

Torts in the Well Water

by Peter Steinhart

Not so long ago, people who talked about the dangers of being poisoned by drinking water were considered eccentrics. Then in 1981, a well serving 16,000 people in San Jose was found to be heavily contaminated with industrial chemicals. Within a couple of years, people all over California were learning that they had been drinking contaminated water. Today a lot of ordinary citizens, along with legislators and government regulatory agencies, are taking seriously the threat of poisoned drinking water.

A survey taken this year by the state Department of Health Services shows that roughly 15 percent of the tested wells are polluted by chemicals. And California's Central Valley has the largest concentration of pesticide-tainted groundwater in the nation, according to a report released in December 1984 by the state Water Resources Control Board.

Until recently, scientists thought chemicals were broken down and filtered by the soil before reaching the groundwater. Consequently, many companies dumped toxic chemical waste directly onto the ground. But as testing methods improved and scientists' understanding of chemicals increased, the assumption that groundwater was naturally protected from chemical contamination was shown to be dead wrong. By that time, however, a lot of people had been exposed to contaminated water. Now, many of those people are turning to the courts:

- Approximately 400 people affected by the chemical leak discovered in San Jose in December 1981 are suing Fairchild Camera & Instrument Corp., claiming the solvent that contaminated their drinking water has caused miscarriages, birth defects and cancer.

- In Riverside County, 4,500 plaintiffs have filed millions of dollars worth of claims resulting from the pollution of water wells by the Stringfellow Acid Pits.

- In Bakersfield, 495 plaintiffs are asking for damages from the Norris School Board, anticipating that children who drank pesticide-contaminated water from a school well will suffer an increased risk of cancer.

The damage awards could be enormous. The Fairchild plaintiffs are asking for punitive damages that might amount to "multi-millions," according to plaintiffs' attorney John G. Tyndall. The Stringfellow suit could result in awards of more than \$100 million. And if Stringfellow's toxic chemicals reach the neighboring Chino aquifer, which provides drinking water to 500,000 people, the damages could be astronomical. Says Dan Stormer of the Los Angeles firm of Litt & Stormer, "We are talking about manufacturers who have consistently ignored indications that there are dangers involved in these toxic wastes, solely to increase their profits. I think the public will respond, and the response will come in large awards."

Lawyers all around the country are waiting to see just how California juries and courts will respond. The fields of toxic torts and hazardous waste management are growing so quickly in California that the American Bar Association, the American Law Institute and the Environmental Law Institute co-sponsored a two-day seminar on hazardous waste last June in San Francisco, and the University of San Francisco recently introduced a course called "Hazardous Waste: Negotiations." Bakersfield attorney Thomas Duggan, a plaintiffs' attorney in the Stringfellow and Norris School cases, says lawyers both in and outside the state are calling him to ask about toxic torts.

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No one has many answers at the moment, but the questions confronting the courts are intriguing:

- Should defendant users, manufacturers and dumpers of toxic chemicals be held strictly liable as well as negligent in failing to exercise proper care in dealing with ultrahazardous materials?
- What are reasonable standards for showing causal links between exposure to contaminated water and subsequent health problems?
- How should damages be determined when plaintiffs' exposure-related illnesses may not show up for 15 or 20 years?
- Should the fear of future illness be a compensable injury?

Toxic tort cases are vastly complicated by the sheer numbers of plaintiffs. The Stringfellow Acid Pits case (*Newman v Stringfellow Acid Pits, Riverside Super Ct, No. 165994MF*), for example, is a consolidated case—not a class action—with 4,500 plaintiffs and 150 defendants. Plaintiffs' lawyer Duggan of Bakersfield's Klein, Wegis & Duggan says the presiding judge of the Riverside County Superior Court is "thinking of asking us to select 10 or 20 plaintiffs who represent the kinds of claims that are being made and to proceed to trial with just those plaintiffs. We'll get the jury's reaction and then see what to do about the other plaintiffs."

Duggan says he thinks the idea is a good one because it would speed up the case by limiting the preparation lawyers will have to do before trial. "Judges will have to fashion procedures for these cases," says Duggan. "There's nothing in the books telling them how to conduct a case with 4,500 plaintiffs."

Also staggering are the numbers of defendants. In the Stringfellow case, the large dumpers named in the complaint in turn sued to include 120 smaller depositors. So long is the list of defendants that when Duggan sought assistance in

Peter Steinhart is a Palo Alto free-lance writer who specializes in environmental issues.

the case, most of the law firms he approached were either representing defendants or their insurers.

Defendants are not limited to the companies that use, manufacture and dispose of the contaminating chemicals. Often named as well are the manufacturers of the storage tanks and the architects and builders of the plants where the chemicals are produced or used. Private utility companies, well owners and operators, and state and local government agencies are other commonly named defendants.

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Whoever the specific parties, the suits generally rest on theories of both negligence and strict liability. James A. Bruen of San Francisco's Landels, Ripley & Diamond and a defense attorney in the Fairchild case says, "We don't see any new theories of liability."

Plaintiffs in the Fairchild suit (*Ross v Fairchild, Santa Clara Superior Ct, No. 543175, Jud. Coun. Coord. Proceeding No. 1678 (Fairchild Chemical Cases II)*), argue that Fairchild and other defendants were negligent in failing to meet ordinary standards of care in the design, installation, maintenance and monitoring of the chemical storage tanks. Moreover, the plaintiffs claim the defendants are strictly liable for engaging in the ultrahazardous activities of using, storing and disposing of toxic chemicals. Finally, the plaintiffs claim that the defendants were negligent *per se* in failing to meet state and federal permit regulations for handling toxic chemicals. In addition, the Great Oaks Water Company in South San Jose is charged with failure to make sure the water it provided to customers was safe and to warn customers about the contamination after it was discovered.

In the Stringfellow Acid Pits suit, the site owners and dumpers are accused under theories of strict li-

ability for dealing with ultrahazardous materials, and the dumpers are accused of negligence for depositing materials that were not supposed to be dumped at the site at all. The plaintiffs also argue that the state and county were negligent in approving the dump site. "The geological work was done improperly," says Duggan. "The bedrock was fractured, not impermeable."

Causal links

By far the most problematic aspect of these kinds of cases is not the number of parties involved, however. The "weak link," says Duggan, is causation. To show a relationship between an injury and exposure to a particular chemical, a plaintiff generally must establish the extent of his exposure, offer medical testimony that he has suffered specific health effects, and present either laboratory studies linking the chemical to the specific health effect or epidemiological studies which show that persons exposed to the chemical have suffered injuries that unexposed persons have escaped. Many chemicals have been so little scrutinized for their health effects that plaintiffs must rely heavily on epidemiological evidence.

Tyndall of The Boccardo Law Firm in San Jose says, "The standard test in the past has been whether it is more probable than not that there is a connection between a tortious event and an injury. You don't have to have certainty or, as in a criminal case, proof beyond a reasonable doubt."

But even establishing probability is not easy, since the exact health effects of most chemicals are still unknown. Trichloroethane (TCA), trichloroethylene (TCE) and carbon tetrachloride, which are among the most frequently reported groundwater contaminants, are known animal carcinogens, but it is not clear whether they are human carcinogens. Toluene, also frequently found in groundwater, has not yet been tested in animals. Dibromochloropropane (DBCP) is known to cause infertility and birth defects, but it has not been established as a human carcinogen.

Plaintiffs in the Fairchild suit claim that the chemicals (primarily TCA) that leaked into their drinking water were responsible for 13 deaths and miscarriages, congenital heart and kidney defects, cancer, skin disorders and blood diseases. A study released in January 1985 by the California Department of Health Services shows that miscarriages and birth defects in the Los Paseos neighborhood south of the Fairchild plant occurred at two to three times the expected rates. Although the study did not directly attribute the high rates to water contamination, it did rule out the conventional causes of those kinds of defects: mothers' behavior, medical conditions and occupations.

"Epidemiological evidence can be of help to a jury," says Bruen. "But there are good epidemiological studies and bad ones. We are in a very complicated area, where science is uncertain." One party's epidemiological study is likely to be contested by the other's, and Bruen fears that if juries are called upon to speculate in areas where science is uncertain, "we will fail to understand the real causes of disease."

Duggan admits that the more the Stringfellow plaintiffs' lawyers learn about epidemiological studies, the more frustrated they feel. "Epidemiologists tell us they don't produce conclusions that can be relied on in court. They can always be picked apart; there's always another possible explanation for the findings. Even if you do a study, it's almost impossible to make a link with present damages, especially when you have a witches' brew of many different chemicals." Duggan says his colleagues in the case are backing away from reliance on epidemiology. "But its very frustrating to think we may have to give up linking current health problems with the contamination."

Another problem with epidemiological studies is the expense. The Los Paseos study would have cost \$200,000 to \$300,000 if performed by a private company. Other problems are a lack of baseline data on the health of a community before a pollution incident and a lack of

private access to government data. While the state Department of Health Services maintains cancer and birth defect registries for some counties, the information is not available to private attorneys. So unless the plaintiffs have a lot of money or the Department of Health Services feels that the threat to public health is immediate enough to warrant a special study, plaintiffs may find they are unable to secure epidemiological evidence.

Fear of cancer

In 1983, San Francisco Superior Court Judge Daniel H. Weinstein, grappled with the some of these issues in the case of *Arnett v The Dow Chemical Co.* (SF Super Ct No. 729586, Jud. Coun. Coord. Proceeding No. 954 (Chemical Exposure Cases)), in which workers at Occidental Chemical Company in Lathrop sued for damages they incurred working with DBCP. The plaintiffs alleged sterility or decreased sperm count, increased risk of cancer and fear of developing cancer in the future.

(1980) 27 C3d 916, 167 CR 831), Weinstein said sufficient guarantees of genuineness existed to justify allowing the jury to hear the issue.

In one of the first major groundwater contamination cases to be decided in the country, a New Jersey appellate court last spring denied damages for medical surveillance of plaintiffs who had been exposed to contaminated drinking water for six years, but who claimed no current related health problems. *Ayers v Township of Jackson* (Super Ct of NJ App Div, No. A-2103-83T3).

The court observed that the toxicologist's testimony that the plaintiffs were subject to an increased risk of cancer was unsubstantiated. Therefore, said the court, there was no justification for imposing on the defendant the financial burden of the plaintiffs' lifetime medical surveillance.

Who's responsible?

In some cases, establishing the source of the groundwater pollution can be almost as difficult as establishing a link between the plaintiff's present or potential injuries and the polluting chemicals. For one thing, groundwater testing does not always reveal existing contamination. According to Evan Nossoff of the State Water Resources Control Board, "You could sink 100 wells into a major aquifer and still not know whether the water is contaminated." Even when testing reveals pollution, the source may not be apparent.

Companies that know they have lost chemicals into the ground may sink wells on their own property to monitor the spread of an underground plume, but the contamination may spread miles beyond their premises. In San Jose, for example, IBM has drilled more than 300 wells to pursue, analyze and clean up pollution from a leak detected in 1981. The pollution was found to extend two miles beyond the plant, and the total detection and extraction costs so far are \$25 million.

One measure of the potential costs of these suits is the increasing difficulty with which users of toxic chemicals secure liability insurance

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The judge refused to allow the plaintiffs to submit to the jury their claim for damages for an increased risk of cancer based on the results of animal tests and expert testimony that the qualitative risk is proportional to the degree of chemical exposure. Weinstein said that there is no evidence of a link between cancer and DBCP that reaches "the requisite level of acceptance within the scientific community to justify legal reliance." But Weinstein had a different reaction to the plaintiffs' prayer to recover damages for the fear of cancer.

Noting that California law recognizes that traumatically induced fear can constitute a disabling and long-lasting emotional injury (*Molein v Kaiser Foundation Hospitals*

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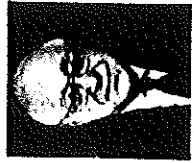
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coverage. Fearing large judgments against American policyholders, European buyers of reinsurance are withdrawing from the market.

Industries facing toxic tort claims traditionally have been allowed to "stack" coverage, so that if they have \$50 million in coverage, they can spread it over 10 to 20 years of claims, effectively giving them \$500 million to \$1 billion in insurance. But, says attorney Harry Redman of the New Orleans firm of Phelps, Dunbar, Marks, Claven and Sims, "It's like the old pyramid game. The coverages and the risks stack so heavily on the insurers that eventually it will break their backs. If you get 2,000 chemical waste dumps running \$10 million to \$200 million apiece, that could put a lot of people out of business." And if insurers decide to limit coverage, that could push companies facing large suits into bankruptcy.

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Industry may push for legislation to limit the compensation awarded victims of exposure, something like the Rasmussen Act (42 USC §2210 (e)), which caps the liability of utilities for nuclear power plant accidents. Yet public concern over toxic chemicals runs so high that few observers expect the Legislature to go for such a measure. Moreover, says Tyndall, "The problem of groundwater is remediable. Groundwater can be cleaned up, albeit at great expense. And it's not that difficult to make sure that this stuff doesn't get into the groundwater in the first place."

Cleaning up the witches' brew

The California Legislature in 1983 passed the first law in the nation governing containment and monitoring of toxic wastes in un-

derground tanks. Health & S C §25280 et seq. Tanks in operation before January 1, 1984, are required to have a system for detecting leaks, and all new tanks must have double linings and monitoring equipment. Violation of these requirements results in civil penalties. Requirements for double lining and monitoring were extended to surface impoundments in 1984 (see Health & S C §25208 et seq).

The state's preventive program is in good shape, according to Kip Lipper, consultant to the Assembly Natural Resources Committee. Now, says Lipper, the biggest problems have to do with cleaning up existing leaks and setting drinking water standards.

The administration argues that local agencies should make sure contamination is cleaned up by the responsible parties, but Lipper says that local agencies don't have the resources or the manpower. For the past two years, some legislators have argued that the state water board, through the regional boards, should be given explicit authority to oversee cleanup operations, as well as increased funds and manpower for the job. But the governor has remained unconvinced and this year deleted from the budget a \$15 million program for state-directed cleanup efforts.

For its part, the Legislature rejected Deukmejian's proposal for a new state Department of Waste Management to take over many of the functions now performed by the state water board. The legislators feared that in transferring jurisdiction from the water boards to the new department, cleanup efforts would become mired in the centralized bureaucracy and water quality would suffer. Attorney Theodore G. Smith, chair of the Silicon Valley Toxics Coalition, says, "Our organization feels the governor's proposal would be a disaster. It would dismantle the regional water boards, which have local hearing requirements and are more responsive and more accessible." Nonetheless, Smith expects the reorganization issue to come up again next year.

Also unresolved is the question

of what criteria should be used in setting drinking water standards. At present, standards are based solely on public health considerations, although only unenforceable "action levels" exist for some substances and there are no guidelines at all for many chemicals now showing up in groundwater. See Health & S C §4010 et seq.

This year, Assemblyman Bill Jones (R-Visalia) introduced a bill (AB 2133) that would make economic factors—for example, the cost to farmers of not using certain

pesticides—a consideration in setting drinking water standards. "Industry is pushing hard to redefine what is safe and to get people to accept less stringent standards," says Ted Smith, Byron Sher (D-Mountain View), chair of the Assembly Natural Resources Committee, introduced a counterproposal (AB 859) that would continue the current health-based standard, and make current action levels enforceable. Both bills were in the Senate Toxics and Public Safety Management Committee when the

Legislature adjourned and are scheduled for interim hearings.

While the governor and the legislators argue over setting drinking water standards and overseeing cleanup efforts, more and more people are being exposed to contaminated groundwater. "The problems that bring people to court are not going to disappear overnight," observes San Jose's Amanda Hawes, an attorney for the Fairchild plaintiffs. And its a sure bet that the number of groundwater suits will continue to rise. □

Second-generation groundwater lawyers

Even before the recent spate of groundwater contamination cases, California had a large group of lawyers specializing in business compliance with water quality laws. Since the federal Superfund act attaches responsibility for chemical wastes to any company that generates them, practically all manufacturers have long sought regulatory advice. San Francisco's Landels, Ripley and Diamond has 18 full-time and 3 half-time lawyers in its environmental department who spend much of their time on water-related regulations. Latham & Watkins of Los Angeles has 17 attorneys who concentrate largely on the field of hazardous waste and groundwater contamination. Pillsbury, Madison and Sutro in San Francisco has 20 attorneys in the field.

Now, as victims of exposure to contaminated groundwater are beginning to sue for damages, a second generation of groundwater lawyers is emerging, and these attorneys are concerned primarily with tort law. The Boccardo Law Firm of San Jose and Klein, Wegis & Duggan of Bakersfield have substantial commitments in this area. Karl S. Lytz of Latham & Watkins says,

"We have a growing number of toxic torts going on."

Indeed, it looks as though California may become an international center for the practice of toxic torts. Developing nations, especially, do not have strict laws protecting their citizens and environment from toxic chemicals. Yet chemical exposure is increasing rapidly in third-world countries as they push for industrial development and their cheap labor attracts U.S. companies.

After the accident at the Union Carbide plant in Bhopal, India, American courts and counsel were sought because Indian courts have had no experience with such large cases and would undoubtedly take decades to reach a judgment. California courts, on the other hand, have a large body of product liability law with which to work, have dealt extensively with questions of venue and have developed means of handling large numbers of defendants. John Tyndall of The Boccardo Law Firm, which was made lead plaintiffs' counsel for the Bhopal litigation, says, "People [in other countries] aren't as affined to suing for personal kinds of injuries."

Because California courts may be more receptive than other state courts to toxic tort claims, California will probably attract suits from other states as well. Amanda Hawes of San Jose's Gallardo, Chu and Hawes says, "California has good legal standards. Most of what we do is based on facts, and the system handles it well." California has extended the statute of limitations to allow a victim to pursue a claim for three years after discovery of a chemical-related injury or disease. California courts allow apportioned damages when exact responsibility for an injury cannot be assigned to one defendant, and civil discovery rules are "in general helpful to a claimant." California juries are concerned about water, relatively well-educated and able to listen to arguments involving medical evidence and epidemiology.

James Eruen of Landels, Ripley & Diamond says, "At the moment, I think we are probably the best-trained legal system in this area of law. We've been involved with the litigation for 10 years. We have a tremendous head start. I think we will always be a resource."

—PS