

**“INDIANA’S COMMON SENSE
APPROACH TO *DAUBERT*”**

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Eight years ago the United States Supreme Court issued its ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹ a ruling that was intended to "liberal[ize]" federal evidence practices and abolish the requirement that expert opinion must represent consensus views.² It was anticipated that *Daubert* would reduce the frequency and intensity of judicial scrutiny of expert opinions. In reality, it has had the opposite effect in Federal Court. In the six-year period after *Daubert*, Federal Courts published 1,065 opinions on expert admissibility on *Daubert* motions, 871 of which involved civil cases. This number represented 36 times the number of rulings in civil cases in the previous six year period.³ Because of the sheer volume of Federal decisions and the lack of uniform measures to judge the reliability of expert testimony⁴, defending a *Daubert* challenge in Federal Court often becomes a daunting task fraught with uncertainty.

Trial lawyers throughout Indiana have carefully watched how the Indiana Supreme Court would respond to *Daubert*. Thankfully, for both the plaintiff and defense bar the Indiana Supreme Court has taken a common sense approach to the admissibility of expert testimony, and has recognized that *Daubert* was intended to liberalize the rules concerning the admissibility of expert testimony. This approach is exemplified by the Court's decision in January of this year in *Sears Roebuck & Co. v. Manuilov*⁵.

In *Sears*, the testimony of two physicians was challenged at trial as unreliable and therefore inadmissible. The physicians expressed the opinion that the plaintiff suffered from symptoms of post-concussion syndrome which adversely affected his ability to return to his former employment. The defendant challenged

¹509 U.S. 579 (1993).

²509 U.S. 579, 588.

³D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock*, 64 ALB. L.Rev. 99, 104 (2000).

⁴"We can neither rule out, nor rule in, for all cases and for all times the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends on the particular case at issue." *Kuhmo Tire Co. v. Carmichael*, 119 S.Ct. 1167, at 1175.

⁵742 N.E.2d 453 (Ind. 2000).

this testimony on various grounds, including the allegation that the testimony was not scientifically reliable. The trial court overruled the defendant's objections and the testimony was admitted at trial.

On appeal, the Indiana Court of Appeals examined in great detail the testimony of each of the physician experts, and ruled that the testimony was not reliable under 702(b) and thus should not have been admitted into evidence by the trial court.⁶ Further, the Indiana Court of Appeals encouraged trial courts to hold separate pre-trial *Daubert* hearings whenever a 702(b) challenge was made to expert testimony.⁷ The scope of such a hearing would have required the party offering the expert testimony to bring her or her expert to the hearing and engage in a mini-trial in virtually every case.

The Indiana Supreme Court reversed the Court of Appeals decision in *Sears* and at the outset of its discussion concerning the admissibility of expert testimony implicitly rejected the suggestion by the Court of Appeals that trial courts should routinely conduct separate *Daubert* hearings before trial.

⁶Sears Roebuck & Co. v. Manuilov, 715 N.E.2d 968 (Ind. App. 1999).

⁷Id. at 993, n.20.

"In adopting evidence rule 702, this court did not intend to interpose an unnecessarily burdensome procedure or methodology for trial courts."⁸

⁸Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. App. 2001).

The Supreme Court next observed that the adoption of Rule 702 “reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence.”⁹ Further, the court reemphasized its earlier decisions that although potentially helpful, Federal Court opinions interpreting *Daubert* are not binding on Indiana Courts in deciding evidentiary issues.¹⁰

In the most critical passage in the opinion, the Indiana Supreme Court instructed trial courts to consider the **general principles** and **general methodology** underlying the reliability of an expert’s testimony, leaving the accuracy, consistency, and credibility of the testimony to be determined by the trier of fact after testimony has been subjected to the adversarial process at trial.

⁹Id.

¹⁰Id. at n.5.

If applied to separately evaluate every subsidiary point made during the testimony of a qualified expert regarding matters based on reliable science, Rule 702(b) can become excessively burdensome to the fair and efficient administration of justice. It directs the trial court to consider the underlying reliability of the **general principles** involved in the subject matter of the testimony, but does not require the trial court to reevaluate and micromanage each subsidiary element of an expert's testimony within the subject. Once the trial court is satisfied that the expert's testimony will assist the trier of fact and that the expert's **general methodology** is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact.¹¹

Applying these principles to the physician's testimony at trial, the Court held that the trial court did not abuse its discretion in admitting the testimony. Likewise, the court rejected the argument that the doctor's testimony about the affects of post-concussion syndrome on plaintiff's ability to return to work as a high-wire circus performer was unreliable. Emphasizing the lack of complexity in the doctor's testimony in this regard, the Court stated as follows:

¹¹Id. at 461.

"The doctor's testimony that the severe blow to the head from the plaintiff's fall resulting in continuing dizziness and headaches and preventing him from returning to his career as high-wire performer is not a matter necessarily restricted to the province of a vocational expert knowledgeable about the requirements of circus high-wire artistry. That dizziness would substantially affect the plaintiff's capacity to perform on the high-wire is a matter of common sense, and does not require vocational expertise." ¹²

¹²Id.

The Indiana Supreme Court's ruling in *Sears* was clearly in line with an earlier decision of the Court in the case of *McGrew v. State*.¹³ In *McGrew*, the Court noted that the complexity of the scientific principles underlying the subject matter of the expert testimony would determine the complexity of the foundation necessary to support the admissibility of the testimony.

¹³682 N.E.2d 1289 (Ind. 1997).

"Inherent in any reliability analysis is the understanding that, as the scientific principles become more advanced and complex, the foundation required to establish reliability will necessarily become more advanced and complex as well. The converse is just as applicable, as demonstrated by the trial court's conclusion that "what we're talking about is not the traditional scientific evaluation. We are talking about simply a person's observations under a microscope." ¹⁴

The Indiana Supreme Court has adopted a sensible approach to *Daubert* challenges. This approach should allow most rulings on the admissibility of an expert's testimony to be made without unduly expensive and burdensome procedures in the trial court.

¹⁴Id. at 1292.