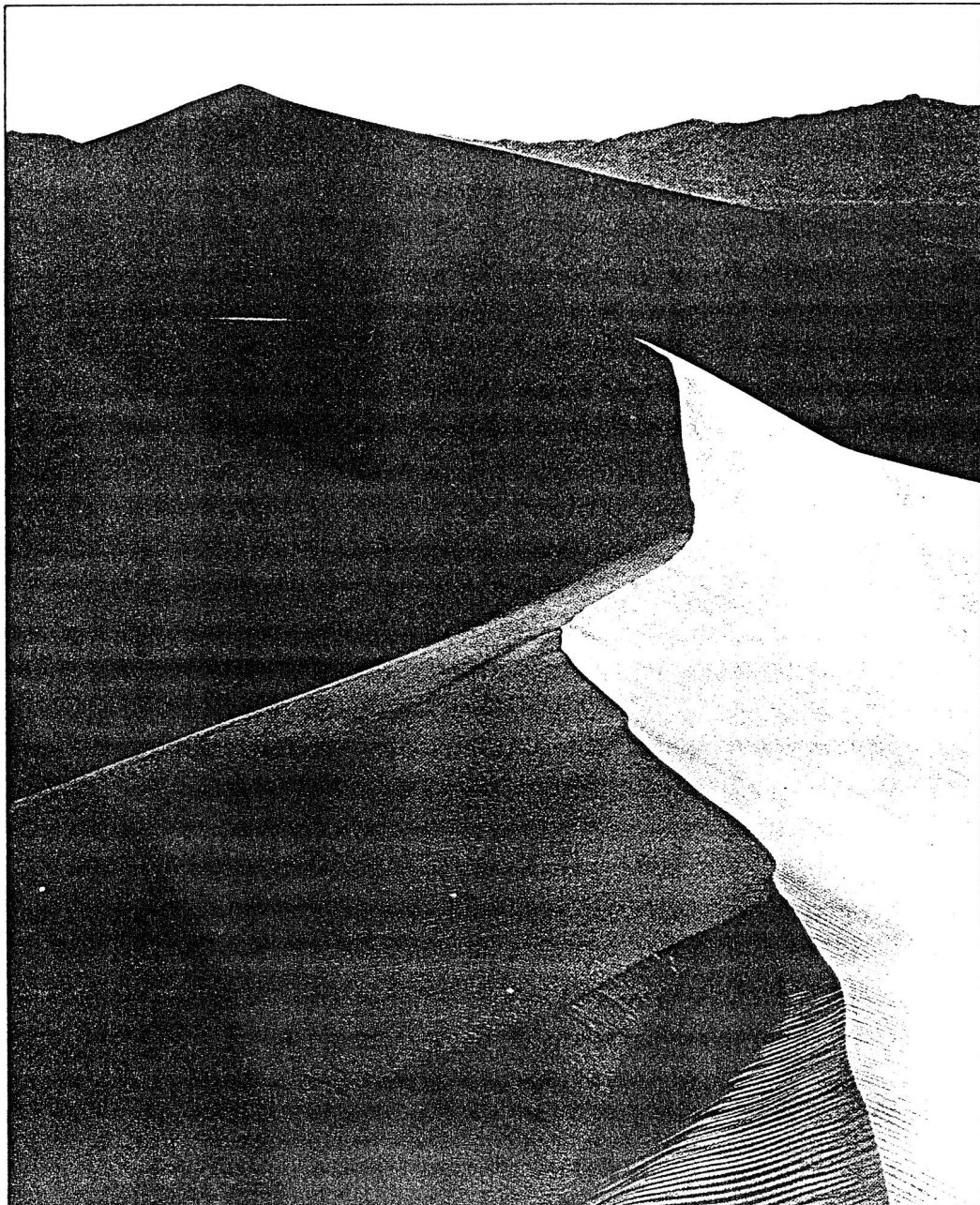


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Round Table Discussion: Science, Environment, and the Law

Alex Kozinski, Moderator*

In Eddie Murphy's recent movie, *The Distinguished Gentleman*, a corrupt congressman crusades against a utility company and its government allies after a little girl develops cancer from electromagnetic fields emitted by high voltage power lines.¹

In real life, a five-year-old girl from San Diego recently lost a case based on exactly that kind of theory.² Her mother began a legal quest against San Diego Gas & Electric (SDG&E)—claiming that the child's rare form of kidney cancer was caused by nearby power lines—after reading about electromagnetic fields in *Family Circle* magazine,³ where most of us get our scientific information. (Laughter.)

The jurors did not find a sufficient causal connection, and the utility won. But SDG&E is not off the hook. A group of San Diego homeowners is now suing it over the location of a new substation.⁴ They claim that the plant, already approved by all of the city planners and in compliance with state law—which in California, let me tell you, is not that easy to do—will increase electromagnetic fields at a local high school and, thus, that the utility should relocate the plant and bury the cables.

There is now an Electromagnetic Radiation Case Evaluation Team, a nationwide network of attorneys that shares strategies and develops cases much like the Asbestos Litigation Group of years past.⁵ Clinical oncologists—who believe that the human body is under constant chemical assault and that chemicals cause almost every kind of human affliction, using terms like “total allergy syndrome,”

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1. See Todd Woody, *Utilities, Cancer Victims Brace for Trial: Will Power Lines Be the Asbestos of the 1990s?*, LEGAL TIMES, Feb. 15, 1993, at 8.

2. Steve LaRue, *Tensions Rise Over SDG&E's Bid to Put a Line Underground*, SAN DIEGO UNION-TRIB., Dec. 27, 1993, at B1.

3. See Woody, *supra* note 1, at 8.

4. Harry J. Fotinos, *Residents of Del Mar Highlands Fail to Block Work on SDG&E Substation*, SAN DIEGO UNION-TRIB., July 31, 1993, at B3. The suit was later dropped “[f]or lack of funds to continue litigation.” Harry J. Fotinos, *Carmel Valley Homeowners Drop Suit to Block SDG&E Substation*, SAN DIEGO UNION-TRIB., Oct. 2, 1993, at B9.

5. See Woody, *supra* note 1.

"twentieth century disease," and "chemically induced AIDS"—are busy providing expert testimony in jury trials.⁶

The California Supreme Court is soon to hear a case by the name of *Potter v. Firestone Tire & Rubber Co.*, in which it seems ready to tackle the question whether people exposed to toxic materials can collect damages, not because they have actually been injured, but because they are afraid that they might have been injured.⁷

Science from the earliest days has been an expanding frontier. As we learn more about the world around us, we also learn that there is more that we do not know. In law, as in life in general, we have to make decisions all the time based on that which we know and that which is unknown.

Uncertainty raises some difficult public policy questions. First of all, how do we decide? Eventually we figured out that, yes, gravity only goes one way and everyone agreed. But that was not always such an obvious thing. What happens in that interim period when there is a theory over which there is no scientific consensus? There may be a majority of scientists on one side of an issue, but there may be other credible scientists who are challenging the conventional wisdom. Who should bear the risk of an erroneous decision? How should we deal with the unknown? How do we deal with a changing scientific environment?

The second question is, once we have determined an acceptable level of risk and who should bear the cost of uncertainty, then we have to determine how to go about pinning the blame or pinning the responsibility on those who are causing the risk. Should these things be done legislatively, by judges, or perhaps some other way? This raises issues about the competence of various parts of our government to perform complex management functions to assess these risks and administer the mechanisms for dealing with them. These are the cutting edge questions we will confront this afternoon.

To help us examine them, we have five distinguished panelists. The first of our panelists is Victor Sher from the Sierra Club Legal Defense Fund, who has a lot of insights into how the political process has dealt and should deal with environmental science.

6. See Michael I. Luster et al., *Chemical Pollutants and "Multiple Chemical Sensitivities,"* in PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW 379, 381, 390-91 (Kenneth R. Foster et al. eds., 1993).

7. Todd Woody, *When Is Anxiety a Tort?*, RECORDER, Nov. 2, 1993, at 1. On December 27, 1993, the court rendered its decision, barring damages in such cases unless the plaintiff can prove more than a 50% chance of developing cancer or that the defendant acted maliciously. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 816-18 (Cal. 1993); see also Todd Woody, *Fear of Cancer Claims Limited*, RECORDER, Dec. 28, 1993, at 1.

And Professor James Huffman of Northwestern School of Law of Lewis and Clark College will join us as well. He will focus on the role of science and scientists in making and enforcing environmental policy.

Also with us is Professor James Krier of the University of Michigan Law School, who will share with us important aspects of environmental risk assessment, discussing the interplay between expert and lay opinions and the appropriate role for each. I should tell you, by the way, that Professor Krier was my property law professor—everything I know about the subject is his fault.

We also have Edward Warren, a partner at Kirkland and Ellis, who can tell us about his vast experience in the courtroom. Mr. Warren has some intriguing ideas about the standards of scientific proof that should be used both in and out of the courtroom.

Another of our panelists is Dr. Patrick Michaels of the University of Virginia, who will focus on the role of courts in dealing with scientific issues, looking particularly, I believe, at the *Daubert* case.⁸

Each of the speakers will have seven minutes and then we will open up the discussion among the panelists and take questions from the floor.

8. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).