DAUBERT "OBSERVATIONS" ARE JUST THAT

Recently, the U. S. Supreme Court held that federal district court decisions admitting or refusing to admit expert scientific testimony into evidence are reversible only if they constitute an abuse of discretion.[i] This effectively decreases appellate review and empowers the trial judge to decide whether a case involving expert scientific testimony goes to trial. That means busy trial judges must make difficult decisions about a scientific theory or technique for which they may have little or no formal training. And considering the multitude of scientific disciplines, and that within a single scientific discipline there may exist multiple models for the evaluation of a theory, the facts can quickly become opaque. Assuming Louisiana appellate courts follow this abuse of discretion standard, it is helpful to re-examine the holding of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[ii] since the U.S. Supreme Court's "observations" about admissibility or exclusion of scientific testimony in that case employed an analysis adopted by Louisiana courts.[iii] This analysis offers guidance for the trial court's evidentiary decision.

In *Daubert,* the U. S. Supreme Court offered some "general observations" to help a trial court assess the reliability of the methodology of witnesses who offer scientific testimony about a theory or technique. The four non-exclusive suggestions are: (1) whether a theory or technique can be or has been tested, (2) whether it has been subjected to peer review or publication, (3) its known or potential rate of error, and (4) its general acceptance in the scientific community. Yet, some Louisiana appellate courts have woodenly recited these four factors as if they are requirements.[iv] And some litigants, seeking to deny the admission of testimony urge conversion of these suggested factors into a rule. This is contrary to the explicit statement of *Daubert* that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. . . .The inquiry . . . is, we emphasize, a flexible one."[v]

The reason for this flexibility is that many opinions in the scientific realm are not testable, measurable or published. As examples, could medical testimony about the cause of a worker's cancer be "tested"? Could orthopedic testimony that disc surgery occurred because of chronic trauma at work rather than a car wreck be "tested"? Can an "error rate" be measured as to psychiatric testimony about a criminal defendant's mental state at the time he allegedly murdered someone? As one commentator has suggested, "Plainly, courts are going to have to ignore *Daubert's* factors in that area [psychiatric testimony], or else *Daubert* will have achieved an unintended elimination of all psychiatric testimony from federal courts. And the same is true for tort cases, once it is recognized that in a tort case the plaintiff doesn't have to prove causation to a degree of scientific certainty but only that it is likelier than not."[vi]

About the third factor, publication, the *Daubert* court wrote: "The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." There is good reason for this flexible approach. According to Sheila Jasanoff, Chair of Cornell's Department of Science and Technology Studies, who was cited by the court in *Daubert*:

> ". . .Journal editors and funding agencies can promote, modify, delay or kill scientific submissions simply by choosing referees with known disciplinary or

> methodological biases. Peer review practices and standards also vary widely across journals, disciplines, and professional societies. In sum, while peer review improves the overall quality of research, as well as the likely integrity of individual publications, it does not mechanically guarantee reliability. Courts therefore should neither be wholly dismissive of peer review nor accord it more respect than it deserves."[vii]

And, the absence of published data concerning a novel scientific opinion may mean nothing at all. A company may choose not to study a potential or known problem simply because it is afraid of the answer, practicing a sort of group psychological denial. Or, knowing the answer, it may choose to suppress the information such as happened in the asbestos industry. Worst of all, an entire industry can produce knowingly flawed information under the guise of research, or under the claim of privilege, as has the tobacco industry.[viii]

"General acceptance", the last observation, is just the old *Frye*[ix] rule, which *Daubert* overruled as the sole criterion for admittance of scientific testimony. It is not really a component of methodology but a recognition that the majority in a scientific community accept a technique or methodology as an acceptable way to evaluate its scientific research. Obviously, if anything was admissible under *Frye*, it is admissible under *Daubert*. The *Daubert* court wrote about the *Frye* standard "That austere standard, absent from, and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.[x] But trial courts should be mindful that scientific consensus is itself no guarantee of correctness, as has been historically shown time after time. Consensus often changes and may be based on shared beliefs that are wrong. When 100 physicists attempted to discredit the theory of relativity in a collection entitled *One Hundred Authors Against Einstein* in 1930, Einstein responded, "Were my theory wrong, it would have taken but one person to show it."[xi] Yet the 1923 *Frye* decision would have excluded Einstein's theory had the theory of relativity been an evidentiary issue in 1930.

The trial court's analysis of a theory must give due consideration to the simple fact that the standard of proof in a civil trial is still, and always has been, more likely than not. Indeed, it may be impossible or inadvisable to adapt scientists' own standards of proof to the case at hand. As Professor Sheila Jasanoff has written, "It is often said that standards of proof are fundamentally different in science and the law. Thus, proof for scientists generally amounts to something like a 95 percent certainty that a presumed cause-effect correlation is not due to mere chance. Proof in civil litigation, by contrast, requires only a showing that the harm alleged was more probably than not caused by the defendant's conduct. Overly stringent restrictions on admissibility could imperceptibly ratchet up the standard of proof in civil litigation. It should be noted that the *Daubert* majority viewed the older 'general acceptance' test from *Frey* as too restrictive."[xii]

Trial courts should not require proof greater than more likely than not. And, trial courts should be mindful of another admonition of the *Daubert* court, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[xiii]

i*Joiner v. General Electric Co.,* 66 USLW 4036 (1997)
ii
509 U.S. 579 (1993)
iii*State v. Foret*, 628 So.2d 1116 (La. 1993)
iv *State v. Quatrevingt*, 670 So.2d 197 (La. 1996); *Southern Message Service, Inc. v. Commmercial Union Ins. Co., et al.,* 647 So. 2d 398, 26, 311 (La.App. 2 Cir. 12/7/97); *State v. Schmidt*, 1997 WL 435026, 97-249 (La.App. 3 Cir. 7/29/97); *Clement v. Griffin,* 91-1664, 634 So.2d 412 (La.App. 4 Cir. 3/3/94)
v*Daubert,*509 U.S. 579, 593
vi Michael H. Gottesman, *Should State Courts Impose "Reliability" Threshholds On The Admissibility of Expert Scientific Testimony Respecting Causation in Tort Cases?,* 1997 Forum For State Court Judges 10(The Roscoe Pound Foundation) July 19, 1997
vii Sheila Jasanoff, *Judging Science: Issues, Assumptions, Models,* 1997 Forum For State Court Judges 5 (The Roscoe Pound Foundation) July 19, 1997
viii *Bliley Releases 850 Confidential Documents; Industry Decries Observation With Events Past*, 12 BNA Toxics Law Reporter*,* 829 (December 24, 1997)
ix9. *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923)
x*Daubert*, 509 U.S. at 579, 587
xiKenneth J. Rothman, *Causal Inference* 6 (Kenneth J. Rothman, et. al. eds., 1988)
xii Sheila Jasanoff, *Judging Science: Issues, Assumptions, Models,* 1997 Forum For State Court Judges 9 (The Roscoe Pound Foundation) July 19, 1997
xiii*Daubert*, 509 U.S. 579, 595