

SCIENTIFIC EVIDENCE REVIEW

Monograph No. 2

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**Standing Committee on Scientific Evidence
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American Bar Association**

**DAUBERT: THE MEDIA'S MIXED
MESSAGES**

by Bennet Susser

When the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹ attorneys carefully scrutinized the decision to see how it would affect their practice. Most litigators (civil and criminal), at some point in their careers, will be required to introduce or oppose scientific evidence at trial. Corporate and transactional attorneys also are concerned if their clients may be exposed to lawsuits based on novel scientific theories.

The public also has an affinity for seeing science introduced into the courtroom. Many of the most exciting civil and criminal cases of recent times have hinged on scientific evidence. However, unlike attorneys, the public will not read actual case decisions. Instead, they rely on a secondary source — the media — for information on developments in science and law.

When the media reported the *Daubert* decision, many different messages were sent. Indeed, some of these messages caused confusion, both among attorneys and lay persons alike. Some articles saw the decision as a defeat for business, while others found it to be a means to exclude claims against business based on "junk science." While several news stories focused on the belief that consumers will now have greater access to courts, still others observed that consumers relying on pseudo-sciences will no longer be able to maintain their actions. Some reports believed that experts would now have a stronger voice in the courtroom, while others found that it is the judges who now possess greater control over what an expert may say. Articles also differed on the strength of the decision. The following are a few examples of the many mixed signals that the public received shortly after the Supreme Court handed down its decision.

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On June 29, 1993, the morning after the high court released its opinion, two of the most analytical and well written newspapers in the country conveyed diametrically opposite reports on *Daubert*. THE WALL STREET JOURNAL, under the headline *Justices Rule Against Business In Evidence Case: Restrictive Standard for Use of Scientific Testimony in Trials is Struck Down*, reported a horrible defeat for defendants opposing the introduction of untrustworthy scientific evidence:

The unanimous decision was a defeat for business and the medical profession which have argued for years that they are subjected to countless consumer lawsuits based on dubious scientific evidence.²

As a leading business newspaper, this article must have sent shockwaves across corporate America.

On the other hand, the NEW YORK TIMES, under the headline *Justices Put Judges in Charge of Deciding Reliability of Scientific Testimony*, presented a more optimistic outlook for business:

The 7-to-2 decision invited judges to be aggressive in screening out ill-founded or speculative scientific theories.³

Did business win or lose? As Americans, we are fixated on declaring winners and losers. Yet *Daubert* was not about one winning or losing. *Daubert* simply changed the rules (or reinforced the Federal Rules) of determining the admissibility of scientific evidence.

Several articles communicated the message that the opinion is a benefit to the public — but for different reasons. Several reporters conveyed the idea that the rejection of *Frye* as a litmus test standard for admissibility will provide injured consumers with greater access to courts based on novel scientific theories. A BALTIMORE MORNING SUN article, *More Expert Testimony of Birth Defects OK'd*, describes the decision as

unlocking the doors of federal courts for injured consumers:

In a unanimous ruling, the court opened the federal courts to hear more scientists and doctors giving their opinions about how birth defects, diseases or injuries were caused — perhaps linking them to such things as medicines, surgery, industrial chemicals and faulty products. Often "expert witnesses" who have been called to offer that kind of testimony have been barred from the witness stand, on the theory that their views were too novel, or untried, and not widely accepted by their peers.

...

...But the controversy [regarding "junk science"] also has had a wide impact on consumers, patients and workers in general.⁴

USA TODAY ends its article, *Scientific Testimony Gets Boost* with a quote from a plaintiff's attorney stating that the ruling relaxing guidelines on scientific evidence "is a clear victory for consumers."⁵

Similarly, the UPI newswire for June 28, 1993 reported that the decision "could make it easier to sue drug companies for damages."⁶ Another UPI newswire released on December 23, 1993 presented a review of significant Supreme Court decisions. It cited *Daubert* as one of two decisions that "not only made corporate attorneys do a double take, but also could affect consumers and those who sue corporations."⁷ In discussing *Daubert*, UPI observed that "[i]n essence, the ruling makes it much easier to sue companies for injuries."⁸

On the other hand, several other articles found *Daubert* as a way to exclude farfetched theories brought under the auspices of "science."

According to an article in Albany's TIME UNION entitled *Trashing the 'Junk' in Court*, the decision offered some hope that judges, after familiarizing themselves with science, will exclude "junk science." The article recognized that companies are forced to take products off of the market even though there is no reliable scientific evidence. The mere existence of lawsuits, presumably as conveyed by the media, will cause a decline in sales and removal of a good product from the marketplace.⁹

Similarly, according to an editorial appearing in the MIAMI HERALD on July 13, 1993 entitled *'Junk' Science on Trial: and Public Could Benefit*, the high court ruling set the stage for the elimination of "junk science" in the courtroom. Praising efforts by the Carnegie Commission on Science, Technology and Government to educate judges in science, the writer observes that:

Any guide that enhances public understanding of science and its processes is to be hailed. In the courtroom, especially, such understanding has become vital to the nation's commerce and well-being.¹⁰

In essence, the press has used *Daubert* as a vehicle to convey two distinct and recurrent themes prevalent in the public's mind: (1) the incredible obstacles that valid claimants must overcome to recover for their injuries; and (2) the widespread prevalence of frivolous lawsuits flooding the courts. However, *Daubert*, at least on its face, did not intend to address either of these two concerns. It merely charged trial judges with the responsibility of performing an enlightened analytical procedure to determine whether to admit scientific evidence.

Headlines reporting the decision also conveyed different meanings to the public. Without reading the text of the article, readers may receive different messages about whether it is the judge or the expert who now has more

power. The WASHINGTON POST's headline, *Judges Get Broader Discretion in Allowing Scientific Testimony* leaves the reader with the impression that judges will now have more flexibility in determining when scientific evidence may be introduced at trial.¹¹ However, the SAN FRANCISCO CHRONICLE ran virtually the identical article under the headline *Ruling Broadens Testimony by Experts*.¹² This conveys a message to readers that it is not the judges but the experts who now have wider latitude in the area of scientific evidence. Does this mean that experts may now testify about more issues than was previously been permitted, irrespective of an analysis by the court? If you read the actual decision, the answer is obviously no. But if you only rely on the SAN FRANCISCO CHRONICLE's article, you may not be so sure.

Articles also differed on the decisiveness of the decision. For example, the BOSTON GLOBE (and other Associated Press newspapers) ran a story entitled *Justices Allow Latitude on Admitting Scientific Evidence*. This article cited a number of portions of the decision, stating that the Supreme Court is confident that federal judges are able to review proffered scientific evidence to determine that it is both relevant and reliable.¹³ On the other hand, the LOS ANGELES TIMES, in an article entitled *High Court Relaxes Curbs on Expert Witness Testimony*, found the decision vague. "In the wake of such vagueness, lawyers on both sides of the case claimed victory, disagreeing on how rigorous the court's screening guidelines are."¹⁴

Reporting that the Supreme Court issued a vague opinion only serves to frustrate the public's expectancy for specific guidance from the highest court of the land. It also furthers the belief that justice moves at a painfully slow pace. To say the decision is vague is also wrong. *Daubert* is specific. It is a firm directive to all federal trial judges that they must apply the Federal Rules of Evidence and carefully and thoroughly review proffered scientific evidence to determine admissibility.

As attorneys, we must be concerned that the public is receiving accurate information. After all, juries are drawn from the public, and any perceptions (or misconceptions) received from the press will ultimately work its way into the jury deliberation room. *Daubert* held that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."¹⁵ The press must also ensure that its reporting is reliable.

Endnotes

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ___, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
2. *Justices Rule Against Business In Evidence Case: Restrictive Standard for Use of Scientific Testimony in Trials is Struck Down*, WALL ST. J., June 29, 1993, at A3.
3. *Justices Put Judges in Charge of Deciding Reliability of Scientific Testimony*, N.Y. TIMES, June 29, 1993, at A13.
4. *More Expert Testimony of Birth Defects OK'd*, BALTIMORE MORNING SUN, June 29, 1993, at 4A.
5. *Scientific Testimony Gets Boost*, USA TODAY, June 29, 1993, at 2A.
6. UPI, June 28, 1993, available in WESTLAW, UPI Database.
7. UPI, Dec. 23, 1993, available in WESTLAW, UPI Database.
8. *Id.*
9. *Trashing the 'Junk' in Court*, TIMES UNION, July 25, 1993, at A1.
10. *'Junk' Science on Trial: and Public Could Benefit*, MIAMI HERALD, July 13, 1993, at 6A.

11. *Judges Get Broader Discretion in Allowing Scientific Testimony*, WASHINGTON POST, June 29, 1993, at A06.

12. *Ruling Broadens Testimony by Experts*, S.F. CHRONICLE, June 29, 1993, at A3.

13. *Justices Allow Latitude on Admitting Scientific Evidence*, BOSTON GLOBE, June 29, 1993, at 11.

14. *High Court Relaxes Curbs on Expert Witness Testimony*, L.A. TIMES, June 29, 1993, at A14.

15. *Daubert*, 509 U.S. at ___, 113 S. Ct. at 2795, 125 L. Ed. 2d at 480.