SUPREME COURT OF THE UNITED STATES

No. 96–188

GENERAL ELECTRIC COMPANY, ET AL., PETITIONERS *v.* ROBERT K. JOINER ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[December 15, 1997]

JUSTICE BREYER, concurring.

The Court's opinion, which I join, emphasizes *Daubert*'s statement that a trial judge, acting as "gatekeeper," must "'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" *Ante*, at 5 (quoting *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589 (1993)). This requirement will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer— particularly when a case arises in an area where the science itself is tentative or uncertain, or where testimony about general risk levels in human beings or animals is offered to prove individual causation. Yet, as *amici* have pointed out, judges are not scientists and do not have the scientific training that can facilitate the making of such decisions. See, *e.g.*, Brief for Trial Lawyers for Public Justice as *Amicus Curiae* 15; Brief for The New England Journal of Medicine et al. as *Amici Curiae* 2 ("Judges . . . are generally not trained scientists").

Of course, neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the "gatekeeper" duties that the Federal Rules impose— determining, for example, whether particular

expert testimony is reliable and "will assist the trier of fact," Fed. Rule Evid. 702, or whether the "probative value" of testimony is substantially outweighed by risks of prejudice, confusion or waste of time. Fed. Rule Evid. 403. To the contrary, when law and science intersect, those duties often must be exercised with special care.

Today's toxic tort case provides an example. The plaintiff in today's case says that a chemical substance caused, or promoted, his lung cancer. His concern, and that of others, about the causes of cancer is understandable, for cancer kills over one in five Americans. See U. S. Dept. of Health and Human Services, National Center for Health Statistics, Health United States 1996–97 and Injury Chartbook 117 (1997) (23.3% of all deaths in 1995). Moreover, scientific evidence implicates some chemicals as potential causes of some cancers. See, *e.g.,* U. S. Dept. of Health and Human Services, Public Health Service, National Toxicology Program, 1 Seventh Annual Report on Carcinogens, pp. v–vi (1994). Yet modern life, including good health as well as economic well-being, depends upon the use of artificial or manufactured substances, such as chemicals. And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points towards the right substances and does not destroy the wrong ones. It is, thus, essential in this science-related area that the courts administer the Federal Rules of Evidence in order to achieve the "end[s]" that the Rules themselves set forth, not only so that proceedings may be "justly determined," but also so "that the truth may be ascertained." Fed. Rule Evid. 102.

I therefore want specially to note that, as cases presenting significant science-related issues have increased in number, see Judicial Conference of the United States,

Report of the Federal Courts Study Committee 97 (Apr. 2, 1990) ("Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation"), judges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific or otherwise technical evidence. Among these techniques are an increased use of Rule 16's pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks. See J. Cecil & T. Willging, Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706, pp. 83–88 (1993); J. Weinstein, Individual Justice in Mass Tort Litigation 107–110 (1995); cf. Kaysen, In Memoriam: Charles E. Wyzanski, Jr., 100 Harv. L. Rev. 713, 713–715 (1987) (discussing a judge's use of an economist as a law clerk in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D Mass 1953), aff'd, 347 U. S. 521 (1954)).

In the present case, the New England Journal of Medicine has filed an *amici* brief "in support of neither petitioners nor respondents" in which the Journal writes:

> "[A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts . . . . Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science."

Brief for The New England Journal of Medicine 18–19; cf. Fed. Rule Evid. 706 (court may "on its own motion or on

the motion of any party" appoint an expert to serve on behalf of the court, and this expert may be selected as "agreed upon by the parties" or chosen by the court); see also Weinstein, *supra*, at 116 (a court should sometimes "go beyond the experts proffered by the parties" and "utilize its powers to appoint independent experts under Rule 706 of the Federal Rules of Evidence"). Given this kind of offer of cooperative effort, from the scientific to the legal community, and given the various Rules-authorized methods for facilitating the courts' task, it seems to me that *Daubert*'s gatekeeping requirement will not prove inordinately difficult to implement; and that it will help secure the basic objectives of the Federal Rules of Evidence; which are, to repeat, the ascertainment of truth and the just determination of proceedings. Fed. Rule Evid. 102.