

MEDICAL EVIDENCE SEMINAR

Medical Causation:

Often times cases turn on the admissibility of an expert witness' causation opinion.

Whether the expert is testifying for the plaintiff or the defendant does not seem to make much difference in whether or not the offered opinion is admissible. For the most part, trial courts adhere to requirements set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), especially in state courts. However, both federal and state courts (especially federal courts) seem to give wide deference to the opinions of treating physicians, allowing causation testimony based entirely on patient history.

I. **Daubert Controls Admissibility in State and Federal Courts**

A. **Federal Rule of Evidence 702** states, “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 an 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.”

1. To be admissible, expert testimony must satisfy the requirements of **Federal Rule of Evidence 702** and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rule 702 has been amended since the Daubert decision but the Seventh Circuit teaches

that while “Rule 702 has superseded *Daubert* ... the standard of review that was established for *Daubert* challenges is still appropriate.” *United States v. Parra*, 402 F.3d 752, 758 (7th Cir.2005).

B. **Indiana Evidence Rule 702** provides: (a) “[i]f 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 an opinion or otherwise; (b) [e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.”

1. When determining whether scientific evidence is admissible under **Ind. Evidence Rule 702(b)**, courts consider the factors discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). See *Hottinger*, 665 N.E.2d at 596. In *Daubert*, the Supreme Court held that for scientific knowledge to be admissible under **Federal Evidence Rule 702**, the trial court judge must determine that the evidence is based on reliable scientific methodology. *Id.* at 592-593, 113 S.Ct. at 2796. To assist trial courts in making this determination, the Supreme Court outlined a non-exclusive list of factors that may be considered: (1) whether the theory or technique can be or has been tested; (2) whether the theory has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory has been generally accepted within the relevant field of study. *Id.* at 593-595, 113 S.Ct. at 2796-2798. Publication in a peer-reviewed journal, while relevant, is not to be dispositive of the issue of scientific validity. *Id.* at 594, 113

S.Ct. at 2797. The focus of the admissibility test must remain on the methodology of the theory or technique, not on the conclusions generated. *Id.* at 595, 113 S.Ct. at 2797.

II. The Gatekeeper Function

A district court considering the admissibility of expert testimony exercises a gate keeping function to assess whether the proffered evidence is sufficiently reliable and relevant. The inquiry to be undertaken by the district court is “a flexible one” focusing on the “principles and methodology” employed by the expert, not on the conclusions reached. *Daubert*, 509 U.S. at 594-95, 113 S.Ct. 2786. In making its initial determination of whether proffered testimony is sufficiently reliable, the court has broad latitude to consider whatever factors bearing on validity that the court finds to be useful; the particular factors will depend upon the unique circumstances of the expert testimony involved. See *Kumho Tire Co.*, 119 S.Ct. at 1175-76.

On the one hand, the court should be mindful that **Rule 702** was intended to liberalize the introduction of relevant expert evidence. See *Cavallo v. Star Enter.*, 100 F.3d 1150, 1158-59 (4th Cir.1996). And, the court need not determine that the expert testimony a litigant seeks to offer into evidence is irrefutable or certainly correct. See *Id.* As with all other admissible evidence, expert testimony is subject to being tested by “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.” *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786. On the other hand, the court must recognize that due to the difficulty of evaluating their testimony, expert witnesses have the potential to “be both powerful and quite misleading.” *Id.* at 595, 113 S.Ct. 2786 (internal quotation marks omitted). And, given the potential persuasiveness of expert testimony, proffered evidence that has a greater potential

to mislead than to enlighten should be excluded. See *United States v. Dorsey*, 45 F.3d 809, 815-16 (4th Cir.1995).

Daubert ensures that all expert testimony is scientifically reliable before being submitted to the jury. A treating physician's expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians hired solely for purposes of litigation. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (holding that *Daubert* applies even when an expert's opinion relies on skill- or experience-based observation). The fundamental purpose of the gate keeping requirement “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire*, 526 U.S. at 152.

III. Admissibility of Treating Physician’s Causation Opinion

Perhaps defense counsel should be buoyed by the federal judiciary’s high opinion of our cross-examination skills because they appear content to allow a treating physician to rely almost solely on a plaintiff’s self-serving medical history, even where the history is inaccurate, in reaching a medical opinion on causation so long as the defense has the opportunity to cross examine the doctor.

There is no statute or common law rule in Indiana that imposes a requirement that an opinion of medical causation of an injury must be based upon physics, engineering, bio-mechanics or kinematics. The authority cited by the Defendants is explicitly to the contrary to their position. Motion in Limine to Exclude Testimony of Dr. Misamore, p. 2. “Questions of

medical causation of a particular injury are questions of science necessarily dependent on the testimony of physicians and surgeons learned in such matters.” *Armstrong v. Cerester USA, Inc.*, 775 N.E.2d 360, 366 (Ind.Ct.App. 2002).

In *Smith v. BMW North America, Inc.*, 308 F.3d 913 (8th Cir. 2002), a district court excluded the testimony of a medical doctor as to the causation of a neck injury because the doctor did not know how much force the plaintiff’s neck could withstand nor could he quantify the forces on the plaintiff’s body during the accident. *Id.* at 919. In reversing the district court’s exclusion of the doctor, the Court of Appeals held the medical doctor was basing his opinion on the information that fell within his field of expertise and that the doctor was unable to quantify how much of the plaintiff’s forward neck flexion occurred did not render the doctor unqualified to render an opinion based upon factors within his area of expertise. *Id.*

A. Walker v. Soo Line Railroad Company

In *Walker v. Soo Line Railroad Company*, 208 F.3d 581 (7th Cir. 2000), the Seventh Circuit Court of Appeals held that the District Court abused its discretion in excluding a psychologist’s testimony regarding an employee’s functioning prior to an alleged lightning strike and in excluding treating physicians’ testimony that an employee suffered a loss of IQ and post-traumatic stress disorder. The basis of the expert opinions?— a standardized test, a client interview and an inaccurate medical history, some of which was relayed by Mr. Walker’s girlfriend.

Medical professionals reasonably may be expected to rely on self-reported patient histories. See *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1019-21 (7th Cir.2000). Such histories provide information upon which physicians may, and at times must, rely in their

diagnostic work. Of course, it is certainly possible that self-reported histories may be inaccurate. Dr. Pliskin himself said that it was not unusual for patients to misrepresent their histories to him. In situations in which a medical expert has relied upon a patient's self-reported history and that history is found to be inaccurate, district courts usually should allow those inaccuracies in that history to be explored through cross-examination. *Walker* at 586. The critical point is that Dr. Pliskin employed a proper methodology to determine Mr. Walker's pre-incident IQ. It was appropriate for Dr. Pliskin to rely on the test that he administered and upon the sources of information which he employed.

A second treating physician relied upon Dr. Pliskin's opinions and conversations with other members of her clinical team in reaching the conclusion that Mr. Walker suffered from post-traumatic stress disorder. Defendant argued that the opinion was unreliable, in no insignificant part, because Dr. Pliskin specifically found that Mr. Walker did not suffer from post-traumatic stress disorder. So here we have a treating physician basing her opinion that a patient suffered from post-traumatic stress disorder on another doctor's finding that he did not suffer from the ailment.

Again, the Court forces a Defendant to rely on cross examination. That two different experts reach opposing conclusions from the same information does not render their opinions inadmissible. See *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1335, 1341 (S.D.Fla.1999) ("Merely because two qualified experts reach directly opposite conclusions using similar, if not identical, data bases ... does not necessarily mean that, under *Daubert*, one opinion is per se unreliable."). Moreover, Dr. Capelli-Schellpfeffer also relied on the information of other professionals who examined Mr. Walker, including a psychiatrist, Dr. Kelly. This

additional information, coupled with her own limited examination of Mr. Walker, reasonably could have led her to come to a conclusion different from Dr. Pliskin's. To the degree that she might have relied on faulty information, the matter certainly could be explored on cross-examination. *Walker* at 589.

B. Cooper v. Carl A. Nelson & Company

In *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008 (7th Cir. 2000), the plaintiff claimed that the pain in his back, neck, shoulders, buttocks and headaches was caused by a slip and fall. The Plaintiff sought to admit the opinions of medical professionals, including a specialist in internal medicine and two board certified neurologists, who had examined him to establish causation. The medical professionals opinions that the fall caused the plaintiff's injuries were based exclusively on the plaintiff's "own statements to the physicians that he had fallen in 1992, that before his fall he had been healthy, and that after his fall his physical condition had deteriorated." *Id.* at 1012. The district court excluded the medical professionals' opinions on causation for lack of scientific basis as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 U.S. 2786, 125 L.Ed.2d 469 (1993). *Id.* at 1019.

In *Cooper*, the court noted the testifying treating physician was a specialist in chronic pain management. It was accepted that trauma is a recognized cause of chronic pain syndrome (CPS). The specialist performed a physical examination of the claimant and obtained a self-reported medical history from the claimant. In the history, the claimant told the doctor about the fall, that he began experiencing pain after the fall in various parts of his body, and that he had been free of pain before the fall. The defendant argued that the history provided by the Plaintiff was false because the Plaintiff had lied about the nature of the fall and lied about being pain free

before the fall. Because the history provided by the Plaintiff was inaccurate, the defendant argued that it was improper to admit the testimony of the medical specialist's opinion on causation. *Id.* at 1020. Defendant also argued that not all CPS patients can point to a particular event as the cause of their condition and that emotional factors can play a role in the onset of the condition. *Id.* The defendant contended the doctor did not take those factors into account in reaching his opinion because it was not necessary to his treatment of the condition to know with any certainty its cause. *Id.*

In rejecting these arguments, the Seventh Circuit noted the defendant was suggesting “an overly demanding gatekeeping role for the district court.” The “purpose of the rule announced in *Daubert* ‘was to make sure that when scientist testify in court that they adhere to the same standards of intellectual rigor that are demanded in their professional work.’” *Id.* “**Rule 703 of the Federal Rules of Evidence** explicitly permits reliance on material ‘reasonably relied upon by experts in the particular field in forming opinions or inferences.’” *Id.* The court made it clear that a defendant may blame another cause during cross-examination of the doctor. *Id.* at 1021. “Similarly, the accuracy and truthfulness of the underlying medical history is subject to meaningful exploration on cross-examination and ultimately the jury evaluation.” *Id.*

The Court held that the defendant's argument about other conditions causing the claimant's CPS “goes to the weight of the medical testimony, not its admissibility.” *Id.* “*Daubert* acknowledged the continuing vital role that ‘vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.’” *Id.* The Court held that the “physician employed the acceptable diagnostic tool of examination accompanied by physical history as related by the patient. In this case, this methodology was acceptable under the gatekeeping requirements of *Daubert*.” The physician's testimony “should not have been

excluded under *Daubert* solely on the ground that his causation diagnosis was based solely on his patient's self-reported history." *Id.* (See also, *Walker v. Soo Line Railroad Co.*, 208 F.3d 581 (7th Cir. 2000), "medical professionals reasonably may be expected to rely on self-reported patient histories. Such histories provide information upon which physicians may, and at times must, rely in their diagnostic work.)

IV. Barring Treating Physician Opinions

However, not all is lost. There are cases which hold plaintiffs, and treating physicians, to the standard set forth in *Daubert* and actually require that in order to be admissible a causation opinion must actually be based on science.

A. Turner v. Iowa Fire Equipment Company

In *Turner v. Iowa Fire Equipment Company*, 229 F.3d 1202 (8th Cir. 2000) an injured plaintiff was diagnosed with a respiratory disorder following her exposure to discharge from fire extinguisher at her place of employment, and brought a personal injury action against fire equipment company that had inspected her employer's fire suppression equipment, and the fire equipment company brought third-party action against manufacturer of fire extinguisher.

Plaintiff's treating physician, Dr. Hof, diagnosed her with hyper-reactive airway disorder, similar in nature to either reactive airways dysfunction syndrome or occupational asthma. It was Dr. Hof's opinion that plaintiff's reactive airways disorder was caused by her exposure to the chemicals from the fire extinguisher discharge. He based his opinion, in part, upon the medical history he obtained from plaintiff and, in part, upon the temporal relationship between the fire extinguisher incident and the onset of symptoms.

Dr. Hof acknowledged, however, that he had not determined whether any other factors may have caused or contributed to Delores's respiratory problems, such as repetitive exposure in the workplace to flour dust, or ammonia-based cleaning products (both shown to be responsible for causing occupational asthma), or repetitive exposure to fumes, chemicals, or cigarette smoke at home. Dr. Hof also acknowledged that he had made no direct effort to determine what caused plaintiff's medical condition, or what specific ingredient in the extinguisher could have caused a reactive airway disorder

The district court concluded that Dr. Hof's causation opinion did not satisfy *Daubert*'s standards of scientific reliability, and granted the motion to strike the opinion. *Daubert* ensures that all expert testimony is scientifically reliable before being submitted to the jury. A treating physician's expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians hired solely for purposes of litigation. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (holding that *Daubert* applies even when an expert's opinion relies on skill- or experience-based observation).

Unlike his diagnosis of condition, Dr. Hof's causation opinion was not based upon a methodology that had been tested, subjected to peer review, and generally accepted in the medical community. Significantly, Dr. Hof did not systematically rule out all other possible causes. He was clearly more concerned with identifying and treating plaintiff's condition than he was with identifying the specific substance that caused her condition. A fact that many treating physicians may readily admit upon cross examination.

Despite the Court's well-reasoned holding in *Turner*, it tempers the enthusiasm of defense counsel with some less than helpful dicta. We first note, as has the Third Circuit, that "we do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness." *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3rd Cir.1999); see also *Westberry*, 178 F.3d at 262 (holding that a reliable differential diagnosis alone provides valid foundation for causation opinion, even when no epidemiological studies, peer-reviewed published studies, animal studies, or laboratory data are offered in support of the opinion).

B. Hannan v. Pest Control Services, Inc.

In *Hannan v. Pest Control Services, Inc.*, 734 N.E.2d 674 (Ind.Ct.App. 2000) both the trial and reviewing court held that plaintiff's expert witness was not competent to offer testimony on causation. In *Hannan*, the court refused to allow Dr. Kelly to testify as to a causal connection between the application of a pesticide on or around plaintiffs' home and their subsequent alleged injury/illness.

"In sum, it is apparent from the proposed testimony of the experts that they were relying on a mere temporal coincidence of the pesticide application and the Hannans' alleged and self-reported illness. Such a relationship is insufficient to establish a prima facie case on the element of causation." *Turner v. Davis*, 699 N.E.2d 1217, 1220 (Ind.Ct.App.1998), *trans. denied* (development and cause of an ailment such as the plaintiff's was a complicated medical question requiring expert testimony. Thus, plaintiff's allegation that she developed a sleep disorder after an automobile accident but did not present any expert testimony in support of her claims should not have been submitted to the jury). None of the purported experts performed any testing that

would rule out alternative causes of the plaintiffs' ailments. Such “differential diagnosis” testing is important in toxic tort cases so that other causes may be negated. See *Tucker v. Nike*, 919 F.Supp. 1192 (N.D.Ind.1995); see also *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216 (Ind.Ct.App.1999). Thus, the opinions of the plaintiffs' experts were tantamount to subjective belief or unsupported speculation. How refreshing!

C. U.S. v. Meyers

Perhaps my favorite case to cite when seeking to exclude the opinion of a treating physician is *U.S. v. Myers*, 569 F.3d 794 (7th Cir. 2009). Plaintiffs alleged injuries caused by perchloroethylene (PCE) contamination on their property from Defendants' dry-cleaning business. Plaintiffs' experts, Drs. D. Duane Houser and Brad Bomba, Sr., submitted reports indicating they would testify that PCE contamination was the cause of Plaintiffs' illnesses. Dr. Brad Bomba, Sr. was the Cunninghams' treating physician from 1986 until 2000.

Dr. Bomba's report consists of one page where he laid out his opinions, a curriculum vitae, and two pages listing the documents he reviewed. Dr. Bomba wrote that he reviewed the reports detailing the PCE contamination at the Cunninghams' home, and he then gives an opinion on the cause of the Cunninghams' illnesses. Other than a reference to the materials reviewed, Bomba provided no basis for this opinion in his report.

When Dr. Bomba was challenged by Defendant, the Cunninghams attempt to salvage Bomba's opinion that PCE caused their illnesses by claiming that a treating physician did not even need to provide a report in order to testify on causation. Simply put, their argument was that

Bomba was qualified to testify as to his diagnosis and treatment of the Cunninghams merely because he was their treating physician.

In debunking Plaintiffs' theory, the Court held no physician may testify to his or her opinion based solely on the expert's say so and a medical degree. Bomba may still testify as to his treatment of the Cunninghams, but he may not provide any testimony as to causation.

Houser and Bomba are medical doctors; however, that does not automatically give them the right to opine on all medically-related subjects in a court of law. See *Alexander v. Smith & Nephew, P.C.*, 98 F.Supp.2d 1310, 1315 & n. 2 (N.D. Okla 2000) (citing *Whiting v. Boston Edison Co.*, 891 F.Supp. 12, 24 (D.Mass.1995) (“Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.”))

V. Conclusion

Obviously there is a wide disparity in how courts approach their gatekeeping duties under *Daubert*. Both parties need to keep their focus on the big picture without losing sight of the details, which can be easier said than done.

Plaintiffs must understand that their expert witness, even a treating physician, may be required to offer a basis for his/her opinion that is something more than a patient history and a temporal connection. However, these cases seem to be limited to differential diagnosis cases (i.e. where the physician must eliminate all other causes rather than issue a causation opinion based on trauma). In your typical soft-tissue case the treating physician is likely to be able to

offer a causation opinion based entirely on the patient history, a physical examination and a temporal connection.

Defendants who seek to bar the testimony of a treating physician should start with getting him/her to admit they are more focused on treating the diagnosed condition rather than reaching an opinion as to what caused the condition. It would also be a good idea to consult with a physician and/or a biomechanical engineer to get an idea of how the injury claimed can be caused (mechanism of the injury). Once you have established how the injury occurs, you can focus on what variables must be considered, measured and documented. This will give you considerable ammunition in the deposition of a treating physician who likely has not done the proper analysis to determine if the accident is capable of creating the force(s) necessary to cause the injury.



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Rob has an extensive background in all aspects of insurance defense litigation. Prior to joining Lewis Wagner, Rob served as In-House Counsel and acted as managing partner for a captive law firm in the insurance industry. His experience includes third party liability claims, complex coverage issues and first party litigation.

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