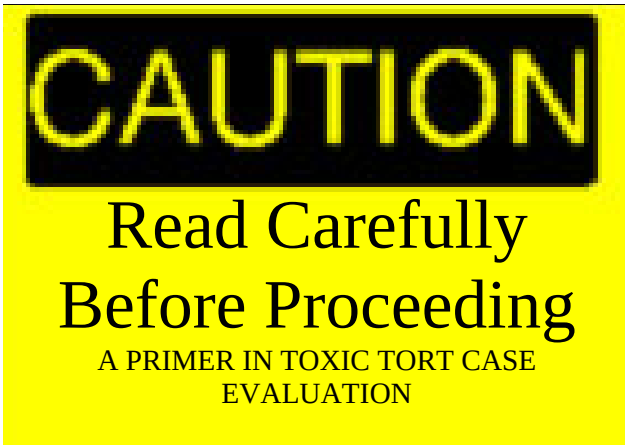

By Mark Rouleau ©

Investigate Your Case Thoroughly

> ***For which of you, intending to build a tower, does not first sit down and estimate the cost, to see whether he has enough to complete it?*** Luke 14:28

Facts

1. **Damages** – Most important issue from the beginning to end. No matter how good the liability if the damages are not big enough the case will be a flop. Judges & Juries will be more likely to find liability where the damages justify bringing the suit.

    a. Medical Records

        i. Billing Records

        ii. Lab reports

        iii. Epidemiological testing by CDC and State agencies

    b. Employment Records

    c. Income Tax Filings

    d. Appearance of the plaintiff and his/her family. How will a jury connect with them and their plight?

    e. Alterations to Activities of daily living (ADL). The tasks of everyday life. Basic ADLs include eating, dressing, getting into or out of a bed or chair, taking a bath or shower, and using the toilet. Instrumental activities of daily living (IADL) are activities related to independent living and include preparing meals, managing money, shopping, doing housework, and using a telephone. Also called activities of daily living.

2. **Chemicals Involved** – Get as much scientific literature, chemical, medical, toxicological and epidemiological as possible on the presumed or known bad actors. TOXNET and PubMed are a good places to start. If you can not find solid medical, and toxicological or epidemiological information showing known hazards with the specific chemicals involved you will have a very tough case and may not make it past summary judgment in federal court.

3. **Defendant** – Do an extensive investigation of the defendant. You need to know if they are likely to have coverage or financial ability to fund the damages. If you are dealing with a RCRA TSDF (Transfer Storage and Disposal Facility) there will be a wealth of public information available online).

    a. **Web Search** – review all of the documents you can find on the defendant, the chemicals and the technology. I suggest Googling every set of numbers of letters that you do not know or understand.

        i. **SEC Filings** – carefully review as these may indicate other suits and relevant facts or information. Monitor these sites as your case progresses to see if your case is reported to the shareholders and the public.

        ii. **Defendant's Websites** including past versions (see Internet Archive http://www.archive.org/index.php for archived versions of the web site). Often times you can make hay out of the changes either showing past claims or knowledge. You also need to inspect shadow sites.

        iii. **Satellite Images** – see Google Teraserver etc

        iv. **Real Estate Records** – for ownership and other possible defendants.

        v. **Corporate Filings** – Secretary of State records for officers and states of incorporation.

        vi. **Dunn & Bradstreet** – financial condition of the corporation.

        vii. **Other Suits** – Check Pacer and do a nationwide search on the defendant to look for other cases and other plaintiff attorneys who have sued the defendant. You can find pleadings on line and you can contact the other attorneys to share information and discovery. Check the local court records in the County where the defendant resides and/or does business as well as the location from which the liability arises.

        viii. **State & Federal Regulatory Agencies** i.e., the Illinois Environmental Protection Agency (IEPA), the Environmental Protection Agency (EPA), RCRA online, the Illinois Pollution Control Board (Note they have a text searchable database of cases and pleadings for enforcement actions online)

        ix. **American Association for Justice (AAJ)** – litigation exchange and work groups.

x. **State TLA**

xi. **TrialSmith** www.**trialsmith**.com for depositions, pleadings and other pending cases against the defendant

b. **Site Inspection** – physically inspect the location and facilities involved. Bring a third party and take photos & measurements where possible. Having an Industrial Hygienist as the third person could be helpful at this point to identify possible problems.

c. **Freedom of Information (FOIA) Requests** – send FOIA requests to the State and Federal Regulatory Agencies. This will not excuse issuing subpoenas to them latter after suit is filed seeking the same information for many reasons including establishing presumptive admissibility as a public record.

d. **Common Law Petition for Discovery** – if you are unaware of the specific facts necessary to evaluate a case (see for example Illinois Supreme Court Rule 224). The equitable bill of discovery was used to enable a plaintiff to obtain information and prepare his cause for trial on the ultimate issues. (37 ALR 5th 645 (1996); 16 Ill.L. & Prac. Discovery § 2 (1971); *Poulos v. Parker Sweeper Co*., 44 Ohio St.3d 124, 541 N.E.2d 1031 (Ohio, 1989); See, e.g., *Arcell v. Ashland Chemical Company, Inc*., 152 N.J.Super. 471, 505-508, 378 A.2d 53, 70-71 (1977); *Ross Stores, Inc. v. Redken Laboratories, Inc.*, 810 S.W.2d 741 (Tex., 1991); *Sunbeam Television Corp. v. Columbia Broadcasting Sys.*, Inc., 694 F.Supp. 889, 891-92 (S.D.Fla.1988).

4. **Witness** – talk with doctors if possible regarding possibility of chemical causation. You want to soften them up to the idea that there may have been a cause that they were not aware of if they did not make that initial diagnosis. You also need to explain to doctors the concept of "reasonable degree of certainty" as it is a legal term of art unknown to most clinical physicians. Fellow employees, and former employees of the defendant can be crucial witness and may have very important knowledge. Other persons who may have been subjected to the toxic exposure. Talking with an governmental enforcement personnel regarding inspections etc. is of great significance.

5. **Causation** – must be shown both medically and from an exposure basis. The standard for admissibility of expert testimony is therefore extremely important. Under Frey the admissibility of the expert opinions is nearly pro forma as long as it can be shown that the methodology employed (not the conclusions) are generally accepted in the relevant scientific community. Daubert on the other hand forces the judge to be an active participant weighing the credibility of the testimony and evidence. Thus in Daubert jurisdictions the motions to exclude testimony or the motion for summary judgment take on far greater significance.

a. **Federal & Daubert Jurisdictions** – Basic Test 1) whether the expert's reasoning or methodology properly can be applied to the facts in issue; 2) whether the theory has been subjected to peer review or publications; and 3) the degree of

acceptance within the relevant scientific community A liability expert is only helpful to the fact finder if he is able to establish such an element of the claim through visual inspection, independent research, testing, and knowledge. *Clark v. Takata Corp., Am. Honda Motor*, 192 F.3d 750 (7th Cir., 1999). An expert is to not required to have direct evidence or a personal observation of the cause of a VOC (volatile organic compound) pollution to provide opinions at to the cause of the pollution, as his opinion can be based on an inference embracing the ultimate issue. *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 787-88 (7th Cir.2000). Differential diagnosis is a common scientific technique, and federal courts, generally speaking, have recognized that a properly conducted differential diagnosis for causation is admissible under *Daubert. See, e.g., Westberry v. Gislaved Gummi AB*, 178 F.3d 257 at 262-66 (4th Cir.1999); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 154-55 (3d Cir.1999); *Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248, 252-53 (1st Cir.1998); *Zuchowicz v. United States*, 140 F.3d 381, 387 (2d Cir. 1998); *Ambrosini v. Labarraque*, 101 F.3d 129, 140-41 (D.C.Cir.1996); *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (9th Cir.1998). "Thus, in evaluating the reliability of an opinion based on a differential diagnosis, courts look at the substance of the expert's analysis, rather than just the label. *See, e.g., Clausen*, 339 F.3d at 1057-58 (advising courts to evaluate whether an expert, in conducting a differential diagnosis, has: (1) insured that the potential cause can in fact cause the injury; (2) taken care to consider other hypotheses that might otherwise explain a plaintiff's condition; and (3) taken care to explain why "the proffered alternative cause was ruled out."); *see also* *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir.1999) (explaining that the differential diagnosis method "`consists of a testable hypothesis,' has been peer reviewed, contains standards for controlling its operation, is generally accepted, and is used outside of the judicial context.") (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 n. 8 (3d Cir.1994))." *Bowers v. Norfolk Southern Corp., 537 F.Supp.2d 1343* (M.D. Ga., 2007).

Some circuits have allowed clinical medical experts to testify to an opinion on causation as long as it is based on methods reasonably relied on by experts in their field. See, e.g., *Zuchowicz v. United States*, 140 F.3d 381, 387 (2d Cir.1998) (accepting the district court's conclusion that plaintiff's experts based their opinions on such methods). *Kennedy v. Collagen Corp.*, 161 F.3d 1226 at 1230 (C.A.9 (Cal.), 1998); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1125 (9th Cir.1994) (finding admissible expert testimony of a rheumatologist based on medical records, his clinical experience, preliminary results of an epidemiological study and medical literature). Expert testimony is admissible absent epidemiological data in formulating their opinions *Kennedy v. Collagen Corp*, 161 F.3d 1226 (9th Cir.1998); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4th Cir.1995).

The fact that a cause-effect relationship between substance and a particular disease has not been conclusively established does not render a physician's expert testimony on causation inadmissible. *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (C.A.9 (Cal.), 1998) *Ambrosini v. Labarraque*, 101 F.3d 129, 139 (D.C.Cir.1996),

cert. dismissed, *Upjohn Co. v. Ambrosini*, --- U.S. ----, 117 S.Ct. 1572, 137 L.Ed.2d 716 (1997)(reversing district court's finding that expert testimony was inadmissible because none of the studies relied upon specifically concluded that Depo-Provera caused the type of birth defects suffered by the plaintiff). See also *Smolowitz v. Sherwin-Williams Co.*, 02-CV-5940 (CBA), 2008 U.S. Dist. LEXIS 91019, at *12-13 (E.D.N.Y. Nov. 10, 2008), 2008 WL 4862981 (noting in toxic tort case involving paint product chemicals that some cases suggest "that treating physicians may render expert opinion testimony regarding causation even without submitting a detailed report" however the opinion must quantify the amount of the substance the plaintiff was exposed to (dosing) and that the amount of toxin the person was exposed to is capable of causing the disease.

A plaintiff does not need to produce a mathematically precise table equating levels of exposure with levels of harm in order to show that they were exposed to a toxic level of a substance but only 'evidence from which a reasonable person could conclude' that the exposure probably caused plaintiff's injuries. *Bonner v. ISP Technologies Inc.*, 259 F.3d 924 (8th Cir., 2001). In many toxic tort cases it is impossible to quantify exposure with hard proof, such as the presence of the alleged toxic substance in the plaintiff's blood or tissue and the exact amount of the toxic substance to which an individual plaintiff was exposed therefore, expert opinions regarding toxic injuries is admissible where dosage or exposure levels have been demonstrated through sufficiently reliable circumstantial evidence. *Plourde v. Gladstone*, 190 F. Supp. 2d 708, 721 (D. Vt. 2002). Even if a judge believes there are better grounds for some alternative conclusion, and that there are flaws in the scientist's methods, if there are good grounds for the expert's conclusion, it should be admitted. The district court cannot exclude scientific testimony simply because the conclusion was 'novel' if the methodology and the application of the methodology are reliable. *Bonner v. ISP Technologies Inc.*, 259 F.3d 924.

In *Goebel v. Denver and Rio Grande Western R. Co.*, 346 F.3d 987 (10th Cir., 2003) the court held there is no requirement that each individual article must fully support the expert's precise theory noting that studies may support a conclusion either "individually *or in combination.*" (346 F.3d 987, 993).

In order to qualify for admission, expert's opinion as to causation need not eliminate all other potential causes; expert's opinion as to probable cause admissible so long as it is based on facts and sound methodology. *Mihailovich v. Laatsch*, 359 F.3d 892 (7th Cir., 2004).

For purposes of admissibility under *Daubert* purposes, temporal and geographic proximity with toxic releases and the onset of a disease is a sufficient scientific basis for considering the toxic release as a possible cause of the disease. *Clausen v. M/V New Carissa*, 339 F.3d 1049 at 1059 (9th Cir., 2003). The fact that the minimum threshold level of toxins necessary to cause harm has not yet been established with any degree of certainty does not render an expert's opinions mere guesswork. *Clausen*, 339 F.3d 1049 at 1059. A lack of specific scholarly support

does not prevent the admission of ***differential diagnosis*** testimony: "The fact that a cause-effect relationship ... has not been conclusively established does not render [the expert's] testimony inadmissible." *Clausen*, 339 F.3d 1049 at 1059; see also *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (9th Cir.1998). The case law specific to ***differential diagnosis*** recognizes that the absence of peer-reviewed studies does not in itself prevent an expert from ruling in a diagnostic hypothesis that might explain the patient's symptoms. *Clausen*, 339 F.3d 1049 at 1060. *Bonner v. ISP Technologies Inc.*, 259 F.3d 924 (8th Cir., 2001).

The fact that a cause-effect relationship between substance and a particular disease has not been conclusively established does not render a physician's expert testimony on causation inadmissible. *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (C.A.9 (Cal.), 1998) *Ambrosini v. Labarraque*, 101 F.3d 129, 139 (D.C.Cir.1996), cert. dismissed, *Upjohn Co. v. Ambrosini*, --- U.S. ----, 117 S.Ct. 1572, 137 L.Ed.2d 716 (1997)(reversing district court's finding that expert testimony was inadmissible because none of the studies relied upon specifically concluded that Depo-Provera caused the type of birth defects suffered by the plaintiff).

i. General Causation (Scientific Possibility) – Scientific information medical, toxicological or epidemiological establishing the relationship between a bad actor that was present and the type of injury, damage or disease that occurred;

ii. Proximity & Possible Dosing - Toxicological and/or Industrial Hygienic – actual presence of the toxic substance in sufficient quantities to cause the harm, injury or damage complained of.

iii. Medical Causation – toxic substance more likely than not caused (to a reasonable degree of medical or scientific certainty) that harm, injury or damage complained of.

A court must be careful not to cross the boundary between gatekeeper and trier of fact. *Milward v. Acuity Specialty Prod.s Group Inc* (1st Cir., 2011). "The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact." *Smith v. Ford Motor Co*, 215 F.3d 713 at 718, 721 (7th Cir. 2000). "When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony--a question to be resolved by the jury." *United States v. Vargas*, 471 F.3d 255 at 264, 265 (1st Cir. 2006) 471 F.3d at 264 (quoting *Int'l Adhesive Coating Co. v. Bolton Emerson Int'l*, 851 F.2d 540, 545 (1st Cir. 1988)); see also *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002).

b. **Illinois & Frye Jurisdictions –** In a significant minority of jurisdictions[1] including Illinois to guarantee the reliability of new or novel scientific evidence. "Illinois, the exclusive test for the admission of expert testimony is governed by the standard first expressed in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63, 262 Ill.Dec. 854, 767 N.E.2d 314 (2002)" See *People v. McKown*, (Ill. 2007) 2007 WL 2729262, 226 Ill.2d 245.

"Commonly called the "general acceptance" test, the *Frye* standard dictates that scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye, 293 F. at 1014. In this context, "general acceptance" does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts. *Donaldson*, 199 Ill.2d at 78, 262 Ill.Dec. 854, 767 N.E.2d 314. Instead, evidence meets the *Frye* standard if the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field. *Donaldson*, 199 Ill.2d at 77, 262 Ill.Dec. 854, 767 N.E.2d 314. Significantly, the *Frye* test applies only to "new" or "novel" scientific methodologies. *Donaldson*, 199 Ill.2d at 78-79, 262 Ill.Dec. 854, 767 N.E.2d 314. Generally, a scientific methodology is considered "new" or "novel" if it is " 'original or striking' " or "does 'not resembl[e] something formerly known or used.' " *Donaldson*, 199 Ill.2d at 79, 262 Ill.Dec. 854, 767 N.E.2d 314, quoting Webster's Third New International Dictionary 1546 (1993)." *Northern Trust Co. v. Burandt and Armbrust, LLP*, (Ill.App. 2 Dist. 2010) 933 N.E.2d 432 at 445, 403 Ill.App.3d 260.

The Frye test ***does not*** make the trial judge a "gatekeeper" of all expert opinion testimony; the trial judge applies the Frye test only if the scientific principle, technique or test offered by the expert to support his or her conclusion is "new" or "novel." (*Donaldson* 767 N.E.2d 314, at 324-25). The Illinois Supreme Court in *Donaldson* stated in some cases "medical science does not seek to establish the existence of a cause and effect relationship--for example, in this instance, the small number of neuroblastoma cases limits study of the disease. As a result, extrapolation offers those with rare diseases the opportunity to seek a remedy for the wrong they have suffered. Thus, in these limited instances, an expert may rely upon scientific literature discussing similar, yet not identical, cause and effect relationships. The fact that an expert must extrapolate, and is unable to produce specific studies that show the exact cause and effect relationship to support his conclusion, affects the weight of the testimony rather than its admissibility. * * * In a courtroom, the test for allowing a plaintiff to recover in a tort suit of this type is not scientific certainty but legal sufficiency; if reasonable jurors could conclude from the expert testimony that [the chemical] more likely than not caused [plaintiff's] injury, the fact that another jury might reach the opposite conclusion

[1] Alabama, Arizona, California, Florida, Illinois, Kansas, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Washington.

or that science would require more evidence before conclusively considering the causation question resolved is irrelevant." (767 N.E.2d 328-329).

c. **Standard of Proof - Reasonable degree of Medical or Scientific Certainty:**

Research has indicated that "reasonable medical certainty" is a concept unheard of in the day-to-day practice of medicine. Several authors have indicated that the legal profession to allow for the introducing testimony involving medical judgment created the expression. It seems that the phrase has its origins in Illinois case law beginning in the 1930's and became widely used throughout the nation as a result of a popular trial technique book of the day. (*Goldstein's Trial Technique*, 1935 ed; Jeff L. Lewin, *The Genesis and Evolution of Legal Uncertainty About "Reasonable Medical Certainty,"* 57 Maryland L. Rev. 380, 381 (1998).)

> "In the case of expert medical testimony, we are accustomed to a doctor's opinion being prefaced by the phrase "within a reasonable degree of medical certainty." This phrase gives the medical opinion its legal perspective. It allows us to know that the opinion is an expression of medical probability based upon recognized medical thought and not mere guess or speculation. (See *Boose v. Digate* (1969), 107 Ill.App.2d 418, 246 N.E.2d 50.) But, there is no magic to the phrase itself. If the testimony of the expert reveals that his or her opinions are based upon specialized knowledge and experience and grounded in recognized medical thought, it is of no consequence that the witness has failed to preface the opinions with the phrase, "within a reasonable degree of medical certainty." See *Redmon v. Sooter* (1971), 1 Ill.App.3d 406, 412, 274 N.E.2d 200; Boose, 107 Ill.App.2d at 422-24, 246 N.E.2d 50." *Dominguez v. St. John's Hosp.*, (Ill.App. 1 Dist. 1993) 632 N.E.2d 16 at 19, 260 Ill.App.3d 591.

Black's Law Dictionary defines "reasonable medical probability" as "a standard requiring a showing that the injury was ***more likely than not*** caused by a particular stimulus, based on the general consensus of recognized medical thought." Black's Law Dictionary 1273 (8th ed. 2004). Black's treats the term "reasonable medical certainty" as a synonym of "reasonable medical probability." Thus, Black's seems to subscribe to the view that "reasonable degree of medical certainty" simply means that, based upon generally accepted medical principles, the statement is more likely than not to be true. The definition as stated in Black's Law Dictionary is not universally accepted.

The Law

6. Theories of Liability – the "Rules of the Road" approach

Create an initial set of jury instructions from the very outset. These are the standards by which your case will be judged. It cannot be over stressed just how important this step is.

Most attorneys do not start their draft jury instructions until shortly before a trial. This is a serious error.

> "The defense wields three weapons to defeat plaintiffs' cases that should be won:
>
> - Complexity,
> - Confusion, and
> - Ambiguity.
>
> *Complexity, confusion* and *ambiguity* are insidious enemies. They creep up when you are not looking. They rarely attack head-on. They are particularly abundant and pernicious in complex cases such as *[toxic torts,]* insurance bad faith or medical malpractice. This is because both the facts and the jury instructions in these cases are often complex, confusing and ambiguous. But these enemies appear in simple cases too.
>
> Sometimes, *complexity, confusion* and *ambiguity* are inherent in the case; other times, they proliferate due to a conscious defense strategy of confounding the jury and judge with endless, immaterial detail. In either event, you must defeat complexity, confusion and ambiguity, or they will defeat you." RULES OF THE ROAD: A Plaintiff's Lawyers Guide to Proving Liability, Rick Friedman.

Jury instructions are loaded with the terms like "reasonable" and "negligent" which have little or no ***real meaning*** to jurors outside of every day activities with which they are personally familiar and in complex cases such as toxic torts are likely to be areas for the defense to exploit confusion on the part of the jurors to relieve their clients from responsibility for their acts. Toxic tort cases are not like simple auto cases where most members of the jury know what the "rules of the road" are and they know when someone violated them. In auto cases jurors generally don't need to be provided with special guidance for determining fault and negligence or reasonableness of the defendant's conduct. However, in toxic tort cases jurors have no real idea regarding the reasonableness of the defendants conduct with respect to the handling, warning, storage (ect.) of the toxic substances. The defendant will exploit any complexity, confusion or ambiguity that exists in this area causing an otherwise good case to be lost. You need to fill the vague concepts of "negligence" and "reasonable" or "reasonableness" with meaning in simple straightforward terms that the jury can use to measure the defendant's conduct.

You need to establish basic standards of conduct that the defendant failed to comply with. In creating this "rules of the road" list you will need to keep four (4) criteria in mind when creating your rules list: (1) the rule must be easily understood and expressed (i.e. Warning labels are required on containers containing more than 0.05% XYZ); (2) it must be on a point that you believe the defense will concede or that you can otherwise easily prove in the absence of the defendant's agreement; (3) it must have been violated by the defendant; and (4) it is serious and material enough that a jury would decide the case in your favor based upon its violation.

Create a list of your theories of liability (rules list) which you will constantly annotate with references (with evidentiary materials sources showing both to breaches of the rule the sources for the rules) and to which you will add rules as you proceed with your case. This working list of the rules when finalized for trial will be the skeleton for your entire presentation with respect to liability. This will allow you to show both duty and breach by demonstrating the standard of conduct for the defendant as well as the breach of that standard. Some basic sources for locating rules for your lists are case law, statutes, codes, policy manuals, industry standards, scientific & medical literature, depositions, etc. Proper preparation and annotation of your rules list will be of great assistance with preparing your pleadings, interrogatories, document requests, responses to motions seeking to limit discovery, motions for summary judgment and trial presentation.

Theories of liability upon which toxic torts may be premised:

a. Common Law

i. **Premises** – failure to warn of a dangerous condition or activity on the premises of which the owner has superior knowledge.

ii. **Negligence** – handling, warning, signage, transportation etc.

1. Breach of Internal Standards – "the failure of a clinic to follow its policies can be evidence of a breach of the clinic's duty to a patient." *Adams v. Family Planning Associates Medical Group, Inc.*, 315 Ill.App.3d at 548, 248 Ill.Dec. 91, 733 N.E.2d 766; *Smith v. Silver Cross Hosp.*, (Ill.App. 1 Dist. 2003) 790 N.E.2d 77, 339 Ill.App.3d 67.

2. Breach of Statutory or Regulatory Requirements - "A violation of a statute or ordinance designed to protect human life or property is prima facie evidence of negligence. (*Barthel v. Illinois Central Gulf R.R. Co.*, (1978) 74 Ill.2d 213, 219.) A party injured by such a violation may recover only by showing that the violation proximately caused his injury and the statute or ordinance was intended to protect a class of persons to which he belongs from the kind of injury that he suffered. (*Barthel*, 74 Ill.2d at 219-20 [23 Ill.Dec. 529, 384 N.E.2d 323]; *Ney v. Yellow Cab Co.*, (1954) 2 Ill.2d 74, 76-79.)" *Recio v. GR-MHA Corp.*, (Ill.App. 1 Dist. 2006) 851 N.E.2d 106 at 115, 366 Ill.App.3d 48.

a. Municipal Codes (Chemical storage codes frequently contained in local fire codes).

b. State Regulations

c. Federal Regulations (RCRA, CERCLA, OSHA etc.) (2000). In *Ross v. Dae Julie, Inc.*, 341 Ill.App.3d 1065, 1074, 275 Ill.Dec. 588, 793 N.E.2d 68 (2003), the court

held that although a violation of OSHA regulations may be evidence of failure to exercise reasonable care, OSHA regulations do not create a duty of care. "OSHA does not create duties owed by employers to mere invitees upon the premises of employers." *Kerker v. Elbert*, 261 Ill.App.3d at 928, 199 Ill.Dec. at 646, 634 N.E.2d at 485; *Barrera v. E.I. Du Pont De Nemours & Co.* (5th Cir.1981), 653 F.2d 915, 920.

3. Negligent labeling or warning (See *Wyeth v. Levine*, No. 06-1249 (U.S. 3/4/2009) (2009))

4. Negligent performance of voluntary undertaking - Generally, pursuant to the voluntary undertaking theory of liability, "one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking." *Wakulich v. Mraz*, (Ill. 2003) 785 N.E.2d 843 at 854, 203 Ill.2d 223; *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill.2d 213, 239, 216 Ill.Dec. 703, 665 N.E.2d 1260 (1996).

5. Res Ipsa Loquitur - *Smith v. Illinois Cent. R.R. Co.*, (Ill. 2006) 860 N.E.2d 332, 223 Ill.2d 441; *Reynolds Metals Company v. Yturbide*, 258 F.2d 321 (9th Cir., 1958); *Farm Services, Inc. v. Gonzales*, 756 S.W.2d 747 (Tex.App.-Corpus Christi, 1988); *Gass v. Marriott Hotel Services, Inc.*, 558 F.3d 419 (6th Cir., 2009).

iii. **Trespass** - *Smith*, supra

iv. **Civil Conspiracy** – the combination or two or more persons or entities for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means. *Lewis v. Lead Industries Ass'n, Inc.*, (Ill.App. 1 Dist. 2003) 793 N.E.2d 869, 342 Ill.App.3d 95; *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill.2d 102, 133, 241 Ill.Dec. 787, 720 N.E.2d 242 (1999).

v. **Products** –

1. Strict Liability

a. **Warning or Labeling**. See, Wyeth v. Levine, No. 06-1249 (U.S. 3/4/2009) (2009) citing to *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 451 (2005) (noting that state tort suits "can serve as a catalyst" by aiding in the exposure of new dangers and prompting a manufacturer or the federal agency to decide that a revised label is required). See also, *Gray v. National Restoration Systems, Inc.*, (Ill.App. 1 Dist. 2004) 820 N.E.2d 943, 354 Ill.App.3d 345 (where

plaintiff's estate sued manufacturer and distributor for improper labeling which exploded from sparks when decedent was fatally injured when he attempted to saw the lid off an emptied 55-gallon drum that contained residue of Chem-Trete BSM 20, consisting of 70% ethanol and 10% methanol.) See *Tyler Enterprises of Elwood, Inc. v. Skiver*, (Ill.App. 3 Dist. 1994) 633 N.E.2d 1331, 260 Ill.App.3d 742, (reversing trial court's grant of summary judgment to manufacturer on property damage suit brought in strict liability claim in products alleging that the MSDS and label on chemical drum was misleading). Products claims in strict liability have also been sustained for parts inspectors who suffered injuries as result of contact with rust preventative oil on parts shipped by a component manufacturer due to their failure to provide sufficient warnings. *Goldman v. Walco Tool & Engineering Co.*, (Ill.App. 1 Dist. 1993) 614 N.E.2d 42, 243 Ill.App.3d 981 (parts manufacturer received knowledge of danger of the rust preventative oil through drum labeling it received but failed to communicate it persons handling the parts that were to be incorporated into tractors).

i. **Insecticide, Fungicide, and Rodenticide Labels**. The Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. § 136v(b) (1994)) section 136v(b) expressly preempts only state-law claims that challenge the adequacy of the warnings or other information on a pesticide's approved product label which are in addition to or different from those required under [FIFRA]," §136v(b). *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005),

   The Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preempt state law based causes of action premised upon defective design, defective manufacture, negligent testing, and breach of express warranty claims. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

   FIFRA does not provide a federal remedy to those injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in §136v(b) precludes States from providing such a remedy. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

"Under FIFRA, a pesticide is "misbranded" if its labeling contains statements that are "false or misleading in any particular," the pesticide's labeling does not contain directions for use which are "necessary for effecting the purpose for which the product is intended," or "the label does not contain a warning or caution statement which may be necessary ... to protect health and the environment." 7 U.S.C. § 136(q)(1)." *Indian Brand Farms Inc v. Novartis Crop Prot. Inc*, 617 F.3d 207 (3rd Cir., 2010). A product pamphlet does not constitute a label. *Indian Brand Farms Inc v. Novartis Crop Prot. Inc*, 617 F.3d 207 (3rd Cir., 2010).

FIFRA's misbranding provisions require "warning[s] or caution statement[s] which may be necessary ... to protect health and the environment." 7 U.S.C. § 136(q)(1)(G). The "term 'environment' includes water, air, land, and all plants and man and other animals living therein...." § 136(j); *Kuiper v. Am. Cyanamid*, 131 F.3d 656, 664 (7th Cir.1997); *Etcheverry v. Tri-Ag Serv., Inc.*, 22 Cal.4th 316, 93 Cal.Rptr.2d 36, 993 P.2d 366, 375 (2000). *Indian Brand Farms Inc v. Novartis Crop Prot. Inc*, 617 F.3d 207 (3rd Cir., 2010).

2. Negligent Manufacture - See for example *Stevenson v. Keene Corp.*, 603 A.2d 521, 527-28 (N.J. Super. Ct. App. Div. 1992) recognizing that "exposure to asbestos caused by negligent manufacture, use, disposal, handling, storage and treatment with resulting injury is a 'tort against the environment,' ... involving a hazardous and toxic substance")

3. Negligent Design – See for example In re Agent Orange" Product Liability Litigation, 517 F.3d 76 (2nd Cir., 2008)

vi. **Warranty** – labeling, instruction MSDS (Material Safety Data Sheet)

1. Express – See for example Thunander v. Uponor, Inc. (D. Minn., August 14, 2012) Civil No. 11-2322 (SRN/SER)

2. Implied

vii. Material Misrepresentation

1. Intentional

2. Negligent

viii. **Ultrahazardous or Inherently Dangerous Activity** – "that the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings." Prosser & Keeton on Torts Sec. 78, at 547-48 (W. Keeton 5th ed. 1984). See also The Restatement (Second) of Torts §§ 519-520 (1977). (1) storage of toxic gas, (*Langlois v. Allied Chemical Corp.*, 258 La. 1067, 249 So.2d 133 (1971) (2) crop dusting with airplanes; *Roberts v. Cardinal Services Inc.*, 266 F.3d 368 (5th Cir., 2001) citing to *Kent v. Gulf States Utilities*, 418 So.2d 493, 498 (La. 1982); The court in *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948), applied strict liability based on the ultrahazardous activity doctrine in connection with the use of hydrocyanic acid gas in fumigating a small shop to exterminate vermin. Storage of flammable liquids. *Kosters v. Seven-Up Co.*, 595 F.2d 347, 354 (6th Cir.1979). Disposal of by-product of chemical substances identified as dichlorobutadiene, containing heavy concentrations of organic chlorides. identified by the symbols BR50 and BR68, is an ultrahazardous activity because those substances are generally inimical to the environment: specifically, they are toxic and harmful to persons on touch or inhalation, corrosive to metals and other materials, noxiously malodorous, and pollutants of ground and surface water and plant and animal life. *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293 (C.A.5 (La.), 1982). See also EPA doc. 9477.1993(01) (opinion letter dated October 4, 1993) entitled "Potential Liability Of Disposal Facilities When Disposing Of Contaminated Debris" "A rule of strict liability applies under RCRA, so that a disposal facility can be liable for improper disposal of untreated waste even if it does so in the good faith belief that the treatment standard does not apply." See also Hazardous wastes strict liability : report to the 1985 General Assembly of North Carolina (1984).[2] But see *Ganton Technologies, Inc. v. Quadion Corporation*, 834 F.Supp. 1018 (N.D. Ill., 1993) or *Indiana Harbor Belt R. Co. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir.1990). *Fritz v. E.I. DuPont de Nemours & Co.*, 45 Del. 427, 75 A.2d 256 (1950), rejected the ultrahazardous activity doctrine and held that business operator was not strictly liable as a result of the escape of harmful gases from his premises. storage of anhydrous ammonia at a chemical plant was not an ultrahazardous activity for purposes of imposing strict liability because the inherent odor characteristics of the chemical made it highly likely that people would recognize the escape of the chemical and be able to take safety precautions such as "moving away from the close proximity of the source of the gas once its odor is detected". *Sprankle v. Bower Ammonia & Chemical Co.*, 824 F.2d 409 (C.A.5 (Miss.), 1987)

[2] http://www.archive.org/stream/hazardouswastess00nort#page/12/mode/2up

ix. **Nuisance** – Toxic tort case involving neuroblastoma due to coal tar seeping into ground water. *Donaldson v. Central Illinois Public Service Co.*, (Ill. 2002) 767 N.E.2d 314, 199 Ill.2d 63. Whether smoke, odors, dust or gaseous fumes constitute a nuisance depends on the peculiar facts presented by each case." *City of Chicago v. Commonwealth Edison Co*., 24 Ill.App.3d 624, 631-32, 321 N.E.2d 412 (1974).

b. **Contract** – undertakings with plaintiff or third party (where plaintiff is a third party beneficiary) establishing a contractual duty on the part of the defendant to warn or provide protection to the plaintiff.

c. **Statutory** –

i. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

ii. Resource Conservation and Recovery Act (RCRA**)**

iii. State Statutes and regulations

iv. Municipal Codes

v. State Regulations

vi. Federal Regulations

7. **Admissibility of Evidence** – what evidence will the jury hear. You must carefully examine and prepare memos for the foundations, exclusions, privileges etc. of all the significant evidence you intend to present in the case. Begin making motions in limine and responses to motions in limine as you continue to work on your case. Each time you encounter a significant piece of evidence ask yourself will it be admitted into evidence; and if you were the defendant how would you argue to keep it out? You must be able to examine the case from both the plaintiff and defendant's perspective in order to successfully anticipate these types of challenges. Expect that every damaging piece of evidence no matter how clear will be challenged by the defense and you must be thoroughly prepared in advance for these challenges.

8. **Jury Instructions** – start working on your instructions from the very beginning of the case. They will be the law as given to the jury. As with the motions in limine create a sub-file folder with your research on these as they come up. You are bound to find material in the cases you encounter that will be the basis for later instruction to the jury.

Locating Experts

You need to determine the type of experts that you will need for your case. Most toxic tort cases will need:

1. Medical Causation Expert,

2. Toxicologist, Epidemiologist, Occupational Medicine Physician

3. Industrial Hygienist

4. Other experts regarding industry duties and standards of care

5. Damages Expert (physiatrist or life care planner),

6. Economist (to present value the future damages)

Once you have determined the experts that will be needed you should use many of the resources listed in the fact investigation area to locate experts. I recommend staying away from expert locater companies. State Trial Lawyer Association (TLA's) discussion groups are a good source for information on experts (both yours and your opponents). Westlaw has a fantastic expert witness research tool that allows you to find all opinions, and depositions that are filed by experts in federal cases and many state cases. TrialSmith has a very large deposition database of defense experts. Many of the State Jury Reporters maintain deposition databases as well. You will want witnesses who are credible and you shouldn't push a case forward if your liability and causation experts are hesitant or feel uncomfortable with the case. You will only waste your time and money on a case that will likely fail.

Theme the Case

You have to be able to explain your case in a simple paragraph in order to succeed with a jury. This is where your "rules of the road" list will be very helpful. By the time that complete discovery you should be able to reduce your rules list into a list of no more than twelve points. You will want to pare down the list to the clearest violations that best support your claim for damages.

Information overload: **"**The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information**"** is a 1956 paper by the cognitive psychologist George A. Miller of Princeton University's Department of Psychology. In it Dr. Miller showed a number of remarkable coincidences between the channel capacity of a number of human cognitive and perceptual tasks. In each case, the effective channel capacity is equivalent to between 5 and 9 equally-weighted error-less choices: on average, about 2.5 bits of information. Make sure to use the KISS principle when theming your case Keep it Short & Simple ("Keep it Simple, Stupid"). Simplicity should be a key goal and that unnecessary complexity should be avoided. Rely upon ordinary prejudices and first impressions (they will rarely fail you when dealing with juries). Remember that we want to avoid the three traps of ***complexity, confusion, and ambiguity***, in which many good plaintiff cases are lost. If you don't eliminate these traps by your rules you are sure to have the defendant argue that how could they have possibly forseen this problem or the consequences where it so complex, confusing and/or ambigious.

The theme of the case should be woven throughout all of your pleadings, discovery, pre-trial preparation of evidence and witnesses, exhibits, opening argument, evidence, closing

arguments and concluded in the jury instructions. A simple coherent straightforward theme:

> You are here to fix a wrong. This case is about choices. The defendant chose not to warn Mr._____ of the extremely dangerous witches brew of toxic chemicals present at the defendant's business. Choosing not to tell Mr. _____ the truth of that danger was just wrong. The defendant knew that XYZ was an extremely toxic chemical and that it was present everywhere at _____. Yet the defendant chose to tell Mr. _____ that he was handling "non-hazardous waste." The defendant requires its own employees to use respirators where chemical XYZ is present. The defendant chose not to require Mr. _____ to use respirators where chemical XYZ was present. Federal law required the defendant to warn its employees of the presence of chemical XYZ. The defendant chose not to warn Mr. _____ of the presence of chemical XYZ. Federal law and industry standards require the defendant to place a warning label on any containers containing the chemical XYZ. Although the containers delivered to Mr. _____ contained some chemical XYZ the defendant chose not to put a label the containers delivered to Mr. ____.
>
> The defendant chose not to give any warnings regarding the presence of chemical XYZ to (use plaintiff's first name). The defendant and its experts admit that chemical XYZ is scientifically documented to cause _____. (Plaintiff's first name) suffered a permanent and irreversible brain injury as a result of exposure to that XYZ. He is now a paraplegic restricted to a wheelchair for the remainder of his life because of the choices of defendant _____ .

The theme should follow the "Rules of the Road" & "Ball on Damages" approach. That is there are minimum expectations for conduct in any given circumstance, and that the defendant chose not to follow those standards. We all live with rules for our mutual benefit. When someone breaks the rules or goes outside the rules others get hurt. Demonstrate that your client was harmed because the defendant chose not to follow the rules and failed to adhere to widely accepted standards of conduct in the defendant's industry. This approach embraces the conservative beliefs that there are rules of proper behavior, those rules must be followed, and anyone breaking those rules is responsible for the consequences.

> *"Your are going to learn from the evidence, the principles and standards for _____ and for this particular _____.*
>
> *These rules are just as basic and common to _____ as driving a car is to you. To understand what this case is about and how to understand to make the right decision in this case, you need to understand these basic rules or principles and standards. Now, I am going to show you what the defendant is going to agree to, what they admit are those basis rules and standards which they agree they have to abide by. (Then show the jury on a separate board, each of the standards, which the defendant is going to be judged upon, read each one aloud.)*
>
> *You are going to hear evidence from _____ own _____ and _____ who will agree that these are the basic standards that they have to be held accountable for, and that they have this obligation to [Plaintiff]. You are going to hear evidence that every reputable _____ understands and agrees with these*

principles. Indeed you are going to hear evidence that the _____ and executives at [Defendant] agree that they should be accountable if these laws, regulations, policies standards and principles are violated.

During this trial, we will prove to you that these principles were violated by [Defendant] when they _____.

Theme the case from the beginning to show the rules and how they were broken. Remember when you present a case you know what you want and the defense knows what it wants, but you are placing your dispute before twelve members of our community to decide. They have their own needs and wants. What does the jury want and what do they get out of hearing these cases. If you don't give them what they need to help you win your case the defense will. The defense will convince them that all of the woes in the world, including the bad economy etc. are as a result of trials, and trial lawyers. You need to let the jury know from the beginning that they are given the very important responsibility of fixing wrongs. They can make the world a better place by fixing a wrong. Then you have to show them what the defendant did was wrong and it is best if you make the jury mad about the defendant's conduct that is why you should refer to their conduct as choices and not just as failures. For example the defendant took enough time to come up with a safety policy for their employees why didn't they do the same for workers coming on to their property. These kinds of differences should be highlighted where the defendant has instituted different policies in different jurisdictions and your situation involves the policy with the lower standards. Be creative but show the wrong, and explain why it is wrong. Repeat the wrong every chance you get.