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New Jersey: Now the Product-Liability Defendant's Playground?

by Joe G. Hollingsworth and Robert E. Johnston

Atlantic City, New Jersey—often called A.C. or America's Playground—has the bright lights and casinos of Las Vegas set on the southern Jersey shore. We confess that we have tried our luck rolling the bones at the Borgata on occasion, but our defense-side colleagues rolled a "natural" just last month in the New Jersey Supreme Court.

On August 1, 2018, New Jersey became the latest state to adopt (in civil cases) the principles governing the admissibility of scientific opinion evidence articulated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) – a win made even sweeter because it comes in the *In re Accutane Litigation* Mass Tort litigation, which has been churning (outrageously) in A.C. for more than a decade. *In re Accutane Litigation*, (A-25-17) (079958) slip op. (N.J. August 1, 2018) ("*Accutane*"). The New Jersey Supreme Court's decision is a full-throated endorsement of the trial judge's gatekeeper role and offers the hope that defendants litigating scientific cases in New Jersey may find the courts more hospitable. The *Accutane* decision also may represent a turning point in the erosion of the gatekeeping function that has occurred over the twenty-five years since *Daubert* was first handed down.

In the early days following *Daubert*, many decisions endorsed the strong judge-as-gatekeeper role. These cases made clear that there were two separate inquiries at play: the qualifications of the expert and, independently, the reliability of the methodologies and data relied on by those experts in formulating their expert opinions (including consideration of whether those opinions "fit" the case at all). Other early decisions (like the *Parlodel* trilogy[1]), provided greater texture and context to what sort of science was reliable and what was not, sharply limiting, for example, the admissibility of opinions based on literature on the low end of the hierarchy of scientific evidence (such as case reports and case series), opinions based on animal studies, and opinions based on other methodologies that were considered unreliable by the scientific community. The response at the state level overwhelmingly reflected the hope for fairer trials that *Daubert*-style protection could provide: as of the end of 2017, forty states had adopted some version of the *Daubert* principles and over-ruled prior *Frye* standards, either by judicial decision, rules amendments, or legislative action.

But the backlash against *Daubert* started early and is gaining ground of late in a few predictable locales. For example, in an opinion from 2017 the Ninth Circuit criticized a lower court for looking "too narrowly at each individual consideration, without taking into account the broader picture of the experts'

[1] *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986 (8th Cir. 2001), *aff'g* 107 F. Supp. 2d. 1015 (E.D. Mo. 2000); *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193 (10th Cir. 2002), *aff'g* 95 F. Supp. 2d. 1230 (W.D. Okla. 2000), and *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194 (11th Cir. 2002), *aff'g Siharath v. Sandoz Pharm. Corp.*, 131 F. Supp. 2d 1347 (N.D. Ga. 2001).

Joe G. Hollingsworth and **Robert E. Johnston** are Partners with Hollingsworth LLP in Washington, DC. Mr. Hollingsworth is the WLF Legal Pulse's Featured Expert Contributor on Litigation Strategies. Text, including referernces, available at www.wlflegalpulse.com.

overall methodology." *Wendell v. Glaxosmithkline LLC*, 858 F.3d 1227, 1233 (2017). The court suggested that where an expert "stands at or near the top of their field" and has "extensive clinical experience with the rare disease or class of disease at issue,' "*Daubert* poses no bar based on [his or her] principles and methodology." *Id.* at 1237. In other words, where an expert is highly qualified, the Ninth Circuit would have *ipse dixit* be admissible, methodological failures go to weight and credibility, and lay juries sort out the good science from the bad science—an outcome that the Supreme Court specifically sought to avoid in assigning the gatekeeper role to the trial judge under *Daubert*. In another case the Ninth Circuit declared that "the judge is supposed to screen the jury from unreliable *nonsense* opinion." *Alaska Rent-a-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (emphasis added). Such rulings are a far cry from the Ninth Circuit's *Daubert* roots, which include not only the original *Daubert* on remand, *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir. 1995), but also extraordinary reversals of judgments rendered after trials in which unsound scientific evidence was admitted, *e.g., Schudel v. General Electric Co.*, 120 F.3d 991 (9th Cir. 1997).

Missouri's judiciary repeatedly rejected opportunities to adopt *Daubert* as the standard for scientific evidence in the state, forcing the legislature to enact legislation in 2017 requiring the adoption of *Daubert* principles in Missouri courts. Revised Statutes of Missouri § 490.065 (2017). In 2017, the Florida Supreme Court refused to enforce the legislature's 2012 statutory amendments to Florida Evidence Code § 766.102, Florida Statutes (2012), that adopted the *Daubert* standard for the admissibility of expert opinion evidence "to the extent that it is procedural." *In re: Amendments to the Florida Evidence Code*, No. SC16-181 at 9 (Fla. Feb. 16, 2017). In fact, the Florida Supreme Court proclaimed that the application of the *Daubert* standard could "undermine[] the right to a jury trial and deny[] access to the courts," raising "grave concerns about the constitutionality of the amendment." *Id*. Of course, as pointed out by the dissent in that case (*id.* at 16), the U.S. Supreme Court, federal district and appellate courts, and courts in 40 other states disagree.

No wonder, then, that *Accutane* seems such an overdue jackpot to defendants in the trenches. In fact, the *Accutane* Court felt so strongly about the importance of the gatekeeper role that it eschewed the moniker of "a *Daubert* jurisdiction" in part because of the discordant views in "*Daubert* jurisdictions" over the proper gatekeeping role for trial judges. *Id.* at 83-84. Just a couple of our favorite take-aways include:

- Bradford Hill criteria can only be used "after an association between an agent and a particular disease has been determined to be present" and cannot be used to create an association that has not already been detected. *Id.* at 78.
- Experts may not ignore higher level scientific evidence, such as "uniform epidemiological evidence" and choose to rely on case reports or animal studies instead. *Id.* at 77.
- Trial courts are not to bless "inspired" scientific theories, but should "permit the jury to hear reliable science to support the expert opinion." *Id.* at 80.

This revolution in the thinking of the New Jersey Supreme Court (made without any legislative or judicial revisions to the rules of evidence) may herald a new charge through forces arrayed against a gatekeeper role for scientific opinion evidence. But litigators interested in reliable scientific evidence need to take up the opportunities presented by the *Accutane* decision and double down, finding opportunities to raise these issues and gain traction not only in the New Jersey lower courts—as our colleagues representing Johnson & Johnson in the New Jersey talc litigation have already done, but also in other jurisdictions that have not been friendly to the *Daubert* gatekeeper role, including some federal appellate courts.

In the meantime, thanks for making it fun again, A.C.

