

EXPERT TESTIMONY

New Standards for Expert Testimony

BY M. G. SUNGAILA AND DAVID M. AXELRAD

Experts testify in almost every civil case that goes to trial in California. In fact, in many types of cases, such as medical malpractice and product liability actions, expert testimony is essential to a plaintiff's recovery. Yet, with the exception of testimony based on novel scientific tests or techniques, the California Supreme Court has not provided guidance as to what the standards for admitting expert testimony should be. Recently, however, the court agreed to fill this analytical void.

KELLY/FRYE V. DAUBERT

Decades ago, under *People v. Kelly* (17 Cal. 3d 24 (1976)) and *Frye v. United States* (293 F. 1013 (D.C. Cir. 1923)), California and federal courts admitted expert testimony based on novel scientific evidence only if the methodology underlying the evidence was generally accepted in the relevant scientific community.

The rule for novel scientific evidence—and, indeed, for all types of expert testimony—changed in the federal courts in 1993 under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (509 U.S. 579) and the subsequently modified Federal Rules of Evidence. Now, before an expert can testify to any “scientific, technical, or other specialized knowledge,” a federal district court must be satisfied that “the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.” (Fed. R. Evid. 702; *see also, Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (extending Daubert to nonscientific expert testimony).)

STATE UNCERTAINTIES

In California, however, the *Kelly/Frye* “general acceptance in the relevant scientific community” test still applies to the narrow class of expert testimony based on new scientific methodology—such as DNA testing and the HGN drunk-driving test. (*People v. Leahy*, 8 Cal. 4th 587 (1994).) The California trial court's role in screening other types of expert testimony is less well-defined.

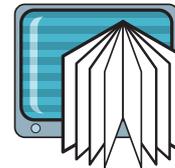
Evidence Code section 801 limits expert testimony to a matter “of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.” Upon objection, a trial court is statutorily required to “exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion.” (Cal. Evid. Code § 803; *see also, Young v. Bates Valve Bag Corp.*, 52 Cal. App. 2d 86, 96 (1942).)

Because the subjects on which expert opinion may be received are so numerous, the Legislature expressly left to the courts the task of interpreting the general-foundation standard under Evidence Code section 801. (Cal. Law Revision Com. com., 29B pt. 3 West's Ann. Evid. Code (1995 ed.) foll. § 801, p. 20.)

Courts of appeal have consistently recognized a trial court's duty to examine the foundation of expert opinions and exclude testimony that lacks proper foundation. (*See, Pacific Gas & Electric v. Zuckerman*, 189 Cal. App. 3d 1113 (1987).)

By requiring trial courts to review the foundation for expert testimony before allowing that testimony to be admitted, Evidence Code sections 801 and 803 assure “the reliability and trustworthiness of the information used by experts in forming their opinions.” (*See, Cal. Law Revision Com. com.*, 29B pt. 3 West's Ann. Evid. Code, foll. § 801, p. 21.)

As one court of appeal noted: “Where an expert bases his conclusion upon assumptions



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GENERAL CREDIT

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which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value,” and it is proper to preclude a jury from hearing that testimony. (*Pacific Gas*, 189 Cal. App. 3d at 1135.) Or as another court opined: “Like a house built on sand, the expert’s opinion is no better than the facts on which it is based.” (*Kennemur v. State of California*, 133 Cal. App. 3d 907, 923 (1982).)

APPELLATE EXPANSIONS

Recently, a number of courts of appeal have further examined the scope and application of Evidence Code section 801. The majority of them have determined that section 801 requires trial courts to analyze whether the foundation for an expert’s opinion, on its face, supports the particular opinion offered.

In *Lockheed Litigation Cases* (115 Cal. App. 4th 558 (2004) (*Lockheed I*)), for example, the Second District affirmed a summary judgment for the defendants in a wrongful death action brought on behalf of former workers at Lockheed’s aerospace plant in Burbank. The plaintiffs claimed that chemical manufacturers and suppliers failed to adequately warn of hazards associated with products they allegedly supplied to Lockheed and that purportedly harmed the workers. The trial court excluded the testimony of the plaintiffs’ sole causation expert, Dr. Daniel Teitelbaum, based on the lack of a reliable foundation for his testimony, and then granted summary judgment for the defendants.

Teitelbaum had relied exclusively on a single survey of epidemiology studies to support his opinion that the defendants’ chemicals—five cleaning solvents used in manufacturing aircraft—increased the risk of contracting the types of cancer at issue. But the survey established only that painters exposed to a complex mixture of thousands of chemicals, containing only three of the defendants’ five chemicals, showed an increased risk of cancer.

The plaintiffs argued that the court had no authority to examine these

deficiencies because Evidence Code section 801 allows a trial court to examine only whether the type of study on which an expert relies is generally the type on which experts tend to rely—for example, epidemiology studies—without examining the relevance of the study’s content to the particular opinion being offered. In affirming the trial court’s exclusion of this testimony, the court of appeal made clear that Evidence Code section 801 requires a link between the matter the expert relies on and the opinion being offered. And the court concluded that “an expert opinion based on speculation or conjecture is inadmissible.” (115 Cal. App. 4th at 564.)

In a subsequent appeal in the same coordinated litigation, the court reiterated that in “determining whether there is a reasonable basis for an expert opinion” under section 801, a trial court “must examine the matter that the expert relied on in forming his or her opinion.” Moreover, the court made clear that this “analysis is limited to determining whether the matter relied on can provide a reasonable basis for the opinion or, on the other hand, reveals that the opinion is based on a leap of logic, conjecture, or artifice.” (*Lockheed Litigation Cases*, 126 Cal. App. 4th 271 at 285 (2005), review granted April 13, 2005, No. S132167.)

The *Lockheed II* plaintiffs claimed that the trial court abused its discretion by excluding the testimony of their sole general causation expert, Dr. Daniel Teitelbaum, because it lacked a reliable foundation. The court upheld the judgment in the defendants’ favor, concluding that the trial court did not abuse its discretion by excluding Teitelbaum’s testimony because, once again, it was based on matter that did not support his conclusions about the ability of the products at issue to cause the harm plaintiffs allegedly suffered.

The California Supreme Court has granted review of the decision in *Lockheed II*. The issue the court will decide, as set forth in the plaintiffs’ petition for review, is whether Evidence Code section 801 permits a trial court “to conduct its own review of the scientific evidence underlying an expert’s opinion to determine

whether the evidence adequately supports the proffered opinion before allowing it to be presented to the jury.” In other words, the court has agreed to go beyond *Kelly* and determine the proper scope of a trial court’s analysis of the admissibility of expert testimony.

LOOKING BACK AT LOCKHEED II

In *Lockheed II* the court of appeal distinguished the opinion in *Roberti v. Andy’s Termite & Pest Control, Inc.* (113 Cal. App. 4th 893 (2003)), which, according to the plaintiffs, supported a narrower interpretation of trial court authority under section 801. In that case, Michael Roberti claimed that his autism was caused by in utero exposure to the pesticide Dursban, which was applied in the cellar of the Roberti home while his mother was pregnant with him. The trial court excluded the plaintiff’s expert testimony on causation at the motion in limine stage on two grounds. First, it ruled that the experts’ causation opinions, based on animal studies, failed the “general acceptance” admissibility test set out in *People v. Kelly* (17 Cal. 3d 24 (1976)). The court reasoned that the experts relied on a novel application of animal studies to humans, with no explanation of how or why such extrapolation was appropriate given the differences between animals and humans and the lack of confirming epidemiology studies. Second, the court concluded that the experts’ causation opinions were, for similar reasons, speculative.

The *Roberti* court of appeal reversed. It rejected applying the *Kelly* test to cases involving expert medical testimony, as opposed to novel devices or processes. The court also determined that “a more extensive preliminary admissibility test” under section 801 of the foundation for the experts’ causation opinions was inappropriate as well. (113 Cal. App. 4th at 836.) The court dismissed this test as a “*Daubert*-style analysis” that applies only in federal courts.

The *Lockheed II* court of appeal noted that *Roberti* “offers no guidance as to what section 801, subdivision (b) requires short of a ‘*Daubert*-style analysis’ ” or a “ ‘more extensive preliminary admissibility

test as in *Daubert*.” (126 Cal. App. 4th at 286.) And the *Lockheed II* court concluded that unlike *Roberti*, no “extensive preliminary admissibility test” was required to determine that the materials on which Teitelbaum relied did not provide a reliable foundation for his causation opinion about the ability of the chemicals at issue to cause the plaintiffs’ claimed injuries.

As in the prior *Lockheed I* opinion, the *Lockheed II* court determined that the epidemiology studies on which Teitelbaum relied did not show that the chemicals at issue increased the risk of contracting the type of adverse health effects the plaintiffs allegedly experienced. (See, *Lockheed II*, 126 Cal. App. 4th at 287–88.) Instead, the studies established only that individuals exposed to a complex mixture of organic solvents—in some instances not even including the chemicals at issue—experienced an increased risk of various adverse health effects. In short, the studies did not provide a reliable foundation for Teitelbaum’s causation opinion because they had no relevance to the causation issues in the case.

In *Lockheed II* the court also considered the animal studies on which Teitelbaum had relied for his causation opinion. It found those studies supplied no basis for his opinion in the case because they failed to show that any of the specific chemicals at issue were responsible for the plaintiffs’ adverse health effects, they analyzed diseases that plaintiffs did not have, and they could not be reliably extrapolated to humans. (126 Cal. App. 4th at 294–95.)

Teitelbaum also based his causation opinion in *Lockheed II* on case reports. The court of appeal found those reports did not support his opinion about general causation either. Case reports are anecdotal observations of symptoms in a single patient or a small group of patients. Case report authors may comment on an apparent temporal relationship between exposure to a chemical and

the onset of apparent adverse health effects in an individual, but they do not isolate or exclude potential alternative causes, investigate or explain the mechanism of causation, or draw conclusions about a chemical’s ability to cause a particular adverse health effect in humans generally. (126 Cal. App. 4th at 295.)

Finally, Teitelbaum relied in *Lockheed II* on treatises and registries of toxic effects that collect and disseminate information about the known or suspected adverse health effects associated with different substances. But many of the treatises and registries concluded there was only a *possible* association between the chemicals and diseases at issue. The court of appeal found this was insufficient in a toxic tort case, in which “a

“ Like a house built on sand, the expert’s opinion is no better than the facts on which it is based. ”

plaintiff must present expert testimony sufficient to establish to a reasonable medical probability”—that is, “more than a mere possibility”—that the defendant’s conduct contributed to the plaintiff’s injury. (126 Cal. App. 4th at 287.)

Other treatises and registries referred solely to the chemicals’ acute effects from short-term exposures, which were not at issue in the case. Still others failed to distinguish between acute effects and chronic effects from long-term exposures; only chronic effects were at issue in the case. As a result, the court of appeal held that these documents could not support Teitelbaum’s opinion that the chemicals were capable of causing the chronic, long-term effects the plaintiffs allegedly suffered. (126 Cal. App. 4th at 295–96.)

Other recent appellate decisions applying section 801 support the scope of a trial court’s examination of expert testimony approved in both of the *Lockheed*

Litigation Cases opinions. (*Jennings v. Palomar Pomerado Health Sys., Inc.*, 114 Cal. App. 4th 1108 (2003) (At p. 1117: “Exclusion of expert opinions that rest on guess, surmise or conjecture is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?” And at p. 1118: “The plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of the plaintiff’s injury.”); *Bushling v. Fremont Medical Center*, 117 Cal. App. 4th 493 at 510 (2004) (An “expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact.”); *People v. Mitchell*, 110 Cal. App. 4th 772 at 783–84 (2003) (“[R]egardless of whether evidence is deemed ‘scientific,’ it will not be admitted unless it is relevant.... In California evidence is relevant only if it has ‘any tendency in reason to prove or disprove any disputed fact.’ And an expert’s testimony must be based on matter ‘that is of a type that reasonably may be relied upon by an expert.’ ”))

GUIDANCE FROM ON HIGH

The increased use of expert testimony, and the corresponding increase in complexity of the scientific studies on which experts rely, heighten the need for guidance concerning the trial courts’ ability to filter that testimony and limit parties to presenting to a jury only those expert opinions that have a proper foundation. The supreme court’s upcoming analysis in *Lockheed II* of trial courts’ responsibility under Evidence Code section 801 will determine whether trial courts have the authority to assess the adequacy of the foundation for an expert’s opinion and the reliability of an expert’s testimony. **CL**

Self-Assessment Test

New Standards for Expert Testimony

MCLE SELF TEST

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1. The “general acceptance” standard under *People v. Kelly* is used to determine the admissibility of all expert testimony in California.
 True False
2. Trial courts are called on to examine the foundation for, and admissibility of, all types of expert testimony under Evidence Code section 801.
 True False
3. An expert opinion cannot rest on guess, surmise, speculation, or conjecture.
 True False
4. Upon objection, a trial court is statutorily required to exclude an expert opinion that lacks a proper foundation.
 True False
5. Recent court of appeal decisions have held that, so long as a particular type of study is one on which an expert would generally rely, a particular expert’s testimony should be found admissible.
 True False
6. The Legislature has set a general framework for determining the admissibility of expert testimony, which the courts have the task of interpreting.
 True False
7. Under current case law, there must be a link between the particular opinion being offered by the expert and the material on which the expert relies.
 True False
8. An expert opinion has no value if its basis is unsound.
 True False
9. The California Supreme Court has agreed to address the proper scope of a trial court’s examination of expert testimony.
 True False
10. An expert’s opinion has no evidentiary value if it’s based on a speculative or unreliable foundation.
 True False
11. In *Lockheed I* the court of appeal analyzed the admissibility of expert testimony that was based on several different types of scientific studies and materials—epidemiology and animal studies, treatises, and case reports.
 True False
12. According to the court of appeal in *Lockheed II*, animal studies can always be used to establish that a product is capable of causing the same type of harm in humans.
 True False
13. Case studies are broad-based studies of the experience of human populations with particular chemicals.
 True False
14. The court of appeal’s opinion in *Roberti* rejects an extensive analysis of the foundation for expert testimony.
 True False
15. The court of appeal’s opinion in *Lockheed II* has been the only appellate decision to support a broad scope of foundational review for expert testimony by trial courts.
 True False
16. Regardless of whether expert testimony is “scientific,” it will not be admitted unless it is relevant.
 True False
17. Most courts of appeal interpreting Evidence Code section 801 have determined that, at a minimum, it requires trial courts to analyze whether the foundation for an expert’s opinion, on its face, supports the particular opinion being offered.
 True False
18. In *Lockheed I* and *Lockheed II* the court of appeal rejected the expert’s causation opinions in part because they were based on epidemiology studies that had no relevance to the causation issues in either case.
 True False
19. In a medical malpractice negligence action, the plaintiff must offer an expert opinion that contains a reasoned explanation of why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause of the plaintiff’s injury.
 True False
20. In *Lockheed I* the plaintiffs argued that Evidence Code section 801 only allows a trial court to examine whether the type of study an expert relies on is the type on which experts in the same field tend to rely generally.
 True False

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