

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. McCONNELL and	:	CIVIL ACTION
DIANE McCONNELL, his wife,	:	
Individually and on their	:	
own behalves and as parents	:	
and natural guardians of	:	
KRISTINE McCONNELL, a minor,	:	
	:	
vs.	:	
	:	
CIBA-GEIGY CORPORATION	:	
	:	
and	:	
	:	
ORKIN EXTERMINATING CO., INC.	:	NO. 80-1692

Philadelphia, Pennsylvania

December 15, 1982

Before HONORABLE ALFRED L. LUONGO, CHIEF JUDGE,
(and a jury of 8)

PARTIAL TRANSCRIPT
ARGUMENT OF COUNSEL

David S. Ehrlich
OFFICIAL COURT REPORTERS
Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106
Walnut 5-9480

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1 APPEARANCES:

2 STEPHEN R. BOLDEN, ESQ.,
3 WILLIAM W. SPALDING, ESQ.,
4 RICHARD C. FERRONI, ESQ.,
5 Attorneys for Plaintiffs

6 F. HASTINGS GRIFFIN, JR., ESQ.,
7 FRANK J. EISENHART, JR., ESQ.,
8 Attorneys for Ciba-Geigy Corp.

9 EDWARD L. McCANDLESS, JR., ESQ.,
10 Attorney for Orkin

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12 (The jury withdrew from the courtroom at
13 11:18 a.m.)

14 MR. GRIFFIN: If your Honor please, at
15 this time I move to strike the testimony of two gentle-
16 men offered by the plaintiff as experts. One, Mr.
17 Todd, the other, Dr. Epstein. And, my basis for the
18 motions to strike are these: With respect to Dr.
19 Epstein, I incorporate what I argued before, that is
20 his testimony taken as a whole is not sufficient
21 under Pennsylvania law anyhow.

22 I add this additional basic ground: It
23 made it perfectly clear on the basis of his testimony
24 that he is not giving independent judgment. He
25 simply says, I'm giving you my evaluation of the
literature. That is hearsay. It can be given only if
there is an exception to the hearsay rule, and there
is no exception to the hearsay rule on this literature.

1 It has never been established by any witness, and I
2 was waiting until the end of all the testimony, that
3 any of the studies to which he referred is authoritative
4 in the field as a text, so it couldn't be independently
5 introduced under the Rules of Evidence.

6 The rule that an expert may refer to
7 matters in his field has not been even fulfilled by
8 Dr. Epstein. Neither he nor any other witness has
9 ever testified that these studies are the type that
10 he would -- that experts in that field would use. And,
11 even if it were, you wouldn't have the case where a
12 man had independent judgment and was basing an inde-
13 pendent judgment in part on some studies, which is --
14 that is the admissible exception. It is a case where
15 he is basing it only on the studies and, therefore, it
16 seems to me that the studies themselves must be
17 admissible by one standard or another. And, since
18 there is simply hearsay, there's no basis for an
19 opinion and, therefore, his opinion should be stricken.

20 Now, with respect to Mr. Todd, your Honor
21 allowed his testimony on accumulation in that building
22 on the theory that although he was basing it on hearsay
23 information, that was information and expert and
24 his field might take into account in reaching an opinion.

25 It is perfectly clear now that that

1 underlying evidence may be -- and, in my view certainly
2 is -- inaccurate.

3 To that extent, that also is hearsay. And,
4 it is an expert basing his opinion strictly on hearsay
5 testimony without any indicia of real truthfulness in
6 that testimony. And, therefore, that also is an
7 opinion that is, basically, from an evidentiary stand-
8 point, a nothing opinion. He would have to have some
9 independent evidence to show the basis for his opinion
10 is accurate. And, for those two reasons I move to
11 strike those two items of evidence.

12 THE COURT: Mr. Bolden.

13 MR. BOLDEN: Your Honor, I believe that
14 Dr. Epstein's testimony is based upon his own indepen-
15 dent evaluation of the literature and his own indepen-
16 dent evaluation of the entire aggregate of the facts
17 in this case, the records that he had before him and
18 the information that had been supplied to him, in-
19 cluding the information from Dr. Todd.

20 His opinion was based on a review of 13
21 studies involving eight different species of animals,
22 his conviction and his explained reasons that positive
23 studies are more significant than negative studies;
24 the insensitivity of animal studies when small samples
25 were being used to identify teratological effects,

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1 which will presumably produce low incidents of mal-
2 formations.

3 Additionally, your Honor, he has testified
4 with conviction, and I quote from his testimony, that
5 "My opinion is that there's a substantial probability
6 that the exposure of Mrs. McConnell to the Diazinon was
7 a contributory factor or the cause of her" -- I think
8 this was not in the testimony -- "birth defect."

9 With respect to the dangerous teratogenic
10 potentials Dr. Epstein concluded, "My conclusion is
11 that there's a substantial probability that Diazinon
12 is a teratogenic and represents a teratogenic hazard
13 to humans exposed to it."

14 With respect to the question of standards,
15 he was pressed on that at length on cross-examination
16 and while his -- some of the testimony is not a model
17 of clarity, I would refer the Court to his testimony
18 on pages 92, if I might have just one moment, your
19 Honor.

20 (Pause.)

21 92, 76 and 77, where, on page 92 he was
22 asked the following question:

23 "I will go back to the exposure. On page
24 72 of your deposition did you not testify, 'If
25 she was not exposed at all, clearly my professional

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1 interest in the case would cease immediately.

2 The calculation which I offer was simply illustra-
3 tive of the kind of ball park dose level, the
4 very high ball park dose level which she could
5 have gotten.

6 "Answer: Correct, sir."

7 And then his testimony on page 76 and 77
8 as follows, by Mr. Griffin:

9 "Question: All right, sir. If you are
10 going to -- if you're going to prove a cause and
11 effect relationship, you're going to have to
12 satisfy yourself as a scientist that there is at
13 least -- was enough of an exposure to this
14 substance to have caused a teratogenic effect.

15 "Answer: Correct, sir.

16 "Question: And, that means that you have
17 to know or at least have a reasonable scientific
18 basis for knowing what level of exposure is
19 necessary in order to create such an effect.

20 "Answer: The information which I per-
21 sonally would need would be the qualitative
22 evidence of exposure, the fact that she was
23 exposed. The quantitative aspects of the exposure
24 I did not consider myself competent to calculate,
25 and for this reason at a very early stage I

1 recommended that an industrial hygienist be
2 brought in to produce estimations of the likely
3 levels of exposure.

4 "I should point out also that when it comes
5 to the areas of teratogenesis and carcinogenesis,
6 there is a consensus in the informed independent
7 scientific community that there is no way of
8 setting safe levels or thresholds. So, any
9 exposure to a teratogen is hazardous, can produce
10 birth defects, the greater the exposure and
11 the more prolonged the exposure the greater the
12 risk. Therefore, the two points are, one, I was
13 satisfied qualitatively about the exposure,
14 there was an exposure, but, B, I felt as indeed
15 you felt, sir, that it would be helpful to have
16 the opinion of a qualified expert in this area
17 on the levels and persistence over and above
18 what I have read myself, and that was, I believe
19 -- that was the area I believe Mr. Todd had
20 discussed with you and your colleagues in the
21 court."

22 Your Honor, on the basis of that testimony
23 I think that the matter clearly is one which is properly
24 submitted to the jury.

25 I would like to refer the Court to the

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1 case of Roberts vs. The United States, which I would
2 hand up to the Court. I have a memorandum on this.
3 The Roberts case is in the -- is in there.

4 (Document handed to the Court by Mr.
5 Bolden.)

6 In Roberts, your Honor, this was a case
7 decided by the United States Third Circuit Court of
8 Appeals involving an inhalation of ethyglycol manu-
9 factured by the defendant. It was a situation involving
10 a case of first impression where there was no known
11 prior cases of inhalation, where the only evidence that
12 had previously been gathered was evidence relating to
13 animal studies and relating to consumption of the
14 ethyglycol rather than inhalation.

15 Succinctly, the facts are that the
16 plaintiff was employed as a mechanic by the All
17 American Engineering Company on the premises of the
18 United States at Lakehurst, New Jersey from January to
19 December 1957.

20 As part of his duties he worked on
21 hydraulic air arresting gear which was being experimen-
22 tally tested for use by the United States Navy on air-
23 craft carriers. It goes on to point out how he was
24 exposed to this ethylglycol.

25 On the points I think which are relevant

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1 to the subject matter before the Court, the Third
2 Circuit commented as follows:

3 "Even if oral ingestion cases are the
4 only known causes of harm, it is possible that
5 no person was ever exposed to ethylene glycol
6 in the same manner as plaintiff. Plaintiff's
7 and defendant's experts differed mainly in the
8 quantity and the type of exposure and the
9 effects from exposure. Their testimony and all
10 other evidence of causation were exclusively for
11 the jury."

12 On page 495 of the court's opinion I
13 quote from the following:

14 "From the first time it manufactured
15 ethylene glycol, commercial containers were
16 labeled with cautionary statements that it could
17 be harmful or fatal if swallowed, and that it
18 should not be stored in open or unlabeled
19 containers. In view of this, the incomplete
20 data on safe quantity which could be ingested
21 and the admission that inhalation is a means by
22 which the substance can be ingested, the jury
23 could have found foreseeability. Defendant
24 stresses this is the first indictment against
25 ethylene glycol under the circumstances and

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1 urges this as a bar to a finding of foresee-
2 ability. We disagree.

3 "In Martin vs. Bengue, supra,
4 the Supreme Court of New Jersey said, 'The fact
5 that the product may have been used by many people
6 over a considerable period of time without prior
7 injury would not preclude the findings of fore-
8 seeability and negligence.'" Citing cases.

9 THE COURT: You are dealing with a
10 totally different subject. What was the proof there
11 that it was in fact harmful? That is our problem here.
12 The question whether there was any proof that this
13 is teratogenic.

14 MR. BOLDEN: Okay, your Honor. The proof
15 was as follows:

16 Dr. Lam, a neurologist and neuro-
17 psychiatrist who treated the plaintiff and Dr. Brieger,
18 a specialist in internal preventative and occupational
19 medicine and toxicology, testified without objection
20 to their qualifications. Each had an impressive back-
21 ground and substantial experience in dealing with
22 disorders caused by toxic substances.

23 THE COURT: What page are you reading from?

24 MR. BOLDEN: Page 492, your Honor.

25 Each was familiar with the literature on

1 the toxic effects of ethylene glycol when orally
2 ingested. Dr. Brieger had performed experiments in
3 which rats were subjected to ethylene glycol mist.

4 On neither new causes other than that of
5 oral ingestion in which ethylene glycol had neuro-
6 toxic effects, both concluded that plaintiff's disorder
7 was a toxic disease of the nervous system caused by
8 exposure to ethylene glycol. This testimony was for
9 the jury. It was not destroyed because their only
10 experience or knowledge had been with cases of oral
11 ingestion.

12 Defendant points to the testimony of Dr.
13 Lam, that in all cases of neurotoxic effects from
14 ethylene glycol known to him there was kidney damage,
15 and he observed no kidney damage to the plaintiff.
16 This is not significant in view of the other testimony.

17 Dr. Lam testified that certain tests
18 made prior to his examination showed the plaintiff
19 had had some kidney injury but that by the time kidney
20 tests were administered by him the kidney had regenerated
21 that the kidney can withstand a considerable degree
22 of insult and recovery and that if the optic nerve is
23 atrophied it will not regenerate.

24 There was similar testimony by other
25 experts. There was also testimony that there were

1 known cases of death following ingestion of ethylene
2 glycol on which there had been no kidney damage.

3 Another of plaintiff's expert witnesses,
4 Dr. Bradley, an industrial hygienist and toxicologist,
5 testified ethylene glycol mist is toxic to human
6 beings. Defendant objected to his competency to
7 testify on the toxicity of ethylene glycol and on its
8 effects on humans.

9 Dr. Bradley had extensive training and
10 experience in the field of toxicology. This included
11 training in chemistry, two years of scientific work
12 in a medical school and many years experience in working
13 with chemical compounds. His entire career had been
14 devoted to toxicology.

15 He had viewed several hundred individuals
16 who had been exposed to various kinds of toxic com-
17 pounds. He was permitted to testify because of his
18 training in chemistry and related fields and his
19 extensive experience in the field of toxicology. This
20 was proper.

21 None of these witnesses stated the reason
22 for the toxicity of ethylene glycol. Through their
23 training and experience which included training in
24 chemistry and related fields, they had personal
25 knowledge of the facts supporting their conclusion.

1 It was not necessary to detail these facts, particularly
2 since defendant admitted ethylene glycol was toxic;
3 but rather this was at the option of the cross
4 examiner.

5 Your Honor, I think that there has been
6 adequate testimony by Dr. Eptstein, both as to the
7 basis upon which he comes to his conclusion and the
8 articulation of it.

9 I would also point out to the Court the
10 language of the Supreme Court in Hamil vs. Bashline,
11 which I believe is in the Smialek case versus Chrysler
12 Motors was extended to apply to a products liability
13 case.

14 In that case the court said:

15 "It is the plaintiff's burden to prove
16 that the harm suffered was due to the conduct
17 of the defendant. As in many other areas of the
18 law the burden must be sustained by a prepon-
19 derance of the evidence.

20 "Whether in a particular case that
21 standard has been met with respect to the
22 elements of causation is normally a question of
23 fact for the jury. The question is to be
24 removed from the jury's consideration only where
25 it is clear that reasonable minds could not

1 differ on the issue.

2 "In establishing a prima facie case, the
3 plaintiff need not exclude every possible
4 explanation of the accident. It is enough that
5 reasonable minds are able to conclude that the
6 preponderance of the evidence shows that
7 defendant's conduct to have been a substantial
8 cause of the harm to plaintiff." "A substantial
9 cause."

10 "Thus, once a plaintiff has established
11 the facts from which a jury could reasonably
12 conclude that the defendant's actions were a
13 substantial factor in bringing about the harm,
14 the fact that some other cause concurs with the
15 negligence of the defendant in producing an
16 injury does not relieve the defendant from
17 liability unless he can show that such other
18 cause would have produced the injury independently
19 of his negligence."

✓ 20 Further on in the opinion the court says
21 this:

22 "Once a plaintiff has introduced evidence
23 that the defendant's negligent act or omission
24 increased the risk of harm to a person in
25 plaintiff's position, and that the harm was in

1 fact sustained, it becomes a question for the
2 jury as to whether or not that increased risk
3 was a substantial factor in producing the harm."

4 I believe there has been that degree of
5 testimony in this case, your Honor.

6 THE COURT: Anything else?

7 MR. BOLDEN: No, your Honor.

8 MR. McCANDLESS: Your Honor, I would also
9 like to add very briefly to the arguments along the
10 lines that have been made. I have --

11 MR. GRIFFIN: Just so we don't get out of
12 order. All I move to do is to strike two items of
13 testimony. I have not yet made my motion. Mr. Bolden
14 went a lot farther than that.

15 THE COURT: I am assuming there will be
16 other motions.

17 I deny your motion to strike the testimony
18 with extreme reservations on my part that I am
19 making error and I am so stating on the record. But,
20 I deny your motions to strike the testimony.

21 MR. GRIFFIN: Then, sir, I move for a
22 directed verdict under Rule 50 on what is left --

23 THE COURT: Just a moment. Let's see if
24 Mr. McCandless has something which might be regarded
25 as preliminary to the ultimate motions.

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1 Do you have --

2 MR. McCANDLESS: Yes, your Honor.

3 THE COURT: All right.

4 MR. McCANDLESS: Because I have prepared
5 a motion for directed verdict which includes --

6 THE COURT: Just --

7 MR. McCANDLESS: -- a motion to strike,
8 I will withhold handing that up now.

9 I will join in Mr. Griffin's motion on
10 Mr. Todd with elaboration.

11 As to Dr. Epstein, I would join with Mr.
12 Griffin and add one or two points that I think ought
13 to be considered and raised.

14 I think within the context of the
15 qualifications of Dr. Epstein, he was qualified to be
16 a reader of literature and analyzer of risk. He
17 specifically, and I think the Court withheld him from
18 doing so, was not qualified to analyze a cause and
19 effect relationship. So, I think as to those areas,
20 and specifically the cause and effect relationship to
21 this particular cleft, Dr. Epstein must be regarded as
22 outside of his field and not qualified, and that
23 testimony be stricken for that reason.

24 Additionally, I think if we take the
25 sum total of what Dr. Epstein has said to the jury,

1 there's nothing in this case with which the jury
2 can with any certainty choose a particular witness
3 and believe something and be able to conclude that
4 in fact what the plaintiff offers on causation did
5 indeed happen.

6 We have two areas of speculation here,
7 and the doctor is quite clear that -- and, he corrected
8 me on cross-examination. I recall asking him, are you
9 saying it is teratogenic, and he says, please don't
10 misquote me, I object to these legal tricks. What
11 I am saying, there is some kind of probability or
12 possibility that it could be. So, we start with the
13 first possibility or probability, and that is that it
14 can do this thing at all, and that leaves that margin
15 of error where the jury has to, by no real yardstick,
16 figure out where it hits.

17 Then we take that and we compound it with
18 the area of speculation that the doctor leaves us with
19 when he says, and it is probably some cause down here
20 in Kristine McConnell. So, we have to areas of
21 speculation, two holes through which we can slip, and
22 the jury has to essentially speculate.

23 I add to that that I think we have
24 established throughout the testimony, and essentially
25 from Dr. Epstein's own words, that really there is no

1 scientific acceptability for the proposition that he
2 wants to give to the jury, and that is, that Diazinon
3 can be teratogenic in man. He is only a reader of
4 literature and he had no literature whatsoever from
5 which he could do that. He acknowledged that there is
6 no necessary obligation, it is just a personal opinion
7 on his part.

8 Now, certainly the court is an appropriate
9 forum to advance accepted scientific theories. But,
10 when we get into the odd-ball theory, the unique
11 theory, I don't think the jury should be permitted to
12 consider such a thing if there is an admission that
13 as to a man who reads literature he has no basis to
14 draw that conclusion. I think that has been brought
15 out throughout the testimony, that really it is not a
16 rat case, it is a child case, it is a human case; he
17 has nothing to take that quantitative step, the
18 qualitative step, beyond what he knows in rats. And,
19 when we tested him I think we see the entire scheme
20 of things here. He admitted that in other species
21 he just couldn't say a thing because there's no study
22 on that specific species. When asked about man, he
23 again said, well, there is no study on this. I just
24 don't know it.

25 He said, what I don't know I can't talk

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about, and he wanted to elaborate someone might have been hiding something from him, but I think it is quite clear he had no basis for that.

And, on the basis of his qualifications and what we are offering to the jury, I just don't think the jury has the tools right now to pick and choose the scientific application, the scientific principles and reach a conclusion that is necessarily justified by the evidence because he left too many holes and gaps in his opinion, in the soundness of his opinion on the certainty of his opinion. I don't think it by any stretch reaches the quality of opinion that must be applied in a causation test on medical subjects.

Under Pennsylvania law the traditional test is, the doctor has to have some degree of certainty. All he said was probability, possibility, and he reduced that to a suspicion sometimes, absolutely refusing to quantify that if there were some figure he would have given us, we could say 75 percent chance, two percent, a minute percent. But, the doctor just wanted to play games, and he refused to quantify that and I think the jury is now equipped with this probability here, but Lord only knows what it might be and Dr. Epstein wouldn't aid us, and it

1 just a right or wrong proposition for them. They can
2 hit or miss and the doctor, Dr. Epstein, did absolutely
3 nothing to aid them in avoiding that possible error
4 where he gave them no guidance with the terms
5 possibility and probability or suspicion. Thank you,
6 your Honor.

7 THE COURT: With the same reservations,
8 I will make the same ruling. And, I say with the
9 reservations. All I'm dealing with at this point is
10 the question in my mind whether there is that minimal
11 degree of reliability to these two expert witnesses'
12 testimony that could serve as a basis for the jury's
13 conclusion, for any reasonable minds to come to a
14 conclusion.

15 In my own view there is not that minimal
16 amount, but what I am in doubt about is whether those
17 who would review my judgment in that regard might
18 have a difference with me and, therefore, conclude
19 that reasonable minds could accept this kind of testi-
20 mony as a sufficient basis for expert opinion.

21 I repeat: In my view, it is not, but I
22 am not certain that that view would be shared by the
23 judges on the Appellate Court, and for that reason I
24 deny the motion to strike.

25 Now, we will consider the other motions.

1 MR. GRIFFIN: Sir, I move for a directed
2 verdict under Rule 50, incorporating the arguments I
3 have made heretofore and not wanting to repeat them,
4 and adding the following:

5 There is no proof in this case of either
6 negligence on the part of Ciba-Geigy, or proof of a
7 defective product. There is no proof whatsoever that
8 the Diazinon that Ciba-Geigy supplied to Dettlebach
9 and was in turn supplied to Orkin, was in any way
10 defective.

11 There is --

12 THE COURT: Yes, would you address that
13 point because I -- we have two different claims here,
14 of course: The negligence claim and the 402A claim.
15 And, as I understand Azzarello versus Black, I have to
16 make a threshold determination whether there is a
17 defective product.

18 MR. GRIFFIN: That is I believe the law,
19 your Honor.

20 THE COURT: All right. But, address
21 yourselves to it, and I want Mr. Bolden to direct himself
22 to it because I do have an obligation, as I understand
23 it under Pennsylvania law, in order to eliminate from
24 the jury's consideration the question of unreasonably
25 dangerous, I have to make a determination. Well, tell

1 me how I go about that with the standards or lack of
2 standards that have been laid down by the Pennsylvania
3 Supreme Court.

4 MR. GRIFFIN: Well, you start, your
5 Honor, with, where is the proof in this case that
6 there is unreasonable danger.

7 Now, unreasonable danger means that there
8 is a danger known or reasonably known to somebody as
9 of the time they did a certain act. As of the time
10 that -- if we are talking a negligence case -- as of
11 the time that Ciba-Geigy sold its product --

12 THE COURT: Well, wait a minute. If we
13 are talking Azzarello, we are talking 402A.

14 MR. GRIFFIN: All right, sir.

15 THE COURT: Which does not relate to what
16 knowledge anyone had. We are dealing now with a
17 weighing, perhaps, that has to be done in determining
18 whether a product with certain benefits and some
19 possible or potential dangers can be characterized
20 or labeled as unreasonably dangerous. I guess to that
21 extent the Pennsylvania Supreme Court has left it to
22 the judge to do that weighing and leave out of the
23 jury's consideration any possible contamination by
24 the thoughts of negligence. So, let's --

25 MR. GRIFFIN: We're talking strict

1 liability.

2 THE COURT: Yes.

3 MR. GRIFFIN: As far as the product is
4 concerned, has there in fact been shown by the evidence,
5 evidence which shows that this product is dangerous
6 at all, and if there is any element of danger to it,
7 whether your Honor, in your best judgment, thinks that
8 is an unreasonable danger.

9 It will be true of any product that is
10 put out. Everytime I step into my automobile I increase
11 the risk that somebody is going to be injured.

12 THE COURT: All right. Let me ask one
13 other question, because you might as well address your
14 arguments as the others will have to.

15 In making that determination do I block
16 out everything that has been presented by way of
17 defense and take only that which has been presented by
18 the plaintiff and make the determination at that point
19 that assuming there was nothing else in the case, would
20 this pass the threshold, or, am I obligated to consider
21 all the evidence in the case; i.e., do I make some
22 kind of factual determination at the outset.

23 MR. GRIFFIN: Well, your Honor, I think
24 the cases don't answer that question with clarity.
25 And, for the purposes of argument here I will just --

1 I will dispose of all the evidence in the case which
2 I think basically should be considered by the judge
3 if in determining this question he really has to
4 determine in his own best judgment, knowing society
5 as he knows it and seeing this product, based on the
6 evidence that he has heard, whether it is an unrea-
7 sonably dangerous product. That is a preliminary
8 question that ha to be made.

9 If, however, I eliminated all the evidence
10 and said, let's just take the plaintiff's evidence and
11 see whether it is an unreasonable product, leaving the
12 judge with the problem of deciding whether there's
13 enough evidence here to convince him that it is a
14 dangerous product and, therefore, can be submitted on
15 a strict liability theory. You're right back to where
16 we started, because the very misgivings that you have
17 about this testimony in this case has to lead you to
18 the conclusion that there isn't any evidence of a
19 dangerous product.

20 You have to take into account what the
21 plaintiff's witnesses have said and you have to take
22 into account the basis for their opinions, and if as
23 a judge and a man skilled in the law you say that
24 that opinion, that evidence is really not sufficient
25 to support an opinion like that, or if you say that

1 opinion, as far as the law is concerned, doesn't
2 really come up to the quantity that the law requires,
3 and I, therefore, have grave misgivings about this
4 proof, how can you make a determination that the
5 product is defective? And, that is a preliminary
6 question that must be resolved, your Honor. The
7 system doesn't allow that to be submitted to the jury.

8 THE COURT: All right. Now go on to the
9 negligence aspect, because that is a totally different
10 question.

11 MR. GRIFFIN: Well, sir, the -- I just
12 think there is no evidence of negligence anywhere along
13 the line. We don't even have evidence of a defect
14 to start off with to see --

15 THE COURT: Well, I will make an argument
16 for Mr. Bolden. I am going to anticipate. You had
17 NIOSH, you had this other literature that showed that
18 there was some possible danger at some levels, shouldn't
19 you have done something or said something. Query,
20 is any question for the jury. Does that provide a
21 sufficient basis for a question for the jury.

22 MR. GRIFFIN: No sir. I don't think it
23 provides a sufficient basis because, again, by defini-
24 tion, it is not a question of whether there may be a
25 danger or whether there is a possible danger, or

1 whether somebody even said there was a danger. The
2 said always goes only to notice. That is all it goes
3 to. And, if there is proof of an underlying danger,
4 then there is some significance to what somebody said
5 about it because then you have notice for a negligence
6 case and some reason that the defendant should have
7 acted on it. But, there still has -- you can't prove
8 the underlying danger by the notice.

9 THE COURT: Well, but you have testimony,
10 do you not, of Dr. Epstein that certainly they should
11 have warned pregnant women not to get within 100 miles
12 of this stuff, just to -- I am exaggerating, of course.
13 He never mentioned how far away. He just said they
14 should not be exposed at all.

15 MR. GRIFFIN: Well, sir, where is the
16 evidence that the industry knew that, or ever brought
17 to the industry's attention?

18 THE COURT: No, no. What he said was --
19 what he said was, that in light of this literature,
20 reasonable -- without using the term -- that a
21 manufacturer should have concluded that --

22 MR. GRIFFIN: I now go back -- you are
23 simply bootstrapping by the literature, which is a
24 fundamental problem in the case. You can't do that.
25 You can't prove a negligence case by the introduction

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BFG05357

1 of hearsay documents that even aren't authoritative
2 in their field.

3 THE COURT: Well, for the moment, those
4 documents are in evidence. So, with all the reservation
5 I have, nevertheless, for the consideration of this
6 motion we have to consider that evidence.

7 MR. GRIFFIN: I would simply say to your
8 Honor, where is the evidence of negligence. The argu-
9 ment is that we should have acted on a 1968 study.
10 All of this all boils down to is just one study. We
11 should have acted on that, even though it is all sub-
12 mitted to the regulatory agencies. The regulatory
13 agencies have passed on it all, all the teratologists
14 in the world, as far as we know, every one of them
15 has passed on it and discarded it, and simply because
16 Dr. Epstein misreads it, that that somehow creates a
17 basis for a negligence claim. That is about all it
18 boils down to.

19 There has to be, in all these areas, your
20 Honor, there has to be a reasonable threshold, because
21 if you follow any argument that a lawyer makes, or the
22 law makes, you can always get to the reduction ad
23 absurdum where in theory you can see a structure of it
24 but it is silly. And, the Court is the guardian of
25 that, and it always has to be. If it is not, if it is

1 -- if all you have to do as a lawyer is to expound
2 words until you can get a formula that makes it sound
3 as if there might be something, and you submit that to
4 the jury, then all cases go to the jury.

5 I have on further thought, your Honor,
6 in a case of this sort.

7 It is really important because, you take
8 a witness like Dr. Epstein who is currently advertising
9 through the legal profession his services as a teacher
10 of how to be an expert witness. He sends out these
11 brochures and sets up a course on expert witnessing --

12 THE COURT: No, no. That is not before
13 me.

14 MR. GRIFFIN: I know it is not before you
15 but I am saying, things like that do occur --

16 THE COURT: I will not consider that. Now,
17 confine yourself to the record.

18 My only interest in Dr. Epstein is that
19 which was presented from the witness stand, and I
20 don't know anything about these other matters and I
21 don't want to know.

22 MR. GRIFFIN: Every time, every time that
23 a court, be it because of expediency or because the
24 fact you spend a good deal of time on a case, and they
25 say, well, this preliminary question, there might be

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1 something to it, every time that is done, if there
2 might be something to it, it is just like the proof
3 in this case. The fact of the matter is, for the
4 system to work properly a judgment has to be made
5 that there is something to it.

6 THE COURT: Okay.

7 Now, this relates to cause and effect for
8 Kristine's injuries, and now address yourself -- I
9 suppose your motion goes also to the claim of emotional
10 distress, et cetera.

11 MR. GRIFFIN: Well, I have one further
12 just short argument to call to your Honor's attention.

13 As far as proof of any underlying claim,
14 be it defect or be it negligence, the plaintiffs are
15 bootstrapping, they're trying to argue from cause and
16 effect cases and say that there might be something
17 in these cases, and if your Honor extends the law in
18 the Hamil and Bashline area on causation, then they
19 have got their case proved. But, they don't. That
20 is only a causation element. You can't use the
21 causation line of reasoning to prove the underlying
22 cause of action.

23 The underlying cause of action has to be
24 proved and proved independently. The Hamil-Bashline
25 argument that they are making, your Honor, assumes --

1 every one of those cases assumes there has been proof
2 of either the underlying negligence or the underlying
3 defective product.

4 THE COURT: There's no question. It
5 starts with the proposition that when it has been
6 shown that ~~there is the~~ -- that it is a contributing
7 factor, that's -- I accept that. I understand that.

8 Our problem here is whether there's any
9 proof of its being -- being a contributing factor. I
10 understand that.

11 MR. GRIFFIN: I already, sir, addressed
12 in the motion for directed verdict at the end of the
13 plaintiff's case, the emotional distress problems.

14 THE COURT: This is the time to repeat it.
15 I want everything summarized in light of the total
16 -- the totality of the evidence that has been presented.

17 MR. GRIFFIN: All right, sir. Whatever
18 may be said about spraying and emotional distress,
19 does not apply, it seems me, to Ciba-Geigy in this
20 case. Just stripping all the other arguments aside.

21 The only thing that the proof shows was
22 used of Ciba-Geigy's on the 26th of March was Diazinon
23 dust, and there is not one word of evidence in the
24 case that that dust had anything to do with the
25 situation in the building. There's no one word of

1 evidence in the case that one speck of that dust ever
2 got into the atmosphere anywhere. So that as far as
3 the 26th is concerned, we are uninvolved.

4 The only other day that they point to is
5 the 7th. Now, as far as the 7th is concerned, one
6 thing is absolutely sure is that Diane McConnell
7 didn't witness any spraying that day, and that to the
8 extent that spraying plays into this so-called
9 emotional problem, Ciba-Geigy's product had nothing
10 to do with it.

11 So, the underlying emotional problem
12 case seems to me to just disappear as far as we are
13 concerned.

14 If there is any thread to it at all,
15 if your Honor sees it, then I would go back to the
16 basic argument on the law that we submitted to your
17 Honor, I submitted a short brief on it, that the
18 plaintiff's attempt here is to simply stretch the
19 law as far as it goes. And, there is no basis for
20 claim of emotional distress on this record.

21 THE COURT: Thank you.

22 Mr. Bolden, I will ask you to respond
23 to Ciba-Geigy's argument first and then we will take
24 Mr. McCandless.

25 MR. BOLDEN: Your Honor, on the issue of

1 negligence, I believe there is evidence from which the
2 jury can find not only notice, that is the 1978 NIOSH
3 report, not 1968, but a failure to act upon that
4 notice with knowledge of that notice at a time when
5 action could have been taken to prevent the spraying
6 in the presence of women of childbearing age.

7 THE COURT: What about 402A?

8 MR. BOLDEN: On 402A, your Honor, of course
9 the question of what the Court has to consider or how
10 it is to go about considering, has not been made totally
11 clear for me from the decisions of the Court.

12 I would not read the Azzarello case, or
13 the Berkebile case as requiring, even requiring a
14 risk versus benefit analysis in a failure to warn
15 situation.

16 THE COURT: Your problem is this: You
17 see, we used to use the nice homely illustrations that
18 even a kitchen knife has a potential for danger, and
19 before the Pennsylvania Supreme Court eliminated un-
20 reasonably dangerous, it made a nice easy for us to
21 illustrate to the jury how they are to come to the
22 conclusion of whether a product is unreasonably danger-
23 ous or not. By looking at the things that were around
24 them every day, a television set with all the possible
25 dangers that are inherent in a television set, or

1 electrical equipment, or an automobile with the
2 potential to do all the harm that it can if it is not
3 used in the way it is intended, et cetera.

4 Then the Supreme Court said, oh, that is
5 a terrible thing to do, to have the jury consider
6 negligence concepts and use the words "unreasonably
7 dangerous." So you, Mr. Trial Judge, make the deter-
8 mination, and once you do, that says to the jury, yes,
9 you may consider whether this product is defective.

10 Now, somebody has to make the determination
11 whether this kitchen knife is a defective product for
12 the purpose for which we are talking about in a
13 particular case. Don't I have at least that obligation
14 in this case?

15 MR. BOLDEN: I believe so, your Honor. Of
16 course a defective product includes a product for which
17 adequate warnings have not been provided.

18 THE COURT: I understand that. And, if
19 the evidence were such that you could show that it had
20 the potential for danger that Dr. Epstein suggested
21 could be present from a single -- and, I don't know
22 whether he used molecule or milligram or what --

23 MR. BOLDEN: Molecule.

24 THE COURT: -- that the presence of some-
25 thing, some trace or some quantity which he refused

1 to specify, of Diazinon in the air, then presumably
2 it is defective simply from being in the atmosphere,
3 and I think we could all agree that that would be
4 a most unreasonable, if I am permitted to use that
5 term, interpretation of this product.

6 Quite apparently it has been used for some
7 number of years in the presence of human beings with
8 no untoward effect except for what appears to be an
9 -- what may be an untoward effect in this case.

10 MR. BOLDEN: The problem with that is,
11 once we have to start analyzing it in terms of past
12 history and in terms of whether or not there has been
13 other known cases, we get back to this problem of
14 whether or not there is an epidemiologic study which
15 confirms the teratogenic effect. And, I believe as a
16 matter of policy the whole toxic tort issue is on the
17 threshold of where is it going to go, and once we go
18 to that level it will be virtually impossible to prove
19 a toxic tort case. And, I believe that is what Hamil
20 vs. Bashline type of reasoning was designed to deal
21 with.

22 THE COURT: No, I don't think so.

23 Well, Mr. Bolden, the one thing that has
24 been working in your favor is that I have invested, you
25 have invested, we all have invested, a number of days

1 in trying this case. And, I was tempted to submit
2 all of these issues to the jury. But, on the matter
3 of defectiveness, I cannot, with any degree of
4 intellectual honesty, say that there is sufficient
5 evidence in this case that this product is defective
6 to permit it to go to the jury.

7 I am evaluating, yes. I think I am
8 obligated to. I am evaluating Dr. Todd's testimony and
9 Dr. Epstein's testimony, and it had a degree of weakness
10 even at the end of the plaintiff's case, that made it
11 terribly suspect. But then with the balance of the
12 testimony came in, it simply eliminated in my mind to
13 the extent that I have any obligation here on defective-
14 ness, as to the -- whether a jury should speculate
15 that this is a defective product, and in conscience
16 I cannot submit it to the jury.

17 So, the 402A claim I grant Ciba-Geigy's
18 motion for directed verdict.

19 On the negligence claim, you are pointing
20 out to the only evidence that there is, which is the
21 one or two statements in the literature, and in
22 particular the NIOSH, that it may be-- may have some
23 degree of danger. But, I think that all of the
24 evidence that has been submitted, including Dr. Farrow,
25 would indicate that this was out of someone's excessive

1 caution, and we don't even know who the authors of that
2 were, the statement was or were. And certainly the
3 evidence has convinced me that the studies that were
4 supposedly the basis for that statement simply would
5 not support a manufacturer with its own studies and
6 its own interpretations that what they did was
7 unreasonable under the circumstances in the minds of
8 any reasonable person. And I think that this jury
9 would probably -- well, I won't say probably, would
10 almost certainly come to that same conclusion because
11 I don't think reasonable minds could differ on this.

12 And again, I have to worry about whether
13 I may have to go through eight more days of trial
14 because those above me may disagree and say, oh, there
15 was enough here for a jury to deal with.

16 But, I think I would rather take the
17 chance that I have to retry the case than to live with
18 the intellectual dishonesty that I would feel if I
19 were to say there was enough evidence here of negligence
20 to submit to a jury.

21 I grant Ciba-Geigy's motion in its
22 entirety, because without this cause and effect, and
23 without any evidence of spraying on March 26th, which
24 is the only incident to which Mrs. McConnell can
25 attribute her emotional distress, I cannot allow any

1 part of the claim to remain against Ciba-Geigy.

2 You can understand the natural sympathies
3 that the Court has in a case like this, but in the
4 final analysis, and at the bottom line we do have
5 an obligation to all litigants, putting aside sympathy
6 and personal feelings, to come up with what we consider
7 the intellectually honest answers, and that I think is
8 the one in this case.

9 Mr. McCandless.

10 MR. McCANDLESS: Your Honor, would I
11 assume correctly, your Honor would grant the same
12 motions on the same bases to Orkin on a 402A claim and
13 a negligence claim relating to causation?

14 THE COURT: Well, you will have to spell
15 out to me in your argument to what extent what I have
16 ruled with respect to Ciba-Geigy necessarily applies
17 to you. There may be that complete similarity, but
18 I want you to spell it out on the record so there is
19 no question in anybody's mind.

20 MR. McCANDLESS: Very well, your Honor.

21 Initially I would like to hand up a
22 written motion for directed verdict which does have
23 a memorandum of law attached.

24 (Document handed to the Court and counsel
25 for Ciba-Geigy and for plaintiffs.)

1 Your Honor, of course on any products
2 liability claim we are talking about, at least for the
3 cause of the cleft pallet and cleft lip, the same
4 product. There is no allegation, no proof that any
5 product other than Diazinon was the cause of this
6 cleft lip and cleft pallet.

7 How did the exposure come about? Well,
8 it came about by Orkin. But, nonetheless, the question
9 is, did Diazinon do it.

10 To that extent, the motion that I make
11 on behalf of Orkin for directed verdict is the same
12 motion that Ciba-Geigy has made, and that is, that there
13 has been no proof that Diazinon has caused this
14 particular cleft pallet.

15 Next, I find that as to any theory of
16 negligence against Orkin, there may be a couple of
17 them. One does directly overlap with Ciba-Geigy's
18 motion, and that is, is there any negligence as it
19 applies to that particular product in its use as
20 a pesticide in these circumstances with the inherent
21 question of, is there any proof that it can cause the
22 type of defect claimed here. I think to that extent,
23 the extent that any negligence would attach to Orkin,
24 or be alleged against Orkin in the use of that
25 particular product for a defect or problem caused by

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1 that product, the same lack of testimony, lack of
2 evidence obtains, and I would move and say that is the
3 same similar argument.

4 Also, we have potentially an argument
5 against Orkin, that Orkin was in some way wrong in
6 what it did; independent of the product it used, there
7 was something wrong about its procedures. There has
8 been absolutely no evidence in this case that says
9 Orkin did anything that was inconsistent with appro-
10 priate standards. I don't think there is any evidence
11 in this case from which such an inference could be
12 drawn. There is no evidence in the case of the plain-
13 tiff, although it may have been asked if an individual
14 were licensed, or one or two other things; no expert
15 testimony, no regulatory evidence came in here to say
16 it was -- that was a basis of any wrongdoing on the
17 part of Orkin.

18 So, we see that there is no independent
19 negligence on the part of Orkin independent of a
20 potential claim that the use of Diazinon was wrong.

21 All the evidence suggests is that Orkin
22 -- and, it is all on the defense case, I would suggest
23 -- that Orkin acted in accordance with the appropriate
24 standards and there has been nothing from which the
25 jury can judge this any other way.

1 Then we come to the incident of March
2 26th. That has a couple of very peculiar aspects to
3 it. March 26th caused no physical injury to Diane
4 McConnell.

5 There has been no testimony that anything
6 Orkin did was the medical cause of the sickness those
7 other people encountered. If they in fact did, and
8 it was all essentially hearsay evidence, no one came
9 in here and said, I was sick and no doctor came in here
10 and said this sickness was caused by Orkin.

11 Granted, in the time relationships one
12 did -- the servicing was followed by this incident.
13 However, certainly, as we have seen in this case,
14 science can differ and the jury does not know what the
15 illnesses were or may have been; the jury does not know
16 what the causes of those illnesses may have been; we
17 don't know whether it was a mixture, a hysteria or
18 anything to do with pesticides. It was merely a
19 coincident event in which the entire world was spinning
20 and go on at the same time as very many other contem-
21 poraneous events, and we ought to have had some
22 expert proof to show that incident in any way related
23 to pesticides. There being no proof of that, what
24 claim can be asserted?

25 First of all, for Diane McConnell, there

1 is no proof at all she was made ill that day.
2 Certainly she didn't go to a doctor, didn't seek
3 medical treatment and left that day. There is no
4 suggestion that in any way disturbed her immediately
5 thereafter or until any time she had any emotional
6 or psychiatric distresses of any sort until the time
7 the baby was born, and then Dr. Toborowsky came in and
8 he says, well, he thinks it is a combination of things
9 with pesticide and with having a defective baby being
10 born.

11 But, the doctor couldn't tell you when in
12 the world this thing, this sickness he diagnosed, may
13 have begun, and part of his essential definition was,
14 what I found had to have begun within three months of
15 something. But, he dated it -- at the earliest he
16 ever dated it was September -- rather, August 1979
17 when the baby was born, or late July; he never related
18 it back to March. We have that failure of his own
19 testimony to relate anything specifically to pesticides
20 in general, or to the specific incident of March 26,
21 1979 -- '78 -- '79, excuse me.

22 Then there is the question of absent
23 injury, absent any physical injury can an independent
24 claim for mental or emotional distress be established
25 on this basis.

1 I, at an earlier time, adopted the
2 Ciba-Geigy memorandum of law on that point. I would
3 merely reiterate that that continues to be my position,
4 that Pennsylvania law has not yet said, and I doubt
5 that it ever will, that for plaintiff's own peculiar
6 reasons she may choose something and she may say it
7 upsets me, and then she may say that that's enough to
8 give me a cause of action, although she is only upset
9 and not physically injured. I think the asbestos cases
10 have shown pretty clearly that where you are merely
11 exposed to something -- I'm not saying there was an
12 exposure here -- without physical injury you're not
13 entitled to make that mental distress claim.

14 At any rate, there is no case that says
15 independent of a tort can this mental distress be
16 claimed. There must be some actionable basis. Mental
17 distress is in this case only an element of damages
18 truly. It is not the actionable incident. What was
19 actionable about March 26th, what was actionable
20 about anything Orkin has done at Amtrack.

21 There has been no evidence that Orkin
22 has ever done anything wrong. In fact, Mr. Steiger
23 who came up here and testified acting on behalf of
24 EPA and its associated state organization, said that
25 after his investigation there was no wrongdoing found.

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1 So, what does the jury have to -- for the March 26th
2 incident. What can the jury say Orkin did wrong?.

3 And, I put on experts --

4 THE COURT: Well, there is evidence that
5 there was spraying that day and a number of people
6 became "ill".

7 MR. McCANDLESS: Right. But certainly,
8 what is the legal link and the causal link to those
9 two events.

10 If people got sick after spraying occurred,
11 is that in itself negligence? There has been no
12 evidence that something was done improperly that day.

13 Mr. Steiger himself acknowledged that I
14 had an incident here, people went to the hospital but
15 I did an investigation and there was no wrongdoing found;
16 nothing wrong. And, we don't know that the sickness
17 was caused by the pesticide. No one has made that link,
18 other than by time. And, I think that in this type of
19 case, we don't know what kind of sickness was involved,
20 we don't know truly what the symptoms were, we don't
21 know who the people were, you certainly have wonder
22 can we relate this and can the jury speculate that
23 that event had anything to do with the sickness that
24 day. There has been no evidence of that. It can't
25 be on Diane McConnell's part. We would have to wonder

1 about the other people. There has been no evidence
2 as to what happened to the other people truly.

3 And I think when your Honor ruled on the
4 objection raised to that type of evidence, you said,
5 well, it may have some limited purpose if we find out
6 that it was an event that led her to believe something.
7 But that begs the question to whether there was an
8 independent legal action for anything Orkin had done,
9 and I find there is just absolutely no evidence that
10 Orkin has done anything other than act in accordance
11 with the guidelines of the regulatory agencies and
12 good pesticide control practices; just no evidence
13 to suggest they have done otherwise.

14 Even in the March 26th incident, even
15 then nobody came in here and said, you guys did it
16 wrong. There is something wrong here, you were negli-
17 gent. Nobody said that. The fact of the matter is,
18 no wrongdoing was the only evidence that came out.

19 So really, I don't think -- nothing here
20 is actionable because there is no physical injury, there
21 is no evidence that there was anything that could be
22 regarded as negligent, or other type of actionable
23 conduct on the part of Orkin.

24 And, the claims as they relate to the
25 Diazinon, or the cause of the cleft pallet and lip,

1 are identical to those raised by Ciba-Geigy because it
2 does relate specifically to the product and the proof
3 directed to that particular product.

4 So, absent any sufficient evidence to
5 link that product, I don't see how Orkin can be found
6 to be liable on any count on this claim since there
7 is no injury demonstrated as a result of anything
8 Orkin had done.

9 For those reasons and the reasons I have
10 raised previously in my request that the testimony of
11 various experts be stricken, I would ask that the
12 Court award a directed verdict in favor of Orkin in
13 this case.

14 THE COURT: Mr. Bolden.

15 MR. BOLDEN: In light of the Court's
16 ruling as to Ciba-Geigy, the only issue that I think
17 I can appropriately address is the issue related to
18 the March 26 spraying.

19 As to that issue, I think that Orkin
20 puts forth a very anomalous and very interesting
21 argument.

22 By analogy I would suppose that Orkin
23 would take the position that if they were to take
24 Diane McConnell and lock her up into a room with
25 Agent Orange for about three days and then let her out,

1 and she were to say that she was distressed, that she
2 might get cancer, their answer would be, well, there
3 is no proof of that. We just locked you in a room --

4 THE COURT: No, no. I think a more
5 apt argument would be -- I mean, if you could say that
6 she was locked up in a room with Agent Orange and was
7 told that she was locked in a room with a Agent Orange
8 and was told that there had been many suspicions of
9 the affect that Agent Orange can have, and if she
10 then had a nervous breakdown or suffered some emotional
11 impact, then perhaps we might have more analogous --

12 MR. BOLDEN: I think we have that in this
13 case, your Honor. I think what we have --

14 THE COURT: All right.

15 MR. BOLDEN: I think what we have in this
16 case is precisely that.

17 THE COURT: All right. Then I think you
18 had better argue that --

19 MR. BOLDEN: I think we have a situation
20 in which --

21 THE COURT: You will recall as part of
22 my hypothetical I said, if she was told at the time
23 all this happened. Because what we may have to deal
24 with in this case is the temporal relationship of
25 one event with another when the alleged onset of

1 emotional distress came about, and in relation to
2 what -- you know, this is what you have to argue.

3 MR. BOLDEN: I understand, your Honor.
4 I understand.

5 What we have here is a situation in which
6 a jury, I believe, could find that Orkin in a negligent
7 and indeed reckless manner sprayed this in a manner
8 which could be -- ,

9 THE COURT: Excuse me, what was the
10 evidence of the manner of --

11 MR. BOLDEN: The evidence was that they
12 were spraying it on the woman next to Mrs. McConnell,
13 on her coat, on her pocketbook if I'm not mistaken;
14 they sprayed it into the holes beneath the computer
15 terminals located no more than 12 inches away from
16 these people; that the man went around spraying it all
17 over the carpet, all over the -- over that particular
18 workman into the computer holes near these people. I
19 believe that when 46 people are carried out --

20 THE COURT: No, no, excuse me. And then
21 who testified that that was improper?

22 MR. BOLDEN: Your Honor, nobody testified
23 that that was improper as an expert. I think this is
24 the kind of conclusion that a jury can make based on
25 their own common experience and their own common sense.

1 You have almost a re ipsa loquitur
2 situation here. You have these people being carried
3 out. You have the fact that the labeling, the labeling
4 says that they are not to get it into a situation where
5 people can inhale the pesticide, or get it onto people.
6 And, that is precisely what was happening in this
7 situation. The jury can infer that they inhaled it,
8 the jury can -- the direct testimony is, it got onto
9 somebody. Diane McConnell was there and Diane
10 McConnell was in the room and was exposed to it at that
11 time. She -- although she was not herself specifically
12 sickened on that occasion by the pesticide, there is
13 clear evidence that she was emotionally upset by the
14 fact that the supervisor told her to get off the floor
15 because she was pregnant. Another person told her to
16 go get a blood test. Her refusal to take the blood
17 test is just evidence from which the jury can find that
18 she was emotionally concerned about the effect it would
19 have upon her baby.

20 The traumatic event that occurred there-
21 after was the birth of her baby and her sight of that
22 baby with the deformity that the baby had.

23 Now, I don't believe that there is any-
24 thing in either the Sinn case or the Neiderman case
25 which requires a physical impact.

1 What Judge Takiff, in the Hughes case
2 indicated was that one must be able to show under
3 his interpretation of Pennsylvania law that there is
4 a physical injury. A physical injury can either be a
5 physical injury which proceeds the traumatic event that
6 produced the emotional stress, or it can be a physical
7 injury which results from the emotional stress.

8 Now, in this particular case there is
9 clear testimony from which the jury can find that
10 Diane McConnell as a result of the emotional stress
11 that she had because of these incidents did have
12 physical symptoms.

13 The spastic colitis to which Dr. Knouse
14 testified and to which Toborowsky testified to as being
15 the psychomatic conditions which he found resulting
16 from the emotional stress.

17 I might also point out that the defendant's
18 own witness, Dr. Jackson, pointed out that Mrs. Mc-
19 Connell's concerns and her fears were reasonable fears,
20 not from a scientific standpoint but from the stand-
21 point of a person in Mrs. McConnell's position
22 confronted with a situation in which she found herself.

23 It is true that in the Sinn case and the
24 context in which the court was speaking in Sinn, you
25 are dealing with the temporal relationship of experiencin

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1 an emotional upset of watching a specific traumatic
2 event. That particular analogy obviously does not
3 exist in a toxic situation or a creeping disease
4 situation, the asbestos situation. But, nothing that
5 I read in Judge Takiff's opinion ruled out the right
6 to recover for the emotional distress if it can be
7 shown that the emotional distress and physical injury
8 resulting from that emotional distress related back to
9 the exposure. Here we have that same situation.

10 THE COURT: Well, but the only physical
11 injury that you are referring to is that which resulted
12 from the emotional distress, isn't that so?

13 MR. BOLDEN: That is correct, your Honor.

14 THE COURT: So, there was nothing that
15 preceded that. What you are saying is that all of the
16 symptoms that she encountered after having this
17 emotional concern, and we will accept Dr. Toborowsky's
18 testimony, that it certainly was not abnormal, it
19 was even normal for her to look around for some
20 explanation. And then having done that, she became
21 emotionally concerned and disturbed about what might
22 have caused the defect in her child.

23 Once she developed the emotional concern,
24 then certain physical consequences flowed. But, I
25 think that simply from reciting that we can show how

1 different that is from having a physical impact
2 accompanied by emotional distress as compared to
3 physical consequences of emotional distress.

4 Now, the closest case to support your
5 position -- and, I don't remember the name of it --
6 it is the one in which the Supreme Court by divided
7 vote let stand a ruling of a lower court that refused
8 to extent viability in the case of the father who
9 learned -- was the father who learned of the child's
10 death.

11 MR. BOLDEN: Yes.

12 THE COURT: Now, that would have been an
13 extension of the Sinn and Burd cases. It was not
14 accepted, but even there you could see that that is
15 a possibility for some little extension of the emotional
16 distress accompanying a traumatic event to someone
17 within the close range of family relationship. But,
18 I think what we are talking about here is such an
19 extension of that that it would require the Pennsylvania
20 courts, I think, to announce it before I could apply
21 it in a case here.

22 I do not consider the cases the Pennsylvania
23 court has come up with up to this point as predictive
24 of liability for emotional distress which relates back
25 in time to some event which may or may not have been

1 accompanied with some physical distress.

2 In this case, from the March 26th incident,
3 as I recall the testimony, there is absolutely no
4 evidence of any distress to Mrs. McConnell herself.
5 There was apparently some effect, even if we can
6 supply cause and effect to the spraying, to some
7 persons, someone in particular who was across the
8 aisle from her at the computers behind her, and that
9 she herself later went, I believe, to that same
10 station. But, nothing to indicate that she had any
11 physical effect whatsoever that day.

12 She did testify that she didn't have the
13 blood test because she didn't want to know, so there
14 was a suggestion there of some possible concern at that
15 moment, but, I still can't relate it to any physical
16 impact of any kind. I have to draw the distinction
17 even with the case in the Third Circuit which had to
18 do --

19 MR. BOLDEN: The Plummer case.

20 THE COURT: -- Plummer case is right.
21 The tubercular bacilli which the evidence was
22 actually invaded the body of these people and then
23 gave rise to concerns. And, I can accept that, and
24 if we had had evidence of the invasion of the body
25 by a substance, even it turned out ultimately to be

1 benign, but some invasion, we have no evidence of any
2 of that.

3 And, again most reluctantly, I don't
4 believe there is evidence to show negligence in the
5 manner of spraying. There is a deficiency in cause
6 and effect between the spraying and the untoward
7 effects that even these other persons suffered, and I
8 have no idea what the nature of their "illness" was.
9 It is just too much in the order of speculation to
10 allow a jury to conclude. And then finally in this
11 instance the time relationship of the emotional dis-
12 tress which apparently built up over a period of time
13 after the birth of the child, and apparently was
14 fed by various TV programs and so forth, all of which
15 were following the event of birth, which was a con-
16 siderable period of time after all of the events
17 chargeable to these defendants.

18 So, again, with a great deal of reluctance,
19 but in the exercise of what I consider the intellectual
20 honesty that is required, I have to grant the directed
21 verdict, motion for directed verdict for Orkin
22 Exterminating Company.

23 MR. BOLDEN: Thank you.

24 THE COURT: I have not attempted to
25 cover exhaustively all of the reasons, and I will simply

1 leave it to counsel to, when and if this matter goes
2 up on appeal, to review all of the various elements
3 that were involved in this case.

4 I had particular concern, just to go back
5 and add what I can, I had particular concern over the
6 lack of evidence with relation to the effect of -- the
7 most possible effect of Diazinon as a teratogenic
8 substance, because it seemed to rely almost completely
9 on Dr. Epstein's interpretation of the literature, and
10 by his interpretation we were left to conclude that
11 it did not really matter how much exposure there might
12 have been by Mrs. McConnell to Diazinon. And, the
13 evidence appeared to be, in the light most favorable
14 to the plaintiff, that on the critical date, December
15 7, 1978, at the very most Mrs. McConnell might have
16 entered the premises to get her paycheck, she might have
17 been on the premises as much as one hour, most likely
18 in the area where the personnel office was, considered
19 in the light most favorable to the plaintiff, Mr. Todd
20 -- Dr. Todd's testimony would indicate that this sub-
21 stance was immediately generated throughout the entire
22 premises, and that it was probably at a concentration
23 level of .2, and I have forgotten what the formula is,
24 but, .2, a concentration level which is so far below
25 the levels at which there was any effect on rats that

1 I just could not allow a jury to conclude, nor could
2 I conclude, that there was any evidence of the defective-
3 ness of this product.

4 There are many other things that I could
5 cover, but I think I had better just leave it at that
6 and leave it to counsel to expound in future pro-
7 ceedings.

8 I will have to call the jury back in, and
9 I feel an obligation to explain to the jury, even if
10 only briefly, what I have done and why.

11 If counsel have any objection, you had
12 better so state now.

13 Bring the jury in.

14 (Whereupon the jury entered the courtroom
15 at 12:28 p.m.)

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