THE DAUBERT STANDARD: A COMPARATIVE STUDY BETWEEN INDIA AND THE UNITED STATES

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The aim of this paper is to analyse the Daubert Standard as it is applied and understood in the United States. The paper will also be focussing on an analysis of the Indian laws on admissibility of evidence to see whether they adhere to the Daubert Standard or not, and whether Daubert Standard is understood in the same sense by Indian courts as it is understood by courts in the United States.

I. Introduction

With the advances in technology happening almost daily, it is becoming more and more difficult for the Courts to keep up with them. Judges often feel perplexed when they have to decipher the complex issues that come up as a result of these advancements. The judges feel technically handicapped in assessing such evidences and because of this, the need for reliability on expert evidence/opinion over the years has increased manifold. Even though taking the help of experts has become a matter of necessity, the courts still have to ensure that expert evidence is not just followed blindly, but sufficient safeguards or standards are in place to ensure that it can be depended upon, without causing unfair prejudice to any party.

The judiciary has for a very long time known to have played the role of a "gatekeeper" when it comes to admissibility of expert opinion as evidence in trial, in order to make sure that it meets the basic standard of reliability.[1] Determining which expert evidence is relevant and which is "junk"[2] is a daunting task that the judges have to perform, but at the same time the task is indispensable to the decision making process, and if not done the right way can change

[1] Richard C. Bost , "*Flawed Geoscience in Forensic Environmental Investigations Part II: How Daubert Affects the Scope and Bases for Expert Opinions*" 2005

[2] Cassandra H. Welch, "*Flexible Standards, differential review: Daubert's legacy of confusion*" , Harvard Journal of Law & Public Policy [Vol. 29 No.3]

the outcome of the case completely. For instance, in a civil case, this could result in an injured plaintiff who is denied compensation for some grievous harm or in a criminal case, expert testimony could convince a jury to convict a person, depriving him or her of freedom or even of life.[3] Thus, the consequences are certainly extremely grave.

In India, Section 45 of the Indian Evidence Act, 1872 defines the scope of expert evidence. The evaluation of an expert evidence is only done by assessing the credibility, credentials and qualifications the expert. The question of who is an expert is defined by section 45 as a person who has special knowledge and skill in the given field. Thus, India's evaluation of expert evidence is limited to an assessment of the credibility and qualifications of an expert witness, and there are various case laws to support the same.[4] However, the situation is not the same in the United States, where there is more to this evaluation. The reliability and relevance of the expert's methodology, in addition to the expert's credentials, are subject to scrutiny in the United States.[5] In 1993, *Daubert v. Merrell Dow Pharmaceuticals , Inc*.set forth the standard by which all federal and many state judges now evaluate proffered expert evidence. The case is known to be perhaps the most important case on evidence ever to be decided. The Supreme Court then further tried to clarify it through two other judgements namely, *General Electric Co. v. Joiner*[6] and *Kumho Tire Co. v. Carmichael* [7], to make up what is now known as the *Daubert trilogy.*

Through this paper, I aim to analyse the *Daubert Standard* as it is applied and understood in the United States. I further seek to analyse whether Indian laws on evidence adhere to the Daubert standard or not, and whether the Daubert Standard is understood by Indian courts in the same sense as it is understood by courts in the United States.

II. The Birth of Daubert in the United States

[3] Jennifer L. Groscup, Lincoln Steven D. Penrod, John Jay Matthew T. Huss , "*The Effects Of Daubert On The Admissibility Of Expert Testimony In State And Federal Criminal Cases*", Psychology, Public Policy, and Law 2002, Vol. 8, No. 4

[4] *Parat v. Bissessar,* ILR 39 Cal 245, *Raj Kishore v. State,* AIR 1969 Cal 321

[5] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 593-96 (1993).

[6] 522 U.S. 136 (1997).

[7] 5 526 U.S. 137 (1999).

For almost 70 years before Daubert, the principle on admissibility of evidence was governed by the *Frye*[8] *test*. According to this test, expert testimony based on a scientific principle could only be admissible if it had gained "general acceptance" in its field. In this case, the defense had sought to introduce an expert to testify to the results of a systolic blood pressure deception test, which is similar to the polygraph test, to which the defendant had been subjected to. The court held that the systolic blood pressure deception test had not achieved general acceptance within the fields of physiology and psychology, and therefore, the expert testimony deduced from the test was inadmissible, and the court did not cite any cases for its reasoning. However soon, it was realised that the test was a poor standard of admissibility as it hindered the admissibility of new advances in technology. A strong division was created between the Courts with some courts applying the test and some were not. This confusion was then finally cleared in the case of *Daubert v Merrel Dow Pharmaceuticals*[9] (hereinafter referred to as the Daubert case).

In this case, plaintiffs Jason Daubert and Eric Schuller, were born with serious birth defects, had alleged that these defects were a result of their mothers' ingestion of the drug Bendectin and sought to introduce expert testimony that Bendectin could cause such defects. Applying the Frye test, the district court found that the scientific principles upon which the plaintiffs' expert testimony was based were not generally accepted. The court therefore granted the defendant's motion for summary judgment.[10] When the case reached the Supreme Court, the Court noted that the Frye test was actually out-dated, and were subservient to the Federal Rules of Evidence. Furthermore, nothing in the drafting history of the rules suggested that general acceptance was intended to be a prerequisite for the admission of expert testimony, and "requiring general acceptance would go against the 'liberal thrust' of the Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony'."[11] It was held that the Frye's test was incompatible with the Federal rules and should not be applied in federal courts. The Supreme Court remanded the case and directed the trial judge to apply a two-prong approach for admissibility- The evidence presented must be both relevant and reliable. First, to be admissible, the evidence must qualify as relevant under Rule 702, which states that such

[8] *Frye* v *United States*, 293 F. 1013 (D.C. Cir. 1923).
[9] 509 U.S. 579, 593-96 (1993).
[10] Cassandra H. Welch, "*Flexible Standards, differential review: Daubert's legacy of confusion*" , Harvard Journal of Law & Public Policy [Vol. 29 No.3]
[11] Ibid

evidence must "assist the trier of fact to understand the evidence or to determine a fact at issue." Thus, as with any other type of evidence, the relevance requirement will cause expert scientific evidence to be admissible for some purposes but not for others. Second, the evidence must be "reliable".[12]

Once the judge has decided a witness is competent enough to serve as an expert, Daubert requires the judge to make an assessment to ensure that the scientific testimony being admitted is not only relevant but also reliable. This would involved examining the reasoning or the methodology used by the expert, to determine whether the methods used qualify as valid scientific methods.[13] "Daubert suggests several factors to aid federal judges in evaluating whether a particular scientific theory or study is reliable: (1) its empirical testability; (2) whether the theory or study has been published or subjected to peer review; (3) whether the known or potential rate of error is acceptable; and (4) whether the method is generally accepted in the scientific community. But these factors are neither exhaustive nor applicable in every case." [14]

III. The Current Application of Daubert in the United States

Even though the Daubert case was a civil one, it has found its presence in the Criminal Cases as well. In most of the Criminal cases, the Daubert standard has been given an extremely open and liberal interpretation. Based on this standard, the judges are empowered with much more discretion and a fairly flexible approach has been adopted by the Courts when it comes to admissibility of evidence. Daubert case was often criticised for lack of clarity, that is, the judges were often puzzled on how to perform the "gatekeeping" function. Therefore the judges had to interpret for themselves whether and how the factors laid down in Daubert should be applied. As a result, many cases following Daubert expanded its interpretation.

The Daubert case was followed by the case of *General Electric Co. v Joiner*[15], in which the Court held, "Nothing in Daubert requires a district court to admit opinion evidence which is

[12] Ibid
[13] Ibid
[14] Fradella, O'Neill, Fogarty, "*The Impact of Daubert on Forensic Science*", Pepperdine Law Review, 2004
[15] 522 U.S. at 146.

connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered". Thus, it established that a judge may exclude expert testimony when there are gaps between the evidence relied on by an expert and his conclusion. [16] Then in 1999, the case of *Kumho Tire v Carmichael*[17] held that judge's gatekeeping function in Daubert applies to all expert testimony and not just scientific testimony. The factors established in Daubert are not just limited to scientific testimony, but all kinds of expert testimony. The Court noted that the language of Rule 702 and Daubert suggests that there should be no distinction between scientific knowledge and other knowledge.[18] These two cases, along with Daubert, form what is called the Daubert trilogy, and they establish that "general acceptance" is no longer the standard for admissibility of expert evidence, but the judges also have some flexibility in determining whether evidence should be admissible or not.

In the case of *Delaware* v *Fensterer*[19], the court held that in a situation where an expert is unable to remember the exact method he used to establish a particular fact, the evidence is bound to be inadmissible for want of sufficient basis. It was held in Daubert, that "Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known."[20] Therefore, following this standard, the judge was of the opinion that a lapse in the memory of an expert cannot be treated lightly and cannot be compared to be the same as an lay man's memory lapse. Thus, another basis for reliability on an expert's opinion was established. The same principle was further followed in the case of *United States* v *Owens*.[21]

However, one case which is known for not explicitly adhering to the Daubert Standard was the case of *United States* v *Scheffer*[22], which involved the question of admittance of polygraphy tests. After the Frye case, it was assumed that polygraphy tests were inadmissible as they lacked "general acceptance" by the scientific community. However, after Daubert,

[16] Cassandra H. Welch, "*Flexible Standards, differential review: Daubert's legacy of confusion*" , Harvard Journal of Law & Public Policy [Vol. 29 No.3]
[17] 526 U.S. 137 (1999).
[18] Cassandra H. Welch, "*Flexible Standards, differential review: Daubert's legacy of confusion*" , Harvard Journal of Law & Public Policy [Vol. 29 No.3]
[19] 474 U.S. 15 (1985).
[20] Ibid
[21] 484 U.S. 554 (1988).
[22] 523 U.S. 303 (1998).

when the "general acceptance" principle was done away with, many lower courts have hinted on the possible admittance of polygraphy tests. In the case of *United States* v *Scheffer*, the court held that polygraphy test was admissible and also, it did not violate any rights under the sixth amendment of the Constitution. However, the court had problems adhering to the reliability standard as laid down in Daubert. The judges were of the opinion that there is simply "no way" to know for sure in a particular case whether a polygraph examiner's conclusion is accurate. The court held that "Unlike other expert witnesses, a polygraph expert can supply the jury with just another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt". Therefore, it is clear from the judgment that the polygraphy test as it has been made admissible by the judgement fails to conform to the "reliability" standard as was laid down in Daubert.

Thus, it can be seen that Daubert is now deeply rooted in the Criminal litigation field in the United Sates and has led to a substantial number of developments in it. It transpired questions of even "generally accepted" methods, for instance, a lot of research has taken place in the field of handwriting analysis. Many scholars have questioned the standards of admissibility which has in turn forced the judges to re-establish their standards of admissibility of evidence. The case even led to the amendment of Rule 702 of the Federal rules of evidence which established stricter rules of reliability and relevancy for admissibility of expert evidences. Even though the Daubert standard is criticised for not being applied consistently in the cases, because of the flexibility it grants to the judges, the Daubert case has still had an unparalleled impact in the Criminal jurisdiction of the United States.

IV. THE INDIAN SCENARIO

As mentioned above, In India, Section 45 of the Indian Evidence Act lays down the scope of admissibility of expert opinion. The Section allows for an expert to give his testimony/opinion, when the "expert" claims to have special knowledge in the subject matter

of enquiry, without which, the Court is unlikely to form a correct judgement. Just like in the courts of United States, whether a person is competent to be an "expert" and give his testimony is a matter which has to be proved in Court is upto the judge's discretion. Therefore, a judge will decide the competency of an expert to give his opinion.

In Indian courts, the opinion of an expert cannot by itself ever be substantial evidence, it can only be corroborative in nature[23]. Thus, courts in India are always warned to be cautious when relying on expert testimony, and the testimony without any corroboration has extremely low evidentiary value.[24] Therefore, expert evidence is merely advisory in nature and the courts are not bound by it.[25] The laws in India on competency of an expert, are limited to his/her qualifications and credentials. For instance, the expert's educational background is a major criterion.[26] Credibility can also be judged by not only the person's qualifications, but also through his experience and recognition in that specific field.[27] The job of an expert is to put before the Court all the materials, together with reasons and convince the court, so that the court may form its own judgement by its own observation of those materials. [28] Thereafter, it is the Court's discretion to decide how much weightage is to be given to the expert evidence.

Hence, it is clear that Indian courts have not yet laid down any rigid guidelines on admissibility of expert evidence. There is definitely a general acceptance of scientific evidence and expert's opinion in Indian Courts, however there is no special law with respect to this. This kind of an approach can definitely be extremely regressive, because the judiciary may not be able to keep up with the technological advances, and therefore the decision making will be prejudiced. Even though no standard has laid, but many courts have opined that in case of any doubt, the guidelines in the daubert standard can be adhered to. [29]

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[23] *Malay Kumar Ganguly* v *Dr. Sukumar Mukherjee* AIR 2010 SC 1162
[24] *Magan Bihar Lal* v *State of Punjab,* AIR 1977 SC 1091
[25] ***Malay Kumar Ganguly* v *Dr. Sukumar Mukherjee*** AIR 2010 SC 1162
[26] *Dhobi Yadav* v *State of Bihar AIR 1989 (2)*
[27] *Collector Jabalpur* v *Nawab Ahmed: AIR 1971 M.P. 32*
[28] ***Ramesh Chandra Agarwal* v *Regency Hospital Ltd,*** (2009) 9 SCC 709
[29] Dr. Kantak MP, Ghodkirekar, Perni SG., "*Utility of daubert guidelines in India*" Journal of *Indian* Academy of Forensic Medicine. 2004

In the case of *Dharam Deo Yadav v State of Uttar Pradesh*[30], the Supreme Court emphasises on the fact that the Indian judiciary needs to move forward with the technology, and give way to innovative and scientific methods of evidence analysis. The traditional methods and tools have become out-dated and therefore, the need of the hour is to strengthen the forensic science for crime detection. Moreover, the court stresses on the fact that the judiciary needs to be equipped to deal with such scientific materials. The court does advocate that in all cases scientific evidence is the most reliable test, but only emphasises on the necessity of promoting scientific evidence. The court then also mentions the factors that were laid down in the Daubert case to determine the reliability and relevance of evidence. In my opinion, the mention of the Daubert case here was an attempt to hint at the need of having an established regime for admissibility of forensic evidence, with a determined standard, as compared to the more organic and fluid system we have in place currently.

The case of *Nnadi K. Iheanyi v Narcotics Control Bureau*[31], was a case which, in my opinion, was deeply influenced by the dual test of admissibility that was established in the Daubert Case. In this case, the Supreme Court referred to the standard laid down in the Daubert case, and realised the need for the court's to play the gatekeeper's role to screen evidence and ensure relevance and reliability of scientific evidence. As a result, the Supreme Court dismissed the expert evidence on the basis that the expert's testimony was not satisfactory/ reliant enough as it failed to explain sufficiently the reason for the scientific conclusion that was drawn by the expert. A similar reasoning was used in the case of *State v Patrick*[32], wherein the court was of the opinion that the scientific explanation given by the expert was not reliable enough. The Supreme Court again referred to the principles of evidence admissibility as established in Daubert, in the case of *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra*[33], in which the question was about the admissibility of brain mapping test. The court in this case held that the report of a brain mapping test cannot just be looked at independently, and its probative value will entirely depend upon its authenticity. Therefore, again, the Indian judiciary is taking the *Daubert's* way ahead.

[30] (2014) 5 SCC 509
[31] (2014) 145 DRJ 267
[32] 2014 SCC OnLine Del 4446
[33] AIR 2005 SC 2277

The Daubert standard came into question again in the case of *Selvi v State of Karnataka*[34] (hereinafter referred to as *Selvi*) wherein the issue was regarding the constitutional validity of narco-analysis and polygraphy tests. The court first started its analysis by looking at the case of *Frye* v *United States*, wherein the admissibility of polygraphy test was dismissed for want of sufficient recognition and acceptance in the scientific field, thus giving birth to the general acceptance principle. The Court then moved forward to the Daubert case, which overruled the general acceptance principle and established the two fold rule of evidence admissibility- relevance and reliability. The Court then looked at a couple of more cases after Daubert which paved the way for polygraph admissibility, until it finally reached the case of *United States v Scheffer*[35]*(*hereinafter referred to as the *Scheffer case).* The Scheffer case finally permitted polygraphy tests in the United States, and the Selvi court heavily relied on its reasoning. However, as it has been mentioned before, the *Scheffer case* did not exactly adhere to the standard laid down in Daubert, and by following *Scheffer*, the *Selvi* case created a bad precedent in India in terms of adherence to the Daubert standard.

V. CONCLUSION AND ANALYSIS

Therefore, what can be seen from these cases is that the Daubert standard is only used in a handful of cases in India, and the understanding of it isn't any different from how it is done in the United States. In my opinion, the current laws on admissibility placed in India, no matter how vague they are, are still used as primary sources to reach correct outcomes in cases and that is why reliability on any foreign standard isn't needed. Also, the dual test established under Dauber- relevance and reliance, even though not explicitly mentioned, is followed in India as well. For an expert evidence to be admissible, the expert first has to be examined as a witness in the court[36]. This kind of cross examination can surely prove whether the evidence that is being presented, is relevant and reliable or not. For instance, if an expert does not provide sufficient data or reasoning for his conclusion, then his evidence may not be taken into consideration. The courts have held that without

[34] (2010) 7 SCC 263
[35] 523 US 303 (1998)
[36] *Balkrishna Das Agarwal v. Radha Devi*, AIR 1989 All 133

such cross-examination, the question of reliance on expert evidence does not arise.[37] The courts have also held that when admissibility of evidence regarding "medical sciences" is concerned, the expert has to cross a certain threshold of having special knowledge or skill in the field, and has to be distinguished from an ordinary witness.[38] Therefore Indian courts do place importance on the 'relevant and reliable standard that was laid down in Daubert.

Therefore, the applicability of Daubert in the United States has been extremely consistent, and the standard has been upheld by Indian courts as well, understood in the same sense as in the courts of the United States. It can also be said that the gatekeeping function performed by Indian courts is not necessarily based on Daubert, but the principle of reliance and relevancy are also judiciously derived looking at the needs of the society. Nonetheless, Daubert has proved to be of immense value as it has definitely influenced the Indian judiciary in adopting a more flexible standard when admissibility of evidence is in question. Therefore, great reliance is place on the Daubert standard not just in the United States, but in India as well.

[37] *State of Maharashtra v/s Damu s/o Gopinath Shinde and others*, AIR 2000 SC 1691
[38] *Malay Kumar Ganguly* v *Dr. Sukumar Mukherjee* AIR 2010 SC 1162