SOMETIMES DOUBT DOESN’T SELL: A PLAINTIFFS’ LAWYER’S PERSPECTIVE ON MILWARD V. ACUITY PRODUCTS

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I. THE INHERENT UNCERTAINTY OF SCIENCE, OUR NATURAL CRAVING FOR CERTAINTY, AND WHAT THAT MEANS FOR CORPORATE ACCOUNTABILITY

Corporations, and the lawyers and scientists who work for them, have become masterful manipulators of science. Time and again, corporate experts and advocates convince judges, juries, and regulatory agencies that there is a lack of certainty regarding the toxicity of a product or chemical. Then, they convince those same decision-makers to forestall any accountability for the corporate poisoning of people and the planet until science produces absolute “proof.” Of course that day never comes because science is not about absolutes. Very few scientific “facts” have been proven to a certainty. Indeed, even Sir Isaac Newton’s long-established principles about how the world works turned out to be “wrong” once modern physicists developed quantum theory and relativity. In other words, there are always uncertainties in science, and corporations have learned how to exploit that uncertainty to huge advantage.

Big Tobacco provides the best-known example of an industry manufacturing doubt. Even today, tobacco companies deny many of the harmful effects of smoking sixty years after epidemiology studies originally showed that people who smoke are much more likely to develop cancer.1 The tobacco companies

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1. See Richard Doll & A. Bradford Hill, Smoking and Carcinoma of the Lung: Preliminary Report, BRIT. MED. J., Sept. 30, 1950, at 4682; Morton L. Levin et al., Cancer and
were the originators of the concept of manufacturing doubt to avoid accountability, and they are masters of the technique. But since the late 1980s, other industries have cultivated their own well-developed expertise in using the same tactics.

Corporations manufacture doubt in several contexts, but the most common marketplace for the peddling of uncertainty is the courtroom. I am a toxic tort lawyer. This means that I represent people who have gotten sick following exposure to poisonous chemicals, and people whose homes or land has been contaminated by pollution. I sue corporations, trying to hold them accountable for the harms that they cause in the course of making profits from selling chemicals.

In virtually all of my clients’ lawsuits, the corporate lawyer’s first line of defense is trying to convince the judge to throw out the case before it ever gets to a jury, on the basis that the opinions of the expert witnesses I have hired are nothing more than “junk science.” They make this argument no matter how well-credentialed the scientist is and regardless of the strength of the data that supports the scientist’s conclusions. Nonetheless, corporations often persuade judges that even the best scientists in the world are performing “junk science” when they provide their opinions in a courtroom in support of someone who claims to have been poisoned by chemicals.

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How do corporations convince judges that good scientists are doing junk science? By manufacturing, highlighting, and exploiting doubt.

You see, most of us—including most judges—crave certainty about any fact that is going to provide the basis for an important decision. This is a natural, human response. If we are not sure that a company did something wrong that caused another person’s problem, most of us are not naturally inclined to order that company to pay a lot of money. So, to the extent that we have doubts about whether a chemical really caused an injury, we usually will not want to make a company pay for it.

In the context of toxic tort lawsuits, there are two important problems with this natural craving for certainty in decision-making. The first is the burden of proof. The burden is on the plaintiff to convince the jury that the defendant caused the injury. But, as a matter of law, this burden is not substantial: in a civil case the plaintiff need prove her case only by a preponderance of the evidence. That is, the plaintiff need only show that, more likely than not, the chemical was one of the substantial factors that contributed to her injury.

“More likely than not” is a standard that allows jurors to have a lot of doubt about causation while still finding for the plaintiff. This standard of proof can be conceptualized in a number of different ways. If, in the minds of the jurors, the scales of justice are tipped in the plaintiff’s favor by the weight of a mere feather, that is enough. Another way to think about it is this: if the jury is fifty-one percent convinced that the plaintiff is right, then the law requires the jury to find for the plaintiff. On the flip side,
even if the jury has forty-nine percent doubt, the law says the plaintiff should win.

Obviously, this legal standard of more likely than not in a civil lawsuit is greatly in tension with our natural craving for certainty. We do not want to find for the plaintiff if we’re only fifty-one percent sure. Indeed, many people would resist finding for the plaintiff even if they are eighty percent sure that the plaintiff is right. But, to the extent that fact finders or judges require civil plaintiffs to prove their case “to a certainty,” or “beyond a reasonable doubt,” those decision-makers are violating the law.9

The second problem with our natural tendency to crave one hundred percent certainty is that science can never give it to us.10 Just because science cannot prove something with absolute certainty, however, does not mean that scientists know nothing. Scientists can and do reach well-reasoned inferences and conclusions based on sets of data that can be interpreted in more than one way.11 Reasonable scientists can and do disagree about such inferences and conclusions all the time. It should not be up to judges to substitute their own judgment for the judgment of scientists whose conclusions fall within the range of opinions about which reasonable scientists can disagree. Judges are not scientists, have not been trained in science, and often fail to understand the processes by which scientists reach conclusions.

Unfortunately, because judges crave certainty just as much as jurors do, some judges are all too willing to throw out the opinions of an expert upon determining that there is too much uncertainty about whether the expert is correct. As a result, judges will often strike the testimony of the plaintiff’s expert in a toxic tort case, even when the record clearly shows that the expert’s opinions fall within the range where reasonable experts can disagree. This is not correct as a matter of law,12 but that often

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10. See, e.g., Jennifer L. Mnookin, Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence, 52 VILL. L. REV. 763, 763 (2007) (“[]judges and scholars evince a disturbing tendency to idealize scientific knowledge. They fail to understand that science, even the best science, is an all-too-human enterprise, not separable from the myriad social, institutional, cultural and rhetorical practices in which it is embedded.”).
11. See id. at 799.
12. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 153 (1999) (suggesting that a district court abuses its discretion by excluding expert testimony that falls within “the range where experts might reasonably differ”).
makes no difference. Corporate doubt production has had a huge impact on toxic tort law. Because corporations are so skilled at persuading judges that even good science is junk, it is very difficult for plaintiff’s cases to survive even long enough for the jury to hear the evidence. Of course, if the plaintiff’s case does make it that far, chemical companies spin the doubt production machine into an even higher gear for the benefit of the jury.

For these reasons, holding a chemical company accountable for poisoning people and/or the planet is very hard to do. Many plaintiffs try, but all too few succeed. The corporate doubt production machine creates roadblocks at every turn.

Occasionally, however, the legal decision-makers manage to see through the façade. Every now and again—despite the best efforts of companies to crank up the doubt machine—judges, juries, or government agencies will look past allegations of uncertainty to understand that the scientific evidence truly does tend to show that this chemical causes that disease. The First Circuit’s recent decision in Milward v. Acuity Specialty Products Group, Inc. provides a powerful example.\(^\text{13}\)

\[ \text{II. BRIAN MILWARD’S STORY} \]

In 2004, at the age of forty-seven, Brian Milward developed a blood cancer known as Acute Myelogenous Leukemia (“AML”) after having worked about thirty years as a refrigeration technician repairing industrial refrigeration units.\(^\text{14}\) In the course of his work, he constantly used various solvent products.\(^\text{15}\) Although neither Mr. Milward nor his employers were aware of it, many of those solvents contained benzene, a chemical that has long been known to cause AML.\(^\text{16}\) The companies that made the various benzene-containing solvents failed to identify benzene as an ingredient on their label, and those companies never warned anyone that their products contain a known cancer-causing chemical.\(^\text{17}\) During Mr.

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14. Id. at 13.
16. Id. at para. 38.
17. Id. at para. 40.
Milward’s work, he would breathe benzene-containing vapors from these solvents for hours on a daily basis.\(^\text{18}\) He would also get the solvents on his skin, where more benzene could penetrate the skin and get into his bloodstream.

In 2007, my law firm filed a lawsuit on behalf of Mr. Milward and his wife, Linda. The Milwards claimed that the companies that made the benzene-containing solvent products to which he had been exposed in his work were negligent because they failed to warn that benzene was in their products, and that use of those products could cause cancer if adequate precautions were not taken to avoid exposures. The Milwards claimed that Brian’s exposures to benzene caused him to develop AML.\(^\text{19}\)

Since at least the 1960s, scientists around the world have all agreed that benzene exposure can cause AML, the type of leukemia suffered by Brian Milward.\(^\text{20}\) Despite this, the very first defense raised by the companies sued in Mr. Milward’s case was that his particular case of AML could not have been caused by benzene exposure.\(^\text{21}\)

In fact, the companies took an even more extreme position. They claimed that the jury should not even be allowed to hear the testimony of the Milwards’ expert witness on causation.\(^\text{22}\) According to the chemical companies, the causation testimony was nothing more than junk science that the judge should strike because it could mislead the jury.\(^\text{23}\) So who was this supposed junk scientist? This is where, to a layperson, the story can begin to strike many as bizarre, even though similar scenarios are played out time and time again in courtrooms across the country.

III. DR. MARTYN SMITH: ONE OF THE WORLD’S TOP BENZENE SCIENTISTS

Brian Milward’s causation expert was not some fly-by-night quasi-scientist who makes his living in courtrooms rather than a laboratory. Not at all. In this case, my law firm had hired a world-

\(^{18}\) Id. at para. 32.  
\(^{19}\) Milward, 664 F. Supp. 2d at 140.  
\(^{20}\) Id. at 144.  
\(^{21}\) Defendants’ Daubert Submission in Opposition to Plaintiffs’ Proffered Experts at 2, Milward, 664 F. Supp. 2d 137 (No. 1:07CV11944).  
\(^{22}\) Id. at 3.  
\(^{23}\) Id. at 13.
renowned expert toxicologist, Dr. Martyn Smith of the University of California at Berkeley, to provide his opinion that benzene caused Mr. Milward’s cancer.\(^{24}\) Dr. Smith has published dozens of peer reviewed articles in scientific journals, describing his research into how benzene causes disease, including AML.\(^ {25}\) He has been appointed to many expert government and scientific panels that have examined the toxic effects of benzene, and is the author of many chapters in medical and toxicology textbooks on the subject.\(^ {26}\) The work on benzene toxicology done by Dr. Smith’s laboratory is often referenced by scientists and government public health agencies all over the world.\(^ {27}\) In fact, one of the defendants’ own experts had edited a textbook and had requested that Dr. Smith write the chapter in that book about benzene and leukemia.\(^ {28}\) By all accounts, Dr. Smith is one of the world’s leading experts in the toxic effects of benzene exposure.

Nonetheless, according to the defendants in Mr. Milward’s case, Dr. Smith’s expert testimony reflected junk science that should be thrown out by the judge. So, to recap: 1) virtually every scientist in the world has agreed since the 1960s that benzene can cause AML; 2) Brian Milward was occupationally exposed to benzene for 30 years, then he developed AML; 3) the expert offered by the Milwards to support the link between his exposure to benzene and his AML is a world-famous benzene toxicologist; and 4) the defendants asked the trial judge to throw out that expert’s testimony as junk science.

In my experience, when one relays those facts to most nonlawyers, they assume that the trial judge scoffed at the chemical companies’ argument. Sadly, that is not how this tale


\(^{25}\) \textit{Id.}

\(^{26}\) \textit{Id.}

\(^{27}\) \textit{Biography of Martyn Smith, GENES & ENV’T. LAB.}, \url{http://gel.berkley.edu/about-us/investigators/martyn-smith}.

goes. In fact, the trial judge granted the defendants’ request and threw out Dr. Smith’s testimony as unreliable junk science.\textsuperscript{29}  
But how? Why?  

IV. FROM THE CORPORATE BAG OF TRICKS: IT’S NOT THE RIGHT KIND OF AML  

The answer is that the defendants managed to convince the judge that, even though benzene is known to cause AML generally, no one can show that benzene is capable of causing the particular \textit{subtype} of AML that Brian Milward has.\textsuperscript{30} Although AML is the specific type of leukemia that has been most closely linked with benzene, over the last few decades scientists have managed to classify AML itself into additional subgroups.\textsuperscript{31} The specific subtype of AML that Mr. Milward has is called “Acute Promyelogenous Leukemia” (“APL”).\textsuperscript{32}  

This is a standard style of argument that is an important component of the corporate toolbox for manufacturing doubt. To the extent that a plaintiff can point to scientific studies showing that a chemical exposure causes a disease, companies will then shift the battleground by seeking ever greater levels of specificity.\textsuperscript{33} “Well, sure, cigarette smoking causes cancer in smokers, but there’s \textit{no evidence} to show that secondhand smoke causes cancer.”\textsuperscript{34}  

\textsuperscript{29} See \textit{Milward} at 146 (“The evidence . . . does not support a conclusion that . . . Dr. Smith’s opinion . . . is based on sufficient facts and data to be accepted as a reliable scientific conclusion, as distinguished from an hypothesis.”).  
\textsuperscript{30} See \textit{Milward}, 639 F.3d at 24 (“[T]his is a case in which there is a lack of statistically significant epidemiological evidence, and in which the rarity of APL and difficulties of data collection in the United States make it very difficult to perform an epidemiological study on the causes of APL that would yield statistically significant results.”).  
\textsuperscript{31} See \textit{id.} at 16 (“The general category of AML can be subdivided in more than one way.”).  
\textsuperscript{32} See \textit{id.} (“Milward’s leukemia, APL is subtype M3 and is an extremely rare disease.”).  
\textsuperscript{33} See Philip Morris Inc. v. French, 897 So.2d 480, 481–82 (Fla. Dist. Ct. App. 2004) (showing special interrogatory questions seeking greater levels of specificity regarding causation).  
\textsuperscript{34} See \textit{id.} at 482 n.1 (explaining that the beginning phase of trial, the plaintiff was required to include testimony and evidence regarding scientific issues of generic causation and whether the defendants were aware of the health risks. Special interrogatories included questions such as whether the plaintiffs proved, by the greater weight, that the evidence regarding second hand smoke shows that it actually causes lung cancer and other diseases. If so, it asks, “which diseases of this subclass are caused by” second hand smoke).
Another version: “Even though some kinds of asbestos can cause mesothelioma, the kind of asbestos that was in our product does not.” And so on. As I have previously noted:

According to the chemical companies, APL is a very different disease from the other kinds of AML, which are known to be caused by benzene. This argument has some facial appeal. On one level, the defendants are correct. There are important differences between the different kinds of AML. The sub-types look different under a microscope, they involve different kinds of cellular and genetic damage, they can have different course and symptoms, and they may be treated different clinically. But the important question in Mr. Milward’s case is whether, if benzene causes the other kinds of AML (and everyone acknowledges that it does), does it make scientific sense that benzene can also cause APL? Dr. Smith’s answer to that question is an emphatic “Yes,” and he has some very good evidence to support that view. But he can’t prove to a certainty that he’s right.

APL is such a rare disease that there are very few studies that have tried to assess whether benzene exposure can cause that particular subtype of AML. There just are not enough cases of APL diagnosed to generate the statistical power necessary to show a relationship between that specific subtype and benzene. The few studies that have looked at the issue do not provide a definitive answer either way. Nonetheless, in the Milward case,

35. See id. (showing the increased level of specificity in the special interrogatories).
38. Id. at para. 24.
39. Id. at para. 25. However, after the district court issued its decision in Milward, a new epidemiology study was published that did find a borderline significant excess of APL among benzene-exposed patients. Otto Wong et al., A Hospital-Based Case-Control Study of Acute Myeloid Leukemia in Shanghai: Analysis of Environmental and Occupational Risk Factors by Subtypes of the WHO Classification, 184 CHEMICO-BIOLOGICAL INTERACTIONS 112, 113
Dr. Smith provided the trial judge with several different lines of data that, when assessed as a whole, convinced him that the weight of the available evidence shows that benzene probably does cause APL. This included explaining in great detail: 1) how AMLs of all type develop from a common ancestor cell; 2) how benzene acts on the body very similarly to certain types of chemotherapy drugs that are known to cause APL specifically; and 3) how the epidemiology studies that have examined the relationship between benzene and APL specifically are consistent with Dr. Smith’s conclusion, albeit not conclusive on their own.

The trial judge rejected Dr. Smith’s testimony on the basis that Dr. Smith had merely shown that he “might be right,” but he might not. In other words, the trial court determined that because Dr. Smith had failed to conclusively prove to a certainty that benzene can cause APL specifically, his testimony must be thrown out as junk science.

The Milwards appealed to the United States Court of Appeals for the First Circuit. In December, I had the opportunity to argue the case to a panel of three First Circuit judges, including Chief Judge Sandra Lynch.

In March 2011, the First Circuit released a wonderful, unanimous opinion written by Chief Judge Lynch, reversing the trial judge’s decision to strike Dr. Smith’s testimony.

V. CAN TWENTY-SEVEN ESTEEMED SCIENTISTS AND DR. SMITH ALL BE WRONG?

When the Milwards filed their appeal, a group of twenty-seven scientists filed what is called an amicus curiae (literally, “friend of the court”) brief in the case, in support of the Milwards’ position. The scientists included epidemiologists, hematologists/oncologists, occupational medicine physicians,

(2009) (finding an elevated odds ratio for APL and benzene of 1.95, with a confidence interval of 0.98–3.88).

40. Declaration of Martyn T. Smith, supra note 37, at paras. 25–27.

41. Id. at paras. 13, 25, 26, 30, 23–38.

42. Milward, 664. F. Supp. 2d at 146.


44. Id. at 14.

45. Amended Amicus Curiae Brief of the Council for Education and Research on Toxins et al., In Support of Appellants at 3, Milward, 639 F.3d 11 (No. 09-2270).
medical toxicologists, toxicologists, industrial hygienists, and a chemist. The list of individual scientists who joined the brief is a who’s who among scientists who research and publish in the areas of leukemia, benzene, and environmental and occupational toxicology and epidemiology. These scientists include faculty members from the Harvard School of Public Health, Mt. Sinai Medical Center in New York, University of Southern California School of Medicine, University of California, University of Texas Medical Branch at Galveston, Stanford University School of Medicine, Tufts University School of Medicine, Massachusetts Institute of Technology, University of Maryland School of Medicine, and Boston University School of Public Health.

What did these twenty-seven scientists have to say? They said that Dr. Smith’s opinion is not only reasonable, but it is correct. In other words, the amicus brief adopts Dr. Smith’s scientific position, and describes how the weight of the scientific evidence supports the view that benzene exposure can cause APL, as well as all of the other forms of AML.

VI. THE ROLE OF THE JUDGE VERSUS THE ROLE OF THE JURY

Now, let us finally turn to the First Circuit’s opinion. The most critical aspect of the opinion is that it explicitly recognizes that there is a bright line boundary between the role of the trial court as “gatekeeper” of expert testimony and the role of the jury as finder of fact.

Under our Constitution, we all have a right to trial by jury. In a jury trial, the jurors are the sole finders of fact, and the sole arbiters of the credibility of witnesses and other evidence. By contrast, the judge, as gatekeeper, gets to decide what evidence is admissible in court. Then the jury gets to decide whether that

46. Id. at 1.
47. Id. app. 1–8.
48. Id. at 33–36.
49. Milward, 639 F.3d at 22; see also Amended Amicus Curiae Brief, supra note 45, at 3–5.
50. U.S. Const. art. III, § 2, cl. 3.
51. See Food Mach. & Chem. Corp. v. Meader, 294 F.2d 377, 383 (9th Cir. 1961) (“It is the jury’s function, not the court’s, to say whether plaintiff’s version of the case is sustained by the greater weight of the evidence.”).
52. Fed. R. Evid. 702.
evidence is persuasive. The Founding Fathers of our country believed that the right to trial by jury provided a critical underpinning to our democracy, by ensuring that regular people in the community would decide the outcome of legal disputes.

Industry’s effort to crank out doubt has strongly eroded this constitutional guarantee in the context of toxic tort cases. Today, the jury system is under constant attack by corporate influences, which do their best to convince everyone that jurors are basically stupid and incompetent. Corporate misinformation runs wild about supposedly bad decisions by juries in cases like the McDonald’s hot coffee case, and most of the public buys into it.

With that backdrop, it can be particularly easy for companies to convince judges that jurors are incompetent when it comes to deciding complex issues of science. But here’s the rub—when it comes to deciding which of two competing experts is more credible on issues involving application of scientific judgment, judges are no better equipped than juries to handle the issues. Few judges are trained as scientists. Indeed, many lawyers (who eventually become judges) went to law school because they avoided science classes when they were in college. Couple this fact with the Constitution’s clear directive that only juries may decide issues of credibility, and one can see that judges are being improperly encouraged to take over the jury’s role by preventing juries from hearing expert testimony that, for whatever reason, the judge finds unpersuasive.

Assessment of a witness’s credibility is a task “solely within the jury’s province.” “Trial courts should not arrogate the jury’s role in evaluating the ‘evidence and the credibility of expert witnesses’ by ‘simply choosing sides in the battle of the experts.’”

54. Alan B. Bookman, We the People, 80 FlA. B.J. 6, 6 (2006) (“‘Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and clothed like swine and hounds.’ John Adams, 1774.”).
55. See generally Hot Coffee (Home Box Office 2011) (describing a corporate misinformation campaign and the public reaction to it considered as a backdrop to tort reform).
56. United States v. Reyes, 352 F.3d 511, 517 (1st Cir. 2003) (quoting United States v. Hernández, 218 F.3d 58, 64 (1st Cir. 2000)).
To be clear, I am not arguing that the *Daubert* decision or the gatekeeping process authorized by Federal Rule of Evidence 702 is facially unconstitutional. That would be silly. But I do believe that, as *Daubert* has been applied, courts often overstep the proper constitutional boundary between gatekeeper and fact finder.

VII. THE HIGHLIGHTS OF THE OPINION

Fortunately, in *Milward*, the First Circuit recognized and highlighted the bright line between the roles of gatekeeper and fact finder. Below are the key aspects of the Court’s holding in relation to these roles.

- Trial courts may not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree.\(^58\)
- Trial courts are not “empowered to determine which of several competing scientific theories has the best provenance.”\(^59\)
- “Lack of certainty is not, for a qualified expert, the same thing as guesswork.”\(^60\)
- The mere fact that an expert’s methodology requires the application of scientific judgment does not render that method unreliable.\(^61\)
- Scientific judgment is a critical part of the process for determining whether exposure to a chemical is capable of causing a particular disease.\(^62\) Many experts can review the

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\(^59\). *Id.* at 15 (quoting *Ruiz-Troche v. Pepsi Cola of P.R.*, 161 F.3d 77, 85 (1st Cir. 1998)).

\(^60\). *Id.* at 22 (quoting *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010)).

\(^61\). *Id.* at 18 (“The fact that the role of judgment in the weight of the evidence approach is more readily apparent than it is in other methodologies does not mean that the approach is any less scientific.”).

\(^62\). See *id.* at 17–18.
same pieces of scientific evidence and reach different conclusions on these issues.\textsuperscript{63} 

- Trial courts should not exclude an expert’s testimony about chemical causation based on picking apart each piece of scientific evidence as being insufficient on its own to \textit{prove} the expert’s conclusion.\textsuperscript{64} The scientific method for evaluating whether a chemical exposure can cause a disease calls for scientists to look at the body of available evidence as a whole, and then apply judgment to say whether, on balance, that evidence weighs in favor of a conclusion that the chemical causes that disease.\textsuperscript{65} Every piece of the puzzle will likely have limitations and flaws. Nonetheless, courts should not prevent experts from testifying about their judgments as to the body of evidence as a whole simply because all of the parts may not be sufficient on their own to demonstrate causation.\textsuperscript{66}

\section*{VIII. What Does This Mean for Us as a Society?}

I firmly believe that the \textit{Milward} decision has significant importance not just for the Milward family and my law firm, but for everyone. Unless and until people like Brian Milward can hold companies accountable in court for the harms and losses that they have suffered when poisoned by chemical companies’ products, then the poisoning will continue. Chemical companies have spread their toxic chemicals throughout the environment, causing thousands of people to become sick and die.

More recently, corporations have become brilliantly adept at creating smoke screens of doubt to avoid having to pay for the harms that they cause.

The First Circuit set off the smoke detector in the \textit{Milward} case. With some effort and some luck, other courts and juries throughout the country will also sound the alarm.

When that happens, we will all live in a safer world.

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\item \textsuperscript{63} \textit{Id.} at 18.
\item \textsuperscript{64} \textit{Id.} at 23.
\item \textsuperscript{65} \textit{See id.} at 17–18.
\item \textsuperscript{66} \textit{Id.} at 23 (“The district court erred in reasoning that because no one line of evidence supported a reliable inference of causation, an inference of causation based on the totality of the evidence was unreliable.”).
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