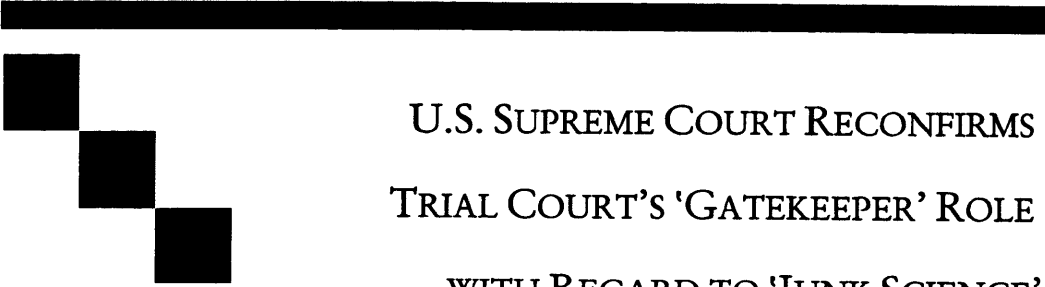


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C O U N S E L O R S   A T   L A W



U.S. SUPREME COURT RECONFIRMS  
TRIAL COURT'S 'GATEKEEPER' ROLE  
WITH REGARD TO 'JUNK SCIENCE'

January 1998

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**U.S. SUPREME COURT RECONFIRMS TRIAL COURT'S  
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As a follow-up to its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>1</sup> the U.S. Supreme Court further defined a trial court's "gatekeeper" role with regard to preventing "junk science" from entering the courtroom. In *General Electric Co. v. Joiner*, (Dec. 15, 1997), the Supreme Court held that the trial judge's decision whether to allow or exclude expert testimony will be reviewed by an appellate court under an "abuse of discretion" standard.

In *Joiner*, the plaintiff "began work as an electrician . . . in 1973. This job required him to work with and around the City's electrical transformers, which used a mineral-based dielectric fluid as a coolant. [The plaintiff] often had to stick his hands and arms into the fluid . . . [which] would sometimes splash onto him, occasionally getting into his eyes and mouth. In 1983 the City discovered that [some of] the fluid . . . was contaminated with polychlorinated biphenyls (PCBs)[,] . . . [which] are widely considered to be hazardous . . . [and which] . . . with limited exceptions, [were] banned" by Congress in 1978.

The plaintiff, "a smoker for approximately eight years" whose "parents had both been smokers" and who had "a history of lung cancer in his family . . . [and] . . . was thus perhaps already at a heightened risk of developing lung cancer . . . was diagnosed with small cell lung cancer in 1991." He filed suit alleging "that his exposure to PCBs 'promoted' his cancer; had it not been for his exposure to these substances, his cancer would not have developed for many years, if at all."

The defendants moved for summary judgment contending that "there was no admissible scientific evidence that PCBs promoted [the plaintiff's] cancer." The district court granted summary judgment because "the testimony of [the plaintiff's] experts had failed to show that there was a link between exposure to PCBs and small cell cancer. The court believed that the testimony of [the plaintiff's] experts . . . did not rise above 'subjective belief or unsupported speculation.' "

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The Court of Appeals for the Eleventh Circuit reversed. It held that “because the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge’s exclusion of expert testimony.” Applying that standard, the Court of Appeals held that the District Court had erred in excluding the testimony of the plaintiff’s expert witnesses.

The Supreme Court reversed the Court of Appeals. It held that “while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under [prior law], they leave in place the ‘gatekeeper’ role of the trial judge in screening such evidence.” The Supreme Court rejected the plaintiff’s “argument that because the granting of summary judgment in this case was ‘outcome determinative,’ it should have been subjected to a more searching standard of review. . . .” The Supreme Court held “that the Court of Appeals erred in its review of the exclusion of [the plaintiff’s] experts’ testimony. In applying an overly ‘stringent’ review . . . it failed to give the trial court the deference that is the hallmark of abuse of discretion review.”<sup>2</sup> The Supreme Court held “that a proper application of the correct standard of review here indicates that the District Court did not abuse its discretion.”

The Supreme Court rejected the plaintiff’s argument that under *Daubert v. Merrell Dow Pharmaceuticals*, the court’s focus “must be solely on principles and methodology, not on the conclusions they generate.” The Court held that “conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. . . . That is what the District Court did here, and we hold that it did not abuse its discretion in so doing.”

The *Daubert* decision has been of the utmost significance in the defense of toxic tort and product liability litigation, as the Supreme Court reaffirmed that it is the trial judge’s *duty* to examine the nature and quality of scientific evidence and keep such evidence from the jury if the proof fails to fulfill the criteria of reliability and relevance. With *Daubert*, the Supreme Court effectively ceased the common judicial practice of allowing juries to consider expert testimony that amounted to “junk science,” admitting such testimony, as some judges would say, “for whatever it is worth.”

Employing *Daubert*, Morgan Lewis’ Toxic Tort/Product Liability Group has succeeded in persuading courts to review and deny admission to expert evidence that, upon examination, is little more than a biased expert’s attempt to fit published data into the circumstances of the particular alleged injury, without sufficient scientific basis or peer approval of the methodology. Our efforts have been particularly successful with respect to serial litigation, where an expert testifies against an industry in similar cases nationwide, repeating the claim that a product is defective based on bogus science. Using *Daubert* in those jurisdictions with the willingness to

rigorously apply the Supreme Court's mandate, the firm's litigators have excluded plaintiffs' experts in serial litigation, influencing the outcome of all cases pending against the particular industry.

The significance of the *Joiner* opinion to our efforts in this area is not only the reaffirmation by the Court that the trial judge is the gatekeeper who can preclude junk science from being examined by a jury. The ruling also clarifies that the trial court must make a searching and critical review of the basis of the expert evidence at issue. Prior to the *Joiner* ruling, it was ardently hoped that the Supreme Court would stay the course and continue to allow trial judges to have an instrumental role in evaluating the expert evidence to come before the jury; the Court's opinion signals that this is the case. Armed with this solid endorsement of *Daubert*, our future challenge will be to develop effective techniques to demonstrate to trial courts that the plaintiff's evidence is, in fact, "junk science" in appropriate cases.

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**Endnotes:**

1. In *Daubert*, the Supreme Court held that when determining whether proffered scientific evidence will assist the trier of fact, and therefore be admissible, a court must consider: whether the theory or technique has been tested; whether it has been subject to peer review; the known or potential rate of error associated with the technique; and the level of general acceptance in the scientific community.

2. A decision by a trial court that is subject to review under an "abuse of discretion" standard will not be reversed "unless the ruling is manifestly erroneous."