

TRYING THE DIOXIN CASE FROM A PLAINTIFF'S POINT OF VIEW

Mary E. Alexander, J.D., M.P.H.
Jack L. Slobodin, J.D.

Cartwright, Slobodin, Bokelman, Borowsky,
Wartnick, Moore & Harris, Inc.
101 California Street, 26th Floor
San Francisco, California 94111

INTRODUCTION

Trying a dioxin exposure case presents interesting and complicated issues for the plaintiff attorney. The trial requires a great deal of effort and preparation mainly in establishing cause. Causation is the primary issue in most cases. It is necessary to provide the court with strong proof of exposure to dioxin and its relationship to the specific injury contained in the complaint. This relationship of cause and effect must be the theme throughout the trial.

VOIR DIRE

Careful selection of the jury should be conducted in a case as complex as a dioxin exposure case. The panel should be questioned by the attorney or judge on areas such as: experience in the military with Agent Orange by the juror, family, or close friends; knowledge of what dioxin is; knowledge of the potential adverse effects of dioxin; experience with chemicals in a laboratory, at school, or at work; stock in the defendant companies; worked by the juror, family member, or close friend in defendant companies or any chemical company; and jurors' opinions about warning consumers and workers of potential dangers of a product.

OPENING STATEMENT

The Opening Statement at the beginning of the trial makes clear the theme around which the case will be developed according to the evidence. The theme reveals the human factors of the case--the effects in human terms of the exposure to dioxin.

Here evidence can be highlighted in story form as the following. "Picture in your mind a valley surrounded by snowcapped mountains. In the valley is a village where children play along the bank of a beautiful stream, cold, and pure as it comes from the distant mountains. The children drink from the springs from which the water flows into the stream. But change comes to the valley and industries move in bringing hazards with such a substance as dioxin without the awareness of any of the townspeople.

" All his life, Kevin, a young boy, played along the bank of the stream where he lived. He drank from the spring and swam in the stream all the time he was growing up. One day Kevin came home from school and told his mother he did not feel well. At the hospital he was diagnosed as having cancer. After a long illness, he died at age 15. His parents are in court-seeking redress.

"In the village, other children began to appear wan and ill, people in feeble health died. An unusually high number of cancer cases developed. Eventually the trail of evidence led beyond the company's fences to the industry that had been making products with the dangerous substance of dioxin as a contaminant."

At the completion of the Opening Statement, the jury should be fully informed about the issues and the case as presented by the plaintiff's attorney. The Opening Statement should set forth that even though the manufacturer may be liable without fault for a defective product, the conduct of the manufacturer in question should show culpability. It is of much value to provide a preview in easily understandable terms of the medical and scientific principles for the jury so they can follow and understand the evidence from both animal and epidemiological data.

PRESENTING THE EVIDENCE

Causation

(1) Exposure. Whether dioxin can cause the injury sustained by the plaintiff will be the central issue in the case. The evidence that is presented should show that exposure caused the effects on the health of the plaintiff. Exposure to the product of the manufacturer must be shown including frequency of exposure, latency, dose or amount of exposure. Coworker testimony can be used to prove these elements of exposure. A coworker or eyewitness describing massive exposure can be very helpful in proving causation.

(2) Exclusion of evidence. Defense efforts toward exclusion of certain information must be countered.

(a) Animal studies are often the subject of a motion to exclude. To prove the relevance of certain data such as those from animal studies it can be shown that scientists make decisions about the potential human carcinogenicity of chemicals based on animal data everyday. More importantly, there is a public policy argument. To exclude animal data is to insist that we use humans as guinea pigs and it follows that the court would be condoning human experimentation.

(b) Studies below ninety-five percent confidence level. Also, the defense may seek to exclude studies which do not show the ninety-five (95) percent statistical confidence level. The argument is that if scientists use 95% level, then the court should. The fallacy of this argument is twofold: (1) the burden of proof in the courtroom to be acceptable need not be more than 51% not 95%. Therefore, it is erroneous to require 95% in the studies used to support plaintiff's claim. Scientists use and rely on studies of less than 95% all the time, because such studies can be important and scientifically sound for other reasons.

Expert Witnesses

It is important to keep in mind the relationship of the experts in the overall presentation of the trial.

The experts need to understand the overall case, the exposure of the plaintiff, the plaintiff's life history and how dioxin exposure has affected his or her life.

Cross-examination is critical. The expert must admit that his or her opinion may be different from that of the scientific community in general, or from that of government scientists or from that of other independent scientists who have been specifically assigned to, or asked to, review the question of the carcinogenicity or toxicity of dioxin.

Emphasize the scientifically disputed aspects of the defense expert's testimony.

CLOSING ARGUMENT

The Closing Argument is the opportunity to persuade and inspire the jury to find for the injured plaintiff. It is the time to emphasize the theme of the case and review only the key issues and the related testimony. In preparing the Closing Argument, ask yourself what the case is about. Visualize yourself at the end of the case listening to the judge reading the jury instructions to the jury and ask: Does that describe my case? and, Is that what I can prove? This enables you to gain control of the direction and control of the trial and avoids the roll of a passive reactor to opposing counsel's actions and tactics.

In the Closing Argument, the elements of legal theories can be reviewed:

(1) Negligence theory is of particular importance. The manufacturer, distributor, and the seller of a dioxin-containing product has an affirmative duty to unambiguously warn workers, ultimate consumers, and others who may be exposed to dangers connected with the product's use. A manufacturer also must warn of such dangers in making substitutions in the use of the product. It is necessary also to warn of engineering controls and the need for personal protection, such as respirators and gloves.

Accordingly, the manufacturer is held to the knowledge and skill of an expert. Therefore, the company is presumed to have knowledge of medical and scientific information. A manufacturer is held responsible even though there is an absence of adequate information. Products and processes must be tested before the product's entry into the stream of commerce. Once the product is marketed, the manufacturer has the duty to monitor environmental effects and to engage in medical surveillance by the collection of epidemiological data.

(2) Another legal theory, Strict Liability is very important to the plaintiff in a dioxin case. Under *Restatement of Torts, 2nd Section 402A*: The product must be shown to be "defective" or "unreasonably dangerous" when it left the possession of the defendant. Further evidence must show that the defect proximately caused an injury to the plaintiff and that the use of the product was reasonably foreseeable.

In dioxin cases, the Failure to Warn Defect is the most common valuable argument of the plaintiff. If the manufacturer of the dioxin containing product does not warn of the dangerous propensity of the product, the product is defective and the manufacturer is held liable for resulting injuries.

The classic Design Defect can also be used in dioxin cases because dioxins are a contaminant of herbicides. These dangerous carcinogenic impurities could have, and should have, been removed from the

herbicides. This is a design defect for which the manufacturer can be held strictly liable.

The theory of Manufacturing Defect would also apply in situations where the concentration of the product varied from the concentration set forth on the packaging or labelling, or where one batch of product contained atypical impurities, that is, amounts of dioxin. It would apply if the herbicides were improperly manufactured so as to contain the highly dangerous dioxins. It is possible to alter the synthesis of a herbicide so as to avoid introduction of an impurity such as dioxin. For example, phenoxy herbicides, such as Agent Orange, were manufactured in such a way as to perpetuate contamination with 2, 3, 7, 8-tetrachlorodibenzo(p)dioxin.

Any warning or instructions on the dioxin-containing product must be adequate. This means the warning must caution against the particular danger such as chloracne and cancer. A warning must tell the user exactly what the danger is, how to avoid the danger, and what to do in case of an overexposure or accident.

(3) Ultra-Hazardous activity. The storage, use, or spraying of dioxin-containing products can be considered an ultrahazardous activity. One who keeps a dangerous instrumentality such as a wild beast on his premises is liable if that wild beast escapes and harms someone, regardless of the amount of care taken to contain the beast. So too, if a chemical product is released and dioxin causes damage and injury in a neighborhood then the releasor may be held liable under this theory.

Thus, the storage of dioxin-containing materials or the spraying of such products can be considered to be ultrahazardous activity and the defendant held strictly liable.

REBUTTAL

The Rebuttal phase of the trial is the time to reiterate the theme of the trial and to link causation to the effect--the presence of and exposure to dioxin and the resulting illness of the plaintiff. It is important to make clear the link between the cause and effect with the action or lack of action by the defendant.

Emphasize the responsibility of the company that made the herbicide. That is, emphasize that the defendant knew the risks or should have taken steps to know the risks and failed to take appropriate action. Explain that the company knew or should have known that dioxin was a contaminant of the product, but nevertheless marketed it without warning of the grave danger to the public.

Explain to the jury that their verdict will provide justice to this individual but will also contribute to the general welfare of all people. Explain that their verdict will help to further fundamental human rights; that the defendant's disregard of public welfare resulted in tragedy for the individual and jeopardized society's effort to maintain the public welfare. Explain that those responsible must be brought to justice.

Reiterate that people have a right to expect that organizations offering products which have, under certain circumstances, the potential to do great harm have done everything possible to make them safe. By such effort toward safety, manufacturers contribute to a stable society which in turn makes possible opportunities for all people to participate safely in the pursuit of happiness.