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Expert Analysis
Recent Expert Reliability Rulings; COMPLEX LITIGATION

By Michael Hoenig
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One of the arduous tasks of trial and appellate judges in complex litigations is to screen expert testimony for reliability. Does the evidence get past the admissibility gate, or not? The judges are thus called "gatekeepers" and, upon their determinations, rests much of the life or death of a complex case. Since the judges' toil in the reliability vineyards is challenging, the litigating attorney for either side ought to view his or her role with some cautious gravity. Advocates wrangling over showings of reliability is serious business. A certain core of earnest diligence is called for. Preparation and structuring of proofs on expert reliability is rarely a shortcut exercise.

In federal courts admissibility of expert testimony is governed by Federal Evidence Rule 702 and further clarified by the Supreme Court's decisions in Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). For a fulsome discussion of these cases and many issued thereafter, see M. Hoenig, "Gatekeeping: Reliability of Expert Testimony Under Daubert (and Frye), chapt. 14, in 2 Preparing For and Trying the Civil Lawsuit (N.Y. State Bar Ass'n Treatise; N.A. Goldberg and J.P. Freedenberg, Editors).

In Weisgram v. Marley Co., 528 U.S. 440, 442 (2000), the court observed that, since Daubert, parties relying on expert evidence have had notice of the "exacting standards of reliability such evidence must meet." Thus, it "is implausible to suggest ... that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail." In other words, opposing counsel in a "Daubert reliability" battle are urged to give it their best shot.

Crossbow Case

An interesting expert reliability war is reflected in a recent decision by U.S. Southern District of New York Judge Nelson S. Roman, Nemes v. Dick's Sporting Goods, 2019 U.S. Dist. LEXIS 143895 (S.D.N.Y Aug. 23, 2019). Plaintiff, Jean Nemes, a 64-year old retired school secretary, received a crossbow as a gift from her husband. This modern "bow-and-arrow device" model was known as a Barnett Lady Raptor FX. However, a few months before his gift, she used her husband's crossbow, a so-called Barnett Reverse Raptor, some 20-30 times and took over a hundred shots. The husband taught Nemes how to use his Reverse Raptor.

Thereafter, plaintiff read the owner's manual for the Lady Raptor cover to cover and understood all the warnings and instructions. She estimated that she shot the Lady Raptor, without any problems, some 250-300 times in the weeks preceding her injury. Yet, one day, after some 12-15 shots, she squeezed the crossbow's trigger and her thumb slid, resulting in the distal half of it being amputated by the bow string. She testified she was not distracted, didn't lose her grip, balance or footing. Somehow, despite claiming her left thumb was below the "finger reminder rail," the thumb got above the rail and into the flight track. Her husband had warned her about the proper finger placement and she stated she fully appreciated the risk of having any body part in the flight track or above the finger reminders of the Lady Raptor.

Plaintiff claimed defective design in that the Lady Raptor lacked proper finger guards which would have blocked Nemes' thumb from going into the bow string path. Plaintiff's expert was Brian O'Donel, an engineer and machine

process safety expert employed by Robson Forensic, Inc., to provide technical investigations, analyses, reports and testimony. O'Donel testified that the Lady Raptor FX crossbow had inadequate thumb guards or barriers to prevent the injury.

The defendants were a sporting goods seller and Barnett Outdoors, maker of the Lady Raptor bow. They countered with two experts, John V. Grace, who, for years, assisted in the design of crossbows, also wrote owner's manuals for safe crossbow use, and instructed hundreds of individuals how to safely use a crossbow. He also testified in several cases. Defendants' second expert was Michael Van Durme, a retired New York environmental conservation police captain, who has been investigating hunting and shootingrelated accidents and injuries for over 20 years, and teaching about such investigations. He has been a Certified Hunter Education Instructor for over 33 years, teaching safe use and handling of firearms, bows and crossbows. He has researched and studied crossbow designs for 15 years and met with factory representatives of every major manufacturer of shooting crossbows.

Defendants sought to exclude O'Donel's opinion that the Lady Raptor lacked an adequate barrier guard. They also sought to exclude his opinion that the latter condition caused the injury. They argued that, in effect, all O'Donel did was handle and observe this and other crossbows, but he did no testing or analysis to determine the size or shape of an injury-prevention barrier guard. Further, they claimed O'Donel failed to come up with the requisite feasible alternative design. Nemes, LEXIS, at *8.

The defense experts Grace and Van Durme were offered on the issue of causation of the injury to refute plaintiff's causation argument. Their point: that plaintiff was "the sole cause of her injuries." Plaintiff likewise moved to exclude their opinions as unreliable under Daubert. Thus, Judge Roman was presented with dueling Daubert motions. He engaged in a rather exhaustive analysis of each expert's methodology and found reliability flaws in each of them. The respective witnesses did have sufficient qualifications to testify as experts but satisfaction of Daubert's reliability standards was another matter.

Methodologies Analyzed

As to O'Donel, the court concluded that the expert's sources of data, experience and testing (plus his reliance on Consumer Product Safety Commission guidelines) revealed "sufficiently reliable methods to assist a jury with deciding the defective design issue. Nemes, LEXIS at *13-*18. However, O'Donel's "strong opinions" on feasibility of a safer alternative design did not provide a sufficiently reliable foundation. The court reviewed each of O'Donel's sources (id. at *18-*30) and found them inadequately reliable. Said Judge Roman: "Such speculation is simply insufficient to support a design defect theory, even if seemingly common sense." Id. at *30. O'Donel could, however, opine on the crossbow's design as a foreseeable cause of the injury. Id. at *30).

The court then turned to the defense experts who were offered on the causation issue. Although they were qualified as experts with specialized knowledge, they failed to show sufficient facts or data that were the product of reliable principles and methods and that were reliably applied to this case. Hence, Grace could testify as to his general knowledge about causes of crossbow injuries and crossbow design but may not opine regarding his belief on the cause of plaintiff's injury "without having analyzed or tested the device at issue." Id. at *36-*41.

Defense expert Van Durme's extensive experience with crossbows offered fair reliability, in general, on the injuries users can receive and the mechanics of crossbow design. But this simply was not sufficiently reliable to apply to specifics of the incident as to which he "did no particularized testing." Thus, Van Durme may testify regarding his general beliefs about crossbow design as it relates to finger injuries. This would be so-called "general causation." But he may not opine on "specific causation" in this incident. Nemes, LEXIS at *41-*45.

Each side gained something by filing Daubert reliability motions to exclude. The court, as gatekeeper, undertook a copious review of expert qualifications and methodologies. The opinion is informative in parsing what gets past the admissibility gate and what does not. The battle and the gatekeeping analysis illustrate what I said at the outset. Counsel for each side must structure their expert proofs diligently.

Here, we have a relatively simple crossbow device, a noncomplicated set of facts and an injury that is perhaps not as severe as others that undergird many products liability claims. Yet, the gatekeeping judge expended much time in analyzing the indicia of unreliability in a manner usually undertaken in more complex litigations. By so informatively parsing the proofs, readers are provided with some guidance for their own Daubert challenges. The point is not that one must perforce agree with the court's conclusions in this case. Indeed, some may not. Rather, the point is that the ambit of the judge's discretion in such inquiries is significant. And, so, we as responsible advocates have to take into account that these battles are not a shoo-in, even relatively simple cases.

WaveRunner Warnings

Daubert reliability issues also can haunt product warnings claims. In Ruggiero v. Yamaha Motor Corp., U.S.A., 2019 U.S. App. LEXIS 18143 (3d Cir. June 17, 2019), a personal watercraft was alleged to be defective because it lacked an adequate warning of the need to wear protective clothing. Plaintiff suffered a severe internal injury when she fell off a 2009 Yamaha WaveRunner operated by plaintiff's boyfriend. Wearing only a two-piece bathing suit when she entered the water, a stream of water entered her rectum at a high velocity, leading to serious injuries.

The WaveRunner had two affixed labels. One, on the cover of the glove box below the handlebars, warned that passengers should wear protective clothing to prevent severe internal injuries and contained a corresponding illustration of a properly dressed rider wearing a wetsuit bottom. The second label, located at the rear of the WaveRunner above the boarding deck, similarly states that severe injuries can occur if a rider is not wearing protective clothing like a wetsuit bottom. Both labels are topped with an orange "WARNING" banner.

Plaintiff sought to introduce the testimony of an expert, William Kitzes, who would opine that onproduct labels were not adequate and should have been placed on the seat of the WaveRunner. After holding a Daubert hearing, the district judge concluded the expert testimony was unreliable and was not sufficiently tied to the facts of the case. The trial proceeded and the court granted Yamaha's motion for judgment as a matter of law. Plaintiff appealed to the U.S. Court of Appeals for the Third Circuit, claiming (1) that the warning fact issues should have been decided by the jury; and (2) that exclusion of her expert, Kitzes, was an abuse of discretion. We focus here on the expert reliability question.

The Third Circuit observed that the trial court found Kitzes' opinion regarding the location of the warning to be "at best, an educated guess." Kitzes "failed to perform any tests on focus groups, take any measurements, rely on any articles on location of warnings," conduct any reenactments or even examine the WaveRunner itself. His conclusions were "mere speculation, not based on any reliable methodology." Ruggiero, LEXIS, at *10-*12. The Third Circuit held the district court did not abuse its discretion.

Further, Kitzes' reliance on an ANSI (American National Standards Institute) standard was unavailing. The expert failed to articulate his methodology supporting how a passenger seat warning is "readily visible" under the ANSI standard and how the existing front and rear warning system falls short. Absent an appropriate explanation, Kitzes' reliance on the ANSI standards is the type of "subjective belief or unsupported speculation" that does not satisfy Evidence Rule 702. Id. LEXIS at *11-*12.

These recent decisions, one on design and causation issues and the second on a warnings claim, illustrate that judicial gatekeeping for expert reliability continues robustly and can affect the outcome of litigation. Diligent, experienced counsel surely know this well, but a few reminders now and then still can have sobering value.