

THE DO'S AND DONT'S OF *DAUBERT*

By Gary I. Rubin

In the nearly 10 years since the Supreme Court decided *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), a lexicon of catch-phrases or “buzz” words has developed to describe *Daubert*'s impact on expert testimony, e.g., it has turned the trial court judge into a “gatekeeper” whose job is to prevent “junk science” from entering the courtroom. See, e.g., *Micro Chemical, Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391 (5th Cir. 2003) (“The trial court acts as ‘gatekeeper’ to exclude expert testimony that is irrelevant or does not result from the application of reliable methodologies or theories to the facts of the case.”); *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (“[T]he district court [has] the discretion needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact.”).

Though handy, such phrases distract from *Daubert*'s true impact: *Daubert* requires that scientific evidence be admissible only to the extent it meets the exacting standard required of good science—the scientific method. *Daubert* is not about preventing juries from hearing a qualified expert's testimony (as plaintiffs' counsel tend to argue). It is simply about the standard the courts require before the qualified expert's testimony is allowed to get to the jury.

In its most basic form, *Daubert* holds that scientific testimony is not admissible absent (1) scientific reliability and (2) relevance. Though relevance is significant, “scientific reliability” has garnered the most attention by courts and commentators, who have generally focused on four factors suggested by the court in determining scientific reliability: (1) testing, (2) peer review, (3) error rate and standards and (4) general acceptance. That is, expert testimony must be based on the “scientific method.” This has not necessarily been a controversial proposition—by itself. However, what has proven to be the basis for some considerable disagreement between plaintiffs and defendants (especially in the toxic tort realm) is how

courts have articulated and applied the Supreme Court's observation that “there are important differences between the quest for truth in a courtroom and the quest for truth in the laboratory.” *Daubert*, 509 U.S. at 596-97. As the evolving case law makes clear, the principal difference is that to be admissible in a courtroom, evidence must be based on existing science, and not merely grounded in hypotheses, whatever their pedigree. This is so even though, as the Supreme Court conceded, the requirement of existing

Expert opinions must be grounded in facts, not hypotheses

empirical evidence “on occasion will prevent the jury from learning of authentic insights and innovation.” *Id.* This “is the balance struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for particularized resolution of legal disputes.” *Id.*

The Supreme Court refined this approach four years later. In *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), plaintiffs sought to proffer expert testimony that relied on limited epidemiology and distinguishable animal studies, standard tools used by scientists in testing causal hypotheses. Plaintiff's experts' conclusions could not be tied to existing science and were based principally on subjective leaps; therefore, the opinions were excluded: “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and opinion proffered.” *Id.*

The point is that expert testimony must be judged based on the current state of scientific knowledge, not on the possibility that additional knowledge may emerge in

the future: “Courts must resolve cases . . . on the basis of scientific knowledge that is currently available, and only evidence that demonstrates a causal relationship between a product and an alleged injury can be admitted as relevant and reliable.” *Newton v. Roche Laboratories, Inc.*, 2002 WL 31989310 (W.D. Tx, 12/5/02), at 3.

There is a critical difference between scientific evidence that “indicate[s] the need for further research and [may] be important in the scientific and regulatory contexts” and tort law, which “requires a higher standard of causation.” *Id.* As courts have recognized, practical demands in clinical or regulatory matters allow for decisions to be made “based on less than sufficient and/or reliable scientific evidence.”

Soldo v. Sandoz Pharma. Corp., 2003 WL 355931 (1/13/03 W.D. Pa.), at 70. However, “such guesses, based on the best available evidence, do not constitute a scientifically reliable approach when used to assess causality via the scientific method.” *Id.* To do otherwise—to allow causal conclusions to be made based on what scientific evidence happens to be available—would “strip [Federal] Rule [of Evidence] 702 and *Daubert* of their objective anchors by lowering the admissibility standard to meet whatever evidence happens to be available, regardless of the scientific unreliability.” *Soldo*, 2003 WL 355931, at 126.

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