Calif. Ruling Got It Wrong On Trial Courts' Gatekeeping Role

By **Robert Wright and Nicole Hood** (September 21, 2023)

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The California Supreme Court's 2012 decision in Sargon Enterprises Inc. v. University of Southern California began a revolution in how California trial judges exercise their authority when admitting expert opinion testimony.

Sargon reshaped a passive judicial role into an active one. The California Supreme Court required that trial judges act as gatekeepers to exclude expert opinion testimony that is unreliable, unsupported or speculative.

As David Faigman, chancellor and dean of the University of California College of the Law, San Francisco, wrote in the Hastings Law Journal, Sargon was "arguably the most important California expert testimony decision in nearly two decades."[1]

Now, 10 years later, has the revolution been derailed? In Bader v. Johnson & Johnson,[2] a California state appeals court applied Sargon narrowly, seemingly recasting the trial judge's gatekeeping role from the active to the passive.

Bader appears to conflict with Sargon and will cause confusion about the courts' gatekeeping responsibilities.

Although the time to grant review in Bader has passed, it is now time for the California Supreme Court to provide direction about the vitality of Sargon and ensure that trial judges continue to wield the tools necessary to bar unreliable expert testimony from the courtroom.

Sargon: The Revolution Begins

Sargon held that, under California Evidence Code Sections 801 and 802, a trial court exercises a "substantial 'gatekeeping' responsibility"[3] to ensure experts exercise the same high standards in the courtroom that they would in their relevant field.[4]

Under Sargon, the trial court must confirm that the type of material that the expert cites provides an adequate foundation for an expert opinion.[5] The trial court must also dig further and determine whether the expert's opinion is logical.[6]

Sargon mandates that trial courts exclude expert witness testimony when based on factual assumptions that lack evidentiary support, or on factors that are speculative or based on conjecture.[7]

The trial court's substantial gatekeeping role thus requires it to exclude expert testimony that is "(1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative."[8]

The trial judge's authority to exclude such testimony comes from the basis for admitting

expert testimony — whether the expert testimony will aid the trier of fact in evaluating the issues before it.[9]

Of course, the trial judge's preliminary determination regarding the admissibility of an expert's opinion is not a decision on the persuasiveness of the opinion.[10] Likewise, that preliminary determination is not a decision on the merits of competing scientific opinions.[11]

The court conducts a limited investigation to see, logically, if the studies and information used by the experts during testimony support a finding that the expert's theory or technique is sound.[12]

The plaintiff in Sargon was a small dental implant manufacturer.[13] The plaintiff's expert tried to establish lost profits by comparing Sargon to "the Big Six" companies that marketed dental implants and controlled over 80% of global sales.[14]

The California Supreme Court held that the expert's testimony did not adequately support his proffered opinions because Sargon, as a very modest manufacturer, was not substantially similar to the Big Six manufacturers that the expert had used for comparison purposes.[15]

The Supreme Court approvingly quoted the trial judge's finding that Sargon was "not similar to the industry leaders by any relevant, objective business measure."[16]

The court also underscored the expert's admission that Sargon was distinguishable from the Big Six by objective business metrics, such as sales and number of employees.[17]

The court held that the trial judge properly relied on these criteria in concluding that Sargon and the Big Six were dissimilar.[18]

As Faigman wrote, in applying these criteria to evaluate the admissibility of the expert's testimony, the trial court properly "second-guessed an analogy underlying the expert's opinion."[19] And the California Supreme Court found that the trial judge properly used its discretion to reject the expert's analogy.[20]

Bader: Is Revolution Losing Force?

Bader involved a claim that cosmetic talc products caused the plaintiff's mesothelioma.[21] Although the plaintiff alleged that the products were contaminated with asbestos, the plaintiff's expert was allowed to testify that, regardless of asbestos contamination, talc behaves just like asbestos whenever a talc particle has the same general shape and size of an asbestos fiber.[22]

Last December, the First Appellate District properly acknowledged that the trial court has "substantial 'gatekeeping' responsibility to ensure that an expert's opinion is based on both reliable material and sound reasoning."[23]

Yet the court construed that gatekeeping role exceptionally narrowly. It appeared to exclude from the gatekeeping role any consideration of the reliability of the expert's opinion.

Instead, the court set a low standard. It found the expert's causation theory had "some support" in a publication by the World Health Organization's International Agency for Research on Cancer, or IARC.[24]

Although the court also identified some statements in the IARC publication that purportedly supported the expert's opinion, the court did not look further and analyze the basis for the IARC's statements.[25]

The court even refused to consider whether the IARC's analysis had "achieved a consensus in the field sufficient to render it 'generally accept[ed].' "[26]

According to the Bader opinion, the IARC working groups reviewed "'all pertinent epidemiological studies and cancer bioassays in experimental animals,' as well as mechanistic and other relevant data."[27]

But by employing such opaque analysis, the court seems to have delegated its gatekeeping responsibility to the IARC.

The court did not address such key questions as how the IARC formed its working groups, what studies those working groups considered, how the conclusions of those studies logically supported the IARC's and expert's opinions, and what peer-reviewed journals published those studies.[28]

Applying the same logic as in Bader, the result in Sargon might have been different. Under the logic of Bader, there easily would have been enough to establish a link between Sargon and the Big Six dental implant manufacturers to support the expert opinion testimony Sargon offered about its lost profits.

After all, Sargon presented the opinion testimony of an expert witness who relied on both historical financial data and analyses of the global dental implant market prepared by an independent market research firm, Millennium Research Group.[29]

The expert testified to his opinions about lost profits with "reasonable certainty" and drew an analogy between Sargon's modest manufacturing operation and the six companies that manufactured 80% of the world's supply.[30]

Yet the trial court in Sargon looked behind the logic of the expert's opinions and ruled that the evidence was not admissible because "the expert's methodology was too speculative."[31] And the Supreme Court in Sargon held that the "lack of sound methodology in the expert's testimony ... supported the trial court's ruling."[32]

In Bader, missing from the appeals court's opinion is any comparable scrutiny of the expert's methodology. Indeed, the court expressly rejected the appellants' argument that the court had any power to engage in such scrutiny.[33]

As Justice Jon Streeter recognized in his concurring opinion in Bader, the expert's causation theory was questionable because of the "lack of any showing that it is empirically testable."[34]

Justice Streeter acknowledged the importance of addressing "foundational validity" as shown by whether a theory is "testable by 'empirical demonstration of accuracy.'"[35]

Still, Justice Streeter and the appeals court majority declined to reach that issue because they mistakenly viewed it as not pertinent to Sargon.[36]

Such a narrow reading of Sargon conflicts with the decisions of some other intermediate

appellate courts. Other courts have read Sargon to require trial courts to assess the foundation for an expert's opinion through examination of the materials on which the expert has relied.

As multiple California appeals courts have held, "The plain language of Sargon dictates that a trial court exercise its gatekeeping function by considering the matter or information an expert actually relied on in reaching an opinion."[37]

Conclusion: Time to Revisit the Revolution?

The Bader appeals court misconstrued Sargon when it allowed the expert to base his theory on a publication by the IARC without considering the empirical testability of that theory.

As Faigman explained,

> Sargon no longer permits trial judges to defer to some proxy professional group, but rather assigns them the weighty responsibility of inquiring how the knowledge was derived. In epistemological terms, what is the group's knowledge claim, and is there an adequate warrant for the claim?[38]

Sargon accomplishes this by focusing courts on the methods and principles that underlie expert testimony, and thus requires judges and lawyers to understand the basis for the knowledge being claimed in court.[39]

The suggestion in the Bader court's opinion that an expert witness can satisfy California Evidence Code Sections 801 and 802 by deferring to a proxy professional group without independently assessing the reliability of the opinion will undermine Sargon and create uncertainty about the scope of the trial court's gatekeeping responsibility.[40]

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[1] Faigman & Imwinkelried, Wading Into the Daubert Tide: Sargon Enterprises, Inc. v. University of Southern California (2013) 64 Hastings L.J. 1665, 1694 (Wading Into the Daubert Tide). Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747.

[2] Bader v. Johnson & Johnson, 86 Cal.App.5th 1094 (2022).

[3] Sargon, supra, 55 Cal.4th at p. 769.

[4] Id. at p.772, citing Kumho Tire Co. v. Carmichael (1999) 526 U.S. 137, 152 [119 S.Ct. 1167, 143 L.Ed.2d 238].

[5] Id. at p.771.

[6] Id. at pp. 771–772.

[7] Id. at p.770.

[8] Id. at pp. 771–772.

[9] Id. at p.770.

[10] Id. at p. 772.

[11] Ibid.

[12] Ibid.

[13] Id. at p. 753.

[14] Id. at pp. 755–757.

[15] Id. at pp. 757–758; see Wading into the Daubert Tide, supra, 64 Hastings L.J. at pp. 1681–1682.

[16] Sargon, supra, 55 Cal.4th at p.778.

[17] Id. at p.777.

[18] Id. at pp. 778–779.

[19] Wading into the Daubert Tide, supra, 64 Hastings L.J. at p.1685.

[20] Ibid.

[21] Bader, supra, 86 Cal.App.5th at p. 1099.

[22] Id. at pp. 1105–1106.

[23] Id. at p. 1104, quoting Sargon, supra, 55 Cal.4th at p.769.

[24] Id. at p.1109.

[25] Id. at pp. 1109–1111.

[26] Id. at p.1110.

[27] Id. at p.1107.

[28] See id. at pp. 1107-1111.

[29] Sargon, supra, 55 Cal.4th at pp.755, 767.

[30] Id. at p.780.

[31] Id. at p.776.

[32] Id. at p.781.

[33] Bader, supra, 86 Cal.App.5th at pp. 1109–1112.

[34] Id. at p.1135 (conc. opn. of Streeter, J.).

[35] Id. at p.1137 (conc. opn. of Streeter, J.).

[36] Id. at pp.1110–1111; see also id. at p.1135 (conc. opn. of Streeter, J.).

[37] Lowery v. Kindred Healthcare Operating, Inc. (2020) 49 Cal.App.5th 119, 125, quoting San Francisco Print Media Co. v. The Hearst Corp. (2020) 44 Cal.App.5th 952, 964; see Onglyza Product Cases (2023) 90 Cal.App.5th 776, 785 (affirming trial court order excluding expert testimony on ground that expert placed too much reliance on a single study; "'[r]arely, if ever, does a single study persuasively demonstrate a cause-effect relationship'" as studies must "'be replicated in different populations and by different investigators before a causal relationship is accepted by epidemiologists and other scientists'"); Olive v. General Nutrition Centers, Inc. (2018) 30 Cal.App.5th 804, 818 (affirming trial court order excluding expert testimony on ground it was based on a "'nearly data free and methodologically primitive' analysis").

[38] Wading into the Daubert Tide, supra, 64 Hastings L.J. at p.1683.

[39] Id. at pp. 1683–1684.

[40] An amendment to Federal Rule of Evidence 702 scheduled to take effect on December 1, 2023, will assist federal trial judges in exercising their gatekeeping authority. The amendment will clarify that proponents of expert witness testimony must demonstrate to the court that the "opinion reflects a reliable application of the principles and methods to the facts of the case." (Fed. Rules Evid., rule 702, 28 U.S.C., effective Dec. 1, 2023.) The Advisory Committee Notes for the amendment highlight that "[j]udicial gatekeeping is essential" for jurors to properly utilize expert opinion testimony. (Fed. Rules Evid., rule 702, 28 U.S.C., advisory committee's note to 2023 amendment.).