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Kaye Scholer Partner Pamela Yates on *Daubert* and Women in Torts

Twenty years ago, the U.S. Supreme Court handed down its ruling in *Daubert v. Merrell Dow Pharmaceuticals*, which raised the bar for admitting expert testimony in federal court. *Daubert* replaced the "Frye" standard, which said that expert evidence could be admitted if the scientific technique upon which it was based was generally accepted as reliable by the scientific community. In its place, Daubert set forth a multi-pronged test and established the judge as a gatekeeper.

Since then, *Daubert* has reverberated across product liability cases, which often rely heavily on expert testimony.

Pamela Yates was a young associate when she authored the summary judgment motion that led to the *Daubert* ruling. Now a partner at Kaye Scholer, Yates deals with *Daubert* issues as a litigator defending pharmaceutical, medical device, consumer and other tort claims. Her clients have included pharmaceutical giants Wyeth, Baxter and Endo Pharmaceuticals.

Yates spoke with *Reuters* about her role in the *Daubert* case, its impact on product liability cases, and the importance of having female litigators at the forefront of cases involving women's health. The answers have been edited for brevity and clarity.

Reuters: When you first drafted the Daubert *motion, did you expect it would have the impact it has had?*

Yates: In all candor, no. We were arguing that an already existing standard for admissibility of expert scientific testimony, *Frye*, remained the appropriate standard, even though the Federal Rules of Evidence had been enacted since that decision. We assumed the court would either agree or disagree, we'd move forward with the case and, if we lost, end up in the 9th Circuit. I never thought the case would end up in the Supreme Court or that a new standard would become the law.

Reuters: What is your reaction to how Daubert *has evolved over the last two decades?*

Yates: The series of cases like Kuomho Tire that were decided by the Supreme Court following *Daubert* were very exciting. (In *Kuomho Tire v. Carmichael*, the court expanded the applicability of *Daubert*

About the Author

Pamela Yates is a partner in Kaye Scholer's Los Angeles Complex Commercial Litigation Department. Her primary area of experience is product liability, where her work has included the defense of tort claims involving pharmaceuticals, medical devices, consumer and prescription product recalls, animal health and toxic torts. Early in her career, Pamela was responsible for the Daubert *case on behalf of Merrell Dow Pharmaceuticals Inc. She drafted the summary judgment motion that lead to the landmark U.S. Supreme Court decision. Throughout her career, Pamela has worked extensively with medical experts in several disciplines, including hearings to exclude plaintiff experts based on the* Daubert *standard. She can be reached at* ***pamela.yates@kayescholer.com***

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beyond scientific testimony to all expert testimony.) Each one added factors to be evaluated before admitting expert testimony so, in a sense, *Daubert* continued to grow. I've been enthused to see some states that were late to jump on the *Daubert* bandwagon, like California and Nevada, recently starting to adopt *Daubert*-like standards.

But I've also been disappointed at times when I'd see courts becoming reluctant to go through their complete "gatekeeping" role. We lawyers are at least partially to blame. If we're going to claim the other side has no credible scientific evidence, we need to say it in less than 50 pages with thousands of pages of exhibits.

Reuters: Critics say Daubert *has made cases lengthier and costlier. Do you agree?*

Yates: I'm not sure *Daubert* battles have made litigation longer or more expensive. It's possible more battles were fought, perhaps where they should not have been. What's happening at times, however, is that we're overburdening our judges. When discussing this phenomenon with a number of judges on a panel, I coined the phrase "over-Daubertized." A way to cure that is to really only challenge the other's sides experts or science when you have a credible challenge you can win.

> ***"If we're going to claim the other side has no credible scientific evidence, we need to say it in less than 50 pages with thousands of pages of exhibits."***

Reuters: How has Daubert *impacted product liability cases?*

Yates: On the science front, the typical pharmaceutical products case necessarily involves some form of medical expert testimony to prove causation. We've also seen *Daubert* utilized to challenge non-science experts - for instance, the FDA expert who offers opinions by simply reading and interpreting company documents with no reliable methodology. Both of these experts are critical to pharmaceutical product liability cases, and both are subject to attack under *Daubert*.

Reuters: Are there any product liability trends you're watching now?

Yates: Last November, the California Supreme Court issued a unanimous opinion in Sargon Enterprises v. University of Southern California that all but adopted the *Daubert* standard. The Supreme Court held that the trial court has a duty to act as a "gatekeeper" against speculative expert testimony. However, in a footnote, the court reaffirmed that, in the narrow situation of expert evidence about new scientific techniques, California still adheres to its version of the Frye rule. Since *Daubert's* roots stem from California federal court, I think many of us have watched and waited to see if or when the standard would be adopted in state court. I think it will be interesting to see what develops following Sargon.

Reuters: On a different topic, a federal judge in New York recently encouraged plaintiffs to include qualified female attorneys on the steering committee of the Mirena MDL regarding claims over Bayer's

popular intrauterine device. Is there an advantage to have female lawyers at the forefront of cases that implicate women's health?

Yates: Absolutely. My first trials were defending silicone breast implants. I fundamentally believe there are some issues that women are just better able to cross-examine women on - or at least are more comfortable doing so. I also think the company gains credibility having women defend women's products, and I'm not sure that the favorable reaction is gender-specific with jurors, although perhaps women jurors react more favorably: "How could a woman defend this product if she didn't believe in it?"

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