



He Can't Say That!

A Discussion of Recent California Case Law Analyzing the Admissibility of Expert Opinion



By Marc R. Ozarski

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In California, admissibility of expert opinion generally cannot be attacked on the grounds that the opinion itself is contrary to prevailing thought. When presented with unorthodox, or out-of-the-ordinary expert testimony, however, the key to attacking admissibility may lie not in the opinion itself, but rather in what the expert relied upon in forming the opinion. As recent California Court of Appeal decisions reveal, it is the matter upon which an expert relies that is often the proper subject of an admissibility inquiry.

The Matter Relied Upon Must be Generally Accepted in the Scientific Community

In the case of *Roberti v. Andy's Pest Control*¹, decided November 26, 2003, the Second District Court of Appeal specifically addressed the issue of whether expert opinion can be attacked on the grounds that it has not gained general acceptance in the scientific community. The court concluded that expert opinion remains admissible even if it is not a generally accepted proposition or theory. However, the court also ruled that the matter relied upon by the expert in forming his or her opinion must be a generally accepted method or theory.

The plaintiff in *Roberti* is a minor suffering from autism. He sued a pest control company for exposure to the pesticide Dursban. In the trial court, the plaintiff planned to offer testimony at trial by toxicologists and medical doctors that his autism could have been caused by *in utero* exposure to Dursban. The trial court, however, granted a pre-trial motion

excluding the plaintiff's expert testimony, on the ground that it was not generally accepted in the scientific community.

On appeal the court re-examined the Supreme Court decision *People v. Kelly*² and its progeny, which held that evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test known as the *Kelly* test.

"The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. The second prong requires proof that the witness testifying about the technique and its application is a properly qualified expert on the subject. The third prong requires proof that the person performing the test in the particular case used correct scientific procedures."³

In *Roberti*, the court of appeal reversed the lower court's decision, holding that the *Kelly* test is only applicable to new scientific techniques, not expert opinion testimony. The *Roberti* court went on to state that the only time *Kelly* is applicable to expert opinion testimony is when an expert's opinion is based upon a new scientific technique, not when an expert's opinion is based entirely upon generally accepted techniques, procedures and theories. The court therefore reasoned that the relevant inquiry for the lower court to employ when ruling on the defendant's motion was whether the plaintiff's medical experts relied upon new scientific techniques in formulating their opinions, not whether the opinions themselves were novel.

The Second District Court of Appeal further explained how the standard for determining the admissibility of expert opinion in California is different than the federal standard commonly referred to as the *Daubert* test. Under *Daubert*⁶, all expert scientific and technical opinion testimony is subject to a threshold reliability test. The federal standard holds that expert opinion testimony must satisfy a preliminary reliability inquiry prior to being offered to the jury for consideration. According to the appellate court in *Roberti*, the matter upon which an expert relies is subject to a reliability test, but expert opinion testimony in and of itself is not subjected to a reliability inquiry prior to being submitted to the jury. After *Roberti*, an expert's opinion is admissible if the matter upon which it is based meets the *Kelly* test and is generally accepted in the scientific community.

It Must be Reasonable for an Expert to Rely on that which is the Basis of His or Her Opinion

Even when an expert's opinion is based on generally accepted scientific techniques, procedures or theories, it must also be a matter which can reasonably be relied on. The mere fact that an expert bases his or her opinion on theories, techniques or processes generally accepted in the scientific community does not give an expert carte blanche to render any opinion he or she desires.

The February 2004 Second Appellate District case *Lockheed Litigation Cases*⁵ 115 Cal. App. 4th 558 (2004) held that it was not an abuse of discretion for the lower court to exclude expert testimony that was based on a scientifically acceptable epidemiological study where the study was not something the expert could reasonably rely on.

In *Lockheed*, the plaintiffs were former and current employees of the Lockheed Corporation, Exxon and Union Oil who

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were suing for personal injuries allegedly caused by exposure to various chemicals. The trial court, on its own motion, ordered hearings to determine whether the plaintiffs' expert's opinion on the issue of causation was admissible.

The court posed two questions for evaluating the admissibility of the evidence relied on by an expert: (1) "For general causation, what is the standard of admissibility under California law for an expert opinion (what standard must evidence satisfy in order for an expert to reasonably rely upon that evidence in forming his or her opinions)?" and (2) "Do the proffered experts' opinions for the wrongful death cases satisfy the standard of admissibility under California law? (Are the studies the expert purports to rely upon of the type that California deems permissible and sufficient for the expert to reasonably rely upon to form the basis of an admissible expert opinion?)"⁶

In examining the facts of the case in connection with the foregoing questions, the trial court set forth an evidentiary threshold for the admissibility of an epidemiological study. The court concluded that an expert reasonably can rely on an epidemiological study to support an opinion on

causation so long as the study demonstrates a relative risk of greater than 2.0.

In other words, the trial court concluded that although an epidemiological study is a matter upon which an expert can rely, it can only be relied on if it demonstrates that the incidence of disease among exposed persons is more than two times greater than that among unexposed persons.

The epidemiological study relied on by the plaintiffs' expert in *Lockheed* concluded that certain people experienced a 20 percent greater incidence of lung cancer and a 40 percent greater incidence of other types of cancer than the general population when exposed to over 130 chemicals, including the chemicals complained of by the plaintiffs.⁷ The trial court therefore found that this study was an unreasonable basis upon which plaintiffs' expert could rely because the study failed to show a relative risk greater than 2.0.

On appeal, the appellate court reviewed the lower court's ruling under California Evidence Code section 801. Specifically the court focused on the following provision in section 801(b): "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . . [¶] (b) Based on matter... that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."⁸

The plaintiff argued that under section 801 the "court should determine only whether the type of matter that an expert relies on in formation of his or her opinion is the type of matter that an expert reasonably can rely on in forming an opinion, without regard to whether the matter relied on reasonably does support the particular opinion offered."

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In rejecting the plaintiffs' argument, the court interpreted Evidence Code section 801 to mean "that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible."⁹

The court reasoned that the expert testimony offered by plaintiffs was based on conjecture and speculation as to causation because the epidemiological study relied on focused on the cumulative effects of exposure to more than 130 different chemicals, not just the five plaintiffs were exposed to; was the sole basis for the expert's opinion; and the study did not indicate whether any single chemical contributed to an increased risk of cancer. The court therefore held that it was not an abuse of the lower court discretion to find that plaintiffs' expert's testimony, although based on a scientifically acceptable epidemiological study, provided no reasonable basis for the proffered expert opinion.

The Matter Relied Upon Cannot be an Assumption of Fact Without Evidentiary Support

Similar to the *Lockheed* decision, the California Court of Appeal for the Fourth Appellate District recently held in *Jennings v. Palomar Pomerado Health Systems* that "an expert's opinion based on assumptions of fact without evidentiary support or on speculative or conjectural factors has no evidentiary value."¹⁰ To the extent that an expert's opinion is based on alleged facts, the facts relied upon must have proper evidentiary support in order for the expert's opinion to be admissible.

In *Jennings*, the plaintiff underwent abdominal surgery in which a ribbon retractor was negligently left in his abdominal cavity. A second surgery was required

to remove the retractor. Following the second surgery, plaintiff contracted an infection which required an arduous recovery time and, ultimately, a third surgery. Because the plaintiff could not return to work, he lost his job. Plaintiff filed a malpractice action against his doctors. He claimed the cause of the infection was the ribbon retractor negligently left in his abdominal cavity after the first surgery. Plaintiff sought to proffer expert medical testimony at trial from a physician with expertise concerning infectious diseases. The expert's opinion that the retention of the retractor in plaintiff's stomach following surgery was the cause of plaintiff's infection was struck by the trial court.

The trial court concluded that the expert opinion was based on speculation and conjecture, and therefore inadmissible. In upholding the judgment on appeal, the appellate court reasoned that under California Evidence Code section 801(a) "an expert may give testimony in the form of an opinion if the subject matter of the opinion is sufficiently beyond common experience that the opinion of the expert would assist the trier of fact."¹¹

Qualified medical experts may testify on matters involving causation when the causal issue is beyond the realm of common experience because they assist the trier of fact. In the context of a personal injury action "causation must be proven within a reasonable medical probability based on competent expert testimony."

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Mere "possibility" alone, however, is insufficient. "A possible cause only becomes 'probable' when... it becomes more likely than not that the injury was a result of its action."¹²

Where the plaintiff's expert opined that the retractor could have caused bacteria to grow inside plaintiff's abdomen, the court conceded that the expert was qualified to render such an opinion.

Nevertheless, the court concluded that such an opinion "was not helpful to the jury absent additional evidence that it was more likely than not that bacteria growing around the retractor migrated to and were a cause-in-fact of the infection in the subcutaneous tissue"¹³ near the surgical incision. Similarly, the expert's opinion that the bacteria growing around the retractor were the cause-in-fact of the infection was too conclusory to satisfy the requirement for admissibility.

Because the expert's opinion was unaccompanied by any logical explanation supporting his opinion and he never articulated how it was more likely than not that the bacteria migrated from the retractor through the plaintiff's abdominal cavity to the infected subcutaneous tissue, his opinion was inadmissible. Stated differently, plaintiff's proffered expert testimony was inadmissible because the allegation that bacteria migrated from the retractor to the

subcutaneous tissue was without evidentiary support.

Closing Thoughts

California Courts, unlike the Federal Courts, will admit expert testimony into evidence even though it may not be a generally accepted opinion or theory. Despite the refusal to adopt the more stringent federal standard, California Courts continue to provide ample grounds to attack the admissibility of expert opinion. As the foregoing cases point out, when an expert opinion appears far-fetched or unorthodox, it is often because the matter the expert relies on is foundationally unsound. Moreover, these decisions begin to shed some light on how litigators can attack expert opinion.

Roberti in particular appears to place some significant barriers on what type of evidence an expert can rely on when forming his or her opinion. There, the Court of Appeal infers that it may be an abuse of discretion for a trial court to admit expert testimony based on matter which fails to demonstrate causation by a preponderance of the evidence.

In other words, if an expert concludes that certain facts cause a specific result, the matter his or her opinion is based on should also demonstrate, more likely than not, that the facts relied upon give rise to the same result.

The way to successfully attack expert opinion is closely tied to matter upon which the expert relies in forming his or her opinion. If the expert is relying on a theory, process or technique not generally accepted in the scientific community, a matter that does not provide a reasonable basis for the opinion or is conclusory, then the expert opinion is inadmissible.

Litigators who wish to attack the admissibility of expert testimony should closely

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examine the foundation for the opinion being proffered in any given situation and be prepared to attack the admissibility of opinions that are based on unaccepted scientific theories, evidence that is unreasonably relied on or assumptions of fact.

¹ *Roberti v. Andy's Termite & Pest Control*, 113 Cal. App. 4th 893 (2003).

² *People v. Kelly* 17 Cal. 3d 24 (1976).

³ *People v. Kelly* 17 Cal. 3d 24 (1976).

⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993),

⁵ *Lockheed Litigation Cases* 115 Cal. App. 4th 558 (2004).

⁶ *Lockheed Litigation Cases* 115 Cal. App. 4th 558 (2004).

⁷ *Lockheed Litigation Cases* 115 Cal. App. 4th 558 (2004).

⁸ *Lockheed Litigation Cases* 115 Cal. App. 4th 558 (2004).

⁹ *Lockheed Litigation Cases* 115 Cal. App. 4th 558 (2004).

¹⁰ *Jennings v. Palomar Pomerado Health Systems, Inc.* 114 Cal.App.4th 1108 (2003).

¹¹ *Jennings v. Palomar Pomerado Health Systems, Inc.* 114 Cal.App.4th 1108 (2003).

¹² *Jennings v. Palomar Pomerado Health Systems, Inc.* 114 Cal.App.4th 1108 (2003).

¹³ *Jennings v. Palomar Pomerado Health Systems, Inc.* 114 Cal.App.4th 1108 (2003).

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detection of preclinical signs of manganese-linked neurotoxicity, the historical context of manganese and occupational parkinsonism, neuroimaging and neuropsychological test results in manganism and a comparison between manganism and Parkinsonism.

Speakers included James M. Antonini, Ph.D. from the National Institute for Occupational Safety and Health; Michael Aschner, Ph.D., of Wake Forest University; Paul Asselin, M.D., from the Commission de la Sante et de la Securite du Travail; Rosemarie M. Bowler, Ph.D., MPH of San Francisco State University; Steve M. Hays, PE, CIH, FACEc of Gobbell Hays Partners, Inc.; Elena Herrero-Hernandez, M.D., MIH of the University of Turin; William Koller, M.D., Ph.D., of the Mount Sinai Medical Center; Donna Mergler, Ph.D., of the University of Quebec; Paul Nausieda, M.D., from the Reginal Parkinson's Disease Center at the Wisconsin College of Medicine; Warren C. Olanow, M.D., Ph.D., of the Mount Sinai Medical Center; Claude Ostiguy, Ph.D.; from the Institut de Recherche Robert-Sauve en Sante et Securite du Travail; Brad A. Racette, M.D. of the Washington University School of Medicine; Harry A. Roels, Ph.D., MSc; of the Universite Catholique de Louvain; Paul Schulz, Ph.D. from the Baylor College of Medicine and the Michael DeBakey VA Medical Center in Houston; Andrew Sass-Kortsak, Ph.D. of the University of Toronto; Peter Spencer, M.D., Ph.D. from the Oregon Health Sciences University; Bernard Weiss, Ph.D. of the University of Rochester School of Medicine and Dentistry; and Mildred Williams-Johnson, Ph.D. of ATSDR/NCEH.

Roundtable discussions during the conference were facilitated by Dr. Rosemarie Bowler, Dr. James Cone, Dr. Chris Martin and Dr. Harry Roels.

