People v. Goldstein: The Professional Reliability Rule and Frye

On July 29, 2004, (Expert Testimony as a Backdoor to Impermissible Hearsay), we explored the question of whether the expert witness may, under the guise of the professional reliability rule as an exception to the hearsay rule, use out-of-court statements by declarants who do not testify at trial. We concluded that such extrajudicial data are not contemplated under the evolved body of law by the Court of Appeals.

In *People v. Goldstein*,[1] decided Dec. 20, 2005, the Court of Appeals addressed two issues: the professional reliability rule and the constitutional right of confrontation in matters involving testimonial evidence under *Crawford v. Washington*.[2] Although *Goldstein* was remanded for a new trial on constitutional grounds, the first part of the decision potentially transports the professional reliability rule back to its 1974 status before the Court ever built any safeguards into the rule. *Goldstein* makes no mention of the precedent cases that ensued across 22 years to shield the rule against indiscriminate abuse. This drives the question whether *Goldstein* has tacitly reversed those decisions.

The Professional Reliability Rule

In *People v. Stone*[3] the Court of Appeals mused over the challenges encountered in "making available to our triers of fact the information available from the arts and sciences" including a legislative effort to "balance ... potentially conflicting factors of the medical soundness and legal admissibility of a psychiatrist's expert opinion."

Expert testimony invades the bailiwick of the trier of fact because it "partial[ly] substitut[es] for the jury's otherwise exclusive province. It is a kind of authorized encroachment ... to draw conclusions from the facts."[4] It is allowed because it facilitates comprehension of matters involving "'professional or scientific knowledge or skill not within the range of ordinary training or intelligence."[5] The vital role of the expert notwithstanding, unchecked it can easily implode the integrity of and dismantle the judicial process.

The "professional reliability rule" has its genesis in two 1974 decisions, *People v. Stone* and *People v. Sugden*[6], which marked the transition away from a prohibitionist posture against

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[1] --- N.E.2d ----, 2005 WL 3477726 (2005).

[2] 541 U.S. 36 (2004).

[3] 35 N.Y.2d 69 (1974).

[4] People v. Lee, 96 N.Y.2d 157 (2001)

[5] Selkowitz v. Nassau County, 45 N.Y.2d 97 (1978).

[6] 35 N.Y.2d 453 (1974).

the admission of expert opinion based upon material not in evidence. *Stone* upheld a psychiatrist's reliance on out-of-court statements by declarants some of whom did not testify at trial. The expert stumbled over himself about his reliance on the outside statements:

- There was some uncertainty in my mind.

- I needed more information which is usually necessary in all the people that I see or examine that I need confirming or non-confirming information, data to substantiate what I think * * * It didn't change my opinion but I needed more information because I alone cannot in most cases make just an independent study and isolate the individual from the rest of the people who know him.

- I could give an opinion but I wouldn't have been as certain as I was after my interviews with the other data.

Stone observed that the traditionally rigid rules of evidence "discourage the professionally responsible psychiatrist from exploring [additional] sources of [relevant] background information ... render[ing] the more thorough and thoughtful opinion inadmissible because not based exclusively upon observations of the defendant and facts in evidence."

Sugden engrafted *Stone* and carved out two exceptions to the former hearsay rule. The expert may rely on material of out-of-court origin: (1) "if it is of a kind accepted in the profession as reliable in forming a professional opinion", and (2) "if it does not qualify under the professional test, comes from a witness subject to full cross-examination on the trial." In its most severe application, *Sugden* evolved as a portal of admissibility in matrimonial actions for nearly any out-of-court statement filtered through either mental health or economic experts.

The dangers from such a broad stroke that admits all sorts of data without testing the declarant's credibility via cross examination was not lost on the high court because declarants incapable of withstanding withering cross examinations could waltz their statements into evidence undisturbed through the expert. The expert thus tacitly usurps the role of the fact finder as the arbiter of credibility.

Shields around the Rule

The Court of Appeals refined *Sugden* across 22 years. *Matter of Leon RR*[7] (1979) constricted the admissibility of extrajudicial declarations contingent upon the contemporaneous *business duty* of the entrant to record and the informant to report the occurrence.[8] *Leon RR* warned: "that the recording of third-party statements by a caseworker [although] routine, imports no guarantee of the truth, or even reliability, of those statements. To construe these statements as admissible simply because the caseworker is under a business duty to record would open the

[7] 48 N.Y.2d 117 (1979).

[8] Citing, Johnson v. Lutz, 253 N.Y. 124 (1930); Richardson, Evidence § 302.

floodgates for the introduction of random, irresponsible material ..."

The presumption that a court presiding in a bench trial has considered only competent evidence[9] notwithstanding, *Matter of Leon RR* stressed the absolute inability "of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact."

Hambsch v. New York City Transit Authority (1984)[10] qualified the professional reliability exception to require "evidence establishing the reliability of the out-of-court material."

People v. Jones (1989)[11] emphasized that the fact finder must "at least" know the facts underlying the opinion in order to evaluate its worth and judge the reliability of the extrajudicial material:

> Authorized use of facts from outside the evidentiary record does not ... alter 'the basic principle that an expert's opinion not based on facts is worthless' because [the] 'opinion is only as sound as the facts upon which it is based.' Consequently, an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion ... Conversely, expert opinions of the kind needing material evidentiary support for which there is none otherwise in the direct evidence or in some equivalently admissible evidentiary form have been excluded.

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By 1996, *People v. Wernick*[12] unequivocally declared that the professional reliability rule is not "a *per se* admissibility authorization [because it] would eliminate important threshold safeguards built into the rule by our precedents." *Wernick* elevated the rule's threshold of admissibility to the same status necessary to admit *scientific evidence*: "the out-of-court evidence must *specifically incorporate* the customary admissibility test for expert scientific evidence -- which looks to general acceptance of the procedures and methodology as reliable within the scientific community" (emphasis included), a direct reference to the *Frye* rule,[13] which studies "whether the accepted techniques, when properly performed, generate results accepted as reliable

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[9] People v. Rosa, 212 A.D.2d 376 (1st Dept., 1995).

[10] 63 N.Y.2d 723 (1984).

[11] 73 N.Y.2d 427 (1989); Jones cites Weibert v. Hanan, 202 N.Y. 328 (1911): the facts supporting the expert's opinion must be laid before the trial court.

[12] 89 N.Y.2d 111 (1996).

[13] Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923), only requires a general acceptance by the discipline, not a unanimous endorsement. See, See, Is It Junk or Genuine, Harold L. Schwab, NY State Bar Journal, November/December 2004; Is It Junk or Genuine, Part II, Harold L. Schwab, NY State Bar Journal, January 2005.

within the scientific community generally."[14]

Goldstein

The principle issue in *Goldstein* arose from the testimony of the prosecution's forensic psychiatrist, Angela Hegarty, which testimony included facts obtained in interviews of third parties. Hegarty stated that "the purpose of forensic psychiatry is 'to get to the truth,' and that interviews of people with firsthand knowledge are an important way of accomplishing that goal."

The Court held that, although Hegarty acknowledged that psychiatrists did not traditionally rely on out-of-court third party interviews and "many good forensic psychiatrists might disagree", she, nevertheless, established "by professionals with good reputations" that such out-of-court interviews were of the kind commonly relied upon by member's of her profession. She admitted that "not everybody holds this view ... that the seeking out of facts from sources other than defendant's own statements and the clinical record is 'very, very much supported in the literature'" and "becoming more and more the practice." The Court commented that inaccuracies in her description of accepted professional practice could have been explored on cross-examination or contradicted by other evidence, neither of which was done. The defendant's psychiatrist similarly "acknowledged that Hegarty's approach was accepted by some reputable professionals, though he said they were a 'minority.'"

To clarify its holding, the Court stated, in dicta, that although Hegarty's *opinion* was admissible because the statements satisfied the test of acceptance in the profession, it remained "questionable" whether she was free, subject to defendant's constitutional right of confrontation, to repeat to the jury all the underlying hearsay information.

In expressing cautious concern over effectively nullifying the hearsay rule by making the expert a "conduit for hearsay" once otherwise inadmissible data is aired in court, *Goldstein* strains the argument that *Sugden* and *Stone* devolved about "the admissibility of a psychiatrist's opinion, not the facts underlying it" (because no one tried to introduce the facts in either case). *Goldstein* rejects such a distinction as meaningless during its analysis of the constitutional questions later in the opinion.

Herein lies the heart of the conundrum. *Stone* and *Sugden* held that, subject to probing cross examination, the expert must distinguish between what part of the investigation was and was not relied upon. *People v. Jones* and *Weibert v. Hanan* require that the underlying facts be laid out in court. *Goldstein* seemingly contravenes these precedent cases if it is ultimately construed to preclude the expert from exposing the underlying factual basis thereby leaving the fact finder helpless to evaluate the worth of the opinion and the reliability of the extrajudicial material. This dilemma, however, lends itself to a ready solution: require the declarant to testify in court.

Albeit in a constitutional setting, the Court recognizes on the psychological undertone permeating this question: "The factually implausible, formalist claim that experts' basis testimony

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[14] People v. Wesley, 83 N.Y.2d 417 (1994).

is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition." The same psychological dynamics are in motion in civil cases as well, irrespective of whether tried to a judge or to a jury. Once the opinion has been rendered, the actual facts become almost irrelevant because compelling instinct urges the truth of the opinion, a *post hoc propter hoc* reasoning process. It is a facile psychological correlation that the opinion and its underlying data are inextricably intertwined, which concomitantly assumes facts not in evidence. (Would Hegarty's review of the defendant's psychiatric records not have implicated the best evidence rule?) Remember the expert in *Stone* who grudgingly conceded how the out-of-court statements spelled the difference for him (very much like Dr. Hegarty who saw her role as the finder of truth, a role reserved for the court)? Remember *Matter of Leon RR*'s warning about the subtle impact of impermissible hearsay "on even the most objective trier of fact"? These observations remind us of various interfacing amongst the different psychodynamics of human nature.

If the expert, as in *Stone*, entertained specific doubts, it is likely that the judge or jury might be similarly wary of questions that could impact whether a party has satisfied the degree of evidence required to sustain a burden of proof.

Recall *Wernick*'s holding that "out-of-court evidence must *specifically incorporate* the customary admissibility test for expert scientific evidence", i.e., the *Frye* test, which, as defined in *Wesley*, examines whether "the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." Under *Wernick* and *Wesley* the phrase "when properly performed" must refer to predictable conclusions reached via the repetition of defined scientific conditions or formulae, a standard inapplicable to "declarations", in or out of court. There are no proper techniques that an expert can perform to assure the reliability of extrajudicial data – the lie detector continues to gather dust.

The allure to admit such statements as a hearsay exception notwithstanding, the expert's gathering process cannot possibly scientifically imbue non-scientific data with truthfulness, reliability, or validity. A declarant's statement is inherently incapable of scientific certification of its truth because human eccentricity is susceptible of motivation and compromised perception. Cross examination of the declarant and not the expert is the only litmus test because defective data may fatally skew the opinion, and ultimate outcome.

The expert's role is limited to enlightening the court regarding issues of "professional or scientific knowledge or skill not within the range of ordinary training or intelligence", not to consume the fact finder by making determinations of fact and credibility. The expert's inveigling the phrase "my discipline customarily relies on such data to form an opinion" has improperly evolved as synonymous with "credibility." Such use of expert opinion, whether in civil or criminal cases, manipulates the role of the fact finder.

Conclusion

In *Wagman v. Bradshaw*,[15] a compelling decision on the professional reliability rule, the Second Department aptly stated the "rules of evidence are the palladium of the judicial process." On the surface *Goldstein* seems to have eroded the professional reliability rule of the added coats of protection it acquired over 22 years. Hopefully, the Court of Appeals will soon fine tune this decision to affirm the protections of yore.

[15] 292 A.D.2d 84 (2nd Dept., 2002).