CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

2016 CLM Boston Conference
July 14-15, 2016 Boston, MA

Medical Malpractice: Moving to preclude medical experts under Daubert, Frye and their progeny – When and why (or why not)?

When, why and how should Frye, Daubert, and their progeny be invoked when moving for summary judgment? What considerations should and need to be taken into account by all parties to the tripartite relationship when making such a decision?

The idea of the court as 'gatekeeper' of admissible expert testimony first arose in 1923, when the Supreme Court of the United States ruled in the matter of Frye v United States, 293 F. 1013 (1923), a matter involving the admissibility of a polygraph test. At its essence, the Court's holding was that when "novel" scientific evidence is involved, the court acts as gatekeeper and applies the "general acceptance" test to determine "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." If the answer is 'no', the evidence is excluded. If the answer is 'yes', the proponent of the novel scientific evidence has passed the threshold test. Notably, the focus was on the methodology, not reliability of the evidence.

In 1975, the Federal Rules of Evidence were promulgated, notably Rules 702 and 703 (the 'expert rules'). Given this codification regarding expert testimony, many legal scholars and courts questioned the viability of the Frye court's holding and whether it was still valid. The answer to this question was both 'yes and 'no' (as will be further discussed below). Suffice it to say for the moment, Frye has been eroded or evolved ('hybrid') over the years by judicial analysis and codifications by various States. Currently, Frye is still adhered to, in one form or another, by 7 States (CA, IL, MD, NY, NJ, PA, WA, and D.C.), with 4 states (MO, NV, ND, VA) codifying their own rules – the remaining majority of States, modeling themselves under the Federal Rules, applying the Daubert standard.

In 1993, the Supreme Court again addressed expert testimony in the matter of Daubert v Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), addressing the issue of whether the drug Bendectin caused birth defects. The Daubert court essentially held that Congress intended to replace Frye with Rule 702, thus supplanting Frye and liberalizing its requirements. Notably, it removed the 'requirement' that scientific evidence must be 'generally accepted' in the field to be admissible - this was now just one factor for the court, as gatekeeper, to consider. Factors now to be considered included not only general acceptance, but 1) whether the theory/technique can (and has been) tested; 2) whether the theory/technique has been subject to peer-review and publication; 3) whether a theory/technique's known or potential rate of error is known or can be tested and, 4) the "existence and maintenance of standards controlling the technique's operation."

Notwithstanding the above, the question still remained whether Daubert was limited only to expert opinion based upon clearly identified scientific principles, or was it to also be applied to opinion based on technical or specialized knowledge (which would be relevant to med mal matters)? This question would soon be answered.

In 1999, the Supreme Court spoke again on the subject, in the matter of Kumho Tire Co. v Carmichael 526 U.S. 137 (1999), a matter dealing with defective automotive tires. The Kumho court reinforced the court's gatekeeper role in Daubert and, in doing so, expanded the number of factors that the court could consider in considering admissibility of scientific evidence (and, this author would argue, making the analysis 'more' stringent' than Frye ever was!). Most notably, Kumho expanded the court's reach to include expert 'conclusions,' thus expanding the gatekeeper role to include expert scientific opinion, not merely methodology (opening the door for use in med mal cases!). Shortly thereafter, in 2000, Rule 702 was amended to reflect Khumo's holding.

Lest we forget about our Frye States, as noted above a minority of States still follow Frye which, dependent upon the State, has undergone its own metamorphosis.

By way of example, see Parker v Mobil Oil Corp 7 N.Y.3d 434 (2006). Parker, decided by N.Y.'s highest court, dealt with whether exposure to unspecified levels of Benzene could cause a certain type of leukemia. The Parker court, while re-affirming N.Y. as a Frye State and holding that the plaintiff was not limited to proving causation by establishing a 'dose-response relationship', nonetheless 'expanded' the Frye analysis in N.Y. It did so by holding that even if an expert opinion or method passes the 'generally reliability' (general causation) analysis, admissibility of the testimony still has to pass a specific reliability/foundation (specific causation) analysis. Accordingly, and again in this author's opinion, N.Y. is now a Frye 'hybrid' state, with a more stringent analysis than Frye originally intended.

So, having provided a general 'lay of the land,' where does that leave us today as medical malpractice professionals and how can we use Frye, Daubert and their progeny to defend our cases?

While some medical malpractice practitioners have attempted to use the above court holdings in summary judgment proceedings to challenge standard of care issues (the 'science-based' approach to medicine), to date we are unaware of any successful results in this regard. A review of cases nation-wide would suggest that, to date, courts have been reluctant to accept the argument that a medical provider's standard of care should be dictated entirely by scientific analysis. We agree with the courts to the extent that such an argument is counterintuitive to the longstanding defense that medicine is "part art/part science." However, perhaps this argument would have potential in very limited fact patterns – for example, if a patient alleges that standard of care required that a certain test should have been performed and, if done, would have diagnosed the condition at issue. However, the peer-reviewed literature does not establish that said test is reliable and the medical community has rejected said test based upon extensive peer-reviewed retrospective analysis. In that limited type of scenario perhaps a court would be more receptive to a science-based standard of care argument.

So, if not standard of care issues, what cases are appropriate for a Frye/Daubert analysis?

In our opinion, the types of cases warranting consideration are ones involving:

- Standard of care matters where peer-reviewed literature has rejected a particular standard of care based upon scientific data not supporting it (see above);
- On proximate cause cases, where there is extensive literature in favor of your position or, conversely, a paucity of medical literature in support of your adversary's position - most commonly, cases involving medications (i.e. dose-response analysis).

So, we know that this type of gatekeeper analysis is potentially good for the defense bar, but what about the plaintiffs? Briefly, as the saying goes, 'what's good for the goose is good for the gander!'

Most notably, plaintiffs across the country have used Frye/Daubert motions in Erb's Palsy cases. The plaintiff argument is, generally, that a permanent brachial plexus injury (i.e. avulsion, as opposed to a stretch, injury to the brachial plexus) cannot occur from 'maternal propulsive forces' – an oft used defense at trial – and that such defense is 'junk science' promulgated by a small number of defense-minded physicians who have crafted a body of literature over recent years in support of this defense. Plaintiffs argue that this 'body of literature' is premised upon anecdotal evidence (of babies being born with Erb's palsy despite delivery via C-section or in completely atraumatic and quick vaginal deliveries), as opposed to proven scientific method. Simply put, plaintiffs are arguing that while maternal propulsive forces can cause a stretch, i.e. temporary, injury, such forces are insufficient to cause an avulsion/permanent injury, in doing so supporting this with testimony from bio-mechanical engineers who have modeled and studied these forces. While plaintiffs have lost many of these motions across the country, it should be noted that at least two appellate courts in N.Y. have precluded as 'junk science' this defense. It remains unclear what N.Y.'s highest court will decide once confronted with this issue. We have also seen some dissenting opinions out of other States questioning the scientific validity of this defense.

It is well advised that any medical malpractice professionals handling these types of cases become very familiar with the arguments that plaintiffs are making nation-wide to preclude this defense as we view this as a 'trend' amongst plaintiffs nationwide prosecuting Erb's palsy cases.

As you can imagine, incorporating a Frye/Daubert argument into a summary judgment motion, or motion in limine, can be a daunting task, both in time and expense. Accordingly, and given that in most instances a tripartite relationship (counsel, claims and client) exists, it is prudent practice to make sure that everyone is 'on board' before such an endeavor is undertaken. Accordingly, the tripartite considerations that go into making such a motion should include: 1) is this case a 'good fit'?; 2) cost-benefit analysis; 3) the timing (and making) of the motion.

The first question that should always be asked (usually first by counsel before presenting it as an option to their claims colleagues and clients) is the case a 'good fit' for Frye/Daubert? In asking this question, factors to consider are:

- Does the medical opinion presumed to be offered by P expert lend itself to this type of analysis?
- Does the literature overwhelmingly support your position? More importantly, is there a paucity of peer-reviewed literature to support P's expert's opinion?
- Is the case of sufficient exposure so as to warrant the cost expenditure?
- Do you how the particular judge presiding over this case has ruled on such motions in the past – is the judge a 'proactive gatekeeper' or 'hands off'?

- Will such a motion invite closer scrutiny of the defense expert's opinion and reveal potential weaknesses in the defense best left undisturbed?

Once it has been determined that the case is a 'good fit,' what next?

.

The next series of considerations, and ones that will certainly be raised by your tripartite colleagues, is cost-benefit analysis. As noted above, a properly made Frye/Daubert motion can be costly as it requires extensive if not exhaustive review of all pertinent medical literature of the issue to be contested (by both counsel and the defense expert proffering the affidavit in support). Given the amount of time and resources involved, analysis on this issue should be the same amongst all the parties to the tripartite relationship. Factors to consider include:

- Will success on the motion be dispositive of the case?
- If not, can significant aspects of the case be limited or dismissed, making the case more defensible or manageable from an exposure standpoint?
- Will the making of such a motion create settlement leverage?

It should go without saying, but we will, that whether a case is a candidate for such a motion should be identified as early on in discovery as possible by defense counsel for several reasons. First, our claims colleagues need to establish reserves on their cases. If there is the possibility of a 'litigation cost-unfriendly' motion down the road, they should be made ware of the possibility early on to establish appropriate reserves on the case. As I am sure we al can agree, no one likes surprises! Further, early identification allows for steps to be taken during discovery to fortify and support the future motion. This would include early, and ongoing, medical literature research, well thought out lines of questioning to P's expert (if expert discovery is permissible in your jurisdiction) and ongoing communication with TPA/client regarding the feasibility of such a motion.

You and your tripartite colleagues have agreed that the motion 'is a go!' Now timing and making of the motion must be considered. In doing so, we all must follow the 'Goldilocks rule' - simply stated, the timing of your motion should not be too early, not too late, but just right!

When to make such a motion, during summary judgment proceedings or as a motion in limine, is a tactical one usually, although not always, made by counsel. Factors to consider include moving during S/J proceedings and educating your adversary and expert of their case's weaknesses well before trial, or waiting until trial and moving in limine.

If you choose to wait until trial, we recommend that the motion in limine be made at the onset of trial. While this may still apprise plaintiff of weaknesses in their case, they will have much less time to engage in the type of exhaustive research needed to confront a well-researched cross examination of their expert. Further trial judges do not like surprises and it has been our experience that trial judges are reluctant to dismiss a case 'mid stream' (and most certainly not after plaintiff's expert has testified). We believe this is based upon a trial judge thinking that allowing the case to go toward a verdict allows for jury to 'get it right' (which otherwise can still be resolved in post trial motion practice) or prompt the parties into settlement discussions.

It should also be noted that denial of motion in limine may not be automatically appealable in every jurisdiction - know your rules! Accordingly, if motion in limine is denied, make certain to object on the record to the introduction of the challenged evidence at the time it is offered at trial, or as soon thereafter as grounds to object become apparent so as to not waive any objection

Finally, and regardless of when a Frye/Daubert-type motion is made, keep in mind the following:

- The motion should, obviously, be in writing and all attempts made to simplify the complexity of the issue for the court's benefit. The more you get bogged down in the scientific minutia the more likely the court will be less receptive to your arguments.
- Always challenge the methodology and reasoning first…do not get caught in the trap of attacking only the opinion - this will lead P to argue that the motion 'goes to weight, not admissibility' and is little more than a garden-variety summary judgment motion with a 'battle of experts' that should be resolved at trial.
- Arguments can and should include that : 1) the scientific opinion offered is outside the area of expertise and that it is unverifiable (i.e. 'say so' evidence); 2) the expert makes unwarranted assumptions and is relying on facts/data that does not match the facts or relevant data in this specific case; 3) that gaps exist between the known data and the stated opinion; 4) the expert, in reaching a conclusion, is not applying the same scientific standards that he/she would apply in a lab setting or for a properly conducted, peer-reviewed, scientific study; 5) the study/test upon which the expert relies contains data which is not identical/sufficiently dissimilar to the situation at issue (i.e. does not isolate a particular medication from a classification of meds, or uses a modeling study/test inconsistent with facts of the case at issue).

Conclusion: The evolution of the court's role as gatekeeper of the admissibility of scientific opinion testimony has created an opportunity for medical malpractice practitioners to challenge more frequently than ever before questionable proximate causes testimony. Used under the right circumstances, this provides a potent tool in the defense of questionable medical claims.

Thank you for attending!