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DISINTERESTED IN *DAUBERT*: STATE COURTS LAG BEHIND IN OPPOSING "JUNK" SCIENCE

by
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The Supreme Court's expert evidence trilogy — *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd., v. Carmichael*, 526 U.S. 137 (1999) — has received a tremendous amount of attention, and rightly so. These cases dramatically tightened the rules for the admissibility of expert evidence in federal courts and in states that have adopted the trilogy. *Daubert* held that scientific evidence must be subjected to a reliability test; *Joiner* concluded that under *Daubert* district courts should scrutinize the reliability of an expert's reasoning process as well as his general methodology; and *Kumho Tire* extended *Daubert's* reliability test to non-scientific expert evidence. The result has been a crackdown on "junk" expert testimony in federal courts.

Tort reform advocates have declared victory and for the most part abandoned the junk science issue. Unfortunately, victory is not, in fact, yet at hand. First, states with most of the American population have not adopted *Daubert*. Second, even many states that purport to apply *Daubert* have not embraced *Joiner* and *Kumho Tire*, opinions that were crucial in establishing that *Daubert* is a stringent test requiring strict scrutiny of proffered expert testimony.

Of the non-*Daubert* states, only Utah applies a test as stringent as the *Daubert* trilogy. Georgia, Idaho, Nevada, South Carolina, and Wisconsin all apply to expert testimony a liberal relevancy standard that focuses on an expert's paper qualifications, rather than the substance of his testimony. Hawaii and Tennessee use *Daubert* for guidance, but refuse to be bound by it.

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The other non-*Daubert* states rely on the common law *Frye* general acceptance test. These states include Alabama, Arizona, California, Colorado, the District of Columbia, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, New Jersey, New York, Pennsylvania, and Washington.

Over the last decade or so, a mythology has grown up around *Frye*, to the effect that the general acceptance test is a wide-ranging, very stringent standard that would restrict the admissibility of junk expert evidence in toxic tort and products liability cases. In fact, *Frye* was traditionally applied only in criminal cases. Only in the last few years have courts in *Frye* states started to apply the general acceptance test to expert evidence in civil cases. In the largest and most significant *Frye* state, California, there are no published opinions applying the general acceptance test in toxic tort or products liability cases.

Even when courts do apply *Frye* to toxic tort and products liability cases, they often apply a very weak version of the general acceptance test, requiring only that an expert's basic methodology be generally accepted. For example, an expert in a toxic tort case merely needs to show that he is using epidemiology; his testimony is admitted regardless of whether he is extrapolating from the epidemiological evidence to causation in a generally-accepted manner. The courts' rationale is that because epidemiology is generally accepted in the scientific community regarding causation issues, there is no need to scrutinize how the expert is utilizing the evidence. By contrast, the federal *Joiner* precedent encourages trial courts to scrutinize how the expert extrapolates from his data to his conclusions.

Moreover, most courts in *Frye* jurisdictions refuse to apply the general acceptance test to evidence that is not clearly the product of a scientific technique. Thus, for example, *Frye* is generally not applied to medical malpractice testimony, or to testimony by an engineer regarding an alleged design defect. In both situations, courts hold that the testimony is based on experience and not a scientific technique. By contrast, *Kumho Tire* requires that federal courts apply a reliability standard to all expert testimony.

Meanwhile, among the states that purport to apply *Daubert*, many adopted it when they thought it was a "loose scrutiny" test that only applied to scientific evidence. Now that *Daubert* has, in the wake of *Joiner* and *Kumho Tire*, proven to be both a strict and an expansive test, some states are backing away from federal precedent. Oregon, for example, claimed to adopt *Daubert* several years ago. However, in a recent opinion, *Jennings v. Baxter Healthcare*, 14 P.3d 596 (Ore. 2000), the Oregon Supreme Court implicitly rejected *Joiner*, and held that courts may only scrutinize an expert's general methodology. The court, in fact, did not cite *Daubert* at all, instead relying on pre-*Daubert* state cases. What is especially troubling about *Jennings* is that the court required the admission of widely-discredited evidence linking breast implants to immune system disease.

Some *Daubert* states are also reluctant to apply *Daubert's* reliability test to "non-scientific" evidence, as required in federal court under *Kumho Tire*. For example, the West Virginia Supreme Court held last year that it would not apply a reliability test to engineering testimony in a products liability case. *Watson v. Inco Alloys International, Inc.*, 2001 W. Va. LEXIS 20 (Mar. 9, 2001).

One solution to the recalcitrance of state courts to adopt appropriate strict standards for the admissibility of expert testimony is for state legislatures to adopt the new, amended version of Federal Rule of Evidence 702, which incorporates the holdings of *Daubert*, *Joiner*, and *Kumho Tire*. Under Rule 702, an expert opinion may only be admitted 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. Many states, including states that have not adopted *Daubert*, currently adhere to the old, far more ambiguous version of Rule 702.

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