

Commentary



Raphael Metzger, Esq.

The Demise Of Daubert In State Courts

By
Raphael Metzger

[Editor's Note: Raphael Metzger is the principal of the Metzger Law Group, a Long Beach, Calif., firm specializing in toxic tort litigation, primarily occupational cancer and lung disease cases. He is a periodic contributor to Mealey's Emerging Toxic Torts. Copyright 2005 by the author. Replies welcome.]

1. Background

In 1993 the Supreme Court effected a sea change in federal evidence law in Daubert v. Merrell Dow Pharmaceuticals Inc. (1993) 509 U.S. 579. Ostensibly liberalizing the admissibility of expert testimony by adopting a scientific reliability test instead of the more restrictive general acceptance test of Frye v. United States (D.C. Cir. 1923) 293 F. 1013, the court deputized federal district judges as "gatekeepers" of scientific evidence with discretion to exclude expert testimony. Chief Justice William H. Rehnquist, who concurred and dissented in part, expressed his concern whether judges have the ability to assess the scientific reliability of an expert opinion in determining its admissibility:

I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility

of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role. *Id.* 509 U.S. at 600-601.

Justice Rehnquist's concern regarding judges' ability to serve as gatekeepers of scientific evidence was prophetic. In the decade following Daubert, federal judges were often called upon to determine whether the opinions of plaintiff's medical and scientific experts were reliable and should be admitted in evidence — a task for which they had no scientific or medical training.

The rewriting of the law of expert testimony by the court was not finished with its decision in Daubert, but was accomplished in two more blockbuster cases: General Electric v. Joiner (1997) 522 U.S. 136, in which the court held a district court judge's exclusion of expert testimony may only be reviewed for abuse of discretion, and Kumho Tire Co. v. Carmichael (1999) 119 S.Ct. 1167, in which the Court held Daubert's exclusionary rule applied not merely to scientific testimony, but to all expert testimony.

In 1998 — the year before the court issued its opinion in Kumho, extending Daubert to all expert testimony — the Federal Judicial Center conducted a survey to assess the effect of Daubert. Johnson, Krafka, and Cecil, “Expert Testimony in Federal Civil Trials: A Preliminary Analysis” (Federal Judicial Center, 2000).

The survey found federal judges admitted all proffered expert testimony without limitation in 59 percent of reported cases — a 16 percent decrease from the 75 percent admission rate of expert testimony reported in a similar survey conducted in 1991. The survey reported that of the expert testimony offered in the reported cases; 43.2 percent was in the fields of medical and mental health; 24.1 percent was in the fields of engineering, process and safety; 22.1 percent was in the fields of business, law and finance; 7.3 percent was in fields of science; and the 3.2 percent was in other fields.

Because the U.S. Supreme Court had not issued its decision in Kumho at the time of the survey, and federal judges were generally not excluding technical testimony at the time, it is probable that the 16 percent decrease in the admission of expert testimony largely occurred in the fields of medicine and science. The Federal Judicial Center has not conducted a survey of expert testimony in the federal courts to assess the effect of Kumho. However, the Kumho decision has undoubtedly resulted in the exclusion of even more expert testimony than the 16 percent exclusion effected by Daubert.

The effect of Daubert and its progeny is profound. In products liability and other cases for which expert testimony is required, Daubert and Kumho have resulted in the exclusion of expert testimony essential to the proof of the cases of seriously injured plaintiffs. In such cases, exclusion of the testimony of the plaintiff's experts results in case-dispositive rulings for the defense. The death blow to the case is administered either by summary judgment or judgment following adverse *in limine* rulings.

2. The Right To Trial By Jury

The Seventh Amendment of the Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dol-

lars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Neither Congress nor the courts may deprive a litigant of the right to jury trial guaranteed by the Seventh Amendment. Raytheon Mfg. Co. v. Radio Corp. of America (1st Cir. 1935) 76 F.2d 943. A fact issue must be submitted to the jury if reasonable men could differ on the conclusions to be reached from the evidence presented. Helene Curtis Industries Inc. v. Pruitt (5th Cir. 1967) 385 F.2d 841. Under the Seventh Amendment guaranty of trial by jury, it is for the jury, not the court, to weigh the evidence and pass upon its credibility. Snead v. New York Cent. R. Co. (4th Cir. 1954) 216 F.2d 169. Federal district courts cannot predetermine facts for the jury. Garcia v. Murphy Pacific Marine Salvaging Co. (5th Cir. 1973) 476 F.2d 303. A court errs if it substitutes itself for the jury, and, passing on the effect of the evidence, finds the facts involved in the issue and renders judgment thereon. Baylis v. Travelers' Ins. Co. (U.S. N.Y. 1885) 113 U.S. 316.

The right to a jury trial under the Seventh Amendment permits expert opinion to have the force of fact when it is based on facts that sustain it. Galloway v. U.S. (1943) 319 U.S. 372. Where consideration to be given to the testimony of an expert is submitted to jury under proper and complete instructions, the jury is free to exercise its untrammelled judgment upon the worth and weight of such testimony. Talley v. Mitchell (6th Cir. 1960) 275 F.2d 244. Thus, under the Seventh Amendment a plaintiff is entitled to have a jury hear testimony of expert witnesses as well as testimony of percipient witnesses and base its verdict thereon.

When a judge determines whether expert testimony is admissible under Daubert and excludes expert testimony proffered by a party, does the judge deprive that party of his Seventh Amendment right to a jury trial? Although federal judges would argue that in making such rulings they merely determine whether there is a sufficient foundation to admit the expert testimony and that they do not weigh evidence, this is a legal illusion. Making a Daubert determination necessarily requires judges to evaluate the evidence on which ex-

perts' opinions are based and to assess the quality and import of such evidence. Characterizing this effort as "foundational" does not negate the fact that judges substantively evaluate and weigh expert testimony in Daubert hearings.

Some contend the function judges perform in conducting a Daubert hearing is functionally equivalent to that which they perform in ruling on a summary judgment motion that does not involve expert testimony. However, there are critical differences in the function a judge performs when ruling on a summary judgment motion and on a Daubert motion.

In ruling on a summary judgment motion, a judge does not determine whether a party's evidence is substantial or persuasive, but only determines whether a party has evidence on a disputed issue. Indeed, the summary judgment statute does not violate the Seventh Amendment only because determination of a summary judgment motion neither requires nor allows federal judges to determine disputed factual issues, but only allows them to determine whether evidence regarding disputed issues exists. Shore v. Parklane Hosiery Co. Inc. (2d Cir. 1977) 565 F.2d 815-819; Diamond Door Co. v. Lane-Stanton Lumber Co. (9th Cir. 1974) 505 F.2d 1199, 1203; United States v. Stangland (7th Cir. 1957) 242 F.2d 843, 848.

The typical Daubert motion does not assert that the plaintiff has no evidence on a material issue, but rather contends that the nature or quality of plaintiff's evidence is such that it should not be admitted in evidence. Thus, unlike a summary judgment motion, a Daubert motion asks a judge to do more than merely determine whether evidence exists regarding a disputed issue.

Proponents of Daubert argue judges have historically had discretion to admit or exclude evidence, and the Seventh Amendment cannot preclude a judge from exercising such discretion. While the Seventh Amendment undoubtedly does not preclude judges from excluding evidence where its prejudicial nature outweighs its probative value, it is doubtful that a judge can exclude evidence that is directly probative of an essential element of a party's case without violating the Seventh Amendment. Therein lies the rub.

The typical Daubert motion is brought to exclude expert testimony of medical causation or product defect — issues that are essential to the proof of a plaintiff's case. Exclusion of the expert testimony offered by the plaintiff is necessarily dispositive of the plaintiff's case, which is why defendants are so enamored with Daubert. However, it is precisely because judges' rulings on Daubert motions are case-dispositive that constitutional issues under the Seventh Amendment arise.

An additional safeguard that protects the summary judgment statute from constitutional invalidity is the standard of review. Because summary judgment does not involve resolution of factual issues, an order granting or denying summary judgment is generally reviewed *de novo*. Balint v. Carson City, Nevada (9th Cir. 1999) 180 F.3d 1047, 1050 (*en banc*). *De novo* review protects litigants against a trial court denial of the right to jury trial under the guise of a ruling granting summary judgment on the basis of a purported absence of disputed factual issues.

However, an order granting a Daubert motion is classified as a mere evidentiary ruling within a judge's discretion, which the U.S. Supreme Court has held should therefore be reviewed for mere abuse of discretion. General Electric v. Joiner (1997) 522 U.S. 136. Since federal appellate courts are precluded from substituting their own judgment for the correctness of a trial court exclusion of expert testimony under Daubert, the standard of review adopted by the U.S. Supreme Court in Joiner does not protect litigants from the denial of the right to trial by jury under the Seventh Amendment where a federal district court judge rejects essential testimony of a plaintiff's expert witness upon considering its nature and persuasive effect, but couches his exclusionary order in terms of mere foundational requirements of evidentiary admissibility.

3. Most State Courts Have Rejected Daubert

While Daubert is the law in all federal courts, Daubert and its progeny have not been accepted by most state courts. Only nine states have explicitly or implicitly adopted the full holdings of the Daubert trilogy, six states have adopted the reasoning and holdings of Daubert and Kumho Tire but have not adopted Joiner, seven states have adopted Daubert's

reasoning, but have not adopted Kumho Tire, and five states utilize the Daubert factors in applying their own tests. Bernstein & Jackson, "The Daubert Trilogy in the States," 44 *Jurimetrics J.* ____ (2004). Notably, some of the most populous states have rejected Daubert in favor of Frye or other standards, including California, Florida, Illinois, New York, New Jersey, Michigan, North Carolina and Pennsylvania. Thus, while Daubert applies in federal courts, it does not apply in most state courts.

4. Courts Criticize Daubert's Gatekeeping Role For Judges Who Are Not Trained Scientists

Several courts have criticized Daubert for imposing a role for judges as gatekeepers of scientific evidence, finding that judges are ill-equipped to fulfill such a role. Indeed, on remand from the U.S. Supreme Court, the Ninth Circuit appeared mystified by the role judges were to undertake:

Though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method." The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study. Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert

testimony because it was not "derived by the scientific method." Daubert v. Merrell Dow Pharmaceuticals Inc. (9th Cir. 1995) 43 F.3d 1311, 1316.

Recently, the Supreme Court of North Carolina wrote:

One of the most troublesome aspects of the Daubert "gatekeeping" approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories under girding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under Daubert. Howerton v. Arai Helmet Ltd. (2004) 348 N.C. 440, 464-465, 697 S.E.2d 674.

This same sentiment has been echoed in the writings of countless other courts and commentators. See, e.g., Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 81 (1st Cir. 1998) (noting that "choreographing the Daubert pavane remains an exceedingly difficult task." "Few federal judges are scientists, and none [is] trained in even a fraction of the many scientific fields in which experts may seek to testify."); Zuchowicz v. United States, 870 F. Supp. 15, 19 (D. Conn. 1994) ("[J]udges may not always have the 'special competence' to resolve complex issues [that] stand 'at the frontier of current medical and epidemiological inquiry.'" (citations omitted)); Goeb v. Tharaldson, 615 N.W.2d 800, 812-13 (Minn. 2000) (observing that "Daubert takes from scientists and confers upon judges uneducated in science the authority to determine what is scientific. This approach, which necessitates that trial judges be 'amateur scientists,' has also been frequently criticized." (citations omitted)); 29 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6266, at 271 (1997) ("It is unrealistic to think that courts can resolve disputes concerning the scientific validity of issues on the frontiers of

modern science where even the experts may disagree. As a result, Daubert has been harshly criticized for imposing such a burden on the lower courts.” [footnotes omitted]; George D. Marlow, “From Black Robes to White Lab Coats: The Ethical Implications of a Judge’s *Sua Sponte, Ex Parte* Acquisition of Social and Other Scientific Evidence During the Decision-Making Process,” 72 St. John’s L. Rev. 291, 333 (1998) (contending that “few judges possess the academic credentials or the necessary experience and training in scientific disciplines to separate competently high quality, intricate scientific research from research that is flawed”).

5. Courts Criticize Daubert’s Gatekeeping Role As A Deprivation Of The Right To Jury Trial

Several courts have criticized Daubert’s gatekeeping role for judges as violating a plaintiff’s right to a jury trial. See, e.g., Howerton v. Arai Helmet Ltd. (2004) 348 N.C. 440, 697 S.E.2d 674, 692 [“we are concerned that trial courts asserting sweeping pre-trial ‘gatekeeping’ authority under Daubert may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.”]; Brasher v. Sandoz Pharmaceuticals Corp. (N.D. Ala. 2001) 160 F. Supp. 2d 1291, 1295 (applying Daubert, but acknowledging that “[f]or the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence

is to usurp the jury’s right to decide the facts of the case”]; Logerquist v. McVey, 196 Ariz. 470, 488, 1 P.3d 113, 131 (2000) [“The Daubert/Joiner/Kumho trilogy of cases . . . puts the judge in the position of passing on the weight or credibility of the expert’s testimony, something we believe crosses the line between the legal task of ruling on the foundation and relevance of evidence and the jury’s function of whom to believe and why, whose testimony to accept, and on what basis.”]; Bunting v. Jamieson, 984 P.2d 467, 472 (Wyo. 1999) [adopting Daubert, but nonetheless expressing concern that “application of the Daubert approach to exclude evidence has been criticized as a misappropriation of the jury’s responsibilities. . . . ‘[I]t is imperative that the jury retain its fact-finding function.’” (citations omitted)].

6. Conclusion

The decision of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals Inc. (1993) 509 U.S. 579, has resulted in the wholesale exclusion of the testimony of plaintiff’s expert witnesses in products liability and toxic tort cases. While some states have adopted Daubert, most states have rejected Daubert, reasoning that judges are ill-equipped to resolve disputed issues upon which scientific experts themselves disagree, and that a judge’s fact-finding role under Daubert violates a plaintiff’s right to a jury trial under the Seventh Amendment. While Daubert has had its heyday in the federal courts, it is meeting its just demise in the state courts. ■