

TERRORISM, TOXICS, AND TORT

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Following the September 11 terrorist attacks, our country found itself in the grip of a kind of fear previously unknown to most of us—fear of an unknown and unpredictable enemy, beyond our control, impossible to predict, lurking everywhere but visible nowhere. With the anthrax threat following hard on the heels of the September 11 attacks, it seemed possible that even the enemy's methods had become stealthy; we felt compelled to be on the lookout not just for knives and airplanes, but also for powdery substances and symptoms of the flu. It would have been peculiar not to have felt at least a little vulnerable.

Although September 11 undoubtedly marked a watershed in our nation's history in many ways, the kind of fear that enveloped many of us following the terrorist attacks was not new to all of us. It was the same kind of fear that had spread like wildfire through countless communities exposed, not to terrorist threats, but to dioxin, mercury, arsenic, asbestos, plutonium, and the like. Toxics and terrorism share these characteristics: they are lethal, uncertain, unpredictable, uncontrollable, unjust, involuntary, and potentially catastrophic. As decades of psychological and sociological research attests, these are the kinds of attributes that make certain risks very scary indeed.¹

In many cases, as any student of tort law well knows, plaintiffs who complain about toxic exposures caused by the carelessness and indifference of others often have only their fear to offer courts evaluating their complaints: maybe it is too early for them to have fallen ill from their exposures, or maybe they cannot prove the illness they do have was caused by the exposures, or maybe all of the experts who might have testified that their illness was linked to toxics have had their testimony thrown out by judges who do not believe in modern risk assessment.² Yet, when fear is all a plaintiff has, most often it's not enough.

Courts give many reasons for this result. Prominent among them is the sense that the fearful are not "truly injured" in the way that the physically harmed are, and that to allow recovery by the merely fearful will be to draw resources away from the truly injured.³ Closely related to this is the perception that people who are fearful as a result of toxic exposures are not thinking clearly; perhaps they are even a little weak. We are all exposed to toxics, all the time, the Supreme Court has reminded us, in a decision denying relief to a man who was afraid he would get cancer because his job had left him covered from head to toe with asbestos on a daily basis.⁴ Exposure to toxic chemicals in adults' drinking water and

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1. For a classic discussion, see Paul Slovic, *The Perception of Risk*, 236 SCI. 280 (1987).

2. See, e.g., *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (affirming refusal to admit into evidence epidemiological and animal studies pointing toward a link between polychlorinated biphenyls (PCBs) and cancer).

3. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433-34 (1997).

4. *Id.* at 427, 430.

babies' bathing water, opined another court, is simply not a traumatic stressor on the order of earthquakes, tornadoes, or overt acts of physical violence.⁵

Even before September 11, these disbelieving and dismissive reactions to fear-based claims were unwarranted. In this essay, I will, first, briefly lay out the considerable research showing that individual anxieties and social traumas arising out of toxic exposures are a sign of neither eccentricity nor malingering; on the contrary, they are strikingly common and predictable reactions to toxic events. I will go on to suggest that after September 11, hostility to fear-based tort claims is even less defensible. Our collective reaction to the events of September 11—a reaction characterized by widespread fear, anxiety, and depression—should make us more sympathetic to, and less dismissive of, tort claims grounded in fear.

Prolonged, uncertain, uncontrollable threats—threats like those posed by both terrorism and toxic contamination—arouse special anxieties in many people, anxieties that can have large effects on individuals and communities. When radiation escaped from the nuclear power plant at Three Mile Island, when cancer began to appear in families who drew their water from wells near an industrial site in Woburn, Massachusetts, and when known carcinogens were found seeping into the basements of homes near Love Canal in New York, the affected individuals and communities experienced a series of social and psychological responses, responses that should be familiar to anyone who has followed the reactions to the events of September 11.

Individuals who have been exposed to substances whose harmful physical effects likely will not become manifest for years, perhaps decades, have suffered a wide range of adverse psychological responses to these exposures. These responses include anxiety and anguish about their future health, depression, and physical conditions linked to their emotional distress, such as fatigue and insomnia, headaches, and stomach problems.⁶ Where only time will tell whether a person will become sick from toxic exposures, the waiting can almost be worse than the sickness. A military veteran exposed to radiation during atomic testing described the awful uncertainty engendered by latent risk in this way: "the worst would be better than this."⁷

Studies of communities that have experienced prolonged exposure to risk have also revealed large and adverse effects on the communities themselves, beyond the individual reactions just described. Kai Erickson describes the phenomenon well:

The experience of trauma, at its worst, can mean not only a loss of confidence in the self but a loss of confidence in the scaffolding of family and community, in the

5. *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1210 (6th Cir. 1988).

6. For more detailed discussion, see Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEO. L.J. 2025 (1999).

7. HENRY M. VYNER, *INVISIBLE TRAUMA: THE PSYCHOSOCIAL EFFECTS OF INVISIBLE ENVIRONMENTAL CONTAMINANTS* 57 (1988).

structures of human government, in the larger logics by which humankind lives, and in the ways of nature itself.⁸

Within families and among neighbors, long-lived threats have often produced arguments and divides that did not exist before the threatening exposures occurred. One of the most dramatic of these social effects of environmental threats is a loss of trust.⁹ A generalized loss of trust in society's institutions has extended not only to the corporations or other entities directly responsible for the threat, but also to the government authorities responsible for reacting to the threat. Sometimes, in fact, citizens have lost more faith in the government than in the polluter. This loss of trust can have severe effects on citizens' relationship with their government and even on the functioning of government. And, once lost, trust is hard to restore.

The loss of trust that often accompanies toxic exposures is connected to the uncertainty surrounding these exposures. This uncertainty puts the government in the position of wanting to say something about the threat, without having very much it can say. The dilemma is reflected in the following statement by the United States Environmental Protection Agency regarding dioxin exposures in Missouri:

Dioxin in Missouri may present one of the greatest environmental problems in the history of the United States. Conversely, it may not.¹⁰

In the absence of information about the actual physical effects of pollution—which, with long-term threats, may not be available for many years, if ever—people are forced to come to their own conclusions about the risks they face. In the absence of good information about insidious threats, people often end up fearing the worst.

A fairly small list of features, it appears, determines whether these adverse individual and collective reactions will emerge in response to a particular hazard. Decades of research into risk perception, spearheaded by Paul Slovic and others, have produced a small list of characteristics that help to determine our perceptions of risk.¹¹ When a risk is unfamiliar, uncontrollable, involuntary, inequitable, dangerous to future generations, irreversible, not obviously beneficial, man-made, fatal, catastrophic, or poorly understood, or some or all of these things, ordinary people are likely to view it as risky. These characteristics work in the other direction when they are reversed; that is, a hazard that is familiar, controllable, voluntary, equitable, dangerous only to the present generation,

8. KAI ERICKSON, *A NEW SPECIES OF TROUBLE: THE HUMAN EXPERIENCE OF MODERN DISASTERS* 242 (1994).

9. Paul Slovic, *Perceived Risk, Trust, and Democracy*, 13 *RISK ANALYSIS* 675 (1993).

10. MICHAEL R. EDELSTEIN, *CONTAMINATED COMMUNITIES: THE SOCIAL AND PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE* 76 (1988) (quoting *St. Louis Post-Dispatch* Nov. 14, 1983).

11. See, e.g., Slovic, *supra* note 1.

reversible, clearly beneficial, natural, diffusely harmful, and well understood is unlikely to generate much concern in the populace. These dichotomous categories help to explain why many people might worry about nuclear power even as they make their way to their doctor's office for an X-ray. The basic insight from these accounts of risk perception is that ordinary citizens, in judging the riskiness of a substance or activity, take into account quality as well as quantity; they do not assess riskiness solely according to the numerical probability and magnitude of harm, but rely as well on the human setting in which a risk is experienced.

Which brings us to the psychological aftermath of September 11. Terrorism bears all the hallmarks of a very scary and depressing hazard: its origins and/or consequences are lethal, unfamiliar (who before September 11 really expected airplanes to be flown into buildings?), uncontrollable, involuntary, inequitable, irreversible, not beneficial, man-made, catastrophic, and poorly understood. About the only characteristic of toxic terrors not clearly associated with terrorism itself is an effect on future generations; and even here, it is not hard to imagine terrorism taking holding on a society and reshaping it for generations to come (we may be in the middle of such a transformation even now).

Toxics and terrorism, however much they are different, both occupy the frightening side of the dichotomous categories made famous by Paul Slovic. Few people think it is crazy, or silly, or weak, to be frightened of the possibility of another terrorist attack. Perhaps the widespread understanding of the anxiety that follows terrorism will encourage a similar understanding of the fear that follows toxic events. It may well be that courts, despite this enlarged understanding, will continue to deny fear-based tort claims. But perhaps they will be inspired to develop better reasons for these denials than that the people who are afraid are irrational, or silly, or weak.