

V. INVESTIGATING THE CASE

A. MEDICAL ISSUES; CAUSATION

§ 30 In general

The initial investigation should focus on whether or not the particular injury suffered by the client can be linked to a toxic exposure.³⁷ Exposure to hazardous chemicals and toxic substances can produce neurological, pulmonary, and other conditions whose symptoms do not appear immediately after the exposure and which are difficult to relate causally to a particular exposure at a particular time. Thus, while negligence in a specific case may appear relatively clear, the proximate cause issue may be very difficult. Thus, litigating the proximate cause

³⁷Determining the Medical and Emotional Bases for Damages, 23 Am. Jur. Trials 479.

Putzrath, Levine, Buncher & Nothstein, "The Diagnosis of Occupational or Environmental Illness and Injury" in G. Nothstein, ed., *Toxic Torts: Litigation of Hazardous Substance Cases* §§ 4.01–4.15 (Shephard's/McGraw Hill 1984).

issue in a toxic exposure case requires a thorough investigation of the client's medical condition.

Cases

Diagnosis of multiple chemical sensitivity (MCS) syndrome had not gained general acceptance in the relevant scientific community and, thus, physician's testimony in support of his diagnosis that employee who worked in building on which contractor performed roofing work had MCS syndrome was inadmissible in her action against roofing contractor alleging its work was negligently performed, causing dust, fumes and particles to filter into the building, rendering her ill. *Collins v. Welch*, 678 N.Y.S.2d 444 (Sup. Ct. 1998).

§ 31 Medical Investigation Checklist

One of the first steps required in the investigation of a toxic exposure case is to conduct a thorough research of the chemical or toxic substance that is involved.³⁸ The information obtained as a result of this investigation should be correlated with what counsel has learned from the client's interview.³⁹ For example, if the exposure is believed to have caused cancer in the client but the latency period of the cancer is abnormally long, that is, the delay in the appearance of symptoms following exposure is inconsistent with the type of cancer the client has developed, that fact should in most instances mitigate against taking the case.

Following is a checklist designed to assist counsel in checking the medical literature:⁴⁰

- Has the chemical been linked to the client's condition?
- What type of exposure is necessary for the condition to develop?
- What is the general pathology of this type of condition?
- What is the latency period of the condition?
- How rare is this condition in the general population?
- What other causes have been linked to this condition?

§ 32 Medical and scientific research sources

Numerous sources exist to assist the attorney with the medical investigation. The primary source for this information is information published by the United States government. In addi-

³⁸For sources of investigation, see §§ 109–113.

³⁹See § 24.

⁴⁰For references to medical texts and periodicals, see §§ 109–113.

tion to publishing a variety of standards, guidelines, and reference works,⁴¹ many government agencies hold hearings on the licensing and use of hazardous chemicals. Some of the agencies include the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration (OSHA).

Although the government's findings from its investigations of various chemicals are valuable, the footnotes of reports submitted by the investigating agencies often are even more valuable. In such footnotes counsel may find references to various studies done on the chemical. Usually the report will refer to studies supporting both sides of the issue and include criticism of a particular study's methodology or its conclusions, such as criticizing human exposure studies for lacking sufficient background data. Industry representatives and scientists often present studies and findings to these agencies, and a review of the report may allow the plaintiff's attorney to get some insights into defense tactics. Perhaps equally important, the government study is a good resource from which to identify and locate possible experts.

When available, transcripts of hearing testimony before federal agencies are also good sources for information and clarification. If the agency proposes to issue a rule, the public is given time to comment on the proposal. Both the proposed rule, which may differ from the rule that is eventually issued, and the public response are useful sources of information about a hazardous chemical or toxic substance.⁴²

States also have agencies with responsibilities similar to their federal counterparts. Although in most respects the information is largely repetitive, state agencies may have some new perspectives on a hazardous chemical or toxic substance. Additionally, states may have more stringent guidelines, evincing a different community standard for the duty of care. The violation of a specific state safety regulation may also bring the case

⁴¹See § 110.

⁴²See, generally, Darrell, "Standards, Rules, and Regulations in Toxic Tort Litigation" in G. Nothstein, ed., *Toxic Torts: Litigation of Hazardous Substance Cases* §§ 8.01–8.10 (Shephard's/McGraw Hill 1984).

Federal Hazardous Substances Act: what constitutes "hazardous substance" under 15 USCA sec. 1261(f), and what acts involving hazardous substances are prohibited under 15 USCA sec. 1263, 29 A.L.R. Fed. 742.

into the realm of an intentional tort and away from the worker's compensation system.⁴³

Other sources of information about hazardous chemicals are private watchdog organizations. Among the public interest groups that are useful are: The Trial Lawyers for Public Justice and the Association of Trial Lawyers of America.

Counsel should consult medical textbooks regarding the client's particular condition;⁴⁴ in many cases this search might be appropriate as the first step in the medical investigation. Some basic information can be found in standard medicolegal texts, but in addition counsel should consult one or more of the medical specialty treatises. For example, if a carcinoma has developed following exposure to a toxic substance, counsel should review oncology texts to determine if a causal relationship between the disease and the chemical has already been documented.

§ 33 Medical records

Obviously, the medical records of the client are vital to the initial investigation.⁴⁵ As soon as the client has signed an authorization for the release of medical information, copies of the records of all of the client's health care providers should be obtained and reviewed. The complete records should be scanned and highlighted for things like rapid weight loss or other signs of the pre-onset of the condition. The medical history and discharge summaries can present an ongoing picture of the progress of the disease. It is also essential to check the records for the entire medical history of the client. The records should also be scanned for entries indicating similar symptoms that might represent a continuing problem or a preexisting condition.

§ 34 Workers' compensation claim

If the client was exposed to a hazardous chemical or toxic substance in the workplace, there will normally be an underlying workers' compensation claim pending. In fact, the client's first approach to counsel may have been for representation in the industrial accident proceedings. Where a client is pursuing a workers' compensation case as well as a third-party liability claim, much of the medical information and much of the

⁴³Am. Jur. 2d, Workmen's Compensation § 57.

⁴⁴See § 109.

⁴⁵Discovery and Evaluation of Medical Records, 15 Am. Jur. Trials 373.

investigative material needed by counsel initially may be available from the employer's insurer.⁴⁶ The insurer's cooperation is generally assured, particularly in those states where the insurer is entitled to recoup compensation benefits paid to an injured worker from a negligent third-party defendant.⁴⁷

§ 35 Medical Report

Where there has been a claim for workers' compensation, counsel who handled or is handling that claim will have had plaintiff evaluated medically by a medical examiner appointed to examine plaintiff in the workers' compensation proceeding. Compensation counsel should be asked to provide present counsel with a copy of the written medical report of the medical examiner. The findings and conclusions of such expert concerning the causal relationship between the client's medical condition and the latter's exposure to the toxic fumes can play a significant role in the preparation of the proof necessary to win the case.

MEDICAL REPORT

HISTORY

[Plaintiff] is a 55-year-old white male carpenter who was well and in good health working at *[construction site]* when on *[date of accident]* painters began painting the area in which he was working, approximately 50 feet underground. He was exposed to and overcome by lacquer fumes. He had previously been in good health and had essentially no pulmonary disease. He was once told of asthma as a child and had an episode of bronchitis and pneumonia many years ago, but specifically, and in contrast to that recorded in the Industrial Commission chart, he has had no history of emphysema or other similar problems. He immediately went to *[family physician]*, his usual doctor who noticed chest tightness, wheezing, and toxic effects of the paint lacquer containing methylene chloride, methyl isobutyl ketone, and methyl ethyl ketone. He then was referred to *[pulmonary specialist]*, who noted that definite bronchitis secondary to this irritation was present. He took a variety of drugs including prednisone and bronchodilators for a period of time and now is taking only Brethine. He notes no drug aller-

⁴⁶For examples of the material that may be available in a typical case, see §§ 6-9.

⁴⁷Am. Jur. 2d, Workmen's Compensation §§ 429-432.

gies and admits to smoking less than one pack a day of cigarettes for less than 20 years. He has not smoked for more than a year. He has not had cough, sputum production, or wheezing. He notes that he is not the same man that he used to be and has exertional shortness of breath walking a block or climbing a flight of stairs. Review of systems reveals a history of walking pneumonia many years ago. He thinks he might have some sort of heart trouble related to this industrial exposure, but this has never been documented. Previous surgery includes a cholecystectomy and a bowel resection and is of no clinical significance. He chews tobacco at this time and drinks no alcohol. There is no paroxysmal nocturnal dyspnea, orthopnea, clubbing, cyanosis, or edema.

COMPLAINTS

“I have marked exertional shortness of breath.” “I cannot do my usual work.” “I can do only sedentary work.” “I can never work as a carpenter.” “I am despondent about this.”

EXAMINATION: *[omitted]*.

DISCUSSION:

This gentleman who smoked little or no cigarettes, had no family history of pulmonary disease and had transient asthma (as a child), was essentially in good health until he was overcome by lacquer fumes. The direct toxins are as noted above. Review of *Gleason's Textbook of Pulmonary Disease* indicates that these toxins have a direct effect on the mucous membranes and, in my judgment, caused an acute chemical bronchitis and bronchiolitis. Indeed, *[family physician's]* description fits this and *[pulmonary specialist's]* appropriate treatment seems reasonable for this. This has very much resolved; however, I believe that there is a degree of pulmonary fibrosis which persists. This cannot be explained on the cigarette smoking or his “asthma” which has been commented on in the past. Indeed, *[pulmonary specialist]* has commented as recently as three months ago as to the recurrent tracheobronchitis related to this toxin. The patient has marked decreased functional reserve and cannot do his previous work. He can do work and is, indeed, willing to work, but does not wish to be tired out. He was put through minimal exercise walking approximately one-half block in the office today and had no symptomatology. I believe this individual had an acute episode with some chronic residuals that I will discuss below. The

direct effect of the three aforementioned chemicals is noted as above.

OPINION:

Based on review of the entire Industrial Commission chart, I believe the patient suffered a pulmonary disease or disorder due to or related to the industrial accident on *[date]*. I believe the disorder to be originally acute tracheobronchitis and acute bronchiolitis and bronchitis. This was manifested by wheezing, rhonci, and rales. There was a great deal of improvement, however, based on the clinical history and picture today, as well as minimal recurrent residual tracheobronchitis. Indeed, the patient must continue to take medications. Based on my review, I believe that this individual suffers the aforementioned disorders related to his industrial exposure and is permanently and partially disabled approximately 35 percent of to total man.

B. USING MEDICAL CONSULTANTS

§ 36 In general

Proof that the negligent exposure caused a particular condition, such as cancer, consists of three steps: (1) that the client has contracted a neurological, pulmonary, cardiac, oncological or other condition; (2) that the chemical involved is capable of producing the client's pathology; and (3) that the chemical in fact caused the condition. Expert testimony is required for all three steps, and it may require as many as three separate experts, although in most instances two experts will suffice.⁴⁸

§ 37 Treating physician

The treating physician can be helpful to counsel in cases involving injury as the result of exposure to a toxic substance.⁴⁹ Although a medical specialist should be retained to examine

⁴⁸Locating Medical Experts, 2 Am. Jur. Trials 357; Use of Medical Consultants, 4 Am. Jur. Trials 253.

McElveen, "The Use of Experts in Toxic Litigation" G. Nothstein, ed., Toxic Torts: Litigation of Hazardous Substance Cases §§ 18.01-18.11 (Shephard's/McGraw Hill 1984).

⁴⁹A doctor is an expert on health and in this capacity is competent to draw conclusions concerning a party's physical condition. Shirley v Drackett Products Co. (1970) 26 Mich App 644, 182 NW2d 726.

the client and testify to his condition,⁵⁰ use of the treating physician adds a good deal of weight to the specialist's testimony. The treating physician's testimony will be useful in illustrating the groundwork upon which the specialist bases an opinion on causation. The treating physician is also a fact witness to the client's gradual deterioration.

The drawbacks to using a treating physician as a causation expert are manifest, however. Many treating physicians will not be sufficiently current on the literature and recent research as the case may require. As a result, the treating physician may not be a good witness to establish proximate causation. If the treating physician is qualified and willing to make the causal connection, however, the physician's testimony should be used on that point. The treating physician was closest to the client during the development of the illness, and this proximity may carry a great deal of weight with the jury.⁵¹

§ 38 Medical specialist

Even where the treating physician is willing to causally connect the client's condition with the exposure, the use of a second expert, preferably a medical specialist, is advisable. Ideally, an attorney should select an expert familiar with toxicology and pharmacology who can explain for the jury how the chemical produces the client's condition. Explaining to a jury the pathology of the client's condition helps diffuse some of the mystery which may surround it. The expert should be well versed in the scientific literature, in studies concerning the chemical, and in the type of illness involved. Generally, this task falls to a toxicologist,⁵² but a pharmacological expert may also be effective to establish the causal relationship between the client's condition and the chemical the client was exposed to.

Where a cancer has developed following the client's exposure, the final expert should be an expert on tumors and cancers, or

Imbus, Buncher, Dyson, Thomas & Nothstein, "Health Professionals as Experts" in G. Nothstein, ed., *Toxic Torts: Litigation of Hazardous Substance Cases* §§ 19.01–19.27 (Shephard's/McGraw Hill 1984).

⁵⁰See § 38.

⁵¹See, for example, *Shirley v Drackett Products Co.* (1970) 26 Mich App 644, 182 NW2d 726, where the testimony of the plaintiff's physician on causation was sufficient to warrant submitting plaintiff's case to the jury in an action against the manufacturer of a domestic cleanser that released chlorine and hydrogen chlorine gas when used.

⁵²Qualification of Toxicologist, 12 Am. Jur. Proof of Facts 629.

in other words an oncologist.⁵³ Such a specialist should be able to give the jury a better understanding of cancer and reinforce the testimony of the other experts.

§ 39 —Preparing the expert

Once the expert has been selected, he or she should be given enough facts to be able to form and justify a professional opinion. Thus, the expert should be made fully aware of the client's medical history, including family history and record of any previous exposures. This means, of course, that all pertinent medical records must be provided to the expert, and that the expert should be given a detailed history of the client's exposure to the hazardous chemical or toxic substance, including the length and intensity of the exposure. Also, whenever possible, the expert should be given the opportunity to examine the client. If counsel has discovered important scientific or medical studies during the initial medical investigation, the expert should be given access to them for comment and analysis.

In a cancer causation situation, for example, the key issue is whether a causal link between the exposure and the condition may be made with the requisite certainty.⁵⁴ Although no court will force the expert to testify to a moral certainty, a trial judge will require the expert to testify to a sufficient certainty so that the jury is not forced to speculate. However, there is some division on what is sufficient certainty. Some courts hold that the testimony must show that the chemical was probably more than not a cause of the cancer. This means that there must be "more than 50 percent" or "within a reasonable degree of medical probability."⁵⁵ The expert should be fully informed of these requirements well in advance of his court appearance in order to make him comfortable with his opinion at the crucial junction of the case.⁵⁶

The expert should be instructed well in advance of testifying

⁵³For a description of oncology as a medical specialty, see Am. Jur. Proof of Facts Fact Book p 639 § I:239.

⁵⁴See, generally, Royal, *The Defense of Medical Causation*, 23 *Trial* 40 (Oct 1987).

⁵⁵On the causation issue in toxic tort litigation generally, see Farber, *Toxic Causation*, 71 *Minn L Rev* 1219 (1987); Note, *Proving Causation in Toxic Tort Litigation*, 11 *Hofstra L Rev* 1299 (1983).

⁵⁶For a further discussion of the issue of causation in the context of expert witness testimony, see §§ 97–100.

of the difference between “a” and “the.” As used in our language “a” and “the” are articles that occasionally are used interchangeably. They have specific and separate meanings, however. “The” when used before a noun such as “cause” is a definite article and has a specifying or particularizing effect. The word “a” is an indefinite article and applies to any one of a class or group. Thus, where “the” admits of no other, “a” refers to one of many. In the world of cause and effect, the difference may be great. Many variables go into the onset of many pathologies that result from toxic exposures, and in many cases one or more other factors may be implicated causally in the client’s condition. Generally, however, it is only necessary that the exposure be “a” cause of the client’s condition, or that the exposure was a substantial factor in bringing it about.⁵⁷

§ 40 — —Preparation Checklist

Counsel will find it helpful to draw up a short checklist of the major matters that should be covered when preparing the expert to testify. The following is an example of such checklist:

- Client’s preexposure medical history
- Facts of the exposure
- Structure of chemical involved
- Timing and intensity of exposure
- Number and frequency of exposures
- Client’s medical history
- Pathology of the client’s condition
- Pertinent medical records
- Pertinent literature on the chemical
- Reasonable degree of medical probability
 - More than 50 percent
 - “A” cause rather than “the” cause

C. DETERMINING THE FACTS

§ 41 In general

The factual investigation of a toxic exposure case requires consideration of matters in at least two stages. The first stage

⁵⁷See the cases collected in Admissibility of opinion evidence as to cause of death, disease, or injury, 66 A.L.R. 2d 1082.

calls for an investigation of the site where the exposure occurred.⁵⁸ The second stage consists of interviews with appropriate witnesses.⁵⁹ Both stages are aimed at confirming the fact of and nature of the client's exposure as well as discovering the facts that will enable counsel to prove liability.

Cases

Plaintiffs in toxic tort litigation could not discover information considered by grand jury during criminal investigation of same corporate defendant. Plaintiffs can not piggyback on grand jury's investigation but must instead show relevancy of information sought to their civil claims. *Cook v Rockwell Int'l Corp.* (1993, DC Colo) 147 FRD 237, class certif gr (DC Colo) 151 FRD 378.

§ 42 Site investigation

In the illustrative fact situation of the model trial,⁶⁰ the exposed worker was a carpenter at a major construction site. In such a case, the attorney should, if possible, personally inspect the place of exposure with a trained investigator. If counsel is unable to accompany the investigator, the latter should be thoroughly briefed before he or she visits the site.⁶¹ A safety engineer should also inspect the site when it is suspected that the general contractor or a subcontractor failed to take adequate precautions to protect workers in the area where the hazardous chemical or toxic substance was being used.⁶² The safety engineer will have the background and training to pinpoint safety violations, as for example, where there have been problems with lack of ventilation or protection for the workers. Extensive photographs should be taken of the scene by an investigator, photographer, and/or the attorney and the safety expert to insure that everything of evidentiary value has been retained.⁶³

Since construction sites are subject to rapid change, the client should accompany the expert and the attorney to the site to explain any alterations at the site and to make the safety expert more aware of the actual conditions at the time of the

⁵⁸See § 42.

⁵⁹See §§ 43, 44.

⁶⁰See §§ 3–8.

⁶¹On investigating the scene of the accident in public liability claims, see *Investigating Particular Civil Actions*, 2 Am. Jur. Trials 1 § 3.

⁶²For a list of industrial hygiene and toxicology experts, see § 108.

⁶³On professional photography, see *Investigating the Civil Case; General Principles*, 1 Am. Jur. Trials 357 § 22.

exposure. Obviously, if construction has been completed, the site may be totally changed or impossible to enter. In that situation, the safety expert should be given access to any percipient witness, including the client, in order to get a clear understanding of the situation as it existed at that time and the precautions that should have been taken.

§ 43 Finding fact witnesses

Counsel should make every effort to obtain the names and addresses of fact witnesses at the client's initial interview. This is the best time to learn about fact witnesses.⁶⁴ The client will know who was working with him and who may have been a witness to the exposure. If the client's memory is hazy, or if the client does not know who was working with him at the time of exposure, the attorney should consult the client's union. Union records can give the names of all those working on a particular job site at a particular time. Additionally, the union officials, especially stewards, may know the names of others who have suffered exposure from the same substance and are bringing similar claims. Interviews with these individuals often lead to the discovery of additional witnesses.⁶⁵

§ 44 Witness Interview Checklist

It is best to interview fact witnesses in a straightforward manner. Most such witnesses are the clients' coworkers and are likely to be sympathetic with the client's claim. Most of them will realize that if the dangerous condition is not recognized and dealt with it is very possible that they will meet the same fate some day. When interviewing such witnesses, counsel should make every effort to build rapport with them on behalf of the client, so as to receive their cooperation and help.⁶⁶

The questioning should be broad at the start, consisting of general questions about the way the site was run and about the client. Then counsel should have the witness narrate the facts of the exposure. After the narration, the attorney should ask specific questions of the witness, including whether or not the witness has suffered any ill effects from being exposed to

⁶⁴See § 25.

⁶⁵On interviewing witnesses and parties during the investigation, see *Investigating the Civil Case; General Principles*, 1 Am. Jur. Trials 357 §§ 11–14.

⁶⁶*Locating and Interviewing Witnesses*, 2 Am. Jur. Trials 229.

the same substance. The attorney should take copious notes, or use a tape recorder if the witness consents to such use, and, where possible, prepare a written statement for the witness to sign.⁶⁷

In interviewing a witness, counsel should try to:

- Establish rapport between counsel, witness, and client
- Determine whether witness knows client personally
- Obtain a description of accident site
- Find out all that the witness knows about the accidental exposure
- Discover the names or identity of other witnesses
- Determine the witness's reaction to the client's exposure