

UTILIZING NOVEL TECHNOLOGIES TO SUSTAIN TRESPASS AND BATTERY AS TOXIC TORTS

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There are more than 32 million organic and inorganic substances registered by the American Chemical Society, with nearly 4000 new substances added each day. Very little is known about the majority of these substances, but research is continually uncovering the deleterious effects of many chemicals and additives on human health. Likewise, new and emerging technologies are making it ever easier for scientists to detect minute quantities of contaminants in the body. Though the concentrations of these contaminants may not be sufficient to cause disease or illness, the unwanted presence of toxins in the body nevertheless can present an offensive invasion to the body. Actions in tort under common law trespass or battery theories may provide an appropriate avenue for plaintiffs exposed to chemical and other toxic contaminants to obtain relief when more traditional theories, such as negligence and product defect, might be difficult to pursue.

Despite the suitability of trespass and battery for toxic tort claims, however, plaintiffs have not readily relied on these theories to recover damages for offensive toxic trespass on the body. With the increased acceptance of new technologies, such as molecular epidemiology and toxicogenomics, which measure genetic biomarkers of exposure and predict effects, evidence of bodily exposure to toxic chemicals will likely generate additional support for trespass and battery as a toxic tort claim.

Defining and Evaluating Trespass and Battery as Toxic Torts

Trespass occurs when one enters the land of another without consent or privilege.³ The actor may be liable if the entry is intentional or otherwise tortious.⁴ Modern application of this rule to toxic torts can be traced to *Martin v. Reynolds*,⁵ where the Supreme Court of Oregon ruled that trespass occurred when emissions from an aluminum plant were deposited on adjacent farmland, making it unsuitable for grazing. Even though the particles were “invisible” to the naked eye, the court found that it was not the size of the particles, but the harm to the land that mattered. Other courts have held, however, that trespass is not dependent on “harm.” Early common law included trespass on “a man’s body.”⁶ Trespass on the body is now generally viewed as battery.⁷

Under the common law, one who acts with the intention of causing a harmful or offensive contact, or imminent apprehension of such contact, whereupon harmful contact directly or indirectly results may be held liable for battery.⁸ In an action for battery, a plaintiff need not prove actual physical injury; rather, a demonstration that the defendant’s conduct caused an alteration of the plaintiff’s body is sufficient.⁹ “The essence of a battery cause of action is an offense to an individual’s dignity from an invasion of that individual’s person, not the physical harm done to the body.”¹⁰ As such, battery “emphasizes the right of the individual to be protected from non-consensual bodily contacts, especially those that are offensive.”¹¹

A primary advantage to a cause of action in battery over traditional, negligence-based toxic tort theories is that it eliminates the require-

ment of proof of causation between a defendant’s action and a plaintiff’s physical injury or illness.¹² Proof of causation in toxic tort claims is typically difficult to prove, particularly when exposure to a toxin or contaminant may lead to a plaintiff’s illness only after a long latency, or when exposure does not result in a disease specific to such exposure. In battery actions, the fact of contact between the body and the substances itself constitutes an injury, particularly when that contact is offensive.¹³

The notion of “offensive” (as opposed to injurious) contact as constituting a battery is critical to recognizing the variety of harm experienced by plaintiffs in toxic exposure situations.¹⁴ Additionally, the question of what constitutes “offensive” conduct is generally a question for the jury to decide.¹⁵ Plaintiffs might have an easier time of demonstrating offensive, rather than medically harmful contact, and thereby be entitled to collect nominal and/or punitive damages (given the intentional tort) for defendant’s actions that would have been precluded by more traditional toxic tort theories.¹⁶

Along with proof of “offensive contact,” plaintiffs must also establish that the defendant acted intentionally in causing the plaintiff to come into contact with the contaminant or toxin. Though proof of intent might present some challenges for plaintiffs, in the environmental battery context, intent can encompass “not only a purpose or desire to bring about a given consequence,” but also extends to “those consequences that the actor believed would be substantially certain to follow from its conduct,” notwithstanding any purpose to cause harm.¹⁷ Thus, intent can be presumed when a reasonable person in the actor’s position would have anticipated with substantial certainty that a harmful or offensive contact was likely to follow.¹⁸

Battery might also eliminate statute of limitations problems some plaintiffs face in bringing toxic tort claims. Some authors have described continuing battery as analogous to a continuing trespass owing to the permanent presence of contaminants in the body following initial exposure.¹⁹ Continuing torts are generally not barred by a statute of limitations. If exposure to a particular toxin is offensive at the outset, it usually does not become complimentary or benign over time. Conversely, the permanent presence of a particular toxin in one’s body might later increase the likelihood that a harmful impact, such as disease or illness, will occur.²⁰ Claims for medical monitoring, whereby plaintiffs generally request defendants to fund a program to cover the cost of medical testing intended to detect and diagnose future disease, are in direct response to this phenomenon and have increasingly been recognized by courts. On the other hand, many courts have been reluctant to allow “fear of” future disease (or “cancerphobia”) claims in the absence of acute physical consequences.²¹ A continuing battery cause of action could provide additional protection to an injured plaintiff and insure that plaintiffs are able to obtain appropriate recovery for all forms of offensive contact.

Battery as a Collective Action

Courts often deny class certification for environmental toxic torts,

