

Hazardous Material Emergency Response Reimbursement Act (430 Ill. Comp. Stat. 55/1).

Likewise Congress has provided consumers with a plethora of statutes which can be violated by potential defendants.

Clean Water Act (33 U.S.C. §1254 et. seq);

Clean Air Act (42 U.S.C. §7601 et. seq);

Toxic Controlled Substances Act (15 U.S.C. §2601 et. seq);

Resource Conservation and Recovery Act (42 U.S.C. §6972);

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. §9601 et. seq);

Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §136 et. seq).

**6. Other Resources**

Fewer resources can provide more concise information in a timely, understandable way than the computer. More traditional computerized research tools like Westlaw and Lexis provide a large number of databases in a lawyer-friendly format.[46] Any lawyer who fails to use the large reference library of the Internet is missing out on a wealth of information as well.[47]

## Conclusion

Safety is of paramount concern to us all. Victims of toxic torts often have been violated by years of unsafe practices which have taken their toll. The resultant injuries are often catastrophic. Yet many lawyers shy away from pursuit of a toxic tort due to a lack of understanding. This need not occur because toxic tort cases present no challenges different from those faced in other cases. We can and should pursue these matters with equal vigor and resolve. This pursuit though difficult is not for us but on behalf of members of the public who have been so tragically hurt by the wrongs of others. As trial lawyers, we work on behalf of the public good every day. Toxic tort cases are just another way to do it.

---

1. This article is adapted from a speech given by Grant Dixon to the Illinois Trial Lawyers on September 9, 2000 titled *Toxic Torts 101*.
2. Illinois Environmental Protection Agency website, www.epa.state.il.us (Sept. 18, 2000).
3. *Toxic Release Inventory* (hereinafter "TRI") *On-Site and Off-site Releases, New Industries compared to Original Industries*, Environmental Protection Agency (1998). And those are only the releases that are ***disclosed*** to the EPA.
4. *Top 20 Chemicals with Largest Total On-Site and Off-site Releases* (TRI 1998).
5. *See, e.g., Top Facilities with Largest Total On-Site and Off-site Releases - Original Industries* (TRI 1998) (an Illinois company is number 25); *Top Facilities with Largest Total On-Site and Off-site Releases - Chemical Wholesalers* (TRI 1998) (Illinois companies are number 10 and 15); *Top Facilities with Largest Total On-Site and Off-site Releases - Petroleum Bulk Terminals* (TRI 1998) (an Illinois company is number 16); *Top Facilities with Largest Total On-Site and Off-site Releases - Electrical Utilities* (TRI 1998) (an Illinois company