HOW WILL COURTS RESPOND TO KUMHO TIRE?

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I. Introduction

The Supreme Court has recently declared that the "gatekeeping" role assigned to the district court judges, as that role was defined by the High Court in *Daubert v. Merrell-Dow Pharmaceuticals, 509 U.S. 579 (1993),* is applicable to the testimony of all experts, including those whose opinions are predicated solely on technical knowledge, skill, or experience in a given field. *See Kumho Tire Company, Ltd. v. Carmichael, 119* S.Ct. *1167 (1999).* On its face, *Daubert* applied only to experts whose opinions were based upon scientific knowledge and theory. In *Kumho,* the Court rejected the approach taken by several, circuits - including the Second, Fourth, Ninth, Tenth, and Eleventh - that *Daubert* did not apply to expert testimony based on an expert witness' technical knowledge, training, or experience. The *Kumho* ruling thus extends the *Daubert* principle of preliminary scrutiny of expert testimony to engineers, fire cause and origin investigators and other "nonscientific" expert witnesses.

A careful reading of the opinion reveals that the Supreme Court not only enhanced the "gatekeeping" role of the federal district courts, but also reaffirmed both the flexible nature of the *Daubert* inquiry and the broad discretion granted to the district courts in carrying out the "gatekeeping" function. The following discussion attempts to predict some of the legal and practical implications of *Kumho* for the subrogation practitioner.

II. Background

A. Expert Testimony and F.R.E. 702 and 703

Federal Rule of Evidence *702* grants testimonial latitude to expert witnesses unavailable to other types of witnesses based on the assumption that the expert's opinion is relevant, will assist the trier in determining tile factual issues, and has a reliable basis in the knowledge and experience of the expert's discipline. Rule 702 reads:

> 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.

F.R.E. 702. Moreover, the 1972 Advisory Committee Notes explained that the rule was not limited to experts in the strict sense, but rather encompassed witnesses whose expertise derived from their "skill", i.e. technical knowledge and experience. F.R.E. 702, Advisory Committee Notes. The determination of whether expert testimony would be helpful in assisting the trier is "[a] common sense inquiry whether the untrained layman would be qualified to determine ... the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." *Id.*

Rule 703 deals with the bases for the expert opinion and reflects an intent to delegate the question of reliability to those in the particular field. The text of the rule states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

F.R.E. 703. Rule 703 contemplates an expansion of the bases for expert opinion testimony, validating the use of data and studies developed by others and relied upon by the expert in forming his opinion. See F.R.E. 703, Advisory Committee Notes. Prior to the *Daubert* decision, these rules were generally interpreted as assigning the determination of reliability to the collective members of the expert's field of expertise and to the jury, not to the trial judge.

In *Daubert*, the High Court announced that the test for admissibility is a "flexible" one, with no single factor being determinative, and that the focus of the inquiry should be on the principles and methodology and not the conclusions generated by their application.

In *General Electric Co. v. Joiner, 118* S.Ct. 512 (1997), the Supreme Court confirmed the gatekeeping function of trial court judges, holding that the decision whether to admit or exclude scientific expert testimony is subject to review only for abuse of discretion. Id. at 519. Most commentators have interpreted the *Joiner* decision as a clear indication that district courts are granted a high level of independence in formulating and applying the *Daubert* factors. Of course, this means the battle to admit proffered expert testimony will be won or lost at the trial level. The *Joiner* Court elaborated on the general test for admissibility announced in *Daubert.* The Court warned that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is too great an analytical gap between the data and the opinion offered." Id. at 519. Therefore, the practitioner must strive to draw on recognized methodologies and theories, and be sure that the application of the methodology to the facts at issue supports the theory being advanced.

III. Kumho Tire Company, Ltd. v. Carmichael - *The Opinion*

Prior to *Kumho,* numerous circuits had recognized a so-called "experience" exception to *Daubert's* reliability test for cases in which the proffered expert testimony involved knowledge generated from skill or experience in a given field or discipline. In *Kumho,* the Supreme Court rejected this approach, holding that the trial court's "gatekeeping" obligation applies not only to testimony based upon "scientific" knowledge, but also to expert testimony based on "technical" and "other specialized" knowledge.

In *Kumho,* the plaintiffs suffered personal injuries when a rear tire of a mini-van suffered a blow out. As a result of the failure, the van crashed and six of its eight passengers were ejected from the passenger compartment. The record on appeal indicated the following: (1) that the tire

was at least five years old as of the day of the accident (being manufactured in 1988 and installed sometime before the plaintiffs purchased the vehicle in 1993); (2) that the mini-van had more than 88,000 miles on it on the date of purchase; (3) that the plaintiffs had driven the vehicle an additional 7,000 miles since its purchase (and the expert could not determine the miles on the tire with reasonable accuracy); (4) that the tread depth was worn below an acceptable level; and (5) that the tire exhibited evidence of previous punctures, at least one of which had been inadequately repaired. All of these points were conceded by the plaintiffs' expert. In addition, the expert's first report based his conclusion not on the signs of abuse noted in his deposition testimony, but rather on "rim flange impressions." Finally, the expert had not inspected other tires of a similar kind for purposes of comparing pertinent features.

The plaintiffs sued the tire manufacturer and distributor alleging that the tire was defective in its design and/or its manufacture. To prove their defect theory, plaintiffs offered the testimony of Dennis Carlson. Mr. Carlson held a masters degree in mechanical engineering, had worked in the industry for nearly ten years, and had been qualified and testified before as a tire failure expert. Following a brief visual inspection ten minutes prior to his deposition, the expert concluded that the blow-out was caused by a defect which forced the various components of the tire to separate without warning.

The trial court excluded the expert's testimony, finding that the proffered opinion failed to satisfy the criteria set forth in *Daubert* and that the plaintiffs had not offered any countervailing factors demonstrating reliability. *See Carmichael v. Samyang Tires, Inc.*, 923 F. Supp. 1514 (S.D. Ala. 1996). After a directed verdict was entered in favor of defendants, on appeal the Eleventh Circuit reversed, holding that *Daubert* was limited to expert testimony grounded upon scientific

methods and principles and did not extend to testimony based upon skill and experience-based observations. *See Carmichael v. Samyang Tire, Inc.,* 131 F.3d 1433 (11th Cir. 1997).

Upon review, the Supreme Court rejected the Eleventh Circuit's narrow reading of *Daubert,* noting first that the language of F.R.E. 702 failed to support any categorical distinction between testimony grounded on scientific knowledge and that grounded upon technical or other specialized knowledge. The Court declared that the purpose of the 44 gatekeeping" function, to insure that a reliable basis exists for the expert's opinion, extended to all expert testimony. Consequently, all expert testimony must have a valid connection to the pertinent inquiry "as a precondition to admissibility." *Kumho,* 119 S.Ct. at 1174 (quoting *Daubert,* 509 U.S. at 592.)

The Court held that a district court "may" consider the specific factors set forth in *Daubert.* Placing great emphasis on the permissive nature of its holding, the Court recognized that where reliability derives from personal knowledge or experience in a given discipline, the *Daubert* factors do not represent a definitive checklist. Other factors not identified in *Daubert* may inform the district court's analysis of reliability. Thus, the Court declared that it could not "rule out, or rule in, for all cases and for all time tile applicability of the factors mentioned in *Daubert . . . ." Id.* at 1175.

The Court invoked *Joiner* and confined that the trial court enjoys the same broad discretion in deciding how to test an expert's reliability as it enjoys when it decides whether the testimony is reliable. This point is significant where certain cases exist in which an expert's methods are "properly taken for granted"; that is, where they may be subject to judicial notice. Therefore, what is a "reasonable" measure of reliability is also a matter within the discretion granted the trial courts under *Joiner.*

Next, the Court reviewed the district court decision to exclude the proffered testimony. The ultimate issue in *Kumho* was whether the tire failure was the result of a product defect or "overdeflection", i.e. misuse of the product. The initial inquiry under *Daubert* was whether the plaintiffs' expert could reliably determine the cause of the tire failure in view of the tire's substantial wear and tear. Carlson's opinion that the failure was due to a manufacturing defect rested upon several underlying propositions. First, Carlson stated that if the tire failure such that occurred is not caused by misuse of the tire, it is normally caused by a tire defect. Second, if a failure were the result of misuse, the tire should exhibit at least two of four physical conditions.[1] Third, where two of the four physical conditions are not present, Carlson normally concludes that the failure was the result of a defect and not the user's misuse or neglect. Carlson conceded in deposition testimony that the subject tire exhibited two of these conditions, but inexplicably discounted these conditions and considered their presence to be insignificant for purposes of his analysis.

The Supreme Court found that the ultimate conclusion reached by the district court, that the expert's methodology was unreliable, was "reasonable." It shared the district court's doubts regarding the reliability of the expert's method of arriving at his conclusion. The Supreme Court addressed the plaintiffs' argument that the district court had applied the *Daubert* factors rigidly, without assessing the propriety of exploring certain factors in the reliability inquiry and noted that the plaintiffs had failed to satisfy "either *Daubert's* factors or any other set of reasonable reliability criteria." The expert's use of the "two-factor" test in conjunction with his visual/tactile inspection failed to support his conclusions.

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[1] The "signs of abuse" cited by Carlson were: (1) proportionately greater wear on the shoulder; (2) signs of grooves caused by beads; (3) discolored sidewalls; and (4) marks on the rim flange.

IV. Kumho - The Implications for the Subrogation Practitioner

The practical implications of the *Kumho* decision are perhaps more important than the legal question decided in the case. The decision clearly enhances judicial power, arguably at the expense of letting juries assess the expert testimony. The decision emphasizes the broad autonomy granted the trial courts in deciding what factors will constitute the reliability inquiry under *Daubert.*

A. The Lower Courts Apply Kumho

A few lower courts have already applied *Kumho* in the products liability context. For example, in *Jarequi v. Carter Manufacturing Co., Inc., 1999* WL 185046 (81h Cir. *1999),* the Eighth Circuit affirmed the district court's exclusion of testimony by plaintiffs mechanical engineer and human factors expert where it found neither to met *Daubert's* reliability threshold. In that case, the engineer opined that the combine's moving parts ("corn head") posed a risk of harm to the user which danger had not been adequately communicated to plaintiff. During his deposition testimony, the engineer admitted the following: (1) that he had never observed tile corn head at issue; (2) that he had never observed a corn head in actual operation; and (3) that his opinion regarding the speed of the parts of the combine was a product of "[my] guess as an engineer." Moreover, he conceded that his opinion that alternative warnings would have been effective had no objective foundation.

Similarly, the court affirmed the exclusion of the human factors expert, finding that this expert had not tested the feasibility of the proposed warning system, could point to no study which supported his opinion concerning their effectiveness, nor had any other manufacturer employed a similar warning system. In fact, this expert had not even read the warnings which were provided by tile manufacturer of the subject combine.

While the Eighth Circuit declared that a district court does not err in looking to *Daubert* for guidance in evaluating proffered expert testimony, the reliability factors listed in *Daubert* should only be relied upon to the extent to which they are appropriate to the particular issue. Echoing the Supreme Court, the Eighth Circuit stated that the trial judge must customize the *Daubert* inquiry to fit the facts of the case.

In *Black v. Food Lion, Inc., 171* F.3d 308 (5'" Cir. 1999), the Fifth Circuit reversed the district court's admission of a doctor's testimony oil medical causation. The Fifth Circuit instructed that the *Daubert* factors were a "starting point" for tile district court's analysis in the usual case. These factors could not be arbitrarily replaced with other reliability factors. Only after the *Daubert* factors have been articulated and applied is the district court then free to consider alternative standards of reliability.[2]

Prior to *Kumho,* the Third Circuit weighed in on the question of *Daubert's* flexible nature, pronouncing the factors to be "simply useful signposts, not dispositive hurdles that a party must overcome in order to have expert testimony admitted." *See Heller v. Shaw Indus., Inc., 167* F.3d

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[2] It should be noted that the injury allegedly suffered in *Black* was a condition whose etiology and cause continues to elude experts in the medical field. In addition, similar to Kumho, the expert in *Black* conceded that her conclusion on medical causation relied on some degree of speculation and surmise. The persuasive value of the case in product liability suits is negligible, though its strict construction of *Kumho* is likely to be followed by many lower courts.

Incidentally, in *Saia v. Sears Roebuck and Co., Inc.*, 1999 WL 280375 (D.Mass.), the court excluded the proposed testimony of plaintiff's economist concerning hedonic damages (loss of enjoyment of life damages). The court there found the expert's methodologies for calculating the value of human life (as a reflection of what people are willing to pay to reduce the risks of injury or death in everyday life) could not pass muster under either *Daubert* or *Kumho. See also M.G. Bancorporation, Inc. v. lube,* 1999 WL 293706 (Del. 1999)(Court affirmed the exclusion of stock valuation testimony in a statutory appraisal action, holding that the approach taken by the defendant's expert therein was not "generally accepted" for valuing banks and bank holding companies.)

146 (3 rd Cir. *1999)*. The language found in the *Kumho* decision appears to support this approach to the reliability inquiry.

B. Trial Court Discretion in Formulation and Application of Test for Reliability

The *Kumho* decision also reaffirms the broad discretionary power given to the district courts in determining what factors are germane to the reliability inquiry. On its face, *Kumho* is neither helpful nor harmful to plaintiffs or defendants. As a practical matter, this broad discretion can present a formidable hurdle if, for example, the individual judge is hostile to the particular theory advanced, the particular expert retained, or subrogation in general. The practitioner should delicately point out that *Kumho* was principally concerned with rejecting a blanket rule prohibiting application of the *Daubert* factors to non-scientific expert testimony. Therefore, while the trial court must discharge its gatekeeping role by reviewing proffered expert testimony, there exists fertile ground concerning just what factors determine reliability in the relevant discipline for the specific issue. In addition, this broad discretion also assures that the trial court judge may avoid unnecessary reliability proceedings in "ordinary cases" without fear of reversal. This should occur where the expert's testimony is based upon established methodologies or techniques and their application to the issue in the case is not reasonably questioned. *Kumho, 119* S.Ct. at 1176. While it is recognized that the lower courts may interpret *Kumho* broadly and use it to dispose of many unsavory cases, the term "ordinary case" may provide a practitioner with some support for avoiding meticulous review of the proposed testimony in run-of-the-mill cases.

C. Other General Observations on *Kumho*

Daubert *as Instructive and Permissive*

Initially, it should be noted that the Supreme Court in *Kumho* repeatedly emphasized the permissive nature of its decision. While the nonexclusive factors set out in *Daubert* "may" offer a

helpful starting point, a trial court has wide latitude in formulating and applying a test for reliability under F.R.E. 702. Under *Kumho,* a trial court will identify the nature of the issue in the case and assess the expert's particular knowledge and expertise and the subject of his or her testimony in that light. *K14inho, 119* S.Ct. at 1175. If the factors enumerated in *Daubert will* assist the trial judge in evaluating reliability of the methodologies or techniques in light of the particular issue, then these factors provide a reasonable measure of the testimony's reliability. Where the plaintiff can demonstrate that other factors bear on the reliability inquiry, then a court may apply those factors as part of its analysis.

Daubert *as an Elastic Measure of Reliability*

The *Kumho* Court underscored the "flexible" nature of the *Daubert* inquiry. "We can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert . . . ." It* is clear that "where [the proffered] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question ... the trial court must determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Kumho, 119* S.Ct. at 1175.

Nevertheless, in *Joiner* and *Kumho,* the Court has stated that it will not countenance a rigid approach to *Daubert.* In fact, the Court specifically rejected the argument that any one factor must be satisfied in order for expert testimony to be admissible under F.R.E. 702. Consequently, even where the testimony fails to pass muster on any single factor, this does not render it *per se* inadmissible.

D. Ramifications for Fire Scene Analysis

Cause and origin investigations must now necessarily be performed with *Daubert's* gatekeeping function in mind. After *Kumho,* the methodology and technique of fire investigators,

their scene observations, calculations, and forensics may be subjected to the four nonexclusive reliability measuring sticks. Because this technical type of investigation may not be conducive to a rigid *Daubert-type review,* the trial court should customize the reliability inquiry to fit the case.

To increase the prospects that the cause and origin opinion will be admissible under *Kumho,* the expert should conduct the investigation in conformance with accepted procedures and methodologies in the field. For example, demonstrating the expert's thorough knowledge and compliance with NFPA 921 pertaining to fire and explosion investigations. In addition, articles which explain or test the various techniques employed at the fire scene and principles of fire propagation and characteristics such as bum patterns, depth of charring, location of fuels and oxygen, principled elimination of alternative sources of fire cause, etc. may assist in demonstrating reliability. The practitioner might offer published studies in professional literature such as Fire Findings. This may convince the court that the techniques have been subject to peer review under *Daubert.*

Similarly, the conclusions reached by public sector investigators will become more significant in the wake of *Kumho.* While some courts have been openly hostile to plaintiffs in subrogation cases, corroborating opinions by the public authorities will be increasingly valuable in satisfying *Daubert* and placating a skeptical court. This may also put pressure upon the adversary to proffer a reliable expert opinion offering an alternative fire cause, which will likewise be subject to the reliability inquiry.

Of course, the application of the methodology or technique is also subject to scrutiny following *Kumho.* Consequently, the practitioner must make certain that the investigator follows recognized practices in analyzing the evidence and data and that his findings and conclusions reflect a reasonable application to the issues in the case. Reading the *Kumho* opinion, it appears

that both the district court and the Supreme Court were most troubled by the expert's equivocation in several key areas, his subjective approach to the "two- factor" test, and his contradictory deposition testimony.

E. Engineers and other Experts

Experts in many disciplines will now be subject to the *Daubert's* reliability inquiry, including construction experts, mechanical contractors, spread theory experts, insurance adjusters, architects, human factors experts/psychologists, weather experts, and of course, engineers. In realistic terms, *Kumho* vests in the trial court, acting within the context of a F.R.E. 104 (a), "considerable leeway" in deciding questions of reliability and relevancy. In preparing a case post-*Kumho,* the practitioner should be cognizant of the enhanced judicial screening and where possible should tailor the theory of the case to the predilections of the individual judge.

In a products or professional negligence case, for example, there can be no substitute for a thorough scene examination and analysis by the expert. The expert should apply recognized methodologies and techniques, perform the necessary and customary calculations and arrive at a theory. Most important, the expert must carefully test the theory for deficiencies. In *Kumho,* it was the expert's lack of a disciplined process (known as induction and differential testing) that appeared to offend the Court. Further, as cases like *Jarequi* illustrate, an expert cannot simply opine that a reasonable alternative design exists where he or she has not inspected the subject design, tested the suggested alternative design (or pointed to the use of such alternative design by another manufacturer), or offered any studies which support that the suggested design is safer and will not unduly impair the utility of the product.

The exact nature and scope of individual, particularized tests for any given case cannot possibly be explored within the context of this paper. Suffice it to say that the practitioner should

strive to present expert testimony which reflects "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho, 119 S.Ct. at 1176. The expert should be steered clear of supposition, professional "hunches", and clear speculation. In addition, the expert must meet at least one of the nonexclusive factors set forth in *Daubert* or an alternative test for reliability which will be accepted by a reviewing court as insuring trustworthiness.

Conclusion

In legal terms, the *Kumho* decision reflects the approach previously endorsed by numerous circuits and is not a dramatic departure from *Daubert.* Nevertheless, the practical effect of *Kumho will* be to heighten the importance of the threshold *Daubert* inquiry, making it the real test of an expert opinion based upon technical knowledge, skill, or experience in a given discipline. It is imperative then that the subrogation practitioner be integrally involved in the expert's field examination and analysis, as well as the development of tested and/or accepted theories where those theories are available. Finally, the practitioner must offer guidance to the expert in the rigorous application of his or her methodologies or techniques to assure that the ultimate opinion is both reliable and relevant to the fundamental issues in the case.

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