

Order Denying Plaintiffs' Motion For Reconsideration And Further Clarifying Expert Discovery Order

08/28/2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA)
PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER DENYING PLAINTIFFS' MOTION
FOR RECONSIDERATION AND FURTHER
CLARIFYING
EXPERT DISCOVERY ORDER

This document relates to all
actions

THIS MATTER comes before the court on Plaintiffs' Motion for Reconsideration of Court Order Dated August 13, 2002, re: Scope of "General Causation." Having reviewed pleadings filed in support of the motion, as well as submissions from both parties proffered in accordance with the court's August 13, 2002 order, and, being fully advised, the court finds and concludes as follows:

I. BACKGROUND

On August 13, 2002, the court issued an order clarifying a March 22, 2002 order establishing an expert discovery schedule. Plaintiffs had asked that the court clarify the earlier order as requiring only that the parties disclose experts addressing the question of whether PPA is capable of causing the injuries alleged in the general population. Defendants argued that plaintiffs must come forward with any expert evidence supporting a conclusion that PPA is capable of causing injury in any significant sub-population, i.e. men and age groups falling outside of the eighteen to forty-nine year old age range. This dispute stemmed from alleged limitations of the Yale Hemorrhagic Stroke Project ("HSP"), evidence central to this litigation.

The court clarified that it would consider alleged limitations of the evidence offered by plaintiffs in support of general causation in the context of conducting its Daubert reliability and relevance analysis. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993) (the court is obliged to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.") The court noted that consideration of these limitations would not transform the inquiry into one of specific causation (i.

e. whether PPA ingestion caused a particular individual's injury). The court also noted that consideration of these limitations would serve the very purpose of the MDL, given that the alleged sub-population limitations identified by defendants constituted issues of widespread applicability.

The court expected generic experts to testify as to general causation issues of widespread applicability and to proffer opinions pertaining to the history, science, and other issues of causation relating to PPA. See, e.g., In re Diet Drugs Prods. Liab. Litig., MDL No. 1203, 2001 U.S. Dist. LEXIS 5927, at *12 (E.D. Pa. May 9, 2001). Since the court deemed causation with respect to significant sub-populations to constitute issues of widespread applicability, the parties were directed to address those issues in their expert discovery. However, the court sought further clarification as to the sub-population groups constituting appropriate subjects for consideration in the Daubert analysis, and, thus, requested suggestions on this issue from the parties.

II. DISCUSSION

Plaintiffs seek reconsideration of the court's August 13, 2002 order. They argue that the court's decision re-defines the term "general causation" in contravention of the Ninth Circuit's definition of that phrase, see In re Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1133 (9th Cir. 2002), improperly heightens the burden placed on MDL plaintiffs, prejudices plaintiffs given their impending deadlines, and will, as a practical matter, work against the goals of the MDL in resulting in numerous appeals. They suggest that the general causation expert discovery be limited to the questions of whether PPA consumption is capable of causing hemorrhagic stroke, ischemic stroke, and any other injury as may be alleged by an MDL plaintiff.

Defendants have no objection to the order. They suggest a detailed breakdown of the evidence into a variety of groups based on dosage of PPA product, individuals not studied by the HSP, and six different categories of individuals studied in the HSP. In sum, defendants' suggested "sub-populations" would consist of the following: (a) individuals who took PPA in recommended doses; (b) individuals who took PPA in any higher dose; (c) individuals under 18 years of age; (d) individuals over the age of 49; (e) individuals, regardless of age, whose last ingestion of PPA was more than three days before the onset of their injury; (f) men who ingested cough/cold PPA products; (g) men who ingested appetite suppressant PPA products; (h) women who had "any use" (as defined

by the HSP) of cough/cold PPA products; (i) women who had "first use" (as defined by the HSP) of cough/cold PPA products; (j) women who had "any use" of PPA appetite suppressants; and (k) women who had "first use" of PPA appetite suppressants.

The court rejects plaintiffs' motion for reconsideration, but finds that the parties require further clarification of the court's orders regarding expert discovery. Although recognizing the relevance of the alleged limitations of the HSP to the Daubert analysis, the court did not intend to divide general causation expert discovery and the eventual Daubert hearings into separate, sub-population based general causation inquiries (i.e. general causation with respect to men, general causation with respect to women, general causation with respect to children). Instead, the court intends to consider these limitations, as they will presumably be raised by defendants, when conducting the Daubert relevance and reliability analysis, and expects plaintiffs to counter these challenges accordingly. The court did not intend to require plaintiffs to produce experts or proof as to each sub-population. The court anticipated that in the course of cross-examination of plaintiffs' experts, defendants would challenge the admissibility of those experts' opinions as they relate to sub-populations, and plaintiffs' experts would respond to those challenges.

In fact, some of the arguments raised by plaintiffs in their motion for reconsideration reflect the very type of arguments the court anticipated hearing in opposition to these sub-population challenges. For example, defendants will likely challenge the reliability and relevance of the HSP given that the individuals in that study were limited by age. As described within plaintiffs' motion, plaintiffs' experts would likely counter that argument by, for example, averring the common use of extrapolation of study results onto other age groups, given the practical and ethical limitations associated with conducting medical experiments. Arguments as to whether such extrapolations are grounded in good science would, thus, be one of the issues for the court's consideration in the face of defendants' sub-population admissibility challenges.

As such, the court has not improperly heightened the burden placed on plaintiffs at the general causation stage. Instead, the court acknowledges the relevance of particular inquiries concerning the issue of general causation and forewarns plaintiffs as to its recognition of this fact. In this respect, the consideration of

these limitations does not contradict the Ninth Circuit's holding in In re Hanford Nuclear Reservation Litig., 292 F.3d 1124. In that case, the lower court had bifurcated discovery into general and individual causation stages. Id. at 1129. The Ninth Circuit held that the district court violated that discovery plan in requiring proof of specific causation prior to full discovery on that question. Id. at 1129-32, 1134-35. Therefore, the decision rested on the fact that the district court had prematurely altered the burden placed on plaintiffs.²² Also, although plaintiffs correctly note that the Diet Drugs general causation inquiry did not entail consideration of arguments based on sub-population limitations, there is no indication that the defendants in that case ever made such a request, or that it would have been appropriate given the nature of the evidence as a whole at issue in that case. See 2001 U. S. Dist. LEXIS 5927. Moreover, plaintiffs can hardly express surprise that defendants will raise criticisms of the HSP based on its alleged sub-population limitations, given that defendants made their intention to raise these arguments clear at the February 2002 status conference.

The court recognizes that its request for sub-population breakdown suggestions has caused unnecessary confusion on the part of the parties. The court requested this information to assist it in determining the appropriate parameters for consideration of the evidence and so that the parties would be fully informed as to those parameters. Now, however, given defendants' detailed sub-population breakdown suggestions, the court finds that plaintiffs should be well aware of the sub-population arguments that will be raised by defendants in opposition to plaintiffs' general causation experts. This decision does not reflect the court's opinion with respect to whether all of the suggestions offered by defendants are appropriate for or relevant to the Daubert analysis. However, plaintiffs are now fully aware of the arguments anticipated by defendants on this basis and should prepare their experts accordingly.³³ The parties may contact the court and request a telephone conference in the event they require further clarification of the court's position on the subject of expert discovery.

III. CONCLUSION

For the reasons stated above, the court hereby DENIES Plaintiffs' Motion for Reconsideration and further clarifies the expert discovery orders previously issued by the court as described within

this order. The parties shall abide by this and the court's previous orders in conducting their expert discovery.

DATED at Seattle, Washington this 28th day of August, 2002.

/s/

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE