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"Weight vs. Admissibility"

By Hillary A. Frommer

An expert witness may lack the particular expertise, knowledge or qualifications that one would argue is necessary to offer an "expert" opinion. That does not mean, however, that the expert will be precluded from testifying to a jury. If a witness qualifies as an expert and if the *Frye* standard is satisfied (where necessary), then the expert should be permitted to testify. A lack of knowledge or qualifications goes to the weight of the expert's testimony and not its admissibility.

The New York Court of Appeals articulated this principle in *Adamy v Ziriakus*.[1] There, it held that because the defendant failed to challenge the qualifications of the plaintiff's forensic pathology expert during the trial, he could not argue on appeal that the expert testimony was inadmissible as a matter of law. This was, essentially, a preservation issue. The court then went on to state, however, that the challenges made to the expert's testimony and qualifications during cross-examination went to the weight of the expert's testimony and not the admissibility.[2] The appellate courts and trial courts have adhered to this rule. For example, In *Rojas v Palese*,[3] a medical malpractice case, the defendant objected to the qualifications of the plaintiff's vascular surgery expert, and sought to preclude his testimony at trial. The court denied that motion, finding that the qualifications "go to the weight and not the admissibility of the expert's testimony."[4] Similarly, in *Stanley Tuchin Assoc., Inc. v Grossman*,[5] an employer sued former employees for breach of a restrictive covenant and the misappropriation of trade secrets. The defendant employees sought to preclude the report and testimony by the employer's expert on the grounds that his opinion was contradicted by that of their own expert. The court held that the employer's report and testimony were admissible because the *Frye* standard was satisfied. The fact that there were competing expert opinions went to the weight of the opinions, and did not render one opinion inadmissible as a matter of law.

In fact, trial courts are reversed when they preclude an expert from testifying due solely to a lack of knowledge, experience or qualifications. For example, in *Ariola v Long*,[6] a medical malpractice case, the trial court precluded the plaintiff's expert from testifying because he lacked personal experience in performing a particular test. The Appellate Division reversed and ordered a new trial, finding that the trial court erred in barring the expert testimony because the lack of the expert's personal experience went to the weight of his testimony, and not to its admissibility. By precluding the expert from testifying, the Appellate Court found, the trial court prevented the plaintiff from proving his *prima facie* case that the defendant deviated from the standard of care. Similarly, in *Ochoa v Jacobsen Div. of Textron, Inc.*,[7] the plaintiff alleged that he was injured while operating the defendant's commercial riding lawnmower. The trial court precluded the plaintiff's expert from testifying because he had no experience, knowledge or education regarding the commercial lawnmower. The Appellate Division reversed, finding that the expert's proffered testimony regarding mechanical safety and interlock systems generally was relevant to the plaintiff's design defect theory, and his lack of particular knowledge or experience went to the weight of his testimony, and not its admissibility.[8]


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How then can a party objecting to an inexperienced or less-than-qualified expert soften the impact of that expert's testimony at trial? One solution is to ask for a limiting instruction to the jury. Section 4410-b of the CPLR provides that "at the close of the evidence, or such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests." There is no set limiting instruction that a court will give. As CPLR § 4410-b states, the party requesting the instruction must craft what it wants given. In the case of expert testimony, a party may ask for an instruction that the jury is free to consider the expert's lack of experience in weighing his testimony; or that jury may reject the expert's testimony altogether. While the latter may appear to be a severe limiting instruction, it is not inconsistent with the New York Pattern Jury Instructions, which state that a jury "may reject the expert's opinion if [it] find[s] the facts to be different from those which formed the basis for the opinion … [and] may also reject the opinion if, after careful consideration of all the evidence in the case, expert and other, [it] disagree[s] with the opinion."[9]

Limiting instructions are routinely given in criminal cases, particularly in prosecutions for drug-related offenses. In *People v Brown*,[10] the Court of Appeals held that the testimony by the prosecution's expert concerning the methods and terminology used in street-level drug transactions must be paired with appropriate limiting instructions that the jury is free to reject the testimony offered, and that the expert's opinion is not proof that the defendant was engaged in the sale of narcotics. The case law suggests that the proper course of action in civil cases is for the trial court to issue a limiting instruction, rather than preclude the expert testimony. For example, in *Board of Managers of 165 Hudson Street Condominium v 195 Hudson Street Assoc., LLC*,[11] the trial court precluded the plaintiff's expert from testifying as to future costs and directed a verdict to that effect. The Appellate Division disagreed with the preclusion, finding that although the qualifications of an expert are within the trial court's "sound discretion," any question as to the expert's particular area of knowledge or expertise "goes to the weight and not the admissibility of the testimony," and could have been cured with a limiting instruction.[12] Similarly, in *Thorne v Grubman*,[13] the Appellate Division affirmed the trial court's decision denying the defendant's motion to preclude the plaintiff from offering the opinion from an accident reconstruction expert. The defendant argued that the expert opined as to the defendant's state of mind. The court not only disagreed with that characterization of the expert's testimony, but found that a limiting instruction could cure any question that the expert opined on the defendant's state of mind.

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1. 92 NY2d 396 (1998).
2. *Id*. at 402.
3. 94 AD3d 557 (1st Dept 2012).
4. *Id.*
5. 2002 NY Slip Op 50428(U) (Sup Ct, Nassau County 2002).
6. 197 AD2d 605 (2d Dept 1993).
7. 16 AD3d 393 (2d Dept 2005).
8. *See also Borawski v Huang*, 34 AD3d 409 (2d Dept 2006) (trial court erred in precluding the plaintiff's expert from testifying); *Bodensiek v Schwartz*, 292 AD2d 411 (2d Dept 2002) (trial court should have permitted the plaintiff's expert to testify because the lack of knowledge in a particular field goes to the weight of the expert's testimony).
9. NY PJI 1:90 (3d ed. 2013).
10. 97 NY2d 500 (2002).
11. 63 AD3d 523 (1st Dept 2009).
12. Limiting instructions concerning expert testimony are commonly given in criminal cases, particularly in prosecutions for drug-related offenses (*see People v Brown*, 97 NY2d 500 [2002] [holding that expert testimony concerning the methods and terminology used in street-level drug transactions must be paired with an appropriate limiting instruction, and the jury must be informed that it is free to reject the testimony offered and that it is not proof that the defendant was engaged in the sale of narcotics]).
13. 40 AD3d 375 (1st Dept 2007).

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