



The Biomechanical Defense

by Jared Behr, Esq.

The biomechanical defense is one of the more controversial defenses available in personal injury actions. Defense attorneys see it as an absolute defense because, if accepted, the jury will find that the accident could not have caused plaintiff's claimed injuries. Plaintiff attorneys, however, generally view it as a "junk science" and strongly argue that an engineer without medical training cannot comment on injury causation.

The landmark decisions in *Vargas v. Sabri* and *Shah v. Rahman* had a major impact on the admissibility of biomechanical testimony throughout New York State. The Appellate Divisions and trial courts are still working through the newly established standards. This article shall briefly review the *Vargas* and *Shah* decisions, analyze a recent decision regarding the admissibility of biomechanical testimony, and discuss best practices moving forward.

In *Vargas*, the First Department upheld the lower court's decision to permit testimony from a biomechanical engineer that the force of the accident could not have caused the alleged injuries, since the engineer's education, background, experience, and areas of specialty, rendered him able to testify as to the "mechanics of the injury" despite his lack of medical training. Moreover, the Court denied plaintiff's request for a Frye hearing

and found that plaintiff's challenges to the engineer's qualifications went to the weight of the testimony and not its admissibility.

In *Shah*, the Second Department agreed with the *Vargas* decision, holding that the trial court properly admitted the biomechanical engineer's testimony without first conducting a Frye hearing. The *Shah* decision took it one step further, holding that "A court need not hold a Frye hearing where...it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony." The Court emphasized that in this case, a proper foundation was laid for the biomechanical expert's opinion.

While *Vargas* and *Shah* increased the likelihood of admissibility for biomechanical expert testimony, they did not create a free pass. There are still hurdles a defense counsel must clear in order to present this defense.

Last year, the Second Department in *Guerra v. Ditta* overturned the trial court's decision to permit testimony from a biomechanical engineer because the defendant failed to establish that the expert's opinions related to "existing data and were the result of properly applied methodology." The Appellate Division did not say that a Frye hearing was necessary, but rather held that a proper foundation must be laid for a biomechanical en-

gineer to comment on causality and whether the accident could have caused plaintiff's injuries. "Separate and distinct from the Frye inquiry is the admissibility question applied to all evidence – whether there is a proper foundation – to determine whether the accepted methods were appropriately employed in a particular case."

For plaintiff attorneys looking to preclude biomechanical experts, the best practice moving forward would be to avoid the Frye argument and focus more on the substance of the biomechanical engineer's methods and challenge the foundation, or lack thereof, laid by defense counsel for the expert's opinion. 📍



Jared Behr, Esq.

Associate Attorney, Salenger, Sack, Kimmel & Bavaro LLP, Woodbury, NY

Jared represents plaintiffs in a variety of personal injury actions. He began his legal career at the Suffolk County District Attorney's Office, is a former Senior Trial Attorney for Allstate, and has tried several cases involving the biomechanical defense.