

SPECIAL FOCUS: CIVIL RIGHTS

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Taking on Monsanto

By Tomás Gahan

Special Focus: Civil Rights



Every year, just before the holidays, my civil rights co-chair Ed Budge and I offer a selection of articles for *Trial News's* special focus on civil rights. Many of these articles are dedicated to issues surrounding "traditional" civil rights claims, such as constitutional torts. But this year, along with most of my law firm (Peterson Wampold Rosato Feldman Luna), I have dedicated virtually the entire year to the litigation and trial of a single case: *Mullen-DeLand v. Monsanto*.

Fortunately, I happened to remember an inspiring column in the *Trial News* from a few years ago where Ed Budge reminded us that, as plaintiffs' attorneys fighting for justice, we are *all* civil rights lawyers, even when we are not specifically raising constitutional claims against the government entity that operates the facility. We regularly review cases involving serious inmate-against-inmate assaults. It bears remembering that jails and prisons are not liable simply because an inmate has been hurt or killed by another. As with the government

(https://www.trialnewsonline.org/trialnews/library/item/february_2020/3795569/). And if

ever a tort case felt like a civil rights case at its core, it has been this battle against Monsanto—one of the largest chemical companies in the world, and certainly among the most nefarious. More specifically, however, there were aspects of the way Monsanto *defended* the case that speak directly to issues relevant to civil rights cases, and which are worth addressing here.

By way of background, ours was the sixth in a line of trials representing families who were injured after being exposed to Monsanto's polychlorinated biphenyls ("PCBs") at Sky Valley Education Center in Monroe ("Sky Valley") in fluorescent light ballasts. Most of the previous cases were tried by the Friedman Rubin law firm, who also supported and guided our trial. We alleged that the PCBs caused our clients a variety of damages, from endocrine disruption to neurocognitive injuries.

In defending against our claims, Monsanto's attorneys focused heavily on the same types of defenses I see raised—or suggested—by governmental entities in civil rights litigation by focusing on particular aspects of the *plaintiffs* as "evidence" that Monsanto is not at fault. In a recent civil rights jail beating case, for example, King County highlighted the fact that the plaintiff was severely mentally ill to suggest that he must have provoked or been the cause of his injuries. In another custodial injury case, the municipality pointed to the fact that the plaintiff had stolen a snack from the "confiscated food" sack in jail to justify the jail officer's decision to throw him from the top bunk, shattering his ankle. In a *Brady* violation case, the Yakima County Prosecutor's Office relied on the plaintiff's confession to a crime of indecent exposure to justify his wrongful prosecution for a brutal home invasion rape. In a police brutality case, the City of Tukwila dwelled extensively on the fact that the plaintiffs—two African American brothers—were drinking on a "party bus" before they were stopped by the police to excuse the beating of the men when they refused to acquiesce to a baseless police seizure. All of these defenses had the same pattern—focus disproportionately on an unrelated fact or aspect of a plaintiff's particular character or conduct to minimize or detract from the fault of the violator. Monsanto's approach here, as addressed in two examples below, was similar, as were our techniques for responding to them.

One way that Monsanto responded to the evidence that the toxic exposure caused neurotoxic injury, including anxiety, stress, and severe emotional problems to the plaintiffs, was to claim that they were "somaticizing"—a term meaning that they were so focused on being poisoned that they believed that they *were* poisoned. The claimed culprit here was the mother of the two students we represented (who, as a teacher at

to believe that they were sick, triggering this somatization. Of course, Monsanto is sophisticated, and they—just like an experienced municipal defendant—were not about to plainly blame the plaintiff; instead, the blame comes through innuendo and suggestion. The best way to respond to such a defense is to call a spade a spade and force the defendant to polarize the case themselves by asserting the defense openly and plainly so the jury knows exactly what they are doing. Here is how my law partner, Felix Luna, did this through the cross-examination of Monsanto's neuropsychologist (for clarity's sake, "CMD" was one of the plaintiff children, and Stacy is her mother):

Q. So you wrote in your report, quote, "[CMD]'s presentation is wholly unrelated to PCBs and is quite unfortunate that this narrative has been placed upon her given her vulnerable and anxious nature"?

A. Yes.

Q. So that's what you wrote?

A. Yes.

Q. So you're basically stating that it's the family dynamic that is causing [CMD]'s problems and not her exposure PCBs over the course of years at Sky Valley?

A. I believe it is the suggestion that she has been poisoned and that there is the potential she could die, and that she has been told she's brain damaged...

Throughout the trial, it became clear that the one individual who had "told" CMD and her brother that anxiety causing "narrative"—according to Monsanto—was Stacy, their mother.

Here is how I addressed that defense during closing argument ("AMD" is the other student/plaintiff and CMD's brother):

In response to [the testimony of the treating therapist], some of Monsanto's experts claim that [AMD and CMD] are somaticizing, that they believe that they're poisoned, and so they act poisoned, and they believe they're poisoned because their mom told them that they're poisoned. So ask yourself, does Monsanto run the same defense for every one of the other kids, teachers and staff at the school, who are hurt? Do they blame all the moms for what's happened to the other students, or just Stacy in this case?

You heard from Dr. Dahlgren, who already has examined other children from Sky Valley, including some boys and girls who, after exposure at Sky Valley, went through puberty at age six. Was that somatization? What about all the other symptoms the other kids at Sky Valley suffered? Was it overly worried moms that led other teachers to quit and leave Sky Valley early because of their own health issues? Was it overly worried moms—overly worried moms can't cause Graves' disease or Crohn's disease, or make your pupils different sizes on some visits. And it's true, I mean, there's no question, Stacy's worried about her kids, and that [AMD, CMD], are worried about their health.

Of course, this affects them, and, of course, this causes stress in the family, but that doesn't make the reality of their toxic exposure less true. It's not a defense to say, "We made you sick and now you're too focused on being sick, so it's not our fault."

By making Monsanto's defense overt rather than subvert, and revealing it for what it really is—a character attack against the plaintiffs—my hope was to polarize the case, and re-center the jury on the legal and factual questions, rather than on Monsanto's veiled attempt at jury nullification. Further, by bringing the defense out into the open, I could contrast it to the actual known facts of the case, hopefully revealing its absurdity in light of the other evidence.

Another way that Monsanto defended the case was to softly—but undeniably—suggest that it was AMD's sexual orientation that caused his mental health issues. This reminded me of some of the unspoken defenses sometimes asserted—or suggested—by the government against minority plaintiffs. Here is how Monsanto articulated this defense at trial:

Q. [to a plaintiff medical expert]: And the reasons why he was anxious included having some sort of intrusive thoughts that were irrational but they were bugging him; right?

A. Yes.

Q. He also was struggling with his sexual identity, do you recall that?

A. I do recall some discussion of that, yes.

Q. Well, wasn't he—I mean, you can imagine that when you're struggling with that,

including my own family;" right?

A. Well, yes, I—that is possible. I do think that he certainly can have any number of things that can be sources of anxiety.

[Testimony from a Monsanto neuropsychologist]...He also told me that his—some obsessiveness, some thoughts with obsessiveness, despair, and depression, started in 2016, 2017, with some kind of issues with his sexual orientation as an adolescent starting to understand those things, and that caused him some despair...

Then, in closing arguments, Monsanto re-emphasized the point:

He said, "I have abdominal problems and I have mental health problems. What are my mental health problems? I have intrusive thoughts, I have OCD." He said, "I have OCD." And why did he start having OCD? You heard it from him, you saw the interview, you saw the clip. I don't have time to show you the clip but you saw it. When he was going through puberty he had a revelation, and then he had to deal with it. And by the time 2017 rolled around and he was teased in school by an unkind girl or girls, he got very down, very depressed. And that's too bad. But in his interview and his discussions with [treating therapist] he explained it all and said, "This has been troubling to me." And then you heard about his OCD and he said, "That's when it started, that's when my OCD started." Well, that's really a shame.

While subtle, everyone that sat through the trial understood what Monsanto was doing. Exploiting underlying, unspoken prejudices is a common approach with defendants, and it's our job to call it out. Fortunately, in this case, I didn't have to. AMD's mother did it for me:

Q. Did you ever talk to [the treating therapist] about what kinds of things were troubling AMD?

A. I think he had an initial check-in with me, but I don't recall details.

Q. Well, did [the therapist] tell you anything about what had troubled AMD in connection with the realization of his sexual orientation?

A. No. And I should say that I don't think that AMD's depression or anxiety stemmed from his sexual orientation. I think that it's not a big deal in our household. It's

Q. I understand that. Do you know whether he reported to Dr.—either [of the treating therapists] that although that's the case, he didn't know that for a period of time?

A. I don't know that. I don't know if he has ever suggested anything like that, that he didn't know if it would be okay in our household. If you're—spend time in our household, that would be very far from the truth.

Q. I understand, but—

A. We have lots of family and friends who are gay and lesbian, it doesn't matter.

Q. I understand. But you're not a 15-year-old, 16-year-old boy who is trying to come to the realization; right?

A. No, but I think that that's a crazy thing to blame this on.

Again, pointing out the defense for what it is, serves both to polarize and re-focus the case on the actual issues before the jury. Stacy did this so effectively, that I did not revisit the issue in closing argument.

At bottom, a chemical company like Monsanto that released a forever chemical into the world without first ensuring that it was safe, violated *all* of our civil rights by exposing us to its dangers. And, like government agencies and municipalities, Monsanto is a powerful entity, used to creating—and enforcing its own rules. This might explain why the defenses it chose to raise are remarkably similar to those we see in our Section 1983 cases and our state civil rights lawsuits.

On December 20, 2022 at 1:30 PM, the jury delivered its verdict, finding both liability and causation against Monsanto for AMD's injuries, awarding him a total of \$20.5 million in compensatory damages and another \$61.5 million in punitive damages.

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