

Auto Law

Stuart Ollanik

Automobiles kill more people in the United States—around 37,000 every year—than any other consumer product. With a police-reported accident every five seconds, an injury every ten seconds, and nearly five deaths each hour, it is no wonder that auto accidents account for more tort trials than any other mode of injury.

This issue of *TortSource* focuses on two hot topics in auto litigation: admissibility of biomechanical expert testimony in low-impact collision cases, and the scope of federal preemption of auto design defect cases.

Catastrophic injuries are easy to prove. Some lesser injuries, however, are not easily provable by objective means that can be plainly viewed on X-rays or CT scans. Proof of soft-tis-

sue injury in auto collision cases has always been a challenge, as has been rebuttal of such claims. This old battle has a new wrinkle: the *Daubert* test for admissibility of scientific expert testimony. Articles in this issue of *TortSource* present the plaintiff and defense perspectives on the validity of expert testimony whether low speed impacts can cause permanent injury.

Lawyers interested in product liability cases will closely watch how lower courts respond to last year's Supreme Court decision on federal preemption of auto defect claims. Did *Geier v. American Honda Motor Co.* severely curtail the plaintiff's right to sue, or narrowly restrict only certain claims that certain model-year vehicles should have been equipped with air bags? Arthur Bryant, who argued the case to the Supreme Court for the Geier family, presents his view of the scope, and limits, of the decision.

This issue of *TortSource* is certain to spark conversation among practitioners, if not outright debate. We hope you enjoy our presentation of these important issues. ❖

Federal Preemption: *Geier* and Its Implications

Arthur H. Bryant

On May 22, 2000, the U.S. Supreme Court issued its most recent decision on federal preemption of state common law claims in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S. Ct. 1913 (2000). The Court unanimously agreed that the federal statute at issue in the case, the National Traffic and Motor Vehicle Safety Act of 1966, does not expressly preempt common law claims. On the issue of federal preemption of state "no-airbag" claims, however, five members of the Court found implied preemption of some state laws (in a ruling the dissent called an "unprecedented extension of the doctrine of preemption"). The implications of *Geier* thus are significant not only for airbag and auto design defect cases but also for cases involving many products nationwide.

Geier is the latest in a series of recent Supreme Court cases on whether vari-

ous federal statutes and/or regulations preempt state common law claims for damages. Most of these involve personal injuries for which the defendant claims it cannot be sued because it complied with federal law, and federal law preempts state laws used by victims to sue wrongdoers for causing their injuries. Over the past 20 years, defendants from nuclear power companies to tobacco companies and auto manufacturers have tried to use and expand this "federal preemption defense" to avoid accountability for their conduct. As in *Geier*, they frequently have found judges (or justices) willing to rule in their favor.

Geier and Preemption Basics

The facts in *Geier* are fairly straightforward. A 1987 Honda Accord driven

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Illustration by Andrew O. Alcalá

Challenges to Admissibility of the Biomechanical Witness A Plaintiff Perspective

Darin Schanker

The last decade has seen a trend develop in which defense attorneys use biomechanical experts for testimony in low-speed rear-end automobile accidents. Often engineers, these experts typically opine that the forces involved in a given accident were not sufficient to have caused the claimed injury. Plaintiff's counsel have found that the most effective strategy to fight this tactic is to prevent these often-persuasive witnesses from ever reaching jurors, by having the trial judge exclude all or most of their testimony. To do this, plaintiff's counsel must effectively argue that the proffered expert testimony is scientifically flawed.

In this age of decreased case budgets and increased expectations by insurance companies in "low-impact" events, the defense attorney must carefully analyze the wisdom of retaining biomechanical experts. With increasing regularity in trial courts across the country, plaintiff's counsel are successfully limiting or excluding such testimony, which results in wasted fees for an expert the defense cannot offer and which deprives the defendant of much of the case theme.

In order for a proposed defense expert to testify, the defense must demonstrate that (1) the witness has qualifications as an expert in the proffered area, (2) the opinions are based upon sufficiently accepted, valid, and reliable scientific principles and data,

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Illustration by Andrew O. Alcalá

Meeting Round-Up

Midwinter Meeting TIPS Fidelity and Surety Law Committee & Forum on the Construction Industry

Christopher R. Ward

“I want to be a part of it, in old New York!” Everyone involved or interested in construction and/or surety and fidelity law who attended this year’s Joint Midwinter Meeting of the TIPS Fidelity and Surety Law Committee and the Forum on the Construction Industry truly had this chance. More than 800 attendees gathered at the beautiful and historic Waldorf-Astoria on January 25 and 26, 2001, comprising practicing attorneys, company representatives, and others involved or interested in the surety, fidelity, and construction fields.

Many members don’t dare miss a year, and this meeting and programs were every bit as rewarding as years past—which is saying a lot! The first day’s program, Beyond the Four Corners: Implied Terms, Liabilities and Defenses in Construction Contracting,



covered information on existing law relating to implied obligations in construction contracting, as well as intriguing demonstrations of the law’s practical application. The following day offered a comprehensive overview of current law relative to

miscellaneous and commercial surety bonds, followed by an insightful presentation on fidelity coverage in the expanding world of e-commerce. Written materials from the programs will be used for years to come.

Superb speakers and presentations were not the only highlights. The meeting provides a chance to see old friends and make new ones among the many people attending for the first time. The hosts provided beautiful receptions at which the quality of food and drink was exceeded only by the quality of the attendees, conversations, and chances to network with those who share a common interest. Smaller functions included the Women’s Networking Breakfast and the party held in the posh presidential suite for the Young Professionals, Women, and Minorities subcommittees. Those looking for something less organized found it easy to sneak off and explore The Big Apple’s assets.

For veterans and first-timers alike, the experience is certainly something we will not soon forget and will make a point to experience again. Next year’s meeting will take place again in New York, to the delight of those who will long “to be a part of it, in old New York!” ❖

Christopher R. Ward is an associate with the law firm of Vial, Hamilton, Koch & Knox, L.L.P., in Dallas, Texas.

One hundred forty-five TIPS members gathered in beautiful October weather in Washington, D.C., for the annual seminar sponsored by TIPS Aviation and Space Law Committee and the Aviation Litigation Committee of the Section of Litigation.

Recent developments in the fast-paced aviation sector usually impact the presentations, and this year was no different. The opening presentation featured a panel of attorneys involved in the recent accidents involving Swissair/Flight 111, EgyptAir 880, Air France/Concorde, and Alaskan Air; and a program on international trends in product liability law delved further into last summer’s Concorde accident.

Speakers from the airline industry, insurers, and defense and plaintiff’s counsel spoke on troublesome issues raised by code shares. Implications of the slogan “your paint, your problem,” embraced by aviation insurers as the standard for imposing liability in code share situations, were discussed, and the choices available to resourceful counsel who wish to pursue recoveries against more than one carrier were examined.

A spirited discussion of aviation and criminal law and the effect of criminal investigations on the civil accident investigation process opened day two. The Valujet

Aviation Annual Seminar Tips Aviation and Space Law Committee and Aviation Litigation Committee of Section of Litigation

Michael J. Holland

experience, in which a contractor was criminally indicted for placing hazardous cargo aboard an aircraft, was cited as the seminal case for possible criminal liability. A panel of representatives involved in the Valujet litigation also detailed the chilling effect that a criminal investigation can have on the willingness of witnesses to cooperate with civil authorities.

Other discussions probed the crash of golfer Payne Stewart’s private aircraft and the Alaskan Airlines accident that revealed the airline had already been the subject of a grand jury investigation into maintenance procedures. Judge Dickran M. Tevzian of the U.S. District Court for the Central District of California spoke on the role of the courts in aviation litigation, including the need for the court to assume strong pretrial

control over the parties and for counsel on both sides to have an adequate understanding of air law. Thomas J. Whalen of Condon & Forsyth LLP in Washington discussed the future of international aviation, arguing that airlines in the Montreal Convention erroneously agreed to unlimited liability, which has led to passengers’ “socking it to” the legally defenseless airlines.

The luncheon speaker was Captain Cecil Ewell, recently retired from American Airlines, who spoke of his early days in the United States Navy and his long and distinguished career at American. Captain Ewell came to praise, not to bury, lawyers, emphasizing the important safety functions aviation lawyers make possible for safety in air transportation.

Evaluation summaries indicated that 80 percent of the answering participants found the seminar “excellent” in its variety of topics and speakers. Plans already are under way for this fall’s meeting, again in Washington. The annual Aviation Symposium is the meeting for practitioners in the field of aviation litigation, due to the quality of presentations and speakers and the camaraderie among attendees. ❖

Michael J. Holland is an attorney with Condon & Forsyth LLP in New York City.



CLEs on Trial Techniques and E-Commerce and the Insurance Industry are among activities scheduled for the TIPS Spring Meeting. See page 8 for more information.

Biomechanical Expert Testimony in Auto Accident Cases

A Defense Perspective

Ryan Acomb

Typically, the defense biomechanical expert in a minor low-impact collision offers relevant and reliable testimony regarding speed of the vehicles at the time of the impact; acceleration rates or amount of force (G forces) exerted by the impact on the victim's body; mechanics of body movement during impact; and/or an injury causation analysis, i.e., whether the minor impact could have caused the alleged injuries. The lower the impact and the more severe the injury claimed, the more crucial it is to have the biomechanical expert's testimony on the potential correlation between the accident and injury. The testimony of the biomechanical expert can be the death knell for the plaintiff's suspect personal injury claim, because it supports the common-sense defense and confirms the average person's experience or belief that a minor impact does not result in any injury, much less a severe one.

To combat the biomechanical expert and protect the questionable personal injury claim from an attack, plaintiffs' attorneys have attempted to co-opt a traditional defense strategy—use of a motion to exclude expert testimony, based on the trial judge's gatekeeper function pursuant to the Supreme Court analysis set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S.137 (1999); and their progeny.

Recent Developments in the Law

Effective December 1, 2000, the U.S. Supreme Court amended Federal Rules of Evidence Rule 702, to codify its ruling in *Daubert* and *Kumho* as follows:

Rule 702 "Testimony by Experts"

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Daubert held the Federal Rules of Evidence superseded the "general acceptance" rule established in *Fry v. United States*, 293 F.1013 (D.C. Cir. 1923), and gave the trial court broader discretion in admitting expert testimony. *Daubert*, in upholding the exclusion of plaintiff's expert testimony that a drug caused birth defects, based its ruling on the reliability of the scientific methodology used by the expert and set forth several discretionary factors the trial court should use as a guidepost when deciding whether to admit scientific opinion testimony. In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Supreme Court ruled a trial court could exclude expert testimony if the expert's conclusions have too great an analytical gap between the underlying data and the opinion proffered. Further, *Joiner* held the proper standard for appellate review is "abuse of discretion." *Joiner* upheld the exclusion of the plaintiff's expert testimony regarding the causative link between exposure of PCP and cancer because the expert's conclusions did not reliably follow the underlying data. Thus, the trial court as gatekeeper should review scientific methods and conclusions to ensure expert testimony is reliable and relevant.

In *Kumho* the Supreme Court clarified that the *Daubert* analysis applies to all experts, not just scientific experts. The *Kumho* Court excluded the plaintiff's tire failure analysis expert's testimony in a tire blowout case. The question was not with the expert's methodology; the Court concluded the expert's methodology was unreliable in the facts of this particular case because the expert could not determine the cause of failure of this particular tire. *Kumho* made clear that *Daubert* gives the trial court wide discretion in deciding what factors may bear on the judge's gatekeeping determination for all experts: "The objective of the gatekeeping inquiry is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Most state courts have adopted the *Daubert* gatekeeper approach, giving the trial court wide discretion, particularly when confronted with technical or nonscientific experts.

Biomechanical Expert Testimony: Reliable and Relevant

Biomechanics is defined as "the application of mechanical forces to living organisms and the investigation of the effects of the interaction of force and the body or system." Tabor's Cyclopedic Medical Dictionary (17th ed. 1993). It involves the interrelationship of multiple scientific disciplines including engineering, accident reconstruction, vehicle dynamics, occupant kinematics, physics, biomechanical engineering, gravity acceleration impact analysis, crashworthiness, and/or medical analysis. Frequently, two experts will testify in tandem, such as an engineer or physicist and a medical doctor.

A competent biomechanical expert should qualify based on the tests announced in *Daubert*.

• Testimony is based on sufficient facts or data.

Daubert required that the gatekeeping inquiry must be "tied to the facts of a particular case." The biomechanical expert's opinion should be based on facts specific to the case, meaning the biomechanical expert should review the following: vehicles involved in the accident, inspecting them in person or scrutinizing photographs of the vehicles taken after the accident, if available; repair estimates for the cars, including inspection of the undercarriage for hidden damage; statements and/or depositions regarding specific facts of the accident made by all persons with relevant knowledge; the police report; the accident scene, if there is a discrepancy regarding time or distance in the facts; and all plaintiff's medical records.

• Testimony is the product of reliable principles and methods.

This requirement incorporates the *Daubert* principle that the expert's testimony must be based on reliable "scientific methodology." Under *Daubert*, factors that may be considered are whether the expert's theory or technique can be and has been tested; whether the theory or technique has been subject to peer review and publication; the known or potential rate of error; and whether the theory or technique enjoys "general acceptance" within a relevant scientific community.

The biomechanical expert should base the determination of speed on the estimates of the drivers and/or accepted principles used to calculate the rate of speed based on physical evidence. In forming opinions regarding the force of the impact on the occupant/plaintiff, the expert will use data concerning sim-

ilar cars from reliable published sources, such as crash test data from the National Highway Transportation Safety Administration and the Insurance Institute for Highway Safety. The expert also may use published biomechanical studies using crash test dummies or cadavers to show body movement and G forces exerted during the accident. Other sources for data are reenactments under controlled conditions using instruments to measure the G force, and/or the expert's professional experience.

• The witness has applied the principles and methods reliably to the facts of the case.

In using the data from published sources described above, the expert must be prepared to testify regarding not only the results but also how the tests were conducted, to show that data was collected under similar circumstances. As recognized in *Joiner*, trained experts commonly extrapolate from existing data. Once the impact force and G force have been established, the expert can testify how that translates into human terms. As a rule of thumb, G force is 32.2 feet per second. A minor impact of less than 5 miles per hour can result in a G force rate of less than 4 G forces, comparable to normal daily activities like a sneeze that asserts 3.5 G forces on the head. The biochemical expert should be qualified to testify whether the amount of force on the body could have caused the type of injury alleged, based on experience and available data for the particular case.

The inquiry envisioned by *Daubert* under Rule 702 is flexible. "Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." "Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called 'general truths derived from . . . specialized experience,'" *Kumho* at 1174, citing Hand, *Historical and Practical Consideration Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901).

Conclusion

The biomechanical expert can reasonably and reliably assist the jury in understanding relevant testimony regarding the force and effects of a minor low-impact automobile accident. If the plaintiff's bar wishes to challenge the biomechanical expert, the proper forum in our adversarial system is at trial, on the merits, through cross-examination presentation of contrary evidence. ♦

Ryan Acomb is an attorney with Porteous Hainkel Johnson and Sarpy in New Orleans.



Illustration by Andrew O. Alcalá

Federal Preemption

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by Alexis Geier crashed. Geier was wearing her seatbelt and shoulder harness, but—because the car did not have an airbag—her face smashed into the steering wheel, necessitating 14 separate facial reconstruction surgeries to date. She and her family sued Honda, alleging that she would have walked away from the crash had the car contained a driver's side airbag. Honda argued that it was immune from suit because the Geiers' no-airbag claim was preempted by federal law.

Under established law, congressional intent to preempt a state law can be found in two basic ways: *express* preemption, in which Congress explicitly states its intent to preempt the state law at issue; and *implied* preemption, in which intent to preempt is not plainly stated. Implied preemption can be found when (1) federal legislation is so comprehensive it leaves no room for states to supplement federal law; (2) compliance with both federal and state law is a physical impossibility; or (3) state law conflicts with federal law because it "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." In *Geier*, Honda urged the Court to find both express preemption and implied preemption of category (3), above.

Express Preemption

Honda's express preemption argument was based on the preemption provision of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(d) (1988), recodified at 49 U.S.C. § 30103(b) (1994), which states: "Whenever a Federal motor vehicle safety standard . . . is in effect, no State or political subdivision of a State shall establish or continue in effect . . . any safety standard applicable to the same aspect of performance . . . which is not identical to the Federal standard." Honda claimed because Standard 208 applies to occupant crash protection and allowed it to manufacture cars without airbags in 1988, a common law claim holding it liable for making a car without airbags would constitute a forbidden "safety standard applicable to the same aspect of performance . . . which [was] not identical to the federal standard" and was, therefore, expressly preempted.

The Court unanimously concluded that the Safety Act does not expressly preempt common law claims, relying on the act's express savings clause that states "Compliance with any Federal motor vehicle safety standard shall not exempt any person from any liability under common law," 15 U.S.C. § 139(k) (1998), recodified at 49 U.S.C. § 30103(b) (1994). The unanimous ruling was a huge victory for plaintiffs for three reasons. First, several courts had already held that the Safety Act *does* expressly preempt common law claims, *Harris v. Ford Motor Co.*, 110 F3d 14100 (9th Cir. 1997); *Gracia v. Volvo Europa Truck*, 112 F3d 291 (7th Cir. 1997); *Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Id. 1996). *Geier* overruled them on this point. Second, auto manufacturers had spent years seeking an express preemption ruling because of its potential broad-based impact, but the Court made clear that the vast majority of auto design defect claims are not, in fact, preempted. Third, several other statutes, including the Boat Safety Act and the National Manufactured Housing Construction and Safety Standards Act of 1974, contain similar express preemption and savings clauses. *Geier* will yield a ruling of no express preemption under those statutes.

Reaching Implied Preemption

Five members of the *Geier* Court chose to disregard Congress' unequivocal words in the Savings Clause and found that compliance with *some* federal motor vehicle safety standards does exempt *some* persons from *some* liability under common law. Although they claimed otherwise, the ruling effectively held that regulatory agencies implicitly have the power to preempt state common law claims, even if Congress explicitly and specifically withholds that power from agencies. Thus, courts must be willing to consider arguments that a particular common law claim is impliedly preempted because it arguably conflicts with some federal law or regulation. In cases under the Safety Act and similarly worded statutes, the express preemption battle has been decided, but the war isn't over. It now must be fought on the implied preemption battleground.

Implied Preemption

Geier offers both bad and good news for implied preemption battles in auto design defect litigation and elsewhere. The bad news, of course, is that the majority of the Court found implied preemption because, in its view, the Geiers' claims conflicted with policies underlying the portion of Standard 208 that applied when the Geiers' Honda was manufactured.

Relying heavily on the *amicus* brief in support of preemption filed by the government, Brief for the United States as *Amicus Curiae* Supporting Affirmance, *Geier v. American Honda Motor Co.*, No. 98-1811 (Nov. 1999), the majority said that the relevant part of

Standard 208 detailing a multi-year regulatory phase-in of passive restraints "deliberately sought variety—a mix of different passive restraint systems." The Department of Transportation wanted variety because "a mix of devices would help develop data on comparable effectiveness, would allow the industry to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems." The majority reasoned that permitting the Geiers' common law tort claim would impermissibly frustrate these regulatory goals by "requir[ing] manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors." This conflict, in the majority's view, rendered the Geiers' claims impliedly preempted by Standard 208.

As the dissent demonstrates, the Geiers' claims did not conflict with the real policies underlying Standard 208—to promote auto safety by encouraging but not requiring manufacturers to install airbags and by relying on a variety of incentives (including the threat of tort liability) to prompt manufacturers to adopt the safest designs yet to avoid consumer backlash. The dissent accurately observed that the majority's willingness to find preemption in circumstances like these creates a major risk that activist lower court judges will erroneously find common law claims impliedly preempted on the basis of any policies they think underlie various regulations.

In fact, the majority's implied conflict holding and rationale were *extremely narrow*. To begin with, the majority did not find all no-airbag claims preempted, leaving open whether there is implied preemption of a claim that manufacturers might have installed "airbags rather than another type of passive restraint" in certain models. Similarly, the portion of Standard 208 relied upon by the majority did not apply to cars manufactured before 1987; front passenger and rear seats; or trucks, tractors, or multipurpose vehicles like jeeps. Honda, of course, urged implied preemption on grounds covering the vehicles and seating positions, but the Court did not adopt Honda's arguments, even though they had been adopted by lower federal courts in other no-airbag cases.

The majority instead gave the U.S. government's position "special weight" and adopted a rationale that, if honestly applied, would lead to implied preemption of virtually no other crash victims' claims. Plaintiffs' lawyers faced with federal preemption arguments under the Safety Act should, therefore, obtain copies of the government's *amicus* briefs on the merits in *Geier*, *Freightliner v. Myrick*, 514 U.S. 280 (1995), and in *Wood v. General Motors Corp.*, 865 F.2d 395 (1988) (in which the government set out its position in a brief in opposition to *certiorari*). They show the limits of the government's position.

The government's position may, of course, change with the new administration, but the Court has repeatedly said that the government's *long-held* position is entitled to deference. The Court itself, however, may well change during this presidential term. Indeed, perhaps the single biggest implication of *Geier* is how important the Court's makeup is to injury victims' rights. *Geier* shows that the rights of millions of potential injury victims can turn on the vote of one member of the Supreme Court.

(The U.S.A.'s *amicus* briefs for the cases cited, opinion letters, and additional information can be obtained from Trial Lawyers for Public Justice, 202.797.8600; 510.622.8150; www.tlpj.org.)

A longer version of this article appeared in *Trial Talk* and is reprinted with permission of the Colorado Trial Lawyers Association, © 2001. ♦

Arthur H. Bryant is executive director of Trial Lawyers for Public Justice, Washington, D.C., a national public interest firm. He argued *Geier* for the plaintiffs in the U.S. Supreme Court.



Did you know you can become part of the Automobile Law Committee's listserv and automatically receive postings of recent case law and legislative changes? Joining is elementary—simply go to the TIPS website at www.abanet.org/tips; scroll down the left-hand column, click on "listserv," then click "Tips—Auto Law" on the drop-down menu. Typing in your e-mail address completes the procedure. In addition to receiving updates, you'll also be able to correspond with all other listserv members with just one click.

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TIPS Chair:	Mitch Orpett
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Editorial Board:	Juanita Luis, Chair Mark Sklan L. Neal Ellis Stuart Ollanik
Editor:	Annemarie Micklo 312.988.6046
Art Director:	Andrew O. Alcalá

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“When I Was a Young Lawyer”

Kim M. Brunner
Senior Vice President and General Counsel,
State Farm Insurance

What is your background, and what inspired you to become a lawyer?

I grew up in the Quad Cities area and was the first of my family to attend law school. Almost all my relatives were farmers, and my father designed parts for an agricultural equipment manufacturer. My first recollection of thinking about becoming a lawyer was in eighth-grade math class. After a debate with my teacher about something completely unrelated to math, he suggested, in exasperation, “You should become a lawyer.” It hadn’t occurred to me before that, but it seemed like a good idea. As to inspiration, I’ve felt my entire life that access to qualified legal counsel is something that all Americans need, regardless of social status.

Where did you go to law school, and what did you do right after?

I went to the University of Arizona College of Law. Immediately after, I taught adult continuing education classes at a local junior college while I studied for the Illinois bar exam. My first job as a lawyer was as a staff attorney with the Illinois Department of Insurance.

What did you learn from your early lawyer experiences?

At my first job, I had absolutely no expertise in insurance regulation, and the issues and legal challenges faced by a state agency were foreign to me. I had taken administrative law in law school with no intention of working in government or specializing in that area. Perhaps more than anything else, my first job helped me learn how to interact, as a lawyer, with a diverse client base. I also learned just how little I knew, despite 20 years of formal education.

Whom do you most admire?

As society and the overall environment become more hectic, I admire “peacemakers” and those who encourage reconciliation of differences short of contentious litigation. Within the legal community, I most admire lawyers who live the professional ethic I was taught in law school.

What is your greatest source of professional pride?

Representing an institution [State Farm] dedicated to providing needed services to everyday people. It is both daunting and rewarding to follow in the footsteps of the exceptional general counsel who preceded me.

What got you started with ABA involvement?

I got involved with the ABA right out of law school. I felt it was important to associate with other young professionals learning the trade. I feel the same way today.

What was the best professional advice you ever received?

When a client comes to you with a question or problem, start by asking what the client would like to accomplish. It’s easy, especially for young lawyers trying to demonstrate their

value, to look past the client’s wants or needs. The lawyer needs a keen understanding of the client’s interests to serve in the most professional and capable manner.

What personality trait has served you best over the years?

Asking questions. I discovered early on in my legal career that law school had prepared me pretty well for passing the bar exam and becoming licensed; it had not provided (nor could it) substantive knowledge of the areas in which I would give legal advice. Fortunately, I worked with some very patient people early on in my career (both lawyers and non-lawyers), who answered my questions and helped me learn how to serve clients most effectively.

What challenges you the most?

Applying all of the experiences gained over the years to the complex problems presented by today’s business and legal environments. Helping clients sort out problems with legal dimensions and pursue their objectives is an increasingly difficult task. As the world grows increasingly complex, in-house positions are more demanding.

What is the one thing regarding the law/lawyers that you cannot stand?

Lawyers who tell clients what they think the clients want to hear. This may engender temporary goodwill, but it is a terrible disservice to the client. While diplomacy is always advisable, it is vital that the lawyer gives the best advice.

What is your favorite type of legal work?

Helping clients avoid problems before they occur. Litigation requires time and attention, which makes the pursuit of an effective preventive law practice more important. It’s the essence, in my judgment, of a successful in-house practice.

Lawyers today are switching jobs and careers more often than in the past. What helped you decide to move to an in-house position, and how did you cope with the change?

I thought my future probably would involve working in administrative law at a large firm. As it turned out, I was presented with offers for in-house positions, something I didn’t initially envision myself doing. Over time, I came to appreciate the extraordinary range of challenges and breadth of opportunities offered by an in-house position—its richness made the transition easy and enjoyable.

What are your future ambitions?

To assist young lawyers in developing skills and experience to perform at their highest professional levels. There is little more satisfying for me than to help others in the same way I was helped early in my career.

What can the ABA do to be a good home to young lawyers?

Provide opportunities for young lawyers in all areas of practice to talk with and learn from each other. The ABA is in an especially strong position to perform this function. The personal growth potential provided by seminars and informal settings is significant.



Kim Brunner
then and now



Kim Brunner’s Advice for Young Lawyers:

- Practice civility and expect it from those around you.
- Give something back to your profession.
- Enjoy your practice, and don’t be afraid to change your career direction.



In Motion

Peter Bennett of Portland, Maine, has been elected vice president and member of the board of directors of the **International Society of Primerus Law Firms**.

Jim Groh was named partner at **Holland & Hart LLP**, in its Denver office.

A. Bruce Jones of Denver and **Walter H. Bithell** of Boise, Idaho, both with **Holland & Hart LLP**, are included in *The Best Lawyers in America for 2001*.

Richard H. Nicolaidis, Jr., and **Robert S. Marshall** recently joined the firm of **Bates & Cary** in Chicago.

Brian P. Voke was elected president of the **Massachusetts Defense Lawyers Association**.

Michael L. Sullivan has joined the Chicago firm of **Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd.**, as partner.

Cale Conley, Josh Sacks and **Richard Griggs** have formed a new firm, **Conley Sacks and Griggs**, in Atlanta.

Robert Caldwell and **Mitch Orpett** received Friends of the Division Awards from the ABA Law Student Division.

Kirsten Christophe was promoted to vice president of the **Marsh FINPRO Group** in the risk advisory services section of the New York office.

Congratulations to all on your achievements!



TIPS 2001 National Trial Academy offers sessions with respected lawyers, judges, teachers, and consultants for a full week of practical experience and extraordinary learning opportunities. This year’s program runs from April 28 through May 2 at the National Judicial College in Reno, NV. Call 312.988.5708 to reserve your place.

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Illustration by Andrew O. Alcala

and (3) the opinions will assist the trier of fact in understanding the evidence. FED. R. EVID. 702. Even if the defendant can make the requisite showing, most courts perform an Evidence Rule 403 analysis to determine whether the probative value of the testimony is substantially outweighed by the danger of unfair prejudice and could mislead the jury.

With regard to the admissibility of scientific evidence, some jurisdictions still follow *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923), which held that scientific evidence should be admitted if based on methods generally accepted within the relevant scientific discipline. However, in 1993 the U.S. Supreme Court abandoned the *Frye* test, declaring the standard had been displaced by the Federal Rules of Evidence. In its place, the Court established the *Daubert* standard, which admits scientific theories, evidence, and opinions even if they have not achieved general acceptance in their field of science, so long as they are the products of sound and valid scientific methodology. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993). The *Daubert* standard is followed in the federal courts and in many jurisdictions around the country.

Daubert's Standard

As a test for admissibility, *Daubert* is much more liberal and less restrictive. The trial court acts as a "gatekeeper" for scientific evidence. In arriving at a determination as to the scientific validity of the proffered expert testimony, the trial court must consider a number of factors, including

1. whether the theory, technique, or conclusion can be **tested**;
2. whether the theory, technique, or conclusion has been subject to **peer review** and publication;
3. consideration of the known or potential **error rate**;
4. whether there were **controlling standards** for the methodology used to reach the conclusion proffered, and whether such controlling standards were appropriately followed;
5. whether the methodology or conclusion is **generally accepted in the relevant scientific discipline**.

At issue in the fight for exclusion of the biomechanical expert is the definition of "the relevant scientific discipline." The defendant must attempt a narrow definition of engineering and biomechanics. Plaintiff's counsel will point out that the injury causation opinions offered involve the sciences of medicine, biomechanics, accident reconstruction, statistics, and epidemiology. In the majority of these cases, plaintiff's treating doctors disagree with the defense biomechanical expert's causation opinions. The plaintiff can successfully exclude the testimony if the judge can be convinced that the relevant scientific discipline includes the treating doctors, whatever their areas of expertise may be.

The typical proffered defense biomechanical expert is not a medical doctor. The expert typically did not perform a clinical medical examination of the plaintiff and has not had direct contact or conversations with the plaintiff's treating physicians. Most often, the proffered expert did not go to the accident scene to make and record observations and did not examine the actual vehicles involved.

Attacking the Cornerstone

As with any expert, it is critical that plaintiff's counsel determine what the witness expert's opinions are based upon. The cornerstone of the expert's opinion is usually a number of "crash test" or "biomechanical" reports that purport to study the effects of impacts on human occupants. Counsel must argue that these studies involve dissimilar persons who were subjected to dissimilar forces under dissimilar impact conditions, resulting in dissimilar injuries. Plaintiff's counsel must also attempt to demonstrate that the opinions and articles cited by the defense expert are not generally accepted in scientific fields, represent a very small minority viewpoint, and are refuted by the clear majority of relevant literature in these fields. The conclusions and the underlying methodology of the expert thus can be deemed not scientifically valid.

The crash test studies relied upon by biomechanical experts usually involve four to seven crash subjects and often do not take into account the disputed facts and dynamics of the collision in question. Plaintiff's counsel must point out the large number of variables that pertain to the injured occupant of a vehicle; these include gender, age, preexisting degenerative changes, positioning of the occupant during impact, rotation of the head during impact, lack of preparation before impact, and so forth. In addition, a number of other injury risk factors can be explored, including the type of head restraints involved, the presence of shoulder restraints, car seat construction, and bumper dynamics, to name a few. Permutations of these factors number in the thousands.

The plaintiff must argue that the threshold for injury has not been investigated adequately to allow reasonable conclusions to be drawn about the universe of people at risk of injury from low-speed rear-impact collisions—particularly considering the multitude of other variables. Specifically, counsel will argue that the crash tests were not designed to delineate an injury threshold for an entire population and are being misapplied by the expert.

A defense-endorsed biomechanical expert can effectively persuade a jury that the forces involved in a "low-speed" impact were insufficient to cause the claimed injury. Plaintiff's counsel must attempt to have this evidence excluded by demonstrating that the testimony is scientifically flawed. Counsel for both parties must have a clear understanding of the issues and an accurate perception of the likelihood that the testimony will be presented to the jury in order to render effective representation. ❖

Darin Schanker (dschanker@coloradolaw.net) is a shareholder in the firm Bachus Schumacher & Schanker, L.L.C., in Denver, Colorado.



Truck Accident Litigation and Insurance covers every aspect of a truck accident case, from both plaintiff's and defense perspectives. \$69.95 (\$59.95 for TIPS members), PC 5190241. *When Worlds Collide: Issues in Crossing Accidents Involving Trains and Tractor Trailers* discusses technical truck issues, the impact of criminal charges on drivers, and an overview of FELA. The book and program materials from this Annual Meeting presentation are available for \$25 by calling 800.285.2221, PC 5190260-A8-96.

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Internet Resources for Reinsurance Arbitrations

Information resources on the Internet for lawyers are expanding geometrically. Insurance and reinsurance practitioners are benefiting from this expansion, as more and more insurance and reinsurance resources appear on the Internet. This article briefly highlights the resources available to lawyers involved in reinsurance arbitrations.

One of the first things in a reinsurance arbitration is the selection of the arbitration panel. The selection process requires knowledge about the background of potential arbitrators. There are a number of paper-based resources available to practitioners that list potential arbitrators and their backgrounds. New to the Internet, however, are electronic versions of these directories tailored specifically for insurance and reinsurance arbitrations.

First out of the box is the Reinsurance Association of America's Arbitrator Directory, which contains biographic information on those who have submitted information for listing by the RAA. The directory is in searchable form at <www.reinsurancearbitrators.com>. The RAA does not certify arbitrators; the directory catalogs individuals interested in serving as arbitrators, mediators, and umpires in insurance and reinsurance disputes.

Another source of information about potential arbitrators and umpires is the ARIAS U.S. site at <www.arias-us.org>. The names of arbitrators certified by ARIAS U.S. are listed, and biographic information on each arbitrator should also be available by the time you read this. Private arbitration/mediation providers like JAMS and the CPR Institute for Dispute

Resolution also list their neutrals, along with full biographies, searchable by geographic location or specialty. The sites are at <www.jamsadr.com/locations.asp> and <www.cpradr.org/panels.htm> respectively.

The RAA and the ARIAS U.S. Web sites also provide links to rules, guidelines, forms, procedures, and other useful information. RAA's has the full text of the recently developed Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes at <www.reinsurancearbitrators.com/procedures/index.html> and also provides an interesting list of books, speeches, and articles about reinsurance dispute resolution <www.reinsurancearbitrators.com/research/index.html>. The ARIAS U.S. site, which is being relaunched, includes the ARIAS U.S. Practical Guide to Reinsurance Arbitration Procedure <www.arias-us.org/res_and_pro/guide_intro.html> and plans to post its Umpire Selection Procedure and a list of certified arbitrators who qualify as umpires.

Other sources for dispute resolution information include the American Arbitration Association <http://adr.org>; JAMS <www.jamsadr.com/home.asp>; and the CPR Institute for Dispute Resolution <www.cpradr.org>. This is just the tip of the iceberg. In addition to the ESLR Web site at <www.abanet.org/tips/eslr/home.html>, other bar and trade organizations are adding material daily about insurance and reinsurance dispute resolution. The Web has become a virtual dispute resolution library. Take advantage and log on.

If you have any Internet sites of interest to our members or have any topics you would like to see discussed, please let me know at lschiffe@llgm.com. ♦

Larry Schiffer practices with LeBoeuf, Lamb, Greene & MacRae, LLP in New York.



Crash Cases: A Guide to Vehicle Collision Litigation provides strategies, case law, and practical information on preparing single-vehicle cases; when and how to use the seat belt defense; arguments for and against preemption of liability in the absence of expert witnesses. \$19.95, PC 5190087. Call the ABA Service center to order, 800.285.2221.



Practice Management

By Jill Peterson Holmquist and Martin Q. Peterson

Selecting a Jury A Science and an Art

Jury selection, although the subject of much scientific research, is still an art, one that is rooted in communication abilities, observational skills, and an understanding of how different people think. The more you know about the science, the better you will be at the art of jury selection.

The most common question about selecting jurors is "What is the profile of the best and worst jurors for my case?" The answer includes descriptions based on age, sex, socioeconomic class, political affiliation, and so on. Scientific research helps answer this question by predicting the percentage of people fitting a given profile who will respond favorably or unfavorably to your case. A jury consultant familiar with demographic and psychographic statistics that predict pro-defense or pro-plaintiff leanings can assist you in evaluating the individuals in the venire.

Unfortunately, however, individuals who fit a given profile may have experiences or viewpoints that lead them to different conclusions from the majority of people fitting that profile. It is here that both the science and the art of jury selection become critical. A wealth of scientific research data can help educate you about jury selection. Much of that data is published in social sciences literature and can be found at a local academic library, in psychology and social sciences abstracts. Research topics vary greatly and range from broad topics (e.g., ways jurors most effectively influence other jurors) to specific (e.g., juror demographics as they relate to views of injury causation, or how a

defendant's level of attractiveness influences mock jurors to change their minds about a verdict).

Although you may not find studies that address issues specific to your case, existing research can provide insight into the kinds of biases and/or preconceptions jurors have, the kinds of facts or presentations that might help persuade them, and the ways they influence each other in deliberations.

Jury consultants provide a variety of services that can enhance your ability to evaluate the venire. Besides providing demographic profiles, they can help you understand the individuals who make up your venire. One tool employed is the community attitude survey, which relies on statistically accurate sampling methods to measure attitudes regarding specific aspects of your case. Surveys are especially helpful when a change of venue may be in order, but they can also be used to identify strongly held values and beliefs that you can draw upon thematically.

Another particularly useful tool is the focus group. Focus groups help you understand how individuals react to your case and grapple with critical issues as a group. Presenting information to focus groups, with the assistance of a neutral facilitator, can help you identify attitudinal and experiential variables that will affect how individuals respond to your case. Based on that information, you can develop effective questions for use in voir dire.

Using a neutral or an oppositionally biased focus group (i.e., one whose members will tend to favor your opponent) will also help you identify hazardous areas that you might otherwise overlook and can probe in voir dire. In addition, interaction with "real" people will give you greater understanding about how laypersons apply logic or common sense to your case. You can use those methods to enhance your persuasiveness as you present your case.

Employing the simple tools of scientific literature, surveys, and focus groups will give you many guideposts for your assessment of potential jurors. It will also help develop and enhance your intuitive sense about potential jurors, so you can proceed with greater confidence. The arsenal of knowledge you acquire through research will help you in practicing the art of jury selection. ♦

Jill Peterson Holmquist, J.D., is president and Martin Q. Peterson, Ph.D., is chief scientist of Forensic Anthropology, Inc. (FAI), a litigation consulting firm based in Lincoln, Nebraska.



Need pointers for accident reconstructions? Pick up ideas from *Accident Reconstruction*, which covers commonly used methods and applications and effective techniques for redirect and cross of experts. Call the ABA Service Center at 800.285.2221 to order this video, \$195 (\$135 for TIPS members), PC 5190138.

Mark Your Calendar

Employee Benefits in Mergers and Acquisitions, April 5-6 in New York City (800.285.2221 or abacle@abanet.org)

Catastrophe Claims under Property Insurance Policies, April 19-20 in St. Thomas, VI. (312.988.5708)

National Trial Academy, April 28-May 2 in Reno, NV (312.988.5708)

Fidelity & Surety Claims Workshop, May 10-11 in Asheville, NC (312.988.5708)

New Issues in Employee Benefits, June 20 Teleconference (800.285.2221 or abacle@abanet.org)

Product Liability MegaConference III, June 21-22 in Amelia Island, FL (312.988.5708)

ABA Annual Meeting, August 2-8 in Chicago (312.988.5672)

Bioethics, Minorities, and the Law, September 8-9, in Tuskegee, AL (312.988.5656)

TIPS Spring Meeting May 3-6, Monterey, CA

CLE Calendar

Trial Techniques, May 3-4: Apply now to reserve your place for the Trial Techniques CLE during the TIPS Spring Meeting in Monterey. The May 3-4 session features nationally known jury consultant and Duke drama professor Dr. David Ball, who teaches lawyers how to add theater techniques to the arsenal of persuasive trial tools. Participants will also explore the innovative 21st Century Courtroom project; hear new evidence that the roles jurors adopt during cases affect jury decisions; and benefit from demonstrations of effective opening statements, mock jury feedback, and use of computer-assisted evidence. This popular program has been known to sell out, so early registration is advised; call 312.988.5672 or log on to www.abanet.org/tips.

E-Commerce and the Insurance Industry, May 3-4: Curious about the changes the burgeoning world of e-commerce will make in the insurance industry? This CLE offers a comprehensive overview of the technology driving e-commerce, including valuable information all lawyers and insurers need to know to prepare themselves and their clients. The risks to both practitioners and clients of engaging in this new electronic frontier will be explored and explained, as will questions concerning the medium's geographic domain and whether regulations can be reconciled with the global reach of e-commerce. In addition, attendees will receive practical advice to help protect their businesses and Web sites—and much more. To register or for further information, call 312.988.5708 or register online at www.abanet.org/tips.

ERISA Basics

Three National Institutes will be held during the spring:

ERISA Basics, May 2-4 in Chicago (800.285.2221 or abacle@abanet.org)

ERISA Basics, May 16-18 in Dallas (800.285.2221 or abacle@abanet.org)

ERISA Basics, May 30-June 1 in New York City (800.285.2221 or abacle@abanet.org)

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David Edsey, a native Chicagoan, is an associate at Tribler, Orpett & Crone, P.C., in Chicago.

Chicago's lakefront is one of its most treasured features. Sunbathers can take advantage of Oak Street Beach for some of the city's best people watching—not to mention freshwater swimming right outside your hotel door! Grant Park, located between the lake and downtown, offers beautifully manicured gardens, statuary, and the Buckingham Fountain, bathed in colorful lights every evening. Joggers should also take advantage of a run along the lake; head east from wherever you are, and you can't miss a jogging path that will take you for miles and accompany you with Lake Michigan's refreshing breezes.

Art lovers shouldn't miss the Art Institute of Chicago, with its truly inspiring collections, or the Museum of Contemporary Art for modern art in a futuristic setting. For world-class browsing or hands-on shopping, take a stroll down the Magnificent Mile, Michigan Avenue between the Chicago River and the Water Tower.

For an excellent restaurant guide, pick up the latest copy of *Chicago* magazine for a description of the cuisine and price range of Chicago's best restaurants, including the many ethnic offerings in neighborhoods such as Greektown or Andersonville.

If you're fortunate enough to attend the Annual Meeting this August, be assured—Chicago is one town that won't let you down!

Frank Sinatra sang "Chicago is my kind of razzmatazz and it has all that jazz." No place better typifies 1920s jazz-age Chicago than the Green Mill, one of the oldest jazz clubs in the country. Located about four miles north of downtown, the club—one of Al Capone's former speakeasies—has not changed since the '20s and is well worth seeing. Other places for cocktails and jazz in intimate and sophisticated surroundings are the Zebra Lounge, Lush Life, Green Dolphin Street, Andy's, and Jazz Showcase.

Most Chicagoans I know can hardly tolerate hearing "Sweet Home Chicago" anymore, but we can't deny that our city also is home to some fabulous blues clubs. For down-home blues, check out Buddy Guy's Legends, Checkerboard Lounge, or B.L.U.E.S. Although House of Blues is not the bona fide blues club its name suggests, its eclectic, folk-art decor is worth seeing, and I recommend their Sunday Gospel Brunch.

Reach stratospheric heights after business hours at the Signature Lounge on the 96th floor of the John Hancock Building, where the unobstructed views are even more enhanced after a few cocktails. If you're looking for laughs, the launching pad of John Belushi, Bill Murray, Alan Arkin, and many others, performs its improvisational comedy nightly. Indulge yourself at Pizzeria Uno or Pizzeria Due for a sampling of Chicago-style pizza. Check the fireworks schedule at Navy Pier—you could end the night with a blast!

If you're looking for daytime diversions, Chicago offers plenty. The city's architectural innovations are celebrated throughout the world, and a great way to see them is from a riverboat architectural tour that takes you along the shores of the Chicago River and Lake Michigan. For tour information, call the Chicago Architecture Foundation at 312.922.3432 or Chicago Avenue Historic District, just south of the Loop—the most elegant address in Chicago in the late 1890s, where entrepreneurs such as George Pullman and Marshall Field built their homes. For Frank Lloyd Wright fans, the highest concentration of his homes anywhere in the world can be seen in suburban Oak Park and River Forest, just west of the city; call the Oak Park Visitors' Center at 708.524.7800 for information.

Attend the ABA Annual Meeting August 2-8, 2001

David Edsey

"My Chicago"



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