

DEFENDING AGAINST A DAUBERT CHALLENGE: A COMMENT

by

Reuben E. Slesinger*

Forensic economic expert witnesses in personal injury and wrongful death cases have had their appearance made more difficult by the Supreme Court ruling in *Daubert v. Merrell Dow* (*Daubert et. al.*), individually and as guardians and Litem for *Daubert, et. al. V. Merrell Dow Pharmaceuticals, Inc.* No. 92-102, argued March 30, 1993, decided June 28, 1993, cited as 113 S. Ct. 2786, 1993) and *General Electric Company v. Robert K. Joiner*, 118, S. Ct. 512 (1997).

The Court held that the legislatively-enacted Federal Rules of Evidence provide the authority summarizing that the relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible. Further, relevant evidence is described as that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The basic standard of relevance thus becomes a liberal one.

It is noted that Frye predated the Rules by half a century. The pertinence of background common law in interpreting the Rules is recognized and the common law may serve as an aid to their application.

In Joiner, the Court appears to have liberalized the acceptability of expert testimony. It recognizes that it is a matter of discretion by the district courts whether to receive or exclude expert testimony, and that appellate court will not reverse unless the ruling is "manifestly erroneous." The Court noted that although Frye was replaced by the Rules of Evidence, the Rules (especially Rule 702) place the limits in the admissibility of purportedly scientific evidence, nor is the trial judge prevented from screening such evidence. It is the duty of the trial judge to decide which scientific testimony is to be admitted, but also whether it is relevant and reliable.

In Joiner, where the plaintiff was an electrician suffering from lung cancer, the original district court (Northern District of Georgia) excluded testimony on the plaintiff's expert and granted summary judgement. The Eleventh court reversed and certiorari was granted. The U.S. Supreme Court held that the district court did not abuse its discretionary power to exclude scientific testimony in this case because it was based on studies involving infant mice that received massive doses of PCB and other testimony based on epidemiological studies. The appellate court was reversed and the case was remanded to the lower court. In effect, the district court was upheld in that it did not abuse its discretionary power. Courts may find that there is too great an analytical gap between the data and the proffered opinion. The Supreme Court indicated that there were other probable causes for Joiner's cancer.

It is possible that, in the future based on Daubert and Joiner, trial judges will appoint their own experts. This would help scientifically untrained judges and juries with

* The author is a Professor of Economics at the University of Pittsburgh.

court-selected experts, thereby diminishing the influence of biased expert testimony in complicated litigation. This procedure is a common practice in Europe. Acceptability of the testimony of such experts could be determined at pre-trial hearings, thereby decreasing numerous arguments and delays during the course of the trial.