New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 257—NO. 73
TUESDAY, APRIL 18, 2017

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Under 'Daubert', It Isn't Getting Easier To Find a 'Reliable' Expert Witness

By **Edward M. Spiro**

And **Judith L. Mogul**

Almost 25 years after the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals*,[1] recent cases in the Southern District of New York continue to demonstrate the wide latitude that the *Daubert* standard affords to judges ruling on the admissibility of expert testimony, even on subjects previously accepted as valid grounds for expert opinion. We discuss below several decisions from the past year that have applied *Daubert* in circumstances both novel and familiar to varying results.

'Daubert' in Historical Context

For the better part of the 20th century, whether expert testimony could be offered on a particular subject turned on whether the expertise in question enjoyed "general acceptance in the particular field in which it belongs."[2] Federal Rule of Evidence 702 offered some additional guidance requiring that the putative expert's "scientific, technical, or other specialized knowledge [must] help the trier of fact to understand the evidence or to determine a fact in issue," and must be "based on sufficient facts or data" and "the product of reliable principles and methods … . reliably applied" to the facts of the case.

In its 1993 decision in *Daubert*, the Supreme Court shifted some of the responsibility for evaluating the reliability of an expert's proffered expertise from a community composed of experts themselves, to the trial judge, "'charg[ing] trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony' and junk science from the courtroom."[3]

> 'Daubert' offered a non-exhaustive list of five factors for determining the reliability of expert testimony.

Daubert offered a non-exhaustive list of five factors for determining the reliability of expert testimony: (1) whether a scientific method can be or has been tested; (2) whether it has been subjected to peer review; (3) the method's known or potential rate of error; (4) whether the application of the method is subject to controlling standards; and (5) the general

EDWARD M. SPIRO *and* JUDITH L. MOGUL *are principals of Morvillo Abramowitz Grand Iason, Anello & Bohrer, P.C. and co-authors of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson Reuters 2016).* BRITTON A. KOVACHEVICH, *an associate at the firm, assisted in the preparation of this article.*

acceptance of the method within the scientific community.[4] As illustrated by the cases discussed below, courts engaging in a *Daubert* analysis have applied these factors flexibly.

'Almeciga'

In his decision in *Almeciga v. Center for Investigative Reporting*,[5] Southern District Judge Jed S. Rakoff took a fresh look at the science behind handwriting analysis, an area of expertise that generally has been widely accepted.[6] Applying the *Daubert* factors, he concluded that handwriting analysis is ultimately "an unscientific endeavor" and ruled inadmissible the expert testimony proffered in that case on that subject. The plaintiff in *Almeciga* had sued a documentary filmmaker for including footage of her in a feature about a Mexican drug trafficking cartel without obscuring her identity, as she claimed they had agreed to do. In its defense, the defendant produced a standard release form signed by the plaintiff which authorized the use of her likeness in the film. Plaintiff responded by engaging a handwriting expert who opined that the signature was a forgery.

In evaluating the proffered handwriting analysis, Judge Rakoff noted that "it is the Court's role to ensure that a given discipline does not falsely lay claim to the mantle of science, cloaking itself with the aura of unassailability that the imprimatur of 'science' confers and thereby distorting the truth-finding process."[7] He went on to engage in a detailed application of *Daubert*, finding the analysis in this case lacking with respect to each of *Daubert*'s five factors. On the first factor, whether the expert's methodology has been tested, Judge Rakoff concluded that the prevailing methods of handwriting analysis are "virtually untestable" and "more like a series of subjective observations than a scientific analysis." The court considered the indicia relied upon by the handwriting expert—such as the angle and curvature of loops—and found that "[p]recisely what degree of variation falls within or outside an expected range of natural variation in one's handwriting … appears to be completely unknown and untested."

In considering the second factor, peer review, he continued: "the key question here is what constitutes a 'peer,' because, just as astrologers will attest to the reliability of astrology, defining 'peer' in terms of those who make their living through handwriting analysis would render this *Daubert* factor a charade."[8] The court noted that while journals exist within the handwriting analysis community, there is a distinct lack of disinterested academic commentary on the discipline. Accordingly, Judge Rakoff found no sufficiently objective scrutiny of handwriting analysis to satisfy *Daubert*'s second factor, nor could he identify rigorous analyses of error rates; prevailing controlling standards in the practice; or general acceptance among other experts to meet the third, fourth, and fifth factors respectively. "For decades, the forensic document examiner community has essentially said to courts, 'trust us,'" Judge Rakoff concluded, "[a]nd many courts have. But that does not make what the examiners do science."[9]

'O'Loughlin'

Southern District Judge Vincent L. Briccetti's decision in *O'Loughlin v. United States Tennis Association Player Development*,[10] illustrates a more flexible application of *Daubert*, relying on the *lack* of scientific data on the causes of eating disorders to admit expert testimony on that subject. The plaintiff in that case, a college tennis player, alleged that the U.S. Tennis Association and related

entities (collectively, USTA or defendants) caused her to develop an eating disorder, and then exacerbated it by pressuring her to lose weight. On defendants' motion for summary judgment, plaintiff sought to introduce a psychiatrist specializing in the treatment of eating disorders to testify to several points, including: (1) that defendants caused and exacerbated plaintiff's bulimia by emphasizing the need for her to lose weight; (2) that defendants did not sufficiently educate coaches and trainers as to plaintiff's condition and how to deal with it; and (3) that plaintiff faced only a 40 percent chance of full recovery from her disorder.[11]

These cases illustrate that varying approaches to admission of expert testimony persist more than two decades after 'Daubert'.

Defendants argued, with respect to the expert's first conclusion on causation, that no tests or analyses exist to isolate the cause of an eating order. Rather than ruling the expert's opinion inadmissible on that basis, Judge Briccetti relied on the dearth of scientific means of ascertaining the root cause of an eating disorder as a basis for relying on the expert's admittedly more subjective experience and professional opinion as sufficiently reliable grounds to admit his causation testimony under Rule 702. Without explicit reference to the *Daubert* factors, the court observed that, although no test exists to prove the ultimate issue of causation, the expert had relied on a wealth of factual information, including the plaintiff's contemporaneous medical records and an evaluation of the various "predisposing factors" exhibited by the plaintiff, as well as the available academic commentary, in reaching his decision. These methods, Judge Briccetti concluded, were "generally acceptable bases for reaching an expert opinion related to a psychological condition," and the expert's opinion was sufficiently reliable to "help the jury 'to understand the evidence or to determine a fact in issue.'"[12]

On the other hand, Judge Briccetti rejected the expert's conclusions as to defendants' education of their staff and plaintiff's odds of recovery. With respect to the former, Judge Briccetti noted that the expert did not "have any specialized degrees, certifications, or licenses in the field of tennis coaching or training," and he was therefore unqualified to opine on whether USTA had adequately prepared its staff to deal with students with eating disorders. With respect to the latter, the court concluded that the expert had not offered sufficient support for the specific probability he had assigned to plaintiff's chances of recovery, which "suggest[ed] specificity and accuracy where in fact [the figure was] not based on any empirical data."[13]

In contrast to Judge Rakoff's approach in *Almeciga*, Judge Briccetti was willing to admit expert testimony despite the lack of an objective test underlying the expert's opinion when the expert was otherwise qualified in a well-established scientific discipline and applied the methods of that discipline faithfully. But *O'Loughlin* is also a lesson to experts and practitioners not to overreach. Judge Briccetti did not conclude that expert testimony as to the training of the plaintiff's coaches or the chances of her recovery was categorically unreliable: instead, he found that the expert in this case was unqualified to testify to the former, and had not reliably opined as to the latter.

'Bah'

Most recently, a decision by Southern District Judge P. Kevin

Castel in *Bah v. City of New York*[14] emphasized the difference between problems with an expert's approach that render the expert's testimony inadmissible, and those which provide fertile ground for impeachment. *Bah* was an action brought pursuant to 42 U.S.C. §1983 by the estate of an emotionally disturbed man killed by police after his mother had asked them to check on his welfare. Plaintiff sought to introduce expert testimony regarding, inter alia, the trajectories of bullets fired during the confrontation and Bah's mental state at the time he encountered the officers. When plaintiff offered well-known forensic pathologist Dr. Michael Baden as an expert on both issues, defendants argued that he was qualified to opine on neither. With respect to bullet trajectories, defendants argued that "Dr. Baden's conclusions go against common knowledge and elementary geometry." Noting that Dr. Baden was an accomplished forensic pathologist who had testified before Congress on the subject of bullet trajectories and the positioning of shooters in the assassinations of both Dr. Martin Luther King Jr. and President John F. Kennedy, the court held that Dr. Baden's testimony would be allowed, noting that "[d]efendants are free to use common knowledge and geometry to impeach Dr. Baden on cross examination, but have not shown his testimony to be unreliable."[15]

However, despite Dr. Baden's expertise on bullet trajectories, Judge Castel was not satisfied that Dr. Baden's "training in psychiatry as a medical student, his internship and residency on the Bellevue Hospital Psychiatric wards," and other experience with mental institutions was sufficient to establish the reliability of Dr. Baden's testimony as an expert on Bah's mental state at the time of the police confrontation. The court therefore admitted Dr. Baden's testimony as to bullet trajectories, but would not allow him to testify as to Bah's mental state.

Conclusion

These cases illustrate that varying approaches to admission of expert testimony persist more than two decades after *Daubert*. Experts, and the attorneys who offer their testimony, must be prepared to defend both the scientific basis of the expert's testimony and his or her faithful application of that science for each component of the expert's proffered testimony.

1. 509 U.S. 579 (1993).
2. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); see also *Daubert*, 509 U.S. at 586.
3. *Almeciga v. Center for Investigative Reporting,* 185 F. Supp. 401, 415 (S.D.N.Y. 2016) (quoting Fed. R. Evid. 702 Adv. Comm. note to 2000 amendment).
4. *Daubert*, 509 U.S. at 593-94.
5. 185 F. Supp. 401.
6. See, e.g., *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005) (recognizing "the broad acceptance of handwriting analysis and specifically its use by such law enforcement agencies as the CIA, FBI, and the United States Postal Inspection Service."); *United States v. Crisp*, 324 F.3d 261, 271 (4th Cir. 2003) ("The fact that handwriting comparison analysis has achieved widespread and lasting acceptance in the expert community gives us the assurance of reliability that *Daubert* requires."). But see *United States v. Hidalgo*, 229 F. Supp. 2d 961, 966 (D. Ariz. 2002) (excluding expert handwriting testimony as to the ultimate issue of authorship, but admitting it as to "factors that would be helpful to the jury in making a finding of identity or non-identity, short of an ultimate opinion," and collecting cases reaching similar results).
7. 185 F. Supp. 3d at 414.
8. Id. at 419-20.
9. Id. at 423.
10. 2016 WL 5416513 (S.D.N.Y. Sept. 28, 2016).
11. Id. at *4.
12. Id. at *5 (quoting Fed. R. Evid. 702).
13. Id. at *6.
14. 2017 WL 435823 (S.D.N.Y. Jan. 31, 2017).
15. Id. at **1, 9-10.