The Effects of the *Daubert* Trilogy in Delaware Superior Court

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Executive Summary

Introduction

Although scientific knowledge is extraordinarily valuable as it assists the trier of fact to make an informed, legal decision, courts continue to struggle with admissibility decisions that evaluate such evidence. Judges must differentiate relevant and reliable experts from the so-called "hired guns" motivated by money alone, and such decisions have significant consequences.

Just over a decade ago, the judge's role in determining the admissibility of experts was redefined as a "gatekeeper" in the U.S. Supreme Court decision, *Daubert*.[2] *Daubert* is one in a trilogy of decisions ruling on the admissibility of expert witness testimony.

With the advent of the changes arising out of the *Daubert* trilogy, a handful of empirical studies have explored whether *Daubert* and its progeny have had any impact on the admissibility of expert testimony. Thus far, legal commentators have primarily targeted discussions of *Daubert* in the civil arena, but there are indications, particularly with the increasing popularity of DNA evidence, that it is creeping into criminal cases as well. Certainly, the reaction immediately after the *Daubert* decision raised concerns about the increased role of the judge to scrutinize experts and how the factors would be applied.

This study, conducted by the NCSC, assessed the feasibility of collecting data to understand if, and how, *Daubert* has altered the admission or exclusion of expert testimony. With the cooperation of Delaware's Superior Court judges, attorneys, and prothonotary staff, the authors pilot-tested a review of both civil and criminal court files supplemented with interviews of targeted attorneys and judges.

> *"No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best."*
> - Learned Hand, 1901[1]

[1] Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 40 (1901), cited in *Minner v. American Mortgage*, 791 A.2d 826, 833.

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, No. 92, 509 U.S. 579 LEXIS (1993).

The Trilogy

The "trilogy" is comprised of three U.S. Supreme Court cases.

Daubert[3] (1993) is the first, in a series of three decisions by the U.S. Supreme Court that, together, comprise the *Daubert* trilogy.

Joiner[4] (1997), the second decision in the trilogy, further clarified the appropriate standard of review for appellate courts to apply, since the admissibility decision may be "outcome-determinative" and effectively render the outcome of a case (e.g., a summary judgment in favor of the defense by excluding the plaintiff's only expert).

Kuhmo[5] (1999) completes the trilogy and ruled that the "gatekeeping" function in *Daubert* applies to all expert testimony, including technical and other specialized knowledge.

[3] *Id.*
[4] *General Electric Co. v. Joiner*, 522 S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).
[5] *Kuhmo Tire, Ltd. v. Charmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 238 (1999).

Legal History on the Admissibility of Expert Witness Testimony

Commercial Marketplace Test

In the early 1900's, courts determined expertise by assessing whether there was a commercial market for the proffered knowledge. If an expert was able to earn a living by espousing the said knowledge, the witness was decidedly an expert.[6]

***Frye* (1923)**

This is also known as the "general acceptance rule" or the "*Frye* test." Although it was the predominant standard for evaluating the admissibility of expert testimony for 70 years in federal courts, and is still in place today in several state courts, it has been criticized for several reasons:

- It did not specify the scope of the "particular field in which it belongs."
- Obtaining agreement of scientists within the same field is difficult; scientists have been famous for disagreements among themselves, giving rise to the image of the "battling experts."
- *Frye* is prohibitively conservative with regard to novel scientific evidence. For example, in its infancy, even DNA evidence would have been excluded by courts under the *Frye* test.

***Daubert* (1993)**

The most notable change in practice under *Daubert* was clarifying the judge's role as the "gatekeeper." The decision requires the judge to take on a more active role to effectively screen the expert opinion prior to submitting it to the jury. The Court provided four, non-exclusive factors for judges to consider in determining admissibility:

- Has the theory or technique been tested (falsifiability)?
- Is there a known or potential error rate?
- Has it been subjected to peer review and published?
- Is it generally accepted within the field (i.e., the *Frye* test)?

Delaware is one of only nine states that has "explicitly or implicitly adopted the full holdings of the *Daubert* trilogy."[7] This project explored if, and how, the *Daubert* trilogy has altered the ways in which courts admit or exclude expert witness testimony and in what ways it has impacted the Delaware Superior Courts, judges, and litigants. A second goal was to assess how best to study the impact by identifying the occurrence of *Daubert* motions and hearings in court records and evaluating the quality of the available data.

[6] Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identificiation Science*, 49 HASTINGS L. J. 1069 (1997-1998) at 1073.

[7] David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 1-17 (Winter, 2004).

Findings

The overall impact of *Daubert* has been minimal compared to what was originally feared when the decision came down from the U.S. Supreme Court. Challenges to expert witness testimony are not a frequent occurrence in either civil or criminal cases in the Delaware Superior Court. Overall, counsel in only 16 percent of product liability cases and 8 percent of felony murder and rape cases challenge an expert's testimony. The practice of holding *Daubert* hearings is even less frequent. *Daubert* motions appeared most frequently in mature cases ready for trial, and judges typically rendered a ruling on the expert's deposition and attorneys' briefs. *Daubert* hearings were reserved for complex civil cases and occasionally entertained during a criminal trial.

Most often, in the product liability cases, the challenged expertise was to explain bio-mechanical engineering concepts by duo-experts (medical doctors teamed with mechanical engineers). In the criminal cases, the expertise was more varied, but included psychologists, medical examiners, and a handful of other forensic experts. The case facts obviously predicted the nature of the expertise.

The Court rendered varied rulings on the motions in limine. Typically, the ruling was not categorically granted or denied, but often the motion was granted in part and denied in part. Partial exclusions by the Court were in response to attorneys' motions which were not always drafted to exclude an expert, but drafted to limit the scope of the proffered testimony.

In post-*Daubert* cases, more so than in the pre-*Daubert* cases, the dispositions often resulted in a summary judgment or a settlement between parties, not a trial. Factors such as effective pre-trial case management or the increased use of alternative dispute resolution techniques may have affected this outcome more than the impact of the *Daubert* trilogy alone.

As such, case management strategies become critical to properly address *Daubert* issues and present unnecessary cost and delay. The Delaware Superior Court adheres to the Delaware case, *Minner v. American Mortgage*, which emphasized the importance of effective pre-trial case management and a reliance upon the discovery record as a basis for ruling:

> *"[I]f [a* Daubert *hearing is] granted in every case, [it] could cripple the trial calendar. While the matter is always discretionary, absent a special reason and need to have the hearings, requests for them should generally be denied. The discovery record should, in a contested case, normally supply a satisfactory basis for a ruling."*[8]

Civil defense attorneys, by and large, filed the majority of motions to challenge expert testimony. The differential impact of these motions was realized most by civil plaintiffs, due to the potential dispositive nature of the motion against a lone

[8] *Minner v. American Mortgage & Guaranty Co,*. 791 A.2d 826, at 845.

Methodology

Two approaches were employed to study *Daubert's* impact. First, a sample of cases from two time periods (1989-1993; 1999-2004) was reviewed.

- 120 felony rape and murder cases
- 126 product liability cases

Based on the case file review, local attorneys were identified who had experience with *Daubert* motions and/or hearings. Interviews with 13 of Delaware's 19 judges and 20 of the 38 targeted attorneys supplemented the case file data.

expert. On the other hand, the Delaware Attorney Generals' office proceeded with several cases even after a successful *Daubert* motion, indicating that the excluded expert evidence was not the sole evidence against the criminal defendant and therefore, less consequential.

Daubert has had an impact on how attorneys prepare a motion in limine and the specific factors argued in the motions. Because of the scheduling orders in place by most judges, filing *Daubert* motions requires more extensive preparation on the part of the attorneys. *Daubert* criteria necessitate higher quality experts and expert reports. In pre-*Daubert* times, counsel motioned the courts to exclude the opposing party's expert on grounds of relevancy, or questioned the expert's qualifications or expertise; in post-*Daubert* times, counsel presented the issues with more specificity. Indeed, the attorneys often cited *Daubert*, yet addressed the general acceptance factor and generally questioned the reliability of the expert's methods.

Daubert motions are used effectively as leverage in civil disputes. In particular, defense attorneys scrutinize plaintiffs' proffered expert witnesses. If a *Daubert* motion is granted and excludes a key or sole plaintiff expert, the defense will likely be granted a summary motion, demonstrating the large incentive for the defense to artfully craft a *Daubert* motion to potentially avoid a trial. As such, the pre-trial phase is of primary interest to understanding the impact of *Daubert* at the trial court level.

Although most judges admitted they were not "amateur scientists," *Daubert* certainly required them to take on an active role. In pre-*Daubert* times, judges would let admissibility or credibility issues be sorted out through cross-examination during trial. A judge admitted during the interviews,

> *"Now, the Court has an independent duty to be gatekeeper, even if there is no opposition from the other side. The Court has the responsibility to make sure the expert does not get in, if not qualified."*

Albeit some judges are more active than others, most judges in Delaware actively participated in the voir dire of the expert witness. *Daubert* has bestowed upon trial judges the responsibility to render admissibility decisions. It is a great responsibility that is not necessarily carried out in a similar manner by the judges, yet appeared to be taken very seriously by the Delaware bench. Apropos, one judge stated,

> *"I ask questions of the expert because I'm the gatekeeper and must be satisfied."*

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A copy of the full report and additional resources on science and the law is available on the NCSC website:
www.ncsconline.org/D_Research/RES_DAUBERT_SciTechLawinfo.pdf

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