A 'Masterly' Opinion on Expert Testimony

By Robert Ambrogi

"Masterly" is the word one blogger used to describe the recent federal appellate opinion overturning a $21 million jury verdict in a product liability case. Another blogger commended the opinion for adhering to the "stark and clear text" of Federal Rule of Evidence 702, rather than the more ambiguous language of the Supreme Court's *Daubert* decision.

The object of these accolades is the Sept. 8 opinion of the 6th U.S. Circuit Court of Appeals in *Tamraz v. Lincoln Electric Company*, in which the court reversed a jury verdict in favor of a welder who claimed his exposure to manganese caused him to develop parkinsonism.

In a carefully worded opinion, Circuit Judge Jeffrey S. Sutton said that the expert testimony of the medical doctor who attributed the welder's disease to his manganese exposure fell on the wrong side of "the often-elusive line between admissible opinion and inadmissible speculation."

While the court was careful to praise the expert as intelligent and knowledgeable, it said that his testimony concerning causation was at best a working hypothesis, not admissible scientific knowledge. "Because the 'knowledge' requirement of Rule 702 requires 'more than subjective belief or unsupported speculation,'" Judge Sutton wrote, "the testimony should have been excluded."

Adding to the significance of the case is that it was one of the first to go to trial of several against manufacturers of welding supplies that were consolidated as multidistrict litigation in the Northern District of Ohio. As the 6th Circuit's opinion noted, this case was seen as a "bellwether … to guide the resolution of the other cases."

Disagreement over Diagnosis

The plaintiff, Jeff Tamraz, worked as a welder in California from 1979 to 2004. Beginning in 2001, he started to suffer symptoms of parkinsonism, including tremors, drooling and impaired coordination. Believing that his condition was due to his exposure to manganese fumes in welding products, he sued five manufacturers.

At trial, the dispute focused not on whether Tamraz suffered from parkinsonism, but on its type. His contention was that he had manganism, a form of parkinsonism caused by exposure to manganese. The defense contended that he had Parkinson's Disease, a form of parkinsonism for which the cause is unknown. The symptoms of the two forms of the disease are similar but not identical.

At the conclusion of the trial, the jury found against all five defendants on claims of strict liability and negligent failure to warn. The jury awarded Tamraz $17.5 million in compensatory damages and his wife $3 million for loss of consortium.

Key to the verdict, the 6th Circuit found, was the testimony of the plaintiff's treating neurologist. Although several doctors testified as expert witnesses, it was the neurologist's evaluation of causation that substantially swayed the jury, the court said.

Uncertain Etiology

In its analysis of the case, the court focused on the evidence regarding the etiology – or causation – of Tamraz's parkinsonism. The neurologist testified that Tamraz's symptoms resembled those of Parkinson's Disease. But he hypothesized that Tamraz might have had a genetic predisposition to Parkinson's that manganese could have triggered, even in lower levels than are necessary to cause manganism.

This testimony should not have been admitted, the 6th Circuit said, because the expert went beyond the boundaries of what is allowed under Rule 702. "The etiological component of this conclusion – the 'manganese-induced' part – was at most a working hypothesis, not admissible scientific 'knowledge,'" Judge Sutton wrote. "Because the 'knowledge' requirement of Rule 702 requires 'more than subjective belief or unsupported speculation,' … the testimony should have been excluded."

Even though the expert's hypothesis was plausible and "may even be right," it was nonetheless untested and required a leap of faith, the court said. "That manganese *could cause* Parkinson's Disease in someone like Tamraz does not show that manganese *did cause* Tamraz's Parkinson's Disease."

Judge Sutton was careful to say that the court's opinion should not be read as a criticism of the expert for presenting the sort of hypothesis that plays a valuable role in advancing medical science. But the law must follow science, not get ahead of it, he noted.

"The issue is the reliability of his opinion from a *legal* perspective," Judge Sutton explained. "And what science treats as a useful but untested hypothesis the law should generally treat as inadmissible speculation."

Dissent Sidesteps Rule 702

In a dissenting opinion, Judge Boyce F. Martin Jr. criticized the majority for its failure to defer to the trial judge's "gatekeeper" finding that the expert's testimony was admissible. The trial judge was correct to have admitted the testimony under the standards set out by the Supreme Court in *Daubert*, Judge Martin argued.

"While [the neurologist] testified that he was not able to point to a specific study showing that manganese exposure caused Parkinson's Disease, his testimony was supported by his own general experience and knowledge …, and theoretical medical writing that explored

the connection between manganese exposure and Parkinson's Disease," Judge Martin explained.

David E. Bernstein, a professor at George Mason University School of Law and a nationally recognized expert on the admissibility of expert testimony, contended that the dissent is wrong in its reliance on *Daubert* in place of Rule 702.

"Rule 702, promulgated in 2000, and not the more ambiguous *Daubert* or *Kumho Tire* opinions, decided in 1993 and 1999 respectively, is what dictates the scope of admissible expert testimony," Bernstein wrote in a post at the blog The Volokh Conspiracy. "Any interpretation of *Daubert*, *Kumho Tire*, or the 1997 *Joiner* case that conflicts with the subsequent statute, Rule 702, is legally incorrect."

No Snarky Stuff Here

Meanwhile, James M. Beck, the Dechert LLP lawyer who writes the blog Drug and Device Law, praised the majority opinion not only for its reasoning, but also for its craftsmanship.

"Every once in a great while, we read an opinion that stands out as an example of judicial craftsmanship," Beck wrote at his blog. "The facts and issues are explained in clear, lively prose. The reasoning is careful and thorough, leading inevitably to undeniable conclusions."

Beck was particularly appreciative of the respect the opinion's author showed to the parties in the case and to the expert whose testimony was under examination. Conceding that, as a blogger, he sometimes takes pleasure in "making snarky comments" about experts, he commended Judge Sutton for taking the high road in the opinion.

"Judge Sutton’s respectful dismissal of an expert’s testimony as inadmissible is much more satisfying than the snarky stuff and delights the angels of our better nature," Beck said. "Advocates looking for a way to exclude the testimony of a well-credentialed, respected expert would do well to follow Judge Sutton’s opinion."

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