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Daubert & Danger: The "Fit" of Expert Predictions in Civil Commitments

By Director of the Civil Clinic and Assistant Professor of Law Alexander Scherr

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Never make predictions, especially about the future. But in civil commitments, courts predict future behavior all the time. Judicial action here has severe results for the individual: deprivation of liberty, potentially unwanted and intrusive treatment, and the stigma of mental illness. Judicial inaction can also do harm: erroneous release can lead to injury of the person or others. Resolving these risks requires courts to find the person poses a danger to him/herself or others because of a mental illness.

The opinions of experts in prediction should help these courts, but over 30 years of scientific and judicial opinion argue that predictions of danger do little better than chance or lay speculation. Even the best predictions leave substantial room for error about individual cases.

One would expect the rules of expert evidence, especially the reliability standards of *Daubert*, to require the exclusion of predictive expertise from the civil commitment process.[1] *Daubert* displaced the *Frye* standard[2], replacing it with a test focused in part on scientific reliability. To be sure, federal evidence law does not bind the states: some follow *Daubert*, some *Frye* and some (like Georgia) follow their own path. But the test should not matter. Given the notorious unreliability of prediction, and deep division in the professional community, we would expect no court to admit predictive opinions under *Daubert*, *Frye* or any evidentiary standard.

Yet, no appellate court has ever ordered exclusion of expert psychiatric testimony about danger in a civil commitment case. To the contrary, courts welcome these opinions, and do so with their eyes open: judicial opinions regularly refer to, and explicitly accept, the imperfections of predictive testimony. What is going on? How can such unreliable opinion survive *Daubert's* stress on scientific reliability?

The answer is simple: *Daubert* requires more than scientific reliability. It also requires assessing how the expertise "fits" the demands of the case. Even without validation, a court may still use an opinion if it has a sufficiently strong fit to fact-finding. The example of predictive expertise helps both to develop a methodology for assessing fit and to find factors for determining fit.

The methodology appraises civil commitment as a case type: its substantive and constitutional dimensions; its burdens of proof; the characteristic patterns of proving danger, including expert testimony; and the legal definition for a finding of danger. The resulting factors for assessing fit include: how thoroughly the substantive law of the case has absorbed concerns over the reliability of a given expertise in shaping the case process; the prevalence of the particular experts as witnesses in the case; the inherent difficulty of fact-finding on the issue and the extent to which the expertise eases that difficulty; and the similarity of the inferential process embodied in the opinion to those required for fact-finding. These factors explain why courts have so readily accepted the deep uncertainties of predictive testimony.

The argument thus suggests a revised model for assessing expertise, which reframes *Daubert* from a test of reliability to an assessment of the demands of judicial fact-finding. The model assumes courts will find ways to admit even risky opinions in a given case, when the fit is strong enough. The model matters in at least three distinct ways:

- For mental health law, the model allows us to conclude that courts have consistently gotten it right about predictive testimony. It thus aligns current doctrine with decades of consistent judicial opinion. Predictive testimony should be admissible in civil commitment cases under *Daubert*.
- The model raises useful questions for evidence scholars. With predictive expertise, the twin concerns of reliability and fit act in inverse proportion. The strength of the fit overcomes weaknesses in the reliability of predictive testimony. But that may not work in all cases, and may in fact reflect features unique to predictive testimony in civil commitments. The contextual methodology described above can guide future research about the limits of expert evidence in other areas.
- The model has practical consequences for federal courts and for states that have adopted *Daubert*. Trial judges can assess not only the standard of rigor experts in a field might require, but also the fit to which that standard bears to the rigor of fact-finding on difficult issues. As trial and appellate courts settle how a given opinion fits within a given case, the frequency and disparity in rulings on admissibility should abate.

More generally, the *Daubert* cases deal not solely with science or the reliability of expertise. Rather, these cases focus on how courts can use advances in knowledge to satisfy the judicial imperative to decide cases. The cases set the terms on which fact-finders borrow from other disciplines. They also require the courts to retain the discipline and pragmatic judgment acquired while resolving previous disputes. Judicial decision-makers must ask not only whether new knowledge can be justified in its own terms, but also whether, when and how new knowledge has a role to play in advancing the just and expedient resolution of conflict. ■

[1] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

[2] *Frye v. United States*, 293 F. 1013 (D.C. App. 1923) ("Sufficiently established to have gained general acceptance in the particular field in which it belongs.")