

## New Jersey Supreme Court Issues Landmark Decision on Standards for Expert Testimony While Reinstating Expert Exclusion Order Secured by Colleen Hennessey and Team

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The New Jersey Supreme Court strengthened the standard for the admissibility of expert testimony in a unanimous decision issued on August 1, 2018. [See \*In re Accutane Litigation\*, Docket No. 079958 \(August 1, 2018\)](#). The landmark decision upheld a trial court's exclusion of the plaintiffs' two key causation experts in the Accutane MCL, and effectively terminated the cases of more than 2,100 individual plaintiffs. The broader ruling, however, establishes a "rigorous" gatekeeping function for the New Jersey Courts and adopts the federal *Daubert* factors as a guide for determining the admissibility of expert scientific testimony.

The Accutane decision hones in on the gatekeeping function of the trial courts when assessing the reliability of expert testimony. Recognizing that "[p]roperly exercised, the gatekeeping function prevents the jury's exposure to unsound science through the compelling voice of an expert" the Court writes that "we can and should have more clear direction to courts on how the gatekeeping function is properly performed... We endeavor to do that with this matter." (*Id.* at 69-70). Toward that end, the Court held that "the gatekeeping role must be rigorous." (*Id.* at 69). In its gatekeeping role, the trial court must "assess both the methodology used by the expert to arrive at an opinion and the underlying data used in the formation of the opinion," to "ensure that the expert is adhering to norms accepted by fellow members of the pertinent scientific community." (*Id.* at 79). In making such an assessment, the Court ruled that New Jersey courts should incorporate the factors identified in *Daubert* as part of their gatekeeping function. These factors, "pertinent for consideration, but not dispositive or exhaustive, are:

- Whether the scientific theory can be, or at any time has been, tested;
- 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";
- 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
- Whether there does exist a general acceptance in the scientific community about the scientific theory."

(*Id.* at 81-82).

In line with its holding on the rigor of gatekeeping required for assessing expert admissibility, the Court approved of the Accutane trial court's methodological analysis wherein it excluded plaintiffs' experts because, in sum, they deviated from core scientific principles and strayed from their own stated methodology when they disregarded the conclusions of nine epidemiological studies in favor of case reports and animal studies to support their conclusions. Significantly, the Court agreed with the trial

court that “case reports are at the bottom of the evidence hierarchy” and “while animal studies may be helpful in ‘framing hypotheses’ the *Reference Manual* intimates that such evidence is far less probative in the face of a substantial body of epidemiologic evidence.” (internal citations and quotations omitted) (*Id.* at 73-74). The Court held that “experts cannot selectively choose lower forms of evidence in the face of a large body of uniform epidemiological evidence,” and ultimately ruled that “[t]he trial court did the type of rigorous gatekeeping that is necessary when faced with a novel theory of causation, particularly one, as here, that flies in the face of consistent findings of no causal association as determined by higher levels of scientific proof.” (internal citations and quotations omitted) (*Id.* at 77, 85).

This opinion from the New Jersey Supreme Court emerges from more than a decade of litigation in the Accutane MCL. The exclusion of the plaintiffs’ experts at the trial court level was spearheaded by Peabody & Arnold LLP partner, Colleen M. Hennessey, who has been lead science counsel in the Accutane litigation.