

**CRITERIA FOR ADMISSIBILITY OF EXPERT OPINION
TESTIMONY UNDER DAUBERT AND ITS PROGENY**

**Elliott R. Feldman, Esquire
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000
efeldman@cozen.com**

Atlanta
Charlotte
Cherry Hill
Chicago
Dallas
Las Vegas*
London
Los Angeles
New York
Newark
San Diego
San Francisco
Seattle
West Conshohocken
Washington, DC
Wilmington

**Affiliated with the Law Offices of J. Goldberg & D. Grossman*

The views expressed herein are those of the author and do not necessarily represent the views or opinions of any current or former client of Cozen O'Connor. These materials are not intended to provide legal advice. Readers should not act or rely on this material without seeking specific legal advice on matters which concern them.

Copyright (c) 2001 Cozen O'Connor
ALL RIGHTS RESERVED

**CRITERIA FOR ADMISSIBILITY OF EXPERT OPINION TESTIMONY UNDER
DAUBERT AND ITS PROGENY**

**Elliott R. Feldman, Esquire
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(800)523-2900
(215)665-2000
efeldman@cozen.com**

I. F.R.E. 702 As Amended To Reflect Ideology of Daubert.

The Federal Rules of Evidence, as well as many state evidentiary codes modeled after the Federal Rules, establish the following threshold requirements for introducing expert testimony:

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.

Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999). In Daubert, the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. In Kumho, the Court made it clear that this gatekeeper function applies to all expert testimony, not just testimony based strictly on scientific principles. Rule 702, as amended, affirms the trial court's role as gatekeeper and provides general standards to be used to assess the reliability and helpfulness of the proffered expert testimony.

Daubert set forth a non-exclusive checklist for trial courts to use in determining whether or not to admit expert testimony. The specific factors identified by the Supreme Court in Daubert are: (1) whether the expert's theory can be or has been tested objectively, as opposed to

being a subjective, conclusory approach that cannot be verified; (2) whether the expert's theory has been subjected to peer review or publication; (3) whether the expert's theory is subject to known or potential rates of error; (4) whether the expert's theory comports with applicable standards and controls; and (5) whether the expert's theory has acquired general acceptance in the relevant academic community.

The Supreme Court emphasized in Daubert that these factors are neither exclusive nor entirely dispositive of whether or not the testimony at issue should be admitted. Subsequent decisions have recognized that not all of the specific Daubert factors can apply to every form of expert testimony. For instance, lack of peer review or publication is deemed unimportant where the opinion is supported by "widely accepted scientific knowledge." Kannankeril v. Terminix International, Inc. 128 F.3d 802, 809 (3d. Cir. 1997).

Other courts have identified other factors to be applied, including: (1) whether the expert's testimony arises out of research conducted by the expert independent of the pending litigation, as opposed to the formulation of opinions exclusively for purposes of testifying; (2) whether the expert's opinion flows naturally, or constitutes a quantum leap from the factual data forming a matrix for the expert's theory; (3) whether other alternative explanations have been addressed and rationally eliminated; (4) the level of intellectual rigor which characterizes the expert's work; and (5) whether the discipline of which the expert is a member itself affords the requisite degree of reliability.

The authoritative commentary in the Advisory Committee Notes for Rule 702 concludes that "the rejection of expert testimony is the exception rather than the rule" even after Daubert. "[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F. 3d. 1074, 1078 (5th Cir. 1996). Daubert and its progeny regularly refer to the primary role of

thorough cross examination and presentation of countervailing testimony, in conjunction with careful jury instructions, as the "traditional and appropriate means of attacking shaky but admissible evidence." Daubert supra., 509 U.S. at 595.

Moreover, although the filing of Daubert motions is attaining the frequency level of motions to dismiss on the basis of alleged spoliation of evidence (largely because the courts have refrained from imposing sanctions for the filing of frivolous Daubert or spoliation motions), the Advisory Committee notes that neither Rule 702 nor the decisional law flowing from Daubert are intended to provide an excuse for an automatic challenge to the testimony of every expert. As the court stated in In re Paoli R.R. Yard PCB Litigation, 35 F 3d. 717, 744 (3d Cir. 1994) proponents of expert testimony "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable." The confusion arises when courts stray from the Supreme Court's directions in Daubert to focus on "principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Some courts have concluded, whether right or wrong, that "conclusions and methodology are not entirely distinct from one another" and therefore have declined to admit expert testimony based upon well accepted standards which yield unorthodox results. Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F. 3d. 594, 598 (9th Cir. 1996).

It is clear beyond peradventure, that non-scientist experts are subject to the same level of scrutiny, even when relying upon generally accepted engineering principles buttressed by extensive personal and practical experience. Even here, the trial judge must find that the proffered testimony is "properly grounded, well-reasoned, and not speculative" before properly allowing its introduction. Watkins v. Telsmith, Inc., 121 F. 3d. 984, 991 (5th Cir. 1997);

American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony After Daubert, 157 F.R.D. 571, 579 (1994).

II. Application of F.R.E. 702 and Daubert Criteria to Subrogation Actions.

A vivid and telling example of how lack of proper preparation can result in dismissal of viable subrogation actions may be found in Booth v. Black & Decker, Inc., 166 F. Supp 2d 215 (E.D. PA 2001) (attached to this paper). Black & Decker moved for summary judgment in this products liability subrogation case, arguing that the plaintiffs' expert's testimony that a toaster oven caused the fire at the plaintiffs' home was subject to exclusion under Daubert. The court held two days of evidentiary hearings, at which plaintiffs' engineering expert testified. Remarkably, counsel for the subrogating carrier did not participate in this hearing, despite having received notice of it. Counsel for the defendant cross-examined the expert, and counsel for the estate of the subrogors (who perished in the fire) also participated.

The court concluded that the plaintiffs' expert was a qualified electrical engineer and thus focused solely on his methodology. Plaintiffs' expert explained that there were two possible causes of the fire: the defendant's toaster oven, and a microwave oven made by another manufacturer. He explained that his examination yielded the conclusion that the defendant's toaster oven overheated as a result of the failure of the main power contacts, and thus caused the fire. His opinion was confirmed by examining the electrical contacts with a scanning electron microscope (for which the court held he was qualified to interpret the results) which disclosed evidence of melting and scoring, classic indications that the contacts had welded together. His conclusion was that the overheating condition had been caused by a manufacturing defect.

Moreover, plaintiffs' expert testified that the defendant's toaster oven was defectively designed because it lacked a high temperature thermal cut-off device notwithstanding having

been constructed of with plastic with a low melting temperature. Remarkably, plaintiffs' expert explained that such a safety device had been included in a toaster oven made by the defendant for sale in Canada, and that it easily could have been included in the American model purchased by the plaintiffs.

The court rejected all of the proffered testimony of the plaintiffs' expert and granted summary judgment in favor of the defendant, Black & Decker. The court's opinion addressed separately the claims of both manufacturing and design defects. Notwithstanding the physical evidence supporting the finding of spontaneous welding of the electrical contacts, the court faulted the plaintiffs' expert for failing to recreate this failure mode with a similar toaster oven. Plaintiffs' expert's interpretation of the scanning electron microscope results were dismissed as subjective; the court noted the absence of any objective evidence that the markings on the contacts necessarily result when the contacts become welded together. Plaintiffs' expert testified that he followed the general methodology pertaining to fire investigation established by the NFPA, including NFPA 921, but the court faulted plaintiffs' expert for being insufficiently specific and failing to identify anything in the NFPA standards that directly addressed the spontaneous welding of contacts. The court further faulted plaintiffs' expert for failing to follow procedures that may have greater application in an academic setting (though they are articulated in Daubert), including subjecting his analysis to peer review, and a qualitative analysis which would measure a percentage for error. Citing a lack of "sufficient care in supporting the credibility or reliability of the methodology" applied by plaintiffs' expert, the court struck his testimony that there was a manufacturing defect in the toaster oven.

The court rejected the "logical conclusion" that the thermal cut-off device in the defendant's Canadian model could have been included in the American model, citing the lack of testimony concerning any similarities between these models and the feasibility of including the

device in the American model. Accordingly, the court again concluded that the expert's methodology was faulty.

The court concluded by referencing testimony of other experts, including the official fire marshal, who faulted the microwave, rather than the defendant's toaster oven, for having caused the fire. Although not stated explicitly, the court's opinion impliedly faulted plaintiffs' expert for not having explained adequately the basis upon which the microwave oven was ruled out as a possible cause of the fire.

The excessive reliance placed by the Booth court on the absence of testing has been rejected by other federal district courts. For example, in Allstate Insurance Company v. Maytag, Corporation, 1999 WL 203349 (M.D. Ill. 1999), the court disputed Maytag's contention that the plaintiff's expert's testimony should be precluded because he did no testing to validate his theory that the fire was caused by a defect in the defendant's cooktop range. The court noted that a failure to do testing "is not an automatic bar to the admissibility of an expert opinion", and that it was far from an absolute prerequisite, particularly in design defect cases. The court properly focused upon the central issue of whether the expert's conclusions comport with the intellectual standards required of experts in that particular field. The defendant recited a litany of testing which it claims plaintiffs' expert should have done, including testing to determine how a six year old wire, which had functioned properly, suddenly could have failed and arced; how such electrical arcing then expelled molten metal through a burner box to a wiring box below; how the molten metal could have escaped from the wiring box to ignite the bottom of the range cabinet; and other testing to rule out alternative causes. The court dismissed summarily the defendant's contentions by noting that the defendant failed to explain why this level of testing was required or expected to be instructive concerning the central inquiry of what caused the fire.

The court proceeded to approve plaintiff's expert's methodology, noting that his inductive reasoning based upon certain facts and his own experience and expertise was appropriate and similar to the process utilized by Maytag's expert. Perhaps the subtext for the court's finding was that Maytag's expert also failed to conduct any testing to support his own hypothesis.

III. Guidelines For Establishing Foundation for Admission of Expert Opinion Testimony in Subrogation Cases.

For subrogation professionals, including property and recovery claims handlers as well as counsel, each of the following factors should be recognized, deployed and applied wherever appropriate:

1. Pre-screening of experts. Experts should be "cross-examined" concerning their credentials before being retained, to ensure that they have ample experiential and educational background in the specific subject matter of the proposed investigation.

2. Restriction of experts' activities. Subrogation professionals should resist the temptation to over-extend an expert, perhaps at the urging of the expert, beyond his or her specific area of expertise. Fire cause and origin experts should not address electrical or mechanical failures; engineering experts should not analyze materials or metallurgical deficiencies.

3. Engage separate, qualified experts for distinct scientific inquires. The preceding rule, when stated affirmatively, requires the retention of qualified experts for each scientific or technical category comprising the theory of causation. If these experts are managed correctly, there should be, at most, moderate, additional expense.

4. Identify and preserve all pertinent physical evidence. The rules of non-spoilation/preservation of evidence dictate that the instrumentality which caused the loss must be

preserved, to the extent possible, in its entirety. All reasonable secondary or alternative causes which have been considered and ruled out similarly must be preserved. All "bridges" between primary and secondary areas of damage such as fuel sources, wiring, piping, and other similar artifacts should be secured and maintained.

5. Photographic and videographic documentation. The loss site should be thoroughly documented, both from macro as well as micro perspectives, through the use of thirty-five millimeter photography, digital photography and videography. Photographs are the most effective and least expensive form of verifying site conditions, and should be used extensively in every investigation.

6. Identify and follow applicable standards. NFPA 921, Guide for Fire and Explosion Investigations, should be routinely consulted and followed for all relevant investigative purposes. Other applicable standards, including the American Society of Testing and Materials Guideline for Collection and Preservation of Evidence and Evaluating Technical Data also should be consulted and relied upon, where appropriate.

7. Testing - in some form - should be considered in every case. The most effective testing, both for the quality of the information yielded, as well as for maintaining reasonable budgets, is that which is focused on establishing a single element of proof in the theory of causation. Each hypothesis must be broken down to predicate components, and then tested independently or verified by reliance upon authoritative scientific or industry literature. Testing is not equivalent to examination (as noted by the court in Booth, supra.) but analysis and interpretation of evidentiary artifacts can be supported by reference to established industry findings, guidelines and benchmarks.

8. Utilize existing industry research. The subrogation professional must be aware of and utilize the extensive database of fire science and engineering literature which is available and

which effectively can be mined for tests which may support an expert's findings in a given investigation.

9. Utilize objective, not subjective, predicate facts. The expert's analysis, wherever possible, should be grounded on specific facts yielded in the investigative process, and objective findings resulting from testing in the scientific community at large, for the particular investigation being conducted.

10. Address potential rates or probability of error, and controls to ensure validity of findings. Every expert analysis must face up to obvious vulnerabilities in the methodology utilized, and then explained how their potential impact has been avoided or reduced to being a de-minimus factor. The subrogation professional should focus upon the weakest - not the strongest - aspect of the expert's analysis since that will be the approach followed by an intelligent opponent.

11. Remember the three R's: reliability, reasonableness and repeatability. Every step of the expert's investigative process should pay attention to these three factors: the reliability of the investigative procedures used; the reasonableness of the conclusions formulated; and the ability to demonstrate, through repetitive analyses, that the investigative method and resulting opinions are scientifically valid and worthy of being presented to the finder of fact.

PHILA1\1537289\1 099995.000