

## BOOK REVIEW

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### Review of: *Science and Litigation: Products Liability in Theory and Practice*

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**REFERENCE:** Kiely TF. *Science and litigation: products liability in theory and practice*. CRC Press, Boca Raton, FL, 2002, 458 pp.

*Science and Litigation: Products Liability in Theory and Practice*, written by Terrence Kiely, a professor at DePaul Law School, focuses on the use of scientific evidence in the courtroom. It declares its audience as judges, expert witnesses, plaintiff or defendant trial counsel, law professors or students<sup>2</sup> as well as corporate scientists and executives, and aims to guide these diverse groups through the intricacies of a products liability case steeped in scientific evidence.

The book divides into two very separate sections, the first devoted to theory, the second to practical application of science in litigation. The first section initially attempts to give a historical context to the use of science in the courtroom, tracing its use from nineteenth century patent, tort and criminal cases to the watershed 1993 decision in *Daubert*<sup>3</sup> and beyond. It also overviews the legal theories behind the admission of science in the courtroom. By far the best chapter in this section is a review and analysis of the peer-review process that is used in the scientific community, a process the Supreme Court emphasizes in separating valid scientific evidence from junk science. This chapter nicely demonstrates that merely because a theory has been peer-reviewed does not determine its reliability, describing the use of ghost authors and financial conflicts of interest as threats to the validity of the peer review process. The author also explores the issue of proving legal causation of harm. This is familiar ground and the chapter mostly applies current products liability examples to this well-trodden area.

The second half of the book is a practical guide to trying a modern products liability case and reads like a how-to manual for plaintiffs' lawyers. It discusses the selection of expert witnesses and the issues about which they can most usefully be asked to testify. It also provides a checklist of issues found in products liability cases and evidence that typically will be used to prove those issues. The section examines pretrial discovery, emphasizing the importance of discovery to the rest of the case, as well as pretrial motions. Finally, the unit ends with an appendix, *Researching the Science Case*, which lists resources and websites available to parties involved in science cases.

Although the book addresses a need in an exploding area, its problem is that it tries to address too many audiences and probably ends up satisfying too few. The theoretical section is too descriptive to interest legal scholars and too broad to appeal to lawyers. Its exposition is sometimes tedious, giving long descriptions of cases without identifying significant points or engaging in much analysis. The author at times gets distracted from his main point, for example, devoting considerable time to discussing bellwether cases, or representative cases for a larger group of cases, which involves more of a procedural case aggregation issue than a scientific question. Further, the first half of the book remains almost completely separate from the second half, with no carryover of themes.

As to the second half of the book, which presumably would be of greater interest to practitioners, its description of many issues is so general that it fails to serve the how-to purpose for which it is intended. Furthermore, although it claims to be of use to judges and defense counsel, and gives lip service to scientific evidence used in criminal cases, it is almost completely directed to plaintiffs' attorneys. Moreover, there is little discussion of the requirements of the Restatement Third of Torts, which emphasizes the need for a plaintiff to prove a reasonable alternative design to the one being challenged through expert testimony, as well as deemphasizes the consumer expectation test. Although most states have not yet had the occasion to adopt the Restatement, it is likely that many states will do so in some form. In addition, the book devotes lengthy discussion to discovery issues, but there is little to no discussion of the disclosure requirements of the federal and many state courts and their impact on discovery in this setting. Nor is there mention of the discoverability of communications between lawyers and testifying and nontestifying experts, both critical concerns in products cases.

Where the book is helpful, one wishes it would have gone further. For example, the chapter on the problems of peer review is significant, but it would have been useful if it had explored more ways in which peer review could be replaced or improved. Similarly, the list of resources in the appendix is helpful, but these lists change rapidly in the fast-growing world of the internet and may soon be outdated. Although the chapter on discovery is of use, there is no mention of businesses' traditional document destruction policies, especially with regard to computer generated documents, and how plaintiffs and defendants can address these issues early in the litigation.

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<sup>2</sup> Introduction, at xvii.

<sup>3</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Most distracting in the book were the numerous grammatical and editing errors found throughout.<sup>4</sup> Even if those errors had been

<sup>4</sup> Some examples can be found on page 111 (Despite the blinding process approximately of the reviewers were able to identify the author.); p. 39 (The historian, Carl Becker's observation on writing history applies with equal force to the investigation and prosecution of a civil case.); p. 84 (Some startling facts about peer review are that reviewers often spend less than two hours reviewing an article.); p. 86 (Each of the specialty journals, some having long pedigrees, have their own, often idiosyncratic editorial standards for publication.); p. 181 (In the absence of statistically significant epidemiological studies to support their general causation theories.)

caught, the book is overwritten and should have been shorter. It also occasionally gets bogged down in lingo which distracts from the flow.

Despite these shortcomings, the book is a useful manual especially for newcomers to the field, such as a new lawyer, a lawyer facing his first products liability case, or a first-time expert. It outlines the steps getting from the research stage to the courtroom in an easily accessible way and explicates clearly the issue of the admissibility of scientific evidence.