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Public Opinion Has No Place in Civil Court

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On Nov. 3, embattled pharmaceutical manufacturer Merck & Co. appeared to even the score with plaintiffs who've been suing it over its painkiller Vioxx. That's the date when a New Jersey jury ruled in Merck's favor in the second Vioxx trial. The first trial, in Texas, notoriously ended with a \$253 million award to the widow of a triathlete who died after he took Vioxx, even though there was no evidence that the drug was responsible for his death.

So Merck deserved to celebrate its victory in New Jersey.

Unfortunately, though, that doesn't mean it's out of the woods with Vioxx. Some 6,400 additional suits have already been filed. And as the opposing outcomes in the first two cases illustrate, the outcomes of the rest of them remain anyone's guess.

That's because American litigation has become a lottery lacking rhyme or reason. For this we owe thanks to Trial Lawyers, Inc. (to borrow The Manhattan Institute's very appropriate name for the trial bar). Today, litigation is no longer about the evidence. The best science doesn't always win and causation is no longer a requirement for a legal claim.

Vioxx isn't the only example. Earlier this year another Texas jury awarded \$31 million to the families of two high school students who died when their vehicle rolled over after the driver lost control at a high speed.

Regrettably, the students were not wearing seatbelts and were ejected from the vehicle. Although seatbelts are the most effective passenger restraint system, the jury found that the manufacturer, Ford, should have used laminated glass in the side windows to prevent ejection. Federal motor vehicle safety

standards have never required laminated side windows and 99.9% of vehicles manufactured at the time did not have them.

As evidence and causation are plainly not the basis for such verdicts, what is? The answer is public opinion.

Public opinion certainly decided the first

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Vioxx case. Merck's attorneys presented a scientific case about what causes heart attacks. The plaintiff's attorney, on the other hand, wheeled in boxes of paper to suggest that the manufacturer had snowed the FDA; put up a wedding photo of the victim, and hired a "shadow jury" that was demographically matched to the real one to offer him daily feedback on his courtroom tactics. The actual jurors took just one hour to rule in his favor.

In many cases the battle never reaches the courtroom. Trial lawyers begin by bringing suit in jurisdictions where the rule of law has been replaced by the rule of lawyers – jurisdictions the American Tort Reform Association quite reasonably calls Judicial Hellholes. Then they stage pre-trials in the court of public opinion.

One such case was the breast-implant litigation that bankrupted Dow Corning. Junk science dominated the headlines – and led to a shotgun settlement.

The outcome of these public-opinion campaigns is that the American public has become utterly intolerant of normal risk. Trial lawyers have established the expectation that all

products must be perfectly safe. Had this been the standard in the 1950s, Jonas Salk would not have developed the polio vaccine. The victims would have been legion as polio continued unchecked.

This did not happen with polio. But perfect safety is the standard today. The result is that other victims with other diseases wait in vain for drugs they cannot get, because litigation has stymied research.

I don't know whether it was appropriate to pull Vioxx off the market. But I do sympathize with the millions of patients who may have safely benefited from it but now must live with pain because lawsuits virtually guarantee that they will have no access to this product.

I sympathize with children who receive the HIV virus from their mothers because liability concerns stalled research on a vaccine to prevent this transmission.

I also sympathize with the Alzheimer's patients who will never see the drug that will help them, because the fear of litigation will cause it to come too late.

These are the real victims of the litigation lottery. And victims they will remain until both sides grasp that public opinion – and not legalistic and scientific arguments – help determine the outcome of tort litigation.

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www.AmericanJusticePartnership.org