

PRODUCT LIABILITY

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Daubert and its gatekeeping system are often praised by defense counsel as being far superior to other standards for evaluating expert opinions. But recent substantial verdicts based on shaky science suggest the Daubert system is not living up to its praise. This article looks at some of those verdicts and offers defense counsel tips for avoiding the same outcome in their own cases.

Is *Daubert* Broken?

ABOUT THE AUTHOR



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The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

I know the question seems a bit ridiculous. *Daubert* has worked wonders since 1993 in protecting defendants from scientifically unwarranted verdicts and plaintiff experts who seem willing to testify to nearly anything. And most states have moved to a *Daubert*-type standard to enhance the expert gatekeeping process. But hear me out.

A month ago I spoke to a group of 85 or so Judiciary Committee members and Senate staffers in the Dirksen Building in one of a series of monthly training sessions sponsored by George Mason's Law and Economics Center. We were supposed to discuss whether *Daubert* is superior to *Frye*, as illuminated by events in the California Roundup litigation. My counterpart was Jeffrey Karp of the Virginia-based Miller Law Firm, a plaintiff firm that is heavily involved in the Roundup cases.

The usual defense message in such a debate is that *Daubert* is definitely better because it offers more opportunity for a detailed analysis of the expert testimony. And that is generally the case – I do prefer arguing exclusion under *Daubert*. At the same time, I have found that the defining factor often is not whether the court utilizes *Daubert* versus *Frye* or any other state-specific standard. Instead, regardless of the standard, the defining feature of admissibility is often the inclination of an individual judge to let

experts battle it out versus a judicial willingness to engage in a hard look at the experts.¹ I've won key motions under both *Daubert* and *Frye* and lost under both, on similar evidence. Judges who act as real gatekeepers will look behind the curtain, read the articles, and examine the expert's claims, rather than simply accept the expert's testimony at face value. In contrast, judges who favor admission typically provide only a cursory review of the expert's testimony, usually pointing to the self-serving statements of the expert as the only support.

So I prepared to speak on the *Daubert v. Frye* great debate and do my darndest to support switching to *Daubert*. But as I prepared, it occurred to me that something was way off. In the federal Roundup MDL *Hardeman* lead case, Judge Chhabria did in fact (as he must) apply *Daubert*. And, he arguably did perform a fairly serious analysis of the studies, IARC, and other expert reliance materials and testimony. As a result of that review, Judge Chhabria, in his pretrial ruling on summary judgment and *Daubert* motions, then made some amazing findings:

- The expert admissibility issue was “a **very close question.**”
- “The **evidence** of a causal link between glyphosate exposure

¹ For a law review analysis of the potency of *Daubert* versus *Frye* that reaches the same conclusion, see Edward Cheng & Albert Yoon, “Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards,” 90 Virginia L. Rev. (2005), Cheng, Edward

K. and Yoon, Albert, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards. Virginia Law Review, Vol. 90, 2005. Available at SSRN: <https://ssrn.com/abstract=609581>.

and NHL in the human population *seems rather weak.*"

- "The evidence, viewed in its totality, *seems too equivocal to support any firm conclusion that glyphosate causes NHL.* This calls into question the credibility of some of the plaintiffs' experts, who have confidently identified a causal link."
- He twice characterized the plaintiff expert opinions as "*shaky.*"²

The judge then declared that "plaintiffs appear to face a daunting challenge at the next phase," and again found that "it is a close question whether to admit the expert opinions" of even the best of plaintiff's five experts.

Apparently, the court believed that plaintiffs' chief experts were very close to being very wrong about Roundup. But he was not convinced that under Ninth Circuit precedent he could exclude any expert unless the expert was truly engaged in "junk science," and he deemed four of the six experts to have survived that very low bar. Thus, despite the obvious weakness of the plaintiff's science, the judge let four experts testify. Even then, in a later ruling, the Court found that the best of the plaintiffs' experts "barely get over the line."

The result? *An \$80.3 million verdict for one plaintiff.* On "shaky" science. Where plaintiffs "barely get over the line." The court later reduced the verdict to \$25 million, but still. It is hard to talk about "only" \$25 million on such a weak science case.

Troubled by this outcome, I took a look at some other recent verdicts in both Roundup and talc litigation. You all know about these – verdicts in these litigations are shocking and have rocked the defense community, not to mention their clients. Like the Roundup cases, the science in the talc litigation is also highly questionable, to the point that several courts have excluded plaintiffs' experts and defendants have won a number of jury verdicts. To this day, in fact, the National Cancer Institute (NCI), which is the preeminent cancer research institution in the world, states that "[t]he weight of evidence does not support an association between perineal talc exposure and an increased risk of ovarian cancer."³

A quick list of verdicts since 2016, focusing just on jury reactions and thus without regard for appeals or reversals (some of these verdicts were reversed), tells the story when plaintiffs win on expert exclusion and get to trial:

- \$289 million - *Johnson* (Roundup, CA state court), verdict reduced based on punitive damages to \$78.5 million

² *In re Roundup Products Liability Litig.*, MDL No. 2741, Case No. 16-md-02741-VC, Document 1596, Pretrial Order No. 45: Summary Judgment and

Daubert Motions pp 1-3, filed July 10, 2018 (emphasis added).

³https://www.cancer.gov/types/ovarian/hp/ovarian-prevention-pdq#_220_toc

- \$2.055 billion - *Pilliod* (Roundup, CA state court), reduced to \$86.7 million
- \$37.2 million - *Barden* (talc, New Jersey), 4 plaintiffs, plus punitive proceeding to come
- \$70 million - *Giannecchini* (talc, Missouri)
- \$29.4 million - *Leavitt* (talc CA state court), no punitive damages awarded
- \$4.69 billion – *Ingham* (talc, Missouri), 22 plaintiffs
- \$25.75 million – *Anderson* (talc, California)
- \$117 million – *Lanzo* (talc, New Jersey)
- \$55 million – *Reistesund* (talc, Missouri)
- \$72 million – *Fox* (talc, Missouri)

These are mostly state court verdicts and mostly under a *Frye*-type approach (California uses *Frye/Sargon*, and Missouri and New Jersey both switched to *Daubert* or a *Daubert*-like approach in the last two years, after the verdicts listed above). But I personally doubt that the outcomes would have differed substantially if the same judges had applied a *Daubert* approach. Plus, the California state Roundup cases, although operating under California's *Frye/Sargon* standard, basically let the same experts testify that Judge Chhabria had already permitted under *Daubert*. And I haven't even discussed the similarly outrageous verdicts in recent medical device and pharmaceutical cases.

My proposition is that the recent massive inflation in jury verdicts has broken

Daubert. In fact, the whole gatekeeping system may be broken. The *Daubert/Frye* system is designed to prevent *most* unreliable expert testimony, but like any imperfect process, it cannot prevent all such testimony. That's fine – the system can handle a few improper verdicts based on faulty science if the verdicts are within some acceptable or reasonable range. And in fact we should anticipate a number of such verdicts each year since there is a wide array of judicial temperaments and quality of plaintiff expert testimony. If verdicts not supported by the science are in the million dollar range, or perhaps even \$10 million, most defendants could absorb such an infrequent loss and move on.

What happens, though, when verdicts come in at ten, twenty, or a hundred times a manageable figure? Plaintiffs have broken through any sort of reasonable range of verdicts recently, with the awards in the stratosphere. Under no rational system can these verdicts be considered "absorbable" or acceptable error. These outcomes are devastating and a series of them could potentially destroy safe and useful products and at least some of the companies that make them.

Which brings us back to *Daubert* and the Roundup MDL outcome. How can our judicial system survive if "shaky" science on the very edge of being excluded ends up resulting in these massive verdicts? If the science in *Hardeman* was indeed so poor, then there is a serious risk that Judge Chhabria erred and should never have let the experts testify at all. If so, his

error was not inconsequential, or manageable, or absorbable. It resulted in a killer verdict that spurred mass litigation and yet more massive verdicts.

Daubert is supposed to prevent junk science from entering the courtroom. But *Daubert*, as currently constructed, cannot prevent juries from rendering way outsized verdicts that are completely out of line with admissible but marginal, “almost junk” science, as was apparently the case in *Hardeman*. As far as I know, a judge is not allowed to ratchet up the *Daubert* test based on the anticipated size of the verdict. And once the shaky experts are allowed, the jury is required to say “yes” or “no” and then likely give the plaintiff most or all the money asked for. The jury cannot reduce the damages based on the “shakiness” of the science, any more than the judge can escalate the gatekeeping standard based on what the jury might do with the verdict.

So while the defense bar continues to advocate for the replacement of the outdated *Frye* standard with *Daubert*, we should all recognize that *Daubert* itself is in the process of being rendered obsolete by the plaintiffs’ insistence on, and juror/judge complicity in rendering, unrecognizably large verdicts. It is also doubtful that jury verdicts will revert back to the old days of “only” \$10 million hits. Verdict amounts are a one way street that only seems to allow upward movement.

What to do? The obvious solution is to tighten *Daubert’s* requirements even further. No longer can courts or the judicial system allow marginal science to

support a case if the verdicts are catastrophic. But *Daubert* is based on the Federal Rules of Civil Procedure and several U.S. Supreme Court precedents, and it would likely take a legislative modification of the rules to make admissibility more difficult for plaintiffs. For the present, I would suggest that defendants use the Roundup example as a reason to argue in their *Daubert* motions that judges need to exercise their *existing Daubert* authority with vigor. Nothing in the *Daubert* process or the Federal Rules requires a judge to admit shaky, equivocal, or “just barely over the line” science, even (in my view) in the Ninth Circuit. If we cannot convince courts to adopt some sort of sliding scale based on the anticipated verdict, we can at least highlight the danger the court system is in. The risk is real, and many judges will recognize it. Go forth and convince.

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