

Daubert Test

In 1993, the U.S. Supreme Court handed down the seminal decision of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469, (U.S. Jun 28, 1993) (NO. 92-102). The case involved the admissibility of novel **Scientific Evidence**. But to begin to understand the significance of *Daubert*, one needs to view the case in its wider context, going back 70 years to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Frye involved the admissibility of opinion evidence based upon the use of an early version of the **Polygraph**. The D.C. Circuit Court held that scientific evidence was admissible if it was based on a scientific technique generally accepted as reliable in the scientific community. Thus, **Expert Testimony** was admitted based on the expert's credentials, experience, skill, and reputation. The theory was that deficiencies or flaws in the expert's conclusions would be exposed through cross-examination. This decision became known as the *Frye* test or the *general-acceptance test*. By the 1990s, the *Frye* test had become the majority view in federal and state courts for the admissibility of new or unusual scientific evidence, even in view of Federal Rule of Evidence 702, passed in 1975, which some courts believed to provide a more flexible test for admissibility of opinion testimony by expert witnesses.

Then, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court changed the standard for admissibility of expert testimony. Under *Daubert*, a trial judge has a duty to scrutinize evidence more rigorously to determine whether it meets the requirements of Federal Rule of Evidence 702. This rule states, "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." In *Daubert*, the Court stated that evidence based on innovative or unusual scientific knowledge may be admitted only after it has been established that the evidence is reliable and scientifically valid. The Court also imposed a gatekeeping function on trial judges by charging them with preventing "junk science" from entering the courtroom as evidence. To that end, *Daubert* outlined four considerations: testing, peer review, error rates, and acceptability in the relevant scientific community. These four tests for reliability are known as the *Daubert* factors or the *Daubert* test.

In 1999, the U.S. Supreme Court significantly broadened that test and the

trial court's gatekeeping role to include expert testimony based on technical and other specialized knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed. 2d 238 (U.S. Mar 23, 1999) (NO. 97-1709). In *Kumho*, the Court held that the gatekeeping obligation imposed upon trial judges by *Daubert* applies to scientific testimony as well as to expert opinion testimony. In order to meet its gatekeeping obligation, a trial court may use the criteria identified in *Daubert* only when they can be applied to determine the reliability of either the underlying scientific technique or the expert's conclusions. But inasmuch as the *Daubert* gatekeeping function is meant to be a flexible one, it must necessarily be tied to the particular facts of a case. Thus, the factors identified in *Daubert* do not constitute an exhaustive checklist or a definitive litmus test.

In *Kumho*, the Court continued to grant trial judges a great deal of discretion. The Court generally permits trial judges to apply any useful factors that will assist the trial court in making a determination of reliability of proffered evidence as deemed appropriate in the particular case. The trial judge may use these factors whether they are identified in *Daubert* or elsewhere.

Despite *Daubert* and the cases that have followed in its aftermath, several issues involving expert testimony remain unresolved, and courts have reached various conclusions on these questions. One such question arises from the U.S. Supreme Court's language defining scientific knowledge. A related issue involves identifying four specific factors by which reliability of such knowledge was to be determined. In forming this definition, the Court drew almost exclusively from the physical sciences. But critics have argued that the *Daubert* factors are not easily applied to many other types of expert testimony, particularly those that depended on unique skills, generalized knowledge and experience, technical prowess, or even on applied science or clinical judgment. Another unresolved issue is whether a *Daubert* inquiry would even be required at all when a court is considering non-scientific expert opinion evidence, or when a particular technique already had gained widespread judicial acceptance.