

## COMMENTARY



### Keeping Junk Chiropractic Out of Court

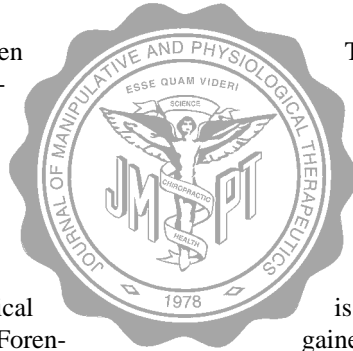
An underlying conflict is growing between chiropractic and the law. Trial lawyers, interested in possible multimillion dollar settlements, contribute to the conflict by retaining chiropractic experts to testify in court to what the lawyer needs them to say but that may not necessarily be based on scientific truth.

The U.S. Supreme Court, American Medical Association (AMA), and National Board of Forensic Chiropractors (NBOFC) are addressing this medicolegal problem. Three cases directly affect the chiropractic professional: *Grant vs Farnsworth* (1988),<sup>1</sup> *Daubert vs Merrell Dow Pharmaceuticals* (1993),<sup>2</sup> and *General Electric Co. vs Joiner* (1997).<sup>3</sup>

In *Grant vs Farnsworth*, the case was placed before the Appeals Court by Grant, who brought a civil rights action alleging violations of his constitutional rights arising from his arrest while protesting at a parade. At the request of a police officer who was restraining Grant, Farnsworth aided the police officer in subduing Grant. Grant stated that he was injured in the course of the arrest and later sought care from a chiropractor.

The court did not accept the evidence offered by the chiropractor. The court explained its position, "the parade protester alleging violations of his constitutional rights arising from his arrest were not entitled to admission of testimony of [the] chiropractor, where [the] chiropractor testified that he could not state with a reasonable degree of certainty the extent and causes of the protester's disability, and he admitted that he could only guess as to the effects of the parade incident on [the] protester because he lacked [the] necessary medical history of [the] protester before that incident."

Grant's chiropractor had his testimony excluded because the court determined that, as an expert, his testimony would not have assisted the jury in determining the extent of any injuries that were attributable to the parade incident. The court highlighted the gate-keeping function of the judge, noting that this function is based in two parts. First, the use of court time is expensive and it keeps the court from handling matters that might be of greater significance or require greater attention to detail than other cases that can be settled without resorting to a trial. Second, the gatekeeper is interested in testimony that would assist in the resolution of the disputed questions of fact. Because this case was settled before the updated *Federal Rules of Evidence*,<sup>4</sup> the court based its decision on the Frye test of "general acceptance."



The "general acceptance" test had its genesis in *Frye*.<sup>5</sup> In that case, in the course of discussing whether polygraph evidence should be admitted, the court made the following statement: "While courts will go a long way in admitting expert testimony deduced from well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

Although chiropractic has "general acceptance," and a chiropractor who is licensed can be considered to be an expert, the judge's role as gatekeeper is still to ensure that the information presented is useful in resolving the issue at hand. As mentioned previously, Grant's chiropractor "could only guess" at the effects of the arrest on Grant, and this degraded the value of his testimony; thus, it was dismissed.

*Grant vs Farnsworth* is significant for several reasons. First, this court case is interesting because it involved a chiropractor. Second, this case has been quoted since it was decided in March 1989. Third, this case further defined how expert opinion is to be presented in court so that the expert's testimony is admissible.

In *Daubert vs Merrell Dow Pharmaceuticals*,<sup>2</sup> Justice Harry Blackmun wrote: "The rules of evidence do assign the trial judge the task of ensuring that an expert's testimony both rest on a reliable foundation and is relevant to the task at hand." The Supreme Court established a general framework for resolving whether expert testimony is admissible. The decision provides specific guidance, in the form of four suggested factors, to judges when they screen expert scientific testimony. The four factors are as follows.

1. Whether the expert's technique or theory may be tested or refuted
2. Whether the technique or theory has been a subject of peer review or publication
3. The known or potential rate of error of a technique or theory when applied and the existence and maintenance of standards and controls
4. The degree of acceptance of a theory or technique within the relevant scientific community

In *General Electric Co vs Joiner*,<sup>3</sup> judges were encouraged to use independent experts to establish the soundness of the theories of the expert witnesses. Justice Stephen Breyer wrote, "judges should strongly be encouraged to make greater use of their inherent authority to appoint experts," on the basis

of an amicus brief filed in the case by the *New England Journal of Medicine*. "Qualified experts could be recommended to courts by established scientific organizations, (National Academy of Sciences or the American Association for the Advancement of Sciences) or credentialing bodies." In chiropractic it has been usual that experts are board certified in orthopedics, radiology, and more recently forensics.

Court appointment of experts was recommended as early as 1901. Judge Hand<sup>6</sup> recommended "a board of experts or single expert, not called by either side, who shall advise the jury of the general propositions applicable to the case which lie within his province."

The NBOFC was the first chiropractic organization to address the needs of judges subsequent to the 1993 case of *Daubert vs Merrell*. According to the *Reference Manual on Scientific Evidence*,<sup>4</sup> "The court's ability to handle complex science-rich cases has recently been called into question... critics have objected that judges cannot make appropriate decisions because they lack technical training... expert witnesses on whom the system relies are mercenaries." Facts of a given case are not delusional entities; right or wrong, they just are. The NBOFC has established education requirements leading to certification as a certified independent chiropractic forensic medical examiner. The *Federal Rules of Evidence* are a significant part of their forensic training. These forensic examiners qualify under federal rule 702. Rule 702 provides: "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."<sup>4</sup>

The U.S. Supreme Court found that the *Federal Rules of Evidence* superseded the Fyre test.<sup>2</sup> Rule 702 and other *Federal Rules of Evidence* place limits on scientific testimony admissibility. The trial judge must ensure the reliability and relevance of the scientific testimony or evidence admitted. The expert's "scientific" knowledge and evidence must be based on "good science."<sup>2</sup>

Justice Breyer stated, "Our court recently made clear that the law imposes upon trial judges the duty, in respect to scientific evidence, to become evidentiary "gatekeepers." The judge, without interfering with the jury's role as trier of fact, must determine whether purported scientific evidence is "reliable" and will "assist the trier of fact."<sup>2</sup>

It is important to note that *Daubert's* requirements are binding only in federal court. Federal Appellate Courts struggle over the standard for excluding opinions of clinical medical experts. Georgia has specifically rejected the *Daubert* test and, in fact, freely allows witnesses, once they meet the modest requirement to qualify as experts under state law, to present their opinions before the jury. In such nonfederal, non-*Daubert* jurisdictions, does this mean any person qualified as an "expert" has free license before a jury and the only defense against such testimony is cross-examination or counter expert testimony? The *Ward*<sup>7</sup> decision clearly answered no. The expert must do more than simply

qualify as an "expert" for his or her purported opinion to become admissible into evidence.

To protect against unreliable expert opinions, the Georgia Court of Appeals held that an expert must do more than merely establish his or her credentials and give an opinion. The expert must also tell how he or she took the facts of the case and applied his or her expertise to them to reach an opinion. The court warned that conclusory expert testimony that merely asserts that the defendant caused the plaintiff's injury is not enough to prevent summary judgment. The expert must also present an explanation for that opinion.

In *Merrell Dow Pharmaceuticals, Inc. vs Havner*<sup>8</sup> the Texas Supreme Court opined, "We have held, however, that an expert's bare opinion will not suffice....The substance of the testimony must be considered."<sup>8</sup> "This is true even if the expert uses the 'magic language' that the opinion is based on 'reasonable medical probability.'<sup>8</sup> "If the expert's scientific testimony is not reliable, it is not evidence."<sup>8</sup>

Increasing concern exists about the impact of false or misleading medical testimony on patient care and credibility of the medical profession. The American Medical Association has decided to include the act of giving courtroom medical expert testimony as part of the official practice of medicine subject to peer review.<sup>9</sup>

Several medical and specialty organizations are working to deter false testimony. For example, the Florida Medical Association (FMA) has developed a program by which physicians who falsely testify are reported to the state licensing board for discipline. The AMA currently is studying programs like the FMA's.<sup>9</sup>

It is our opinion that the American Chiropractic Association (ACA) and state chiropractic boards will follow suit. As a result, when a doctor of chiropractic testifies in court as an expert witness that testimony may be subject to evaluation by other qualified chiropractic physicians, and, if that testimony is found to be inaccurate, sanctions or even the loss of their license to practice chiropractic may follow. Until now, no disciplinary mechanism has existed to punish the unreliable chiropractic expert witness and protect the integrity of the court system.

The NBOFC concurs with the AMA, which has identified that "some expert witnesses develop theories of medicine (chiropractic), or causation that are not sufficiently grounded in science."<sup>10</sup> Examples may include misquoting standard journal articles and texts, making false statements, and deliberately omitting important facts and knowledge. Generally, an economic incentive to do so exists. Income derived from expert witness testimony can be substantial. In this day and age of managed care, economic incentives can change the position of the expert's testimony. "Junk science"<sup>11,12</sup> (chiropractic) finds its way into court through unchecked testimony of physicians.

The NBOFC is spearheading an effort for chiropractic to weed out unreliable chiropractic testimony. It encourages the national trade and state associations to promote legislative action to sanction chiropractic physicians who testify falsely.

On December 7, 1998, the U.S. Supreme Court heard oral arguments in *Kumho Tire vs Carmichael*<sup>13</sup> and must wrestle with whether Daubert factors apply to all expert testimony or whether blanket application is appropriate in nonscientific fields where knowledge is experienced based.

The chiropractic profession needs to have an understanding of Daubert to ensure compliance and avoid opinion exclusion. Lacking this knowledge raises concerns on completion of their case analysis. Opinions based on properly documented analysis, with authoritative treatises and detailed workpapers, are much less likely to be excluded under Daubert scrutiny.

Another reason is recognizing when an opposing expert witness's work fails to meet the suggested factors. The expert may be the most qualified person to critique or review the work of the opposing expert and should have the most extensive knowledge of the body of information on which the opposing expert relies. Research materials may be invaluable in demonstrating that the method applied is not generally accepted, that it has been previously scrutinized and subsequently discredited, or that it fails to meet the tests for other reasons. One such article was recently published in *Spine* by Freeman et al.<sup>14</sup> A suggestion that the opposing expert's opinion could be excluded on Daubert grounds could leave their side without admissible evidence.

It should be noted that being a licensed chiropractor alone is not sufficient to qualify as an expert in every case. Through specialized training to better understand the requirements and needs of the courts, the forensic chiropractic examiner can become a valuable tool in providing an "evidenced-based" opinion regarding legal questions. This training, similar to the independent medical examiner (IME) program sponsored by the National College of Chiropractic and NBOFC forensics program sponsored by Logan and Texas Chiropractic Colleges, should prepare the expert in

the methods, forensic analysis, and principles that have a reliable evidence-based reasoning and methods that are scientifically valid.

Warren T. Jahn, DC  
2960 Roxburgh Dr  
Roswell, GA 30076-2427  
Clayton W. Hopkins, DC  
Preston H. Long, DC  
Leanne N. Cupon, DC  
Jeffrey D. Berklich, DC  
Preston B. Fitzgerald, DC

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