

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CANDICE R. MUMFORD,)	
)	
Plaintiff,)	C.A. No. 00C-05-022WLW
)	
v.)	
)	
SAMUEL RIFFE PARIS,)	
)	
Defendant.)	

Submitted: December 3, 2001

Decided: January 25, 2002

ORDER

Upon Defendant's Motion *in Limine* to
Exclude Plaintiff's Expert Witness.
Granted in part; Denied in part.

Nicholas H. Rodriguez, Esquire, of Schmittinger & Rodriguez, Dover, Delaware,
for the Plaintiff.

Douglass Lee Mowrey, Esquire, of Bouchelle & Palmer, Newark, Delaware, for the
Defendant.

WITHAM, J.

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Before the Court is the motion *in limine* of Samuel Paris (“defendant”) to bar the testimony of Dr. Richard T. Callery, the expert of Candice Mumford (“plaintiff”), as well as plaintiff’s motion in opposition to the same. Because Dr. Callery is qualified to testify on the issue of whether or not the defendant experienced a syncopal episode, but is not qualified to testify as to the particular cause of syncope alleged by defendant here, defendant’s motion *in limine* is granted in part and denied in part.

Background

Dr. Callery’s testimony pertains to the defendant’s use of an unavoidable accident defense to the claim of negligence. Defendant alleges that any negligence attributed to him was unavoidable because he was overcome by a sudden, unanticipated illness—a syncopal episode—while driving his car. This episode led to the motor vehicle accident at issue.¹

Dr. Gold, with whom defendant treated after the accident, will testify for the defendant. He is board certified in internal medicine, cardiology, and electrophysiology. Dr. Gold’s opinion is that defendant is susceptible to drug-induced sustained ventricular tachycardia resulting in syncope² and, in fact, just

¹ Sudden loss of physical capacity or consciousness while driving is generally accepted as a defense to negligence provided that the loss of capacity or consciousness was unforeseeable. *Lutzkovitz v. Murray*, 339 A.2d 64 (Del. Supr. 1975).

² “Syncope” is commonly understood as fainting or swooning. *Webster’s Dictionary* 378 (1987 Edition). It is “a brief lapse in consciousness caused by transient cerebral hypoxia” (i.e. inadequate oxygen which may occur through various causes), and “is usually preceded by a sensation of light-headedness and often may be prevented” *Mosby’s Medical, Nursing, & Allied Health*

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such an event occurred to defendant at the time of the accident here as a result of medication taken to treat atrial fibrillation.

In contrast, Plaintiff offers the testimony of Dr. Callery to prove that the defendant did not suffer a debilitating syncopic event at the time of the accident. Dr. Callery is a medical doctor and board certified in anatomic pathology and forensic pathology. He is the Chief Medical Examiner of the State of Delaware and Director of the State Forensic Science Lab and Crime Lab. Dr. Callery will testify that the defendant did not suffer a syncopal event because the defendant's behavior at the time of the accident was not compatible with syncope. Defendant purportedly drove his vehicle purposely, stopping and starting and turning to the left and right, etc., before the collision occurred. This is inconsistent with fainting or syncopathy.

Claims of the Parties

Defendant alleges that plaintiff's expert is simply not qualified to comment upon or rebut the opinions of Dr. Gold because Dr. Gold is a cardiologist and Dr. Callery's expertise extends only to diagnosing cardiological problems upon autopsy or death. Defendant notes that Dr. Callery does not treat live patients. Dr. Callery admitted that he is not an electrophysiologist or an expert in arrhythmia. Importantly, he testified that he did not know what Dr. Gold's report meant when it revealed that defendant was easily inducible for sustained ventricular tachycardia. For these reasons, defendant believes Dr. Callery is not qualified to rebut Dr. Gold's determination that defendant is susceptible to medication-induced sustained

Dictionary 780, 1516 (4th ed. 1994).

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ventricular tachycardia resulting in syncope, and that he cannot rebut the allegation that defendant did indeed experience such an event at the time of the accident.

Plaintiff responds that Dr. Callery is completely qualified to give testimony as to the fact that defendant's behavior was inconsistent with syncope at the time of the accident, because he is not testifying as a cardiologist but as a medical doctor based upon the fact that Defendant did not suffer a syncopal event.

Expert Testimony

Under Delaware Rule of Evidence 702, “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.” Rule “702 ‘requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility.’”³

The trial judge is the “gatekeeper.”⁴ When an expert's opinion is “challenged, the trial judge must decide if the expert's testimony ‘has a reliable basis in the knowledge and experience of [the relevant] discipline.’”⁵ It is the obligation of “a trial judge to ‘ensure that any and all scientific testimony is not only relevant, but

³ *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 523 (Del. Supr. 1999) (citations omitted).

⁴ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 501 U.S. 579 (1993).

⁵ *M.G. Bancorporation* 737 A.2d at 523.

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reliable.”⁶ “[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”⁷

Consequently, the trial judge has broad discretion to determine what “specific factors are, or are not, reasonable measures of reliability in a particular case.”⁸ Due to this great latitude, the trial court’s decision to admit or exclude expert testimony will be reviewed under an abuse of discretion standard.⁹ This standard applies regardless of whether the trial judge has ruled “on either the reliability of an expert’s methodology or the reliability of an expert’s ultimate conclusion.”¹⁰

Various tests have been set forth which list specific factors that are reasonable measures of reliability. *Daubert* and *Kumho*, for example, set forth four factors that a trial judge should consider when examining the narrow issue of the reliability of the science or technology underlying an expert’s opinion.¹¹ A broader analysis is

⁶ *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 588 (Del. Supr. 2000) (citing *Daubert, supra.*).

⁷ *Id.* (citing *Kumho, supra.*).

⁸ *M.G. Bancorporation, Inc.* 737 A.2d at 521.

⁹ *Id.* at 523.

¹⁰ *Id.*

¹¹ *Hall v. Radnich*, Del. Super., C.A. No. 97C-10-154, 2000 WL 1211279 at *3, Tolliver, J. (July 11, 2000) (Op. and Order) (noting that the Delaware Supreme Court officially adopted *Daubert* and *Kumho* in *M.G. Bancorporation, Inc.*, and setting out the *Daubert/Kumho* factors as follows:

(1) Has (or can) the particular theory or technique been tested;

needed, however, when the Court considers the general admissibility of an expert.

When a broader analysis is required, appropriate factor to consider have been set forth by the Delaware Supreme Court in *Cunningham v. McDonald*.¹²

The trial court must decide that: (i) the witness is "qualified as an expert by knowledge, skill, experience, training or education" (D.R.E. 702); (ii) the evidence is relevant and reliable; (iii) the expert's opinion is based upon information "reasonably relied upon by experts in the particular field" (D.R.E. 703); (iv) the expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue" (D.R.E. 702); and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.¹³

Accordingly, it is in view of these factors that defendant's objections to the admissibility of Dr. Callery's testimony must be addressed in this case.

Discussion

First, it does not appear that the defendant contests the qualifications of Dr. Callery as a medical doctor in his field of expertise, forensic pathology. There is no challenge to his training, education and experience in that realm. Rather, defendant questions whether the witness is qualified as an expert by knowledge,

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- (2) Has it been subjected to peer review;
 - (3) Is there a known or potential rate of error in the technique; and
 - (4) Has the technique been generally accepted within the appropriate scientific community.)

¹² 689 A.2d 1190, 1193 (1997).

¹³ *Id.* (citing *Nelson v. State*, Del. Supr., 628 A.2d 69, 74 (1993)).

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skill, experience, training or education with respect to the specifically-alleged cause of the syncopic episode here.

Opinion evidence may be offered if an expert's education, training or general experience demonstrates sufficient knowledge of general principles, even if the expert does not have particular experiences with the exact issue under examination. '[A]n experienced practicing physician is an expert, and it is not required that he be a specialist in the particular malady at issue in order to make his testimony as an expert admissible.'

* * *

[On the other hand] [i]f scientific issues are implicated in the expert's conclusion, in-depth experience in the underlying scientific principles is required of the expert.¹⁴

In this case, Dr. Callery is qualified as a medical doctor to explain, within reasonable medical probability, why he does not think the defendant had a syncopal event; however, Dr. Callery conceded that he did not understand the particular cause of the alleged syncopic episode here as put forth by Dr. Gold—i.e. Dr. Callery testified that he did not know what Dr. Gold's report meant when it revealed that defendant was easily inducible for sustained ventricular tachycardia.¹⁵

¹⁴ *Bell Sports Inc.* 759 A.2d at 590 (citations omitted).

¹⁵ Dr. Callery's deposition testimony submitted by defendant shows the following:

Q. . . . Are you unaware that Dr. Gold did electrophysiological studies that revealed that Mr. Paris was easily inducible for sustained ventricular tachycardia?

A. Yes, I read that, yes. I did read that, yes.

Q. Do you know what that means?

A. Well, not really, Not really . .

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For this reason, Dr. Callery is not qualified to rebut Dr. Gold's determination that defendant is susceptible to medication-induced sustained ventricular tachycardia resulting in syncope. If, as Dr. Callery testified, he did not really know what sustained ventricular tachycardia means; then, he is not qualified to discuss the susceptibility of the defendant to a drug-induced version of the same (which then allegedly led to syncope). Nor can he discuss what physical symptoms of syncope would be manifested by the defendant (e.g. how long it would take the event to occur, would there be physical warning signs, etc.) if the alleged syncope was caused by a drug-induced sustained ventricular tachycardia. Dr. Callery has disqualified himself from testifying regarding this *one* particular cause of syncope, and if he did opine on this issue he would simply be guessing.

As plaintiff has noted, Dr. Callery is fully qualified to give his opinion on the lack of a syncopal event, and whether or not defendant's behavior (or driving) suggested the occurrence of such an episode.¹⁶ He may even discuss other causes of syncope with which he is familiar; however, by his own testimony he has excluded himself from discussing the susceptibility of defendant to syncope via a drug-induced sustained ventricular tachycardia, and the likelihood or manifestations of that particular cause of syncope in defendant's case.

If Dr. Callery's testimony stays within the framework set forth above, the remainder of the factors set forth in *Cunningham v. McDonald* will be satisfied.

¹⁶ *Bell Sports, Inc., supra.*

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Defendant does not dispute that Dr. Callery, as a medical doctor in the field of pathology, is "qualified as an expert by knowledge, skill, experience, training or education;" the evidence he will provide is certainly relevant under D.R.E. 401, and is reliable if kept within the above-noted confines; his opinion is based upon information "reasonably relied upon by experts in the particular field;" it will "assist the trier of fact to understand the evidence or to determine a fact in issue"; and as limited by the Court, Dr. Callery's testimony will not create unfair prejudice or confuse or mislead the jury.¹⁷

Wherefore, consistent with the guidelines set forth above, defendant's motion *in limine* is ***granted in part and denied in part***. IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

dmh

oc: Prothonotary

xc: Order Distribution

¹⁷ 682 A.2d at 1193.