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PERSPECTIVE

Defending *Daubert*, 20 years after it was decided

By Pamela Yates

About a year ago, I sat on a conference panel with a number of judges on the topic of the *Daubert* evidentiary standard — from the U.S. Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals* (June 28, 1993).

Down the line the judges on the panel went, each with his own complaint. When it was my turn to speak, I surprised the audience by confessing that I actually got the whole ball rolling back in 1989, when as a young associate I wrote the summary judgment motion in the case. The client was Merrell Dow, being sued for birth defects allegedly caused by their prescription medicine, Bendectin.

My confession got a laugh, but began a serious discussion. The consensus was that *Daubert* motions were getting too complicated, too broad and — with some tipping the scales at 50 pages — far too long. Filing a 50-page *Daubert* motion arguing there is no scientific debate itself may raise enough of a question on the scientific debate for the case to get to a jury, we discussed.

Some of the judges on this panel made confessions of their own. They were tired of reading, and thereby tempted, when confronted with these *Daubert* “monster motions,” simply to deny them. I coined the phrase “over-Daubertizing” on the spot.

When I was tasked with drafting the summary judgment motion, the Bendectin litigation already had been going on for several years, and firms across the country had been filing motions in various cases, trying to throw out the plaintiffs’ case on

grounds that they didn’t have enough scientific evidence to warrant a jury trial. Facing a trial in the *Daubert* case, we needed to establish the strength of the scientific research we had, and that the other side had nothing to demonstrate Bendectin caused birth defects unless their expert completely re-worked the data.

I did the only thing I could think of: start over, and take the motion to its very basics — no frills, nothing fancy. Essentially, it said: “Your Honor, the Frye standard applies, and here’s the science. We have more than 30 studies showing no increased risk and they have nothing — nothing, that is, until they pay someone to creatively re-analyze the data to reveal different

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results.” Unlike the lengthy and complex motions we routinely see today, it was very straightforward, only about 20 pages long, including the expert affidavit.

Soon we were headed to U.S. district court in San Diego. When my senior partner stood up to address the court, Judge Earl Ben Gilliam said, “Counsel, you have carried your burden based on your moving papers. I’d like to hear from plaintiff’s counsel.”

After asking some general questions about the science and the relevant data, the judge then asked the plaintiff’s counsel a very specific question: “If you had an expert who was going

to come in to this court room and testify that the earth is flat, should that expert be permitted to testify to a jury?”

To this day, I remain surprised by the answer that followed: “Yes, your honor. That expert should be permitted to testify.” Surely he should have differentiated his case from the flat earth society.

Before we knew it, the opinion and order granting the motion were issued. We won again in the 9th U.S. Circuit Court of Appeals and were on our way to the U.S. Supreme Court. The client had hired a top litigator to argue before the Supreme Court, and since his name appropriately had to be added to the caption and there is a limit to the number of names that can be listed, “the youngster’s” name was dropped from the briefs. But it didn’t matter. I had helped kick-start and shepherd the case through the various levels, and I was going to be sitting in the audience to hear the Supreme Court oral arguments!

Interestingly, the Supreme Court reversed the lower court’s findings, 9-0, but in doing so created a new standard for admissibility of expert evidence with specific factors to be evaluated. A 9-0 loss was actually a win for our client. In its opinion, the court specifically directed judges to now act as “gatekeepers” on whether enough scientific evidence existed to proceed beyond the summary judgment stage. This was significantly better than both Frye and the federal rules.

Under the newly created *Daubert* standard, the case went back to the 9th circuit. This time our team argued that under the new standard, the evidence still

failed, and the 9th circuit again agreed. Post *Daubert* the few remaining Bendectin cases wound down pretty quickly.

Twenty years on from the original *Daubert* decision, I am pleased to see some courts finally adopting this important standard or something close to it. But whether newly adopted or long standing, we lawyers must proceed judiciously. Lawyers opposing *Daubert* motions have figured out that if they put together a large enough opposition with a significant number of attachments, there must be enough evidence to survive a *Daubert* challenge. At least this is what I heard from the judges on the panel.

We need to adjust our strategy accordingly, by picking our battles, taking a step back and asking ourselves: “Where do we really have a *Daubert* issue? Where can we — should we — win?” “Can we portray the other side’s experts as being members of the flat earth society?” And if that means chipping away at just a small portion of the opposition’s science case instead of attempting to do away with the whole thing, so be it. After all, on its 20th birthday, *Daubert* is just hitting its stride.

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