LOS ANGELES
Daily Journal
— SINCE 1888 —
MONDAY,
FEBRUARY 14, 2005
VOL. 118 NO. 30

# Message in 'Lockheed': Judges Must Control Medical Testimony

**By Frederick J. Ufkes**

On Feb. 3, 2005, the 2nd District Court of Appeal issued its decision in *Lockheed Litigation Cases*, 2005 DJDAR 1347, concerning the admissibility of expert testimony in toxic tort cases. Finally, an appellate court decision exists that provides support for the examination of unsubstantiated medical testimony in toxic tort litigation.

Not only that, but the court provided trial judges with a road map of how to properly examine expert medical testimony to determine that its foundation is proper, and that there is a logical progression between the foundation and the proffered opinion.

For years, plaintiffs attorneys prosecuting toxic tort cases in California have decried *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), and its federal court progeny. *Daubert*, a pharmaceutical case, provided an analytic framework for the examination of proffered expert testimony to ensure reliability and admissibility. Initially thought to be more flexible than the previous *Frye* rule, *Daubert*'s emphasis on trial judges' roles as gatekeepers for reliable, properly founded opinion testimony has resulted in numerous courts excluding what is pejoratively described as "junk science."

The Supreme Court of California refused to adopt *Daubert* in *People v. Leahy*, 8 Cal.4th 587 (1994), indicating that, in its analysis, the *Frye* rule was more restrictive and ensured that more reliable testimony and evidence was provided to the jury.

As a result, plaintiffs attorneys statewide vigorously resisted any attempt by defendants to have the court review expert medical testimony in toxic tort litigation. Relying on *People v. McDonald*, 37 Cal.3rd 351 (1984), and other criminal cases, they argued that trial judges in California have no business examining expert medical testimony in toxic tort litigation.

In their opinion, an "M.D." at the end of an individual's name provides carte blanche for the expression of any medical opinion no matter how preposterous or ludicrous.

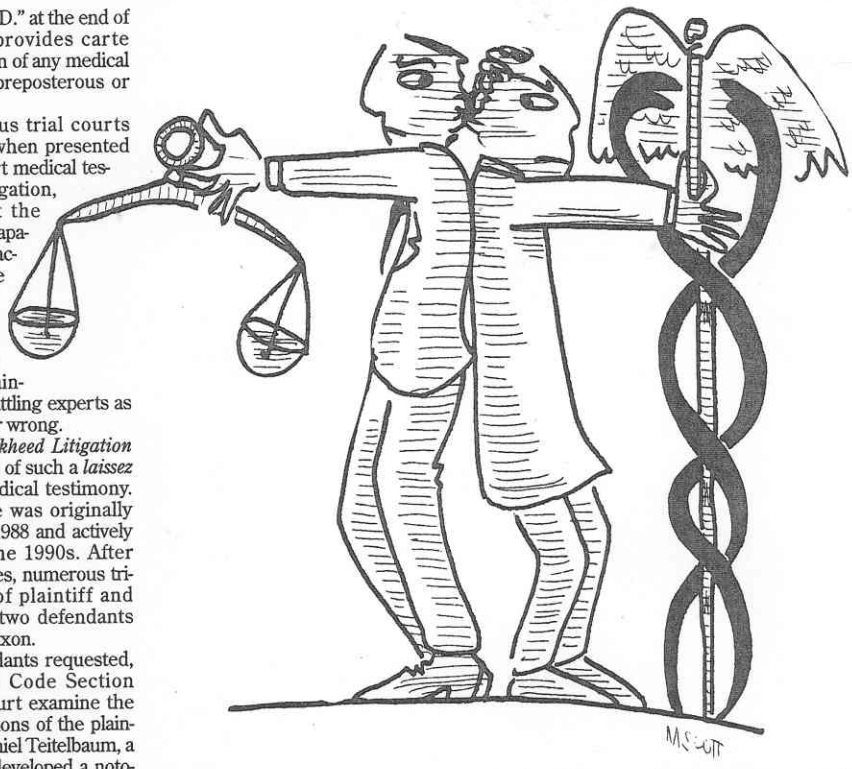
As a result, numerous trial courts throughout California, when presented with a challenge to expert medical testimony in toxic tort litigation, took the position that the court did not have the capability of doing so. The practical effect was to abdicate the judges' responsibility to determine the admissibility of evidence and left the jury to decide between the plaintiffs' and the defense's battling experts as to which side was right or wrong.

The trial court in *Lockheed Litigation Cases* had seen the effect of such a *laissez faire* view of expert medical testimony. The first *Lockheed* case was originally filed in 1986, served in 1988 and actively litigated throughout the 1990s. After going through four judges, numerous trials and a mixed bag of plaintiff and defense verdicts, only two defendants remained: Unocal and Exxon.

The Group 6B defendants requested, pursuant to Evidence Code Section 402(a), that the trial court examine the foundation and the opinions of the plaintiffs' principal expert, Daniel Teitelbaum, a doctor. Teitelbaum had developed a notorious reputation as an expert, traveling the country and testifying more than 100 times a year through the 1980s and 1990s.

Teitelbaum testified that exposure to even a single molecule of a chemical identified as a potential animal carcinogen was sufficient to cause any form of cancer in humans. At the 402(a) hearing, the defendants argued that the foundation relied upon by Teitelbaum was not the kind reasonably relied upon by experts in the field, and that the identified foundation did not provide sufficient information upon which an expert could rely in expressing an opinion on causation. Evidence Code Section 801(b).

Teitelbaum's opinions were reviewed by the court in detail, and, in a written decision, the court excluded his testimony. Plaintiffs and defendants then agreed to a dismissal in order for resolution on appeal.



The Court of Appeal upheld the trial judge's exercise of discretion in a finely worded and well-considered opinion. For each category of information upon which Teitelbaum relied (epidemiology studies in humans, animal studies and others) the court determined that there was insufficient information upon which an expert could rely to express the opinions that Teitelbaum expressed.

The court found that, when reviewed *in toto*, the information was insufficient to establish the necessary foundation for the admissibility of his testimony. Specifically, the court determined that human epidemiology studies concerning a group of chemicals could not be used to establish a causal link between any individual chemical and the end point disease studied.

The court also indicated that animal studies, by themselves, must be shown to be relevant to the human condition, not based upon modes of exposure or routes that have no application to the human condition.

But more fundamentally, the court told trial courts in California that enough is enough. No longer are trial judges to sit passively by when a member of the medical profession takes the stand, identifies him or herself as a doctor and then testifies about anything under the sun.

The Court of Appeal re-emphasized to trial judges that they have the responsibility to review and rule upon the admissibility of all evidence, ensuring its reliability and proper foundation. It is about time!

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