The Changing Role of Judges in the Admissibility of Expert Evidence

Expert evidence to establish causation and damages has become a necessary component of virtually every civil case litigated in state courts. While all states require judges to screen the qualifications of testifying experts and the reliability of their evidence, the criteria to do so varies by jurisdiction.

Just over a decade ago, the U.S. Supreme Court’s decision in *Daubert* sought to clarify the role judges are to play in admitting expert testimony, establishing judges as “gatekeepers.” This issue of *Civil Action* profiles a study conducted by the National Center for State Courts (NCSC) to assess the impact of *Daubert*. The study explores how *Daubert* has altered the admission or exclusion of expert testimony in the Delaware Superior Court and tests a data collection methodology to be used in a subsequent multi-jurisdictional analysis.

The *Daubert Trilogy* in Delaware

The use of scientific expertise in the courtroom is extraordinarily valuable in assisting the trier of fact in making informed, legal decisions. However, courts struggle with deciding whether to allow scientific evidence into the courtroom and how to evaluate such evidence. Judges must evaluate the admissibility of all experts, whether their expert opinion is based on scientific, technical, or specialized knowledge.

In the early 1900’s, judges evaluated the admissibility of expert witnesses using the “commercial marketplace test.” Expertise was assessed by whether there was a commercial market for the proffered knowledge. In other words, if an expert was able to make a living through espousing the said knowledge, the witness was deemed an expert.

The “commercial marketplace test” was replaced by the “*Frye* test” developed in *Frye v. United States*, which held that in order for expert evidence to be admitted in a court, a showing must be made that the expert’s theories, methodologies, tests and techniques are generally accepted within the expert’s own community. The scientific principle had to have gained a “general acceptance” in the particular field in which it belonged. The appeal of the “general acceptance” test was its simplicity, yet beneath the simplicity, lay its downfall – it was too vague.

In 1993, the United States Supreme Court clarified Rule 702 of the Federal Rules of Evidence in admitting expert testimony. Through the *Daubert* trilogy of cases, the Court stated that it only interpreted the Federal Rules of Evidence, but the substantial change prompted by the decisions led to the revision of Rules 701, 702, and 703 of the Federal Rules of Evidence in 2000. Specifically, Rule 702 was amended to read,
The most notable change was to the judge’s role. The Court clarified the judge’s role as the “gatekeeper,” which requires the judge to take on a more active role to effectively screen expert opinion before submitting it to the jury. In Daubert, the first case in the trilogy, the Court provided four, non-exclusive factors to consider in determining admissibility:

- Can the theory be tested?
- Has the theory or technique been subjected to peer review and publication?
- Is there a known or potential error rate?
- Has it been generally accepted by the relevant community?

The second case in the trilogy, Joiner, clarified the appropriate standard of review for appellate courts to apply, effectively giving more power to the trial courts in making admissibility decisions. The trial court exercises its discretion in excluding testimony and an appellate court should defer to that trial court’s decision.

The third and final case, Kuhmo, held that the judge’s gatekeeping function in Daubert applies to all expert testimony, not just scientific expert testimony, and that the trial courts have considerable latitude in how to apply the Daubert factors. The trial court may reasonably apply various Daubert factors to evaluate reliability of the expert’s methodology relevant to the facts of the case and the area of proffered expertise.

Why Study Delaware?

The federal courts follow the procedural rules set forth in Daubert. State courts have the option of retaining the Frye test, adopting Daubert, or applying a new rule, typically a hybrid of Frye and Daubert. Presently, only a few states have adopted Daubert in its entirety. According to Bernstein and Jackson, Delaware is one of only nine states to adopt the entire Daubert trilogy, and was therefore an ideal candidate for this study.

Delaware began shifting toward using Daubert-like standards to review expert testimony in 1989 through case law. In 1999, the Delaware Supreme Court adopted the Daubert trilogy in M.G. Bancorporation.

What Was the Purpose of the Pilot Study?

The first goal of the empirical study was to explore, if, and how, the Daubert trilogy has altered the ways in which courts admit or exclude expert witness testimony and in what ways has it impacted the courts, judges, and litigants. The 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. This second goal pilot-tested two methodologies:

- What data are available from a review of court files?
- What can be learned from interviewing targeted judges and attorneys who have experience with Daubert motions?
In the first phase of the study, NCSC staff reviewed Delaware Superior Court case files to assess the incidence and use of Daubert motions and/or hearings. Just over half of the filings in the Delaware Superior Court are civil. The Delaware Superior Court provided project staff with a complete list of product liability cases from 1989-1993 (Pre-Daubert) and 1999-2004 (Post-Daubert), totaling 126 cases. Staff then adopted three identifier flags for these cases:

- Form 30 Interrogatories
- Expert Witness Depositions
- Motions in Limine

In the second phase, supplemental interviews with 20 attorneys and 13 judges uncovered their experiences with Daubert motions.

What Did the Study Discover in Civil Cases?

Project staff reviewed, in depth, 57 of the product liability case files. An explicit reference to an expert witness was made in 30 percent of the cases. The case file review uncovered twenty cases in which a motion to exclude, in whole or in part, proffered expert witness testimony. Ten cases were filed pre-Daubert and ten were filed post-Daubert. The types of disputes were surprisingly similar among the twenty cases. Most notably, there were “duo-experts,” matching a medical doctor with an engineer to explain the spectrum of issues in the case.

The study shows that the failure to “survive” the Daubert challenge is contributing to the Vanishing Trial

Other factors besides the impact of the Daubert trilogy may be contributing to the apparent vanishing trial. Effective pre-trial case management and the increase in using alternative dispute management techniques like mediation and arbitration tend to decrease the number of cases that reach trial. In the Minner case, the Delaware Appellate Court emphasized the importance of effective pre-trial case management and reliance upon the discovery record as a basis for ruling. In fact, the Delaware study found that Daubert motions and hearings were primarily conducted pre-trial, rather than on the eve of trial as in criminal cases.

Daubert also requires that judges take a more active, gatekeeper role during pre-trial motion hearings. One judge in the study admitted, “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.” Most judges in Delaware reported that they actively participate in the voir dire of the expert witness and take their responsibility to render admissibility decisions very seriously. As one judge stated, “I ask questions of the expert because I am the gatekeeper and must be satisfied.”
The Study’s Conclusions

The overall impact of Daubert has been minimal compared to the original fears when the U.S. Supreme Court issued its decisions on the admissibility of expert testimony. The Delaware Superior Court appears not to be affected by excessive or unnecessary cost or delay as a result of the trilogy. Although Daubert has created additional barriers to civil plaintiffs’ ability to bring their case to trial, the impact has been isolated to a small number, albeit important and complex cases.

The study recommends further investigation into the effect of the Daubert trilogy, focusing on pre-trial and trial activity, not isolated to disposition outcomes and appellate opinions. Future work should also target particular cases and case types to provide rich data on Daubert motions.

It is also likely that there are differences in large urban courts and in jurisdictions with a local legal culture that diverges from what was discovered in Delaware. The respect and admiration between the bench and the bar in Delaware has cultivated a culture that can be used as a model for other jurisdictions in developing a strong legal culture.

Finally, the Delaware study of the Daubert trilogy indicates that the bench and bar perceive the gatekeeper role of the judge to be a good doctrine with criteria for judges to use in providing fact finders with higher quality experts and expert reports. Most crucially, the findings emphasize the need for judicial education in using the Daubert trilogy to evaluate expert witnesses.

The National Center for State Courts will expand its work beyond the Delaware study in a proposed project to examine variation in state expert evidence admissibility rules that have different levels of judicial review over proffered expertise (e.g., Frye, Daubert and hybrid-rules). The study will provide a multi-jurisdictional analysis of whether and how those rules affect the cost, timeliness, and perceived fairness of litigation for both courts and parties. The study will also explore the secondary effects of decisions to admit or exclude evidence on litigants, expert witnesses, and specific areas of science. The analyses will target product liability, medical malpractice, and other complex civil cases for which expert evidence typically plays a key role.

The NCSC’s Delaware study and plan for follow-up research will be featured in the session, “Empirical Research on the Law-Science Interface: Scientific Expert Evidence,” to be held at the annual meeting of the Law and Society Association, July 2006.

Editor of this issue of Civil Action:

Nicole L. Waters is a Court Research Associate in the Research Division of the National Center for State Courts. Dr. Waters’ work at the NCSC includes examining the policy and social implications of jury procedures, investigating the reciprocal interplay between science and the law, and evaluating issues of civil justice at both the trial court and appellate court levels. In addition to leading a study on the effects of U.S. Supreme Court decisions on admissibility of expert witness testimony, she currently serves as project director of the Civil Justice Survey of State Courts, a grant of the Bureau of Justice Statistics of the U.S. Department of Justice. Dr. Waters received her Ph.D. in sociology at the University of Delaware, with a specialization in law and society and research methodology/statistics.

Online research services for the NCSC and Civil Action are provided by LexisNexis.
Excerpt of speech delivered at
Arthur M. Sackler Colloquia
of the National Academy of Sciences,
Washington, D.C., November 17, 2005

Wisconsin has adopted neither the Frye nor the
Daubert approach. We apply a relevancy-assistance
standard. The general rule is if scientific, technical,
or other specialized knowledge will assist the trier
of fact to understand the evidence or to determine
a fact in issue, a witness qualified as an expert by
knowledge, skill, experience, training, or education,
may testify. Wis. Stat. §907.02 (2005). Evidence will
be excluded if it is not relevant, wastes time, if its
probative value is outweighed by its prejudicial
effect, or if the evidence is inherently improbable.

In a non-Daubert state, like Wisconsin, business groups are proposing bills
to adopt Daubert, reasoning that it will make life easier for defendants.
Legislation will in all likelihood be opposed by the plaintiffs’ bar. The Wisconsin
proposal applies Daubert to civil, but not criminal cases.

Judges are and should be gatekeepers to rid the courts of
ejunk science. Daubert is a radical break with past judicial
deferece to scientific norms and conventions on questions
of admissibility of scientific evidence. The question is
whether Daubert puts judges in over their heads. Judges
often apply reliability criteria differently than a scientist
would. Judges have prevented respected scientists from
testifying. A witness is said to be “Dauberted” if excluded from testifying.
Being “dauberted out” may make scientists even less willing to testify.

Many bemoan that the disjuncture between science and law has become a
very practical problem with the advent of Daubert. Chief Justice Rehnquist
warned in Daubert that evidentiary rules should not impose on judges either
the obligation or the authority to become amateur scientists in order to
perform the role of gatekeeper.

Justice Breyer’s concurrence in Joiner recognized that Daubert sometimes
asks judges to make subtle and sophisticated determinations about scientific
methodology and its relation to the conclusions an expert witness seeks to
offer. He suggested that judges appoint scientific experts to help them. The
American Association for the Advancement of Science is developing a panel
to study the issue.

Judges are using pretrial conferences to narrow issues, appointing special
masters and using specially trained law clerks. There are efforts across the
country to educate judges on scientific issues. A prominent example is the
“Science for Judges” program hosted by Brooklyn Law School’s Center for
Health, Science and Public Policy in collaboration with the Panel on Science,
Law and Technology of the National Academy of Science, the Federal
Judicial Center, and the National Center for State Courts (at www.brooklaw.
edu/centers/scienceforjudges/).

A service of the NCSC Mass Tort Clearinghouse

At a recent State Judges Forum on Mass Tort Litigation,
state trial judges voiced support for a mechanism to
identify and connect state and federal judges managing
similar types of litigation in other jurisdictions. To
meet that need, the National Center for State Courts
(NCSC) has created the Mass Tort Judges Network,
a secured-access, online database of state court judges
who are presiding in mass tort cases. The Judges
Network is maintained by the NCSC both as a
vehicle to connect mass tort judges with one another
and to provide access to news and educational resources
about developments in mass torts.

Through a collaborative agreement with Thomson West,
judges participating in the Mass Tort Judges Network
will also have the opportunity to obtain free access
to case documents (e.g., case management orders,
decisions, and memoranda) in other state and federal
courts’ mass tort cases through an online document
clearinghouse at Westlaw and to share their own
documents. West will provide the litigants and Westlaw
subscribers paid access to these documents as well.
West will bear the cost of copying the documents in
accordance with each court’s procedures.

Also new to the NCSC Mass Tort Clearinghouse is a
case study of state-federal management of the PPA
litigation by NCSC researchers, Albert Sheng and
Paula Hannaford-Agor. The PPA litigation study
highlights four areas of pre-trial management—removal,
discovery, expert discovery, and class certification—
that warrant special attention. Of particular interest are
observations about joint Daubert hearings from both
plaintiff and defense perspectives. The report concludes
with a summary of best practices, based on fundamentals
of active judicial supervision and communication
and cooperation among courts, judges, and attorneys.
See the report located under “Mass Tort Network”
at www.ncsconline.org.

For additional information, please contact Anne Skove,
NCSC Senior Knowledge Management Analyst, at
askove@ncsc.dni.us or (757) 259-1884.
Judicial election campaigns are becoming more hotly contested and more partisan than ever. The National Center for State Courts (NCSC) has established a national program to implement recommendations of the Call to Action issued by the Summit on Improving Judicial Selection and improve judicial selection practices.

One key recommendation is to establish non-governmental monitoring groups to encourage fair and ethical judicial campaigns. The National Advisory Committee on Judicial Campaign Conduct established by the NCSC held a second workshop on Effective Judicial Campaign Oversight Committees in Chicago in October 2005. Teams representing 11 states—Alabama, California, Illinois, Kansas, Missouri, Montana, North Carolina, New Mexico, New York, South Dakota, and Tennessee—learned how to prepare for election cycles and monitor and respond during elections. Several themes emerged, including the advantages of unofficial oversight committees and strategies for operating successfully in an often highly charged political environment.

An updated version of the how-to handbook, Effective Judicial Campaign Conduct Committees, will be available soon at www.judicialcampaignconduct.org.

David Rottman, NCSC principal and expert on judicial selection, emphasizes the growing momentum in establishing these committees. Another recommended reform, the preparation and dissemination of voter guides, is also being adopted by an increasing number of states. With the 2005 general election, the New York Unified Court System began publishing an online voter guide for the public with nonpartisan information about judicial candidates.

Earlier in the year, the NCSC convened a national symposium on judicial speech in partnership with the National Judicial College. Chief justices and judges from 38 states participated to weigh the balance of free speech rights with the right of the states to regulate judicial conduct. Call to Action/2005 updates the original recommendations and adds new ones to reflect state experiences and the impact of recent federal court decisions.

Most recently, in January 2006, the U.S. Supreme Court declined to grant certiorari in the 8th Circuit Court of Appeal’s decision in Dimick v. Republican Party of Minnesota (previously the White case) that struck down provisions of Minnesota’s Code of Judicial Conduct that prohibited partisan activities and personal soliciting for campaign funds by candidates. As a result, candidates in Minnesota’s non-partisan judicial elections can now attend political party conventions, seek political party endorsement, and personally solicit campaign contributions—but only to “large groups” or by letter—as long as the identity of the donors remains unknown to the candidates. In White, the Supreme Court had stricken Minnesota’s “announce clause.”

An upcoming issue of NCSC’s Caseload Highlights will address national implications of Dimick and preview 2006 judicial elections.