

Your Work is Done, But Will A Jury Ever Hear About it?

Admissibility of Expert Evidence at Trial

Scott McDaniel, JD, PE-Retired

McDANIEL ACORD, PLLC

TULSA, OKLAHOMA



Environmental Forensics and Litigation

- Identification and Quantification of Injury / Impact
- Causation
 - Source Identification
 - Fate & Transport
- Allocation / Apportionment
- Remedy



Admissibility is the Key

- To the Success of the Engagement, and
- To the Success of Your Career

Federal Rule of Evidence 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

FRE 702 Essential Elements For Admissibility

1. Qualified
2. Testimony is relevant
3. Based on sufficient data
4. Reliable principles and methodology
5. Reliable application

Daubert

***Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)**

- Landmark case – entirely changed the landscape for the admissibility of expert opinion evidence and defined Trial Judges’ “gatekeeping” role to prevent unreliable expert evidence from reaching the jury.
- FRE 702 revised after 1993 to incorporate the U.S. Supreme Court’s analysis in *Daubert*.

Daubert

“Daubert” is forever entrenched in the legal lexicon. It has become:

- A noun
- A verb
- An adjective
- The expert’s “Scarlett Letter”

What is the Proper Pronunciation?

Answer – It Depends...

Daubert



+



For use in areas of the country where hot tea is consumed at breakfast

Daubert



+



For use in areas of the country
where gravy is its own food group

Daubert

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

- Held that FRE 702 superseded the long-standing “Frye Test,” from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1928)
 - Scientific evidence is admissible only if the principle upon which it is based is sufficiently established to have general acceptance in the field to which it belongs.
- Going forward, “general acceptance” is no longer an absolute prerequisite, but may be one of the criteria in the trial court’s analysis.

Daubert

- *Daubert* focused on FRE 702(2) – is the expert’s opinion the product of reliable principles and methods?
- At issue in *Daubert* was scientific evidence – did the drug, Bendectin, cause plaintiffs’ birth defects.
- U.S. Supreme Court expanded *Daubert*’s principles to ALL expert testimony, not just testimony based on science. *Kumho Tire Co. v Carmichael*, 526 U.S. 137 (1999) (tire failure expert).

Daubert

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

- *“Under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”*
- *“The inquiry...is, we emphasize, a flexible one.”*
- *“The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.”*

Non-Exclusive Reliability Checklist

#1: Whether the expert's theory or method can be or has been tested?

- Can the method or theory be challenged in an objective sense?
- Is the method or theory a subjective or conclusory approach that cannot be tested for reliability?
- Always begin with an objective hypothesis and document compliance with the Scientific Method. No pre-determined outcomes.
- *Daubert – “But, in order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method.”*

Non-Exclusive Reliability Checklist

#1: Whether the expert's theory or method can be or has been tested?

The Scientific Method:

- Expert seeks to prove a hypothesis by generating data from a well-designed and executed study, employing a null and alternate hypothesis, and designing and performing tests to disprove the null hypothesis.
- Data generated in the study must meet applicable standards of statistical significance before concluding that the hypothesis is proven₁₃

Non-Exclusive Reliability Checklist

#2: Whether the expert's theory or method has been subject to peer review and publication?

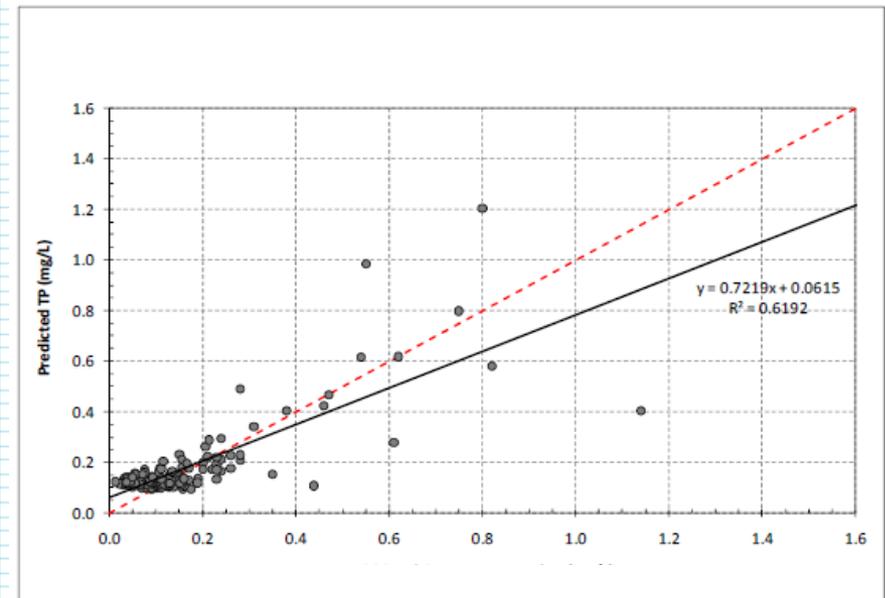
- Reputation and quality of the publication?
- Is the peer review rigorous or illusory?
- Published solely to support litigation?



Non-Exclusive Reliability Checklist

#3: What is the known or potential error rate?

- Is the potential error known from reliable sources?
- Has the error rate been determined, and if so, what is it?



Non-Exclusive Reliability Checklist

#4: Whether standards and controls exist and were maintained?

- Use objective, well recognized standards – i.e., EPA, ASTM
- Develop and adhere to a QAPP
- Use certified laboratories
- Use qualified personnel
- Document everything



Non-Exclusive Reliability Checklist

#5: Whether the method or theory has been generally accepted in the relevant field

- Publication?
- Has the method been replaced or updated?
- Has the method received minimal acceptance?
- Did the study adhere to the accepted method?



Non-Exclusive Reliability Checklist

#6: Whether the testimony derives from the expert's research or work outside of the litigation?

- Were opinions developed solely to support the litigation?
- Does the expert have an active professional practice other than as a litigation expert?

Non-Exclusive Reliability Checklist

#7: Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion?

- Too great an analytical gap between the data and the opinion offered
- *Ipse Dixit* – simply because she says so



Non-Exclusive Reliability Checklist

#8: Whether the expert has adequately accounted for obvious alternative explanations?

- Again – adhere to the Scientific Method
- Present an objective analysis, don't deliver a litigation outcome-driven conclusion
- Document that alternative explanations were identified and eliminated through robust analysis

Non-Exclusive Reliability Checklist

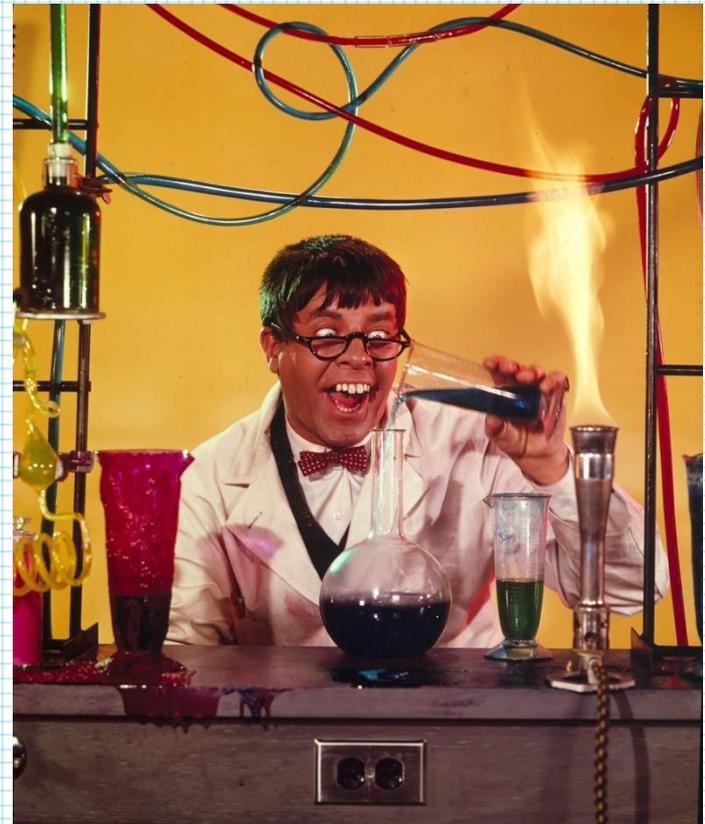
#9: Whether the expert was as careful as he would be in his regular professional work?

- Adhere to all standards applicable to the work outside of the litigation context.
- Document everything.

Non-Exclusive Reliability Checklist

#10: Whether the field of expertise is known to reach reliable results?

- General acceptance of the legitimacy of the field.
- Novel or “junk science” likely inadmissible.



In Conclusion

- Preserve your credibility
- Maintain objectivity
- Use well documented and accepted methods
- Follow all defined protocols and document the justification for any deviation
- Vet any new or novel approach with your client and its attorney
- Don't put it in writing unless you are willing to be cross-examined about it
- Support every conclusion with data and analysis
- Leave the advocacy to the attorneys