NEW YORK COURT OF APPEALS ROUNDUP:

EVIDENTIARY ISSUES IN MEDICAL MALPRACTICE, *RES IPSA*, AND EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION

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Recent decisions of the Court that we discuss this month involved whether and for what purposes clinical guidelines or algorithms may be admitted into evidence in a medical malpractice action; if and when summary judgment may be based upon circumstantial evidence under the *res ipsa loquitur* doctrine in a negligence action; and when and how expert testimony on the reliability of eyewitnesses identifications should be admitted in a criminal action.

Med Mal/Use of Clinical Guidelines

In *Hinlicky v. Dreyfuss*, the issue was whether the trial court had properly admitted into evidence a flowchart, or algorithm, incorporating a set of clinical guidelines published by the American Heart Association in association with the American College of Cardiology. The anesthesiologist treating the deceased patient used the flowchart to determine whether the patient needed an evaluation of her heart prior to surgery. He concluded that she did not. Neither the decedent's internist, nor the vascular surgeon who performed the procedure, utilized these clinical guidelines in reaching their decisions not to submit her for pre-operative cardiac testing, although experts testifying for the defense approved of their use. A key issue in the case was whether the three defendant doctors' failure to refer the deceased for such pre-operative testing was negligence.

A unanimous Court, in an opinion by Chief Judge Judith S. Kaye, concluded that it was not error to admit the flow chart into evidence as demonstrative of the anesthesiologist's testimony concerning the steps he took in deciding not to refer the decedent for cardiac testing prior to surgery.

The underlying facts involved a 71-year old woman who underwent surgery for the removal of plaque from her carotid artery that was significantly impairing blood flow to her head and could a cause stroke. She died of a heart attack 25 days after surgery, and her estate instituted the malpractice action. At trial, plaintiff maintained that pre-operative testing was

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mandated under prevailing medical standards by reason of decedent's history and medical condition.

The jury returned a unanimous verdict for the defendants.

While the Court recognized that scientific works generally are excluded as hearsay when offered for their truth, it determined that the clinical guidelines here were used by the anesthesiologist to show the steps he took to reach his decision that no pre-operative testing was required, and not to prove the recognized standard in the profession. It appears, however, that defendants' experts used the guidelines in a manner to prove the accepted standard of care.

Plaintiff's counsel failed to seek a limiting instruction on the use of the demonstrative exhibit. The Court therefore did not decide what instruction should have been given. Thus, "whether evidence may become admissible solely because of its use as a basis for expert testimony remains an open question in New York." The Court did, however, acknowledge the need for trial courts to place limits on the basis of an expert's opinion to avoid the testimony becoming a "conduit for hearsay."

The opinion in *Hinlicky* alerts counsel to diligently argue for limiting instructions when clinical guidelines are received into evidence and to seasonably object to testimony that tends to turn such guidelines into affirmative proof of the applicable standard of care.

Res Ipsa/Summary Judgment

In *Morejon v. Rais Construction*, the Court took the occasion to clarify the viability, albeit limited, of the application of the doctrine of res ipsa loquitur (the "doctrine") as a basis upon which summary judgment may be awarded to a plaintiff in a negligence case. A unanimous Court, in an opinion by Judge Albert M. Rosenblatt, affirmed the order of the Appellate Division, Second Department, that had reversed the Supreme Court's use of the doctrine in granting summary judgment in favor of the plaintiff. However, the Court rejected the blanket rule suggested by the Appellate Division that the doctrine may never be used as the basis for granting a plaintiff such relief.

The case was brought on behalf of a workman who was fatally injured, allegedly by a roll of roofing material that fell from the roof of a building under construction and struck him in the head. The motion court, applying the doctrine, granted summary judgment to the worker's estate on the issue of liability. The motion was granted in the face of the testimonial evidence by the defendant construction company and the owner of the building that tended to show the existence of issues of fact, including whether the accident had in fact happened.

In reaching its conclusion that the doctrine could be relied upon to grant summary judgment only in the rarest of cases, the Court traced in detail the development of the doctrine in New York since the first use of the term "*res ipsa loquitur*" in the late 19th Century.

While adhering to its earlier pronouncement – that the doctrine creates an inference of negligence – the Court concluded that the doctrine is in fact nothing more than the introduction of facts to prove negligence by circumstantial evidence. If that evidence presents a question of fact, the case cannot be decided by summary judgment and must proceed to trial. It is only when that circumstantial evidence is "so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable," that summary judgment or a directed verdict will lie for the plaintiff.

Eyewitness ID Experts

In neither *People v. Rudolph Young* nor *People v. Paris Drake,* did the Court explicitly hold that expert testimony on the reliability of eyewitness identification meets the *Frye*[1] admissibility test of general acceptance by the psychological community, but in both opinions the Court clearly expressed its view that such testimony should be admitted in an appropriate case. "[I]ndeed, there are cases in which it would be an abuse of discretion to exclude such evidence," for example when the identification is not "strongly corroborated," the Court observed in *Young*. The Court divided (6-1) over the application of its stated view to the two cases, however.

In *Young*, immediately after the armed robbery of a couple, the wife told the police that she would be unable to help them create a composite sketch of the perpetrator because his face was partially obscured by a scarf. She later was shown a photo array, but was unable to pick out defendant's photograph. Still later she was shown a line-up and heard the voices of its participants, at which point she identified the defendant. The defendant was found guilty, but that conviction was overturned because the line-up was the result of an arrest without probable cause.

Prior to the re-trial of the case, the court held an "independent source" hearing to determine whether the wife could identify the defendant without relying upon the line-up, and she testified that she recalled the defendant's face from the day of the crime. The Court of Appeals conceded there was "force" to the argument that, given the facts set forth above, it was impossible to find that the prosecution had proven an independent source for the identification by clear and convincing evidence, but ultimately determined that there was some support for this finding of fact by the lower courts. Judge George Bundy Smith's dissent argued that, under the circumstances, even to hold an independent source hearing was an error, as a matter of law.

At the re-trial – which took place eight years after the crime – the wife testified that she recognized the defendant from the robbery. The People also introduced evidence that items stolen from the victims were found in the possession of two acquaintances of the defendant, one of whom testified that she received an item from the defendant.

The trial court barred the testimony of defendant's identification expert. The proffer established that, had the psychologist been permitted to testify, he would have explained various factors affecting the accuracy of eyewitness identification, including that identification is less reliable when it is cross-racial, a weapon is involved, or the victim is under

a high level of stress. He also would have addressed the impact of suggestion upon memory and the difficulty of establishing the source of one's recollection. The dissent argued that the exclusion of this evidence also was an error, as a matter of law.

The majority, in an opinion by Judge Robert S. Smith, held that the trial court acted within its discretion. Were it not for the additional evidence, preclusion of the expert testimony would have been "hard to justify;" however, the corroboration was strong enough that the trial court reasonably could have concluded that the opinion testimony was of "minor importance." Thus, despite language encouraging the admission of expert testimony as to the perils of eyewitness identification when relevant, the Court has indicated by its decision in *Young* that when a trial court exercises its discretion to exclude such testimony, it will not be second-guessed if there is corroborating evidence of guilt.

Erroneous Instruction

There was no indication of corroborating evidence to support the eyewitness identifications in *People v. Drake,* and the issue was much contested at trial.

The case arose out of a notorious unprovoked attack on a young woman who was hit in the head with a brick as she stood on a street in Manhattan. At trial, two of the eleven eyewitnesses identified the defendant. One of them initially had refused to help with the investigation, but came forward after seeing the defendant on television being escorted by the police. The other had previously selected a different suspect out of a photo array as having "some of the characteristics" of the attacker (the same suspect that another witness similarly had picked out). Three eyewitnesses testified that the defendant was *not* the attacker. The remaining eyewitnesses were unable to say whether or not the defendant was the man they had seen. The facts surrounding these identifications, misidentifications, and lack of identifications, were put before the jury.

The trial court would not permit defendant's expert psychologist to comment on the reliability of any fact witness' identification, restricting her testimony to the factors affecting eyewitness identification in the abstract and supporting research data. Because the issue of this restriction was not preserved for review, the Court did not rule on it, but the majority opinion by Chief Judge Judith S. Kaye suggested in *dicta* that it is appropriate to have psychologists apply their expert knowledge to the particular facts of the case when providing opinion testimony.

The issue before the Court in *Drake* was whether the jury instructions essentially charged the psychologist's testimony out of the case. After giving the standard charge on expert witnesses, the trial judge told the jury that the psychologist's testimony "may not be used to discredit or accredit the reliability of eyewitness testimony in general or in this case." It would seem safe to assume that, at a minimum, at least some of the jurors may well have been confused.

Applying the test of whether a jury, hearing an entire charge, would gather the correct rules to be applied,[2] the Court upheld the conviction. The disputed sentence was incorrect, and by itself could be interpreted to mean that the psychologist's testimony should not be considered for any purposes, the Court agreed, but in the context of the charge as a whole, "No reasonable juror could have concluded . . . that [the psychologist's] testimony had been effectively stricken from the case." Judge George Bundy Smith again dissented on the basis that the effect of the charge as a whole was to "negate" the psychologist's testimony, without which the verdict could not be sustained.

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[1] *See Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). New York continues to follow the more restrictive *Frye* test, rather than the test articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579 (1993), now followed in many states, as well as in federal courts.

[2] *See People v. Russell,* 260 N.Y. 147, 153 (1934).