

Rule of Law: Ambush In Angleton **by Richard Epstein**

CHICAGO—The most memorable observation in Errol Morris's film, "The Thin Blue Line," runs like this: "It takes a good Texas prosecutor to convict the guilty . . . and a great Texas prosecutor to convict the innocent." Today, this wry remark applies to plaintiffs lawyers, now that Mark Lanier, down in Angleton, Texas, has drawn blood from Merck for its former blockbuster drug, Vioxx.

Forget the jury's whopping quarter-billion-dollar verdict in *Ernst v. Merck*, because it's cut 90% by the caps that Texas law places on punitive damages. Still, where do \$25 million in actual damages come from? Robert Ernst died in his sleep, without pain and without medical bills. His lost income as a Wal-Mart employee was small. But the \$24 million price tag for anguish and loss of companionship to his widow Carol is off the charts. And for what?

Not the death of her husband, whose arteries were 70% clogged and who died, so Dr. Maria Araneta's death certificate states, of arrhythmia, or irregular heart beat. No mention of any heart attack. But in his dramatic eleventh-hour maneuver, Mr. Lanier whisked Dr. Araneta back from the Arabian peninsula to testify conveniently that she really thought that an undetected blood clot had caused the death, but had been dislodged in the last-ditch efforts at resuscitation.

Pretend that this new account is true, and it still doesn't show that Vioxx caused the blood clot. Long before Vioxx, people died of heart failure from all sorts of causes, including physical exertion and dehydration. That second causal link to Vioxx was not made even if the first one to a blood clot is generously presumed. Carol Ernst's lawsuit should be DOA right here, but a clever set of jury instructions allowed the jury to say that Vioxx may have been a contributory cause of death.

By what odds? Merck's clinical trials showed an elevated risk of heart attacks but only in persons that took Vioxx in heavy doses for intestinal polyps for 18 months or more. Ernst took Vioxx only for eight months. In post-trial interviews, the jury members revealed their anger that the company didn't show "respect" for its customers by telling the truth about Vioxx's risks. And they clearly were moved by Mr. Lanier's expert bashing of Merck's medical employee, Dr. Nancy Santanello, who struggled to explain how Merck tried to show the efficacy of the drug in response to criticisms of it.

All this goes to show that physicians under the gun make lousy witnesses, which we already knew. To understand the Angleton verdict, one would think that Vioxx were the moral equivalent of mustard gas. But in truth, we should be grateful to any firm that speeds its product to market when its anticipated use promises many more benefits than adverse side-effects. Merck should not apologize for pushing hard to win quick market acceptance; before Vioxx was withdrawn, countless people with chronic pain were able to get on with their lives. Now these folks are left far worse off because of a double whammy: a Food and Drug Administration that yanks too many drugs off the market

because it has no idea how to evaluate risk, and individual jurors who think it is their solemn duty to "send a message" to the drug companies on whose products we so desperately depend.

So, in return, I would like to send my message to Mr. Lanier and those indignant jurors. It's not from an irate tort professor, but from a scared citizen who is steamed that those "good people" have imperiled his own health and that of his family and friends. None of you have ever done a single blessed thing to help relieve anybody's pain and suffering. Just do the math to grasp the harm that you've done.

Right now there are over 4,000 law suits against Merck for Vioxx. If each clocks in at \$25 million, then your verdict is that the social harm from Vioxx exceeds \$100 billion, before thousands more join in the treasure hunt. Pfizer's Celebrex and Bextra could easily be next. Understand that no future drug will be free of adverse side effects, nor reach market, without the tough calls that Merck had to make with Vioxx. Your implicit verdict is to shut down the entire quest for new medical therapies. Your verdict says you think that the American public is really better off with just hot-water bottles and leftover aspirin tablets.

Ah, you will say, but we're only after Vioxx, and not those good drugs. Sorry, the investment community won't take you at your word. It realizes that any new drug which treats common chronic conditions can generate the same ruinous financial losses as Vioxx, because the flimsy evidence on causation and malice you cobbled together in the Ernst case can be ginned up in any other. Clever lawyers like Mr. Lanier will be able to ambush enough large corporations in small, dusty towns where they will stand the same chance of survival that Custer had at Little Big Horn. Investors can multiply: They won't bet hundreds of millions of dollars in new therapies on the off-chance of being proved wrong. They know they'll go broke if they win 90% of the time.

Your appalling carnage cries out for prompt action. Much as I disapprove of how the FDA does business, we must enact this hard-edged no-nonsense legal rule: no drug that makes it through the FDA gauntlet can be attacked for bad warnings or deficient design. In plain English, Mr. Lanier, you're out of court before you make your opening statement. You've already proved beyond a reasonable doubt that the fancy diagrams that university economists use to explain why the negligence system maximizes social welfare is an academic delusion that clever lawyers use to prop up a broken tort system. So where does that leave Merck? Perhaps in Chapter 11, where this madness may be brought to a halt.

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