**Liberalization of expert testimony admissibility – N.Y.**

*By Richard E. Lerner*

The New York Appellate Division, First Department, appears to have relaxed the standards for the admission of expert scientific testimony. Under the *Frye* rule (*Frye v. United States*), admissibility of evidence depends on whether the expert’s testimony is based on scientific principles or procedures or whether the testimony has sufficiently gained general acceptance in its specific field.

The *Frye* test underlies New York’s two-part test on the admissibility of scientific expert testimony. This requires the testimony to be 1) based on scientific knowledge not within the scope of the juror’s knowledge, and 2) based on scientific principles or procedures, comporting with the general acceptance test.

In recent decisions by the lower courts, the requirement for a general-acceptance test for expert scientific testimony has become more lenient, allowing "some support" that looks scientific to be admissible. It will ultimately be up to the Court of Appeals to resolve the *Frye* issue. In the meantime, litigants should preserve the record for future review by the Court of Appeals.

**Background**

Under the *Frye* rule, admissibility of expert opinion evidence in New York depends upon whether the expert’s testimony is based on scientific principles or procedures, or whether it has gained general acceptance in the field to which the principles or procedures relate. The rule requires that the party proffering the scientific evidence conclusively demonstrate general acceptance. Normally, if the proof were accepted only by a minority of scientists in the relevant field, the proof would be excluded. The New York courts continue to apply the *Frye* general-acceptance test, rather than the *Daubert* test set forth by the U.S. Supreme Court, which is applicable in the federal courts and has been adopted by many states. In *Daubert*, the U.S. Supreme Court held that a scientific theory may be presented in a federal court, even though it has not achieved general acceptance, so long as the proponent establishes that the theory is grounded in the scientific method.

**Issue**

New York — in theory — has a stricter standard governing the admissibility of expert testimony than the federal courts. The theory and the practice are quite different, however, and it appears that there is a tension between the desire of some courts to adopt the more liberal *Daubert* approach — without actually citing it as authority — and the desire of other courts to maintain the *Frye* barrier to theories that have yet to gain general acceptance.

**Analysis of recent case law**

The *Frye* standard underlies New York’s two-part test on the admissibility of scientific expert testimony. The first prong of the test requires that the proffered testimony be based upon scientific knowledge and skill that is not within the scope of the juror’s ordinary training or intelligence. If the proffered proof is based solely on common knowledge or intelligence, the testimony is excluded because the jury could form a reasonable opinion of its own. The second prong requires that the expert’s testimony be based on scientific principles or procedures, comporting with the general-acceptance test.

While a particular procedure need not be unanimously endorsed by the scientific community, it must be *generally accepted* as reliable. Whether a theory passes muster may be established by court opinions, texts, laboratory standards or scholarly articles, and often involves considering whether a sufficient quantum of other experts in the same field accept the reliability of the theory or process.
It is within the province of the trial court to determine whether the expert’s testimony is both necessary to assist in the jury’s interpretation and has gained general acceptance. If the expert’s proposed testimony is found — upon a “Frye hearing” — to pass the two-prong test, the weight to be given the testimony is left to the jury.

Each of the Appellate Departments has stated its agreement that the New York Court of Appeals has adopted the Frye standard and that expert testimony on a particular method or procedure must be generally accepted within the specific professional community in order for it to be admissible.

Prior to the First Department’s 2004 decision in Marsh v. Smyth, any apparent differences that existed among the departments appeared to be based upon specific facts of a case, rather than a particular view of the department. From a factual standpoint, differences arise when a court is required to determine whether a methodology or procedure is novel, and when a court must decide whether the expert has indeed relied on a generally accepted procedure or methodology.

The New York courts have stressed that in applying Frye, a trial court should not focus on the expert’s conclusion or result, but instead on the methodology, procedure or test itself. In Marsh v. Smyth, a patient underwent a hysterectomy to treat her ovarian cancer, following which she complained of severe pain and weakness in her arm and shoulder, which was thereafter diagnosed as long thoracic nerve palsy. She alleged that the palsy was caused by the anesthesia team’s improper hyper-abduction of her arm for an extended period while she was under general anesthesia. After conducting a Frye hearing, the trial court granted the defendants’ pretrial motion to preclude the testimony of the plaintiff’s two medical experts on the grounds that their theories concerning the positioning of the arm during the surgery were not generally accepted in the medical field.

The First Department reversed, finding that the trial court went beyond the “limited” role of a Frye hearing and intruded upon the jury’s realm of weighing the evidence. The court found that the experts’ testimony and the supporting medical literature satisfied the Frye standard. While the majority opinion perfunctorily stated that the trial court erred in precluding the plaintiff’s experts, the lengthy concurring opinion articulated the view that as long as there is some support for the proposed expert’s opinion, it will then fall to the jury to determine whether the testimony is credible:

Expert testimony as to whether the asserted conduct of the defendants was the causative agent for the plaintiff’s injury does not really involve anything novel or experimental as contemplated by the Frye test. Rather, it is exactly that which is often the primary point of contention in a personal injury action, where the plaintiff offers an opinion that the defendant’s conduct caused the injury, and the defendant denies any such conduct and counters that the injury resulted from some other causative agent, unrelated to defendant. Such expert testimony simply does not warrant a preliminary Frye-type hearing; these types of competing claims are adequately dealt with at trial.

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The appropriate question for the court at such a hearing is the somewhat limited question of whether the proffered expert opinion properly relates existing data, studies or literature to the plaintiff’s situation, or whether, instead, it is “connected to existing data only by the ipse dixit of the expert.”

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So, the proper inquiry for the motion court here was, at most, simply to ensure that the expert opinions of [plaintiff’s experts] relating to plaintiff’s situation found some support in existing data, studies or literature. Their submissions provided the requisite support for the theory of causation they proposed, and accordingly, their testimony should have been permitted (emphasis added).

So we see that the general-acceptance test was made somewhat wishy-washy. If the expert can point to “some support” that looks scientific, it will pass muster, at least within the First Department.

Often in cases involving the Frye principle, the court’s decision does not explicate the scientific (or allegedly scientific) issue in dispute. A recent example is Gayle v. Port Authority of New York and New Jersey. In Gayle, the court stated
“defendant’s factual disagreement with plaintiff’s medical causation theory did not warrant a [Frye] hearing, since no scientific technique or novel application of science was at issue. Defendant’s Frye objection during the testimony of the plaintiff’s medical experts was properly rejected, since there were relevant examples and data accompanying the experts’ opinions” (emphasis added). The “relevant examples and data” were not discussed in the reported decision. The trial record of the case, however, demonstrates the laxity of the requirement of some mere showing of relevance.

What was at issue during the Gayle trial — but not mentioned in the reported decision — was whether the plaintiff, who suffered a shock that passed from one hand to the other, could have sustained nerve injury in his groin. (The plaintiff claimed that he had difficulty achieving an erection, and his expert testified that the shock had caused peripheral nerve injury in the groin.) At trial, the defendant’s request for a Frye hearing was denied, because the plaintiff was able to point to medical journal articles in which individuals who had been struck by lightning had sustained groin injuries. The defendant countered this by pointing out that it is a rule of physics that electricity travels by the shortest route, and that the electricity that traveled through the plaintiff — which passed from hand to hand — could not have taken a detour through the groin to damage the peripheral nerves. Additionally, it was shown that the individuals struck by lightning were grounded at the feet — that is, the electricity passed from the upper part of the body to the feet, necessarily passing through the groin.

As in Marsh v. Smyth, the court essentially held that this dispute could be adequately dealt with at trial. Is such a dispute, however, “adequately dealt with at trial,” as the Marsh and Gayle courts believe? Consider that in New York, an expert cannot be cross-examined in front of the jury with reference to medical or scientific texts that the expert does not acknowledge to be authoritative: Watkins v. Labiak, 6 A.D.3d 426 [2d Dep’t 2004]; Bryant v. Bui, 265 A.D.2d 848 [4th Dep’t 1999]. Thus, if the expert simply denies the authoritativeness of, e.g., myriad medical texts that indicate that the expert’s theory is not in accordance with generally accepted principles, the opponent of the testimony is stymied. Nor can a party present the medical texts through his own expert, as that would constitute improper bolstering. Thus, under Marsh v. Smyth and Gayle v. Port Authority, it would suffice if the expert could point to a scientific article and make a colorable argument that it is relevant; that is all that is needed in the First Department to defeat an application to preclude expert testimony.

In Marsh, the First Department found that the defendant failed to demonstrate that the plaintiff’s expert was employing a novel procedure or methodology. As stated in the concurring opinion, the plaintiff’s expert was (at most) propounding a novel theory regarding the mechanism of the injury. Under such circumstances, the Frye test must be adapted to the situation, the court held: “Unlike a newly developed test or process, a theory about the mechanism of an injury will not prompt the profession generally to weigh in with its own studies or publications on the subject.” Under this approach:

the challenge should only be successful where the challenged theory of causation finds no objective support, but instead is based solely upon the expert’s own unsupported beliefs. Accordingly, the court’s concern must be limited to making sure that within the scientific field in question, there is a substantive, demonstrable, objective basis for the expert’s conclusion.

This turns the general-acceptance test on its head, converting it into a test of whether there is some — any — objective support, even if the objective support has been discredited. Under the logic of the First Department concurrence, if the facts suggest that the expert is offering an opinion on the mechanism of an injury, his findings do not need to be in accordance with what is generally accepted in his professional community:

The focus of the inquiry in such an instance should not be upon how widespread the theory’s acceptance is, but should instead consider whether a reasonable quantum of legitimate support exists in the literature for the expert’s views. Nor is it necessary, as the motion court seems to have believed, that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff’s expert.

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To require proof in a medical malpractice case that a propounded theory of causation is accepted by a substantial percentage of the profession would be to impose a virtually insurmountable hurdle. As a
practical matter, it is likely that any theories of causation propounded by plaintiffs’ experts will be challenged by an equal or greater number of defense experts.

So, the proper inquiry for the motion court here was, at most, simply to ensure that the expert opinions … relating to plaintiff’s situation found **some support** in existing data, studies or literature (emphasis added).

The *Marsh* and *Gayle* cases thus appear to subvert the *Frye* general-acceptance test in allowing “some relevant data” to suffice to pass muster. In two more recent cases of the First and Second Departments, however, it was held that an expert affirmation that does not pass muster under *Frye* cannot defeat a motion for summary judgment. In *Heckstall v. Pincus*, 2005 NY Slip Op. 05174 (1st Dep’t, June 16, 2005), the plaintiff’s expert contended that a medication prescribed by the defendant physician created or aggravated the arrhythmia that caused the death of the decedent. The First Department noted that the defendant’s moving papers demonstrated the safety and efficacy of the medication, but that in opposition, the plaintiff, *inter alia*, failed to present any clinical or epidemiological data or peer reviews linking the medication to death or arrhythmia. Accordingly, upon the authority of *Frye v. United States*, this court held that the Supreme Court erred in denying the defendant physician’s motion for summary judgment.

In *Parker v. Mobil Oil*, 2005 NY Slip Op. 02454 (2d Dep’t, March 28, 2005), the Second Department held that the Supreme Court had erred in denying the defendants’ motion for summary judgment because the opinion evidence of the plaintiff’s expert physicians failed to demonstrate “through scientific or legal writings, judicial opinions, or expert opinion other than that of the proffered expert” that their opinions were generally accepted. Thus, the Second Department held that the plaintiff’s experts’ opinions that his exposure to benzene caused his alleged injuries did not pass muster under *Frye*. Because the plaintiff’s experts’ opinions were not supported by the scientific literature, the Second Department held that they were insufficient to defeat the defendants’ motion for summary judgment.

**Comment**

Thus we see that the *Frye* decisions of 2005 are more restrictive than the 2004 *Frye* decisions. Since the law is in flux, litigants would be well advised to take all possible steps to preserve the record for ultimate review by the Court of Appeals. In the first instance, the issue should be preserved, either through pretrial motion practice or at trial, with a request for a *Frye* hearing. In support, the opponent of the testimony should be prepared to offer into evidence all (or as many as is reasonable) of the scientific or medical authorities that would demonstrate that the plaintiff’s expert’s theory is contrary to generally accepted principles. Assuming the application is denied and the expert is permitted to testify, the opponent should be prepared to attempt to cross-examine the expert using each of the authorities, which should be separately marked and clearly identified for the record.

After the expert denies the authoritativeness of the materials cited by the opponent, those materials would not be admissible as evidence that could be presented to the jury. Nonetheless, the materials should be offered as court exhibits, in order to preserve the record for appellate review. Finally, when the opponent’s own expert takes the stand to testify, he should seek to make a record that these previously marked materials are indeed authoritative. Should objection be made that this should not be done in the presence of the jury (which is, of course, likely), a request should be made that this testimony be taken outside the jury’s presence.

Ultimately, the Court of Appeals will be asked to rule on a *Frye* issue, and unless a well-preserved record is placed before it, there is great risk that the court will not grasp the full dimensions of the issue, which will open the floodgates to junk science in the courtroom.

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3. 12 A.D.2d 307 (1st Dep’t 2004).
[1996]); shaken baby syndrome (see People v. Yates, 290 A.D.2d 888 [3d Dep’t 2002]; and multiple-chemical-sensitivity syndrome (see Oppenheim v. United Charities, 266 A.D.2d 116 [1st Dep’t 1999]).

6 A.D.3d 183 (1st Dep’t 2004).

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