

The Adoption of Daubert

Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993)

- The Trial Judge has a gatekeeping role and must screen such evidence to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”
- Trial Judges must assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue.

- Factors that may be considered in making this determination include:
 1. Whether the theory or technique can and has been tested
 2. Whether the theory or technique has been subjected to peer review and publication
 3. The known or potential rate of error for the theory or technique
 4. The existence and maintenance of standards controlling the operation of the technique or test
 5. And whether the test or technique has been generally or widely accepted in the scientific community

Relevance and Reliability

The Hallmarks of Daubert – think of the Scientific Method – the ability to duplicate your findings

- Whether the theory or technique can and has been tested as it relates to the facts in question (relevance)
- Whether the theory or technique has been subjected to peer review and publication (reliability)
- The known or potential rate of error for the theory or technique (reliability/duplication)
- The existence and maintenance of standards controlling the operation of the technique or test (reliability)
- And whether the test or technique has been generally or widely accepted in the scientific community (reliability)

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)

- The trial court's gatekeeping function applies to all expert testimony offered under the rule, even though the opinion is based upon the expert's personal experience rather than scientific knowledge.
- The factors in Daubert may not apply in all cases, and additional factors may be considered to make certain the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practices of an expert in the relevant field."

- General Electric Co. v. Joiner, 522 U.S. 136 (1997) – Facts: Electrician develops lung cancer and sues General Electric because he alleges his constant contact with carcinogens in products they produce increased his risk potential. His expert witness was prepared to testify that mice, when given high doses of “PCBs”, developed a different string of cancer than the petitioner did. Held: Judges may conclude there is “too great an analytical gap” between the underlying science and the expert’s opinions.

❖ Raise before trial or potentially waived.

- Feliciano-Hill v. Principi, 439 F.3d 18 (2006) – employment disability action where plaintiff had expert’s report 5 months prior to trial. Court held that objecting just prior to testimony may be deemed waiver as untimely. Because Daubert generally contemplates a “gatekeeping” function the district court may reject motions as untimely.

- ❖ The proper method is a Motion in Limine
- ❖ The burden is on the objecting party
- ❖ It must be appropriately raised and not simply conclusory
- ❖ A court may choose not to grant a hearing
- U.S. v. Hansen, 262 F.3d 1217 (2001) – Daubert hearings are not required but may be helpful in complicated cases involving multiple expert witnesses. A court should conduct an inquiry when the opposing party's motion for hearing is supported by conflicting medical literature or expert testimony.
- U.S. v. Glover, 479 F.3d 511 (2007) – the trial court fulfilled its gatekeeping function regarding expert testimony by conducting voir dire to determine whether evidence should be admitted.

Destruction of Pure Opinion

- Marsh v. Valyou 977 So2d 543 (2007). Court held that a causation expert's proffered expert testimony that trauma can cause fibromyalgia was "pure opinion testimony" which was not subject to the requirements of the Frye Standard and was therefore admissible regardless of whether or not the hypothesis had gained general acceptance. It was considered "pure opinion" because it was based on his training and experience.
- The current evidence rules are intended to specifically prohibit the admission of such testimony. The code requires specific application of standardized principles and methods to the individual facts of the case to establish the reliability of the proffered testimony.

- Group 1 – Attorney Fee Expert: BP Oil company sues their insurer for breach of duty to defend against an environmental suit resulting from the BP Oil Spill. At trial, BP calls a local real estate lawyer, Joe Smith, to testify as to reasonableness of attorney’s fees paid by the company. Will the Court allow this testimony?
 - (NO) Joe Smith would not be allowed to testify, but an attorney with more knowledge of the issue at hand has been allowed to testify in certain courts. Primrose Operating Co. v. Nat'l Am. Ins. Co., No. 03-10861 (5th Cir. Aug. 23, 2004). Court allowed Attorney Chris Boyer to testify because he had substantial experience in oil and gas industry matters and was acquainted with details of underlying litigation from having represented oil company's co-defendant. Insurer complained that Mr. Boyer furnished no report, but that omission was harmless, as insurer did receive notice via letter of Mr. Boyer's identity and probable opinion, as well as his resume and copies of underlying invoices.
- Group 4 – Accountant/Economic Expert: In a breach of contract case, Client wants to prove lost profits. Your expert plans to present damage calculations based on pro formas (a business prediction). Will Judge allow this?
 - (NO) Nilssen v. Motorola, Inc., No. 00-2049 (7th Cir.) the trial court applied Daubert to exclude expert opinion that was “chock-full of methodological flaws.” Among them was the impermissible reliance on a proforma business prediction, rather than defendant’s actual sales experience, in calculating lost equity damages. The court concluded that it was “wholly irrational for [the expert] to use a pie-in-the-sky projection rather than calculating what revenues that 25% [equity] would have turned out to generate in real-world terms.”
- Group 5 – DNA Expert: Defendant is convicted of sexual battery. He appeals trial court’s decision and wants an expert DNA analyst to testify that another DNA analyst found male (not his) DNA in a sample taken from the victim. Would this testimony be allowed?
 - (NO) however DNA is generally admissible – but reliability issues go beyond the matter of testimony to the proper performance of protocols and probability estimates. Tolbert v. State, No. 4D12-309 (FLA 4th DCA, May 1, 2013), Court found that testimony of DNA analyst about DNA match that considered the initial DNA test results, obtained by non-testifying expert, was inadmissible hearsay, when trial testimony was based on report of analyst who had conducted the initial DNA.
 - See also U.S. v. Wright, 215 F.3d 1020, 1027 (9th Cir. 2000) (PCR and RFLP of DNA testing both satisfy Daubert standard for the admissibility of scientific evidence. U.S. v. Beverly, 369 F.3d 516, 530 (6th Cir. 2004) Mitochondrial DNA testing was sufficient when methodology was properly vetted.

- Group 6 – Fingerprint Expert: Will fingerprint evidence be admissible when the expert testifies that the process used to examine the prints is widely accepted within the field of forensic identification?
 - (YES) U.S. v. Herrera, 704 F.3d 480 (2013). Expert testimony that latent prints were the defendant's met Daubert when the expert relied on ACE-V method of determining the fingerprints were from the same person. The key here is not the widely accepted within the field but the methodology used. The ACE-V method met the necessary scientific method of hypothesis testing and could establish known error rates that proved reliability.
- Group 7 – Injury/Causation: Your client began taking antidepressants related to a motor vehicle accident she experienced. During the following years she began experiencing significant weight gain which corresponded with an onset of diabetes. Would the consumption of the drug be sufficient to establish causation?
 - (NO) Guinn v. AstraZeneca Pharm, 602 F.3d 1245 (2010). While differential diagnosis may be considered reliable methodology under Daubert, trial court did not abuse discretion in excluding expert's testimony where expert failed to consider possible alternative causes of injury. Here the court found that the expert failed to meet the reliability requirements, there was a failure within the methodology, and the only connection between the conclusion and the data is the expert's own opinion.
 - See also Eberli v. Cirrus Design Corp., 615 F.Supp.2d 1357 (S.D. Fla., 2009) (trial court excluded proffered expert testimony on cause of engine failure where expert didn't utilize any specific technique or methodology, nor perform testing to form his opinion; instead, expert 'theorized' based on his knowledge of accidents and airplanes and merely listed potential causes instead of drawing any conclusion).
- Group 8 – Property Valuation: Your client's property was contaminated when a train wrecked and deposited chemicals throughout the property. Should an expert on commercial property appraisal whom has solely determined fair market value be permitted to testify to the loss suffered and damages appropriate?
 - (NO) Whilite v. Rockwell Intern. Corp., 83 S.W.3d 516 (2002). Court held that fair market value was insufficient to establish loss suffered by property owner. Additional expert testimony was necessary to establish diminishment of property value as expert on commercial property appraisal could not establish total loss as he had no training relating to chemistry and contaminated properties. Fair Market Value was not an appropriate standard to determine loss suffered. While methodology in determining FMV is reliable it does not take into account factors contained in this case. Compare this with other cases where total loss of a vehicle has been determined and the appraisal value of the vehicle (pre-crash) was testified to by an individual with multiple years of experience in automotive repair, ASE certifications in vehicle damage estimation, and has conducted hundreds of appraisals using a standard methodology.