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Keep Junk Science Away From Juries

By **Lawrence Ebner** (May 5, 2021, 4:17 PM EDT)


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Two decades ago, U.S. Supreme Court Justice Stephen Breyer wrote an article explaining that because "[s]cientific issues permeate the law ... there is an increasingly important need for law to reflect sound science."[1]

And as former U.S. Court of Appeals for the Seventh Circuit Judge Richard Posner indicated in a frequently cited opinion, "the courtroom is not the place for scientific guesswork."[2]

The Need for Sound Science in the Courtroom

Ensuring that only sound scientific testimony is presented in federal and state judicial proceedings has become more essential than ever. The class action/mass action personal injury bar has grown into a gluttonous behemoth.

It feeds on an ever-increasing number of multinational corporations whose widely used but allegedly hazardous products range from highly innovative, U.S. Food and Drug Administration-approved drugs and medical devices, to widely used, U.S. Environmental Protection Agency-approved lawn care chemicals, to mundane household staples such as talcum powder. Scientific issues — primarily whether use of a product caused a plaintiff's cancer or other serious illness or injury — underlie virtually all of these liability suits.

Additional types of civil litigation also turn on scientific questions. For example, the underlying issue in a growing wave of suits filed by state and local governments around the U.S. is whether fossil fuel energy companies should be required to pay billions of dollars in compensatory and punitive damages for supposedly causing or exacerbating man-made climate change.[3]

If these cases, or other litigation brought by climate alarmists,[4] survive motions to dismiss based on grounds such as the political question doctrine, displacement of federal common law and preemption of state tort law, scientific issues will be at the forefront.

How Daubert and Its Progeny Address the Need To Exclude Junk Science

When suits involving medical or other scientific issues go to trial, plaintiffs lawyers rely on expert witnesses to persuade juries that the relevant science is on their side. Unfortunately, too many of these well-rehearsed and highly compensated expert witnesses are purveyors of "junk science" — expert testimony that is not based on reliable scientific principles and methods.

When junk science carries the day, our nation's civil justice system has failed. The Supreme Court attempted to fix the junk science problem in Daubert v. Merrell Dow Pharmaceuticals, a 1993 product liability case.[5]

Daubert and two Supreme Court cases that followed — General Electric v. Joiner, in 1997,[6] and Kumho Tire Co. v. Carmichael, in 1999[7] — firmly established the doctrine, codified in the Federal Rules of Evidence,[8] that to be admissible in federal courts, expert testimony must be based on principles and methods that not only are relevant, but also reliable.

Importantly, the Supreme Court indicated that federal district court judges must act as gatekeepers,

excluding scientifically unreliable expert testimony, which can confuse, mislead and prejudice juries, and thus deprive the opposing party of a fair trial and due process. As Justice Breyer explained in his article:

> A judge is not a scientist, and a courtroom is not a laboratory. But the law must seek decisions that fall within the boundaries of scientifically sound knowledge.[9]

Most states have incorporated Daubert's expert testimony admissibility standards into their own evidentiary rules and/or case law. But some state court trial judges routinely shirk their gatekeeper role, allowing juries to hear expert testimony that is scientifically unreliable and leads to unfair verdicts, unwarranted damages awards and deprivation of a defendant's right to due process of law.

How Talc Litigation Illustrates Why State Trial Judges Must Fulfill Their Gatekeeper Role

State trial judges' failure to adhere to Daubert expert testimony admissibility standards can produce runaway jury verdicts. This due process problem is illustrated by the current onslaught of state court product liability litigation alleging that consumers' use of Johnson & Johnson LLP talcum powder products, primarily baby powder, has caused cancer due to the presence of asbestos.

For example, in Lanzo v. Cyprus Amax Minerals Co., a New Jersey Superior Court jury, after hearing the plaintiffs' expert witnesses, awarded $117 million in compensatory and punitive damages in 2018, based on allegations that the principal plaintiff's use of Johnson & Johnson talcum powder products caused his mesothelioma. But on April 28, a New Jersey Appellate Division court reversed and remanded for new, separate trials for Johnson & Johnson and its co-defendant talc suppliers.[10]

The appellate court was "convinced [that] the trial court did not perform its required gatekeeper function," and that "the trial court's admission of [the plaintiffs' experts'] opinions ... was clearly capable of producing an unjust result."[11] Unfortunately, other state appellate courts do not enforce state trial judges' Daubert gatekeeper role as vigorously.

Indeed, the St. Louis Circuit Court has provided the most dramatic example of why due process demands that trial judges keep junk science away from juries. This notoriously plaintiff-friendly state trial court has become a haven for suits in which female plaintiffs claim that hygienic use of Johnson & Johnson talcum powder products caused their ovarian cancer due to the alleged presence of asbestos.

Johnson & Johnson disputes these allegations. But in the recent case of Ingham v. Johnson & Johnson, a trial judge in the St. Louis Circuit Court, over the company's objections, aggregated 22 dissimilar plaintiffs — reflecting disparate medical histories, personal habits and product use patterns — into a mass trial before a single jury.

The trial judge then allowed the jury to hear plaintiffs' one-size-fits-all expert witness causation testimony, which to be charitable, was scientifically flimsy. Nonetheless, the jury found in July 2018 that Johnson & Johnson was liable and awarded the plaintiffs billions of dollars in compensatory and punitive damages.

Last year, the Missouri Court of Appeals for the Eastern District upheld the admissibility of the plaintiffs' expert testimony, and allowed more than $2 billion in compensatory and punitive damages.[12] The Missouri Supreme Court declined to review the case.

Johnson & Johnson now has filed a certiorari petition that presents for the U.S. Supreme Court's review due process questions relating to the trial court's consolidation of the plaintiffs' claims, most of whom had no relevant connection to Missouri, and the grossly excessive punitive damages award.[13]

The amicus brief that I authored for the Atlantic Legal Foundation filed in support of the certiorari petition[14] argues that the presentation of junk science undermined the fair jury trial to which Johnson & Johnson was entitled, including by magnifying the prejudicial effect of the 22 disparate plaintiffs' collective causation testimony, and by helping to induce the jury's breathtaking damages award.

Why Appellate Courts Should Ensure That Juries Are Protected From "Science That Is Junky"

Some scientific controversies are legitimate subjects for consideration by juries. In those circumstances, juries can and should observe the parties' "battle of the experts" — taking into account each side's expert testimony and cross-examination of the other side's expert witnesses before deciding which side is more credible.

But as the late Supreme Court Justice Antonin Scalia indicated in a Daubert trilogy concurring opinion, trial judges have the duty to protect juries from "science that is junky."[15] When a trial judge abdicates this responsibility by allowing expert witnesses to deposit a heap of junk science in front of a jury box, appellate courts not only need to correct that injustice, but also establish a precedent that will foster sound science in judicial proceedings.

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Disclosure: Mr. Ebner authored the amicus curiae brief that the Atlantic Legal Foundation filed in support of the pending certiorari petition in Johnson & Johnson Inc. v. Ingham.

[1] Stephen Breyer, Science in the Courtroom, Issues in Science and Technology, Summer 2000, at 2, 4.

[2] Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996).

[3] See Keith Goldberg, Big Oil Faces Rising Tide Of Gov't Climate Change Suits, Law360 (Sept. 18, 2020); see, e.g., Mayor & City Council of Baltimore v. BP p.l.c., 952 F.3d 452 (4th Cir. 2020), cert. granted, No. 19-1189 (Oct. 2, 2020); City of New York v. Chevron Corp., No. 18-2188 (4th Cir. April 1, 2021).

[4] See, e.g., Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020), reh'g denied, No. 18-36082 (Feb. 10, 2021).

[5] Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993).

[6] General Electric Co. v. Joiner, 522 U.S. 136 (1997).

[7] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[8] See Fed. R. Evid. 702 & 703.

[9] Breyer, supra at 2.

[10] Lanzo v. Cyprus Amax Minerals Co., et al., Nos. A-5711-11 & A-5711-17, N.J. Super. Ct., App. Div. (April 28, 2021); see Bill Wichert, J&J, Imerys Beat $117M Talc Verdicts Over Flawed Testimony, Law360 (April 28, 2021).

[11] Id. at 41, 49.

[12] Ingham v. Johnson & Johnson, 608 S.W.3d 663 (Mo. Ct. App. 2020).

[13] Johnson & Johnson v. Ingham, No. 20-1223; see Mike Curley, J&J Urges High Court To Nix $2.1B Talc Verdict, Law360 (March 2, 2021).

[14] Available at https://tinyurl.com/3nb79uu9.

[15] Kumho Tire, 526 U.S. at 159 (Scalia, J., concurring).