

## **ADAMSKI AND JACOBBER-BOOKING THE EXPERT WITNESS**

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by Abbott S. Brown, Esq. and William L. Gold, Esq.

In *Adamski v. Moss*, 271 N.J.Super. 513, 638 A.2d 1360 (App. Div. 1994), the Appellate Division made it easier for parties in medical malpractice cases to use "learned treatises". In some cases, parties will now be able to obtain all of the expert opinions required in such litigation without incurring the cost of an expert witness. *Adamski* is an expansion of the policy announced in *Jacobber v. St. Peter's Medical Center*, 128 N.J. 475, 608 A.2d 304 (1992), wherein the Supreme Court, in urging the increased use of learned treatises, quoted Wigmore who wrote "those who write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants." *Jacobber, supra*, 128 N. J. at 495.

*Adamski* was an informed consent case. Ms. Adamski alleged that she suffered damage to a nerve in her right arm during an operation to remove a benign tumor in her neck. She claimed that the defendant failed to disclose that the surgery could result in nerve damage and thus failed to obtain her informed consent to the procedure. Defendant moved for summary judgment based upon plaintiff's failure to provide an expert report. The *pro se* plaintiff's responding certification indicated that she was unable to secure the services of an expert witness but informed the Court that she intended to prove the medical aspects of her case through "learned treatises". Nevertheless, the Trial Court granted defendant's motion.

In affirming the dismissal, Judge Dreier noted that until recently, "learned treatises were inadmissible substantively in New Jersey, except for their use for impeachment of a witness, and then only when the witness recognized the treatise as authoritative." *Adamski, supra*, 271 N.J.

Super. at 517, citing *Ruth v. Fenchel*, 21 N.J. 171, 176 (1956). After commenting that learned treatises became conditionally admissible as a result of the Court's decision in *Jacobson*, *supra*, and the adoption of *N.J.R.E.* 803(c)(18), Judge Dreier summarized the two prerequisites for use of learned treatises to establish the standard of care in malpractice cases, stating:

"First, the learned treatise must either be called to the attention of an expert witness upon cross-examination or be relied upon by the expert in direct examination...The rule thus requires that there must be an expert on the stand either as the party's witness or as an adverse witness being cross-examined...Second, the particular treatise must be established as a reliable authority by testimony or by judicial notice." *Adamski*, *supra*, 271 N. J. Super. at 519-520.

On first reading, the *Adamski* opinion would seem to still require use of an expert, if not to establish the standard of care, then at least to establish the reliability of the learned treatise. However, Judge Dreier, while stating that plaintiff cannot require defendant's expert to render such an opinion, citing the seminal case of *Hull v. Plume*, 131 N. J. L. 511 (E. & A. 1944) and the more recent *Graham v. Gilchinsky*, 126 N. J. 361 (1991), correctly observed that the plaintiff could compel the **defendant doctor** to provide the opinion which is the foundational prerequisite to use of the learned treatise. The Court emphasized:

"Defendant, on the other hand, could be asked concerning the fact of his expert opinion in the past, rather than being required to make an expert evaluation in the present. *Rogoski v. Schept*, 91 N. J. Super. 135, 147-149, 219 A. 2d 426 (App. Div. 1966). *Cf.*, *Stigliano v. Connaught Laboratories, Inc.*, 270 N. J. Super. 373, 378, 637 A. 2d 223 (App.Div. 1994)(applying this principle to a defendant compelling a plaintiff's treating physician to testify). The treatises might have been qualified during a deposition." *Adamski*, *supra*, 271 N. J. Super. at 520.

The *Adamski* opinion foresaw the possibility of "cases in which learned treatises, qualified by judicial notice or by a witness, could satisfy a requirement for expert proof." *Adamski*, *supra*, 271 N. J. Super. 522.

A review of *Jacober, supra*, demonstrates that use of learned treatises should gain widespread acceptance by the Courts in medical malpractice, toxic tort and products liability litigation. In *Jacober*, the plaintiffs filed suit alleging that the doctors were negligent, *inter alia*, for using a catheter which was too large for their newborn. At trial, plaintiff's counsel attempted to use two texts, Klaus & Fanaroff, *Care of the High Risk Neonate* (2d Ed. 1979) and James, "Emergencies in the Delivery Room" in *NeoNatal-Perinatal Medicine* (2d Ed. 1977) to support the argument that a smaller catheter should have been used and impeach the defendants' experts. One of the defense experts conceded that *Klaus & Fanaroff* was "a standard text" but nevertheless not "authoritative". Indeed, another defense expert testified that nothing in the medical literature was "authoritative". Nevertheless, the Trial Court precluded plaintiff's counsel from cross-examining the defendants with these textbooks. The jury returned a verdict in favor of the defendants.

In reversing, the Supreme Court noted that treatises generally have a high degree of trustworthiness and reliability due to the scrutiny, criticism and revision that is required in order to "find its way into publication." *Jacober, supra*, 128 *N.J.* at 495. The Court noted it is illogical and unfair to allow experts to give opinions on "book knowledge" and then deprive the party challenging the opinions to effectively utilize "divergent opinions expressed in other reputable books." *Jacober, supra*, 128 *N.J.* at 494-495. The Court held that an expert only need recognize a text as "the type of material reasonably relied on by experts in the field", *Jacober, supra*, 128 *N.J.* at 495, in order for a party to utilize that textbook as "substantive evidence on both direct and cross examination." *Jacober, supra*, 128 *N.J.* at 491. The Court further held that if an expert testifies that a treatise or periodical is regarded by professionals in

the field as trustworthy, then articles in the publication satisfy the requirements of the rule. Thus, the Court adopted *F.R.E.* 803(18), [now *N.J.R.E.* 803(c)(18)], which permits statements contained in learned treatises to be utilized as evidence. The Court noted that the policy behind the rule is to help equalize resources by "permitting a party with less access to expert witnesses to advance an argument before a jury based on opinions set forth in learned treatises". *Jacober, supra*, 128 *N.J.* at 495. [Emphasis supplied].

The combination of *Jacober* and *Adamski* provides significant opportunities for both plaintiff and defendant in medical malpractice cases. Neither defendants nor experts will be able to avoid being confronted with statements from reputable medical literature. Therefore, it is more important than ever to perform a comprehensive search of the medical literature. These sources may include:

- 1: core textbooks utilized in medical schools; *e.g.*, *Williams, Obstetrics* (19th Ed. 1993)
- 2: articles published in recognized journals such as the *American Journal of Obstetrics and Gynecology*;
- 3: The Committee Opinions, Practice Guidelines, Policy Statements, Practice Standards, and Technical Bulletins published by most major medical organizations, such as the American College of Obstetricians and Gynecologists (ACOG). These publications are listed in the *Healthcare Standards Directory*, (ECRI - 1994).

Once the helpful opinions have been located, the *Adamski* Court correctly recognized that the defendant may be compelled during a deposition to state whether, at the time of defendant's treatment of plaintiff, (not at the time of the deposition), the defendant believed that the "treatises or publications" containing the helpful opinions meet the *Jacober* standard of reliability. If in fact the reliability of the learned treatise is high, *e.g.*, the Physicians Desk Reference, it will be impossible for a defendant to remain credible and appear competent if the

doctor denies such a widely respected text met the *Jacober* "reliability" test. Once this concession is obtained the information and opinions contained therein are admissible for all purposes.

*Adamski* is particularly significant in informed consent cases. The Court in *Adamski, supra*, noted that while "no medical expert is required to prove that an undisclosed risk would have been material to the patient's consent, it must first be shown that the risk...was recognized within the medical community." *Adamski, supra*, 271 N. J. Super. at 519, citing *Febus v. Barot*, 260 N.J. Super. 322, 327, 616 A.2d 933 (App.Div.1992). *Adamski, supra*, permits the plaintiff to compel the defendant to establish the reliability of a learned treatise which demonstrates knowledge in the medical community of the risk which occurred. Thus the need for an expert will be eliminated in many informed consent cases.

In sum, the *Adamski* opinion provides a roadmap by which attorneys can cost effectively utilize expert opinions to prove their cause. The *Jacober* Court noted that greater use of reliable learned treatises will enhance "the ability of juries to evaluate expert testimony", *Jacober, supra*, 128 N.J. at 494. *Jacober* and *Adamski* will help both plaintiffs and defendants distinguish meritorious claims and defenses from those supported by "hired guns" see, *Rubanick v. Witko Chemical Corp.*, 125 N. J. 421, 453 (1991) or those "who take the stand for a fee". *Jacober, supra*, 128 N.J. at 495. As such, these cases will go far in advancing the cause of justice for all.

Abbott S. Brown is a Certified Civil Trial Attorney specializing in medical malpractice and product liability litigation.  
William L. Gold is a Certified Civil Trial Attorney specializing in legal malpractice and toxic tort litigation.