



The New Jersey Supreme Court Has Adopted the Expert Admissibility FACTORS AND Gatekeeping Function of the Trial Court's Enunciated in *Daubert*

The standard for the admissibility of experts in civil cases only, in New Jersey, changed effective August 1, 2018. The New Jersey Supreme Court, *In re: Accutane Litigation* (A-25-17) (079958), adopted the expert admissibility factors in standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) which standard is more stringent than New Jersey Rules Of Evidence regarding admissibility of expert testimony; however, the New Jersey Supreme Court has “stopped short” of declaring New Jersey a “*Daubert* jurisdiction” because although the *Daubert* factors are useful, the Court hesitates “to embrace the full body of *Daubert* case law as applied by state and federal courts” and is concerned that there is “no monolithic body of case law uniformly or even consistently applying *Daubert*”. *In re: Accutane Litigation* at page 83. Further, and notably, the “general acceptance test for reliability” is still the standard in criminal matters. *In re: Accutane Litigation* at page 83. In adopting the *Daubert* factors, the New Jersey Supreme Court decision reconciled N.J.R.E. 702, and relatedly N.J.R.E. 703, regarding expert admissibility. *In re: Accutane Litigation* at page 6.

After significant discussion as to the United States Supreme Court *Daubert* trilogy of : *Daubert v. Merrell Dow Pharmaceuticals*, 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, 141 – 142, 150 (1999) the New Jersey Supreme Court held that New Jersey case law and the *Daubert* trilogy “are aligned in the general approach to a methodology – based test for reliability. Both ask whether experts reasoning or methodology underlying the testimony is scientifically valid”. *In re: Accutane Litigation* at page 80; *Daubert* 509 U.S. at 594-595. The *Daubert* standards, although not dispositive or exhaustive, now recognized by the New Jersey Supreme Court are as follows:

- 1) Whether the scientific theory can be, or at any time has been, tested;
- 2) Whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review but is not a “sine qua non”;
- 3) Whether there is any known or potential rate of error and whether there exist any standards for maintaining or controlling the technique’s operation; and
- 4) Whether there does exist a general acceptance in the scientific community about the scientific theory.

In re: Accutane Litigation at page 81 – 82; See also *Daubert*, 509 U.S. at 592. Incorporating these factors to be used by New Jersey trial court's "...dovetail with the overall goals of our evidential standard and would provide a helpful -- but not necessary or definitive -- guide for our courts to consider when performing their gatekeeper role concerning the admission of expert testimony. Several are aimed at achieving the same examination for peer acceptance of a methodology (but not the outcome reached from that methodology)..." *In re: Accutane Litigation* at page 82. More specifically, the Court held:

"Our view of proper gatekeeping in a methodology-based approach to reliability for expert scientific testimony requires the proponent to demonstrate that the expert applies his or her scientifically recognized methodology in the way that others in the field practice the methodology. When a proponent does not demonstrate the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable."

In re: Accutane Litigation at page 84. As the United States Supreme Court held in *General Electric*, "in its gatekeeper role, a trial court is free to exclude expert testimony where the expert's conclusions are not sufficiently tethered to the facts or drawn from the applicable data" and that the trial court may determine "there is simply too great an analytical gap between the data and the opinion proffered" for the expert testimony to be considered reliable." *General Electric*, 522 U.S. at 146 – 147. *In re: Accutane Litigation* at page 62. Further, the standard is flexible. *Kumho Tire* "underscores that the objective" of the *Daubert* gatekeeping "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *In re: Accutane Litigation* at page 64 citing *Kumho Tire Co.*, 526 U.S. at 152. As such, not all *Daubert* factors necessarily apply, and the *Daubert* factors are not a "definitive checklist or test". *In re: Accutane Litigation* at page 63 citing *Kumho Tire Co.*, 526 U.S. at 141 – 142. Rather, the trial judge has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *In re: Accutane Litigation* at page 64 citing *Kumho Tire Co.*, 526 U.S. at 152. Based upon the foregoing, the New Jersey Supreme Court approved of the *In re Accutane* trial court's well -supported and well -reasoned methodological analysis and the "rigorous gatekeeping that is necessary when faced with a novel theory of causation, particularly one ... that flies in the face of consistent findings of new causal association as determined by higher levels of scientific proof."