

Dewayne Johnson v. Monsanto: What Does the Future Hold for Technology in Agriculture?

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On August 10, 2018, a California jury found that Monsanto knew that the widely-used active ingredient in Roundup, glyphosate, is dangerous and failed to warn consumers about the danger. The trial court in San Francisco ordered Monsanto to pay \$289 million in damages (\$39 million in compensatory and \$250 million in punitive) to a man who claimed glyphosate had caused his cancer, non-Hodgkins Lymphoma (NHL), from which he expects to live only a few more months. Monsanto has indicated it will appeal the result. [[Dewayne Johnson v. Monsanto](#), No. CGC-16-550128.]

The rules by which expert testimony was admitted in the case and presented to the jury raise important public policy considerations for industry, public regulators, and the public, specifically in determining the duty owed by the government to keep the public safe from possible harm from agriculture technology, in this case glyphosate. Closely related to this question is determining the public's expectation and tolerance for exposure to environmental harms, as well as the public's understanding of the challenges that will need to be overcome to feed a growing world population.

Thus, in an uncertain regulatory environment, there is a question of whether it will be possible for industry to sell such products as glyphosate to support the large-scale agriculture needed to feed the world. More than 5000 lawsuits have been brought against Monsanto alleging harm from the use of glyphosate. Monsanto asserts more than 800 peer-reviewed academic studies support the conclusion that glyphosate is safe if used in accordance with its label. And, some public agencies have found the use of glyphosate does not cause cancer, only that there is a correlation with the occurrence of cancer. Given this situation, is there a business model for Monsanto to continue profitably selling glyphosate in light of this uncertainty? If not, are there viable alternatives? What if glyphosate disappears from the market? What will be the impact on large-scale agriculture?

Although the result in [Dewayne Johnson v. Monsanto](#) implicates each of these important public policy questions, this note is limited to laying out the legal foundation brought out in the court proceedings that bring these questions to the fore.

Legal Proceedings

In 2016, California filed a petition to list glyphosate, as a chemical "known to the state to cause cancer" in accordance with the state Safe Drinking Water and Toxic Enforcement Act. The state's decision to list glyphosate was based on a report issued by the International Agency for Research on Cancer (IARC) of the World Health Organization, which classified the chemical as a "probable human carcinogen". Monsanto sued in state court to block the listing. On March 10, 2017, the court upheld the validity of the state's decision to list glyphosate. See [Monsanto v. Office of Environment Health Hazard Assessment](#). Following this decision, Dewayne Johnson sued Monsanto for damages for the cancer he alleged he contracted from exposure to glyphosate.

The heart of this case turned on a battle over the admissibility of conflicting expert testimony on epidemiology, toxicology, genotoxicity, and causation more generally. Each side claimed the studies relied on by the opposing experts were improperly conducted and should not have been admissible as

evidence. The Court explained that in California, it is “very difficult to exclude” expert opinion founded on peer review studies. It is for the jury to assess the credibility of the conflicting evidence. (Arizona follows a similar rule for handling admissibility of expert testimony, Arizona Rule of Evidence #702, Testimony by Expert Witnesses; and for the role of the jury in weighing expert testimony, see State v. Pandeli, 242 Ariz. 175 (2017)).

As a result, the expert testimony introduced into evidence by both parties was put before the jury for its consideration. The court instructed the jury how to assess the expert testimony as a matter of law:

“You do not have to accept an expert’s opinion. As with any other witness, it is up to you to decide whether you believe the expert’s testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert’s testimony.”

Among other things, the jury found both that glyphosate was “a substantial factor in causing harm to Mr. Johnson”, and that it had “potential risks that were known or knowable in light of the scientific knowledge that were generally accepted in the scientific community.” The verdict in favor of Johnson flows directly from these key findings. It is important to note there was no finding that the glyphosate actually caused the cancer, only that it was a “substantial factor” in causing harm.

Aftermath

A Vice-President for Monsanto, Scott Partridge, issued a public statement following the jury’s verdict in the case which included the following comment:

“The jury’s opinion does not change the science. Glyphosate has a more than 40-year history of safe use. Over those four decades, researchers have conducted more than 800 scientific studies and reviews that prove glyphosate does not cause cancer. The National Institutes of Health and the Joint FAO/WHO Meeting on Pesticide Residues both recently reaffirmed glyphosate does not cause cancer. The U.S. Environmental Protection Agency and other regulatory authorities in Europe, Canada, Japan, Australia, Korea, and elsewhere routinely review all approved pesticide products and have consistently reaffirmed that glyphosate does not cause cancer.”

Given the law on admissibility of expert testimony, it is not clear that resorting to supporting science will be enough to carry the day for Monsanto and glyphosate. Bayer, the German pharmaceutical and agriculture technology giant, recently completed the acquisition of Monsanto. The business community’s initial reaction to the verdict is reflected in an 18% drop in Bayer’s stock in the week following the jury verdict. While the facts were different in more than 5,000 previous cases challenging the safety of glyphosate, the result in Dewayne Johnson raises the question about the future viability of the product in the marketplace. The situation poses a serious challenge for Bayer/Monsanto. It also calls for serious reflection by public officials and the public at large about human safety and health and what it will take to maintain agriculture at the level necessary to feed the world.

Update – Bayer Could Win a New Trial for Roundup

On October 10, 2018 a California judge issued a tentative ruling for a new trial on the proposed punitive damages awarded to Dewayne Johnson. If finalized, the ruling would grant a motion by Bayer arguing that the evidence did not prove the company intended to harm the plaintiff.