

### III. LEGAL BACKGROUND

#### A. THEORIES OF RECOVERY

##### § 9 In general

Where the plaintiff's exposure to a toxic substance or hazardous chemical occurs at a construction worksite, counsel's immediate concern should be to obtain workers' compensation benefits for the injured worker.<sup>29</sup> Once compensation has been settled, counsel for the worker must give consideration to the

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<sup>29</sup>For workers' compensation cases where benefits were awarded workers who suffered pulmonary injuries from the inhalation of toxic fumes at a worksite, see *Hemphill v Industrial Com. of Arizona* (1962) 91 Ariz 322, 372 P2d 327 (worker developed chronic bronchitis and other conditions as result of inhaling fumes from chemical spray); *Lumbermen's v Lynch* (Ga App 1940) 11 SE2d 699 (acute bronchial inflammation of lungs caused by inhal-

third-party liability aspects of the claim.<sup>30</sup> Within the context of the model trial case, a number of possible defendants and several possible theories present themselves. Generally, such a case presents the possibility of negligence claims against the owner of the premises and the general contractor, site manager, or supervising architect.<sup>31</sup> It also suggests the possibility of a product liability claim against the manufacturer and seller of the product containing the toxic substance or hazardous chemical.<sup>32</sup> These matters are treated in this subdivision of the article, along with the subject of the statute of limitations.<sup>33</sup> The liability of one subcontractor for an injury to an employee of another subcontractor, which does not involve the application of special rules of law within the context of the model trial case, is treated generally in the sections on jury instructions.<sup>34</sup>

#### Cases

Worker who allegedly developed cancer as result of exposure to 222 products in workplace could not recover on negligence, products liability, and other tort claims against 55 manufacturers, where complaint and discovery responses established that he was unable to identify which defendant or product caused or contributed to his injury. *Bockrath v. Al-*

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ing chlorine gas fumes while welding in underground tank); *Armour & Co. v Industrial Com.* (1937) 367 Ill 471, 11 NE2d 949 (engineer for meat packer overcome by exposure to fumes from broken ammonia pipe in refrigeration plant); *Ramsey v Bendix Aviation Corp.* (1946) 314 Mich 169, 22 NW2d 259 (worker developed bronchiectasis from inhaling chromic acid fumes); *Davies v Onyx Oil & Resin Co.* (1943) 24 NJ Misc 119, 46 A2d 806 (grain terminal building engineer developed chronic emphysema, bronchitis, and asthma from exposure to grain dust from wheat, oats, rye, barley, corn, and other grains); *Bednarek v International Milling Co.* (1951) 279 App Div 698, 108 NYS2d 316 (worker developed chronic bronchitis and asthma from flour and feed dust in employment). See also *CF&I Engineers, Inc. v Industrial Com.* (1974, Colo App) 520 P2d 1048 (worker developed chronic hepatitis from exposure to fumes from chemical spray containing trichloroethylene while working in large cylindrical tank).

<sup>30</sup>See, for example, *Alexander Pool Co. v Pevey* (1963) 247 Miss 389, 152 So 2d 451 (judgment for plaintiff affirmed in action against pool company for negligent installation of a chlorinator that broke during operation exposing plaintiff to toxic chlorine gas fumes resulting in chronic bronchitis with pulmonary fibrosis and secondary pulmonary emphysema); *Sheets v Agro-West, Inc.* (1983, App) 104 Idaho 880, 664 P2d 787 (comparative negligence of worker injured from inhalation of toxic fumes at worksite in third-party action).

<sup>31</sup>See §§ 10–13.

<sup>32</sup>See § 14.

<sup>33</sup>See § 15.

<sup>34</sup>See §§ 103–106.

drich Chemical Co., Inc., 64 Cal. App. 4th 1, 74 Cal. Rptr. 2d 774 (2d Dist. 1998), reh'g denied, (June 15, 1998).

Employee, who alleged that she was fired for complaining to employer that she and co-workers were exposed to toxic chemical without adequate protection and ventilation, failed to state cause of action for wrongful discharge in violation of public policy; although OSHA expressly protects from termination employee who files complaint with OSHA, public policy expressed therein does not go so far as to protect employee who disrupts orderly management of employer's business by merely complaining within workplace. Occupational Safety and Health Act of 1970, § 11(c), 29 U.S.C.A. § 660(c). *McLaughlin v. Gastrointestinal Specialists, Inc.*, 696 A.2d 173 (Pa. Super. Ct. 1997).

## § 9.5 Theories of employer liability

◆ **Note** See also: Workers' Compensation: Employer's Intentional Misconduct, 48 Am. Jur. Proof of Facts 2d 1, and Intentional Infliction of Emotional Distress by Employer, 45 Am. Jur. Proof of Facts 2d 249

### Cases

Plaintiffs' claims against renovators, alleging that they were exposed to asbestos while working for defendants on renovation project and seeking to impose liability under RICO, are dismissed, where plaintiffs alleged that their pay was kept artificially low because they did not receive hazard pay they would have demanded had they known of presence of asbestos, because claim for hazard pay is claim for emotional distress which, as claim for injury to person, does not provide standing under RICO. *Fried v SunGard Recovery Servs.* (1995, ED Pa) 900 F Supp 758, RICO Bus Disp Guide (CCH) ¶ 8941, 26 ELR 20500.

Personal-injury action by asbestos-removal worker against project manager and air-sampling professional for project was not barred by collateral estoppel based on earlier workers' compensation proceeding against employer in which arbitrator ruled that worker had failed to prove that his injuries were proximately caused by exposure to solvent fumes, where arbitrator's decision was appealed to circuit court and appeal was then dismissed pursuant to settlement between parties which did not address issue of causation, and thus there was no final judgment on merits. *Arnett v Environmental Science & Eng'g* (1995, 3d Dist) 275 Ill App 3d 938, 212 Ill Dec 467, 657 NE2d 668, mod, on reh (Nov 22, 1995).

Workers at airplane-manufacturing plant stated supportable claim for employer's intentional infliction of emotional distress, where employer required employees to perform work with chemical that employer knew would cause illness in employees, as other employees who had worked with chemical in experimental trials shortly before had suffered illness, and employer removed medical warnings from chemical containers and harassed employees seeking medical treatment for injuries resulting from their exposure to chemical. *Birklid v Boeing Co.* (1995) 127 Wash 2d 853, 904 P2d 278, 11 BNA IER Cas 97, remanded without op (CA9 Wash) 73 F3d 368.

## § 10 Liability of owner

Generally, the employer of an independent contractor is not liable for the negligent acts of the contractor. This general rule is so riddled with exceptions, however, that it has been said that the rule itself is now little more than a preamble to a catalog of its exceptions.<sup>35</sup> One exception to the general rule of nonliability is recognized when the employer retains an independent contractor to perform work which is inherently or intrinsically dangerous.<sup>36</sup> This liability is based on the theory that a person who engages a contractor to do work of an inherently dangerous character remains subject to an absolute, non-delegable duty to see that it is performed with a degree of care that is appropriate to the circumstances.<sup>37</sup> In other words, the employer of an independent contractor has a duty to see that all reasonable precautions are taken during the contract's performance, so that third persons may be effectively protected against injury.<sup>38</sup> What is inherently dangerous work is generally a question of fact for the jury.<sup>39</sup>

In some cases the liability is premised on a related but slightly different basis. Thus, one who employs an independent contractor to do work which the employer should recognize is likely to create during its progress a peculiar risk of harm to others unless special precautions are taken, is subject to liability for physical harm caused by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer had provided for such precautions in the contract or otherwise.<sup>40</sup> For liability to attach under this doctrine, the employer must only recognize that the work being performed by the independent contractor necessarily involves peculiar risks of harm unless special precautions are taken;

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<sup>35</sup>Van Arsdale v Hollinger (1968) 68 Cal 2d 245, 252, 66 Cal Rptr 20, 437 P2d 508.

<sup>36</sup>Am. Jur. 2d, Independent Contractors § 41.

<sup>37</sup>See Restatement (Second) of Torts § 427 (1965).

<sup>38</sup>See the cases collected in Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor, 34 A.L.R. 4th 914.

<sup>39</sup>Donovan v General Motors (1985, CA8 Mo) 762 F2d 701; Warren v McLouth Steel Corp. (1981) 111 Mich App 496, 314 NW2d 666.

<sup>40</sup>See Van Arsdale v Hollinger (1968) 68 Cal 2d 245, 66 Cal Rptr 20, 437 P2d 508; Woolen v Aerojet General Corp. (1962) 57 Cal 2d 407, 20 Cal Rptr 12, 369 P2d 708.

Restatement (Second) of Torts § 416 (1965).

additional proof that the employer knew or should have known that the independent contractor had not taken or planned to take such precautions is not required.<sup>41</sup>

There is a conflict of authority as to whether the doctrine imposing liability upon the employer of a contractor for negligence in the performance of inherently dangerous work, or work which involves a peculiar risk of injury in the absence of special precautions, extends to employees of the contractor to permit recovery by them from the employer for injuries sustained in the course of such work. Many cases have denied employer liability for an injury to the employee of a contractor,<sup>42</sup> with some courts distinguishing between “third persons” and employees of contractors,<sup>43</sup> and other courts holding that the employee of a contractor employed to perform inherently dangerous work assumes the risk of such employment.<sup>44</sup> Many other courts permit the employee’s recovery, however, particularly where the injury occurs in the course of construction work.<sup>45</sup>

This liability may not be entirely vicarious. It has been held that the liability attaches when the employer knows or should know that the contemplated project involves inherently dangerous work, or that it involves a peculiar risk of injury unless special precautions are taken, and neither the independent contractor nor the employer have exercised reasonable care to see that the requisite precautions were taken.<sup>46</sup> Nor is the liability total vis-a-vis the injured worker. In some states, the employer may offset against his or her liability to the plaintiff the value of workers’ compensation benefits paid or payable to

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<sup>41</sup>McDonald v Oakland (1967, 1st Dist) 255 Cal App 2d 816, 63 Cal Rptr 593.

<sup>42</sup>See cases collected in Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor, 34 A.L.R. 4th 914 §§ 5–7.

<sup>43</sup>See, for example, Morris v Soldotna (1976, Alaska) 553 P2d 474.

<sup>44</sup>See, for example, St. Julian v Owens-Illinois, Inc. (1978) 59 Ohio Misc 66, 11 Ohio Ops 3d 59, 394 NE2d 359.

<sup>45</sup>See cases collected in Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor, 34 A.L.R. 4th 914 §§ 3, 4[a].

<sup>46</sup>McDonald v Oakland (1967, 1st Dist) 255 Cal App 2d 816, 63 Cal Rptr 593.

the plaintiff by the negligent contractor (or its insurer) as the plaintiff's employer.<sup>47</sup>

### Cases

In action against smelter owner for injuries sustained by employee of independent contractor performing repair work when hot gasses and mud containing sulfuric acid and arsenic flew out when section of top of settling chamber was removed, trial court erred in granting summary judgment for smelter owner since even if smelter owner had warned injured employee's supervisors of all potential hazards known to smelter owner in performing repair work, including those involved with settling chamber, its warnings may have been insufficient in that particular danger that harmed employee may have been one of which smelter owner did not know but should have known, and in that warning alone is not always sufficient, and since issues of fact existed as to whether smelter owner had breached its duty to employee by handing over unsafe work place. *Martinez v Asarco, Inc.* (1990, CA9 Ariz) 918 F2d 1467, 90 CDOS 8477 (applying Ariz law).

## § 11 Liability of general contractor

A general contractor in control of the structure or premises upon which the work is being done is liable to an employee of another contractor rightfully using any portion of the worksite for negligence in failing to keep it in a safe condition for such use. This liability arises from the duty imposed by the common law upon one in possession of premises toward invitees, a duty of which cannot be delegated to an agent or subcontractor.<sup>48</sup>

The duty owed by a general contractor to an employee of a subcontractor is to exercise ordinary care to keep the premises in reasonably safe condition, and it is not limited to conditions actually known to be dangerous but which might be found so

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<sup>47</sup>See *Witt v Jackson* (1961) 57 Cal 2d 57, 17 Cal Rptr 369, 366 P2d 641. See also *Rodgers v Workers' Comp. Appeals Bd.* (1984) 36 Cal 3d 330, 204 Cal Rptr 403, 682 P2d 1068 (comparative fault principles applied).

<sup>48</sup>See *Gonzales v Robert Hiller Constr. Co.* (1960, 2d Dist) 179 Cal App 2d 522, 3 Cal Rptr 832; *Souza v Pratico* (1966, 1st Dist) 245 Cal App 2d 651, 54 Cal Rptr 159; *Grant v Joseph J. Duffy Co.* (1974, 1st Dist) 20 Ill App 3d 669, 314 NE2d 478; *Tillile v Konkle* (1956) 383 Pa 420, 119 A2d 209; *Fenimore v Donald M. Drake Constr. Co.* (1976) 87 Wash 2d 85, 549 P2d 483. But see *Allison Steel Mfg. Co. v Superior Court of County of Pima* (1974) 22 Ariz App 76, 523 P2d 803 (liability of prime contractor at worksite limited to negligently supervised activities and failure to keep joint working spaces reasonably safe).

General contractor's liability for injuries to employees of other contractors on the project, 20 A.L.R. 2d 868 § 3.

by the exercise of reasonable care.<sup>49</sup> The general contractor's duty to provide a safe place to work includes the duty to warn employees of danger and to avoid exposing them to dangerous conditions.<sup>50</sup> However, the general contractor may not be liable for failing to warn of a condition at the worksite that was an open, apparent, and obvious danger inherent in the performance of the work.<sup>51</sup>

If the general contractor lets out part of the work, the contractor is under a legal obligation to conduct the work that has been retained safely for the benefit of the workers of any subcontractor. This same responsibility applies to the premises in general so far as they are under the general contractor's supervision. In the usual situation, even though all the work is committed to various subcontractors, the general contractor or its superintendent undertakes to correlate the various jobs, to see that each branch of the work is properly done, and to supervise the project as a whole. As the premises are to be cooperatively used by all the workmen employed, it is part of this general supervision to see that they are safe for that use.<sup>52</sup>

In an action between the general contractor as defendant and a plaintiff, who was an employee of a subcontractor, where the negligence of the subcontractor is the primary cause of the injury, recovery by the plaintiff must rest either on some evidence that the defendant so directed and controlled the subcontractor as to be liable as a principal or employer, or evidence that the defendant remained in such control of the premises in respect of the cause of the injury as to have been charged with the duty of inspection for the safety of the plaintiff as an invited person on the worksite.<sup>53</sup>

Where the plaintiff has been injured as a result of the method

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<sup>49</sup>Delgado v W. C. Garcia & Associates (1963, 1st Dist) 212 Cal App 2d 5, 27 Cal Rptr 613.

<sup>50</sup>Kuntz v Del E. Webb Constr. Co. (1961) 57 Cal 2d 100, 18 Cal Rptr 527, 368 P2d 127; Revels v Southern California Edison Co. (1952) 113 Cal App 2d 673, 248 P2d 986.

<sup>51</sup>Ferrante v Caye Constr. Co. (1963, 2d Dept) 19 App Div 2d 553, 241 NYS2d 28, affd Ferrante v Caye Constr. Co. (1964) 15 NY2d 584, 255 NYS2d 98, 203 NE2d 492.

<sup>52</sup>See Morgan v Stubblefield (1972) 6 Cal 3d 606, 100 Cal Rptr 1, 493 P2d 465; Katapodis v Koppers Co. (1985, CA7 Ind) 770 F2d 655 (applying Indiana law); Hooey v Airport Const. Co. (1930) 253 NY 486, 171 NE 752; Caspersen v La Sala Bros., Inc. (1930) 253 NY 491, 171 NE 754.

<sup>53</sup>General contractor's liability for injuries to employees of other contractors on the project, 20 A.L.R. 2d 868 § 3.

of operation, the particular negligence relied on is usually that of faulty superintendence. The negligence may lie (1) in the adoption of a dangerous plan of work,<sup>54</sup> (2) in the failure properly to supervise the order or coordination of the work,<sup>55</sup> or (3) in the negligent exercise of retained control.<sup>56</sup>

#### Cases

Duties owed by general contractor to subcontractor's employees were analogous to those owed by owner of premises to business invitees, and include duty to exercise ordinary care, duty to warn of unduly hazardous conditions that might affect welfare of subcontractor's employees, and duty to perform any duties undertaken by general contractor in non-negligent manner; summary judgment in favor of general contractor for burn injuries suffered by subcontractor hired to remove calcium chloride compound, that witness testified was hazardous chemical that could cause serious skin injuries, from tank was reversed, where general contractor advised subcontractor of problems associated with heat and humidity inside tank and provided water and Gatorade to subcontractor's employees, where general contractor did not maintain equipment on-site needed to extricate employee from tank who passed out from heat exhaustion, and where burns could have been prevented if employee's clothing had been removed and his skin washed with water. *Franklin v Osca, Inc.* (1992) 308 Ark 409, 825 SW2d 812.

"Ultrahazardous activities" conducted by an independent contractor are those that are so dangerous that even the exercise of reasonable care cannot eliminate the risk of serious harm; in such cases, the employer is strictly liable for any harm that proximately results. *Kinsey v. Spann*, 533 S.E.2d 487 (N.C. Ct. App. 2000); *West's Key Number Digest, Master and Servant* ¶319.

### § 12 Right to control work of independent contractor

If the employer has retained an element of control over the work, the employer should be responsible for the harmful consequences of its performance as a concomitant of the control retained.<sup>57</sup> A similar duty is imposed upon the independent

<sup>54</sup>See *Holdren v Morris* (1947) 190 Misc 673, 74 NYS2d 807.

<sup>55</sup>See *Thill v Modern Erecting Co.* (1965) 272 Minn 217, 136 NW2d 677; *Pelowski v L. R. Watkins Medical Co.* (1913) 120 Minn 118, 139 NW 618.

<sup>56</sup>See § 13.

<sup>57</sup>*Morris v Soldotna* (1976, Alaska) 553 P2d 474. See also *Litton v Travelers Ins. Co.* (1950, DC La) 88 F Supp 76 (judgment for plumber employed as steamfitter by general contractor for acute and chronic bronchitis suffered as a result of exposure to chlorine gas on the owner's premises which escaped from pipes under the owner's control—*res ipsa loquitur* applied against the owner).

contractor who lets out part of the work to subcontractors.<sup>58</sup> This is the rule of the *Restatement*, which provides: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.”<sup>59</sup>

It is not enough that the employer has merely a general right to order the work stopped, to inspect its progress, to make recommendations, to prescribe alternations and deviations, or even to even conduct safety meetings and prescribe safety requirements. There must be such a retention of the right of supervision that the contractor is not entirely free to do the work in any way deemed appropriate; and it is a question of fact for the jury to determine whether an employer of an independent contractor retains sufficient control so as to make the employer liable.<sup>60</sup>

### § 13 Statutory duties of owners and contractors

The principles underlying the liabilities of owners of premises under construction and independent contractors, such as general or prime contractors, site managers, and supervising architects, have been embodied in statutes in some states, the specific terms of which should be referred to in given cases.<sup>61</sup> For example, Alaska’s so-called “Safe Place to Work Act” provides that “(a) an employer shall (1) furnish employment which is reasonably safe; (2) furnish and use safety devices and safeguards; (3) adopt and use methods and processes reasonably adequate to render the employment or place of employment reasonably safe; and (4) do every other thing reasonably

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<sup>58</sup>See *Fluor Corp. v Sykes* (1966) 3 Ariz App 211, 413 P2d 270; *Summers v Crown Constr. Co.* (1972, CA4 W Va) 453 F2d 998.

<sup>59</sup>*Restatement (Second) of Torts* § 414 (1965).

<sup>60</sup>*Morris v Soldotna* (1976, Alaska) 553 P2d 474 (fact that owner and general contractor maintained supervisory agents at worksite not sufficient to make them liable for negligence of subcontractor where there was no evidence that they actively controlled any aspect of the subcontractor’s work).

<sup>61</sup>See, for example, *Morris v Soldotna* (1976, Alaska) 553 P2d 474 (“Safe Place to Work Act”); *Zucchelli v City Constr. Co.* (1958) 4 NY2d 52, 172 NYS2d 139, 149 NE2d 72 (statutory rule recognized).

necessary to protect the life, health, safety, and welfare of employees.”<sup>62</sup>

In addition to safe-place-to-work statutes, most states have administrative regulations that provide specific requirements for worker safety, particularly as it involves the inhalation of actual or potentially toxic gases, fumes, or particulate matter. To borrow another example from Alaska, that state’s general safety code provides that where any toxic materials are used or stored warning signs must be posted with a white background and red letters not less than three inches high.<sup>63</sup> Further, it requires that respirators or masks are to be furnished to employees who are exposed to hazardous dusts, gases, fumes or mists, or to atmosphere deficient in oxygen.<sup>64</sup> Finally, the Code provides that whenever workers are engaged in brush or spray coating operations in any confined space in which there is no natural ventilation, they shall be provided with forced ventilation or with adequate respiratory protective devices that will protect them.<sup>65</sup>

Whether these statutes and administrative orders create private rights of actions for their breaches depends upon the wording and interpretation of the regulations. However, even where such safety regulation may not provide the basis of a third-party suit by an injured worker, it may further define the common-law duty of the owner of the premises and of the general contractor which may then lead to an inference of negligence or a finding of negligence per se upon proof of a violation.<sup>66</sup>

#### Cases

Summary judgment was granted to United States and independent contractor engaged by US to maintain residences for naval personnel, in toxic-tort action arising from exposure of child to roofing sealant installed by contractor on foundation of residence. Plaintiffs claimed that child, while playing, got into puddle of sealant, and as result, was exposed to tri-ortho-cresyl phosphate (TOCP) that resulted in progressive neurological impairment. US delegated entire day-to-day maintenance operations to contractor and, under discretionary-function exemption to Federal Tort Claims Act, could not be held liable. Further, expert medical evi-

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<sup>62</sup>Alaska Stat § 18.60.075.

<sup>63</sup>Alaska Gen Safety Code § 300.20(4).

<sup>64</sup>Id., § 304-03(b).

<sup>65</sup>Id., § 324-05.

<sup>66</sup>*Morris v Soldotna* (1976, Alaska) 553 P2d 474. See also *Bachner v Rich* (1976, Alaska) 554 P2d 430 (statutory duty of supplier of scaffold at construction site).

dence introduced by plaintiffs failed to prove causal relationship between child's exposure and neurological impairment. Treating physician had no actual knowledge that roof coating contained TOCP; manufacturer of sealant had never used TOCP as ingredient; and contractor denied adding anything to coating. Second medical expert was research scientist who did not work on humans and merely opined that blood test on child, that had never been performed on humans, was consistent with degenerative neurological process such as that caused by exposure to TOCP. Third witness, chemist who claimed expertise in toxicology, but who was not physician, performed tests on shirt worn by child's mother for traces of TOCP, but results were inconclusive, and methodology used was not sufficiently reliable. Neurologist who worked in field of insecticides and pesticides theorized that child was asphyxiated by sealant. However, this was inconsistent with evidence that there was no sealant on child's face except for what child put on his face by touching it with his hands. Finally, neuropsychologist attempted to link exposure to sealant with Parkinsons'-like symptoms, but child suffered no such symptoms. *Goewey v United States* (1995, DC SC) 886 F Supp 1268.

#### § 14 Liability of paint manufacturer

The maker and supplier of products for sale in the marketplace containing toxic substances or hazardous chemicals owes a duty to those into whose hands the articles may come to convey a suitable notice of the danger so that the proper precautions may be taken to prevent wrongful use and a consequent injury.<sup>67</sup> If the product is hazardous, or if it may become hazardous when used in certain ways, there must be warnings of the dangers; and where warnings are given, they must be adequate to inform users of the hazard.<sup>68</sup> These duties not only extend to the immediate purchaser but to third persons who may be endangered by the product's use.<sup>69</sup> Generally, a breach of any of these duties by the manufacturer or

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<sup>67</sup>On the negligence liability of sellers of products containing hazardous chemicals or toxic substances, see generally Restatement (Second) of Torts §§ 388, 394 (1965).

Buser, Failure to Warn in Toxic-Tort Cases, 23 Trial 21 (Oct 1987).

<sup>68</sup>See *Pell v Victor J. Andrew High School* (1984, 1st Dist) 123 Ill App 3d 423, 78 Ill Dec 739, 462 NE2d 858, CCH Prod Liab Rep ¶ 10070, 50 ALR4th 1207; *Butler v PPG Industries, Inc.* (1985) 201 NJ Super 558, 493 A2d 619, CCH Prod Liab Rep ¶ 10575.

<sup>69</sup>See Restatement (Second) of Torts § 388, comment n (1965). See also *Jackson v Coast Paint & Lacquer Co.* (1974, CA9 Mont) 499 F2d 809 (applying Montana law—manufacturer's duty to warn extended to an employee of a company hired to coat the inside of railroad tank cars and was not discharged by warning to plaintiff's employer). But see *Prather v Upjohn Co.* (1986, CA11 Fla) 797 F2d 923, CCH Prod Liab Rep ¶ 11107 (manufacturer not liable to uninformed worker where adequate warning given to employer and product sold only to knowledgeable industrial users).

seller of a product containing a hazardous chemical or toxic substance would give rise to a cause of action for negligence.<sup>70</sup>

In most cases liability will be sought solely or alternatively under the Restatement rule of strict liability in tort for product liability, which has been adopted in most states. The Restatement provides that one who sells a product in a defective condition, unreasonably dangerous to the user or consumer, is subject to liability for physical harm and property damage caused to the ultimate consumer if (1) the seller is engaged in the business of selling such a product, and (2) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.<sup>71</sup> The rule applies although the seller has exercised all possible care in the preparation and sale of the product and the user or consumer has not bought the product from or entered into a contractual relation with the seller.<sup>72</sup> Where the seller has reason to anticipate that danger may result from a particular use, the seller may be required to give adequate warning of the danger; a product sold without such warning is in a defective condition.<sup>73</sup> Where warning is given, however, the seller may reasonably assume that it will be read and heeded; a product

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<sup>70</sup>See, for example, *Shirley v Drackett Products Co.* (1970) 26 Mich App 644, 182 NW2d 726 (housewife developed acute bronchitis and bronchial asthma from inhaling toxic fumes of toilet bowl cleanser).

Generally, see the cases collected in *Liability of manufacturer or seller for injury caused by domestic or industrial soaps, detergents, cleansers, polishes, and the like*, 79 A.L.R. 2d 482 §§ 1–11; *Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products*, 78 A.L.R. 2d 696 §§ 3–7, 15.

Pollan, "Theories of Liability" in G. Nothstein, ed., *Toxic Torts: Litigation of Hazardous Substance Cases* §§ 11.01–11.25 (Shephard's/McGraw Hill 1984).

<sup>71</sup>Restatement (Second) of Torts § 402A(1) (1965).

Liability of manufacturer or seller for injury caused by domestic or industrial soaps, detergents, cleansers, polishes, and the like, 79 A.L.R. 2d 482 § 2.5 (strict liability); Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 A.L.R. 2d 696 § 10.5 (strict liability). See, generally, *Products liability: product as unreasonably dangerous or unsafe under doctrine of strict liability in tort*, 54 A.L.R. 3d 352.

<sup>72</sup>Restatement (Second) of Torts § 402A(2) (1965).

<sup>73</sup>Restatement (Second) of Torts § 402A, comment h (1965).

Failure to warn as basis of liability under doctrine of strict liability in tort, 53 A.L.R. 3d 239.

bearing such a warning, which is safe for use if it is followed, is not in defective condition nor is it unreasonably dangerous.<sup>74</sup>

#### Cases

Negligence and products liability action was properly dismissed as against suppliers of component chemicals incorporated into allegedly defective polyurethane foam insulation in plaintiffs' building where complaint did not allege that component chemicals were unreasonably dangerous at time they left hands of defendants, and allegations of defectiveness were directed exclusively to insulation itself; absent specific allegations either that components were defective or that manufacturers knew that their products would be combined to form dangerous or defective product, defectiveness of finished product cannot be imputed to manufacturers of components. *Gifaldi v Dumont Co.* (1991, 4th Dept) 172 AD2d 1025, 569 NYS2d 284.

### § 14.5 Warning Requirements; Learned Intermediary Defense

#### Cases

Pursuant to learned intermediary defense, manufacturer of toxic chemical processed at refinery discharged its duty to refinery workers to warn about hazards of its product by providing information to independent intermediary, the refinery's lessee and one of lessee's owners. *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999); West's Key Number Digest, Products Liability ¶43.

Jury verdict was affirmed in negligence and strict-liability action brought by bricklayer foreman and members of his family against manufacturer of Sure Klean 600 hydrochloric-acid-based mortar cleaner. When bricklayer dropped drum of mortar cleaner onto pallet, bung closure popped out of drum and mortar cleaner splashed into his right eye. As result, bricklayer eventually lost sight in eye. Bricklayer claimed that defendants were liable for failure to warn of precautions to be taken in moving drum, in using NPT-threaded closure rather than buttress-threaded closure, and in packaging mortar cleaner in awkward (and thus dangerous) container. Trial court erred in submitting jury instructions regarding defendant's failure to warn under both negligence and strict-liability theories. With respect to failure-to-warn claims, any distinction between strict-liability and negligence principles is illusory; regardless of which theory is followed, plaintiff must prove that defendant knew or should have known of potential risks associated with use of its product, but failed to provide adequate directions or warnings to users. While issue should have been submitted under negligence theory only, error was harmless and did not justify reversal of verdict. Sufficient evidence existed to support submission of negligent failure-to-warn instruction to jury where bricklayer did not know how hand-tightened lid came off drum, although he had occasionally had problems with "cross-threading" closures when screwing them into containers. In addition, trial court did not err in refusing to give state-of-the-art instruc-

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<sup>74</sup>Restatement (Second) of Torts § 402A, comment j (1965).

tion on plaintiff's negligence claim. Under Iowa law, product's conformance to state-of-the-art is complete defense to strict-liability claim, but is not absolute defense to negligence claim. Thus, negligence defendant is not entitled to jury instruction based on state-of-the-art, notwithstanding that evidence of state-of-the-art may be admitted in negligence cases to rebut plaintiff's proof that defendant breached duty to exercise degree of care reasonable manufacturer would have used in light of generally recognized and prevailing scientific knowledge. Trial court did not err in refusing to submit instruction on doctrine of avoidable consequences, where bricklayer's failure to check bung closure and to wear goggles and protective gear occurred before, rather than after, his injury and thus before cleaner manufacturer committed any legal wrong against bricklayer. Jury verdicts finding no liability on part of manufacturers of drum and bung closure and allocating 100-percent fault to mortar cleaner manufacturer were not inconsistent where there was no evidence that drum or bung closure was defective in and of itself, and there was evidence that dangerous product was created when mortar cleaner manufacturer used drum and bung closure to contain 15 gallons of hydrochloric-acid-based mortar cleaner. *Olson v Prosoco, Inc.* (1994, Iowa) 522 NW2d 284.

In negligence, strict liability, and breach of warranty action brought by former school teacher who alleged injury as result of exposure to fumes and spray of polyurethane roofing materials being used to reroof junior high school at which she was employed, trial court erred in granting summary judgment in favor of defendant manufacturers of polyurethane foam and polyurethane coating based on learned intermediary defense. Both defendants asserted that they had no duty to warn roofing contractor or plaintiff about any possible hazards associated with their products because roofing contractor was experienced, knowledgeable applicator of these products and therefore chargeable with knowledge of properties of products. However, learned intermediary defense could not relieve manufacturers of their duty to warn unless their reliance on intermediary was reasonable, and it could not be determined from record whether it was reasonable for defendant manufacturers to conclude that contractor was knowledgeable about hazards because there was testimony that contractor had no knowledge of hazards associated with roofing materials involved and facts were in dispute as to whether either defendant sent contractor any information concerning chemical properties of products and hazards associated with them. *Swan v I.P., Inc.* (1993, Miss) 613 So 2d 846, CCH Prod Liab Rep ¶ 13451.

## § 15 Application of statute of limitations

In order to avoid possible running of the statute of limitations and resulting malpractice claims, counsel must at all times keep an eye on the statute of limitations,<sup>75</sup> even to the point of filing a lawsuit before it is fully ready to be litigated.

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<sup>75</sup>Solving Statutes of Limitation Problems, 4 Am. Jur. Trials 441.

Statute of limitations under Federal Tort Claims Act (28 USCA sec. 2401(b)), 29 A.L.R. Fed. 482.

This is especially true in third party liability cases where an industrial accident or workers' compensation claim may be pending, which may or may not toll the running of the statute of limitations on the third party case according to local law.<sup>76</sup> In case of any doubt counsel should file the action as soon as practicable. A lawsuit may be dismissed if investigation proves that it is unwarranted, but it may not be brought after the statute has run.

Generally, the period of time limited for the bringing of a tort action, which varies from state to state, begins to run from the date of the injury.<sup>77</sup> In the model trial case, the plaintiff was immediately overcome on exposure to the toxic fumes created by the spraying of the painting contractor's crew, thus starting the running of the applicable limitations period. In other toxic exposure cases, however, the injury may occur as the accumulated result of multiple exposures over a long period of time or because the illness or condition caused by the exposure has a long latency period.<sup>78</sup> In the latter situations the courts are not in agreement as to when the statute of limitations begins to run.<sup>79</sup> The older cases tended to hold that the statute of limitations begins to run on the date of the defendant's negligent act.<sup>80</sup> To mitigate the harshness of the application of this rule in many cases, other courts held that the statute began to run from the date of the plaintiff's "injury," which may occur after the date of the defendant's negligence; but that rule has also been variously interpreted to mean from the first indication of symptoms to the time when disability occurred.<sup>81</sup> Some courts now hold that the statute begins to run on the date of the plaintiff's exposure to the toxic substance or hazardous chemical or, alternatively, on the date of the termination of the plaintiff's employment in the toxic

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<sup>76</sup>Derivative causes of action; third party defendant actions, see Solving Statute of Limitations Problems, 4 Am. Jur. Trials 441 § 7.

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident, 71 A.L.R. 3d 849.

<sup>77</sup>Am. Jur. 2d, Limitations of Actions § 135.

<sup>78</sup>Am. Jur. 2d, Limitations of Actions § 137.

<sup>79</sup>See cases collected in When statute of limitations begins to run as to cause of action for development of latent industrial or occupational disease, 1 A.L.R. 4th 117.

<sup>80</sup>1 A.L.R. 4th 117 § 3.

<sup>81</sup>1 A.L.R. 4th 117 § 4.5.

environment.<sup>82</sup> Many modern cases have borrowed the “delayed discovery rule” from medical malpractice cases,<sup>83</sup> holding that the limitations period runs from date of discovery of the injury, which may mean from the first diagnosis of the disease<sup>84</sup> or from the time both the injury and its causal relationship to the exposure are known.<sup>85</sup>

### Cases

Worker’s personal injury claim against manufacturer of toxic substances, seeking damages for respiratory problems he experienced as result of workplace exposure to the substances, accrued at time worker had made repeated visits to hospital and health center for treatment for his respiratory symptoms, filed workers’ compensation claim based on such symptoms and submitted injury investigation reports to his employer; such actions, together with worker’s statements to attending nurse and documentary evidence of his diagnoses, demonstrated that worker had discovered injury underlying his claim. *McKinney’s CPLR 214-c. Whitney v. Quaker Chemical Corp.*, 90 N.Y.2d 845, 660 N.Y.S.2d 862, 683 N.E.2d 768 (1997).

Accrual of personal injury claim under CPLR § 214 would be measured from date of injury (installation of allegedly toxic foam insulation in plaintiffs’ house), not date of last exposure (which included continuing exposure for one plaintiff who continued to reside in house), since, at date of injury, all elements of tort could be truthfully alleged and plaintiffs had colorable claim against defendants. *Snyder v Town Insulation, Inc.* (1993) 81 NY2d 429, 599 NYS2d 515, 615 NE2d 999.

In cases involving latent occupational diseases, discovery of the injury should not be equated with a plaintiff’s discovery of the precise name of the disease that is causing his symptoms or that the disease is permanent; the seriousness of a personal injury need not be fully apparent or even fully developed in order to commence the statute of limitations. *Childs v. Haussecker*, 974 S.W.2d 31 (Tex. 1998), reh’g of cause overruled, (Sept. 24, 1998).

## B. DAMAGES

### § 16 In general

Injuries suffered as a result of toxic exposure often cause chronic neurologic, cardiac, and pulmonary pathology that

<sup>82</sup>1 A.L.R. 4th 117 § 4.

<sup>83</sup>Am. Jur. 2d, Physicians, Surgeons, and Other Healers § 321.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R. 4th 972.

<sup>84</sup>1 A.L.R. 4th 117 § 5.

<sup>85</sup>1 A.L.R. 4th 117 § 7.

sometimes results in the death of the victim.<sup>86</sup> As a result, claims for damages in toxic exposure cases frequently cross over from personal injury damages<sup>87</sup> to damages for wrongful death.<sup>88</sup> The following sections<sup>89</sup> briefly review items of damages that may be claimed in both cases.<sup>90</sup>

### § 17 Personal injury damages—Generally

◆ **Note** For a discussion of punitive damages recoveries from manufacturers, see Punitive Damages in Products Liability Litigation, 54 Am. Jur. Trials 443.

Personal injury damages in toxic exposure cases fall into two broad categories: (1) special damages for past and future medical expenses and loss of wages and (2) general damages for pain and suffering and its attributes and effects. The distinction between special and general damages is also made on the basis that all provable economic loss up to the time of trial constitutes the plaintiff's special damages and that future economic loss, along with damages for pain and suffering, constitutes general damages.

Aside from the damages for medical expenses and physical pain and suffering, counsel should not overlook the mental stress and anguish that frequently accompany physical injuries in toxic exposure cases, particularly where the client's illness or condition has been diagnosed as terminal.

General damages for pain and suffering and mental distress should be calculated on a per diem basis, particularly in a jurisdiction where counsel may be allowed to present per diem calculations to a jury at trial.<sup>91</sup> The physical pain and suffering should be measured from the onset of the symptoms; the claims for the mental anguish resulting from a terminal illness or

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<sup>86</sup>See, generally, Singer, Proving Damages in Toxic Torts, 21 Trial 59 (Nov 1985).

Excessiveness or adequacy of damages awarded for injuries to, or condition induced in, respiratory system, 15 A.L.R. 4th 519; Excessiveness or adequacy of damages awarded to injured person for injuries to organic systems and processes of body, 12 A.L.R. 3d 475.

<sup>87</sup>See §§ 17, 18.

<sup>88</sup>See §§ 19, 20.

<sup>89</sup>See §§ 17–22.

<sup>90</sup>Roeca, "Damages" in G. Nothstein, ed., Toxic Torts: Litigation of Hazardous Substance Cases §§ 17.01–17.19 (Shephard's/McGraw Hill 1984).

<sup>91</sup>Per diem or similar mathematical basis for fixing damages for pain and suffering, 3 A.L.R. 4th 940.

condition caused by the toxic exposure should be measured from the date of diagnosis to the date of death or remission; and the future mental damages should be measured from the date of remission for the life expectancy of the client.

The special damages recoverable by or on behalf of persons injured as a result of toxic exposure include (1) necessary and reasonable medical expenses, including actual past expenses for physician, hospital, nursing, and laboratory fees, and the cost of medicines and prosthetic devices;<sup>92</sup> (2) costs of medical expenses reasonably expected to be incurred in the future;<sup>93</sup> and (3) damages for the loss of past and future earnings,<sup>94</sup> including actual loss of wages or salary, loss of existing vocational skill,<sup>95</sup> loss of capacity to earn increased wages,<sup>96</sup> loss of profits or net income by person engaged in business,<sup>97</sup> and the cost of hiring a substitute or assistant.<sup>98</sup>

General damages, which are those damages usually awarded for the subjective factors of pain and suffering from physical injuries,<sup>99</sup> may also include pain and suffering reasonably likely to occur in the future;<sup>1</sup> “phantom pain” and other subjective

<sup>92</sup>Necessity and sufficiency, in personal injury or death action, of evidence as to reasonableness of amount charged or paid for accrued medical, nursing, or hospital expenses, 12 A.L.R. 3d 1347.

<sup>93</sup>Requisite proof to permit recovery for future medical expenses as item of damages in personal injury action, 69 A.L.R. 2d 1261.

<sup>94</sup>Forensic Economics—Losses in Case of Disability, 15 Am. Jur. Proof of Facts 2d 311.

Effect of anticipated inflation on damages for future losses—modern cases, 21 A.L.R. 4th 21.

<sup>95</sup>Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R. 3d 88.

<sup>96</sup>Am. Jur. 2d, Damages § 92.

<sup>97</sup>Profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death, 45 A.L.R. 3d 345.

<sup>98</sup>Cost of hiring substitute or assistant during incapacity of injured party as item of damages in action for personal injury, 37 A.L.R. 2d 364.

<sup>99</sup>Showing Pain and Suffering, 5 Am. Jur. Trials 921.

Pain and Suffering, 23 Am. Jur. Proof of Facts 2d 1.

Admissibility, in civil case, of expert evidence as to existence or nonexistence, or severity, of pain, 11 A.L.R. 3d 1249.

**[Section 17]**

<sup>1</sup>Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R. 3d 10.

pain not readily apparent to lay person;<sup>2</sup> mental anguish;<sup>3</sup> fright and shock;<sup>4</sup> anxiety, depression, and other mental suffering or illness;<sup>5</sup> physical injuries caused by mental anguish;<sup>6</sup> harm from loss of sleep;<sup>7</sup> sexual dysfunction;<sup>8</sup> and past and future impairment of the ability to enjoy life.<sup>9</sup> In some states the spouse of the toxic exposure victim may join in an action to recovery damages for loss of consortium.<sup>10</sup>

#### Cases

Once a toxic exposure plaintiff claiming emotional distress damages for a fear of cancer claim establishes that the defendant has acted with oppression, fraud, or malice, the plaintiff must still demonstrate that his or her fear of cancer is reasonable, genuine, and serious in order to recover damages. In determining what constitutes reasonable fear, it is not enough for a plaintiff to show simply an ingestion of a carcinogen or a significant increase in the risk of cancer. In addition, the plaintiff must show that his or her actual risk of cancer is significant before recovery will be allowed. Under this reasoning, a plaintiff's fear is not compensable when the risk of cancer is significantly increased, but remains a remote possibility. *Potter v Firestone Tire & Rubber Co.* (1993) 6 Cal 4th 965, 25 Cal Rptr 2d 550, 863 P2d 795, 93 CDOS 9695, 93 Daily Journal DAR 16566.

To obtain award of exemplary or punitive damages for wanton or reck-

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<sup>2</sup>Phantom Pain, 9 Am. Jur. Proof of Facts 103.

<sup>3</sup>Mental anguish or suffering as element of damages in personal injury action, Am. Jur. 2d, Damages §§ 195–198.

<sup>4</sup>Mental or emotional disturbance or distress as basis of cause of action, Am. Jur. 2d, Fright, Shock, and Mental Disturbance §§ 1 et seq.

<sup>5</sup>Anxiety Neurosis Following Trauma, 30 Am. Jur. Proof of Facts 1; Depression Following Trauma, 29 Am. Jur. Proof of Facts 529; Phobic Neurosis (Phobic Reaction) Following Trauma, 29 Am. Jur. Proof of Facts 571.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 A.L.R. 4th 13.

<sup>6</sup>Recovery for mental or emotional disturbance causing bodily injury or illness, Am. Jur. 2d, Fright, Shock, and Mental Disturbance §§ 13–24.

<sup>7</sup>Loss of Sleep as Element of Damages, 28 Am. Jur. Proof of Facts 1.

<sup>8</sup>Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sexual organs and processes, 13 A.L.R. 4th 183.

<sup>9</sup>Recovery of Damages for Loss of Enjoyment of Life, 24 Am. Jur. Proof of Facts 171; Anosmia (loss of sense of smell), 27 Am. Jur. Proof of Facts 361.

Loss of enjoyment of life as a distinct element or factor in awarding damages for bodily injury, 34 A.L.R. 4th 293.

<sup>10</sup>Wife's Damages for Loss of Consortium, 30 Am. Jur. Proof of Facts 73; Loss of Consortium in Parent-Child Relationship, 27 Am. Jur. Proof of Facts 393.

Husband's damages for loss of consortium, Am. Jur. 2d, Husband and Wife § 455.

less disregard for public safety in handling of hazardous or toxic substances, plaintiff must prove that defendant's conduct was wanton or reckless, show that danger created by wanton or reckless conduct threatened or endangered public safety, prove that wanton or reckless conduct occurred in storage, handling, or transportation of hazardous or toxic substances, and prove that injury was caused by wanton or reckless conduct consisting of all of foregoing elements. LSA-C.C. art. 2315.3 (Repealed). *Rivera v. United Gas Pipeline Co.*, 697 So. 2d 327 (La. Ct. App. 5th Cir. 1997).

In personal injury action in which employee alleged he was injured when exposed to chemicals while cleaning reservoir storage tank at chemical plant, trial court did not abuse its discretion in award of \$218,012 for future medical expenses, where testimony of physician clearly established that employee would need ongoing monthly, or sometimes weekly, psychotherapy, continuous anti anxiety medication, and continual monitoring of his prescription drug intake, and where economist calculated monthly cost of psychotherapy sessions (\$1,200 per year), monthly cost of group therapy sessions (\$2,160 per year), and annual medication cost (\$1,460), and he calculated present value of these expenses over 42 years of life expectancy as \$218,012. *Sandbom v BASF Wyandotte, Corp.* (1996, La App 1st Cir) 674 So 2d 349.

Finding that oil company had been grossly negligent in allowing exposure of millwright who performed work at plant over 14-year period to be exposed to benzene, warranting award of punitive or exemplary damages in wrongful death action brought by family of millwright, was supported by evidence that destructive effects of benzene were known in the early 1900's, which satisfied objective prong of Moriel standard, and that company with knowledge of risk had failed to provide adequate monitoring, allowed them to wash their hands in benzene, and did not monitor contract workers for benzene exposure and prevented its industrial hygienists from doing so, which established company's subjective awareness of risk which was created. *Mobil Oil Corp. v Ellender* (1996, Tex App Beaumont) 934 SW2d 439.

## § 18 — Checklist

In a toxic exposure case where the client has survived the incident without incurring a terminal disease or condition, the following items of damages should be considered. If the client dies as a result of the effects of the toxic exposure following a prolonged illness, the damages listed should also be claimed in a legal action where a survival statute permits their recovery.<sup>11</sup>

### PERSONAL INJURIES DAMAGES CHECKLIST

- Doctor's bills
- Hospital bills
- Ambulance service

<sup>11</sup>Am. Jur. 2d, Abatement, Survival, and Revival §§ 66-68.

- Other medical expenses, for example, wheelchair, nursing home
- Lost wages
  - Days lost at work
  - Wage per diem, per hour, etc.
- Future medical expenses
  - Estimated amount of future treatment
  - Adjust for medical care inflation
  - Adjust for present value
- Future lost wages
  - Life expectancy without illness or condition
  - Estimated work years lost
  - Adjust for inflation, pay raises
  - Adjust to present value
- Pain and suffering
  - Physical pain of illness or condition
  - Symptoms, for example, vomiting, nausea, weight loss
  - Pain of chemotherapy and side effects
  - Future pain (number of days left)
- Mental anguish
  - Date illness or condition diagnosed
  - Date illness or condition terminated (by death or remission)
  - Anxiety over treatment
  - Anxiety over personal situation
  - Anxiety over family situation
- Mental anguish where illness or condition terminal
  - Anxiety of learning of fatal disease
  - Anxiety over living with fatal disease
  - Anxiety over approaching death
  - Pain of approaching death
- Future mental damages, if illness or condition in remission
  - Increased risk of other illness or condition
  - Risk of recurrence
  - Anxiety over recurrence or other toxic exposures

### § 18.3 —Emotional distress

#### Cases

Because railroad employee exposed to asbestos could not recover under FELA for negligently inflicted emotional distress absent manifested

symptoms of any disease, he could not recover medical monitoring costs as element of emotional distress damages; employee sought to recover economic cost of extra medical check-ups that he expected to incur as result of his exposure to asbestos-laden insulation dust. Federal Employers' Liability Act, §§ 1 et seq., as amended, 45 U.S.C.A. §§ 51 et seq. *Metro-North Commuter R. Co. v. Buckley*, 117 S.Ct. 2113, 138 L.Ed.2d 560 (U.S. 1997).

In an action by residents living near a landfill against a tire company that disposed of toxic materials at the landfill, resulting in contamination of plaintiffs' water supply, plaintiffs were excepted from having to prove it was probable that cancer would develop in order to recover emotional distress damages, since defendant's conduct brought the case within the "oppression, fraud or malice" exception for recovery of fear of cancer damages. The trial court found officials at defendant's plant had increased knowledge as to the dangers involved in careless disposal of hazardous wastes, and had a specific, written policy for hazardous waste disposal. However, the officials largely ignored the policy. The court found especially reprehensible the fact that defendant, through its plant production manager, discouraged compliance with its internal policies and state law solely for the sake of reducing corporate costs. Under these circumstances, there were sufficient facts supporting the trial court's conclusion that such conduct displayed a conscious disregard of the rights and safety of others. However, an award of fear of cancer damages was still dependent on whether plaintiffs' fears were reasonable with reference to the actual likelihood of cancer due to the toxic exposure. *Potter v Firestone Tire & Rubber Co.* (1993) 6 Cal 4th 965, 25 Cal Rptr 2d 550, 863 P2d 795, 93 CDOS 9695, 93 Daily Journal DAR 16566.

## § 18.5 —Medical monitoring

### Cases

Toxic exposure plaintiffs may recover damages for medical monitoring only if the evidence establishes the necessity, as a direct consequence of the exposure in issue, for specific monitoring beyond that which an individual should pursue as a matter of general good sense and foresight. Thus, there can be no recovery for preventive medical care and checkups to which members of the public at large should prudently submit. Medical monitoring costs are not speculative, since they are based upon the specific dollar costs of reasonable and necessary periodic examinations. *Potter v Firestone Tire & Rubber Co.* (1993) 6 Cal 4th 965, 25 Cal Rptr 2d 550, 863 P2d 795, 93 CDOS 9695, 93 Daily Journal DAR 16566.

A medical monitoring claim is not equivalent to a claim for the increased risk of future harm, such as the development of disease. An increased risk claim seeks present compensation for a future injury to the plaintiff's general wellbeing, even though there is no evidence of present harm. By contrast, medical monitoring damages reimburse the specific cost of periodic medical testing which is proved by a reasonable medical certainty to be necessary. Medical monitoring damages compensate the plaintiff for the reasonable certainty that he will be required to pay for prospective testing and evaluation, and as such constitute "actual loss," an essential element of a cause of action in tort. *Miranda v Shell Oil Co.* (1993) 17 Cal App 4th 1651.

In toxic tort action against pesticide manufacturers by plaintiffs who allegedly drank pesticide-contaminated water, medical monitoring costs, i.e., cost of future periodic medical examinations and related care, intended to facilitate early diagnosis and treatment of disease or illness caused by plaintiffs' exposure to toxic substance, was recoverable item of damages, even though plaintiffs had no current physical injury. However, toxic-tort plaintiff who seeks money damages for future medical surveillance is required to establish that need for monitoring is reasonable certain consequence of exposure. At least five factors appear to bear on this issue: (1) significance and extent of plaintiff's exposure to chemicals; (2) relative toxicity of chemicals; (3) Seriousness of diseases for which plaintiff is at increased risk; (4) relative increase in plaintiff's chance of developing disease as result of exposure; and (5) clinical value of early detection and diagnosis. *Miranda v Shell Oil Co.* (1993, 5th Dist) 12 Cal App 4th 28, 15 Cal Rptr 2d 569, 93 CDOS 106, 93 Daily Journal DAR 197, 23 ELR 20779, review gr (Cal) 17 Cal Rptr 2d 608, 847 P2d 574, 93 CDOS 1971, 93 Daily Journal DAR 3532 and reprinted for tracking pending review (5th Dist) 17 Cal App 4th 1651, review dismd, cause remanded, ordered published, in part (Cal) 93 CDOS 9747, 93 Daily Journal DAR 16615.

Firefighters exposed to asbestos at training facility were not entitled to award for medical monitoring during latency period of asbestos-related diseases, although firefighters' expert recommended regular chest x-rays and pulmonary studies, as he also testified that increase in risk of asbestos-related disease would be slight, and medical monitoring damages required significantly increased risk. *Lilley v. Board of Sup'rs of Louisiana State University*, 735 So. 2d 696 (La. Ct. App. 3d Cir. 1999), writ denied, 99 1162 La. 6/4/99, 1999 WL 408443 (La. 1999); West's Key Number Digest, Damages ¶191.

To prevail on common-law claim for medical monitoring, plaintiff must prove: (1) exposure greater than normal background levels, (2) to proven hazardous substance, (3) caused by defendant's negligence, (4) as proximate result of exposure, plaintiff has significantly increased risk of contracting serious latent disease, (5) monitoring procedure exists that makes early detection of disease possible, (6) prescribed monitoring regime is different from that normally recommended in absence of exposure, and (7) prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. *Redland Soccer Club, Inc. v. Department of the Army and Dept. of Defense of the U.S.*, 696 A.2d 137 (Pa. 1997).

In order to sustain a claim for medical monitoring expenses, the plaintiff must prove that: (1) he or she has been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible. *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999); West's Key Number Digest, Damages ¶43.

**§ 19 Wrongful death damages—Generally**

All states today provide a statutory basis for recovering damages for the wrongful death of a tort victim in an action brought by the decedent's surviving heirs or the personal representative of the decedent's estate.<sup>12</sup> Funeral expenses are usually allowed,<sup>13</sup> but general damages are frequently limited to the economic loss suffered as a result of the death<sup>14</sup> and the pecuniary value of the decedent's care, comfort and society,<sup>15</sup> including the loss of household services from a deceased spouse<sup>16</sup> and the parents' loss of a minor's services.<sup>17</sup> Loss of a prospective inheritance as result of death of injured person also may be recovered in some jurisdictions.<sup>18</sup> Some states also permit the survivors to recover general damages for the grief and anguish suffered as a result of the loss of the decedent.<sup>19</sup> Survival statutes exist in most states that permit the decedent's survivors or estate to recover special damages, which are generally limited to those incurred between the time of the exposure or when symptoms first developed and the date of the decedent's death.<sup>20</sup> Survival statutes may also permit the recovery of punitive damages on behalf of the decedent's es-

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<sup>12</sup>See, generally, Am. Jur. 2d, Death §§ 2–188.

<sup>13</sup>Am. Jur. 2d, Death § 129.

Common-law recovery of funeral expenses from tortfeasor by husband, wife, or other relative of deceased, 3 A.L.R. 2d 932.

<sup>14</sup>Forensic Economics—Death of Person in Labor Force, 13 Am. Jur. Proof of Facts 2d 45.

<sup>15</sup>Predicting Personal Injury Verdicts and Damages, 6 Am. Jur. Trials 963 §§ 75–77.

Recovery, in death action, for loss of society and companionship, Am. Jur. 2d, Death § 135.

<sup>16</sup>Damages for Loss of Housewife's Services, 13 Am. Jur. Proof of Facts 193; Forensic Economics—Death of Person Not in Labor Force, 14 Am. Jur. Proof of Facts 2d 311.

Admissibility and sufficiency of proof of value of housewife's services, in wrongful death action, 77 A.L.R. 3d 1175.

<sup>17</sup>Damages for Wrongful Death of, or Injury to, Child, 20 Am. Jur. Trials 513.

<sup>18</sup>Wrongful Death Damages—Loss of Prospective Inheritance, 24 Am. Jur. Proof of Facts 2d 211.

<sup>19</sup>Am. Jur. 2d, Death § 126.

<sup>20</sup>Am. Jur. 2d, Abatement, Survival, and Revival §§ 66–68.

tate,<sup>21</sup> which are generally not recoverable in a wrongful death action.<sup>22</sup>

## § 20 — Checklist

Where death has resulted from a toxic exposure, counsel should consider the following damages in a direct or third-party action on behalf of the decedent's estate or surviving heirs.

### WRONGFUL DEATH DAMAGES CHECKLIST

- Loss of Support
  - Average life expectancy
  - Years of work remaining
  - Estimated yearly earnings
  - Adjusted for raises, inflation
  - Reduce to present value
- Loss of Services
  - Work done around the house
  - Average hours of work
  - Replacement value of work
    - Federal minimum wage
    - Actual replacement value
- Loss of Society
  - Care, comfort, consortium, etc.
- Loss of prospective inheritance
- Mental anguish, where recoverable
- Funeral expenses

## § 21 Client's diary

An effective means of documenting damages is to have the client, spouse, and close family friends detail the day to day struggle and problems of coping with toxic exposure by each keeping a diary. The diary should be a private record of the life of the family as it goes through the various stages of dealing with the serious disability or imminent death of a family member. The attorney should encourage the family to include

<sup>21</sup>Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged, 30 A.L.R. 4th 707.

<sup>22</sup>Am. Jur. 2d, Death § 136.

their hopes and aspirations as well as to record their deepest feelings of grief and fear in the diary. The diary should try to create a positive picture of the family, one that shows strength as well as weakness.

Such diaries have many uses. One is to refresh the recollection of family members about feelings and events that have occurred in the past that may be difficult to remember. Before testifying at a deposition or at trial, the client or the family member should review the diary in order to be a more effective witness. Using a diary to refresh recollection before testifying may require its production for the inspection of the opposing side, however.<sup>23</sup> Where the family wishes to keep the diaries private, they should not be used to refresh memory before testifying.

## § 22 Damage experts

An economic expert should be consulted by counsel in a toxic exposure case where the event has caused a permanently disabling condition that destroys or substantially impairs the client's earning capacity and in death cases to calculate the pecuniary losses suffered by the survivors from the loss of the decedent.<sup>24</sup> In addition to assisting counsel to prepare and evaluate the case, such an expert can be used advantageously at the time of trial. Without an economic expert on damages, counsel's statements to the jury during summation regarding damages are the arguments of counsel and may be disregarded by the jury as such. However, if the figures that counsel wishes to urge on the jury have been testified to by an expert in the form of an opinion, they are evidence in the case and entitled to much greater weight.

Counsel should also consider referring the client, and in some cases the client's family, to a psychologist for counseling. In addition to helping the client or the client's family cope with the severe stress serious injury and death creates for its victims and their survivors, a psychological expert can also bolster the mental distress element of the damages portion of the case by providing evidence in the form of an expert opinion on many of

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<sup>23</sup>Fed R Evid, Rule 612.

<sup>24</sup>Forensic Economics: General Overview; Death of Person in Labor Force, 13 Am. Jur. Proof of Facts 2d 45; Death of Person Not in Labor Force, 14 Am. Jur. Proof of Facts 2d 311; Losses in Cases of Disability, 15 Am. Jur. Proof of Facts 2d 311; Period of Economic Loss in Death and Personal Injury Cases, 38 Am. Jur. Proof of Facts 2d 195.

the subjective and emotional aspects of the client's damages. In the case of a client who survives the exposure but has experienced severe mental and emotional distress, the fees charged by a psychologist or counselor may be recoverable as items of the special damages.

#### IV. CASE INTAKE

##### § 23 In general

Processing the toxic exposure-construction accident case is relatively simple where the client originally presents himself or herself shortly after the exposure for the prosecution of a workers' compensation claim. In that situation the compensation proceeding and the third-party liability case generally proceed along parallel tracks, with the former matter usually resolved well in advance of the latter. The other typical situation is where the client has been referred to counsel from another attorney who represented the client in a workers' compensation proceeding. In this situation processing the case is similar to undertaking any other type of civil litigation,<sup>25</sup> except that counsel may rely on the compensation attorney's being able to supply a variety of investigative and medical materials that ordinarily are not available to counsel in the usual civil case at the time of case intake.<sup>26</sup>

##### Cases

Class was certified under FR Civ P 23(b)(2) consisting of all retired and former employees at industrial plant whose job duties exposed them to orthotoluidine and aniline supplied by defendants. Plaintiffs alleged negligence and strict liability based on failure of defendants to provide adequate warning of health hazards of these products. Plaintiffs introduced evidence of National Institute for Occupational Health study that found that workers at industrial plant had excess risk of developing bladder cancer ranging from 3.6 to 27.2 times normal risk. Plaintiffs sought injunctive relief in form of court-administered fund paid for by defendants that would cover reasonably anticipated costs of medical monitoring program for bladder cancer for lifetime of class members. *Gibbs v E.I. DuPont De Nemours & Co.* (1995, WD NY) 876 F Supp 475, 25 ELR 20926.

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<sup>25</sup>Processing the Case, 1 Am. Jur. Trials 189.

<sup>26</sup>See §§ 6-8, 35.