

PERSPECTIVES ON DAUBERT:

AVOIDING AND EXPLOITING “ANALYTICAL GAPS” IN EXPERT TESTIMONY

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THE DAUBERT TREND

- Growing national “trend” toward stricter scrutiny of expert testimony.
- Cheered by “junk science” critics and decried by others as an invasion of the jury’s traditional role.
- Real expert opinions seldom fit neatly into “junk science” labels (“The Earth is flat” or “The Moon is made of Green Cheese”).
- Courts, lawyers and parties are increasingly confused by standards that should predictably exclude “bad science” and predictably allow “good science” to remain.

THE DAUBERT MAZE

- Daubert provided a list of “flexible” and “nonexhaustive” factors to guide trial courts in exercising their “gatekeeper” function.
- Since they were issued, they have been applied to thousands of scenarios, often with bewildering and frankly conflicting results – each sustained as a valid exercise in judicial “discretion.”
- Challenges proliferated such that many litigants feel “obliged” to make them, irrespective of the chance of success, strains on the system, costs to clients, and dilution of “judicial capital.”
- More of a “bright line” rule was clearly needed and some courts have been moving toward providing it.

ORIGINS OF THE “ANALYTICAL GAP” TEST

- 12 years ago, The US Supreme Court abolished the Frye “general acceptance” test and substituted its “flexible” factors.
- Testing, peer review and publication, known or knowable rates of error, and general acceptance.
- Apparently, the intent was to empower trial courts to exercise the “gatekeeper” role broadly, rather than constraining them by “bright line” principles.
- Consistent with this “empowerment,” the Court later held in Joiner that the trial court’s rulings were not reviewed on appeal de novo, but rather by a liberal “abuse of discretion” standard.

ORIGINS OF THE “ANALYTICAL GAP” TEST

- Daubert originally focused on methodologies – not the conclusions themselves. But Joiner transformed that focus in an important way.
- “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 . . . 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 expert’s methodology and the conclusion.”

ORIGINS OF THE “ANALYTICAL GAP” TEST

- Joiner found a fatal “analytical gap” for two reasons.
- Experts assumed all the fluid to which plaintiffs were exposed contained PCBs, but that was not supported by the record.
- Experts based opinions on animal studies that used much higher exposures than those sustained by plaintiffs.
- Hence, testimony was not *relevant* – and the Court focused on a traditional relevancy analysis to evaluate the testimony.
- The “relevance” analysis was therefore firmly established as a foundation of a new and more easily understood test – alongside the Daubert factors – to evaluate expert evidence.

THE “ANALYTICAL GAP” TEST: SCIENTIFIC OR NON-SCIENTIFIC EVIDENCE?

- In Kumho Tire, the Supreme Court applied the “analytical gap” test to “non-scientific” evidence (failure analysis based upon experience and observation).
- The Court paid “lip service” to the Daubert factors, but because they did not really “fit,” it focused on the “analytical gap” test.
- The Court did not focus on methodology’s reliability, but rather on whether the expert reliably applied the methodology.
- But the Court did not restrict “analytical gap” analysis to “non-scientific” evidence, as some have argued. Indeed, Joiner was a “scientific” evidence case. The “gap” analysis applies to all types of expert evidence.

THE “ANALYTICAL GAP” TEST: TEXAS COURTS TAKE THE LEADING EDGE

- Gammill: 1st used “gap” test to preclude “non-scientific” testimony regarding seat belt failure where analysis failed to show how the observations supported the conclusions.
- Helena Chemical: Used “gap” analysis to determine admissibility of crop failure opinions focusing on whether the expert’s “observations support his conclusions.” Allowed “gap” to be filled by testimony from other witnesses that cured the absence of essential evidence in the expert’s testimony.
- Helton: Held expert opinion regarding gas production estimates unreliable because expert failed to explain “how the factors he employed affected his calculations.” Opinion unreliable even if the methodology was generally accepted and even if underlying facts and data were accurate. Court did not employ Daubert factors at all.

THE “ANALYTICAL GAP” TEST: TEXAS COURTS TAKE THE LEADING EDGE

- Ramirez: Court held expert’s opinions regarding wheel defects unreliable notwithstanding expert’s testimony that his conclusions were based on “the laws of physics” and “generally accepted” and used in accident reconstruction analysis. Expert failed to “explain how any of the research or tests he relied on supported his conclusions.”
- These cases use the “gap” test as a controlling inquiry and relegate the traditional Daubert factors to a supporting role, at best.
- Focus is on the expert’s reasoning process. The process must be explained to ensure that the methodology and the facts and data upon which it relies are capable of producing an opinion that is relevant to the case.
- With this focus, the Texas Supreme Court developed a practical and “common sense” test for the reliability of expert opinions.

AVOIDING AND EXPLOITING “ANALYTICAL GAPS”

- Two types of “gaps:” (1) gap between the data relied upon and the facts of the case, and (2) gap between the methodology and the conclusions.
- Gap 1 arises when expert relies upon assumptions based upon data that is materially different from the facts of the case, e.g. Joiner. Data must substantially match to guarantee relevance.
- Gap 2 arises when opinion is based on flawed calculations or methodology which, if properly applied, fail to support conclusions, e.g., Helton.
- Gap 2 also can arise if the expert fails to explain how the methodology’s application produced the opinion, e.g., Ramirez.

AVOIDING AND EXPLOITING “ANALYTICAL GAPS”

- **Gap 1 problems (discrepancy between data used and facts of case) is an exercise in relevancy. Advocates must work with the expert to make sure that any variances are not sufficiently material to compromise a relevancy analysis.**
- **Gap 2 problems (flawed calculations or failure to explain how the methodology produced the opinion). Advocates must present “step by step” direct examination and produce a record of reliability for appellate review.**
- **Cross-examiners must focus on the inability of the data or the methodology to produce relevant opinions, or upon the expert’s inability to explain the connections adequately.**
- **Advocates should think like a trial judges! Judges understand relevancy – they often do not have scientific training or experience. To get best results, use relevancy as an approach that judges understand and with which they are familiar.**