On the Abuse of *Daubert*

Defendants have filed *Daubert* flavored motions to exclude evidence in this case. Before addressing applicable law, petitioner offers a few comments on the all too common practice of defendants to file such motions. This is not about picking on the defendants in this case. On the contrary, defendants are simply doing what most of them do--converting potential lines of cross-examination into *Daubert* motions. The defendants in this case seek to exclude the testimony of a doctor because he relied on medical records of the deceased, that of a toxicologist because he followed the methodology of a standard text he co-authored, and crash data retrieval downloaded in accordance with a truck manufacturer's specifications.

The precise year defendants began filing indiscriminate *Daubert* motions is difficult to pin down but it's clear a tipping point was reached some time in the late 1990s when the practice became standard. Here's how it works. As explained below, respected commentators have written and some courts hold that a *Daubert* issue must be raised by providing conflicting medical literature or expert testimony. Petitioner's oppositions to the various *Daubert*-related motions show this was not done in this case. What defendants usually do instead was done here which is to raise questions which may be permissible as cross-examination (and preferably confuse or complicate the issue at hand) and graft the questions to a *Daubert* buzzword or phrase; methodology if you're in Louisiana state court; sufficient facts or data, the expert's methodology, or lack of reliable application of the methodology to the facts, if you're in federal court. Voilà. You now have what defendants call a *Daubert* motion.

The explosion of *Daubert* motions is particularly troubling because the *Daubert*

court specifically recognized federal Rule 702's "liberal thrust" and its "general approach of relaxing the traditional barriers of opinion testimony." And recall that *Daubert* itself was about a cutting edge tort involving toxic insult from the anti-nausea drug Bendectin. By contrast, this case involves vehicles colliding. Although the harm suffered is catastrophic, the relevant scientific principles involved in defendants' motions are those of vehicular speed, medical treatment of burns, and intoxication associated with abuse of alcohol.

Before turning to each motion of the defendants, let's look at the evolution of *Daubert*, its application in Louisiana, and some new procedural considerations in the Louisiana Code of Civil Procedure. Attendant with these considerations, , it is easy to forget that *Daubert* does specify criteria that expert scientific evidence must satisfy. First, the evidence must be relevant under L. C. E. Art. 401, a weak condition which is satisfied if the evidence tends to make some fact in issue more probably true than it would be in the absence of the evidence. Second, the evidence under L. C. E. Art. 702 must be "grounded in the methods and procedure of science." All the trial judge is asked to decide in a *Daubert* hearing is whether the proffered evidence is based on "good grounds" tied to a sufficient methodology. The trial court's gatekeeping function should not determine whether opinion evidence is correct or worthy of credence--that's the jury's job.

A Short History of Expert Testimony in Federal Courts

For seventy years the case of *Frye v. United States*[i] controlled the admissibility of expert scientific evidence in federal courts. Courts applying *Frye* typically limited its application to so-called "black box" testimony, i.e. machines, devices, or techniques that authoritatively and automatically decide outcome-determinative "truths,"[ii] since such

testimony has the aura of infallibility and thus the potential to overawe the jury.[iii]

The *Frye* court affirmed the trial court's refusal to allow a scientist's testimony about a criminal defendant's test results from a predecessor of a polygraph machine stating that before admitting expert scientific testimony "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." For the most part, U.S. courts only applied the *Frye* test in criminal cases.[iv] And *Frye* did not stand as a roadblock to the admissibility of scientific expert testimony, being cited less than one hundred times in federal and state cases until 1975.[v] In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[vi] the United States Supreme Court considered whether *Frye* survived the 1975 adoption of Federal Rule of Evidence 702. The rule, since changed, provided:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The court held Rule 702 superceded *Frye's* "rigid" requirement that testimony based on a scientific methodology or technique was admissible only if it had achieved "general acceptance" in the relevant field. The *Daubert* decision recognized Rule 702's "liberal thrust" and its "general approach of relaxing the traditional barriers to opinion testimony." The decision directs trial courts to assess whether proffered testimony or evidence admitted at trial is not only relevant but reliable.[vii]

According to *Daubert*, trial courts should make a "preliminary assessment of

whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[viii] The court referenced five factors that should guide the trial court's decision. It emphasized none of the factors was indispensable and the overall inquiry is a flexible one. The "nondefinitive checklist" directs trial courts to evaluate:

> (1) whether the expert's technique or theory can be or has been tested - that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
>
> (2) whether the technique or theory has been subject to peer review and publication;
>
> (3) the known or potential rate of error of the technique or theory when applied;
>
> (4) the existence and maintenance of standards and controls; and
>
> (5) whether the technique or theory has been generally accepted in the scientific community.

Over the next seven years, the U. S. Supreme Court addressed the admissibility of expert testimony three more times. In *General Electric Co. v. Joiner*[ix] the court held that appellate courts must apply the highly deferential "abuse of discretion" standard to trial court rulings admitting or excluding scientific evidence. The *Joiner* court also allows federal trial courts to examine the relationship between an expert's methodologies and conclusions, stating that they "are not entirely distinct from one another." The court concluded that a trial court must not "admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."[x]

The supreme court concluded in *Kumho Tire Co. v. Carmichael*[xi] that Rule 702 mandates all types of expert evidence are subject to the "gatekeeping" requirements of *Daubert*. *Kumho* contains language which reemphasized the five *Daubert* factors could not always be used to evaluate the reliability and admissibility of all types of expertise. Trial courts should have broad discretion to devise alternative tests for "determining whether particular expert testimony is reliable."[xii] It is not necessary that all, or even one, of the *Daubert* factors be satisfied for the testimony to be admissible. Expert testimony from historically reliable disciplines which conforms to the standards associated with those disciplines shall be freely admitted. Conclusions consistent with commonly used methodologies will be admissible when drawn "from a set of observations based on extensive and specialized experience."[xiii] And most significantly, trial courts may use discretion "to avoid unnecessary 'reliability' proceedings in ordinary cases when the reliability of the expert's methods is properly taken for granted."[xiv] The court emphasized that the best gauge for assessing whether expert testimony is reliable is whether the expert employs in the courtroom the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[xv]

In *Weisgram v. Marley Co.,*[xvi] the court ruled that an appellate court reversing a trial court's decision to admit an expert's testimony need not remand the case to allow that party a second chance to cure what the appellate court regarded as unreliable evidence. Thus, the party affected by the exclusion of the evidence may not be permitted to reexamine the disqualified expert so as to provide a satisfactory explanation of his methodologies' reasonings and conclusions. Further, the party harmed by the appellate decision to exclude testimony may not be permitted to find other experts who can validate or cure the excluded expert's work.

Rule 702 was amended in 2000 in response to *Daubert* and *Kumho*.[xvii] Rule 702 now provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *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.*

The italicized language "affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."[xviii] The committee notes on amended Rule 702 make plain that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."[xix]

***Daubert* as Applied in Louisiana State Courts**

The Louisiana Supreme Court adopted the principles set forth in *Daubert* in *State v. Foret*.[xx] In applying these principles, the trial court is vested with vast discretion.[xxi]

Whether a person meets the qualifications of an expert witness and is competent to testify in a specialized area is within the discretion of the trial court.[xxii] A district court's decision to qualify an expert will not be overturned absent an abuse of discretion.[xxiii] Louisiana Code of Evidence Article 104 allows the court to conduct a

preliminary hearing to determine whether the qualifications and/or opinions of an expert are reliable enough to allow them to be heard by the jury.

Foret establishes that Article 702, which is based upon former federal Rule 702, controls the admissibility of expert scientific evidence in Louisiana. For the testimony of an expert to be admissible, the court must first determine whether the expert's reasoning or methodology embodies "the knowledge and experience of his discipline." In making this reliability determination, the applicability of the five "*Daubert*" factors may be considered by the court.[xxiv] The *Daubert* factors are flexible and do not represent a definitive checklist. Some or none of the factors may be readily applied in a particular case.[xxv]

Note that the court must proceed under Article 702 (identical to former federal Rule 702) as opposed to present federal Rule 702. Despite an attempt in the 2001 Regular Session, the Louisiana Legislature has refused to follow the new federal Rule 702 approach.[xxvi]

While former federal Rule 702 and current state Article 702 focus on the methodology of the expert, amended federal Rule 702 allows further gatekeeper inquiry into the expert's conclusions as well by testing whether the expert had sufficient facts (step 1 - "the testimony is based upon sufficient facts or data") and whether the expert reliably applied the methodology to those facts (step 3 - "the witness has applied the principles and methods reliably to the facts of the case.") *Daubert*, 509 U.S. at 595, clearly limited the relevant inquiry to methodology only - "the focus, of course, must be solely on principles and methodology, not on the conclusions they generate." The Louisiana Supreme Court has endorsed this focus on methodology only.[xxvii]

Louisiana appellate courts have repeatedly emphasized that the sole focus is the

expert's methodology, not the expert's conclusions. Two cases from the Fourth Circuit clearly articulate the narrower Louisiana rule.

> Recently, this Court decided[xxviii] that *Daubert* comes into play only when the methodology used by the expert is being questioned. This court found it improper to use Daubert analysis when questioning the conclusions reached by applying the methodology to the facts.[xxix]

The Fifth Circuit agreed in *Keener v. Mid-Continent Casualty:*[xxx]

> We find that the trial court did not err in admitting [the doctor's] testimony. The requirements of *Daubert* and *Foret* were satisfied. The focus of the gatekeeper under C.E. art. 702 "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. 579, 595.

The First Circuit supports this view.

> The *Daubert*/*Foret* guidelines require "only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion."[xxxi]

Thus, in Louisiana, as long as the expert's methodology is acceptable, cross-examination at trial is the means by which the facts and application are tested whereas federal courts now test facts and application at the gatekeeper hearing before allowing the expert to testify at all. While one can argue whether the new federal approach is helpful or impermissibly invades the province of the trier of fact, it is inarguable that

the new federal approach goes beyond Louisiana Article 702. Focusing on methodology only, the experts qualified in Louisiana should only be excluded if they violate fundamental principles of their disciplines' methodologies. Of course, the testimony must "fit" the facts of the case by assisting the trier of fact to understand the fact in issue.[xxxii]

Triggering a Hearing

The trial judge decides whether to admit or exclude expert testimony.[xxxiii] But there is little guidance as to when an evidentiary hearing is required or what procedures a court should employ in deciding whether to admit expert testimony. *Kumho* states "[t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable."[xxxiv] And *Kumho* advises that the trial judge has discretion to avoid "unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted."[xxxv] But the threshold showing required for a *Daubert* hearing is unclear and varies depending upon the court and jurisdiction.

It is plain that trial courts are more likely to conduct a *Daubert* hearing on "less usual or complex cases,"[xxxvi] once the opposition has called the expert's proffered testimony "sufficiently into question."[xxxvii] In civil cases, a court might refuse "to undertake any reliability-relevancy determination until the movant has made a prima facie showing of specific deficiencies in the opponent's proposed testimony."[xxxviii] The Fifth Circuit has concluded that the issue was raised "by providing conflicting medical literature and expert testimony."[xxxix] Other federal circuit courts of appeal have

specifically found that district courts are not required to hold a pretrial evidentiary reliability hearing in carrying out their trial court gatekeeping function.[xl]

Louisiana appellate courts have supported a trial court's denial of a motion in limine to conduct a *Daubert* hearing as being within the trial court's discretion.[xli] But the Louisiana Supreme Court has granted writs to overturn the trial court's refusal to conduct an evidentiary hearing to determine whether proposed expert testimony is scientifically reliable.[xlii] And an appellate court has held that the trial court was required to hold a *Daubert* hearing to determine the admissibility of an expert opinion.[xliii]

Louisiana procedural law concerning *Daubert* hearings was clarified by Act 787 of the 2008 legislative session. Amendments to LSA CCP art. 1425, which became effective in 2009, require a pre-trial hearing only if the movant sets forth "sufficient allegations" showing the necessity for such a hearing. Art. 1425 F (1) provides:

> Any party may file a motion for a pretrial hearing to determine whether a witness qualifies as an expert or whether the methodologies employed by such witness are reliable under Articles 702 through 705 of the Louisiana Code of Evidence. The motion shall be filed not later than sixty days prior to trial and shall set forth **sufficient allegations** showing the necessity for these determinations by the court. (emphasis added)

Just what are sufficient allegations is not defined in the article but it obviously means something more than a party's musing or random hypothetical coupled with a *Daubert* catch phrase. As a threshold matter, a *Daubert* movant should set forth a statement from a learned text, provide a peer reviewed publication, give the trial judge an affidavit or

deposition from a qualified expert, or some other effort along those lines. Sufficient allegations must mean something and it has to mean more than uninformed speculation of a biased litigant. Without reaching this minimum threshold, there is no need for a hearing in a Louisiana state court.

In federal court, threshold factors for the hearing could presumably include defects in the expert testimony's (1) factual basis; (2) data; (3) principles; (4) methods; or (5) their application, although Louisiana state courts must limit an attack to methods only. Whatever the approach there appears to be a two step trial court inquiry that first requires an initial showing of unreliability and then an ultimate determination of reliability involving application of *Daubert* factors or any factors the trial court deems appropriate.[xliv]

In federal court, a *Daubert* hearing is typically filed as a motion to strike; in state court, such a hearing is usually triggered by a rule to show cause as to why a motion in limine should not be granted. A motion should 1) clearly identify the specific portions of the testimony to which objections pertain; (2) state the grounds for objection in detail with supporting analysis; and (3) attach evidentiary material relied upon in support of the motion.

An objection to the admissibility of evidence is not preserved for appellate review unless a contemporaneous objection to the evidence is made on the record at the trial or hearing.[xlv] When the objecting party fails to request a *Daubert* hearing, objections to the admissibility of an expert witness's testimony under *Daubert* are not preserved for appeal.[xlvi]

At The Hearing

If a *Daubert* hearing takes place, the court "is not bound by the rules of evidence

except those with respect to privileges."[xlvii] In other words, expert testimony may be challenged by inadmissible evidence. "When expert testimony is challenged under *Daubert*, the burden of proof rests with the party seeking to present the testimony."[xlviii] The proponent of expert testimony "need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable."[xlix] For the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case. All the trial judge is asked to decide in a *Daubert* hearing is whether the proffered evidence is based on "good grounds" tied to a sufficient methodology.[l] A trial court "must take care not to transform a *Daubert* hearing into a trial on the merits."[li]

i 293 F.1013, 1014 (D.C. Cir. 1923).

ii Prof. Michael H. Graham, *Scientific and Technological Evidence,* in Handbook Of Federal Evidence15 (4th ed., 1999 Pocket Part); Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law's Hubris*, 43 Emory L.J. 913, 915 (1994).

iii Prof. Michael H. Graham, *The Expert Witness Predicament*, 54 U. Miami L.Rev. 317 (2000).

iv *Developments In The Law,* 108 Harv.L.Rev. 1423, 1529 n. 160 (1995).

v Prof. Michael J. Saks, Merlin and Solomon: *Lessons From The Law's Formative Encounters With Forensic Identification Evidence*, 49 Hastings L.J. 1069, 1076 (1998).

vi *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-595, 113 S.Ct. 2786, 125 L.Ed.2d 469.

vii *Daubert*, 509 U.S. 579, 593-595.

viii *Daubert*, 509 U.S. 579, 592.

ix *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

x *General Electric,* 118 S.Ct. 512, 517-519.

xi *Kumho Tire Company v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

xii *Kumho,* 119 S.Ct. 1167, 1175-1176.

xiii *Kumho,* 119 S. Ct. 1167, 1178.

xiv *Kumho,* 119 S.Ct. 1167, 1176.

xv *Kumho,* 119 S.Ct. 1167, 1176.

xvi *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000).

xvii Advisory Committee Notes, Fed. R. Evid., Rule 702, as amended.

xviii Advisory Committee Notes, Fed .R. Evid., Rule 702, as amended.

xix *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996).

xx 628 So.2d 1116 (La. 1993).

xxi *Mistich v. Volkswagen of Germany, Inc.*, 666 So.2d 1073, 95 0939 (La. 1/29/96), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxii *Merlin v. Fuselier*, 789 So.2d 710, 718, 00-1862 (La.App. 5 Cir. 5/30/01), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxiii *Merlin v. Fuselier*, 789 So.2d 710, 718, 00-1862 (La.App. 5 Cir. 5/30/01), and *Cheairs v. State,* 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxiv The five *Daubert* factors are listed in the section, "A Short History of Expert Testimony in Federal Courts."

xxv *Kumho,* 119 S. Ct. 1167, 1171, and *Independent Fire Insurance Company v. Sunbeam Corporation,* 755 So.2d 226, 234, 1999-2181 (La. 2/29/00).

xxvi Sen. Dardenne (R- EBR Parish) filed Senate Bill 446, it was referred to the Judiciary A Committee, but it never passed even that initial stage.

xxvii *Independent Fire Insurance Company v. Sunbeam Corporation*, 755 So.2d 226, 236, 1999-2181 (La. 2/29/00); and *Blank v. Sid Richardson Carbon & Gasoline Co.*, 762 So.2d. 1115, 2000-1025 (La. 6/2/00).

xxviii *Dinett v. Lakeside Hospital*, 811 So.2d 116, 2000-2682 (La.App. 4 Cir. 2/20/02).

xxix *Doe v. Archdiocese of New Orleans*, 823 So.2d 360, 2001-0739 (La.App. 4 Cir. 5/8/02).

xxx 817 So.2d 347, 355, 01-CA-1357 (La. 5 Cir. 4/20/02); *writ denied*, 825 So.2d 1175, 2002-1498 (La. 9/20/02).

xxxi *Wingfield v. La. DOTD*, 835 So.2d 785 (La.App. 1st Cir. 11/08/02), *writ denied*, 845 So.2d. 1059 (5/30/03), *cert. denied*, 124 S.Ct. 419 (10/14/03).

xxxii *Cheairs v. State*, 861 So.2d 536, 2003-0680 (La. 12/3/03).

xxxiii Fed. R. Evid.104(a) and La.C. Evid. Art 104(a).

xxxiv *Kumho,* 119 S.Ct. 1167, 1176.

xxxv *Kumho*, 119 S.Ct. 1167, 1176.

xxxvi *Kumho,* 119 S.Ct. 1167, 1176.

xxxvii *Kumho,* 119 S.Ct. 1167, 1174.

xxxviii Margaret Berger, *Supreme Court's Trilogy on Admissibility of Expert Testimony, Reference Manual on Scientific Evidence* 28-29 (Fed. Judicial Center 2000).

xxxix *Tanner v. Westbrook*, 174 F.3d. 542, 546 (5th Cir. 1999).

xl *United States v. Alatorre,* 222 F.3d. 1098, 1102 (9th Cir. 2000) (quoting *Daubert*, 509 U.S. @ 592) and *United States v. Nichols,* 169 F.3d. 1255, 1262-1264 (10th Cir. 1999).

xli To the extent *Caubarreaux v. E. I. Dupont deNemours,* 714 So.2d. 67, 71 required a pretrial *Daubert* hearing in every instance, it is likely overruled by *Kumho.* See *Tadlock v. Taylor,* 857 So.2d 20, 2002-0712 (La.App. 4 Cir. 9/24/03).

xlii *Benn v. Hilton,* 815 So.2d. 830, 2002-0620 (La. 5/10/02).

xliii *Corkern v. T.K. Valve, et al.,* 934 So.2d 102, 2004-2293 (La.App. 1 Cir. 3/29/06).

xliv Robert J. Goodwin, *The Hidden Significance of Kumho Tire Co. v. Carmichael: A Compass for Problems of Definition and Procedure Created by Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 52 Baylor L. Rev. 603, 626 (Summer 2000).

xlv La. C.Evid. Art. 103(A); *Davis v. Kreutzer*, 633 So.2d 796, 803 (La.App. 4 Cir. 1994), and *Brown v. Schwegmann, et al.,* 958 So.2d 721, 2005-0830 (La.App. 4 Cir. 4/25/07). Fed. R. Evid. 103(a).

xlvi *State v. Pickett*, 2003-1492 (La.App. 3 Cir. 5/26/04), 878 So.2d 722, and *Brown v. Schwegmann, et al.,* 958 So.2d 721, 2005-0830 (La.App. 4 Cir. 4/25/07). Fed. R. Evid. 103(a).

xlvii Fed. R. Evid.104(a) and La.C. Evid. Art 104(a).

xlviii *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998).

xlix *Tanner v. Westbrook,* 174 F.3d 542 (5th Cir. 1999).

l *Globetti v. Sandoz Pharmaceutical Corporation,* 101 F.Supp. 2d, 1174, 1177 (N.D. Ala. 2000).

li *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239 (5th Cir. 2002).