KonMari Method™ Your Cases: Neutralizing Junk Science Defenses in Design Defect Cases

By: Jasper V. Abbott

Unless you have been living under a rock for the last few years, you have inevitably heard of Marie Kondo and the KonMari Method™. The KonMari Method™ is a simple but brilliant strategy to declutter your home: get out all your personal items, get rid of the items that don't spark joy, the junk, and then reorganize your personal items. The KonMari Method™ works because it recognizes that it is easier to get rid of the junk at the outset rather than later.

However, as litigators, we often do the opposite. We wait until the end of the case to get rid of the junk. We know from experience that manufacturers, and even whole industries, rely on junk science defenses to prevail in design defect cases. And at the beginning of design defect cases, we often know what junk science the defense will present. It is the same junk science they relied on in prior cases about the same defect. This presents a great opportunity to use the KonMari Method™ to address the junk science at the beginning rather than the end of our cases. This article will address how to use this approach using design defect litigation with standup forklifts as an example.

Identifying the Junk (Science)

The first step in getting rid of the junk science in our cases is to identify the junk science. The United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, sets the standard for the admissibility of scientific testimony and evidence.[1] Under Daubert, there are generally five factors that courts consider in addressing whether to admit a particular "scientific" test or methodology: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.[2] These factors are flexible; the goal of these factors is to ensure that when an expert offers scientific testimony, that testimony has "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[3]

How do we determine if an expert's methodology shows the same intellectual rigor as other experts? It's simple, we look at the scientific method. The same scientific method we were all taught in middle school. The scientific method outlines the basic steps that we expect experts to take to arrive at reliable, scientific-based conclusions. There are five basic steps to the scientific method: (1) observation, (2) hypothesis, (3) experimentation, (4) data analysis, and (5) conclusion. Junk science fails to follow the scientific method.

Now, let's look at how this applies in the context of forklift design defect litigation. Left leg and foot crush injuries are fairly common in sidestance standup forklifts. As a result, forklift manufacturers have routinely hired experts offering the same or similar defenses to the cases being brought based on these injuries. These experts routinely opine that putting doors on the forklifts (a common-sense design that would prevent the typical injuries) would make them more dangerous. The theory being that a door will delay the operators' egress from the machines and thus "force" them to stay in the machines as they tip over or go off loading docks.

---

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

[2] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-50 (1999).

[3] *Id.* at 152.

Because there are no reported accidents involving people that prove this hypothesis, the experts used anthropomorphic test devices (i.e., test dummies or "ATDs") to gather the data to support the argument. This testing was done years ago, but it is still relied upon by defense experts in these cases. While there are numerous problems with the ATD testing, the chief issue is that ATDs do not behave like humans during off-dock and tip-over events in standup sidestance forklifts. Rather than trying to avoid injury in these events, like a conscious human would do, the ATDs actually lead with their heads thereby exacerbating any injury suffered during these events. In the ATD tests, which are routinely relied on by manufacturers in this type of case, forklifts are tipped over and sent off a loading dock with an ATD inside the forklift.

These ATD tests are junk science. The tests do not prove the hypothesis—that forklifts with doors are more dangerous to human operators than forklifts without doors. In this scenario, the ATD does not mimic human behavior or responsiveness. Therefore, it fails step three of the scientific method because the "experiment" does not actually test the hypothesis. Whenever you are confronted with scientific defenses, go through the steps of the scientific method and identify the holes in the defense.

Use *Daubert* Early in the Case to Neutralize the Junk

Once you have identified the junk, it is necessary to bring it to the court's attention as soon as possible. Oftentimes you will know about the junk science defenses from the outset of the design defect case. The defense was likely used in previous cases about the same defective design. Nevertheless, we customarily wait until the eve of trial to move to exclude this testimony and evidence, when *Daubert* motions and motions in limine are typically due.

Under *Daubert*, the proponent of expert testimony has the burden of showing that the testimony is admissible by a preponderance of the evidence.[4] The party offering an expert's testimony must show several things. First, that the specialized knowledge will be helpful to the jury. Second, that the expert is qualified, and that her testimony is based on sufficient facts or data and reliable methods and principles applied reliably to the facts of this case.[5]

The court acts as a gatekeeper of expert testimony. It is tasked with ensuring that juries are not presented with "junk science."[6] Because expert testimony is so difficult for jurors to evaluate, it can be both powerful and quite misleading.[7] Because of this, the court's gatekeeping function is especially important to ensure that jurors are not misled.

Under *Daubert*, the court must decide if the expert had followed a reliable methodology and properly applied the methodology to the facts of the case.[8] The Court has "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[9] Courts cannot merely take the expert's word that his methodology is reliable, nor can the Court simply rely upon the *ipse dixit* ("because I said so") of the expert.[10] Any step in the expert's methodology which renders it unreliable also "renders the expert's testimony inadmissible."[11]

---

[4] *Daubert*, 509 U.S. at 592 n. 10.

[5] O.C.G.A. § 24-7-702.

[6] *See Bullock v. Vokswagen Gro. of Am., Inc.*, 107 F. Supp. 3d 1305, 1309 (M.D. Ga. 2015).

[7] *Daubert*, 509 U.S. at 595.

[8] *See Kumho*, 526 U.S. at 156.

[9] *Daubert*, 509 U.S. at 597.

[10] *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1244 (11th Cir. 2005).

[11] *Id.* at 1245 (quoting *Amorgianos v. Amtrak*, 303 F.3d 256, 267 (2d Cir. 2002))

Experts must be able to apply some science, specialized knowledge, or expertise to their opinions. Opinions solely based on personal experience or opinion may be excluded.[12] Even when an expert has relevant training, if their methodology for forming opinions is not reliable, then their opinions must be excluded.[13]

Nothing in the rules prohibits us from making *Daubert* challenges early in the case. Nothing in the rules prohibits us from filing early motions in limine to prohibit the introduction of junk science. In fact, this approach provides a number of strategic advantages. First, the judge may grant the motion, thus prohibiting one of the defendant's chief defenses in the case. This will only improve the chances of having a just resolution for your client, either before or after the trial.

Second, even if the judge does not grant it, it allows you to educate the court about the issue early in the case. *Daubert* motions, motions in limine, and dispositive motions are routinely due at the same time. If that is the time that the judge is first learning that the defendant is relying on junk science, they likely do not have the time to focus on that issue given the many other pending motions. Many *Daubert* motions and motions in limine are simply filed as a matter of routine. Which makes it easy for courts to gloss over such motions. *Daubert* allows and calls on courts to engage in a rigorous scientific analysis. But, the time when *Daubert* motions are typically due does not permit that type of rigorous analysis. An early *Daubert* motion and/or motion in limine can allows a judge to give more thought to the issue.

Exposing the Junk (Science) to the Jury

Even when their gatekeeping function is thoroughly explained to them, some courts are still hesitant to disallow junk science. In that situation, if you go to trial, you need to be able to address the junk science with the jury. The jury needs to understand that valid science follows the scientific method and that the junk science defense offered by the defendant does not follow that method. If it is permitted during *voir dire*, you should address the scientific method with the potential jurors. What is their understanding of the scientific method? Are they comfortable using the scientific method to access the scientific testimony in the case? In opening, throughout your case-in-chief, and throughout your cross-examinations, you show the holes in the defense. You show that the defense being offered does not adhere to the scientific method. And you bring it to the jury's attention again in closing. At every step you need to be prepared to challenge the junk science.

Conclusion

Many of us have used the KonMari Method™ to get rid of the junk in our homes. We need to use the KonMari Method™ to get rid of the junk science in our cases. The manufacturers who make the defective products that injure our clients are banking on our unwillingness to aggressively and proactively address the junk science they rely on routinely in these cases. However, can address it as soon as possible in our cases. Doing so will only improve our chances of getting the junk science out.

About the Author
Jasper Abbott is an attorney at Warshauer Law Group in Atlanta, Georgia. Jasper has extensive experience as a litigator in cases involving medical malpractice and civil rights violations. Jasper's outstanding skills have been recognized by his colleagues and he was selected by Super Lawyers as a Rising Star in 2017, 2018, and 2020. He is licensed in Oklahoma and Georgia.

---

[12] *Mason v. Home Depot*, 283 Ga. 271, 279-280 (2008).
[13] *HNTB Ga. Inc. v. Hamilton-King*, 287 Ga. 641, 643-44 (2010).

Jasper currently resides in Atlanta with his wife, Deah, and son, Alyosha. When Jasper is not practicing law, he enjoys going to baseball and basketball games, eating good food with friends and family, and visiting the Georgia Aquarium with his wife and son.