WEIGHT OF THE EVIDENCE:
A LOWER EXPERT EVIDENCE STANDARD METASTASIZES IN FEDERAL COURTS

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APPENDIX B

"HONORABLE MENTION" COURT DECISIONS

(**Editor's Note**: This appendix supplements Appendix A to the WLF WORKING PAPER *Weight of the Evidence: A Lower Standard for Expert Evidence Metastasizes in Federal Courts*. Appendix B compiles federal court decisions that make only brief reference of the First Circuit's *Milward* decision. Appendix A and the main WORKING PAPER text are available on WLF's website at https://www.wlf.org/2020/02/19/publishing/wlf-working-paper-kogan-march-2020/.)

A. Traditional Tort Action Areas Receiving "Honorable Mention" (Toxic Torts, Products Liability, Negligence/Wrongful Death, Medical Malpractice)

Other tort cases that fall within the traditional tort areas, but which make only a brief reference ("honorable mention") of the *Milward* decision, are identified below by federal circuit and traditional tort area.

First Circuit (Where *Milward* Is Binding Precedent)

Products Liability

Bertrand v. General Electric Co. (D. Mass. 2011)[1]

> "'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky, but admissible evidence.'"[2]

Pukt v. Nexgrill Industries, Inc. (D.N.H. 2016)[3]

> "Generally, disputes about the factual bases of an expert's opinion affect the weight and credibility of the opinion but not its admissibility."[4] "Any weakness in the factual bases of the experts' opinions can be addressed through cross-examination."[5]

Short v. Amerada Hess Corp. et al. (D.N.H. 2019)[6]

> "A plaintiff in a personal-injury action of this variety generally must demonstrate two forms of causation: general and specific. ''General causation' exists when a substance is capable of causing a disease' and ''[s]pecific causation' exists when

[1] Civil No. 09-11948-RGS.

[2] *Id*., slip op. at 4, quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596 (1993), and citing *Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 15 (1st Cir. 2011).

[3] Civil No. 14-cv-215-JD (D.N.H. 2016).

[4] *Id*., slip op. at 3, citing *inter alia Milward*, 639 F.3d at 22.

[5] *Id*. at 7, citing *Milward*, 639 F.3d at 22.

[6] Civ. No. 16-cv-204-JL (D.N.H. 2019).

exposure to an agent caused a particular plaintiff's disease.'"[7]

Medical Malpractice

Bradley v. Sugarbaker (1st Cir. 2015)[8]

> "A district court['s…] decision to admit or exclude testimony is reviewed for an abuse of discretion […] But, '[t]he [abuse of discretion] standard is not monolithic: within it, embedded findings of fact are reviewed for clear effort, [and] questions of law are reviewed de novo.'"[9]
>
> "[…] Bradley's reliance on *Milward* is unavailing. There, this Court determined that, '[w]hen the factual underpinning of an expert's opinion is weak it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.' But *Milward* concerned the district court's extensive evaluation of the reliability of the scientific theories underscoring the expert's testimony, and not the threshold issue of factual relevance."[10]

Guzman-Fonalledas v. Hospital Expanol Auxilio (D.P.R. 2018)[11]

> "In *Daubert*, the Supreme Court listed four factors to determine an expert's testimony's reliability, but 'd[id] not presume to set out a definitive checklist or test.'[12] The First Circuit has held that the proponent of expert testimony does not need to prove that the expert is correct, but 'must show only that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.'"[13]

Arrieta v. Hospital Del Maestro (D.P.R. 2018)[14] (expert testimony not admitted)

> "In *Daubert*, the Supreme Court 'vested in trial judges a gatekeeper function, requiring that they assess proffered expert scientific testimony for reliability before admitting it.'[15] Moreover, the Supreme Court later 'clarified that courts have this function with respect to all expert testimony, not just scientific.'"[16]

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[7] *Id*., slip op. at 15, quoting *Milward*, 639 F.3d at 13 (quoting *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28 cmts. c(3), c(4) (2010)).

[8] 809 F.3d 8 (1st Cir. 2015).

[9] *Id*. at 17, quoting *Milward*, 639 F.3d at 13-14 (quoting *Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 83 (1st Cir. 2010)).

[10] *Id*. at 20, n. 10, quoting *Milward*, 639 F.3d at 22.

[11] 308 F. Supp. 3d 604 (D.P.R. 2018).

[12] *Id*. at 609, quoting *Daubert*, 509 U.S. at 593.

[13] *Id*., quoting *Milward*, 639 F.3d at 15.

[14] Civil No. 15-3114 (MEL).

[15] *Id*., slip op. at 4, quoting *Milward*, 639 F.3d at 14.

[16] *Id*., quoting *Milward*, 639 F.3d at 14 n.1, (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)).

Negligence

Situ v. O'Neill (D.P.R. 2016)[17]

> "The *Daubert* Court identified four factors that may assist the trial court in determining whether or not scientific expert testimony was reliable: '(1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the technique's known or potential rate of error; and (4) the level of the theory or technique's acceptance within the relevant discipline.'[18] The factors are not a checklist for the trial judge to follow, but rather the inquiry is a flexible one, allowing the trial judge to determine and adapt these factors to fit the particular case at bar."[19]

Second Circuit

Products Liability

In re Mirena IUS Levonorgestrel-Related Products Liability Litigation (MDL No. II) (S.D.N.Y. 2018)[20]

> "As the Third Circuit has put the point: 'To ensure that the Bradford Hill/weight of the evidence criteria is truly a methodology, rather than a mere conclusion-oriented selection process … there must be a scientific method of weighting that is used and explained.'[21] And as the First Circuit has required, while the expert's bottom-line conclusion need not be independently supported by each of the nine Bradford Hill factors, in analyzing the factors, separately and together, the expert must employ 'the same level of intellectual rigor' that he employs in his academic work.'"[22]

Fourth Circuit

Products Liability

In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation (D.S.C. 2016)[23]

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[17] Civil No. 11-1225 (GAG) (D.P.R. 2016).

[18] *Id*., slip op. at 5, n. 1, quoting *U.S. v. Mooney*, 315 F.3d 54, 62 (1st Cir. 2002) (citing *Daubert*, 509 U.S. at 593-94).

[19] *Id*. at 5, n. 1, citing *Kumho Tire Co., Ltd.*, 526 U.S. at 150; *Milward*, 639 F.3d at 15-16.

[20] 341 F. Supp. 3d 213 (S.D.N.Y. 2018).

[21] *Id*. at 247, quoting *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.,* 858 F.3d 787, 796 (3d Cir. 2017); *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 607 (D.N.J. 2002) (same), *aff'd*, 68 F. App'x 356 (3d Cir. 2003).

[22] *Id*. at 247-48, quoting *Milward*, 639 F.3d at 26 (quoting *Kumho Tire*, 526 U.S. at 152).

[23] 174 F. Supp. 3d 911 (D.S.C. 2016).

"Whether an established association is causal is a matter of scientific judgment, and scientists appropriately employing this method 'may come to different judgments' about whether a causal inference is appropriate."[24]

"While a causation opinion need not be based on epidemiological studies, [], it is well established that the Bradford Hill method used by epidemiologists does require that an association be established through studies with statistically significant results.[12]" […] [12] *Milward v. Acuity Specialty Products Grp., Inc.*, 639 F.3d 11 (1st Cir. 2011), on which Plaintiffs rely, is no exception. There, the expert 'noted that *epidemiological studies have found a statistically significant increased incidence of AML in benzene-exposed workers* and have identified a dose-response relationship.' *Id*. at 19 (emphasis added)."[25]

Fifth Circuit

Toxic Tort

Yarbrough v. Hunt Southern Group, LLC (S.D. Miss. 2019)[26]

"Dr. Goldstein states that he applied the Bradford Hill Criteria of Causation to determine 'that the residents in the Yarbrough household were exposed to, and suffered from, toxins released by the presence of Aspergillus and Penicillium in their home.' (Goldstein Report 5, ECF No. 216-1.)

'Sir Bradford Hill was a world-renowned epidemiologist who articulated a nine-factor set of guidelines in his seminal methodological article on causality inferences.[27] […] Sir Bradford Hill's article explains that 'one should not conclude that an observed association between a disease and a feature of the environment (e.g., a chemical) is causal without first considering a variety of 'viewpoints' on the issue.'"[28]

Seventh Circuit

Wrongful Death

Ashley v. Schneider National Carriers, Inc. (N.D. Ill. 2016)[29]

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[24] *Id*. at 916, citing *Milward,* 639 F.3d at 18.

[25] *Id*. at 936 and n. 12, citing *Milward*, 639 F.3d at 19.

[26] Cause No. 1:18cv51-LG-RHW (S.D. Miss. 2019).

[27] *Id*., slip op. at 4, quoting *Jones v. Novartis Pharm. Corp.*, 235 F. Supp. 3d 1244, 1267 (N.D. Ala. 2017), aff'd, 720 F. App' 1006 (11th Cir. 2018), quoting *Milward*, 639 F.3d at 17 (citing Arthur Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROC. ROYAL SOC'Y MED. 295 (1965)).

[28] *Id*. at 4, quoting *Jones*, 235 F. Supp. 3d at 1267, aff'd, 720 F. App'x 1006 (11th Cir. 2018), quoting *Milward*, 639 F.3d at 17.

[29] Case Nos. 12-cv-8309, 13-cv-3042 (N.D. Ill. 2016).

"Defendants also uncovered that Mr. Hess lacked any factual basis supporting his assertion other than his own personal knowledge. That being said, '[w]hen the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.'"[30]

Eighth Circuit

Products Liability

Clinton v. Mentor Worldwide, LLC (E.D. Mo. 2016)[31]

"Plaintiff also points out that Dr. Skinner could not rule out necrotizing fasciitis as the cause of plaintiff's pain prior to her diagnosis. However, '[p]roponents of expert testimony need not demonstrate that the assessments of their experts are correct, and trial courts are not empowered to determine which of several competing scientific theories has the best provenance.'"[32]

Personal Injury/Wrongful Death

Crawford v. Safeway, Inc. (D. Neb. 2016)[33]

"'Proponents of expert testimony need not demonstrate that the assessments of their experts are correct, and trial courts are not empowered 'to determine which of several competing scientific theories has the best provenance.'"[34]

Ninth Circuit

Products Liability

In Re Nexium Esomeprazole (9th Cir. 2016)[35]

"At best, Dr. Bal analyzed three of the nine Bradford Hill factors that guide scientists in drawing causal conclusions from epidemiological studies.[36] We agree with the district court that Dr. Bal's analysis of the factors he did discuss was 'extremely thin.'"[37]

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[30] *Id*., slip op. at 10, quoting *Milward*, 639 F.3d at 22.

[31] Civ. No. 4:16-CV-00319 (CEJ) (E.D. Mo. 2016).

[32] *Id*., slip op. at 8, quoting *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012) (quoting *Milward*, 639 F.3d at 15.

[33] Civ. No. 7:14CV5001 (D. Neb. 2016).

[34] *Id*., slip op. at 4, quoting *Kuhn*, 686 F.3d at 625 (quoting *Milward*, 639 F.3d at 15).

[35] 662 F. App'x 528 (9th Cir. 2016).

[36] *Id*. at 530, citing *Milward*, 639 F.3d at 17 (citing Arthur Bradford Hill, *supra* note 27).

[37] *Id*.

Negligence/Strict Liability

Wendall v. GlaxoSmithKline, LLC (9th Cir. 2017)[38]

> "However, expert testimony may still be reliable and admissible without peer review and publication.[39] That is especially true when dealing with rare diseases that do not impel published studies."[40]

B. Non-Traditional Tort and Other Cases Receiving "Honorable Mention" (Environment/Discrimination/Business/Criminal)

Milward's has had such a broad influence that courts have also referenced it in federal cases implicating non-traditional torts and other areas. Those areas include environmental, discrimination (employment and enrollment-related age and racial), business (tort and contract), and criminal law. The cases below are identified by nontraditional tort or other area and sub-area, and by federal circuit.

Environmental Cases

Third Circuit

McMunn v. Babcock & Wilcox Power Generation Group, Inc. (W.D. Pa. 2014)[41]

> "Moreover, as the Court of Appeals for the First Circuit recognized, '[t]here is an important difference between what is unreliable support and what a trier of fact may conclude is insufficient support for an expert's conclusion.'"[42]

Discrimination Cases

First Circuit

EEOC v. Texas Roadhouse, Inc., (D. Mass. 2016)[43] (Employment/Age)

> "As long as the expert's testimony is found to rest upon reliable grounds, 'the traditional and appropriate means of attacking shaky but admissible evidence' is through '[v]igorous cross-examination, presentation of contrary evidence, and

[38] 858 F.3d 1227 (9th Cir. 2017).

[39] *Id*. at 236, quoting *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003).

[40] *Id*., citing *Milward*, 639 F.3d at 24 ("recognizing that the 'rarity' of a particular form of leukemia was one reason that it would be 'very difficult to perform an epidemiological study of the causes of [the disease] that would yield statistically significant results.'").

[41] Civ. No. 2:10cv143 (W.D. Pa. 2014).

[42] *Id*., slip op. at 7, quoting *Milward*, 639 F.3d at 22.

[43] *EEOC v. Texas Roadhouse, Inc.*, Civ. No. 1-11732-DJC (D. Mass. 2016).

careful instruction on the burden of proof.'"[44]

"[…] In addition, the parties' differing opinions as to which party the corrected PUMS data supports, D. 594 at 16; D. 621 at 8-10, can again be addressed in the course of direct and cross-examinations of both Saad and Crawford and, ultimately, will be resolved by the jury."[45]

"[…] While the *Frye* standard of general acceptability is no longer the touchstone of admissibility of expert opinion under Fed. R. Evid. 702 post-*Daubert*, whether a methodology has been peer reviewed remains one factor for the Court to consider when addressing challenges to the admissibility of expert testimony."[46]

"[…] any such limitations of his analysis are concerns to be raised on cross-examination and are a matter for the jury to consider and weigh."[47]

Riley v. Massachusetts Department of State Police (D. Mass. 2018)[48] (Employment/Racial)

"If the Court determines that the expert's testimony is reliable and relevant, 'the traditional and appropriate means of attacking shaky but admissible evidence' is through '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" [49]

Students for Fair Admissions, Inc. v. Harvard (D. Mass. 2018)[50] (Enrollment/Racial)

"'Even assuming, arguendo, that this Court were to conclude that 'the factual underpinning of [either party's] expert's opinion [was] weak,'' the challenges by SFFA and Harvard affect 'the weight and credibility of the testimony' to be evaluated at trial when the Court assumes its fact-finding role."[51]

Fourth Circuit

Brown v. Nucor Corp. (4th Cir. 2015)[52] (Employment/Racial)

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[44] *Id*., slip op. at 2, citing *Milward*, 639 F.3d at 15 (quoting *Daubert*, 590 U.S. at 590).

[45] *Id*. at 13, citing *Milward*, 639 F.3d at 15.

[46] *Id*. at 15, citing *Milward*, 639 F.3d at 14, 22.

[47] *Id*. at 16, citing and quoting *Milward*, 639 F.3d at 22 (explaining that '[w]hen the factual underpinning of an Expert's opinion is weak, [that] is a matter affecting the weight and credibility' of that expert's opinion), (quoting *United States v. Vargas*, 471 F.3d 255, 264 (1st Cir. 2006)).

[48] Civ. No. 15-14137 (D. Mass. 2018).

[49] *Id*., slip op. at 2, quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*, 509 U.S. at 590).

[50] 346 F. Supp. 3d 174 (D. Mass. 2018).

[51] *Id*. at 193-94, quoting *Pac. Indem. Co. v. Dalla Pola*, 65 F. Supp. 3d 296, 304 (D. Mass. 2014) (quoting *Milward,* 639 F.3d at 22).

[52] 785 F. 3d 895 (4th Cir. 2015).

"'[T]rial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable.'"[53]

Equal Employment Opportunity Commission v. Freeman (4th Cir. 2015)[54] (Employment/Racial)

"Rather, courts widely agree that 'trial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable.'"[55]

General Business Cases

First Circuit

In re Neurontin Marketing and Sales Practices Litigation (1st Cir. 2013)[56] (Tort—Fraudulent Marketing)

"Admissibility does not turn on a determination by the trial court of 'which of several competing scientific theories has the best provenance,' nor does it turn on convincing the trial court that the proffered expert is correct."[57]

Keppler v. RBS Citizens N.A. (D. Mass. 2014)[58] (Tort—Consumer Bank Fraud)

"However, that is no reason to exclude her testimony. 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof [would be] the traditional and appropriate means of attacking' Kerr's opinion in those circumstances."[59]

Pacific Indemnity Co. v. Dalla Pola (D. Mass. 2014)[60] (Contract—Homeowner Insurance Subrogation)

"Even assuming, arguendo, that this court were to conclude that 'the factual underpinning of [the] expert's opinion [was] weak,' the challenges by the defendant at most affect 'the weight and credibility of the testimony—a question to be resolved by the jury.'"[61]

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[53] *Id*. at 936, quoting *Milward*, 639 F.3d at 15.
[54] 778 F.3d 463 (4th Cir. 2015).
[55] *Id*. at 472, quoting *Milward*, 639 F.3d at 15.
[56] 712 F.3d 21 (1st Cir. 2013).
[57] *Id*. at 42, quoting *Milward*, 639 F.3d at 15 (quoting *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998)).
[58] *Keppler v. RBS Citizens N.A.*, Civ. No. 12-10768-FDS (D. Mass. 2014).
[59] *Id*., slip op. at 8, quoting *Milward*, 639 F.3d at 15.
[60] *Pacific Indemnity Co. v. Dalla Pola*, 65 F. Supp. 3d 296 (D. Mass. 2014).
[61] *Id*., quoting *Milward*, 639 F.3d at 22.

> "[…] To the extent Dalla Pola wishes to expose any alleged flaws in Klem's expert analysis, he will have an ample opportunity to do so through cross-examination and the presentation of evidence at trial." (""Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[62]

Noveletsky v. Metropolitan Life Ins. Co., Inc. (D. Me. 2014)[63] (Contract—Life Insurance Policy)

> "With regard to the sufficiency of the facts and data in particular, 'trial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support.'"[64]

Mass. Mutual Life Ins. Co. v. DB Structured Products, Inc. (D. Mass. 2015)[65] (Tort—Securities Fraud & Misrepresentation)

> "The *Daubert* Court identified four factors which might assist a trial court in determining the admissibility of an expert's testimony: (1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the technique's known or potential rate of error; and (4) the level of the theory's or technique's acceptance within the relevant discipline."[66]
>
> "'These factors, however, 'do not constitute a definitive checklist or test.'"[67]
>
> "'Given that 'there are many different kinds of experts, and many different kinds of expertise,' these factors 'may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'"[68]
>
> "While expert testimony may be excluded if there is 'too great an analytical gap between the data and the opinion proffered,'[69] '[t]his does not mean that trial courts are empowered 'to determine which of several competing scientific theories has the best provenance.'"[70]

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[62] *Id*., citing and quoting *Milward*, 639 F.3d at 15.
[63] Civil No. 2:12-cv-00021-NT (D. Me. 2014).
[64] *Id*., slip op. at 11, quoting *Milward*, 639 F.3d at 15 (quoting *Ruiz-Troche*, 161 F.3d at 81).
[65] *Mass. Mutual Life Ins. Co. v. DB Structured Products, Inc.*, Civ. No. 11-30039-MGM (D. Mass. 2015).
[66] *Id*., slip op. at 7-8, citing *Milward*, 639 F.3d at 14.
[67] *Id*. at 8, quoting *Milward*, 639 F.3d at 14 (quoting *Kumho Tire Co.*, 526 U.S. at 150).
[68] *Id*. quoting *Milward*, 639 F.3d at 14 (quoting *Kumho Tire Co.*, 526 U.S. at 150).
[69] *Id*. quoting *Milward*, 639 F.3d at 15 (quoting *Joiner*, 522 U.S. at 146).
[70] *Id.*, quoting *Milward*, 639 F.3d at 15 (quoting *Ruiz-Troche*, 161 F.3d at 85).

"'*Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct.'"[71]

"Rather, '[t]he proponent of the evidence must show only that 'the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.'"'[72]

"As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,'[73] 'it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities.'"[74]

"[…] First, contrary to Defendants' assertion, Dr. Kilpatrick does provide support for his 31 questions and the weight assigned to each. He points to the USPAP standards, commonly used appraisal forms, and his own knowledge and experience in the field."[75] "('In concluding that the weight of the evidence supported the conclusion that benzene can cause APL, Dr. Smith relied on his knowledge and experience in the field of toxicology and molecular epidemiology and considered five bodies of evidence drawn from the peer-reviewed scientific literature on benzene and leukemia.')."

"[…] Ultimately, the trier of fact will have to make that determination. But it is not a reason to exclude Mr. Butler's opinion."[76]

"[…] FN [17] Defendants' other arguments for exclusion, namely, the inconsistencies between some of the CAM questions, while no doubt bearing on the persuasiveness, or weight, of the analysis, do not render it inadmissible." ("'(There is an important difference between what is *unreliable* support and what a trier of fact may conclude is insufficient support for an expert's conclusion.'"). (emphasis in original).[77]

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[71] *Id*.

[72] *Id*.

[73] *Id*., quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*, 509 U.S. at 590).

[74] *Id*., quoting *Milward*, 639 F.3d at 15.

[75] *Id*. at 10-11, citing *Milward* 639 F.3d at 19.

[76] *Id*. at 13, citing *Milward*, 639 F.3d at 22 (quoting *U.S. v. Vargas*, 471 F.3d 255, 264 (1st Cir. 2006) ("'When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.'")).

[77] *Id*. at 15-16, n. 17, citing and quoting *Milward*, 639 F.3d at 22.

Ferring Pharms., Inc. v. Braintree Labs, Inc. (D. Mass. 2016)[78] (Tort—False Advertising/Unfair Trade Practices)

> "If expert testimony 'rests upon good grounds, based on what is known, it should be tested by the adversarial process.'"[79]

Lawes v. Q.B. Construction (D.P.R. 2016)[80] (Tort—Defective Construction-Related Traffic Management Plan)

> "Courts may exclude theories and conclusions when their sole connections to the data are the expert's own dogmatic statements."[81] ("'conclusions and methodology are not entirely distinct from one another' and 'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.')."
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> "[…] Thus, the categorical assertion that a monitoring plan, which Aronberg admitted did not require nightly inspections under Section 6B of the MUTCD,23 would have detected a midblock crossing problem has little support in light of the random crossing and skirting patterns that the merchant marines testified to." ("'Expert testimony may be excluded if there is 'too great an analytical gap between the data and the opinion proffered.'")[82]
>
> "[…] Traditionally, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the . . . appropriate means of attacking shaky but admissible evidence.'"[83]

Packgen v. Berry Plastics Corporation (1st Cir. 2017)[84] (Tort—Breach of Implied Warranties/Negligence)

> "'Exactly what is involved in 'reliability'. . . must be tied to the facts of a particular case.'"[85] "'So long as an expert's scientific testimony rests upon good grounds, based on what is known, it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities.'"[86]

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[78] *Ferring Pharms., Inc. v. Braintree Labs, Inc.*, 210 F. Supp. 3d 252 (D. Mass. 2016).
[79] *Id*. at 257, quoting *Milward*, 639 F.3d at 15.
[80] *Lawes v. Q.B. Construction*, Civ. No. 12-1473 (DRD) (D.P.R. 2016).
[81] *Id*., slip op. at 23, citing and quoting *Milward*, 639 F.3d at 15.
[82] *Id*. at 29, citing and quoting *Milward*, 639 3d. at 15
[83] *Id*. at 40, quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*).
[84] Civ. No. No. 16-1348 (1st Cir. 2017).
[85] *Id*., slip op. at 3, quoting *Milward*, 639 F.3d at 14-15 (quoting *Beaudette v. Louisville Ladder, Inc.*, 462 F.3d 22, 25-26 (1st Cir. 2006)).
[86] *Id*. at 3, quoting *Milward*, 639 F.3d at 15 (quoting *Daubert*, 509 U.S. at 590).

Iconics, Inc. v. Massaro (D. Mass. 2017)[87] (Tort—Software Copyright and Trade Secret Infringement)

> "Once it is established that an expert's testimony 'rests upon good grounds based on what is known,' however, I should allow the evidence to be presented to the jury and 'be tested by the adversarial process.'"[88]

> "[…] Ultimately, however, it is the factfinder's role to evaluate the credibility of an expert's testimony, which may include a consideration of the data underlying the testimony." ("'When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.'").[89]

> "[…] As discussed above, the strength of the factual underpinning of an expert's opinion is a matter of weight and credibility."[90]

In re Asacol Antitrust Litigation (D. Mass. 2017)[91] (Tort—Antitrust)

> "The standard for admissibility is not whether Clark's methodology is the best; only whether it is 'methodologically reliable' and rests on 'good grounds,' which the Court concludes it does."[92]

In re: Dial Complete Marketing and Sales Practices Litigation (D.N.H. 2017)[93] (Tort—Consumer Fraud, False and Misrepresentative Marketing)

> "As our court of appeals noted in *Milward v. Acuity Specialty Prod. Grp., Inc.*:
>
> '*Daubert* does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct.'[94] 'The proponent of the evidence must show only that 'the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.''[95] The object of *Daubert* is 'to make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'"[96]

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[87] 266 F. Supp. 3d 461 (D. Mass. 2017).

[88] *Id*. at 466, citing and quoting *Milward*, 639 F.3d at 15.

[89] *Id*. at 470, citing and quoting *Milward*, 639 F.3d at 22.

[90] *Id*. at 475, citing *Milward*, 639 F.3d at 22.

[91] Civil Action No. 15-cv-12730-DJC (D. Mass. 2017).

[92] *Id*., slip op. at 16, citing and quoting *Milward*, 639 F.3d at 15.

[93] *In re: Dial Complete Marketing and Sales Practices Litigation*, MDL Case No. 11-md-2263-SM (D.N.H. 2017).

[94] *Id*., slip op. at 12, quoting *Milward*, 639 F.3d at 15 (quoting *Ruiz–Troche*, 161 F.3d at 81).

[95] *Id*., quoting *Milward*, 639 F.3d at 15 (citing *United States v. Vargas*, 471 F.3d 255, 265 (1st Cir. 2006)).

[96] *Id*. at 12, quoting *Milward*, 639 F.3d at 15 (quoting *Kumho Tire Co.*, 526 U.S. at 152).

> "[…] However, '[t]here is an important difference between what is unreliable support and what a trier of fact may conclude is insufficient support for an expert's conclusion.'"[97]

Janssen Biotech, Inc. v. Celltrion Healthcare Co., Ltd. (D. Mass. 2017)[98] (Tort—Patent Infringement)

> "The parties shall particularly be prepared to discuss whether Dr. Wurm's test results provide Dr. Butler and him with a reliable basis from which to conclude that the ingredients of the accused powders, in their allegedly equivalent concentrations, perform substantially the same function in the accused powders as they do in the patented invention."[99] […] More specifically, they shall be prepared to address whether Drs. Wurm and Butler employed scientifically sound and methodologically reliable methods in reaching their conclusions that the 29 ingredients that Dr. Wurm added to the claimed powders did not mask[] large differences in Dr. Wurm's comparisons by performing overlapping functions with the 12 allegedly equivalent ingredients."[100]

Fifth Circuit

Gil Ramirez Grp., LLC v. Houston Indep. Sch. Dist. (S.D. Tex. 2016)[101] (Civil RICO)

> "The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact. … When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.'"[102]

Ninth Circuit

Johns v. Bayer Corporation (S.D. Cal. 2013)[103] (Tort—False and Deceptive Advertising (Class Action))

> "Taking all the evidence into consideration, the Court finds Plaintiffs' arguments go to the weight rather than the admissibility of Dr. Blumberg's testimony." ("'There is an important difference between what is unreliable support and what a trier of fact may conclude is insufficient support for an expert's

[97] *Id*. at 17, quoting *Milward*, 639 F.3d at 22.
[98] Civil Action No. 15-10698-MLW (D. Mass. 2017).
[99] *Id*., slip op. at 3, n. 1, citing *Milward*, 639 F.3d at 15.
[100] *Id*.
[101] Civ. No. 4:10-CV-04872 (S.D. Tex. 2016).
[102] *Id*., slip op. at 6, quoting *Milward*, 639 F.3d at 22.
[103] Civ. No. 09cv1935 AJB (DHB) (S.D. Cal. 2013).

conclusion.'").[104] […] "Thus, Plaintiffs' request for piecemeal exclusion of selected studies based solely on their allegations that such studies, taken in isolation, are unreliable, is an inappropriate ground for exclusion and exceeds the court's gatekeeping function under Rule 702." […] "('In this, the court overstepped the authorized bounds of its role as gatekeeper.')."[105]

Townsend v. Monster Beverage Corp. (C.D. Cal. 2018)[106] (Tort—Antitrust/Anti-competition/Unfair Competition (Class Action))

"('There is an important difference between what is *unreliable* support and what a trier of fact may conclude is insufficient support for an expert's conclusion.')."[107]

Tenth Circuit

White v. Town of Hurley (D.N.M. 2019)[108] (Tort—Discrimination (Employment/Age))

"'[T]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact.'"[109]

Criminal Cases

First Circuit

United States v. Candelario-Santana (D.P.R. 2013)[110]

"To the contrary, Dr. Greenspan's testimony before *this* court failed to meet the high standards of scientific reliability and evidence demanded in his field."[111]

US v. Tavares (1st Cir. 2016)[112]

"To say more on this point would be to paint the lily. In the circumstances here, we think that any question about the factual underpinnings of Auclair's opinion goes to its weight, not to its admissibility."[113]

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[104] *Id*., slip op. at 20, citing and quoting *Milward*, 639 F.3d at 22.
[105] *Id.*
[106] 303 F. Supp. 3d 1010 (C.D. Cal. 2018).
[107] *Id*, quoting *Milward*, 639 F.3d at 22 (emphasis in original).
[108] Civ. No. 17-0983JB\KRS (D.N.M. 2019).
[109] *Id*., slip op. at 54, n. 54, quoting *Milward*, 639 F.3d at 22 (quoted in David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence* 702, 57 WM. & MARY L. REV. 1, 33 (2015)).
[110] Crim. No. 09-427 (JAF) (D.P.R. 2013).
[111] *Id*., slip at 10-11, citing *Milward*, 639 F.3d at 26 (emphasis in original).
[112] 843 F.3d 1 (1st Cir. 2016).
[113] *Id*., citing *Milward*, 639 F.3d at 22.