

EVIDENTIARY ISSUES IN TBI CASES – DAUBERT MOTIONS

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This article will address Motions in cases of Traumatic Brain Injury (TBI) seeking to suppress neuropsychological testing and testimony, and Positron Emission Tomography (PET) testing and testimony. We will also examine how to use *Daubert* to attack defense experts in TBI cases.

A. Codification of Daubert Trilogy

In 1993, the United States Supreme Court altered the way Federal courts consider the admissibility of scientific evidence, *Daubert v Merrell Dow Pharmaceuticals, Inc.*¹ In 1997 and 1999 the Supreme Court refined the *Daubert* decision in *General Elec. Co. v Joiner*,² and *Kumho Tire Co. Ltd. V Carmichael*.³ The *Daubert*, *Kumho Tire*, and *Joiner* cases became, what is fondly referred to as, the “*Daubert* trilogy.”⁴ In those decisions, the Court required trial judges to serve as gatekeepers who would exclude unreliable expert testimony whether of a scientific or non-scientific variety.

1. Daubert

In *Daubert*, the Court listed a number of non-exclusive factors, which trial courts should assess in determining reliability of proposed scientific evidence. They include: (1) whether the expert's methodology has been tested, (2) whether the methodology has been published and subjected to peer review, (3) the method's rate of error when it has been applied, (4) the existence of standards and controls, and (5) whether the methodology or principle is generally accepted in its field.

2. Kumho Tire

The Court, in *Kumho Tire*, extended the same list to offers of non-scientific, expert testimony where appropriate, but added that courts should consider other reliability criteria where the *Daubert* factors are inappropriate.

3. Joiner

In *General Electric v Joiner*, the Court found that District court decisions on the admissibility of expert testimony are reviewed on appeal with an abuse of discretion standard.

4. FRE 702

The December 2000, amendments to Federal Rule of Evidence 702 codify *Daubert* and *Khumo Tire*. That Rule, as of 2008, states:

¹ *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 U.S. 579 (1993).

² *General Elec. Co. v Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L.Ed.2d 508 (1997).

³ *Kumho Tire Co. Ltd. V Carmichael* 526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999).

⁴ See, *The Daubert Trilogy and the States*, 44 *Jurimetrics* 351 (Spring 2004), *Berger*, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, Reference Manual on Scientific Evidence, 2d Ed., Federal Judicial Center 2000.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (Emphasis added)

The Committee notes on the proposed revision state:

While the admissibility of such evidence is, and remains, subject to the general principles of Rule 403, the revision requires that expert testimony be "reasonably reliable" and "substantially assist" the fact-finder. The rule does not mandate a return to the strictures of *Frye v. United States*, 293 F.2d 1013 (D.C. Cir., 1923) (requiring general acceptance of the scientific premises on which the testimony is based). However, the court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder. In civil cases the court is authorized and expected under revised Rule 26(c)(4) of the Federal Rules of Civil Procedure to impose in advance of trial appropriate restrictions on the use of expert testimony. In exercising this responsibility, the court should not only consider the potential admissibility of the testimony under Rule 702 but also weigh the need and utility of the testimony against the time and expense involved.

5. Federal Reference Manual on Scientific Evidence

The Federal Judicial Center distributed the *Federal Reference Manual on Scientific Evidence*⁵, to all Federal Judges. The Chapter entitled *Reference Guide on Medical Testimony*, page 479, states,

While this reference guide does not propose legal standards to govern admissibility of medical evidence, it does provide a framework for legal analysis by describing the scientific and professional practices of physicians as they perform their professional duties and offer opinions on diagnosis, treatment, and internal and external causation.”

6. Daubert Motions

State Courts are responding to the trickledown effect of the Supreme Court rulings by adopting them, not adopting them or adopting portions of them. Therefore, plaintiff trial lawyers must understand how to deal with *Daubert* type motions since they will influence the evidence and proof presented to the jury and ultimately the case outcome. They must carefully review the specific state law to determine how, and to what extent, the jurisdiction has adopted, or not adopted, *Daubert*, *Joiner* and *Kumho Tire*, and whether their particular state’s evidentiary code differs from Federal Rule of Evidence 702. See, *The Daubert Trilogy and the States*, 44 *Jurimetrics* 351 (Spring 2004).

If you have handled a traumatic brain injury case then the chances are high that you have seen defense motions to exclude evidence. Those motions seek to exclude or limit evidence. They include:

⁵ Federal Judicial Center, *Reference Manual on Scientific Evidence*, 2d.ed., 2000.

1. Neuropsychological Opinions,
2. Positron Emission Tomography Tests,
3. Biomechanical Evaluations,
4. Duplication of Expert Opinion,
5. Duplication of Witness Testimony,
6. Vocational Rehabilitation Assessments,
7. Economic Evaluations, and
8. Life Care Plans.

To combat these efforts to devalue plaintiff's case, lawyers need to know the science and law. This familiarity is essential to the creation of good law and prevention of bad law. We now turn to the issue of neuropsychological testing.

B. Neuropsychological Testing

The effect of *Daubert* and its progeny on Motions seeking to limit or exclude expert neuropsychological testimony and evidence is evolving as State Court's deal with these issues.

Trial and appellate courts, in following Federal Rule 702 and *Daubert's* progeny, will look very closely at the issues of sensitivity, specificity, reliability, and validity of neuropsychological tests utilized and administered. Similar arguments and analyses, on the way to proving general acceptance in the scientific community, show up in jurisdictions employing the older 1923 *Frye* test⁶. In either case, providing the court with more scientific information is essential. We are seeing courts scrutinize the qualifications of the expert neuropsychologist and the methodology she employs in arriving at her conclusions.

A 2007 Federal Ruling in the *Bado-Santana, et. al. v. United States District Court for the District of Puerto Rico*⁷, found that plaintiff's expert was qualified under Fed. R. Evid. 702 to render expert testimony on Mild Traumatic Brain Injury (MTBI) where the record showed that the expert was sufficiently experienced, trained, and educated to render expert testimony on MTBI. The court stated:

Rule 702 imposes "a gate-keeping function on the trial judge to ensure that an expert's testimony 'both rests on a reliable foundation and is relevant to the task at hand.'" *United States v. Mooney*, 315 F.3d 54, 62 (1st Cir. 2002) (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993))⁸...

The Rule 702 inquiry is a "flexible one, and there is no particular procedure that the trial court is required to follow in executing its gate keeping function under *Daubert*." *United States v. Diaz*, 300 F.3d 66, 74 (1st Cir. 2002) (citing *Daubert*, 509 U.S. at 594))⁹...

The Court in *Daubert* suggested several factors to consider in assessing an expert's reliability: (1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and

⁶ *Frye v United States*, 293 F. 1013; 1923 U.S. App. LEXIS 1712; 54 App. D.C. 46; 34 A.L.R. 145 (D.C. 1923)

⁷ *Bado-Santana, et. al. v. United States District Court for the District of Puerto Rico* 482 F. Supp.2d 192, 2007 U.S. Dist. LEXIS 29117 (D.P.R. 2007)

⁸ *Bado, supra*, 482 F. Supp.2d 192 at 194.

⁹ *Bado, supra*, 482 F. Supp.2d 192 at 194.

publication; (3) the techniques known or potential rate of error; and (4) the level of the theory or techniques acceptance within the relevant discipline.¹⁰ ...

These factors, however, are not definitive or exhaustive, and the trial judge enjoys broad latitude to use other factors to evaluate reliability. [*Daubert* at 196]¹¹ ...

The *Bado-Santana*¹² defendant, Ford Motor Co., filed a *motion in limine*, to preclude neuropsychologist, Dr. Margarida, from testifying that plaintiff, Tatiana Cortez, suffered mild traumatic brain injury. The case arose from an automobile accident in May 1999 where a Ford Explorer over-turned and Carlos Bado, the driver, died. Bado left behind his then pregnant girlfriend, co-plaintiff Tatiana Cortez, who was a passenger, and his daughter, who was born after the accident, co-plaintiff Carolina Bado-Cortez. Plaintiffs sued defendant car manufacturer for damages suffered from the automobile accident and claimed that the accident resulted from the manufacturer's negligence in manufacturing the vehicle. The manufacturer moved in limine to preclude the girlfriend from presenting all evidence at trial that she suffered Mild Traumatic Brain Injury because of the car accident.

1. "M.D." Qualification Argument

The manufacturer moved *in limine* to exclude the expert's testimony on grounds that she was not qualified to testify about Mild Traumatic Brain Injury (MTBI) and her opinion was based on flawed methodology. The court ordered a *Daubert* hearing and found that the expert was qualified to render expert testimony on MTBI. The fact that she was not a neurologist or physician did not resolve whether she was qualified to render expert testimony on MTBI. (*physician v non-physician argument*). The American Psychological Association stated that neurological examinations were limited in their capacity to detect brain damage and that neuropsychological testing was the only means of diagnosing some forms of brain damage. Moreover, the record in the case showed the expert was sufficiently experienced, trained, and educated to render expert testimony on MTBI.

2. Admissibility v. Weight Argument

The methodology underlying the proffered expert testimony was scientifically valid and could have properly been applied to the facts at issue. This was true, the court found, even where the expert did not interview the girlfriend's treating psychiatrist and psychologist. (*Failure to review prior condition argument that goes to weight not admissibility*) The court stated that challenges to the methodology used by an expert witness were usually and adequately, addressed by cross-examination. Hence, the court denied manufacturer's motion in limine.

3. Causation Argument

Another issue we see the trial court dealing with is whether a neuropsychologist, who is not a "medical doctor," can testify as to whether the mental impairments he measures are caused by a particular event. The Supreme Court of Florida in *Grenitz v Tomlian*¹³, addresses the issue.

Grenitz, Id., was Petitioners', a doctor and a hospital, petition for review of a decision by the District Court of Appeal, Fourth District (Florida), reversing a jury verdict for the

¹⁰ *Bado, supra*, 482 F. Supp.2d 192 at 196.

¹¹ *Bado, supra*, 482 F. Supp.2d 192 at 196.

¹² *Bado, supra*, 482 F. Supp.2d 192.

¹³ *Grenitz v Tomlian* 858 So.2d 999 (Fla. 2003).

defense in an action brought by respondent, a brain-injured child. The lower trial court refused to admit testimony by the child's expert neuropsychologist as to the cause of the child's brain damage. The intermediate court's decision reversing the trial court conflicted with decisions of other district courts.¹⁴

The child's expert, a non-physician neuropsychologist, could not give testimony as to why the injury had not occurred weeks prior to the child's birth. The state's highest court found that the intermediate court had achieved the correct result for the wrong reason. The trial court did not err in disallowing the expert's testimony as to the medical causation of the child's brain damage. The trial court erred in limiting the expert's testimony as to 1) brain and behavioral development and, 2) the relationship of behavioral and functional patterns to human brain development, which was within the witness's expertise. The state's highest court based its holding on the expert's credentials, not the definition of the practice of psychology in Florida's Statute.

The intermediate court's result was approved, but the reasoning was disapproved to the extent that it was inconsistent with the state's highest court's opinion. The decisions of the other districts were approved to the extent that they were consistent with the state's highest court's decision. The case was remanded to the intermediate court with instructions to reverse the final judgment and remand the case to the trial court for a new trial.

Similarly, the Circuit Court Judge in *McCarthy v. Atwood*¹⁵, ruled on plaintiff's *motion in limine* to exclude the opinion of a neuropsychologist, hired by the defendant, who evaluated the plaintiff. The injured plaintiff allegedly suffered a head injury in a motor vehicle accident and sued defendant driver. Pursuant to a motion by the driver, the injured party was ordered to submit to a medical examination.

The injured party filed a motion *in limine* concerning opinions by the expert regarding the examination seeking to exclude the testimony of a neuropsychologist concerning the cause or extent of his brain injury and resulting cognitive dysfunction and memory loss. The appellate court concluded that the expert could render medical opinions as to the injured party's mental ailments, conditions, and diseases as well as the relationship between his conduct and such ailments, conditions, and diseases, assuming that the driver showed the relevance of such opinions. However, the expert could not render an opinion that the injured party did or did not sustain a mild traumatic brain injury since such an opinion concerned the causation of a physical human injury. A medical doctor, the court reasoned, could only render such testimony, not a psychologist.

4. Observations

These recent court rulings¹⁶ reveal some of the current trends of evidentiary motions and neuropsychological issues. Exclusions of neuropsychological evidence must meet

¹⁴ *GIW Southern Valve Co. v Smith*, 471 So.2d 81 (Fla. Dist. Ct. App. 1985), and *Bishop v Baldwin Acoustical & Drywall*, 696 So. 2d 507 (Fla. Dist. Ct. App. 1997).

¹⁵ *McCarthy v. Atwood* 67 Va. Cir. 237 (2005).

¹⁶ *Santana, et. al. v. United States District Court for the District of Puerto Rico* 482 F. Supp.2d 192, 2007 U.S. Dist. LEXIS 29117 (D.P.R. 2007); *McCarthy v. Atwood* 67 Va. Cir. 237 (2005). *Grenitz v. Tomlian* 858 So.2d 999 (Fla. 2003); *McCarthy v. Atwood* 67 Va. Cir. 237 (2005).

reliability thresholds and relevancy thresholds. What each of those thresholds is can be determined by the court. The issue, whether a neuropsychologist can state opinions as to medical causation, appears, in courts that have made rulings, to be that they cannot. They can however opine about the existence and extent of mental conditions. It is wise to have a medical doctor (neurologist or psychiatrist) to testify as to causation and to point to the neuropsychologist for opinions of actual impairment levels.

C. Positron Emission Tomography

The most frequently studied biological process has been energy metabolism. Positron Emission Tomography (PET) measures this process and hence brain function. This is primarily because energy metabolism is closely linked to brain function, although in a very complex way. Energy metabolism and, therefore, brain function, is revealed through the study of three components of energy, which are normally physiologically coupled. These components are glucose metabolism, oxygen metabolism, and cerebral blood flow. Glucose metabolism is studied through the use of an analogue of glucose (i.e. deoxyglucose) labeled with a radiotracer such as Flourine-18 or Carbon-11. Oxygen metabolism is investigated with the use of Oxygen-15, and cerebral blood flow with Oxygen-15 labeled water. Because it is a tracer method, PET has the distinct advantage of being thus far the best modality for the detection of a wide variety of biochemical processes. In fact, it's only limitation is chemical ingenuity and its inherent high sensitivity. Furthermore, one of its advantages is that PET has a high degree of quantification accuracy regarding changes pre- and post- intervention in brain regions with altered brain perfusion or metabolism. Unfortunately, interpretable PET data are almost never available for any individual prior to the incident, behavior or brain insult that led to the legal proceeding. Nevertheless, in current standardized settings, rigorously defined, PET data are very reproducible.

PET accurately localizes signal sources, thereby more closely identifying regions of the brain in terms of anatomy and function. Its most important application to date has been to map the hemodynamic responses to defined cognitive and affective stimuli to determine the anatomical loci sub serving specific brain functions in the cognitive, behavioral, and affective domains. The grossly oversimplified underlying assumption has been that cognitive functions are located in focal brain regions, though in fact that is unlikely the whole picture. Evidence from brain studies points to the notion that most complicated behavioral and psychological processes are not located in a single brain center. Neuronal circuitry regarding any one cognitive operation most likely extends into more than one circuitry, though in fact the concept of "localization" may refer to functions causally connected to specific neuronal circuits.

1. Literature

In 1990, the American Association of Neurology published a paper.¹⁷ Almost 20 years ago, the AAN stated: "The role of PET in the evaluation of head trauma has not currently been established." This statement is not grounds to exclude PET although defendants, when cited in their Motions in limine, frequently rely on it.

¹⁷ *Assessment: Positron Emission Tomography*, Neurology, 41:163-167 1991.

Since the AAN paper, much literature has been published supporting the reliability of PET. For example a 2003 paper, *A study of persistent post-concussion symptoms in mild head trauma using positron emission tomography*,¹⁸ was published stating,

Positron emission tomography (PET) using 2-[F-18]fluoro-2-deoxyglucose (FDG) in head injured persons with normal neuroanatomical scans has also indicated hypometabolism in frontal and temporal brain regions, with which deficient neuropsychological performance and post-concussion symptoms can be correlated.

Humayun found “...mild CHI patients even without discernible lesions can have glucose metabolic abnormalities that are consistent with their neuropsychological deficits.”¹⁹ Ronald Ruff, Ph.D., a distinguished neuropsychologist in San Francisco, correlated PET with neuropsychological findings²⁰. Many other studies, conclusions, and papers, published with similar correlations.²¹

Three current articles reaping the findings of prior studies are: the 2003 article *Neuroimaging in Patients with Head Injury*,²² a 2004 article entitled *2-Deoxy-Fluoroglusose-Positron Emission Tomography Imaging of the Brain: Current Clinical Applications with Emphasis on the Dementias*,²³ and the 2005 article *Functional Neuroimaging and Cognitive Rehabilitation for People with Traumatic Brain Injury*²⁴. The references and citations in these articles contain a wealth of support for the admissibility of PET in traumatic brain injury cases.

The future goals of PET imaging in brain injury patients was recently delineated. PET studies are required to detect ischemic lesions that develop soon after head trauma and help to clarify the significance of ischemia both clinically and pathophysiologically in these patients. PET can also be used to diagnose patients with diffuse axonal injury in order to determine the extent of damage and

¹⁸ S H A Chen, D A Kareken, P S Fastenau, L E Trexler, G D Hutchins, *A study of persistent post-concussion symptoms in mild head trauma using positron emission tomography*, *J Neurol Neurosurg Psychiatry* 74:326–332 (2003).

¹⁹ M.S. Humayan et al., *Local Cerebral Glucose Abnormalities in Mild Closed Head Injured Patients with Cognitive Impairments*, *Nucl Med Com* 10:335-344 (1989).

²⁰ R.M. Ruff et al., *Selected Cases of Poor Outcome Following a Minor Brain Injury: Comparing Neuropsychological and Positron Emission Tomography Assessment*, 8(4) *Brain Injury* 297 (1994).

²¹ For eg., see, Therapeutics and Technology Assessment Subcommittee, American Academy of Neurology, *Assessment: Positron Emission Tomography*, 41 *Neurology* 163 (1991); M.A. Roberts et al., *Neurobehavior Dysfunction Following Mild Traumatic Injury in Childhood: A Case Report with Positive Findings on Positron Emission Tomography (PET)* 9(5) *Brain Injury* 425 (1995); Newberg and Alavi, *Neuroimaging in Patients with Traumatic Brain Injury*, *Journal of Head Trauma Rehabilitation* (December 1996); Alavi et al., *Metabolic consequences of acute brain trauma: Is there a role for PET?* *J Nucl Med* 37:1170-1172, 1996; ; N. Fontaine et al., *Functional Anatomy of Neuropsychological Deficits after Severe Traumatic Brain Injury*, 53 *Neurology* 1963 (1999); M. Bergsneider et al., *Disassociation of Cerebral Glucose Metabolism and Level of Consciousness During the Period of Metabolic Depression Following Human Traumatic Injury*, 17(5) *J. Neurotrauma* 389 (2000);

²² Newberg & Alavi, *Neuroimaging in Patients with Head Injury*, *Semin Nucl Med*, vol XXXIII, no.2 (April), 2003: 136-137.

²³ Va Heertumm et al, *2-Deoxy-Fluoroglusose-Positron Emission Tomography Imaging of the Brain: Current Clinical Applications with Emphasis on the Dementias*, *Semin Nucl Med* 34:300-312, 2004.

²⁴ Strangman et al, *Functional Neuroimaging and Cognitive Rehabilitation for People with Traumatic Brain Injur*, *Am. J. Phys. Med. Rehabil.* Vol. 84, no.1.

prognosis. PET studies may help delineate reversible and irreversible lesions in order to direct therapeutic interventions towards preventing further damage.²⁵

Clearly, the assessment of PET was developing within a few years of the AAN paper. The AAN's failure to reassess its 1991 paper is not grounds to omit PET in traumatic brain injury cases.

2. Cases

Early cases dealing with PET include *People v. Weinstein*,²⁶ *Hose v Chicago Northwestern Transp. Co.*,²⁷ *Penney v. Praxair*,²⁸ *U.S. v. Gigante*, , *U. S. Mezvinsky*. Only the 1997 case of *Hose* permitted the PET evidence. However, each of the other cases had specific distinctions from *Hose* that actually reveal how PET is useful when used appropriately. In *Hose*, the Eight Circuit noted:

There is also no question that the PET scan is scientifically reliable for measuring brain function.²⁹

A 2006 New York case, *Brown v. Allerton*,³⁰ reveals that state's reliance on legislative enactments:

In an action in which a claim for personal injuries is asserted, an X-ray, magnetic resonance image, computed axial tomography, *positron emission tomography*, electromyogram, sonogram or fetal heart rate monitor strips of any party thereto is admissible in evidence. (L.1993, c. 482 Legislation) (Emphasis added)

One must review the literature and science of using PET to educate Judges about how far from the 1991 AAN paper medicine, science and the law has come. The idea is to “corroborate” the existence of brain injury with other diagnostic tests and medical testimony. It is not a standalone test but is useful to the jury in understanding issues of brain injury and its effects on your client.

D. Final Comments

The rules of evidence, state precedents, and individual court's interpretation of issues in TBI cases will continue to evolve. The crucial thing to be aware of is the latest scientific literature and how courts have applied, or not applied, *Daubert*. The correlations between PET and neuropsychological findings go a long way in corroborating traumatic brain injury. When used with other evidence and testimony from qualified medical experts as to causation, they go a long way in communicating your client's injury to wary defendant, his insurance company, and their lawyers.

Being a good neurolawyer requires this scientific and legal knowledge not only to defend *Daubert* type motions but also to initiate them. Successful motions are filed around the country excluding bad scientific methods utilized by overzealous defense experts. For instance in

²⁵ See, footnote 22 herein.

²⁶ *People v. Weinstein*, 156 Misc.2d 34, 591 N.Y.S.2d 715 (N.Y. Sup. Ct. 1992).

²⁷ *Hose v Chicago Northwestern Transp. Co.*, 70 F.3d 968, 43 Fed. R. Evid. Serv. 446 (8th Cir. 1995).

²⁸ *Penney v Praxair, Inc.*, 116 F. 3d 330, 47 Fed R. Evid. Serv. 277 (8th Cir. 1997).

²⁹ *Hose*, 70 F.3d 968, 973.

³⁰ *Brown v. Allerton*, 2006 NY Slip Op 52092U; 13 Misc. 3d 1232A; 831 N.Y.S.2d 351; 2006 N.Y. Misc. LEXIS 3169

Florida, this motion seeking to exclude the “fake bad scale,” created by Dr. Paul Lees-Haley was successfully invoked:³¹

The “Fake Bad Scale” (FBS) is unreliable and does not pass the standards set forth in *Frye v. U.S.* for the reasons set forth fully herein and highlighted as follows:

- 1) The FBS is biased against women, those with psychological problems and the truly disabled;
- 2) This FBS has been rejected at least twice by courts in Hillsborough County for failing to meet the Frye standards.
- 3) The FBS is unreliable and therefore unscientific because there is no uniform agreement as to the appropriate cut-off score to be used;
- 4) The FBS has not been proven to be reliable or scientific because it has not been subjected to independent review by the “Buros Mental Measurement Test Evaluation System.”
- 5) The FBS is unreliable because it scores points towards malingering or exaggerating when a patient acknowledges true symptoms of physical injury or psychological distress,
- 6) The FBS is unreliable because unlike every other scale in the MMPI-2, there is no scoring or administration manual for the FBS ,
- 7) The FBS is highly controversial with no general acceptance reached among the authors of the MMPI-2, the American Psychological Association, or the practicing neuropsychologists who utilize validity tests

Using Daubert motions offensively by plaintiff, in addition to opposing and defending those made defensively, will create good law and prevent bad law for future courts to consider in their rulings.

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