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Authoritative texts: Expert witnesses are allowed to read to the jury the contents of inadmissible scientific and medical literature as the basis for an opinion

By Kurt D. Lloyd

In *Wilson v. Clark*, the Illinois Supreme Court adopted Federal Rule of Evidence 703, holding that the Illinois rules of evidence allowed an expert witness to testify to an opinion based on facts or data which have not been admitted into evidence.[1] Since *Wilson,* an expert witness has been allowed to read into evidence from many different types of hearsay documents to explain the basis of his opinion, such as medical records, deposition transcripts, another physician's opinion from a medical report, unsworn witness statements, or correspondence.[2] These types of documents are referred to as non-substantive evidence. However, when it comes to published scientific and medical literature, some Appellate courts have ruled that *Wilson* does not allow an expert witness to read to the jury from recognized medical and scientific literature, because the content would be improperly introduced to the jury as substantive evidence.[3] Such rulings directly conflict with the expert's permitted use of other types of non-substantive evidence under *Wilson.* As will be shown below, under the law of *Wilson* and its progeny a party's expert witness is allowed to read to the jury from the contents of recognized medical and scientific literature on direct examination; provided, however, that the proper foundation is shown that the literature is reasonably relied upon in the field, that the content is being offered as the basis for an opinion and that a limiting instruction is given to the jury.

What is an Authoritative text?

Illinois courts have long recognized that expert witnesses rely on information contained in authoritative scientific and medical literature within their field.[4] The term of art "authoritative" when referring to publish literature appears to have derived from the language used by the Illinois Supreme Court in *Darling v. Charleston Community Memorial Hospital,* where the Court commented that a party is allowed to cross-examine an expert about the views of "*recognized authorities*, expressed in treatises or periodicals written for professional colleagues."[5] However, to lay an adequate foundation for the use of medical literature, an expert opinion that a particular book or article is "authoritative" is not expressly required.[6] Many Illinois Appellate courts have affirmed the trial judge's finding that an adequate evidentiary foundation for use of published literature had been made, despite the word "authoritative" never being uttered. For example, in *Bowman v. University of Chicago Hospitals*, the use of a table from a medical textbook showing the mortality rates for neonatal bacterial infections was allowed over counsel's objection that the witness had not designated it as "authoritative."[7] In *Bowman*, the trial court's finding that expert's testimony that the textbook was a "standard, well-respected text" adequately laid a foundation for the use of the textbook was upheld.[8] Similarly, in *Bergman v. Kelsey*, the defendants objected to an expert's use of a guideline published by the *American College of Obstetrics and Gynecology* ("*A.C.O.G.")* because no expert had deemed it authoritative.[9] The

plaintiff offered expert testimony that *A.C.O.G.* is an "educational forum that produces educational material that translates into their definition as guidelines. Many of these guidelines translate to the standard of care." Based on this expert testimony, the *Bergman* court found no abuse of discretion in finding that an adequate foundation for the *A.C.O.G*. guideline as a recognized had been made.[10]

This does not mean that an expert witness can rely upon any publication he likes, then simply characterize the publication as authoritative or well-recognized, so that he can parrot from it on the witness stand. In *City of Chicago v. Anthony*, our Supreme Court articulated a standard for an expert's use of inadmissible evidence on direct examination, holding that a document containing substantively inadmissible facts or data "*must be of the type reasonably relied upon by experts in the field."*[11] This standard clearly applies to medical and scientific texts and literature.[12]

Of course, while using its discretion the trial court's function is to determine whether an adequate foundation has been met before the expert reads the materials to the jury.[13] As a practical matter under Supreme Court Rule 213, the party intending to elicit expert testimony from the content of published literature must have previously disclosed that their expert witness intends to rely upon its contents as the basis of an opinion and the supporting opinion.[14] More importantly, the party must have disclosed an expert's opinion that the article or book is authoritative or recognized in the expert's field.[15] This necessary opinion cannot be merely that the expert "personally considers" the material to be a recognized authority, but rather that experts generally consider the material to be reasonably relied upon by other experts in the field.[16] The literature cannot be considered "junk science."[17] The literature must be relevant to the circumstances,[18] and that the probative value of the materials must outweigh its prejudicial value.[19]

Revealing the Contents of Medical Literature

In *People v. Anderson,* the Illinois Supreme Court held that an expert witness is expressly allowed to reveal to the jury the contents of non-substantive documents which contain facts or data upon which he has relied as the basis of an opinion.[20] There, the defendant's expert witness read from physician reports containing opinions about the sanity of the defendant. The *Anderson* Court drew no distinction between medical or scientific literature and other types of non-substantive evidence. The *Anderson* Court reasoned that an expert should be allowed… "*to reveal* the contents of materials upon which he reasonably relies in order to explain the basis of his opinion."[21] To the extent the material is deemed trustworthy by the expert's profession, the *Anderson* Court concluded that "it would be both illogical and anomalous to deprive the jury of the reasons supporting the opinion."[22] Therefore, under the evidentiary rule established by *Anderson*, an expert witness must be allowed to reveal the contents of medical and scientific literature to explain the basis for his opinion; otherwise, the jury has no way to evaluate the underlying validity of the expert's opinion.

In *Kochan v. Owens-Corning Fiberglass Co,*[23] the court directly applied the logic of *Anderson* to the question of an expert reading to the jury from published medical literature. Affirming the trial judge, the *Kochan* court held that the plaintiff's expert witness could read to the jury from published medical articles as basis for his proximate cause opinion that asbestos was linked to lung cancer.[24] The *Kochan* court further found that, because the "underlying facts" contained in the quoted literature had provided a basis for the expert's opinion, *i.e.* when the industry should have known that asbestos had been linked to cancer, the contents of the medical literature had been properly revealed to the jury.[25] Citing *Anderson,* the *Kochan* court distinguished earlier contrary Appellate court cases and concluded that the medical literature was not being offered as substantive evidence, but rather as non-substantive evidence which supported the basis of an opinion.[26] Similarly, in *Elam v. Lincoln Electric Co*, the plaintiff's expert neurologist was allowed to read from numerous articles and scientific literature as a basis for his opinion—specifically medical and scientific literature which showed an increased incidence of Parkinson's disease among workers exposed to welding fumes.

Importantly, in both *Kochan* and *Elam* a limiting jury instruction was given regarding the use of published literature as non-substantive evidence.[27] The Illinois Pattern Instruction No. 2.04 is approved for use when an inadmissible document has been offered in evidence for a limited non-substantive purpose, as follows:

> **2.04 Limiting Instruction--Expert Testifies to Matters Not Admitted in Evidence**
>
> I am allowing the witness to testify in part to [books] [records] [articles] [statements] that have not been admitted in evidence. This testimony is allowed for a limited purpose. It is allowed so that the witness may tell you what he/she relied on to form his/her opinion[s]. The material being referred to is not evidence in this case and may not be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, you will give the opinions testified to by this witness.[28]

Lastly, the expert may not use medical or scientific literature to simply rehash, bolster or corroborate his opinion. Such a use is error.[29]

Publication of the Medical and Scientific Literature to the Jury

No Illinois Appellate court has decided whether non-substantive evidence from medical and scientific literature can be physically shown to the jury during a trial. It is correct that an expert witness can be cross-examined with non-substantive materials that are not in evidence.[30] On cross-examination, a medical chart or a verbatim statement read from a page in a book or article is not substantive evidence.[31] However, even though a proper foundation has been shown as to the reliability of the material in the field, the courts have found that such a foundation does not permit an attorney to slyly attempt to introduce the material as substantive evidence.[32]

This raises the question whether the party can publish the contents from a book or article to the jury during direct examination to further show the basis of his expert's opinion demonstratively. Certainly, if the law permits the jury to hear the verbatim words of the literature as they are read by the expert, then why cannot the jury see the words on the printed page and in the context that they were written and published? If the trial gives the jury the proper limiting instruction, Illinois law would appear to support showing the printed page to the jury.[33]

In conclusion, under *Wilson v. Clark,* the expert witness is allowed to read to the jury from non-substantive, hearsay medical or scientific literature to support his opinion. At trial, the value of an expert's opinion can be much more powerful; provided, that the trial lawyer knows how to properly lay the foundation so that medical or scientific literature which forms the basis of the opinion is read to the jury, rather than simply a "naked" opinion. The attorney's preparation for the expert's use of literature begins with the proper Rule 213 discovery disclosures of the well-recognized or authoritative nature of the literature, including specific reference to the written statements or other materials that the expert intends to quote at trial as the basis for his opinion. Hopefully, with an understanding of the non-substantive use of literature as the basis for an expert's opinion, the expert's opinion can be transformed into persuasive testimony before the jury. ■

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1. *Wilson v. Clark*, 84 Ill.2d 186 (1981)

2. See, e.g. Lawson v. G.D. Searle, 64 Ill.2d 543, 557 (1976) (detailed review of all published clinical studies); Henry v. Brenner, 139 Ill.App.3d 609,614 (1st Dist. 1985)(medical records of other physicians);Hatfield v. Sandoz-Wander, Inc., 124 Ill. App.3d 780,787-88 (1st Dist. 1984)(depositions); Han v. Holloway, 408 Ill.App.3d 387, 393 (1st Dist. 2011)(statements from police accident report)

3. Mielke v. Condell Memorial Hospital, 124 Ill.App.3d 42 (2nd Dist. 1982)(a medical negligence case, where the plaintiff's attorney on direct examination of his expert medical witness attempted to elicit testimony which revealed statements in the medical literature upon which the expert had relied and that had formed the basis of his standard of care opinion. The Defendant objected arguing that the medical literature was hearsay evidence which could not be cross-examined. The trial judge ruled that the expert was allowed to state his opinion and to recite the written authorities he reviewed for the basis of his opinion, but that the expert was precluded from reading to the jury from the articles. On appeal, the Mielke court affirmed the trial court's exclusion of the contents of the literature, concluding that the Plaintiff's attorney had improperly attempted to introduce medical literature as substantive evidence); see also, Schuchman v. W.R. Stackable, 198 Ill.App.3d 209 (5th Dist. 1990).

4. Lawson, supra.

5. 33 Ill.2d 326, 336 (1965)(emphasis added)

6. See e.g. 366 Ill.App.3d 577 (1st Dist. 2006)

7. Id., at 587-88

8. Id.

9. 873 N.E.2d 486 (1st Dist. 2007)

10. Id.

11. 136 Ill.2d 169, 554 N.E.2d 1381 (1990)

12. Solis v. BASF Corp, WL 4748286(1st Dist. IL App (2012)

13. Stapleton v. Clark,

14. Supreme Court Rule 213(f)(3)

15. Iser v. Copley Memorial, 288 Ill.App3d 408 (3rd Dist. 1997) (the party intending to offer literature on direct

as a basis for an expert's opinion must disclose to the opposing party under Rule 213 the expert's preliminary foundational opinion that the literature is authoritative or recognized in the field.)

16. People v. Hauser, 305 Ill.App.3d 384 (1999)

17. Mitchell v. Palos Community Hospital, 317 Ill.App.3d 754 (1st Dist. 2000)

18. Ruffiner v. Material Service, 116 Ill.2d 53, 58 (1987)

19. Ziekert v. Cox, 182 Ill.App.3d 926 (1st Dist. l989)

20. 113 Ill.2d 1 (1986)

21. 113 Ill.2d 9

22. Id.

23. 242 Ill.App.3d 781(5th Dist. 1993).

24. Id., at 699.

25. Id.

26. 841 N.E.2d 1037, 1049-50 (5th Dist. 2005)

27. See e.g. Elam where the court affirmed the following limiting instruction language: "It is allowed so that the witness may tell you what he relied on in forming his opinions. The materials being referred to are not evidence in this case and may not be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, you will give the opinion testified to by this witness."

28. I.P.I. 2.04

29. Solis, supra; People v. Prince, 362 Ill.App.3d 762, 776 (1st Dist. 2005)(expert testimony that her work was peer reviewed or verified by another worker was improper)

30. People v. Pasch, 152 Ill.2d 133 (1992)

31. Downey v. Dunnington, 384 Ill.App.3d 350, 379 (4th Dist. 2008)

32. Jager v. Libretti, 273 Ill.App.3d 960, (1st Dist. 1995)

33. I.P.I. 204; Kochan, supra.

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