Gatekeepers in Michigan Courts

Daubert Requires Trial Judges to Close the Gate on Junk Science

By Ellen Keefe-Garner and Beth R. Wickwire

Overview and Relevant Law

For a Michigan plaintiff to prevail in a medical malpractice action, the key elements of breach of the standard of care and causation must be supported by expert testimony.[1] However, expert testimony is not admissible unless it is first determined by the trial judge that the expert is qualified and that the opinions of that expert are scientifically reliable. This legal standard was first adopted by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals*.[2] The mandates set forth in the *Daubert* opinion were later adopted into Michigan jurisprudence, as reflected in the Michigan Rules of Evidence at MRE 702 (Rule 702), in the Michigan Compiled Laws (MCL) at MCL 600.2955, and in Michigan caselaw.

Rule 702 provides that a qualified expert witness may offer opinions at trial if the court first determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Rule 702 goes on to say that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of opinions, but only if the following three conditions are met: (1) the testimony is based on 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.[3] In other words, under Rule 702, the testimony must be both *reliable* and *relevant* to the case at bar.

The mandates of Rule 702 have been codified by the Michigan legislature in the Michigan Compiled Laws at section 600.2955. Section 600.2955 provides that scientific opinion testimony is not admissible unless the trial court first examines an expert's opinions and the bases for those opinions and then considers seven specific factors that are outlined in the statute. In particular, section 600.2955 provides that scientific opinions rendered by an otherwise qualified expert are not admissible unless the court first determines that the opinions are both *reliable* and *relevant*. In making a determination about the admissibility of the opinions, the trial judge is required to consider the following seven specific factors:

The trial court's "gatekeeping role" is an assigned responsibility to ensure that any expert testimony admitted at trial is "reliable."

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community….

(f) Whether the basis for the opinion is reliable and whether experts in the field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.[4]

In addition, in *Gilbert v Daimler Chrysler Corporation,*[5] the Michigan Supreme Court emphasized that it is the obligation of the trial court to ensure that any expert testimony admitted at trial is "reliable."[6] The *Gilbert* Court called the trial court's assigned responsibility a "gatekeeping role" and indicated that the admissibility of an expert's opinions would be within a court's "discretion."[7] Emphasizing the importance of the trial court's vetting of an expert's opinion testimony, the *Gilbert* Court cautioned that a trial judge may neither "abandon" this obligation nor perform the function "inadequately."[8]

The *Gilbert* Court then went on to say that Rule 702 mandates a "searching inquiry," not just of the data underlying expert testimony, but also of the manner in which the expert interprets and applies that data to the facts of the case.[9] Under this scenario, it is insufficient for the proponent of expert opinions merely to show that the opinions rest on data viewed as legitimate in the context of a particular area of expertise, such as medicine.[10] Under *Gilbert,* the proponent must also show that any opinions arising from the data express conclusions that are based on *reliable* scientific principles and methodology.[11] Further, the proponent must show that the data is *relevant* to the issues in the case at bar.[12] According to the *Gilbert* Court,

Fast Facts

Michigan Rule of Evidence 702, MCL 600.2955, and Michigan caselaw require expert testimony to both rest on a scientifically reliable foundation and be relevant to the case at bar.

Conducting both a critical review of the opposing party's medical literature and an independent search and review of the relevant medical literature is necessary to a successful *Daubert* challenge.

Ideally, a *Daubert* challenge should be brought after the expert witness at issue has been deposed and after the deadline for filing witness lists.

this analysis prevents legitimate data from serving as a "Trojan horse" that facilitates the surreptitious advance of "junk science" and spurious, unreliable opinions.[13] Since *Gilbert,* the Michigan Supreme Court has continued to confirm that the proponent of scientific opinion testimony in a case must satisfy the trial court that the expert and the opinions are qualified under both Rule 702 and MCL 600.2955.[14]

In summary, while expert testimony is required in a medical malpractice action, it is not admissible unless it is first shown by its proponent, and determined by the trial judge, to both rest on a scientifically reliable foundation and be relevant to the task at hand. Attorneys seeking to discredit an opposing expert's opinions on one or both of these bases can bring what is known as a *Daubert* challenge. Such a challenge results in a trial court evaluating the expert's opinions in one of two ways: either by analyzing the scientific literature and expert opinions in the context of a motion and exhibits, or by holding a hearing during which the expert appears in court to provide live testimony in support of the opinions. It is within the context of Rule 702, MCL 600.2955, and the rules set forth in Michigan caselaw, that a trial court must evaluate any expert's testimony before admission and, in the process, close the gate on any "junk science."

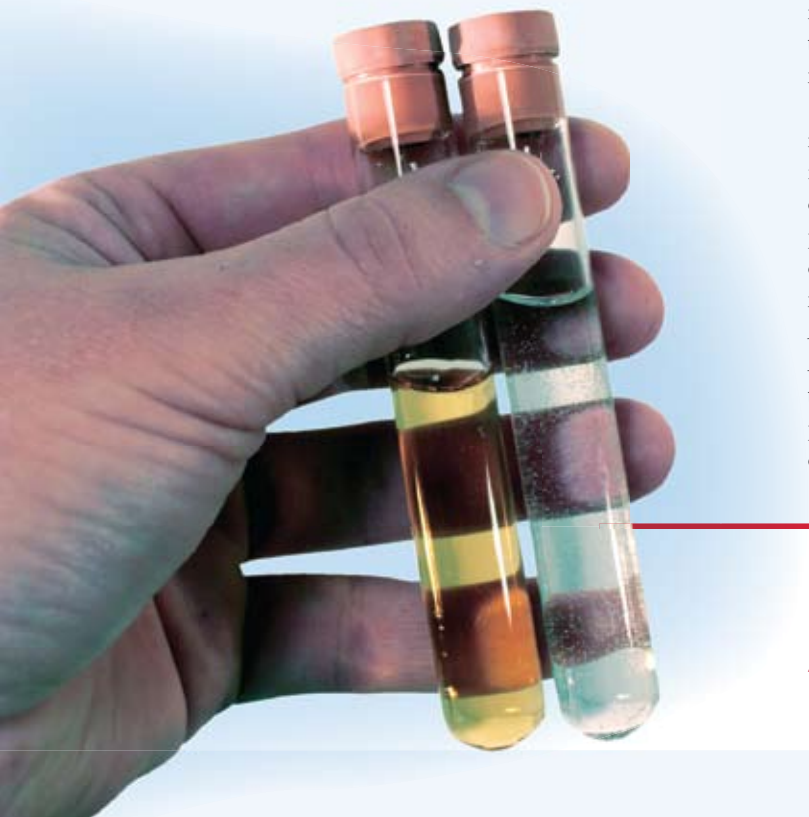
Practical Application—Discovery as the Foundation

The foundation for a *Daubert* challenge begins when a medical malpractice case is filed. Specifically, an affidavit of merit or affidavit of meritorious defense provides the first information about an expert's opinions. As the case progresses through discovery, there are several tools that an attorney can and should use to flesh out the expert's opinions. The information that is accumulated during discovery can later be used to mount a *Daubert* challenge against the opinions of an opposing party's expert.

An initial step in exploring an expert's opinions is to obtain responses to expert witness interrogatories. In addition to requesting an expert's curriculum vitae, the interrogatories should specifically request the title and a brief description of *all* the expert's presentations and publications. This allows opposing counsel to determine whether any of the expert's research addresses the medical issues contested in the subject case. Interrogatories should obviously request that the expert describe any and all opinions that he or she intends to offer in the case, but they should also specifically request references for any scientific, medical, or technical articles, publications, or other literature that the expert plans to use in supporting his or her opinions. This should force an expert to reveal any and all scientific and medical literature that may substantiate his or her opinions, and in response, opposing counsel can immediately begin to distinguish these opinions from the medical issues in the case.

Following an analysis of the responses to interrogatories, the expert's deposition must be taken. During the expert's deposition, opposing counsel should attempt to determine whether the expert has objective, scientific support—including, but not limited to, medical literature and studies—to support the proffered opinions. In addition, it is sometimes possible to get an expert to acknowledge that none of his or her own research, presentations, or publications are directly applicable to the narrow medical issues presented in the case. Further, an expert witness's deposition presents another opportunity to pin the expert down with regard to the references for any scientific, medical, or technical articles, publications, or other literature that the expert is using to support his or her opinions. Obviously, it is to the advantage of a party bringing a *Daubert* challenge to frame the medical issues in a case as narrowly as possible, thus allowing that party to distinguish the opinions offered in the subject case from the examples set forth in the cited medical literature.

As just discussed, a *Daubert* challenge obviously requires a moving party to distinguish the materials relied on by the expert in forming his or her opinions from the medical issues in the case at bar. However, it is also important for the challenging party to present his or her own medical literature that directly contradicts or discredits the expert's proposed opinions. Therefore, a final, critical aspect of discovery for a party bringing a *Daubert* challenge is to perform independent medical research. As previously set forth, Michigan law is fairly straightforward in this area. As such, it is usually the medical research that is most persuasive to a trial judge and that will "make or break" a *Daubert* challenge to expert testimony.



The reliability *prong in* Daubert *forces the trial judge to become a researcher or a scientist and the* relevancy *prong forces the trial judge to become a pseudo-physician.*

Practical Application—Timing

There are several factors to consider in determining when to bring a *Daubert* challenge. As previously discussed, a *Daubert* challenge is most effective *after* the expert witness has been deposed. In addition, it is most advantageous to bring a *Daubert* challenge *after* the final deadline for the filing of both original and amended witness lists. This prevents the opposing party from adding another expert if the challenge is successful. If possible, a *Daubert* challenge should be brought *before* the deadline for filing summary disposition motions. This allows the challenging party to move for summary disposition if the witness is effectively stricken and the opposing party is left without an expert to provide the requisite testimony. However, if necessary, the challenge can also be brought as a motion in limine, and if the expert testimony is successfully stricken, the challenging party can move for a directed verdict at trial.

When developing the timing of a *Daubert* challenge, one must consider that a hearing may take several days, and also that it may take several weeks or months to receive a ruling following a hearing or a review of a motion and exhibits. This is because, again, in analyzing each piece of evidence provided in support of an opinion, a judge must decide if the literature is both *reliable* and *relevant*. Both of these requirements force the trial court to assume the complicated role of analyzing the scientific and medical data and extrapolating from this data to the contested facts in the case. In other words, the *reliability* prong in *Daubert* forces the trial judge to become a researcher or a scientist and ask (and answer!) questions such as: "Is the size of the cohort in this study large enough to make the results more probable than not? Is the testing method scientifically reliable? Are the results statistically significant? Is the potential error rate known?" In addition, the *relevancy* prong forces the trial judge to become a pseudo-physician and ask questions such as: "Does the specific medical condition or issue in the literature adequately relate to the narrow medical issue at hand? Does the plaintiff or decedent in the case fall into the demographic group covered by the study?" Also, in factually contested cases, the water is often muddied further because the nature of the specific medical condition at issue itself may be in dispute, as well as other important facts such as whether the plaintiff/decedent had any relevant pre-existing conditions.

Another factor to consider when deciding on the timing of a *Daubert* challenge is that up until the moment when a witness is barred or an opinion is stricken, a trial court will likely consider any medical evidence that purportedly supports the expert's opinions. This is because, as previously set forth, Michigan law imposes a heavy obligation on the trial court to fully vet the expert testimony, and the *Gilbert* Court admonished that the trial court may neither "abandon" this obligation nor perform the function "inadequately."[15] As the trial court assumes the onerous burden of analyzing the admissibility of the expert testimony, the trial judge will often encourage or welcome additional information. If opposing counsel produces late or even last-minute materials, the appropriate action is to request that the trial court hold another hearing to re-evaluate the issues, even if this results in a delay in trial. Again, Michigan law *requires* the trial court to become the filter through which any expert opinions must pass before the opinions can be presented to the jury.

Conclusion

While expert testimony is required in a medical malpractice action, it is not admissible unless it is first shown by its proponent, and determined by the trial judge, to both rest on a scientifically reliable foundation and be relevant to the task at hand. Attorneys seeking to discredit an opposing expert's opinions on one or both of these bases can bring a *Daubert* challenge. Counsel should begin laying the foundation to bring a *Daubert* motion as soon as a medical malpractice case is filed, and they should use the discovery process to gather information to support it. If the proponent of the evidence fails to show a scientifically reliable foundation for the expert's opinions or that the testimony is relevant to the narrow issues in dispute, the trial court is required to close a metaphorical gate and exclude the evidence. ■

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FOOTNOTES

1. *Young v Nandi*, 276 Mich App 67, 76; 740 NW2d 508 (2007).
2. *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
3. MRE 702.
4. MCL 600.2955(1).
5. *Gilbert v Daimler Chrysler Corporation*, 470 Mich 749; 685 NW2d 391 (2004).
6. *Id.* at 780.
7. *Id.*
8. *Id.*
9. *Id.* at 782.
10. *Id.*
11. *Id.*
12. *Id.* at 783.
13. *Id.*
14. *Craig v Oakwood Hosp*, 471 Mich 67; 684 NW2d 296 (2004); *Clerc v Chippewa Co War Memorial Hosp*, 477 Mich 1067; 729 NW2d 221 (2007).
15. *Gilbert, supra* at 780.