

Rubanick and Jacober — The Expanding and Contracting Universe of Expert Testimony

by Abbott S. Brown and William L. Gold

In recent years, the New Jersey Supreme Court has greatly expanded the scope of expert testimony available to attorneys handling medical malpractice, product liability and toxic tort cases. Although some have criticized the expanded admission of expert opinions as the use of "junk science," the ability to use previously inadmissible opinions will be most significant in cases involving issues of medicine, technology or the sciences. However, more recently, the New Jersey Supreme Court has given attorneys a defense against use of these newly admissible opinions.

The court opened the door to the expanded admission of expert testimony in *Rubanick v. Witco Chemical Corporation*.¹ In *Rubanick*, plaintiff alleged her husband died as the result of colon cancer caused by his exposure to polychlorinated biphenyls (PCBs). Mr. Rubanick had been exposed to PCBs over a five-year period and died at the age of 29. At a Rule 8 hearing, plaintiff called Dr. Earl Balis, who testified that Mr. Rubanick's colon cancer was caused by exposure to PCBs. Dr. Balis held a doctorate in biochemistry, was a primary cancer researcher at Sloan-Kettering Cancer Center in New York for 37 years and had headed a research group primarily concerned with investigating the cause, diagnosis and treatment of colon cancer. He had participated in the publication of approximately 170 scientific articles, of which 15 concerned the cause of cancer.

Dr. Balis had not examined the plaintiff's decedent; rather, his opinion was based upon the extremely low incidence of cancer in males under 30, the absence of other risk factors, such as smoking or family history of cancer, the fact that approximately 5 percent of plaintiff's co-workers developed cancer during the relevant time and evidence that PCBs produce cancer in animals and humans. Dr. Balis testified

that, although the scientific community "pays no attention to PCBs whatsoever," 13 of the 39 papers he had reviewed on the subject supported his opinion.

The defendant manufacturer of PCBs called three witnesses, who testified that there were no published scientific studies suggesting that colon cancer had any relationship to PCB exposure. The defense experts noted that it was impossible to extrapolate findings in animal studies to humans. They further noted that the very specific kind of PCB utilized by the plaintiff's decedent had a low chlorine content and that there were no studies indicating that PCBs of similar chlorine content caused cancer in animals. The defense experts indicated that, of 17 studies on the effects of exposure to PCBs in humans, none identified an increase in colon cancer. The defense experts stated that there was not even "a substantial minority acceptance" of the opinions put forth by Dr. Balis. At the close of the hearing, the trial court found that Dr. Balis' opinion was not admissible because "the theory of causation Dr. Balis offered had not been generally accepted by the scientific community."² Due to the lack of expert testimony, the trial court granted summary judgment to the defendants. The Appellate Division affirmed.

The Supreme Court reversed in a far-reaching opinion. While stating that it did not "easily depart from the traditional test governing the admissibility of expert testimony,"³ the court noted that toxic tort litigation does not generally lend itself to the use of "well established and widely accepted scientific theories of causation that can, at the level demanded by the scientific method, precisely delineate the causal path between the toxin and the pathology."⁴ The court therefore held that:

[I]n toxic-tort litigation, a scientific theory of causation that has not yet

reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field. The evidence of such scientific knowledge must be proffered by an expert who is sufficiently qualified by education, knowledge, training, and experience in the specific field of science. The expert must possess a demonstrated professional capability to assess the scientific significance of the underlying data and information, to apply the scientific methodology, and to explain the bases for the opinion reached.⁵

The court explained that it was not necessary that there be general scientific agreement with the opinions drawn, but merely that the methodology and data are generally used by experts in the field. The court then also noted that Dr. Balis' methodology appeared to be sound and well-founded. Dr. Balis' review of the decedent's personal and family history, articles and studies of the effects on animals and humans of exposure to PCBs and the extremely low incidence of cancer in males under 30 was sufficient to permit admission of Dr. Balis' opinion.

However, in *Jacober v. St. Peter's Medical Center*,⁶ the Supreme Court has provided practitioners with a weapon to counter the expanded ability of experts to render opinions that have not even obtained the respect of a minority of those in the relevant scientific community. In *Jacober*, the plaintiff's child was born prematurely and had a birth weight of one pound, 10 ounces. In order to monitor the infant's blood pressure and gasses, the defendant physicians decided to insert a catheter. Two catheters were prepared: a 3.5 catheter and a 5.0 catheter. The defendants attempted to catheterize the infant using the larger catheter, causing circulation problems which resulted in auto-amputation of the toes on the right leg and growth problems with the leg. When the in-

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fant was 10 years old, the right leg was misshapen and six inches shorter than the left leg.

Plaintiffs filed suit, alleging that the doctors were negligent, *inter alia*, for using the large catheter. Plaintiff's expert testified that it was a deviation from generally accepted standards to use the large catheter because of the infant's low birth weight. Defendants presented experts who testified that the large catheter should have been used. At trial, plaintiff's counsel attempted to use medical literature to support the argument that the smaller catheter should have been used. Plaintiff's counsel attempted to cross-examine the defense experts with several texts which the defense experts conceded were "standard" but nevertheless not "authoritative." Indeed, one of the defense experts stated that he would not accept his own publication as "authoritative" for anyone other than himself. This expert testified that nothing in the medical literature was "authoritative," but rather was at best "one man's opinion." The trial court prevented plaintiff's counsel from cross-examining the defendants with these textbooks. The jury returned a verdict in favor of the defendants.

The Supreme Court, recognizing that experts have been trained to testify that no text is authoritative, even their own, held that an expert only need recognize a text as a "standard authority," not "authoritative," in order to utilize that textbook to cross-examine the expert.⁷ The court further held that, if an expert testifies that a publication is regarded by professionals in the field as trustworthy, then it satisfies the requirements of the rule. The court noted it is illogical to allow experts to give opinions on "book knowledge" and then deprive the party challenging the evidence of the opportunity to interrogate the witness about "divergent opinions expressed in other reputable books."⁸ The court noted that textbooks generally have a high degree of trustworthiness and reliability due to the scrutiny, criticism and revision that are required in order for

a textbook to "find its way into publication."⁹ The court adopted *F.R.E.* 803 (18), which permits statements contained in learned treatises to be utilized as evidence. The court noted that adoption of the federal rule will 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."¹⁰ Finally, the court noted that the new rule applies not only to learned treatises, but also to other texts if the texts represent the type of material relied upon by experts in the field, such as "safety codes."¹¹ Thus, not only will medical texts be admissible into evidence, but safety codes and other manuals also may now be forcefully utilized as evidence. Indeed, experts will be permitted to introduce the information contained in such publications on direct examination if they rely on the publications in forming their opinion. These publications can be used offensively to bolster a witness offered by that party, or defensively to counter the *Rubanick*-type expert witnesses who offers opinions which are contrary to the prevailing opinion in the field as found in research obtained by the attorney.

In sum, the Supreme Court has greatly expanded the ability of attorneys to effectively utilize expert opinions to prove their cause. In the future, litigation of medical, technical and scientific issues will be won in the library. ■

Abbott S. Brown and William L. Gold are partners in the South Orange law firm of Brown, Gold & Beck. Both Brown and Gold have been appointed as certified civil trial attorneys by the New Jersey Supreme Court.

Endnotes

1. 125 N.J. 421 (1991).
2. *Id.* at 430.
3. *Id.* at 433.
4. *Id.* at 449.
5. *Id.* at 449.
6. 128 N.J. 475 (1992).
7. *Id.* at 488.
8. *Id.* at 494-95.
9. *Id.* at 475.
10. *Id.* at 495.
11. *Id.*