

What if Nobody Came to the Panic-demic?

By Scott Freeman, DRI Pacific Region Director

5:00 a.m. My wife and I are roaming a Walmart Supercenter searching for provisions. Like the two stores we hit earlier, the shelves are eerily bare of essentials. We are far behind the prepper curve. As despair grows, we notice an excited mob of Walmart shoppers descending upon a heavily laden cart in the dairy section. I slip in and score a box of 50 eggs. Our family of six will eat, at least a little while longer.

Have I inserted my family into a scene from a retreaded Hollywood flick about a dystopian future? No, this was March 2020 in Phoenix, Arizona, shortly after the coronavirus panic had set in. We were caught flatfooted, but we were determined to catch up.

It was then when my wife uttered those fateful words I had longed to hear her say, “I want a large-capacity freezer for our garage.” After a quick search, however, I determined that everyone within a 150-mile radius already had that same brilliant idea. But, then I found one! It was the lone floor display model at a Home Depot, three-and-a-half hours away, in Show Low, Arizona. The last freezer in the state! I bought it on the spot over the phone and promised to retrieve it the next day.

My wife gave me the “How do you think you’re going to bring home a 20 cubic foot freezer from the White Mountains of Arizona where snow storms are imminent?” look. I answered her stare with an impassive, “Not a problem. I will haul it back in my pickup.” My “pickup” is a 50-year-old Ford F100—with 15-year-old tires. “As long as you are current on the life insurance premium,” she said, “go for it.”

And I did. After a few days of scavenging, we had that thing filled with bacon, ribeyes, and flour: a family’s near-term survival secured.

What does this have to do with DRI? Stay with me. The dramatic epiphany is coming.



Later, I tried impressing my mechanic with my dire tale: a long drive on slick, snow-covered roads, highway speeds, a heavy load in the box, ancient truck, ancient tires, my family’s welfare riding with me. His reaction left me nonplussed. You see, he knew there was absolutely no added drama or peril to my adventure. The inline super-six engine in my Ford had outlived my dad, and it would outlive me, too. And those tires, they were quality Michelins, in great shape, with plenty of tread. They would go tens of thousands more miles. No big deal.

I barely remember when my dad brought home that truck 50 years ago, but I distinctly remember when I bought those tires 15 years ago. At that time, my law firm was doing a lot of defense work for tire manufacturers. We were coming off the crest of the Ford–Firestone litigation, and the plaintiffs’ bar had their arguments in high form. They had experts who would literally wear white coats in the courtroom and don special tire handling gloves,

lest they be harmed by the “death tire” in their presence. Plaintiffs’ experts spouted numbers and referred to charts, graphs, tests, and other “science-y” sounding stuff. To them, all tires were the same because they were black and round, and, to them, all tires should have a *six-year* expiration date. After all, they would say, “if it saves just one life....”

Thankfully, the manufacturers—and their defense lawyers—fought back, and won. All tires might be black and round, but tires were nevertheless different in important ways. The seemingly impressive charts and graphs signified nothing: correlation does not imply causation. *Daubert* motions exposed the “science” as junk.

My conversation with my mechanic was not the only thing that prompted me to reminisce about tire litigation. Not long after we had our freezer stocked, I sat at home for nearly a month in mandated isolation. My wife had become ill and

tested positive for COVID-19. During that period, and thereafter, I took in a lot of press conferences and read a lot of media accounts about the pandemic. The media was advocating that public officials craft policy according to “science” and “experts.” Charts, graphs, and “curves” were regularly displayed. Schools were suddenly closed to in-person learning, which meant our four elementary school students were home with us. People’s businesses were crushed by confusing and logically confounding rules. Mask wearing was imposed. Only providers of “essential” services were permitted to go to work while everyone else was confined at home. The precautionary principle was being profusely applied.

Current events had a ring of familiarity.

Many defense lawyers have handled expert-laden disputes, often involving scientific principles, and not just those of us who have handled “tire aging” claims. We are in a unique position to help the public differentiate between actual science and something that just sounds technical or beyond the ken. We are also familiar with the pitfalls of appeals to authority and can foster an understanding of the confines of expertise, assuming it even exists, as to the specific question at hand. Objection: Lacks Foundation, Speculation. Sustained. The Jury Will Disregard.

A goal of science is to gain an understanding of the natural world through the rigorous application of the scientific method. Basically, the scientific method involves testing a hypothesis through robust, controlled, repeatable, independently verifiable experiments. The results of these experiments can confirm, reject, or tell us nothing about the hypothesis. The conclusions, if any, and no matter the variety, invite more hypotheses, more questioning, and more experimenting. The process is humbling; the inquiry ceaseless.

In our current situation, we, as defense lawyers who are trained to question “scientific” claims, can help the public discern whether policy decisions are actually supported by science, and point out that much uncertainty remains. What is the scientific basis for claiming that mask-wearing works? We know that the CDC recommends mask wearing to prevent the spread of COVID-19, but we should still examine the science that has backed those pronouncements. Are lockdowns effective? How has that been tested? Can we determine when a jurisdiction imposed a lockdown simply by looking at testing or other data? Why or why not? And why is the local watering hole shuttered while the trendy microbrewery across the street remains open? We should continue to apply the scientific method to scrutinize these matters.

A more critical and measured approach to the issues we face could go a long way toward dispelling fears and could help us comprehend the limited extent of our knowledge. We are not going to know it all or have a “solution” to every challenge. But, those limitations do not perforce the acceptance of speculation or submission to the precautionary principle—a plaintiffs’ personal injury lawyer’s utopia.

What happens when we give in to speculation and fear? We can lose a lot more than our liberty, our businesses, our children’s education, or our sanity. We can lose lives. Public health officials in Arizona already are sounding the alarm about a significant increase in suicides seen in the emerging data. Is this spike related to the virus, the reaction to the virus, or something else? We do not yet know. Also hidden in the background are people like my sister. She died in June after spending nearly six weeks in medical facilities. She died after a delayed diagnosis of an otherwise treatable condition. She died after weeks of isolation from her family, in a vulnerable condition, suffering needlessly. Her “one life” was not lost because of the COVID-19 virus, but because of our reaction to it. Was that reaction rational?

A lot of pain and suffering has resulted from this virus. It has killed many vulnerable to it. A rigorous and robust application of the scientific method can help us understand this virus, dispel fear, and avoid panic. Sound policies can be built on such knowledge. We are fortunate to be a part of an organization filled with friends and colleagues who understand and promote a critical and constructive approach to problem solving. Our clients seek us out for those skills, and now, perhaps more than ever, the public can benefit from our training and experience.

What if nobody came to the panic-demic? Either way, many of us would still be dealing with the effects of a devastating pandemic and related loss. But, maybe some of us would not have needed that garage freezer. Maybe some of us would be back earning a living or in school. And maybe a few of us might have that “one life” saved.

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The opinions expressed herein are those of the author and do not necessarily reflect the position of DRI.