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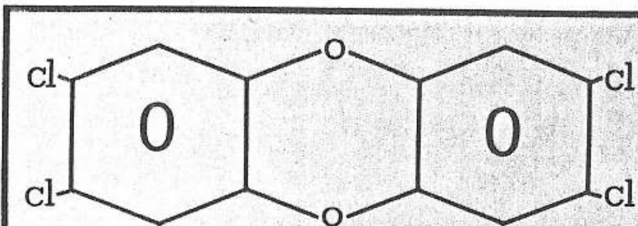

A Dioxin Molecule

Although there are 75 possible chemical structures classified as chlorinated dioxins, the term is more commonly used to refer to the most toxic member of the group — the compound known as 2,3,7,8-TCDD (2,3,7,8-tetrachlorodibenzo-p-dioxin).

The compound is made up of two benzene rings, bonded with two oxygen atoms. Two chlorine atoms are attached to each ring.

Dioxin can result from a two-part reaction in the manufacture of TCP, a common chemical intermediate in the manufacture of herbicides.

Lawyers Take Aim at Dioxin

A Silver Bullet — Or Merely a Dud?

BY JOHN RILEY
National Law Journal Staff Reporter

IT IS JUST a molecule. So far it has proven elusive. But in the wake of the $180 million Agent Orange settlement, the legal and scientific pursuit of dioxin is far from over. It is, many feel, just beginning.

Plaintiffs' lawyers around the country are slowly drawing a bead on the controversial molecule — a substance that has been called the most potent synthetic toxin known to man.

But with substantial scientific disagreements over dioxin's health effects largely untested in the courtroom, pivotal decisions are rapidly approaching that could determine whether dioxin becomes a silver bullet among toxic torts in the 1980s or a dud.

Billions of dollars in dioxin-related claims are already in the litigation pipeline — ranging from cases involving hazardous-waste sites and accidental spills to occupational exposures and domestic herbicide spraying. Some include not only standard claims for manifested medical problems, but also unusual claims for "cancerphobia," enhanced risks and medical monitoring that could be crucial to the field of environmental torts generally.

In addition to upcoming "fairness hearings" on the Agent Orange settlement, two other major dioxin cases are currently on trial. In Charleston, W.Va., claims of 172 workers against Monsanto Co. for dioxin exposures from Agent Orange production at a plant in nearby Nitro, W.Va., are being tested in a trial of seven of the cases. And in Belleville, Ill., 75 residents of Sturgeon, Mo., have been in court for five months pursuing claims stemming from a 1979 railroad spill.

Still more litigation, lawyers say, could be spurred by victories in these cases, the results of dozens of scientific studies currently under way and the outcome of ongoing federal surveys of chemical production and disposal sites across the country for possible dioxin contamination. And further Agent Orange litigation could be pressed by an estimated 2,300 Vietnam veterans who opted out of the class action over spraying of dioxin-contaminated herbicides during the Vietnam War.

"The amount of disease that has been caused by dioxin is nowhere nearly known," contends Thomas Henderson of the Pittsburgh law firm of Henderson and Goldberg, a member of the plaintiffs' management committee in the Agent Orange case. "But the amount of dioxin

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How the Plaintiffs' Bar Shares Its Information

BY DAVID RANII
National Law Journal Staff Reporter

LAWYERS WHO bring mass tort lawsuits increasingly are taking to heart an old maxim: There is strength in numbers.

In cases focusing on products ranging from tampons and the morning-sickness drug Bendectin to General Motors X-cars, hundreds of plaintiffs' lawyers with similar cases scattered across the country have established highly organized networks for sharing and disseminating information. Their common goal: to minimize their efforts and maximize recovery for their clients — and themselves.

Although some "litigation groups" are formed at the behest of courts in multidistrict litigation or in class actions, personal-injury lawyers have found it mutually advantageous to join forces voluntarily in many other cases involving the same product and common foes, sometimes doing so with the aid of the Association of Trial Lawyers of America.

Many of these groups, also called "clearinghouses," have proved efficient and successful. But lawyers cite some potential pitfalls as well.

One problem, veteran plaintiffs' attorneys say, is internal: ego battles between the lawyers involved. And attorneys also must contend with prob-

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U.S. DISTRICT CHIEF JUDGE MILES W. LORD — Minneapolis Star-Tribune

A Judge's Public Battles

BY DAVID RANII
National Law Journal Staff Reporter

ST. PAUL, Minn. — When U.S. District Chief Judge Miles W. Lord was state attorney general here in the late 1950s, his subordinates chipped in and bought him a portrait of a gleaming white knight for his office.

"That is the way most of the people saw Miles," recalled Douglas Amdahl, chief justice of the Minnesota Supreme Court and a friend of Judge Lord. "He was a representative of the poor and the undefended [as attorney general]. I don't think he has ever changed."

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HIGHLIGHTS

$2.35M in Fees p. 2

A JUDGE in Olympia, Wash., has awarded $2.35 million in attorney fees and costs to plaintiffs' lawyers who won a $15 million class action against a state agency there.

More Havoc p. 3

BANKRUPTCY Courts were thrown into havoc once again last week when the top administrator of the federal courts announced that he would not continue to pay judges their salaries.

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Toxic-Tort Spotlight Shines on Dioxin

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generated suggests to me that there is a problem of major proportions, and there is much less litigation now than there will be."

"Dioxin may be becoming the chic claim," adds W. Stuart Calwell of Charleston's Calwell, McCormick & Peyton, who is trying the case against Monsanto.

Incomplete Returns

The returns, however, aren't even close to complete. Some skeptics suggest that gradually intensifying federal regulation of dioxin-contaminated products and problems of proof in cases of low-level exposure quickly will put a cap on claims.

And others point out that, despite a few settlements and one trial victory, plaintiffs' lawyers have yet to demonstrate that they can consistently overcome the considerable legal and scientific hurdles of dioxin litigation and win verdicts.

"People are watching the outcomes of these cases very closely," notes Dr. Ellen Silbergeld, a toxicologist with the Environmental Defense Fund in Washington, D.C., who has testified as a plaintiffs' expert in dioxin cases.

"We are beginning to telescope the normal lag between science and law," says Mr. Henderson. "With dioxin, we're marching more in step. But that means we're on the cutting edge of both science and law on these cases."

It was the Agent Orange controversy that first focused widespread public attention on dioxin. Some 12 million gallons of the defoliant, shipped in orange-striped drums, were used to eliminate ground cover for enemy troops in jungle areas in Vietnam from 1965 to 1970.

Its use in the war was canceled in 1970 amid concern over dioxin contamination of one of Agent Orange's constituent parts, the herbicide 2,4,5-T. After extended regulatory hearings, most domestic uses of 2,4,5-T were suspended by the Environmental Protection Agency in 1979.

Legal accountability has taken longer. Although knowledge and research on an unwanted toxic byproduct of 2,4,5-T manufacture dates to a 1949 accident at Monsanto's Nitro plant — one focus of the current litigation in Charleston — the substance was not identified as dioxin until the late 1950s.

The Agent Orange class action focused on claims from many Vietnam veterans that exposure to dioxin during the war was responsible for numerous medical problems, ranging from chloracne — a painful skin condition — to nervous-system disorders, liver disease, cancer and birth defects in their children. *In re Agent Orange Product Liability Litigation*, MDL 381 (E.D.N.Y.).

Beyond chloracne, however, the Veterans Administration, Monsanto, Dow Chemical Co. and five other Agent Orange manufacturers named in the suit have contended that there is no proof of adverse long-term health effects in humans and resisted dioxin claims. (NLJ, May 21.)

That key issue was not resolved by the Agent Orange settlement. "We had 18 world-class scientists ready to testify," notes Chicago attorney Stephen Schlegel, a member of the class action's management committee. "And the defendants had 30 to 60 of their own."

"In my opinion, one of the big reasons for the defendants settling was that the question of causation was going to a jury from literally soup to nuts," adds Mr. Henderson. "Once that's established as it very well might have been, you could have had situations arise where the Agent Orange verdict would have been applied as offensive collateral estoppel."

While they contend that evidence of dioxin's long-term toxic effects on humans is strong, plaintiffs' lawyers and sympathetic experts concede that study of the toxin is in its infancy compared with widely litigated substances like asbestos. That has created a set of special problems in dioxin cases.

Loren Fisher/NYT Pictures

UPI/Bettmann Archive

TIME FOR SAFETY? Shown at left are Omar Cunningham (left) and Lonnie Hurley, who are among 172 Monsanto Co. employees contending that they became ill because of dioxin in a herbicide produced at the company's Nitro, W.Va., plant (above). The trial of claims against Monsanto, now under way in U.S. District Court in Charleston, is providing a test of company-sponsored studies that contend the toxin has no proven long-term health effects.

Dr. Irving J. Selikoff, director of the Environmental Sciences Laboratory at New York's Mount Sinai Hospital School of Medicine, says the scientific uncertainties surrounding dioxin fall generally into three areas.

One is the question of "unity of the species" — the applicability of animal data to humans. Because attention has focused on dioxin only recently, he says, "We have lots of data on animals but a paucity of data on humans except in cases of very high exposures."

Those problems are compounded by questions about "dose response" — the extent to which medical risks may vary based on the extent and duration of exposure and the difficulties of establishing the extent and duration of exposure in a particular case.

Finally, Dr. Selikoff notes, rapid scientific advances in developing human epidemiological data are hampered by the problem of long latency periods for cancer and other medical consequences. "What do you do before you find out?" he asks. "You have to give specific answers, and science can't give specific answers."

"The human data is in a great state of flux," adds Dr. Silbergeld, "and the contrast with asbestos is valid. Asbestos produces fairly few effects. One is cancer, and a relatively rare cancer, and it leaves its tracks behind it. Dioxin has more of a diversity of effects with more subtlety, a lack of uniqueness and problems of establishing exposure after the fact."

Even when human studies are done, they tend to raise as many questions as they answer. For example, in February, a U.S. Air Force scientific team released a long-awaited epidemiological study of 1,045 enlisted men and officers involved in Operation Ranch Hand — the code name for the Agent Orange spraying project in Vietnam. The study concluded that there was "insufficient" evidence to support a causal relationship between herbicide exposure and adverse health.

Critics of the study, however, have attacked both its methodology and its conclusions.

Advocates for veterans claiming Agent Orange injuries argued that the Ranch Hand study group included active duty personnel who might well be disinclined to report physical or psychological problems. They also contended that the exposure patterns of ground troops patrolling in sprayed areas were very different from air personnel who returned to relatively hygienic surroundings and facilities after spraying missions.

Other criticisms have focused on the conclusions of the study. The Ranch Hand raw data for the study population included elevated levels of certain types of minor birth defects, deaths among newborns, subjective psychological complaints and certain liver disorders and skin cancers.

The Air Force investigators dismissed such anomalies because of a lack of correlation to the estimated levels of Agent Orange exposure within the group and the availability of other explanations, such as smoking and alcohol consumption. But others are dubious.

"It's a remarkable study," notes Dr. Silbergeld, who wonders whether the data justified the conclusions. "You see a number of adverse effects — particularly in the death rates of children in their first year of life — that seem to me to be statistically significant."

Jury Fright

While an unusual degree of scientific uncertainty and expert disagreement seems to go with the territory in dioxin cases, plaintiffs' lawyers do not view them as insurmountable barriers.

For one thing, there are, quite simply, experts who will make the medical link with dioxin that plaintiffs need,

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Dioxin Cases Still Face Scientific Battles

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basing their opinions on that human data that does support a link.

"There are a wide range of symptoms and differences in susceptibility, but dioxin exposure establishes a pattern that is very unique," argues Dr. Bertram W. Carnow of Chicago's University of Illinois School of Occupational Medicine, an expert witness in a 1982 dioxin-related trial and who is expected to testify in the Monsanto case. "Using biostatistical analytical techniques, it can be identified."

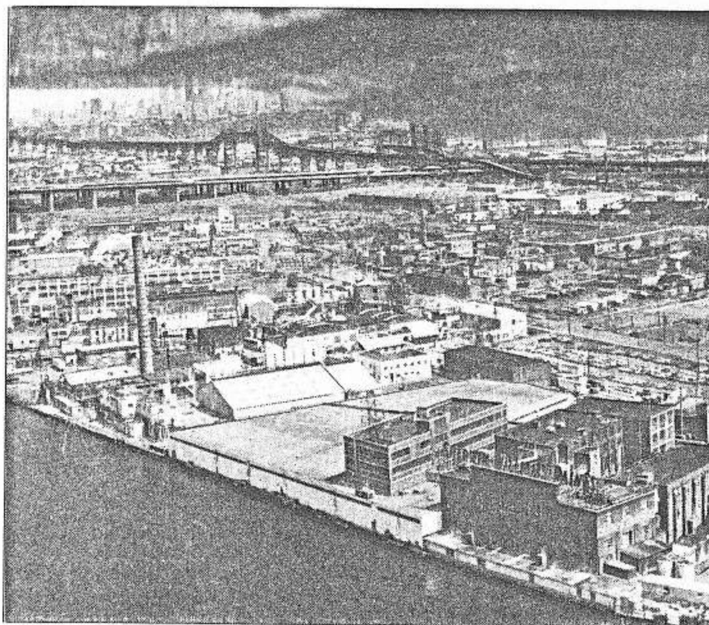
In addition, some lawyers suggest, the difficulties of proving causation are balanced by widespread public fear of dioxin flowing from incidents such as discovery of the Love Canal hazardous-waste dump site near Niagara Falls, N.Y., and the spraying of dioxin-contaminated waste oil on roads in Times Beach, Mo.

"In some ways, dioxin is much more difficult," says Jack Slobodin of San Francisco's Cartwright, Sucherman, Slobodin & Fowler Inc., who has represented a number of plaintiffs in dioxin cases arising out of 1968 and 1969 herbicide spraying incidents in Globe, Ariz. "Asbestos has been fairly well-established. But on the other hand, for a jury dioxin is much more frightening."

In 1981, Mr. Slobodin settled 21 of his cases involving plaintiffs from five families who had sued the U.S. Forest Service and Dow Chemical for injuries resulting from spraying of the Tonto National Forest with a dioxin-contaminated Dow herbicide called Kuron. One of the suits was for wrongful death. *Shoecraft v. Dow Chemical Co.*, 74-662-PHX-CAM (D. Ariz.).

The settlements, Mr. Slobodin says, were "substantial" and were the first dioxin-related settlements he knows of. Since then, however, there have been other hints that dioxin litigation, despite the controversy over causation, is anything but a dead end.

In an early settlement stemming from Missouri's waste-oil debacle, for instance, two families whose horse farms were contaminated with elevated dioxin levels settled litigation last fall in a St. Louis circuit court for $2.68 million. *Piatt v. Independent Petrochemical Corp.*, 57103-F.



New Jersey Newsphotos

LAWSUIT TARGET: An aerial view of Newark, N.J., shows the location of the Diamond Shamrock Corp. plant (white building to right of smokestack in left foreground), which is the focus of a suit over dioxin contamination stemming from the production of Agent Orange.

And in 1982, Monsanto and two co-defendants paid a reported $7 million to settle claims of 47 railroad workers arising out of the Sturgeon, Mo., railroad spill of orthochlorophenol, a chemical solvent with trace levels of dioxin contamination.

When a fourth co-defendant, the Norfolk and Western Railway, went to trial in that case, a Madison County, Ill., circuit court jury returned a judgment for $58 million — a vivid illustration of the magical potential of the word dioxin for plaintiffs despite a reversal of the verdict earlier this year by Illinois' 5th District Appellate Court. *Lowe v. Norfolk and Western Railway*, 5-82-0687.

The interest of the dioxin bar is currently focused on the Monsanto case in Charleston's U.S. District Court, where Mr. Calwell and partner Harvey Peyton Jr. are trying the largest dioxin-related occupational-injury claim ever. *Adkins v. Monsanto*, 81-2098.

The trial began in late June and could last for six months, lawyers have said. Total claims in the 172 cases filed against the St. Louis-based chemical manufacturer over operations at its Nitro plant have been estimated in the vicinity of $700 million.

Mr. Calwell contends that his clients have suffered a variety of adverse health consequences, and are at risk for still more, as a result of being immersed in what he characterizes as a "chemical soup" of which dioxin was a major component.

"Unlike Agent Orange," he says, "one problem we do not have is proving exposure. Our people were in it up to their necks every day."

The litigation is being closely watched as an early and important test on causation in an occupational setting. The Environmental Protection Agency has identified 19 sites where herbicide manufacturing processes have created a high probability of dioxin contamination. And at least one other major lawsuit, involving workers at an Agent Orange facility in Newark, N.J., has been filed. *Lamoreaux v. Diamond Shamrock Corp.*, L-036231-83 (Essex Cty. Sup. Ct.).

The origins of the Monsanto case date to the 1949 accident in the Nitro plant's 2,4,5-T operations — one of the earliest, and most studied, incidents involving high-level human exposure to dioxin. Several studies of the exposed Nitro workers commissioned by Monsanto are often cited in the dioxin literature and by those who claim the toxin has no proven long-term health effects.

This case will provide a courtroom test of the validity of the company-sponsored studies. Monsanto contends they show that the accident and subsequent lower-level dioxin exposure of workers during 2,4,5-T production at the Nitro plant from 1949 to 1969 caused chloracne problems and some short-term systemic health effects, but no long-term effects or permanent damage, such as cancer.

Mr. Calwell and Mr. Peyton, on the other hand, claim that some data doesn't support that position; the methodology of the studies was flawed; and their conclusions were affected by the fact that Monsanto was footing the bill.

The case, according to Mr. Calwell, is being tried under an exception to the exclusivity provisions of West Virginia's workers' compensation laws that allows workers to recover full damages in court for injuries caused by the "intentional and deliberate" con-

That, too, has focused attention on the case from lawyers interested in seeing what evidence Mr. Calwell can

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AP/Wide World Photos

A FEAR OF DYING: About 200 residents of Times Beach, Mo., are seeking damages for emotional distress from 'cancerphobia' in one group of suits stemming from the spraying of dioxin-contaminated waste oil on area roads. A local park (above) also is contaminated, according to private tests.

Monsanto Trial Tests Research on Dioxin

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develop of alleged corporate irresponsibility on the part of one of the country's leading 2,4,5-T producers.

While presiding Judge John T. Copenhaver Jr. has sealed documents supporting Mr. Calwell's successful opposition to a summary judgment motion on the deliberate intent issue, pretrial filings that have been unsealed reveal some potentially embarrassing Monsanto memos.

In the wake of the 1949 accident, for example, memorandums obtained by Mr. Calwell indicate that Monsanto was alerted to potential short-term systemic toxic effects beyond chloracne from a little-understood 2,4,5-T byproduct — later identified as dioxin — and resisted some Public Health Service recommendations for cleaning up operations and protecting workers.

"Enough work has already been done to establish which materials in the present process are hazardous," the company's safety director wrote the Public Health Service in a 1953 letter questioning the utility of outside involvement. "However, our scientists have discovered that it is not as simple to control the toxic agents chemically as one might think."

And in March 1965 Monsanto's medical director, transmitting for testing a sample of the 2,4,5-T dioxin contaminant that had been received from Dow Chemical Co., referred to it as "the most toxic compound they have ever experienced. It presumably is toxic by skin contact, as well as by inhalation."

In another memorandum later that March the medical director, Dr. R. Emmet Kelly, says of the dioxin contaminant, "Very conceivably, it can be a potent carcinogen."

More recent memorandums reveal Monsanto's concerns with dioxin-related worker-safety claims.

In November 1977, for example, Monsanto directed its plant managers to "resist" employee and union requests for certain chemical-exposure and occupational-disease data.

The memorandum instructs operating personnel to say that "time is needed to prepare a response" or that "it is a complicated question" but "not that clearance is needed from St. Louis," and then forward the request to St. Louis where "as limited a response as deemed appropriate will be developed."

Mr. Calwell contends that the pattern of such disclosures will reveal that Monsanto concealed 2,4,5-T hazards from workers and continued an unsafe production process over the two decades that the chemical was manufactured.

Monsanto, on the other hand, contends that the full picture shows it took appropriate steps to protect workers' safety and keep them informed. The 1977 memo, it argues, was stimulated by concerns about employee privacy and the need for care in disseminating potentially misleading data before it is "placed in the proper medical or scientific perspective."

While the Agent Orange settlement and the Monsanto trial have attracted plenty of attention, there are those who question just how much of the current public concern over dioxin hazards will eventually ripen into viable personal-injury litigation.

With most uses of 2,4,5-T and other dioxin-contaminated herbicides curtailed, says Mr. Slobodin, "I don't see a great number of suits because I don't think many people are being exposed to it."

In addition, problems of latency and the lack of scientific agreement on what exposure levels are hazardous also raise questions about how many health problems will actually be generated by the discovery of dioxin-contaminated sites.

In the absence of clear evidence of health damage, one response from the plaintiffs' bar has been to assert claims for emotional distress from "cancerphobia" and for damages based on increased medical risks on behalf of those living or working near known or suspected dioxin sites.

Such claims, for example, have been included by Arnold Levin of Philadelphia's Levin and Fishbein in two complaints — each covering about 100 plaintiffs — over the Times Beach spraying incident. Similar claims have been included in the Diamond Shamrock complaint in New Jersey.

In that case, attorneys Michael J. Naughton and Richard E. Kummer of Newark's Carella, Byrne, Bain & Gilfillan are seeking certification of seven different classes that would include not only workers at the Agent Orange manufacturing facility but also residents of the area, nearby businesses, and present and former employees of those businesses.

"One of the big problems is proximate cause," acknowledges Mr. Naughton. "But everybody living down there — they all have a phobia now. The problem is, if you allow it I don't know where you cut it off."

While the response of the courts to such claims is uncertain, Mr.

> Lacking clear evidence of health damage from dioxin, some plaintiffs' lawyers are asserting claims for 'cancerphobia.'

Naughton points to a 1983 case involving non-dioxin contamination of well water in Ocean County, N.J. The trial court there rejected a claim of enhanced risk of cancer as too speculative, but refused to dismiss claims for emotional distress based on cancerphobia and related claims for the costs of future medical surveillance. *Ayers v. Township of Jackson,* 189 N.J. Super. 561.

A similar result was approved in late May in a case involving a successor landfill to the Love Canal site contaminated with high levels of dioxin and other toxic substances. In that case, *Askey v. Occidental Chemical Corp.,* 356/84 (4th Dept.), a New York appellate court denied class certification to nearby residents but ruled that, in addition to existing medical problems, the enhanced risk of future problems could support a present claim for medical monitoring costs.

"The courts must recognize these claims," argues Philadelphia's Mr. Levin. "The phobias are there, and most judges will charge on them. And in the context of an environmental tort, it becomes very appealing to award all the damages now."

He also echoes the confidence of many others that the number of dioxin cases will continue to climb as government surveys identify new waste sites and sources of dioxin contamination, and that issues of causation will not block recoveries.

"The dioxin is there," Mr. Levin says, "and the first few cases are where the paths are being paved. But as more scientific studies come to the fore, we'll get there."

WORTH READING

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A WEEKLY INDEX TO LEGAL LITERATURE

• Martin, Benjamin F., **The Hypocrisy of Justice in the Belle Epoque,** Louisiana St. Press: Baton Rouge, La., 1984. ISBN 0-8071-1116-3. $22. 251 pages include bibliography and index. The extent to which justice departs from its norms is the measure of hypocrisy.

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■ INSURANCE LAW

Comments, **Subrogation in Pennsylvania — Competing Interests of Insurers and Insureds in Settlements With Third-Party Tortfeasors,** Temple Law Quarterly: 1983, Vol. 56, No. 3, Pgs. 667-704.

■ INTERNATIONAL LAW

Carbonneau, Thomas E., **Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce,** Texas International Law Journal: Winter 1984, Vol. 19, No. 1, Pgs. 33-114.

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Matasar, Richard A., **The Scope and Limits of Supplemental Jurisdiction,** U.C. Davis Law Review: Fall 1983, Vol. 17, No. 1, Pgs. 103-190.

■ LABOR LAW

• Brock, Jonathan, **Bargaining Beyond Impasse,** Auburn House Publishing: Boston, 1982. ISBN 0-86569-110-x. $22.95. 279 pages include index. Joint resolution of public sector labor disputes.

■ LAND USE AND URBAN DEVELOPMENT

Rainville, Michael J., **Remedies for Intangible Intrusions: The Distinction Between Trespass and Nuisance Actions Against Lawfully Zoned Businesses in California,** U.C. Davis Law Review: Fall 1983, Vol. 17, No. 1, Pgs. 389-412.

Wilkerson, Daniel J., **Inverse Condemnation Damages in Oregon,** Willamette Law Review: Winter 1984, Vol. 20, No. 1, Pgs. 169-178.

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Goldberger, David, **A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?,** Texas Law Review: November 1983, Vol. 62, No. 3, Pgs. 403-452.

• Robbins, Dennis A., **Legal and Ethical Issues in Cancer Care in the United States,** Charles C. Thomas: Springfield, Ill., 1983. ISBN 0-398-04841-x. $18. 163 pages include index. The complexion of the health-care industry influences the treatment.

Warmflash, Lawrence M., **The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute,** Brooklyn Law Review: Winter 1984, Vol. 50, No. 2, Pgs. 229-254.

Calif.'s Installment Plan

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Co. v. Community Hospital of Los Gatos-Saratoga Inc., SF-24171.

Setback for Victims?

"The decision begins to remove the specter of a severe economic burden from physicians, hospitals, universities and other health-care institutions," said Dr. David B. Horner, president of the California Medical Association, which filed an amicus brief in the case.

However, the decision was viewed by one dissenter as a setback for victims of medical malpractice. Justice Stanley Mosk said: "This imprudent legislation provides benefits to the wrongdoer at the expense of the victim."

American Bank and Trust sued the hospital on behalf of Mary English, whose legs were severely scalded in the hospital shower before brain surgery in 1976. Mrs. English was awarded nearly $200,000, but since has died of a brain tumor. American Bank is handling her estate.

After Mrs. English won the award in 1977, Community Hospital made a motion to pay the money in installments. In the first test of MICRA, a Santa Clara, Calif., County Superior Court trial judge ruled the 1975 law was unconstitutional. The Court of Appeal upheld that ruling.

The case was argued three times before the California Supreme Court. In April 1983, it ruled that the law was indeed unconstitutional. *American Bank and Trust Co. v. Community Hospital of Los Gatos-Saratoga Inc.,* 33 Cal.3d 674.

The hospital asked for a rehearing, which was granted for September 1983. Justice Joseph Grodin, who recently joined the high court, voted with the original dissenters this time around to create a majority.

Attorney Fees Unaffected

Mrs. English's attorney, Donald Howard, a partner in the San Jose, Calif., firm of Popelka, Allard, McGowan, Jones & Howard, argued that the 1975 law was unconstitutional under the equal protection clause because it created classifications that distinguished between medical and non-medical plaintiffs and defendants.

In almost all other injury cases, the plaintiffs gets present and future damages in one payment. But in malpractice cases, the defendants can ask for structured payments for future damages. However, if the plaintiff dies, generally the bulk of future damages is discontinued, although damages for loss of earnings may still continue in some instances.

The ruling does not affect the payment of attorney fees in medical-malpractice cases, which most commonly are percentages of the total award or settlement. Under California law, attorney fees are paid in a lump sum at the time of the award. If an installment payment of future damages is involved, the fee award is based on estimates of the future payout. Calif. Business & Professions Code Sec. 6146.

"I think there is going to be a substantially greater amount of litigation over the interpretation of this decision," said Mr. Howard.

"For a jury to try to determine when the payments are made and on what basis is a nightmare," he said. "Lump sums are much easier to handle. They eliminate further litigation and reopening the case."

In Mrs. English's case, the justices decided that her estate should receive the lump sum, but in the future, under this decision, malpractice payments may be made in installments.

Thomas R. Fellows of San Jose's Robinson & Wood Inc., attorney for the defendant, disagrees on the impact of the decision. He believes structured payments may mean more malpractice cases will be settled rather than going to trial.

The law "encourages people to think about settling lawsuits, rather than trying them," Mr. Fellows said. "Let's say a person says, 'I don't want a structured settlement. Let's go to court.'

"With the statute, the defense now has the leverage to say, 'Whether you want a structured settlement or not, you can go to trial and still end up with a structured award.' So it makes more sense to talk about structured settlements before spending money on a trial."