

Protecting Plaintiff's Experts
from *Daubert/Robinson*

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Protecting Plaintiff's Experts

- Legal Overview
- New Federal Rules of Evidence
- New Trends: “Analytical Gap”
- Ten Practice Pointers

Legal Overview: Rule 702

- *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)
- *E.I. du Pont De Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995)

Legal Overview: The Relevancy and Reliability Requirements Apply to ALL Experts

- *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999)
- *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713 (Tex. 1998)

Legal Overview: Relevancy

- Evidence regarding phases of the moon are relevant to “darkness,” but not to irrational behavior.
- Specific v. General Causation
 - Benzene can cause health problems. (general)
 - Worker in this case were exposed to sufficient levels of Benzene to cause health problems. (specific)
 - *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999)

Legal Overview: Traditional Reliability Factors

- Testability
- Peer Review & Publication
- Potential Rate-of-Error
- Generally Accepted
- Non-Judicial Uses of the Theory (*Robinson*)
- Whether Theory Relies on Subjective Interpretation (*Robinson*)

New Federal Rule of Evidence 701

Rule 701 — Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

New Federal Rule of Evidence 702

Rule 702 Testimony by Experts

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 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.**

New Trends: “Analytical Gap”

- *General Electric v. Joiner*, 118 S. Ct. 512 (1997)
 - A trial court may conclude that there is simply too great an “analytical gap” between the data and the opinion proffered.

New Trends: “Analytical Gap”

- *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713 (Tex. 1998)
 - Holds the the *Robinson* reliability factors “cannot always be used with other kinds of experts.” 972 S.W. 2d at 726.
 - Upholds the exclusion of testimony noting an “analytical gap” existed between the expert’s observations and his conclusion. *Id.* at 727-28.

New Trends: “Analytical Gap”

- *St. Martin v. Mobil Exploration*, 224 F.3d 402 (5th Cir. 2000)(*en banc*)
 - The trial judge properly considered alternative indices of the expert’s reliability
- *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606 (5th Cir. 1999)
 - Trial Court did not abuse its discretion in admitting a psychiatrist’s testimony (without an application of the *Daubert* standards) when there was:

New Trends: “Analytical Gap”

- *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999)
 - Reversed the exclusion of expert testimony and a judgment as a matter of law in favor of the defense.
 - Expert opinions were sufficiently reliable because:
 - Symptoms indicated significant exposure.
 - Testing showed at least 100 ppm.
 - Plaintiffs testified that they were soaked in benzene.
 - The plant was not designed for highly toxic chemicals.
 - Not necessary to show exact level of benzene exposure.

New Trends: “Analytical Gap”

- *JcPenney Life Ins. Co. v. Baker*, 33 S.W.3d 417 (Tex. App.--Fort Worth 2000, no writ)
 - Did the heart attack cause wreck or did the wreck cause the heart attack.
 - Basis for testimony is largely experience and observations in the medical field.
 - Testimony of an internal medicine physician is “clearly not the type of testimony that can be easily evaluated under the *Robinson* factors.”
 - Not abuse to allow testimony because testimony was closely related to expert’s experiences in the medical community.

New Trends: “Analytical Gap”

- *Astran v. Cantu*, 2000 WL 1675713 (Tex. App.-- Austin 2000, no writ)(no publication)
 - Dr. Joe Thornhill gave eyeball opinion that combined speed of the vehicles was 10 m.p.h.
 - The Austin Court held “[t]his State has a long history of allowing qualified accident reconstruction experts to testify.”

New Trends: “Analytical Gap”

- *Nissan Motor Co. v. Armstrong*, 32 S.W.3d 701 (Tex. App.--Houston [14th Dist.] 2000, writ req'd)
 - Neal Mizen testified that loose dust boot prevented the accelerator mechanism from closing.
 - Defendants contend:
 - *Mizen not automotive engineer,*
 - *Had never designed a car part, and*
 - *Did not test the throttle cable.*
 - Mizen reviewed Nissan documents, NHTSA documents, depositions and photos and videos of the

New Trends: “Analytical Gap”

- *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252 (Tex. App.--San Antonio 1999, writ denied)
 - Bob Swint’s and Rex McLellan’s testimony is upheld in a defective fuel pump relay case.
 - The experts inspected the vehicle, eliminated other causes and tested the relay, which failed.
 - The court held that the testimony “did not fit all of the enumerated factors of *Robinson*, and therefore applied the more general reliability test.”
 - The Court held that there was no “analytical gap” between the underlying data and the opinion that the fuel pump relay failed.

Practice Pointer No. 1: Judges are Taller and Better Lookin’

- Abuse-of-Discretion
 - *Joiner*, 118 S. Ct. at 512.
 - *Robinson*, 923 S.W.2d at 558.
- “Considerable Leeway” in deciding how to determine if testimony is reliable
 - *Kumho*, 119 S. Ct. at 1176.

Practice Pointer No. 1: Judges are Taller and Better Lookin’

- Research Judges and Compare Venue Options
 - “Often, the determination of what is ‘junk’ is best left to the jury after rigorous cross-examination.”
Hon. Bob McGrath
 - “I have never allowed...over objection, anyone to testify as an accident reconstructionist.”
 - *Hon. William Barbour (see 163 F.3d. 935)*

Practice Pointer No. 1: Judges are Taller and Better Lookin’

- Check Judge’s *Daubert* Opinions on Westlaw
- Consult Local Attorneys Who Have Dealt with the Judge on *Daubert* issues
- FACTOR THE GATEKEEPER INTO YOUR VENUE DECISIONS

Practice Pointer No. 2: Investigate Your Experts

- Verify the Expert's Resume
 - contact prior employers
 - contact educational institutions
 - contact licensing boards
- Avoid Jack-of-All Trade Experts
- Look for Industry or Research Experience

Practice Pointer No. 2: Investigate Your Experts

- Look for expert with prior testing and development with your product
 - helps in *Daubert*
 - reduces costs to rely on prior work
- Prior *Daubert/Robinson* History
 - ask the experts
 - Westlaw
 - List Serves

Practice Pointer No. 3:

- *St. Martin v. Mobil Exploration*, 224 F.3d 402 (5th Cir. 2000)(*en banc*)
 - The trial judge properly considered alternative indices of the expert's reliability.
- Use Reliability Experts
 - Affidavits approving methodology
 - Track work done by your testifier
- Make a record of proper methodology

Practice Pointer No. 4: Use Computer Simulations

- Most Manufacturers Use to Test Products
 - Ford's ADAMS modeling
 - Prior testing verifies validity
 - Relatively Inexpensive
- Powerful Visual Tools

Practice Pointer No. 5: Rely on Other Testing

- NHTSA
- Transport Canada
- Defendant
- Third Party Tests
- Prior Research by your Expert
- Satisfies a *Robinson* factor regarding in litigation uses

Practice Pointer No. 6: Follow Government or Industry Methods

- *Rushing v. Kansas City Southern R.R.*, 185 F.3d 496 (5th Cir. 1999)
 - The reliability of a test prescribed by the legislature or a regulatory agency may not be challenged under *Daubert*.
- Use government test protocols
- Use industry test protocols (ANSI etc...)

Practice Pointer No. 7: Bootstrap Experts

- Use Reliable Consulting Experts
- Use Reliable Secondary Experts

Practice Pointer No. 8: Defense Expert's Agreement on Methodology

- Send Discovery Request to Get Protocols
- Have Defense Experts Agree With Methodology
- Send RFA Regarding Methodology

Practice Pointer No. 9: Limit Testimony; Don't Surrender

- *Morton Int'l v. Gillespie*, 2001 WL 27911
(Tex. App.--Texarkana 2001, n.w.h.)
 - Renfro was not qualified on airbags
 - Used occupant kinematics and defense admission to establish “delayed deployment.”
- Comment to Rule 702
 - allows general education experts

Practice Pointer No. 10: Procedural Tips

- Establish Early *Daubert* deadline
 - Rule 11 Agreements
 - Scheduling Order
- Smoke-out a *Daubert* challenge
 - Contention Interrogatories
 - File Motion to Admit Under Rule 104 (a)
- Make a Complete Bill-of-Exceptions

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