



Experts' Opinions Must Be Based On Facts

UNLIKE HUMPTY DUMPTY, WITNESSES CAN'T MAKE UNPROVED ASSERTION

By PATRICK J. FILAN

"I don't know what you mean by 'Glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't – till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

—Lewis Carroll,
"Alice's Adventures in Wonderland"

Were Humpty Dumpty an expert who offered such an opinion in a courtroom his opinion would likely be inadmissible "ipse dixit." *Ipse dixit* means "an assertion made but not proved." See *Klein v. Norwalk Hospital*, 299 Conn. 241 (2010), citing "General Electric Co. v. Joiner," 522 U.S. 136, 137, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). "Nothing . . . requires a . . . court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."

In *Klein*, the defendant's expert offered an opinion that the plaintiff's injuries were not caused by the negligence alleged against the defendant. The opinion was based on a review of the plaintiff's medical records. The admissibility of the opinion was challenged unsuccessfully at a Porter hearing.

The case was tried to a defense verdict and appealed.

The Connecticut Supreme Court reversed, noting that the defendant did not make the required showing under Porter that his methodology, a review of medical records, had been subjected to peer review or had a known rate of error for his chosen methodology, two of the Porter requirements. The Court went on to state that the absence of such evidence was "determinative of the inadequacy of the defendant's proof of the methodology's reliability."

Without evidence that a records review constituted a reliable methodology, the expert's opinion was nothing more than his *ipse dixit*, or an opinion like Humpty Dumpty's: "It means just what I choose it to mean — neither more nor less."

A factual basis for an expert's opinion has long been required. See *Wallace v. Saint Francis Hospital and Medical Center*, 44 Conn.App. 257 688 A.2d 352, (1997). In the same case, the court stated that the facts upon which an expert's opinion is based are an important consideration in determining the admissibility of his opinion. "Just because someone has a medical degree or is board-certified . . . that does not authorize him to testify about a theory that is not based on a solid foundation." *Clarke v. Schofield*, 632 F. Supp. 2d 1350, 1355 (2009). Facts assumed in a hypothetical question must have their basis in the evidence on the record. *Wallace, supra*.

An *ipse dixit* opinion even from a well-credentialed may also be inadmissible because it is

not helpful to a jury in rendering a verdict. Connecticut Code of Evidence section 7-2 provides that a witness "qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion . . . if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

An expert who expresses an *ipse dixit*-type opinion is not offering testimony that will assist a jury or fact finder in understanding the evidence or rendering a decision. All that jury is hearing is an unsubstantiated opinion that has no factual basis in the record and is devoid of a reliable method by which the opinion was reached. Expert testimony "will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." See *Clarke v. Schofield*, 632 F. Supp. 2d 1350, 1355 (2009).

Expert opinions are admissible and helpful to a jury when there is a factual basis in the record for the opinion and where the methodology by which the opinion was reached is reliable and passes muster under Porter. The *ipse dixit* of a credentialed witness is not helpful to the jury and is not based on a reliable methodology.

In challenging an expert's seemingly conclusory *ipse dixit* opinion at a Porter hearing



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and on cross-examination some things to look for are:

- Is the opinion based upon a solid evidentiary and factual foundation?
- Does the opinion ignore important facts in the record?
- Are facts that are not helpful to the expert's opinion explained away in some coherent, scientific fashion?
- If unhelpful facts are not addressed and dealt with coherently, the opinion becomes more and more inadmissible *ipse dixit*.
- Has the expert articulated and explained the method by which he arrived at his opinion?
- Is the expert's methodology reliable under the *Porter* criteria? That is, has the

methodology been tested; subjected to peer review; does it have a known or potential rate of error? Has it garnered general acceptance in the relevant scientific community?

- Are there flaws in the expert's reasoning that make reliance on the opinion unreasonable and render the conclusions of doubtful validity?
- Is there an "analytical gap" between the data relied on and the opinion offered?

Conclusion

The subjective opinion of even a well-credentialed expert who is unable to present and explain the evidence he relies on and cannot point to a reliable methodology he utilized in reaching his opinion

is expressing an *ipse dixit* opinion that should not be admissible.

When confronted with *ipse dixit* expert opinions, lawyers should be like Alice, who challenged Humpty Dumpty, "The question is whether you can make words mean many different things." The *ipse dixit* expert would have it as Humpty Dumpty, who replied, "The question is which is to be master — that is all." The rules of evidence do not permit unsubstantiated conclusory opinions even from well-credentialed experts. Expert opinions must be based on the evidence and a reliable methodology by which the opinion was reached. Unsupportable conclusions which ignore the evidence and resemble a closing argument should not be admitted. ■