

**Prerequisites For The Admissibility Of Expert Witness Testimony Under Federal
Law: An Examination Of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
509 U.S. 579 (1993) And Its Progeny**

Overview of *Daubert* Test and Admissibility of Expert Witnesses

From 1923 until 1993, the federal courts decided the admissibility of expert witness testimony by applying a “general acceptance” test, adopted in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under *Frye*, an expert’s testimony had to be based on a theory or method generally accepted in the scientific community. The *Frye* court held polygraph evidence inadmissible.

Although polygraph evidence has yet to obtain general acceptance in the scientific community, the *Frye* general acceptance test was replaced in 1993 by the United States Supreme court holding in *Daubert v. Merrell Down Pharmaceuticals, Inc.*

The petitioners in *Daubert* sought review of a lower court’s refusal to admit expert testimony, by experts claiming that Bendectin could cause birth defects. The issue came up in opposition to respondent manufacturer’s motion for summary judgment. The proffered expert had good credentials, and concluded that Bendectin had the potential to cause birth defects.

The trial court granted summary judgment and the Ninth Circuit Court of Appeals affirmed. The plaintiff-petitioners’ experts had not conducted any studies to support their testimony, instead relying on studies conducted by other scientists, none of whom had found conclusive evidence of a connection between Bendectin and birth defects. Neither did the experts’ conclusions reflect the “general scientific opinion” in the community regarding the issue of Bendectin and birth defects. Only one of the petitioners’ experts had done any original research, but he did not explain his methodology. Accordingly, the Supreme Court vacated the

court of appeals' decision and remanded, holding that evidence could be admitted even if not "generally accepted" as long as the evidence could be shown to be both **reliable** and **relevant**.

On remand, the court of appeals held that experts could only testify about research that is not their own if they provide "verifiable evidence that the testimony is based on 'scientifically valid principles.'" *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317-1318 (9th Cir. 1995). Ultimately, the Ninth Circuit once again affirmed summary judgment after excluding plaintiffs' experts, this time finding that the experts did not satisfy the new *Daubert* test. *Id.* Specifically, the plaintiffs' experts did not base their testimony on the "scientific method," and the evidence was insufficient to establish cause as a matter of law. *Id.* at 1318-1322.¹

In order to satisfy the *Daubert* test, the reasoning and methodology of the expert must be scientifically valid and applicable to the facts at issue. Thus, a proponent of expert testimony must satisfy the trial judge:

1. That the expert testimony exhibits scientific knowledge.
 - a. Scientific knowledge is derived from the scientific method.
 - b. Scientific knowledge can be verified.
2. That the expert testimony will lead to a better understanding or determination of a fact in issue.

¹ In *Daubert* on remand, the 9th Circuit added the following element: whether the expert is wishing to testify about matters regarding research he or she has conducted independently from the litigation at hand or whether the research or opinion was developed by the expert for the specific purpose of testifying for the current litigation. 43 F.3d 1311 (1995). The Sixth Circuit adopted this additional element in *Thomas v. City of Chattanooga*, 398 F.3d 426 (6th Cir. 2005).

Under *Daubert*, trial courts should consider:

1. Whether the theory or technique of the expert can be or has been tested and/or falsified.
2. Whether the theory or technique of the expert has been subject to peer review and publication.
 - a. Publication is not required but helps bolster credibility.
 - b. If a hypothesis is submitted to the scientific community, there is a greater likelihood that problems with the hypothesis will be discovered.
3. The known or potential rate of error of the technique or method.
4. The existence and maintenance of standards or controls.
5. Whether the theory or technique has obtained general acceptance in a relevant scientific community.

509 U.S. 579, 591-595.

Daubert requires that the **reliability** of expert testimony be established before its admission in court. Reliability of expert testimony can be established in the following ways:

1. Expert testimony which is helpful in understanding the evidence or determining a fact in issue (the “fit” requirement).
2. The theory or methodology of an expert is accepted by a relevant scientific community.
3. An expert’s “bald assertion” of validity is not enough; an objective independent validation of the expert’s theory or methodology is required.
4. The expert testimony must be grounded in science and be more than an “unsupported speculation or subjective belief.”
5. The expert must be qualified as an expert in the area of law which is at issue in the case.

Daubert requires that the **relevance** of the expert testimony be established before its admission in court.

1. According to Federal Rule of Evidence 401, the expert testimony must make a fact of consequence to the determination of the case at hand more or less probable than it would be without the evidence.
2. According to the Supreme Court in *Daubert*, the relevance requirement is to be construed liberally.

Some of *Daubert's* Progeny

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Supreme Court extended the *Daubert* test to include all expert testimony, not just scientific testimony. *Kumho* was a product liability case involving a blown tire on a minivan which resulted in the death of one and serious injuries to many others. The Respondents, survivors and decedent's representative moved to admit the testimony of Dennis Carlson, Jr., an expert in tire failure analysis, who wished to testify that a tire defect caused the blow-out. The expert based his opinion on a visual inspection and a tactile examination of the tire as well as upon his own theory that the absence of two types of evidence exhibiting tire abuse indicated that the blow-out was caused by a product defect.

The Supreme Court excluded Carlson's testimony because his methodology in regards to the particular tire in question was shaky and unreliable; that is, the unreliability of Carlson's methodology in general was not questioned, but his *methodology* in determining the cause of the blow-out of the particular tire involved in the case at hand was questioned. The Court found that none of the *Daubert* factors indicated that the expert's testimony was reliable.

Carlson claimed that his method was accurate and reliable, but the Court ruled that a court is not required to accept the opinion of an expert only by the "**ipse dixit**" of the expert,

i.e., simply because the expert claims the opinion to be reliable. 526 U.S. at 146. The court also reaffirmed that a trial court can preclude an expert from testifying beyond his or her area of expertise regardless of the testimony's reliability. The purpose of the *Daubert* test is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

In response to *Daubert* and *Kumho*, Rule 702 of the Federal Rules of Evidence was amended in 2000:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The amendments essentially incorporate some of the guidance given by the Supreme Court in *Daubert* and *Kumho*. See also Advisory Committee Notes to 2000 amendments.

***Daubert* Test Interpretation**

- A. None of the *Daubert* factors are dispositive; the *Daubert* test is a flexible one. 509 U.S. at 594.
- B. According to *Kumho*, "*Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case." 526 U.S. at 141-142.
- C. The trial court has the power to decide whether or not special briefing or proceedings are required to investigate reliability before deciding admissibility. *Id.* at 152.
- D. The list of *Daubert* elements is not a definitive checklist but is instead intended to be tailored to the particular facts of the case. *Downs v. Perstorp Components, Inc.*, 126 F. Supp.2d 1090, 1099 (E.D. Tenn. 1999).

General Acceptance

- A. General acceptance is not required under the *Daubert* test but it can *bolster* an expert's credibility.
- B. According to *United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993) (holding DNA evidence admissible), general acceptance occurs when a "substantial portion of the pertinent scientific community accepts the theory, principles, and methodology underlying scientific testimony because they are grounded in valid scientific principles." *Id.* at 561.
- C. General acceptance does not require consensus, certainty, or approval by other courts. *Id.* at 556.
- D. According to *Bonds*, the absence of general acceptance is defined as occurring when the evidence is "manifestly unsupported outside the proponent's own laboratory." *Id.* The Court found the procedures used by the FBI regarding DNA was accepted by the general scientific community and that "acceptance in the scientific community of DNA profiling and of the basic procedures used was sufficient to meet the requirements for general acceptance." The DNA profiling was admitted.

Strategies Under *Daubert* To Exclude Testimony

- A. A trial court can conclude that a "scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true," and then direct judgment or grant summary judgment. 509 U.S. at 596.
- B. Under Rule 703 of the Federal Rules of Evidence, expert opinions based on hearsay are admissible only if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Id.* at 595.
- C. The admission of expert testimony is reviewable under the "abuse of discretion" standard.
- D. The expert's testimony does not come in just because the expert says his testimony is reliable. *Kumho*, 526 U.S. at 146.

Some Recent Applications of *Daubert*

A. District Courts

1. *Mohney v. USA Hockey, Inc.*, 300 F. Supp.2d 556 (N.D. Ohio W.D. 2004).

a. Details of the *Mohney* Case

- 1) This case involved a hockey player who collided with the boards which resulted in spinal damage and eventual quadriplegia. The Plaintiff was wearing a helmet at the time manufactured by the Defendant.
- 2) Plaintiff sought to admit testimony of Norman Johanson, a mechanical engineer with experience in product design and safety. Johanson opined that the incompatibility of the helmet and mask resulted in the Plaintiff's injury. The district court, Judge David Katz, ruled that the expert testimony was not admissible, in part, because Johanson failed to conduct any testing or to consult outside sources to support his opinion.
- 3) Plaintiff also offered the testimony of Dr. Richard Collins, who has a Ph.D. in mechanical engineering, to show that Defendant's product failed to work properly. The Court found Collins' testimony inadmissible, because he failed to test his theory.

2. *Knotts v. Black & Decker, Inc.* (May 13, 2002), 204 F. Supp.2d 1029 (N.D. Ohio W.D. 2002).

a. Details of the *Knotts* Case

- 1) The *Knotts* case involved a house fire that killed two people. The fire department concluded that the fire was accidental and believed to have been initiated by a battery charger manufactured by the Defendant. The Plaintiffs offered the testimony of a fire origin expert as well as a product defect expert to link the cause of the fire with the battery charger.
- 2) Judge Katz concluded that the proffered testimony of both experts failed the *Daubert* test, and excluded them.

- 3) The Court found that the testimony of fire origin expert Ralph Dolence was not admissible. Dolence is a licensed electrician and former firefighter. He concluded that the fire was caused by the battery charger manufactured by the Defendant. The Court found that Dolence based his opinion on his examination of pictures (which turned out to be of poor quality and therefore not reliable), x-rays of and an examination of the parts of an exemplar battery charger, fire department inspection reports, and the statements and testimony of various witnesses. Dolence failed to conduct any testing. In short, he did not complete any form of scientific analysis based on a reliable methodology to support his opinion. The Court held that it was not required to admit expert testimony simply on the assertion by the expert that the opinion is reliable. Further, the Court found that “Dolence’s opinion is incapable of bridging the analytical gap sufficient to establish an admissible opinion on the origin of the fire.” 204 F. Supp.2d at 1040.
 - 4) The Court further found that the testimony of product defect expert Dr. George Kramerich was not admissible because it failed to meet the requirements of the *Daubert* test. Kramerich’s testimony failed the reliability and “fit” portions of the *Daubert* test. Dr. Kramerich relied on articles and reports regarding similar battery chargers and witness testimony. He posited “failure modes,” but he could not support them to a reasonable degree of engineering probability. *Id.* at 1042-1043. Citing *General Electric Co. v. Joiner* 522, U.S. 136, 146 (1997), the court held that there was “too great an analytical gap between the data and the opinions offered.” The expert completed no independent testing and as a result, the Court found his testimony unreliable.
- b. Expert testimony will be excluded if the hypothesis or opinion of the expert has not been properly tested in a timely and reliable manner.

B. Sixth Circuit

1. *Bureau v. State Farm Fire and Casualty Co.*, 2005 U.S. App. LEXIS 7966 (6th Cir. 2005)

a. Details of the *Bureau* Case

- 1) This case involved a home in Harrison Township, MI which endured serious water and mold damage allegedly from a thunderstorm. The homeowners filed a claim with their insurance company; the insurance company refused to pay because the policy did not provide coverage for lack of maintenance or losses as a result of mold unless the mold was a result of a loss which was specifically covered by the policy. Defendant sought the admission of expert testimony from Michael Neuman, the structural engineer employed by Soils and Materials Engineering, a firm hired by Defendant to investigate the case. Neuman opined that the water damage to the home as well as the mold was a result of a leaky roof.
- 2) The Court allowed the expert testimony on the grounds that the expert's reliability was "taken for granted." The reliability of Neuman's testimony was "taken for granted" because he testified **based on his own visual inspection** of the roof. There was no basis to question Neuman's methodology, so the testimony was admitted. *Id.* at 977.

b. If an expert utilizes methods which are not original or controversial, there is no need for peer review or empirical analysis. Formal gatekeeping by the trial court is not required if reliability of the expert's testimony is taken for granted. *Id.*

c. A trial judge has broad discretion to avoid unnecessary reliability proceedings where, as mentioned above, the expert's methods are not original and where no cause for questioning the expert's credibility exists. *Id.* at 975.

2. *Thomas v. City of Chattanooga*, 398 F.3d 426 (6th Cir. 2005)

a. Details of the *Thomas* Case

- 1) A police officer responded to a domestic violence call. When he arrived at the scene, he looked through the window of the home and saw the husband holding guns. The officer then shot the husband seven times. Plaintiffs,

the husband and wife, claim that the city had an unwritten policy or custom of using excessive force. They offered for admission into evidence the testimony of Phillip Davidson, who had “experience with police operations.” Davidson wished to testify that, after reviewing statistical evidence such as complaints from forty-five suits against the Chattanooga Police Department alleging use of excessive force since 1994, he inferred that there was a policy or custom of use of excessive force by the police department for which the police officers were not punished.

2) The Court refused to allow Davidson’s testimony because he provided no reliable methodology or technique to exhibit the way in which he came to his conclusion. The expert’s opinions were conclusory and without supporting data, which was deemed by the Court to be insufficient to meet the *Daubert* requirements. 398 F.3d at 432.

b. An expert may rely on experience to support the validity of his or her opinion. *Id.*

c. If the expert relies solely on experience to support the validity of his or her opinion, the witness must also explain how the experience relates to his or her ultimate opinion and how the experience is applied to the facts of the case at hand. The Court cannot just take the expert’s “word for it.” *Id.*

C. Supreme Court of the United States

1. *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000)

a. Details of the *Weisgram* Case

1) This was a wrongful death case involving carbon monoxide poisoning during a house fire. Plaintiff, decedent’s son, brought an action against Defendant alleging a defect in the home’s heater, manufactured by Defendant, which allegedly caused the fire and decedent’s death. The Plaintiff offered expert testimony of three witnesses to prove that the heater was the cause of the fire.

- 2) The Court found that the testimony was inadmissible because the opinions of the experts (one of them Ralph Dolence)² were “speculative and not shown to be scientifically sound,” therefore making the witnesses “incompetent” to prove Plaintiff’s case. 528 U.S. at syllabus.
 - b. A party offering expert testimony cannot expect to present less than its best expert evidence at the outset of a case with the expectation of having a second chance to present more evidence later. 528 U.S. at 455.
 - c. The *Daubert* proof requirements for reliability and relevance are strict.
2. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)
- a. Details of the *General Electric* Case
 - 1) This case involved an individual diagnosed with cancer who brought a products liability claim against Defendant who produced carcinogens to which Plaintiff was exposed. Plaintiff proffered expert testimony by Dr. Arnold Schecter who opined that it was “more likely than not” that Plaintiff’s lung cancer was linked to both cigarette smoking and carcinogen exposure. 522 U.S. 136, 143. The trial court decided that the proffered expert testimony was unreliable.
 - 2) The Supreme Court found the testimony to be inadmissible on grounds that it was mere speculation. The Court found that the studies which the expert completed on laboratory animals were not sufficient to support the reliability requirement of the *Daubert* test; the Court noted that a study of disease patterns in humans would have been more reliable. *Id.* at 143-144.
 - b. A court may exclude expert testimony if there exists too great an analytical gap between the data upon which the opinion is based and the opinion itself.
 - c. A trial court is not required to admit expert testimony based solely on the *ipse dixit*, or unsupported assertion, of the expert.

² *Weisgram v. Marley Co.*, 169 F.3d 514, 519-520 (8th Cir. 1999) (holding that trial court abused its discretion in permitting Dolence to testify).

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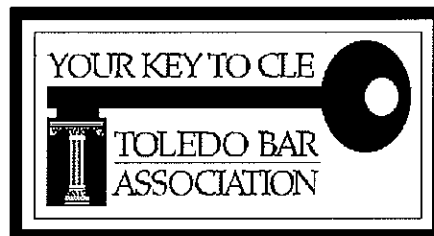
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Stuart J. Goldberg is a member in the litigation section of Eastman & Smith Ltd., concentrating his practice in the areas of product liability, personal injury, commercial litigation, insurance coverage, health care litigation and employment law. Mr. Goldberg has represented large and small manufacturers, nursing homes, physicians, trucking companies, insurance companies, auto service centers, and employers and employees in a wide variety of disputes.

Mr. Goldberg has presented in bar association seminars on trial tactics, settlement negotiations and alternative dispute resolution, as well as in-house client seminars on trends in product liability, insurance and personal injury law. Mr. Goldberg received his B.A. *cum laude* from Amherst College in 1982, and then graduated from Boston University School of Law with a J.D. in 1985.

Mr. Goldberg's leadership in the practice, as well as organizations like Leadership Toledo, the United Way campaign, the Toledo Board of Jewish Education, Neighborhoods in Partnership and the Jewish Council's Community Relations Committee led to a community *Twenty Under 40 Award* (1997), and the Toledo Bar Association's second Annual *Community Service Award* (2000).

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