

HOW THE DAUBERT-KUMHO RULINGS EFFECTS MEDICAL EXPERT WITNESSES

(abstracted from an article for publication for physicians by Perry Hookman MD, FACP, FACG-Dr.Hookman is Board Certified in both Internal Medicine and Gastroenterology)

www.hookman.com

The 1993 Supreme Court Daubert ruling followed by the 1999 Kumho decision now imposes significant incentives to both plaintiff and defendant in Medical malpractice cases to bar unreliable expert testimony. The Daubert – Kumho rulings now make the proper selection of an appropriate medical expert crucial. Because now the Daubert’s “gate keeping” role for trial judges may exclude even a Board Certified medical expert in the same specialty. An expert long on experience but lacking published empirical data supporting their conclusions will not make the grade.

Daubert teaches that one should not just rely on the credentials of the medical expert. The medical expert in Federal court, and increasingly in the State courts, must be more than credible, as evidenced by Board Certification. Testimony must continue to be based on medical knowledge within the physician’s expertise. But whenever possible, the medical expert must currently also support all methodology and opinions with **objective documentation and “reliable methodology”**. The important questions now are: Has the expert’s theory or technique in question been tested? Has it been subjected to peer review and publication? What is its error rate? Do standards exist? Is there widespread acceptance in the medical community? In summary with what learned treatises from peer reviewed medical publications can the medical expert document and thus support his opinions or theories? The Daubert test applies to all scientific evidence. (509 U.S. at 593,n.11) The Daubert-Joiner-Kumho trilogy has in practice raised the bar for admissibility of expert testimony in every category. Additionally it is difficult if not impossible, for even an experienced medical clinician or practitioner to offer an expert opinion based on technical or specialized knowledge obtained through experience or education alone.

The Daubert revolution has been codified and arguably extended through amendments to the Federal Rules of Evidence.

702.A clause has been added which requires proof that 1.) All expert testimony is based on sufficient facts or data, 2.) Expert testimony is the product of reliable principles and methods, and 3.) That the expert applies the principles and methods reliably to the facts at issue in the case.

706. Authorizes the federal courts to appoint their own expert witnesses, and retains substantial discretion in their choice and use. Experts who have acceptable credentials but who lack support from established universities or validation of their theories in the medical literature are unlikely to be appointed. A party that knows that the scientific literature supports its position gets a triple reward if the court grants its motion for a court appointed expert: The expert likely supports its position, the expert’s fees are split with its opponent, and the witness may receive an invaluable imprimatur before the jury as the “court appointed expert.”

Daubert makes it easier for attorneys to exclude unreliable, irrelevant testimony. An aggressive motion practice (a motion for summary judgment and a motion to exclude the expert’s testimony) can help to dispose of meritless cases.

Thus now the medical expert must increasingly make a great effort to document all his stated opinions from peer reviewed medical literature. This requires thorough research of published clinical guidelines (used in this context -if accepted by the court under Federal Rules of Evidence 803(18)- as learned treatises), &/or Specialty Position Statements. The medical expert must also research medical articles from evidence based medical literature, &/or current peer reviewed published articles on the medical standard of care, -dealing with the litigated issue(s) during the contested period. This requires that the medical expert be selected not only by his appropriate credentials, his knowledge of the standard of care, and his experience with the issues involved, but most importantly with his ability to correlate his

medical opinions with the peer reviewed medical literature- in such a way that his opinion is thoroughly backed up with the most recent literature in the field.

Objective information has always been important, especially when other medical experts as is usually the case have opposite medical opinions based on anecdotal “experience”. But objective and documented medical information is now crucial. In some instances the medical expert’s opinion on the standard of care **when supported by peer reviewed medical literature** was admissible even though his professional background did not perfectly match that of the defendants.

The competent medical expert in the new millennium realizes that the real world documentation of the medical standard of care is usually not found in classic medical textbooks whose out of date medical information is already about 5-10 years old -even on the day of publication. Instead, every tenet of the expert’s theory, opinion, and reasoning must now be supported by adequate documentation from peer-reviewed medical literature whenever appropriate. Thus support of the expert’s medical opinions now demands a thorough familiarity with peer reviewed current medical journals, and good computer dexterity with the medical research engines of Medical School Hospitals, Medline, and the National Library of Medicine.

References:

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

Kumho Tire Co. Ltd. V. Carmichael, 526 U.S. 137 (1999)

***States declining the Daubert rules:** States declining to follow Daubert have rules similar to the Daubert criteria. Also many jurisdictions typically continue to follow the “general acceptance” test articulated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Although the Frye test predated the Federal Rules of Evidence by half a century, it continued to serve as an aid to their application until Daubert held it inapplicable to cases arising under Rule 702. As a consequence, several states not adopting Daubert have relied on the similarity between their evidence codes and the Federal Rules of Evidence.