

COMMENTARY

DOUG BANDOW

Banishing junk science from the courtroom

Controversy continues to swirl about the Democratic Party's fund-raising practices, and few interest groups have been more generous to President Clinton and company than the trial lawyers, who have donated more than \$100 million to political candidates since 1990. At their behest he has vetoed liability reform legislation. In some states, such as California, the Democrats have essentially become adjuncts of the trial bar.

However, voters finally seem to be catching on. Last November Californians rejected an initiative to make it easier for "consumer attorneys," as they style themselves, to file abusive securities lawsuits when a firm's stock price declined.

Judges, too, are becoming more willing to curb litigation abuses. For instance, a federal district judge in Oregon has dismissed 70 cases charging injury from breast implants, ruling that there is no scientific validity to the claims.

Judge Robert Jones' decision is a welcome response to breast implant litigation, which has become one of the most egregious examples of junk science in the courtroom. Not that there aren't a lot of abuses to choose from. Lawyers once won judgments based on the claim that bumps from falls caused cancer. Equally bizarre have been lawsuits over

asbestos, electromagnetic fields and so-called multiple chemical sensitivity. Many cases have been dismissed by judges or rejected by juries. But enough succeed to keep the trial attorneys prosperous.

So has it been with silicone breast implants. They came onto the market in the 1960s and were used by about 1 million women. For nearly three decades there was no evidence they caused harm, but eventually some women blamed one medical condition or another on their implants and sued. Bad publicity followed, along with a power grab by Food and Drug Administration head David Kessler, who ordered the implants off the market in 1992. Panic set in, accompanied by a deluge of lawsuits, more than 21,000 so far.

The trial bar and its allies furiously fanned the legal flames. Last year a gaggle of dubious medical "experts" even traveled to Australia to stir up implant litigation in that nation. The Australian TV show "Sunday" highlighted several doctors made rich by scaring women.

The liability surge destroyed the silicone breast implant industry. Even manufacturers of other silicone-based products, like cardiac pacemaker wires and artificial

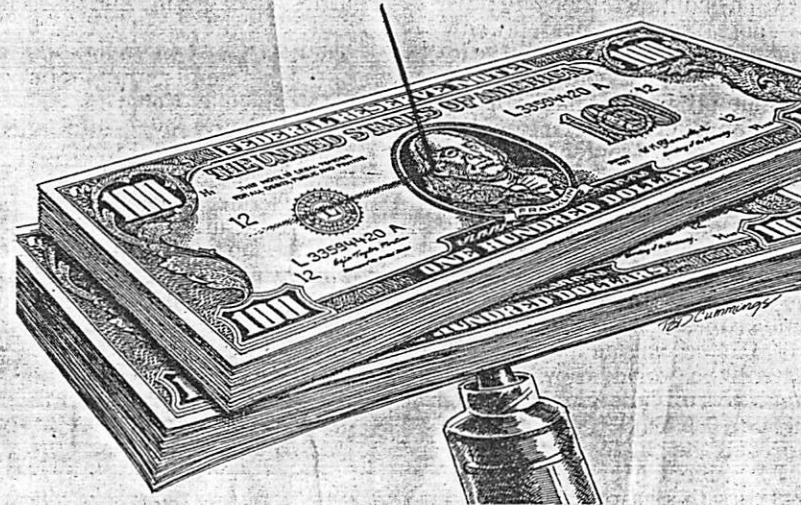


Illustration by Barbara Cummins/ Los Angeles Times Syndicate

joints, have become wary of the business. The primary victims have been patients, especially women who've suffered from mastectomies. (Nine cancer groups, including the American Cancer Society, have petitioned the FDA to lift its ban, contending the agency's "basis for restricting access to silicone breast implants no longer exists.")

This enormous legal havoc rests on minimal evidence. True, many

of the plaintiffs are ill, but correlation does not prove causation. As Dr. Marcia Angell, executive editor of the *New England Journal of Medicine*, and author of the new book, "Science on Trial," relates, many women have "developed symptoms that any woman over 25 could develop." However, the drumbeat of negative publicity helped convince them that breast implants were to blame.

But even in today's litigious cli-

mate, eight of 10 cases have gone for the defense. And as Judge Jones' sophisticated review found, evidence purporting to show a link between implants and illness did not meet the scientific threshold justifying its presentation to a jury.

Several studies have found no relationship between the disease scleroderma and implants. A 1994, Mayo Clinic review reported "no association" between implants and connective-tissue diseases. Similar were the results of a Harvard study the following year. In 1996, another Harvard report found no "large hazard" of the disease. The review did observe a "small" increased risk, but the researchers emphasized that any effect was "very small," and acknowledged that this conclusion might reflect women over-reporting disease simply because of the massive publicity surrounding implants.

On the other side, a new analysis from the University of Michigan suggests some relationship between implants and connective-tissue disease. The results are not, however, statistically significant, and the authors warn that "further large-scale studies will be required to establish the relative

importance of individual materials and the importance of genetically regulated individual susceptibility."

This further research needs to be carried out in the laboratory, not the courtroom. Damages are supposed to be awarded based on probabilities, not possibilities, especially where the weight of evidence remains overwhelmingly against causation. Particularly important is ensuring that verdicts reflect science rather than appeals to sympathy.

President Clinton and the GOP Congress are talking about bipartisan cooperation. Liability reform would be a good place to start: Lawmakers should set standards for scientific evidence, limit punitive damages, restrict liability in cases of multiple defendants, promote early settlements and require losers to pay attorneys' fees.

People who've been injured due to the negligence of others should receive redress. But American courtrooms should not be legal lotteries, where plaintiffs need demonstrate neither injury nor fault to win a big prize.

Doug Bandow is a nationally syndicated columnist.