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Daubert Alert: The First Circuit Takes A Step Back In *Milward v. Acuity Specialty Products*

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On January 8, 2011, the U.S. Supreme Court denied *certiorari* in *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11 (1st Cir. 2011) and let stand a First Circuit holding admitting a plaintiff expert's causation opinion resting solely on his self-proclaimed "weight of the evidence." Plaintiffs' advocates have proclaimed that *Milward* will "reshap[e] toxic tort causation law," and defendants can expect to see *Milward* cited against them in all future *Daubert* challenges to plaintiff causation testimony.¹

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Defendants have numerous arguments to limit *Milward*'s scope. *Milward* rests on legal reasoning contrary to the Supreme Court's holdings in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and it involves the distinguishable factual setting of a rare cancer and limited scientific evidence. Nonetheless, *Milward* marks a milestone in the plaintiffs' bar's campaign in soliciting a new "scholarship" of *Daubert* criticism. Defendants must respond as well to this broader challenge. As one court explained: "The *Daubert* trilogy, in shifting the focus to the kind of empirically supported, rationally explained reasoning required in science, has greatly improved the quality of the evidence upon which juries base their verdicts." *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002). *Daubert* must be defended.

The *Milward* Ruling

In *Milward*, the plaintiff alleged that benzene exposure caused a rare type of acute myeloid leukemia (AML) called acute promyelocytic leukemia (APL). Plaintiffs' causation expert could not point to any epidemiological evidence linking APL to benzene exposure, but he opined that causation could be inferred because (1) benzene is associated with other forms of AML, (2) experimental research suggests a specific type of chromosomal damage might lead to APL, and (3) it is biologically plausible that ben-



Eric G.
Lasker

zene might cause this type of chromosomal damage. While acknowledging that none of these individual lines of evidence was itself sufficient, plaintiffs' expert opined that the "weight of the evidence" demonstrated that benzene could cause APL. The district court disagreed, concluding that while the plaintiffs' expert causation hypotheses were "'plausible,' they remain hypotheses, the validity of which has not been reliably established."²

The First Circuit reversed. While not disputing the district court's conclusions on each line of causation evidence, the First Circuit held that the district court "erred in reasoning that because no one line of evidence supported a reliable inference of causation, an inference of causation based on the totality of the evidence was unreliable."³ The First Circuit held that the "admissibility [of weight of the evidence testimony] must turn on the particular facts of the case."⁴ One of the key facts in *Milward* was the rarity of APL, which purportedly made it difficult to perform an epidemiological study ... that would yield statistically significant results."⁵

Milward's Legal Errors

Milward is premised on two legal holdings that are contrary to *Daubert* and *Joiner*. Accordingly, its precedential value should be limited.

First, in endorsing plaintiffs' expert's "weight of the evidence" approach, the First Circuit acknowledged that "no scientific methodology exists for this process."⁶ But *Daubert* holds that "in order to qualify as 'scientific knowledge,' an [expert's] inference or assertion must be derived by the scientific method."⁷ *Daubert* explains that "[s]cientific methodology today is based on gen-

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erating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.⁸ While a court can review individual lines of evidence for scientific reliability, it cannot so evaluate a subjective “weight of the evidence.” That is the holding in *Joiner*, in which an expert causation opinion based on similar “weight of the evidence” reasoning was only able to garner a single vote on the Court. See *Joiner*, 522 U.S. at 153-54 (Stevens, J., dissenting).

Milward’s endorsement of the “weight of the evidence” approach is contrary to rulings in the Fifth and Tenth Circuits and numerous federal district courts.⁹ Moreover, while the “weight of the evidence” approach is used in regulatory settings, courts have recognized that regulatory agencies are governed by a preventative perspective that differs substantially from the standard of causation that governs tort liability.¹⁰

Second, the First Circuit appeared to lower the admissibility bar because the plaintiff’s claim involved a rare disease for which epidemiological studies were not only nonexistent but allegedly impossible to perform. See *Milward*, 639 F.3d at 24-25. But under the scientific method, an expert witness cannot opine based upon the assumption that missing evidence, if it existed, would support a causal hypothesis. Rather, “proposed testimony must be supported by appropriate validation – i.e., ‘good grounds,’ based on what is known.” *Daubert*, 509 U.S. at 590. The First Circuit’s science-leads-law reasoning contravenes the holdings of other federal circuits that have more faithfully hewed to the Supreme Court’s teachings.¹¹

Milward’s Limiting Factual Context

Milward also can be distinguished on its facts. The factual setting in *Milward* of a rare disease and a relative lack of scientific research on causation is far different from that found in most mass toxic tort and product liability cases. Toxic tort and product liability litigation today is driven by mass claims against deep pocket manufacturers of FDA- and EPA-regulated products. By their nature, these claims often involve more common medical conditions and alleged causative agents that have been extensively tested for human safety. Accordingly, in most

cases, plaintiffs’ experts cannot hide behind a lack of existing scientific knowledge as a defense for speculative causation theories.

Milward’s Genesis – The Coronado Conference

For the reasons above, defendants should be able to limit *Milward’s* reach as a matter of law and fact. However, the plaintiffs’ bar campaign that led to *Milward* presents a greater challenge to *Daubert* and one to which defendants also must respond.

In 2003, the plaintiffs’ bar used proceeds from the breast implant litigation settlement to fund a two-day symposium on “Scientific Evidence and Public Policy” in Coronado, California. The Coronado Conference was heavily weighted towards the interests of the plaintiffs’ bar, and the attacks on *Daubert* and *Joiner* were scathing. One Coronado Conference paper argued that “the confusions, misconceptions, and attempts to fuse contradictory philosophies” in *Daubert* “is a cautionary tale of what happens when lay people try to opine on technical matters of another discipline, in this case jurists holding forth on the philosophy of science.”¹² Another described *Daubert* as “muddled” and castigated *Joiner*, saying “the Court sounded like nothing so much as a conclave of medieval logicians.”¹³

Further, the Coronado papers accused the Court of a nefarious scheme to stack the deck in favor of defendants: “The *Daubert* litigation thus gave the Supreme Court an opportunity to stem the increasing flow of resource-intensive toxic tort lawsuits through a politically invisible interpretation of the words ‘scientific and knowledge’ in the obscure Federal Rules of Evidence.”¹⁴ “[T]he very fact of science being on trial via *Daubert* tips the scales further against the public interest and toward corporate interests.”¹⁵ *Daubert*, the Coronado critics decried, “has become part of the arsenal of the radical right.”¹⁶

The seeds planted in the Coronado Conference bore fruit in *Milward*. Indeed, the First Circuit relied heavily on (1) one Coronado Conference paper that had criticized *Daubert* for adopting a “corpusecular approach to expert testimony,”¹⁷ and (2) the plaintiffs’ “scientific methodology expert,” whose own Coronado Conference paper argued that “[t]he Court’s opinion in *Joiner* risks mislead-

ing lower courts, inviting similar mistaken rejections of particular evidence or having a chilling effect on efforts to review scientific evidence in the same way that scientists do.”¹⁸ The defense bar cannot meaningfully respond to *Milward* simply by pruning back the offshoots of the plaintiffs’ bar’s Coronado harvest; it must eradicate the Coronado criticisms at their root.

Conclusion

Daubert remains a powerful weapon in the fight against frivolous litigation and junk science in the courtroom. *Milward* does not change this fact. But *Milward* reminds us that *Daubert* is under attack and that it must be defended.

1 Gold, *The “Reshaping” of the False Negative Asymmetry in Toxic Tort Causation*, 37 Wm. Mitchell L. Rev. 1507, 1580 (2011).

2 See *Milward v. Acuity Specialty Prods. Grp., Inc.*, 664 F. Supp. 2d 137, 144-49 (D. Mass. 1999), *rev’d*, 639 F.3d 11 (1st Cir. 2011).

3 *Milward*, 639 F. 3d at 23.

4 *Id.* at 19.

5 *Id.* at 24.

6 *Id.* at 18.

7 *Daubert*, 509 U.S. at 590 (emphasis added).

8 *Id.* at 593.

9 See *Hollander v. Sandoz Pharms. Corp.*, 289 F.3d 1193 (10th Cir. 2002); *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 198 (5th Cir. 1996); *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 608 (D.N.J. 2002); *Caraker v. Sandoz Pharms. Corp.*, 188 F. Supp. 2d 1026, 1040 (S.D. Ill. 2001); *Siharath v. Sandoz Pharms. Corp.*, 131 F. Supp. 2d 1347, 1371 (N.D. Ga. 2001), *aff’d Rider*, 295 F.3d 1194 (11th Cir. 2002).

10 See *Rider*, 295 F.3d at 1201; *Glastetter v. Novartis Pharms. Corp.*, 252 F.3d 986, 991 (8th Cir. 2001).

11 See, e.g., *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 381 (5th Cir. 2010); *Rider*, 295 F.3d at 1202; *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) (“Law lags science; it does not lead it.”).

12 David Ozonoff, *Epistemology in the Courtroom: A Little “Knowledge” Is a Dangerous Thing*, 95 Am. J. Public Health S13, S13 (2005).

13 Susan Haack, *Trial and Error: The Supreme Court’s Philosophy of Science*, 95 Am. J. Public Health S66, S69 (2005).

14 Thomas McGarity, *Daubert and the Proper Role of the Courts in Health, Safety, and Environmental Regulation*, 95 Am. J. Public Health S92, S94 (2005).

15 George P. Lakoff, *A Cognitive Scientist Looks at Daubert*, 95 Am. J. Public Health S114, S117 (2005).

16 *Id.* at S120.

17 Sheldon Krinsky, *The Weight of Scientific Evidence in Policy and Law*, 95 Am. J. Public Health S129, S134 (2005).

18 Carl Cranor, *Scientific Inferences in the Laboratory and the Law*, 95 Am. J. Public Health S121, S123 (2005).