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TOXIC TORT WARRIOR

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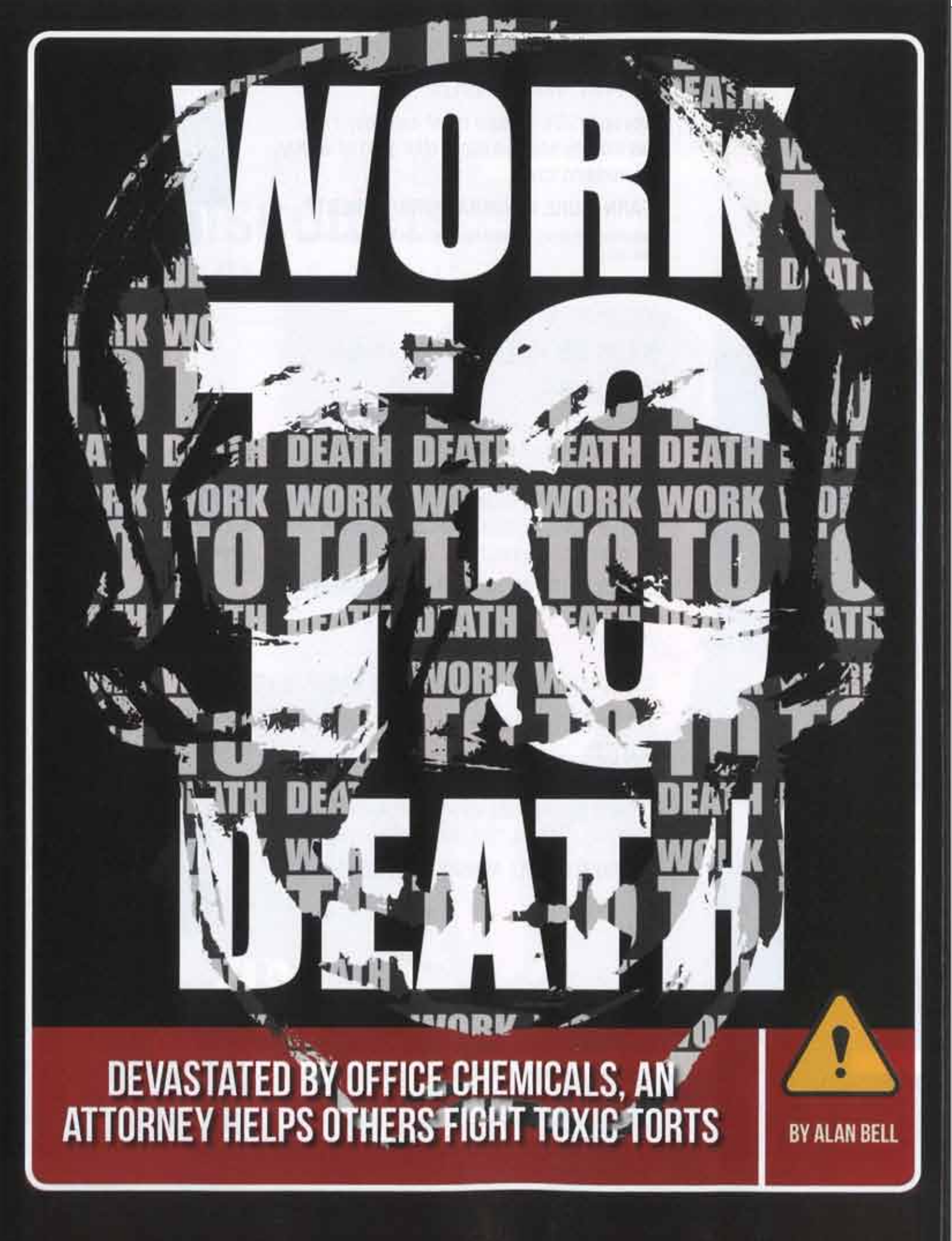


DEVASTATED BY OFFICE CHEMICALS, AN ATTORNEY HELPS OTHERS FIGHT TOXIC TORTS

BY ALAN BELL

After years of prosecuting hardcore criminals, attorney Alan Bell, then 35, took a private-sector job in South Florida's newest skyscraper as he planned his run for the U.S. Senate. But starting in November 1989, he began suffering such bizarre medical symptoms that doctors suspected he'd been poisoned by the Mafia. He eventually discovered he wasn't poisoned by a criminal but by his office building. His illness was diagnosed as being caused by exposure to toxic chemicals at work, and he became disabled in 1991. His rapidly declining health forced him to flee his glamorous Miami life to a sterile bubble in the remote Arizona desert for eight years. He lost his career and his marriage.

Bell's book, Poisoned: How a Crime-Busting Prosecutor Turned His Medical Mystery into a Crusade for Environmental Victims, *relates how, despite his precarious health, he began collaborating with top scientists dedicated to raising awareness about this issue and finding treatments. As his health improved, he collaborated with toxic tort lawyers, including some connected to the true stories depicted in the films* Erin Brockovich *and* A Civil Action, *to help other victims win justice in court.*

The following edited excerpt from the chapter "Chemicals Take Down a Football Coach" describes one case Bell helped through medical and legal arenas.

Dan Allen was a beloved head football coach at College of the Holy Cross in Worcester, Massachusetts. His wife, Laura, contacted me through my Environmental Health Foundation. She reached out to me because her husband suffered from multiple chemical sensitivity, and they were searching for treatments.

"Dan's been coaching from a wheelchair on the sidelines, but now they've fired him because he can't do it anymore," Laura said, obviously near tears as she told me her husband's story.

Dan was working in his office, located inside the gymnasium at Holy Cross, in early 2001 when he saw men wearing white suits and gas masks working on the gym floor. The coach left his office, walked over to the gym, and asked what was going on. The workers told him they were resurfacing the floor.

"Do I need to leave?" Dan asked.

They assured him he would be fine in his office.

Dan's health problems began shortly afterward. He developed a headache first. Then a toe went mysteriously limp. Within 18 months, he was in a wheelchair with a lifeless right arm and had to rely on his family to feed and bathe him. Hearing this made me wince in sympathy; my own days as a wheelchair user and dependency on others hadn't been that long ago.

Laura, a registered nurse, was trying to find answers for him. They'd been to many medical specialists. She said, "I'm convinced he developed MCS when they resurfaced the floor of the gym, but his doctors won't make the connection to the chemicals. I was hoping you could recommend a doctor who might have some experience with this kind of injury."

College of the Holy Cross head football coach Dan Allen paces along the sidelines during a game.

"If he has MCS, the best place you can go is to Dallas," I told her.

"What about stem cell treatments in the Bahamas?" she asked desperately.

"No, don't go there. That's quackery."

"OK. Thanks," she said.

The next time she called, Laura told me they had gone to the Bahamas and spent a hundred grand on stem cell treatments to no avail. I suggested that she take Dan to Richardson, Texas, to see Dr. Alfred Johnson because he'd helped me.

"No," she said. "That's too far."

As we continued to talk and I heard more about how the company had resurfaced the gym floor knowing Dan was in his office, I realized Dan had a solid legal case against the company. Despite the fact that Laura had already consulted several lawyers who refused to represent him because they said he had no case, I was convinced otherwise. "Let me send you to a doctor I know," I said. "She can evaluate your husband."

I wanted Dan to visit her primarily to help him medically. If her evaluation also helped his legal claim, that would be a bonus. However, when I said the doctor was at Boston University, near where Dan and Laura were living, Laura balked, saying Dan had already been there.

"You don't understand," I argued. "It's not the university that matters. It's the particular scientist. You need to see Dr. Marcia Ratner at Boston University. She's an internationally recognized neurotoxicologist."

I knew Dr. Ratner from the Scientific Advisory Board of the Environmental Health Foundation that I founded years earlier. When she examined Dan, Dr. Ratner came up with a shocking diagnosis: Dan had amyotrophic lateral sclerosis, also known as Lou Gehrig's disease. We both wondered if the coach's chemical exposure triggered his early onset of ALS. Was that possible?

I called Laura after Dr. Ratner had

ILLUSTRATION BY BRENAN SHARP/SHUTTERSTOCK.COM; PHOTO COURTESY OF ALAN BELL


Dr. Marcia Ratner

seen Dan. "Look, this is serious," I said, after saying how sorry I was about her husband's diagnosis. "Holy Cross College isn't paying your husband anything, right?"

"Right," she said. "Nothing."

"Let me talk to your husband."

When she put him on the phone, I said, "OK, Dan, here's what we're going to do. I'm going to get a lawyer for you, so you can sue Holy Cross College for terminating you without giving you workers' compensation for injury on the job. Is that all right with you?"

"Yes," Dan said.

"OK, great. Mind if I talk to your wife again?"

When Laura came back on the line, I told her I was going to arrange for a colleague to work up the workers' compensation claim. "Can you find out what exact product was used on that floor?"

"Sure," she said. "I'll talk to the maintenance guy. He has the stuff in the shed."

Once I knew what the resurfacing product was, I obtained its material safety data sheet—an itemized list of chemicals it contains. I was shocked to discover that these chemicals included benzene, toluene and isocyanates, all of which are classified as ultrahazardous substances in Massachusetts.

Slowly and meticulously, I proceeded to build two lawsuits on behalf of Dan Allen. The first was against his employer, Holy Cross, seeking workers' compensation because he had been injured on the job. The second was a lawsuit against the manufacturer of the resurfacing compound.

I arranged for a workers' compensation expert to file a claim. Next, I contacted a dosing expert I knew at Harvard University, who calculated the chemical dose Dan had been exposed to. Based on our data—including the square footage of the area, the cubic feet of air in the space where the compound was applied, the location of Dan's office, the doors and windows, and so on—we calculated the exact chemical dose Dan inhaled as a result of the floor resurfacing. We now had the right pieces in place to prove that Dan's injury was caused by his exposure to the chemicals used in resurfacing the floor.

We knew Dan was in the building when the floor was being refinished with chemicals known to be neurotoxic—in fact, the floor refinishers were required by their employer and Occupational Safety and Health Administration regulations to wear respirators. They had sealed off the area where they were doing the work, but somehow Dan's office, adjacent to the gymnasium, became part of the sealed area instead of being sealed off. He was therefore working without a respirator in the same area as the toxic chemicals.


Dan Allen before the onset of ALS.

Dr. Ratner told me that Dan's initial symptoms—nausea, headaches, dizziness—made a great deal of sense to her.

"We have an area of our brain called the area postrema that alerts us to something poisonous," she said. When toxic chemicals penetrate the nervous system, this part of the brain signals the body to get rid of it by triggering the vomiting reflex. "That's one of the reasons why people inhaling these chemicals inside buildings report feeling nausea and vomiting as well as dizziness, headaches and other symptoms."

PROVING THE CONNECTION

Once Dr. Ratner diagnosed Dan Allen with ALS, and the dosing expert from Harvard had calculated the exact dose of the isocyanates and toluene Dan was exposed to, I recruited Dr. Mohamed Bahie Abou-Donia of Duke University, a world expert on isocyanates, as a medical expert on Dan's legal case.

Dr. Abou-Donia had conducted research studies exposing mice to the same chemicals used in the flooring compound that caused Dan to fall ill. Like humans, some mice are born with a gene that predisposes them

PHOTOS COURTESY OF ALAN BELL AND BOSTON UNIVERSITY SCHOOL OF MEDICINE

Dan Allen became a wheelchair user whose family had to feed and bathe him.

PHOTO COURTESY OF ALAN BELL

to developing ALS after exposure to certain chemicals.

The result? Basically, his studies proved that mice with the gene developed ALS after chemical exposure, while the animals without the gene stayed healthy. Dr. Abou-Donia concluded that it wasn't the coach's fate to develop his fatal disease. Like Dr. Ratner and me, he believed that Dan's exposure to isocyanates and toluene triggered his onset of ALS.

Like all diseases, whether you get ALS depends on a combination of your genetic predisposition toward the condition combined with environmental triggers, including chemical exposure. ALS usually affects older people, he explained. "Although you can see it in younger people in their 40s and 50s, it's rare." Dan was only in his mid-40s.

"We know chemical exposure can alter the DNA of a human being," Dr. Abou-Donia said, "and make people more susceptible to disease, causing upregulation and downregulation of many genes that cause disease."

What does this mean in layman's terms? Each of us begins life with a particular set of genes—about 20,000 to 25,000 of them. Scientists are gathering evidence proving pollutants and chemicals are altering our genes—not by mutating them but by sending signals that switch them on when they otherwise might remain dormant, or even silence the genes altogether.

Exposure to gene-altering substances can lead to disease long after the toxic exposure is gone, permanently injuring glands, organs and cells throughout your body. Animal studies show that some environmental chemicals cause epigenetic changes that trigger breast and prostate cancer, obesity, diabetes, heart disease, asthma, Alzheimer's, Parkinson's disease, learning disabilities—and ALS.

When genes are turned off due to chemical exposure, they can't direct the manufacture of proteins essential for healthy cell function. Chemicals can also cause chromosomes to uncoil and genes to "express" or be "turned on," when they otherwise might have remained dormant. Dan's brain chemistry had been altered on a cellular level by his exposure to the toxins used to resurface the gym floor, causing his onset of ALS at a tragically young age.

Dr. Abou-Donia believes that chemical exposure is one of the primary causes of today's chronic diseases like asthma, autism, birth defects, cancers, developmental disabilities, diabetes, endometriosis, infertility, Parkinson's, Alzheimer's and others.

In his 2015 textbook, *Mammalian Toxicology*, he cites statistics that should terrify us all, like this one: "In 1900, U.S. chemical consumption was less than 100 million metric tons, but by 2000, this had increased to more than 3.3 billion metric tons."

In his estimation, there are over 5 million man-made chemicals, of which only 70,000 are in commercial use today, with many more to come. The isocyanates that Dan was exposed to were also linked to thousands of human deaths in 1984 after the explosion of a chemical plant in Bhopal, India, owned by the Union Carbide Corp. Yet somehow this chemical is still finding its way into our everyday products.

BUILDING MY TEAM

With my experts on board, I had the scientific support necessary to prove this case. Next, I needed legal boots on the ground in Massachusetts to walk the case into the courtroom. I recruited Michael Hugo, a well-known attorney who had been a partner of Jan Schlichtmann in the now-closed law firm of Schlichtmann, Conway, Crowley and Hugo.

This firm had successfully won compensation for victims of a toxic chemical spill in Woburn, Massachusetts. The case was dramatized in the best-selling book and film *A Civil Action*, with John Travolta, Robert Duvall and James Gandolfini starring in the movie.

The case eventually nearly bankrupted Schlichtmann, the lead attorney. In the eyes of many, this outcome served as a cautionary tale depicting the risks inherent in pursuing complex environmental injury cases.

To some, Schlichtmann was a hero, a noble lawyer willing to risk it all for a worthy cause. To others, Schlichtmann was a crazy man.

I didn't care either way because

John Travolta (left) played Jan Schlichtmann in *A Civil Action*.

Schlichtmann had won, and I would, too. *(Bell was admitted pro hac vice and was co-counsel in the case.)*

During the trial, my team presented solid evidence that most human disease and death is the result of the interaction between our genes and environmental exposures. In Dan's case, the disease was a horrific one that vastly reduced his life span.

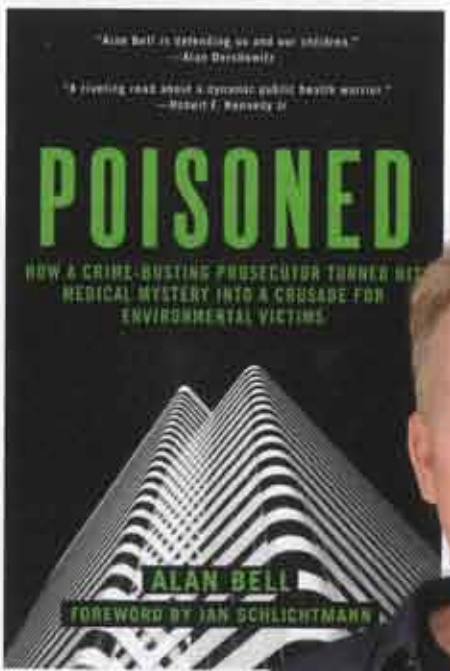
Dr. Ratner believes Dan had a predisposition to develop ALS, which made him more sensitive to chemicals. She noted, "Genetic predispositions and past insults to the body, including previous chemical exposures, can make a person hypersensitive to future chemical exposures, which in turn can exacerbate or unmask latent liver, kidney or neurological disorders like ALS."

When filing a toxic tort lawsuit, case law requires that the claim be based on science generally accepted by the scientific community. This is called the *Daubert* standard, the standard used by trial judges to determine whether an expert's testimony is based upon scientifically valid reasoning or methodology.

This standard has been the subject of intense criticism over the years. Plaintiffs attorneys claim this restriction bars many worthy claims by disallowing juries to hear cases and denying victims their day in court.

The legal team representing the chemical manufacturing company tried to get Dan Allen's case thrown out of federal court using the *Daubert* standard, claiming our case wasn't based on sound science. Dr. Ratner's testimony was critical to our case because it logically connected the dots.

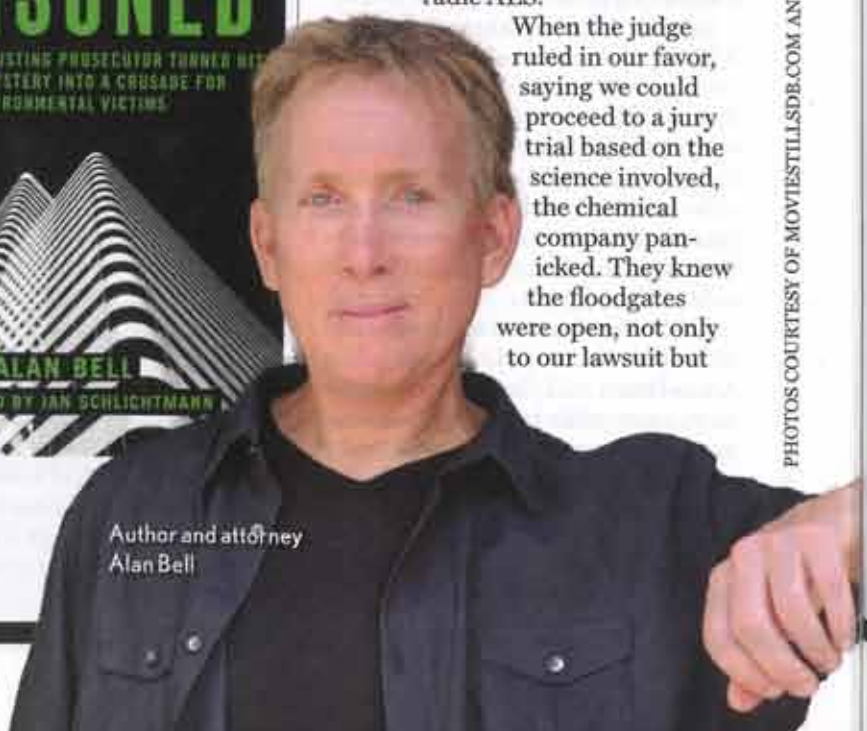
Up until that point in the legal arena, ALS was thought to be purely genetic. Now, together with my local legal counsel and experts, we were attempting to prove in court for the first time that chemical exposure can trigger the onset of ALS. The Dan Allen case would potentially break new ground. *(Go to ABAJournal.com to see Dr. Ratner's report,* The Allen Case: Our *Daubert* Strategy, Victory, and Its Legal and Medical Landmark Ramifications.*)*



A SOLID, SAD VICTORY

On Sept. 24, 2008, U.S. District Judge F. Dennis Saylor (of the District of Massachusetts) handed down his decision regarding whether the testimony of Dr. Marcia Ratner and other experts could be heard by a jury. The testimony of Dr. Ratner was allowed, as well as that of Dr. Christine Oliver, an assistant clinical professor of medicine at Harvard Medical School, who concluded that Dan Allen had sporadic ALS.

When the judge ruled in our favor, saying we could proceed to a jury trial based on the science involved, the chemical company panicked. They knew the floodgates were open, not only to our lawsuit but



Author and attorney Alan Bell

PHOTOS COURTESY OF MOVIESTILLSDB.COM AND ALAN BELL

for many more to follow. We had shown in court that chemicals can trigger the onset of a previously dormant disease.

Sadly, by then, Dan had died of the disease, causing heartbreak for Laura and a deep sorrow among all of those who knew and loved this amazing man. The only thing we could say to comfort his family was that we had won the decision, which meant the defense knew their chances of winning at trial were dismal.

Testimony from a sympathetic widow, combined with powerful evidence that the chemicals Dan was exposed to caused him to die long before his time, would smash their case to bits. The defense opted to seek a settlement. The case settled in 2009.

For the Allen family, and for us, too, it was a bittersweet victory. While the case broke new legal ground and exposed the truth behind what had really happened to Dan Allen, it couldn't erase the pain and suffering he and his family had endured.

I was left feeling both triumphant and grief-stricken, but I vowed to keep fighting for those who needed me. ■

Attorney Alan Bell prosecuted organized crime cases for Florida before developing multiple chemical sensitivity. He founded the Environmental Health Foundation, which advocates for victims of environmental injury. Bell lives in Capistrano Beach, California, and he focuses on toxic tort cases. Bell can be contacted at alanbell.me.

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Julia Roberts (center) played the title role in *Erin Brockovich*.

WHY TOXIC TORTS ARE HARDER THAN USUAL TO LITIGATE AND WIN

By Lorelei Laird

In movies such as *Erin Brockovich* and *A Civil Action*, viewers spend about two hours watching lawyers investigate a serious environmental problem and then sweep a jury off its feet with the force of their evidence.

In reality, environmental litigators say it can take years, depending on the type of case. A big reason for that is the *Daubert* standard, which governs whether an expert witness's opinion is admissible in court.

Expert witnesses are vital for proving a toxic tort case—which often involves substantial science—but the *Daubert* standard gives the other side a way to discredit and exclude those witnesses.

Allan Kanner, a plaintiffs toxic tort lawyer and founder of Kanner & Whiteley in New Orleans, says many defendants practice "carpet-bombing with *Daubert*."

Allan Kanner

"It's getting to the point where if you have a case now with 16 expert witnesses, you'll see 16 *Daubert* challenges," says Kanner of the ABA Section of Litigation and the Section of Environment, Energy and Resources.

With a *Daubert* hearing for each of those witnesses, that can mean a lot of hearings—and therefore a lot of extra time and money. That can make toxic tort cases difficult to litigate.

"It's sort of my belief that these type of cases are won or lost at the *Daubert* stage," says James Ray, an environmental litigator and partner at Robinson & Cole in its Hartford, Connecticut, office and a former co-chair of the litigation section's Environmental & Energy Litigation Committee.

SHOW CAUSE

Causation also can drag out toxic tort cases: showing that the injury was caused by the substance at issue.

For example, Ray says in a case in which the plaintiff argues that chemical exposure caused a certain cancer, you'd have to look at all the factors that could cause that cancer, including each plaintiff's genetics, lifestyle and other relevant factors. That's in addition to examining whether the chemical causes the cancer in the amount to which the plaintiff was exposed.

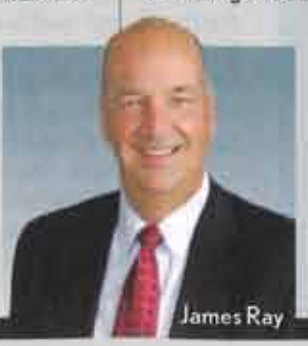
Kanner says plaintiffs may do it, too, looking for a "smoking gun" showing the defendant knew the substance would sicken people. That all drags out discovery, often for years.

Kanner has been approached for advice by lawyers who are five or six years into a toxic tort case and not close to finished.

For lawyers working on contingency, as many personal injury lawyers do, that's a big investment. But because toxic tort cases, particularly class actions, can generate very high verdicts and settlements, there's a lot of incentive to keep going.

"They view it as a big damage case," Kanner says. "But all other things being equal relative to other areas of litigation, toxic torts cost more and take longer."

The jury is another complication. Both sides want people who may be sympathetic to them, but Ray says toxic tort defendants also need jurors who are willing and able to consider complex scientific evidence.



James Ray

Kanner cautions, however, that it's easy to get so involved in the scientific side of things that you can lose the jury.

"You've got to deal with [the science]," he says. "But at the end of the day, you've got to try ... a case that jurors can get behind."

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