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NEW JERSEY SUPREME COURT ADOPTS *DAUBERT* (MORE OR LESS) FOR CIVIL CASES

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Although regarded by many as a relatively plaintiff-friendly court, the New Jersey Supreme Court recently bucked the stereotype by largely adopting *Daubert* for civil cases. The court's decision in *In re: Accutane Litigation* is a behemoth, weighing in at 85 pages (not including the syllabus), but the background and outcome are pretty straightforward.

The decision arises out of claims brought by more than 2,000 plaintiffs who allege that the acne drug Accutane caused them to develop Crohn's disease. Because multiple epidemiological studies consistently have concluded that Accutane does not cause Crohn's disease, the defendants sought a hearing to evaluate the admissibility of the plaintiffs' expert testimony on causation. In particular, the defendants challenged the testimony of two of the plaintiffs' experts—Dr. Arthur Kornbluth, a gastroenterologist, and Dr. David Madigan, a statistician.

Dr. Kornbluth both explained why he had concluded that there is a causal relationship between Accutane use and Crohn's disease and attempted to poke holes in the epidemiological studies that had found no such relationship. Dr. Madigan focused solely on trying to neutralize the epidemiological studies. The defendants' experts defended the studies and explained the methodological flaws in the conclusions of the plaintiffs' experts.

The trial court excluded the testimony of both Dr. Kornbluth and Dr. Madigan. As later explained by the New Jersey Supreme Court, the trial court deemed Drs. Kornbluth and Madigan to be "self-validating expert[s]' who were unwilling to subject their ideas for evaluation in the scientific community, either through peer review submission or through the scrutiny of the process of publication in scientific literature." Noting that these experts had cherry-picked evidence that was supportive of their opinions, while disregarding more scientifically powerful evidence that undercut those opinions, the trial court held that such an approach "cannot bridge the analytical gaps inherent in Plaintiffs' hypothesis." It accordingly deemed the "conclusion-driven" opinions of plaintiffs' experts inadmissible.

The New Jersey Appellate Division reversed. Though acknowledging that a trial court's evidentiary decisions are subject to the abuse-of-discretion standard, the Appellate Division opined that reviewing courts owe less deference to trial court decisions regarding the admissibility of expert testimony. It proceeded to hold that the experts should not have been excluded because both were "extremely well qualified" and "considered all of the relevant data and information, applied

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appropriate methodology in analyzing the epidemiological studies, and expressed valid reasons for rejecting the conclusions of some of the epidemiological studies and in accepting other studies as supportive of their opinion." The Appellate Division specifically disagreed with the trial court's perception that the experts were "hired gun[s]" and concluded that the trial court's unfavorable opinion of those experts was not supported by the record.

The New Jersey Supreme Court granted the defendants' petition for review and reversed the decision of the Appellate Division. In a nutshell, the court held that (i) the Appellate Division erred in watering down the abuse-of-discretion standard, (ii) New Jersey courts should apply the *Daubert* factors when considering the admissibility of expert testimony in civil cases, and (iii) the trial court did not abuse its discretion in excluding the testimony of Drs. Kornbluth and Madigan.

The court explained that "[c]harged with determining whether to admit expert testimony, the trial court is responsible for advancing the truth-seeking function of our system of justice, while still allowing for new or developing opinions on medical causation that may not yet have gained general acceptance." It further explained that "[p]roperly exercised, the gatekeeping function prevents the jury's exposure to unsound science through the compelling voice of an expert. "

The court emphasized that, "[d]ifficult as it may be, the gatekeeping role must be rigorous." Quoting one of its earlier decisions on the topic, the court explained that "[t]he [trial] court's function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs." The court instructed that "in respect of the gatekeeping role, ... we expect the trial court to assess both the methodology used by the expert to arrive at an opinion and the underlying data used in the formation of the opinion. That will ensure that the expert is adhering to norms accepted by fellow members of the pertinent scientific community."

Summarizing the required inquiry, the court stated: "Our view of proper gatekeeping in a methodology-based approach to reliability for expert scientific testimony requires the proponent to demonstrate that the expert applies his or her scientifically recognized methodology in the way that others in the field practice the methodology. When a proponent does not demonstrate the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable."

The court made clear its belief that New Jersey law and federal law were already largely consistent in this respect, explaining: "[B]oth our law and the *Daubert* trilogy are aligned in their general approach to a methodology-based test for reliability. Both ask whether an expert's reasoning or methodology underlying the testimony is scientifically valid."

The court further noted that "*Daubert* identified a non-exhaustive list of factors for courts to consider using, if helpful, when it expanded on its test for assessing the reliability of scientific expert testimony": (i) "[w]hether the scientific theory can be, or at any time has been, tested"; (ii) "[w]hether the scientific theory has been subjected to peer review and publication ..."; (iii) "[w]hether there is any known or potential rate of error and whether there exist any standards for maintaining or controlling the technique's operation"; and (iv) "[w]hether there does exist a general acceptance in the scientific community about the scientific theory."

The court declared itself “persuaded that the factors identified originally in *Daubert* should be incorporated for use by our courts. The factors dovetail with the overall goals of our evidential standard and would provide a helpful ... guide for our courts to consider when performing their gatekeeper role concerning the admission of expert testimony.”

The court nevertheless “stop[ped] short of declaring ourselves a ‘*Daubert* jurisdiction.’” It explained that “[l]ike several other states, we find the factors useful, but hesitate to embrace the full body of *Daubert* case law as applied by state and federal courts.” Because “there is no monolithic body of case law uniformly or even consistently applying *Daubert*,” the court stated, “[w]e hesitate to sweep in adherence to the various approaches taken among the circuits and state jurisdictions when applying the *Daubert* factors.”

Turning to the standard of review, the court rejected the Appellate Division’s holding that reviewing courts owe less deference to trial court rulings on the admissibility of expert testimony. Acknowledging that a less deferential approach may be appropriate in the criminal context, in which the admissibility of expert testimony remains subject to the *Frye* general-acceptance standard, the New Jersey Supreme Court ruled that “it is not appropriate in the context of a civil mass tort case, where the trial court has been entrusted with methodology-based review as the gatekeeper of expert testimony.”

The Supreme Court then proceeded to hold that the trial court acted well within its discretion in excluding the testimony of Drs. Kornbluth and Madigan. In so holding, the court emphasized that there is a hierarchy of scientific evidence, which ranges from case reports at the bottom of the hierarchy to statistically significant epidemiological studies at the top. The court observed that “while animal studies may be helpful in framing hypotheses, ... such evidence is far less probative in the face of a substantial body of epidemiologic evidence” (internal quotation marks omitted). And to illustrate that proposition, the court explained: “Such was the case here; initial animal studies may have suggested a possible causal connection between Accutane and Crohn’s disease, but since that time a uniform body of epidemiological evidence has dispelled any such theory.”

The court also scathingly criticized the experts’ result-oriented selection of studies on which to base their conclusions. Putting it bluntly, the court noted that “[t]he many contradictions in the experts’ methodology were not lost on the trial court, which concluded that experts in the scientific community would not accept as consistent with scientific norms a methodology such as that used by plaintiffs’ experts. In particular, the court found the methodology unsound because it relied on [two studies] to the exclusion of other evidence.”

Summarizing the trial court’s reasoning, the New Jersey Supreme Court stated: “The trial court reasoned that the overall approach taken by Dr. Kornbluth—rejecting the evidence from the epidemiological studies, which all found no causal association, and proffering his own alternative opinion that a causal association was present based on lesser forms of evidence—was based on an unsound methodology.” The court observed that the trial court’s reasoning “comports with the decisions of many other courts that experts cannot selectively choose lower forms of evidence in the face of a large body of uniform epidemiological evidence.” In so noting, the court cited with approval statements of other courts condemning experts who engage in “[r]esult-driven analysis” and “cherry-picking” of studies.

The New Jersey Supreme Court also deemed it significant that Dr. Kornbluth had “never submitted his ideas concerning biological mechanism or Accutane’s relation to Crohn’s disease for peer review or publication.” Finally, the court lambasted Dr. Kornbluth for invoking the Bradford-Hill factors “to support his personal view that a causal association existed between Accutane and Crohn’s disease.” The court explained that “those guidelines are invoked only after an association between an agent and a particular disease has been determined to be present; their pointed purpose is to determine whether a detected association reflects true causality, it is not to create an association that has not already been detected through appropriate studies.”

The New Jersey Supreme Court’s decision provides clear guidance to trial courts about the proper performance of their gatekeeping role. It should go a long way toward ridding courtrooms in New Jersey of “result-driven” expert opinions.