



## OUTSIDE COUNSEL

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### 'Frye's' Applicability to Medical Malpractice Cases

Recent *Frye* decisions in both the First Department (*Marsh v. Smyth*, 12 AD3d 307 [1st Dept. 2004]) and Second Department (*Zito v. Zabarsky*, 28 AD3d 42 [2d Dept. 2006]) strongly suggest that New York Appellate Courts are cautioning against applying *Frye* principles too restrictively in medical malpractice cases.

The onslaught of "gatekeeping" motion practice spawned by *Daubert* and its progeny has prompted defendants in medical malpractice cases to increasingly move for summary judgment and, if they lose, file *Frye* motions challenging the basis of the expert's opinions.

In essence, under the guise of *Frye*, defendant physicians are taking two bites at the apple. To discourage such unnecessary and abusive motion practice, defendants need to know that the state courts are frowning upon utilizing *Frye* in medical malpractice cases.

Each of these insightful decisions, analyzed more fully below, suggests that preclusion of expert testimony under *Frye* is a drastic remedy to be used only sparingly in the medical malpractice arena. These cases favor allowing jurors to weigh the credibility of expert medical opinion rather than permitting judges to determine its admissibility.

Even the recent Court of Appeals *Frye* decision (*People v. LeGrand*, 2007 NY Slip Op 02588), albeit a criminal case involving an eyewitness expert, espouses a liberal application of *Frye* principles.

#### General Applicability of 'Frye'

In New York, the test for determining the reliability and admissibility of expert testimony and opinion remains governed by *Frye v. United States*, 293 F 1013 (1923), which ruled that before any expert is permitted to express an opinion or conclusion, "the thing from which the deduction is made must be sufficiently



established to have gained general acceptance in the particular field in which it belongs." Thus, proposed expert testimony is precluded if an opinion or conclusion has not achieved "standing and scientific recognition among physiological and psychological authorities." *Id.*

New York has adhered to the *Frye* standard, despite federal reliance on the U.S. Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 US 579 (1993), which permits an expert to testify if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 588. Under *Daubert*, federal trial courts perform a "gatekeeper" role to determine if proposed expert testimony is both relevant and reliable. In regard to reliability, and the question of whether or not a particular theory or technique constitutes scientific knowledge, a trial court could take into consideration certain nonexclusive factors, including whether it was tested, subjected to peer review and publication, the potential rate of error and general acceptance.

#### Use in Medical Malpractice Cases

In the medical malpractice arena, *Frye* has been applied almost exclusively to issues surrounding causation. *Frye* has been utilized to test the principles of causation regarding a birth defect (can a prolonged second stage of

labor cause compression to the brain resulting in brain damage?) (*Del Maestro v. Grecco*, 269 AD3d 250 [2d Dept. 2005]); nerve damage (can the placement of electrodes of electrical muscle-stimulating unit on anterior neck of patient cause permanent nerve damage?) (*Hooks v. Court Street Medical PC*, 15 AD 544 [2d Dept. 2005]); hyperabduction (can malpositioning of an arm during surgery cause nerve damage?) (*Marsh v. Smyth*, 12 AD3d 307 [1st Dept. 2004]); silicone toxicity (can facial injections of liquid silicone administered as an acne treatment cause silicone toxicity?) (*Pauling v. Orentreich Medical Group*, 14 AD3d 357 [1st Dept. 2005]).

Procedurally, a party challenging expert testimony pursuant to *Frye* must make a prima facie showing, in the first instance, that a particular principle or methodology underlying proposed expert opinion has not been generally accepted in the relevant scientific community, and therefore represents a novel theory. *Zito v. Zabarsky*, 28 AD3d 42 (2d Dept. 2006). This is frequently accomplished by submitting an expert affidavit containing supporting references to studies and professional publications. *Id.*

Once a party has made a prima facie showing that the proposed expert opinion is not reliable, the burden shifts to the proponent of such evidence to establish general acceptance. It has been held that the proponent's burden in this regard is to provide proof amounting to "a fair preponderance of the credible evidence." *DeMeyer v. Advantage Auto, et al.*, 7th Judicial District, Wayne County, New York (J. Raymond Cornelius, June 27, 2005).

#### 'Zito' Case

In *Zito v. Zabarsky*, 28 AD3d 42 (2d Dept. 2006), plaintiff alleged that the defendant doctor departed from good and accepted practice by prescribing an excessive dose of Zocor (a cholesterol-lowering drug), causing polymyositis (an autoimmune condition). Plaintiff's experts claimed that a causal nexus existed between an excessive dose of Zocor and the onset of polymyositis. The Queens County

trial court held a *Frye* hearing after the experts testified at trial and ruled that plaintiff's experts' opinions were inadmissible since the plaintiff failed to produce any medical literature that reported a causal nexus between an excessive dose of Zocor and the development of polymyositis. The trial court was critical of plaintiff's experts' reliance on merely a single reference to the literature to support the expert opinion: a May 1997 article from a medical journal. The trial court reasoned that *Frye* could not be satisfied without medical literature that expressly reported a connection between an excessive dose of Zocor and the onset of the disease.

On appeal, the Second Department reversed, finding this application of *Frye* overly restrictive and stating, "the fact that there was no textual authority directly on point to support the expert's opinion is relevant only to the weight to be given the testimony, but does not preclude its admissibility." The *Zito* court agreed with a prior First Department ruling that "it is not necessary that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. *Marsh v. Smyth*, 12 AD3d 307 (1st Dept. 2004) (the *Marsh* case is discussed more fully below). The *Zito* court further found that "general acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions." *Beck v. Warner-Lambert Co.*, 2002 NY Slip Op 40431[U], 6-7.

The *Zito* court found that in addition to the one study cited, plaintiff's experts supported their theory with generally accepted scientific principles and existing data. Specifically, plaintiff's experts explained generally accepted side effects of cholesterol-lowering drugs, which included myopathy, or muscle inflammation, which in turn causes elevated CPK, which is indicative of muscle toxicity, and triggered the autoimmune response. It was undisputed that plaintiff's CPK levels were extremely elevated after the onset of her symptoms. Moreover, upon learning of her elevated CPK, defendant discontinued the Zocor therapy. Plaintiff's experts also relied on the scientific theory of the dose/response relationship, which holds that both the beneficial and toxic effects of a drug will be greater with increased doses.

In reversing the trial court and permitting this expert testimony, the *Zito* court cautioned against the potential chilling effect *Frye* motions present to the aggrieved, stating that, "a strict application of the *Frye* test may result in disenfranchising persons entitled to sue for the negligence of tortfeasors." *Zito* at p. 46.

### 'Marsh' Case

Similarly, in *Marsh v. Smyth*, 12 AD3d 307 (1st Dept. 2004), the Appellate Division again reversed a trial court's ruling to preclude expert testimony based on *Frye*. The plaintiff in *Marsh* claimed a compressive nerve injury from improperly positioning her arm in a "hyperabducted" state for an extended period during a hysterectomy.

In granting the *Frye* motion, the trial court reasoned that the bulk of the evidence showed that plaintiff's theory of causation was not generally accepted in the medical community and relied on the defense assertion that the term "hyperabduction" was different from the term "excessive abduction." The defense argued that the absence of the term "hyperabduction" in the medical literature completely invalidated plaintiff's reliance on that term. Moreover, the trial court chose to ignore plaintiff's experts' reliance on a 1947 article that used the term "hyperabduction," accepting the defense expert's assertion that such article was irrelevant. The experts also battled over whether the brachial plexus nerve group was separate and distinct from the long thoracic nerve, with the judge adopting the defendant's contentions. The trial court ruling was reversed.

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The majority decision in *Marsh* is brief, but in a lengthy and thoughtful concurring opinion, Justice David Saxe provides a detailed history and analysis of *Frye* as it relates to personal injury, medical malpractice and other cases. This concurring opinion is cited as support in the *Zito* case discussed above. Specifically, Justice Saxe makes clear that given the facts in *Marsh*, "where the proposed expert testimony concerns a claim that the plaintiff's injury was caused by the actions taken by the defendants, the whole concept of the *Frye* analysis is of limited applicability." *Id.* at 311. Justice Saxe emphasizes that it was not the trial court's job to decide which expert's conclusions were right, even though trial judges may be tempted to do just that:

Expert testimony as to whether the asserted conduct of the defendants was the causative agent for the plaintiff's injury does not really

involve anything novel or experimental as contemplated by the *Frye* test. Rather, it is exactly that which is often the primary point of contention in a personal injury action, where the plaintiff offers an opinion that the defendant's conduct caused the injury, and the defendant denies any such conduct and counters that the injury resulted from some other causative agent, unrelated to the defendant. Such expert testimony simply does not warrant a preliminary *Frye*-type hearing; these types of competing claims are adequately dealt with at trial.

*Id.* at 311-312.

The proper inquiry for the trial court, according to Justice Saxe, was, at most, simply to ensure that the expert opinions of plaintiff's experts "found some support in existing data, studies or literature." Despite plaintiff's experts reliance on medical terms that did not exactly match those in the relevant literature, and plaintiff's reliance on a 1940s study as proof of their position, the Appellate Division found in plaintiff's favor on the *Frye* issue.

Perhaps most instructive, Justice Saxe states that, "the focus of the inquiry...should not be upon how widespread the theory's acceptance is, but should instead consider whether a reasonable quantum of legitimate support exists in the literature for the expert's views. Nor is it necessary, as the motion court seems to have believed, that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff's expert."

### Conclusion

The *Zito* and *Marsh* cases make clear that *Frye* does not require medical malpractice experts to find documented support in the medical literature that exactly matches their opinions. Similarly, battles over semantics and medical terminology are not properly fought under the auspices of *Frye*. An expert's reasoned medical opinion, consistent with the spirit and nature of the specialty in question, should suffice. The recent trend seems to favor the old fashioned way to resolve these issues: let the jury decide.