California Supreme Court Case Sets New Standards for Expert Testimony

By M.C. Sungaila

As published in *The Washington Legal Foundation's The Legal Pulse,* on December 5, 2012, reprinted and/or posted with permission.

Experts testify in almost every civil case that goes to trial. Indeed, in many types of cases, such as medical malpractice and product liability actions, a plaintiff cannot recover without expert testimony. Despite the importance of this type of testimony, the California Supreme Court had remained silent about the proper standards for admitting it. Until now.

In *Sargon Enterprises, Inc. v. University of Southern California*, the Court considered whether the trial court erred by excluding expert testimony to substantiate the lost profit damages allegedly stemming from USC's refusal to clinically test a new implant designed by the plaintiff dental implant company; but for USC's breach, the implant company claimed, the company would have become a worldwide leader in the implant industry and made millions of dollars in profit each year. The Supreme Court affirmed the expert's exclusion, concluding that "trial courts have a substantial 'gatekeeping' responsibility," including the duty "to exclude speculative expert testimony."

The Supreme Court explained that

under Evidence Code section 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative."

The court further observed that other provisions of law, including case law, "may also provide reasons for excluding expert testimony." Citing to the U.S. Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals,* the Court warned, however, that the focus of the trial court's analysis must be on the principles and methodology espoused by the expert, and not on choosing between two competing expert opinions.

The Supreme Court emphasized that the trial court's preliminary determination whether "the expert opinion is founded on sound logic is not a decision on its persuasiveness." Instead, under Evidence Code section 801, "the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture" and then "conduct[] a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.'" Applying this standard to the lost profits expert testimony in the case before it, the Court noted that the expert based his lost profit estimates not on any market share the plaintiff company had in fact ever achieved, but rather on a hypothetical increased share of the market that would have been achieved because of the "innovative" implant that never made it to market. "An accountant might be able to determine with reasonable precision what Sargon's profits would have been if it achieved a market share comparable to one of the Big Six [implant companies]. The problem here, however, is that the expert's testimony provided no logical basis to infer that Sargon would have achieved that market share." As the Court noted:

World history is replete with fascinating 'what ifs.' What if Alexander the Great had been killed early in his career at the Battle of the Granicus River, as he nearly was?… Many serious, and not-so-serious, historians have enjoyed speculating about these what ifs. But few, if any, claim they are considering what would have happened rather than what might have happened."

In adopting this standard, the Court approved the reasoning in *Lockheed Litigation Cases*, in which the Second District Court of Appeal affirmed summary judgment for the defendants in a wrongful death action

brought on behalf of former workers at Lockheed's aerospace plant in Burbank. The *Lockheed* plaintiffs claimed that chemical manufacturers and suppliers failed to adequately warn of hazards associated with products they allegedly supplied to Lockheed and that purportedly harmed the workers. The trial court excluded the testimony of the plaintiffs' sole causation expert, Dr. Daniel Teitelbaum, based on the lack of a reliable foundation for his testimony, and then granted summary judgment for the defendants.

Teitelbaum had relied exclusively on a single survey of epidemiology studies to support his opinion that the defendants' chemicals — the cleaning solvents used in manufacturing aircraft — increased the risk of contracting the types of cancer the plaintiffs claimed to have. But the survey established only that painters exposed to a complex mixture of thousands of chemicals, containing only three of the defendants' five chemicals, showed an increased risk of cancer.

The plaintiffs argued that the court had no authority to examine these deficiencies because Evidence Code section 801 allows a trial court to examine only whether the type of study on which an expert relies is generally the type on which experts tend to rely — for example, epidemiology studies — without examining the relevance of the study's content to the particular opinion being offered. In affirming the trial court's exclusion of this testimony, the Court of Appeal made clear that Evidence Code § 801 requires a link between the matter the expert relies on and the opinion being offered. *Accord*, *Jennings v. Palomar Pomerado Health Sys., Inc.* ("The plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury"); *Bushling v. Fremont Medical Center* (An "expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact.").

California lawyers have long awaited the Court's adoption of a uniform expert testimony admissibility standard. The Court had the opportunity to adopt a gatekeeping expert testimony standard in 2005, when it granted review in a subsequent expert testimony appeal in the *Lockheed Litigation Cases* coordinated litigation. The Court dismissed review of that case after it was fully briefed, however, because a majority of the members of the Court at the time owned stock in the defendant companies.

Ms. Sungaila, an appellate partner at Snell & Wilmer L.L.P., has briefed and argued many expert testimony cases, including the Lockheed Litigation Cases.

M.C. Sungaila
714.427.7006
mcsungaila@swlaw.com

M.C. Sungaila has successfully briefed and argued appeals raising cutting-edge and core business issues statewide as well as nationally and internationally. Clients appreciate her "clear, concise, and persuasive" manner, laud her as a "great strategic thinker who plays five or six moves ahead," and call on her to craft winning approaches to emerging legal issues across multiple cases and jurisdictions. Clients also value M.C.'s strategic approach during pretrial and trial consultations in cases where an appeal by either side appears inevitable or a "key case" outcome might impact a whole series of cases for a client.