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Introduction to the Symposium

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SCIENCE FOR JUDGES II

INTRODUCTION

*Margaret A. Berger**

This issue of the *Journal of Law and Policy* contains a second installment of articles about science-related questions that arise in the litigation context. As previously explained, these essays are expanded and edited versions of presentations made to federal and state judges at programs funded by the Common Benefit Trust established in the Silicone Breast Implant Products Liability Litigation.¹ These conferences are held at Brooklyn Law School under the auspices of its Center for Health Law and Policy, in collaboration with the Federal Judicial Center, the National Center for State Courts, and the National Academies of Science's Panel on Science, Technology and Law. Science for Judges II focused on two principal topics: (1) the practice of epidemiology and its role in judicial proceedings; and (2) the production of science through the regulatory process of administrative agencies.

Epidemiology has played a significant role in toxic tort actions in proving causation, often the most crucial issue in dispute. A failure to prove causation means a victory for the defense. Many courts consider epidemiologic evidence the "gold standard" of proof, and some judges go so far as to hold that a plaintiff cannot prevail in proving causation in the absence of confirmatory epidemiologic studies.² The three papers on epidemiology by

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¹ See Margaret A. Berger, *Introduction, Science for Judges*, 12 J. L. & POL'Y 1 (2003).

² See, e.g., *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Supp. 1441, 1480 (D.V.I. 1994).

extremely well-credentialed scientists should therefore be of considerable interest to anyone concerned with toxic tort litigation. The first, by Professor John Concato of the Yale University School of Medicine, provides an overview of different research designs that epidemiologists employ in conducting studies. The second, by Professors Joseph Lau and John Ioannidis of the Tufts-New England Medical Center, discusses how and when multiple epidemiologic studies can be combined. The final paper by Professor James Robins of the Harvard School of Public Health expresses skepticism about hinging compensation in toxic tort actions on proof of causation derived from epidemiologic data.

The second set of papers deals with science produced by administrative agencies. An introductory comment by Professor Richard Merrill of the University of Virginia Law School explains that both the Federal Drug Administration (FDA) and the Environmental Protection Agency (EPA)—which are responsible for regulating the great majority of products that become the subject of toxic tort litigation—require scientific studies and make scientific assessments in the course of their work. The science that is produced may subsequently become relevant in court proceedings when, for instance, a plaintiff claims that taking a drug approved by the FDA caused adverse health effects. Papers by Dr. Michael Friedman, formerly with the FDA, and Robert Sussman, Esq., formerly with the EPA, discuss the respective roles of these agencies in creating scientific information. Professor Wendy Wagner of the University of Texas Law School writes of a relatively new phenomenon: the importation into regulatory decision-making of a new approach that has its roots in the *Daubert*³ test used by federal courts in determining the

The notion that one can accurately extrapolate from animal data to humans to prove causation without supportive positive epidemiologic studies is scientifically invalid because it is inconsistent with several universally accepted and tested scientific principles.

Id.

³ In *Daubert v. Merrrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the first of the Supreme Court's recent cases on the admissibility of expert testimony, the Court imposed an obligation on federal district judges to screen scientific opinions proffered by an expert to ensure scientific reliability before

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admissibility of expert testimony. In the final paper, Professor Sheila Jasanoff of the John F. Kennedy School of Government at Harvard University and Dogan Parese provide a comparative perspective by contrasting the policies that drive the treatment of asbestos claims in the United States with those that lead Great Britain and the Netherlands to manage the compensation of asbestos victims through administrative rather than judicial processing.

These brief descriptions of the papers contained in this issue of the *Journal* provide a glimpse of the complexity and importance of the scientific and policy issues that courts encounter when handling toxic tort litigation. It is the hope of the organizers of the Science for Judges programs that these papers will prove useful to judges and lawyers who deal with the daunting questions that arise at the intersection of science and the law.

allowing the expert to testify.