THE DAUBERT CHALLENGE FOR EXPERTS IN SUBROGATION CASES: IS THE SKY REALLY FALLING?

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I. INTRODUCTION

The U.S. Supreme Court's decision in Daubert v. Merrill Dow, Inc., 113 S.Ct. 2786 (1993) has created yet another hurdle for subrogation professionals. Daubert and the more recent Kuhmo Tire Company v. Carmichael, 119 S.Ct. 1167 (1999) decision increasingly are being utilized by the defense bar and liability specialists. Numerous journals, articles, seminars and even week-long conventions across the country have been devoted to the goal of defeating claims under the authority of Daubert/Kuhmo Tire. Daubert motions routinely are presented to preclude experts from testifying. The courts who have granted these defense applications have precluded the plaintiff from being successful at trial even before a single member of the jury is selected. With careful selection and thorough preparation of experts in the post-Daubert era, there is no reason to believe that the complex and oftentimes catastrophic roadblocks now presented cannot be overcome. These decisions will, however, require us to select and prepare our experts with renewed focus and attention.

Subrogation professionals should begin to pay particular attention to the application of Daubert to the work performed by fire investigators and engineers who commonly determine the failure modes of instrumentalities in product liability and negligence cases. Daubert already has been applied in these contexts by a number of courts who are reconfiguring the ways in which litigators do battle.

The real concern of Daubert is that without the most thorough selection criteria and preparation, an expert may not survive a Daubert challenge. As a preliminary matter, the expert, the attorney, and the subrogation specialist must have a detailed understanding of Daubert and its progeny. Preparation also requires a full understanding of the tactics which may be used to preclude the expert's testimony. Nothing less than mastery of these issues is required, since the failure to defeat such a challenge will result in the dismissal of your claims.

Perhaps the most beneficial part of the new Daubert/Kuhmo Tire expert framework which is commonly overlooked is that it enables the subrogating carrier to challenge the often questionable and unsupportable expert theories presented by the opposition. The key, as always, is to be better prepared than our adversaries.

II. BACKGROUND

The recent U.S. Supreme Court decisions in Daubert and Kuhmo Tire have started a revolutionary change in the way many experts are qualified to testify in the federal courts, both in New York and throughout the country. Only through careful scrutiny of the fallout from these decisions will we be able to understand the full practical implications of these changes from prior practice. Ultimately, these decisions and their progeny will determine the criteria for retention of experts and how they present their testimony. Many times these factors will make the difference between prevailing -- or not -- at trial.

Until Daubert, the basis for the Court's admission of expert testimony at trial has been the expert's "resume." The court's inquiry typically has been limited to whether the expert may be considered qualified on the basis of his or her training, background and experience, for the purpose of offering opinions about the relevant subjects at issue. In the usual case, the expert was deemed qualified by the trial judge once a satisfactory showing was made that the witness was an authentic expert on the subject. Courts have evinced a preference for avoiding a threshold ruling concerning the admissibility of the expert opinion, and instead have left any lingering questions about the experts' methodology and approach for cross examination by opposing counsel.

In short, the rulings by the courts generally have been: "It goes to the weight of his/her testimony, not to its admissibility."

The new approach under Daubert and Kuhmo Tire compels the trial court to consider certain factors before the expert is allowed to offer opinions to the jury. The purported

goal is to prevent injustice at the trial level from the use of unreliable expert opinions which may carry great weight with a deliberating jury.

III. THE DAUBERT DECISION

The first and foremost change in the consideration of expert evidence occurred in the Daubert v. Merrill Dow Pharmaceuticals decision of 1993. The United States Supreme Court ruled that federal judges should act as gatekeepers to make certain that the evidence which was claimed as being "scientific" in nature would be considered intellectually reliable by other experts in the same field. The primary point was that the trial judge must determine before the presentation of expert testimony whether the witness was a qualified expert in his or her field, and also whether the approach that the expert used in reaching his or her conclusions qualifies as a legitimate scientific methodology.

It was understandable that certain federal court judges might be hesitant about performing this function since presumably few were scientists and many may have had little scientific training. The Supreme Court understood this and explained that the district court judges need only become generally familiar with the scientific method to a point where they could determine whether a reliable scientific methodology had been used. The court identified the following factors in determining the reliability of certain scientific evidence: empirical testing; peer review; publication; objectivity of the data; repeatability; and "acceptance" in the relevant scientific community. The high court was clear that these factors should not be regarded as a definitive check list or litmus test and, instead, noted that whether the Daubert factors applied depend upon the particular circumstances of the case at issue.

The Daubert decision itself involved an allegation that a morning sickness drug manufactured b the defendant Merrill Dow Pharmaceuticals, and ingested by the plaintiff's mother prior to his birth, caused the plaintiff's birth defects. The plaintiff's experts based their testimony on research that the morning sickness drug was linked to various birth defects found in

animals. Testimony concerning animal studies was critical because there was no research linking the drug to defects in human fetuses.

The posture of the Daubert case when it came before the United States Supreme Court was that the plaintiff's expert's trial testimony had been barred because the lower courts determined that the studies performed on animals and not on human subjects were not "generally accepted" within the relevant scientific discipline. The "general acceptance" test, set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), was the old standard used by courts to gauge the reliability and admissibility of expert testimony. The Supreme Court discarded the Frye "general acceptance" test applied by the lower courts. In doing so, the Supreme Court held that scientific expert testimony should be admitted only when it met the test under Federal Rule of Evidence 702, which required both relevance and reliability in proffered testimony. Specifically, the Supreme Court directed the lower courts to consider the following four-part test when determining whether the proposed scientific expert's testimony is scientifically reliable: (1) whether the technique or theory used may be tested or refuted; (2) whether the technique or theory has been subjected to peer review or publication; (3) the known or potential rate of error of the particular scientific technique; and, (4) the degree of acceptance of a theory or technique within the relevant scientific community.

IV. KUHMO TIRE V. CARMICHAEL

In 1997, the Eleventh Circuit Court of Appeals held in Kuhmo Tire that Daubert was limited to “scientific testimony” only. The Appeals Court ruled that the Daubert analysis applied only when an expert relied upon scientific principles as opposed to skill or empirical data. Many federal courts around the country were wrestling with this very issue, which directly affected fire investigators and other specialized experts who could fairly be characterized as having based their opinions on experienced-based observations as opposed to strict scientific knowledge.

In the Spring of 1999, the United States Supreme Court resolved the ongoing conflict. In reviewing the Eleventh Circuit's decision, the Supreme Court ruled that Daubert's general holding -- setting forth the trial judge's "gatekeeping" obligation -- applies not only to testimony based upon scientific knowledge but also to testimony which may be technical, experience based or "otherwise specialized knowledge." The Supreme Court further stated that a trial court should consider one or more of the specific Daubert factors when doing so will help to determine the reliability of the proffered testimony. However, the Court emphasized that the Daubert reliability test is a flexible one and that the list of Daubert factors was not to be applied blindly or rigidly in each and every case.

V. DAUBERT/KUHMO TIRE: THE IMPLICATIONS FOR THE SUBROGATION RECOVERY SPECIALIST

The practical implications of the Kuhmo decision are perhaps even more important than the legal questions ultimately decided in the case. The decision clearly enhances judicial power, arguably at the expense of allowing juries access to qualified expert testimony. The decision emphasizes the broad autonomy granted to the trial courts in deciding which factors will be used in conducting the reliability inquiry under Daubert.

(a) Ramifications for Fire Scene Analysis

Cause and origin investigations now must be performed with Daubert's gatekeeping function in mind. After Kuhmo, the methodology and techniques of fire investigators, their scene observations, calculations and overall forensics may be subjected to the four non-exclusive reliability measuring sticks. Because this technical type of investigation may not be conducive to rigid-Daubert type review, the trial court should, in fairness, customize the reliability inquiry to fit the case.

To increase the probability that the cause and origin opinion will be admissible under Daubert/Kuhmo, the expert should conduct his or her investigation in full conformance to accepted procedures and methodologies in the field. For example, it is a good starting point to

demonstrate the expert's thorough knowledge and compliance with NFPA 921, the accepted and authoritative set of guidelines for conducting fire investigations. In addition, articles and texts which explain the various techniques employed at the fire scene, including analysis of burn patterns, depth of charring, location of fuels, fire loads, available oxygen, and elimination of alternative sources of ignition may assist in demonstrating reliability. Additional support may be gained by offering well respected publications, studies and professional literature in support of the expert's opinion and methodology. This may demonstrate to the court that the techniques used have passed muster under peer review, pursuant to Daubert.

Similarly, there may be more reason to utilize the conclusions reached by public sector investigators in the wake of Kuhmo. When courts express skepticism about theories of fire causation or propagation, corroborating opinions by the public authorities will become increasingly valuable in satisfying a Daubert review. This also may exert pressure upon the adversary to obtain a reliable expert opinion -- instead of the "anything but the plaintiff's theory" approach -- which likewise will be subject to the same reliability inquiry.

In reading the Kuhmo decision, both the district court and the Supreme Court were troubled by the expert's equivocation in several key areas, including his subjective approach to his own "two factor" test and his contradictory deposition testimony. All experts must be prepared to face similar judicial scrutiny, the likes of which many may never have encountered before.

(b) Engineers and Other Experts

Experts in many disciplines outside of the fire sciences now also will be subject to Daubert's reliability inquiry, including construction experts, electrical and mechanical engineers, fire "spread" experts, architects and civil engineers, human factor experts, weather experts, and of course, claims adjusters. The Kuhmo decision vested the trial court with "considerable leeway" in deciding questions of reliability and relevancy. In preparing a case post-Daubert and Kuhmo, the subrogation professional should be aware of the enhanced judicial

screening which will be faced. The expert should apply recognized methodologies and techniques to form reasonable conclusions and arrive at a theory. The expert must carefully test the theory for deficiencies. In Kuhmo, it was the expert's lack of a disciplined process that offended the court. No longer can an expert declare that his opinion is right just because he knows that it is right based upon his many years of experience.

VI. PREPARING FOR THE DAUBERT CHALLENGE ON YOUR EXPERT

Once the case law of Daubert and Kuhmo Tire is well understood by the subrogation professional, counsel and the expert, all eyes then must focus on preparing the expert to survive the defendant's plan of attack. The first area of challenge will be the expert witness' qualifications. The best way to prepare for this attack starts with the decision to retain the expert. The experts we engage should be carefully screened to make certain that they have the proper educational background, work experience and overall training, and are able to follow the more rigid Daubert/Kuhmo Tire reliability inquiry. Those experts who refuse, for instance, to follow NFPA 921 and to explain their fire analysis under accepted scientific rigors that will past muster in the age of Daubert and Kuhmo are not only of little value, but actually are counter-productive to your subrogation efforts.

VII. THE NEW YORK STATE APPROACH: DOES DAUBERT APPLY?

Most lawyers with experience in trying cases in the New York State courts would tell you that the "Frye" standard applies to the admission of expert testimony. Frye v. United States (cite) is a 1923 decision of the Court of Appeals for the District of Columbia which was presented with the issue of whether evidence derived from a polygraph machine was admissible.

The Frye Court stated that "[T]he thing from which the expert's deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs." Better known as the "general acceptance" test, the Frye formulation was the

dominant standard for the admissibility of novel scientific evidence across the country, including the federal courts, until Daubert came along. As was mentioned above, Daubert held Frye to be overruled, superseded by the Federal Rules of Evidence.

New York State courts, which do not follow the Federal Rules of Evidence, have not been quick to adopt Daubert in all situations or to abandon the Frye test entirely. For instance, in 1994, the New York Court of Appeals decided People v. Wesley, 83 NY 2d 417 (1994), a criminal case addressing the admissibility of DNA profiling evidence, then considered "novel scientific evidence". New York's highest court explicitly retained Frye's "general acceptance" test. The court noted that "general acceptance" does not mean "unanimous endorsement" by the entire scientific community at large. Rather, the court opined that the deciding factor is whether the evidence itself is generally accepted as reliable by the relevant scientific community. This decision shows the continued allegiance of New York state courts to the Frye "general acceptance test" for novel scientific evidence.

Since Frye continues to apply as the "novel scientific evidence" reliability standard, the ultimate question facing New York trial judges (as well as lawyers and subrogation specialists) is what test would govern the admissibility of an expert's testimony or proposed expert technique if the opinion is not "novel" or "purely scientific". A good example of such an experience based discipline is that of the fire cause and origin investigator. Based upon some recent decisions by New York State Courts, the test may not be Frye, but instead is gradually becoming an amalgam of the concepts articulated in Daubert and Kuhmo.

A very recent decision rendered by Suffolk County Supreme Court Justice Alan Oshrin in Wahl v. American Honda Motor Co., NYLJ, June 21, 1999, p. 33 (Sup. Ct. Suffolk Co. 1999) provides some guidance with respect to the admissibility of expert testimony in New York which is not purely novel or scientific. The Wahl matter involved injuries sustained by a plaintiff in a three wheel recreational vehicle known as an ATV. Plaintiff asserted claims of

defective design with respect to the vehicle center of gravity height, as well as in its relationship to the distance to the front of the rear wheels of the vehicle. Plaintiff's expert was a well qualified engineer who had published articles in the past concerning the instability and related safety problems of ATVs. The defendant manufacturer objected to his proposed testimony and argued that the expert's methodology was not generally accepted in the engineering community and should not be heard by a jury. The defendant essentially was asserting a traditional "Frye" objection to the expert's testimony. In his written opinion, Justice Oshrin reviewed Daubert's five screening factors and specifically noted that the Kuhmo Tire decision ruled that the gatekeeping duty of a trial judge applied not only to scientific testimony but to all expert testimony. Justice Oshrin observed that the trial judge has a role as a gatekeeper to screen for trustworthiness and reliability of an expert witness. In reviewing New York law, Justice Oshrin ruled that the Frye analysis was not applicable in cases where the issue was reliability of expert evidence which was not scientific or novel. Instead, the court concluded that it would apply the reliability standard as derived from Daubert and Kuhmo Tire, when Frye was inapplicable.

This is one of the first New York State Court decisions where the preliminary proceeding, to assess whether the expert witness testimony was sufficiently trustworthy to be admitted, was done pursuant to the reliability standard set forth in Daubert and Kuhmo Tire. Other well respected New York State Court trial judges have entered the Daubert/Kuhmo Tire debate and have issued some interesting decisions, all of which demonstrate a trend at least to consider a Daubert screening when Frye does not apply. See, City of New York v. Richard Basciano, et al, No. 402063/99 (Sup. Ct. NY Co.); Clemente v. Blumenberg, NYLJ, September 31, 1999, p. 31, Col. 4. It should be noted, however, that at least one New York State appellate level court, the Appellate Division, Third Department, has rejected some of the gatekeeping duties imposed on a trial judge under Daubert, instead deferring to a jury to decide if the expert's opinion is unreliable. See, Hallahan v. Ashaland Chemical Company. NYLJ, December 10, 1999. The trial judge in the Hallahan case had allowed the jury to deliberate on

the questionable testimony of plaintiff's expert who opined about a link between benzene exposure and a certain form of leukemia.

Because of this ongoing conflict which is currently unfolding in the New York State Courts, Daubert and Kuhmo Tire may be crucial in the performance of judicial gatekeeping for the reliability of expert testimony. However, it is probably more difficult for a Daubert attack to be brought in the State Courts, as opposed to the Federal Courts, in that New York Civil Procedure Law and Rules generally do not allow for expert depositions and there is generally a more limited expert disclosure process. Still, Daubert and Kuhmo Tire are important decisions that may soon have important implications for the subrogation practitioner in both the federal and state court systems.