

## SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

### *'Daubert' Update: A Word of Caution to Plaintiffs*

For the plaintiff depending on expert testimony to establish an essential element of its claim, the court's gatekeeping function in assessing the admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals Inc.*,<sup>1</sup> may bar not only the expert, but the plaintiff itself from the courtroom door.

Federal Rule of Evidence 702 provides that a qualified expert may testify based on scientific, technical or other specialized knowledge if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

This rule incorporates the principles set forth in *Daubert*, which first articulated the trial court's "gatekeeping" function of ensuring that expert evidence be admitted only if it is both relevant and reliable. *Daubert* instructed that the court's inquiry should be flexible, setting forth four nonexclusive factors to be considered in assessing the reliability of the expert's methodology, including whether the expert's theory can be, and has been tested; whether it has been subjected to peer review and publication; its known or potential rate of error; and



whether the theory has received widespread acceptance.

The test for determining admissibility of expert testimony under Rule 702 and *Daubert* is deceptively simple. Its application has generated volumes of detailed and complicated legal decisions examining and evaluating proposed expert testimony on a wide variety of subjects. A number of recent decisions from the U.S. District Court for the Southern District of New York illustrate the breadth and complexity of expert litigation in this district and the high stakes for both sides involved in challenging and defending the admissibility of expert testimony.

#### **Importance of an Empirical Basis**

One of the most frequent challenges to proposed expert testimony is that it lacks an objective foundation that can be tested and evaluated. This was the basis on which Judge Charles S. Haight Jr. excluded expert testimony in *Roane v. Greenwich Swim Committee*,<sup>2</sup> a case arising out of injuries sustained by a swimmer during a

rescue attempt. The plaintiff sought to support his claim that the boat from which the rescue was attempted was defectively designed through expert testimony proposing two safer alternative boat designs. The expert based his conclusions on photographs of the vessel in question, a review of the medical records and depositions testimony and "his experience and training as a professional engineer, designer, naval architect and risk assessment consultant." Judge Haight noted that although he did not question the expert's qualifications, his "methodology [did] not seem to rise to the level of intellectual rigor mandated by Rule 702." Relying on the U.S. Court of Appeals for the Second Circuit's recent decision in *Zaremba v. General Motors Corp.*,<sup>3</sup> he stressed that the expert had no drawings or models of his alternate designs, which had not been tested or subjected to peer review. Having excluded the expert's testimony, Judge Haight concluded that the plaintiff could not make out a prima facie case of a design defect, and thus granted summary judgment to the boat manufacturer on that claim.

Lack of scientific rigor also proved fatal to the testimony of one of plaintiffs' experts in *Santoro v. Donnelly*.<sup>4</sup> The expert proposed to testify that warnings that came with a gas fireplace heater on which the minor plaintiff was severely burned were insufficient. The expert testified at his deposition that he had relied solely on his experience in forming that opinion. Citing the limited nature of the expert's inspection of the fireplace heater and the

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lack of any specific research that supported his opinion, Judge Shira A. Scheindlin held that his testimony was inadmissible “given the total lack of scientific rigor with which he reached his conclusions.” By contrast, she held that the plaintiffs’ second expert did pass muster under *Daubert* with respect to four of the five opinions to which he proposed to testify. She noted that unlike the first expert, the second expert had cited to specific research and data to support his opinion that the fireplace heater posed an unreasonable risk of injury. Judge Scheindlin found that his opinion was reliable despite the fact that the studies on which he relied related not to fireplace heaters, but other appliances such as space heaters, water heaters, ranges and furnaces, because: the underlying hypotheses about contact burns had been tested; the studies on which he relied had been published; his ideas had gained acceptance within the scientific community; and his inferences connecting this research to fireplace heaters were reasonable.

### **‘Daubert’ Factors Not Applied Mechanically**

Courts have repeatedly stressed that the *Daubert* factors should not be mechanically applied to exclude expert evidence, as long as the expert’s opinion is capable of being tested. Thus, in *Lesser v. Camp Wildwood*,<sup>5</sup> Judge Robert W. Sweet denied a motion to exclude the testimony of a tree expert on the condition of a tree that fell during a storm, injuring a camper. The defendant challenged his opinion as “unsubstantiated and speculative,” because he relied on photographs rather than a physical examination of the tree (which defendants had destroyed). Judge Sweet held that neither *Daubert* nor *Kumho Tire Co. v. Carmichael*<sup>6</sup> (which made clear that the court’s gatekeeping function applies to expert testimony in all areas) “requires physical examination where informed and reasonable empirical inferences can be

made from photographic evidence.” He stressed that the critical inquiry is “whether the expert’s theory can be challenged in some objective sense, or whether it [is] instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability.”<sup>7</sup>

Because the expert’s report specified the evidence on which he was relying (including the tree’s abnormally small diameter, the presence of an electrical insulator that might have wounded the tree, discoloration of the tree’s outer surface and the manner in which the tree broke), Judge Sweet concluded that it was “clearly possible to test those conclusions objectively.” He also rejected the argument that the opinion was unreliable because there was no known rate of error for the expert’s methodology, reasoning that the type of inferences that the expert made “are not governed by statistical methods which would generate numerical rates of error.”

### **Toxic Tort Cases**

Battles over the admissibility of expert testimony are particularly hard-fought in toxic tort cases where plaintiffs often rely exclusively on expert witnesses to establish the dual requirements of general causation (that the agent in question is capable of causing the type of injury suffered by the plaintiff) and specific causation (that the particular injury of the plaintiff was in fact caused by the agent in question).

Focusing on the issue of general causation, Judge Lewis A. Kaplan issued in March 2005 another in a series of decisions assessing the admissibility of expert testimony in the multidistrict *Rezulin Products Liability Litigation*, involving thousands of cases brought by plaintiffs claiming that the diabetes drug Rezulin had caused them liver damage.<sup>8</sup>

The particular expert opinions at issue in the March 2005 decision were proffered to support the claims that Rezulin could produce “silent” liver injury—liver injury

unaccompanied by elevation in liver enzymes. No existing studies provided direct support for the contention that Rezulin could cause silent liver injury.

In a lengthy opinion, Judge Kaplan found that the challenged testimony did not satisfy *Daubert*, identifying a series of unsupported leaps from existing scientific data to the conclusion that Rezulin could cause silent liver injury. The experts relied on a series of studies that showed that Rezulin could cause certain types of damage to liver cells, which they theorized could lead to silent liver injury. Judge Kaplan found various defects in the experts’ analysis, including that they had provided no evidence for the crucial link in their causal chain—that the types of liver injury they had identified could be silent. The experts articulated various theories to support their conclusion, but provided no empirical support. Judge Kaplan rejected those theoretical assumptions as insufficiently reliable under *Daubert* because their extrapolations had never been tested, peer-reviewed, published (outside of the context of the litigation) or widely accepted in the scientific community.<sup>9</sup>

In another recent decision, Magistrate Judge Frank Maas cautioned against requiring too high a “level of exactitude” in proving general causation in relatively new toxic tort cases, where the medical literature may not as yet be completed. The plaintiff in *Green v. McAllister Brothers Inc.*,<sup>10</sup> claimed that he suffered respiratory problems from inhaling dust from the collapsed World Trade Center while working, without adequate protection, on a tugboat owned by the defendant, which was hauling barges containing World Trade Center debris to the Fresh Kills landfill.

The defendant challenged the testimony of plaintiff’s proposed toxicology expert, arguing that to satisfy *Daubert* the opinion would have to quantify the dose of specific toxins to which plaintiff was exposed and then demonstrate that

scientific literature supported the theory that exposure to comparable doses could cause the type of injury of which plaintiff complained. Magistrate Judge Maas held that such a level of scientific rigor “would likely sound the death knell” for plaintiff’s claim in the absence of samples of the dust that plaintiff had inhaled, and that this level of exactitude was not necessary in this case, in light of the fact that it was reasonably well-established that dust itself could trigger asthma.

### Other Likely Causes of Injury

Another frequently encountered pitfall in expert testimony is the expert’s failure to account for other likely causes of a plaintiff’s injury. Thus, in *Green*, despite the fact that plaintiff’s expert testimony was admissible on the question of general causation, Magistrate Judge Maas concluded that it was necessary to hold a hearing to determine if the expert’s testimony on specific causation was sufficiently reliable. He held that although an expert need not rule out every possible cause before testifying as to a particular theory of causation, in this case the expert would have to demonstrate the basis for his conclusion that plaintiff’s injuries were caused by the World Trade Center dust to which he was exposed while working on defendant’s boat rather than from his earlier presence in the actual vicinity of the World Trade Center following its collapse.<sup>11</sup>

### Unbiased Data in Statistics

When expert testimony is based on statistical analysis, counsel offering that testimony must ensure that the expert is working with unbiased data and must be mindful of the need to collect appropriate data throughout the discovery process. In *U.S. Information Systems, Inc. v. International B’hd of Elec. Workers Local Union No. 3*,<sup>12</sup> the court excluded the plaintiffs’ expert testimony on the

anticompetitive effects of an alleged antitrust conspiracy in the awarding of telecommunications installation contracts, because the data sample on which that opinion was based was skewed in favor of plaintiffs’ position. Specifically, the data set was derived from responses to subpoenas served by plaintiffs regarding contracts on which plaintiffs had been excluded from bidding or on which plaintiffs had been the lowest bidders but which were awarded to other contractors. Plaintiffs had initially sought much broader discovery which was limited by the court following defendants’ objections. When the plaintiffs’ expert subsequently based his opinion on the information obtained as a result of that more limited discovery, defendants challenged that opinion arguing that the data sample was neither random nor representative.

Acknowledging that the sample was restricted by “the desires of the defendants to limit discovery and [the district judge’s] resulting order,” Magistrate Judge James C. Francis IV concluded that the sample was tainted nevertheless. He observed that “[b]y allowing the projects listed in the subpoena to be selected on the basis of the plaintiffs’ damages claims, the data sample would necessarily contain projects where the plaintiffs believed they had either been unfairly kept out of the bidding process or wrongfully denied the award.” Because the data-sampling process was “systematically biased to select projects with the very price differential that [the expert’s] analysis was designed to test for,” Magistrate Judge Francis held that the plaintiffs had failed to establish the reliability of their expert’s opinion.<sup>13</sup>

### Conclusion

As these cases demonstrate, counsel must focus on developing support for expert testimony at the earliest stages of litigation. Because motions to exclude expert testimony of necessity come after the close of discovery, parties who have

neglected this task may find themselves without critical expert testimony only on the eve of trial, after years of costly and time-consuming litigation, and with no opportunity to rectify the defects in their expert’s opinion or to resuscitate their case.

1. 509 US 579 (1993).
2. 330 FSupp2d 306 (SDNY 2004).
3. 360 F3d 355 (2d Cir. 2004).
4. 340 FSupp2d 464 (SDNY 2004).
5. 282 FSupp2d 139 (SDNY 2003).
6. 526 US 137 (1999).
7. 282 FSupp2d at 144, quoting the Advisory Committee Notes to the 2000 Amendments to Rule 702.
8. 2005 WL 583751 (SDNY March 14, 2005).
9. As he had in an earlier decision regarding Rezulin’s alleged cause of a different type of liver injury, see *In re Rezulin*, 2004 WL 2884327 (SDNY Dec. 10, 2004), Judge Kaplan specifically rejected plaintiffs’ attempts to rely on differential diagnosis (a type of clinical process of elimination) to support their contention that Rezulin was capable of causing silent liver injury. He stressed that differential diagnosis is appropriate only for determining specific causation once the universe of possible causes has been established, but that it may not properly be used to establish general causation. “A physician thus may not link any particular patient’s injury to Rezulin unless there is some reliable basis for the opinion that therapeutic doses of Rezulin can cause such an injury.”
10. 2005 WL 742624 (SDNY March 25, 2005).
11. See also *Wills v. Amerada Hess Corp.*, 379 F3d 32 (2d Cir. 2004) (expert testimony properly excluded where expert failed to account for the fact that plaintiff’s husband smoked and consumed alcohol, both of which are recognized causes of the type of cancer from which the husband suffered, and which the expert testified should be attributed to exposure to toxins on the defendant’s ships); *Bonton v. City of New York*, 2004 WL 2453603 (SDNY Nov. 3, 2004) (Scheidlin, J.) (excluding expert testimony which failed to account for any nondiscriminatory explanations, such as parents’ income level and employment status, for differences in treatment of black and white children in foster care determinations); *Point Productions A.G. v. Sony Music Entertainment, Inc.*, 2004 WL 345551 (SDNY Feb. 23, 2004) (Buchwald, J.) (expert testimony excluded as “irretrievably unreliable and indefensible” based on “report’s gaping omissions of real world events” that were alternative causes of the plaintiff’s economic condition).
12. 313 FSupp2d 213 (SDNY 2004).
13. See also *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 2003 WL 22124991 (SDNY Sept. 15, 2003) (Patterson, J.) (plaintiffs’ expert testimony in suit alleging race discrimination in awarding of concert promotion contracts excluded because expert analysis was based on sample of contracts weighted in favor of plaintiffs’ claims in the lawsuit and thus neither random nor representative).