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From: Cindi Berry <cberry@cjrg.com>
Sent: Thursday, April 09, 2015 11:07 AM
To: Comments Mailbox
Subject: Comments on the Report of the Committee on the Rules of Evidence
Attachments: NJ Daubert Comments.pdf

Attached please find a comment letter with attachments regarding the Report of the Supreme Court Committee on the Rules of Evidence (specifically with respect to N.J.R.E. 702).

The letter is signed by representatives of several corporations, but you may use my contact information below for future correspondence or if you require additional information. A hard copy of the comment letter, along with a separate document with email addresses for the signatories, is being sent via FedEx.

Thank you very much for your consideration.

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April 9, 2015

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Sent via FedEx and Electronic Transmission

Your Honor:

We, the undersigned, are companies that have facilities or sell products in New Jersey and believe that now is the time for New Jersey to adopt the construction of Federal Rule of Evidence 702, and by implication, the cases interpreting it. New Jersey is a hub for scientific research and manufacturing and its evidentiary rules must adapt to the needs of its community, or be it will be left behind. Its evidentiary rule is outdated and as such, has been singled out as far preferable by one of the most well-known plaintiff law firms in the US.[1] Adopting the prevailing evidentiary standard in the US will bring New Jersey into the digital age and improve consistency in the way expert evidence is treated in our courts.

Recently, several states have set aside the ***Frye*** rule and have adopted ***Daubert***.[2] Today, only eight states and the District of Columbia cling to the outdated ***Frye*** rule, and both DC and Missouri are debating adoption of the Federal ***Daubert*** standard this year. It is time for New Jersey to address the reliability of all expert evidence, not just novel scientific evidence. It is to all parties' benefit that adjudications rest on reliable evidence and methodologies. Moreover, consistent rules that address the real merits of disputes provide businesses with predictability when evaluating risk and making decisions about where to contract, build and invest.

Daubert will not (as its opponents sometimes claim) impose tremendous burdens on the judicial system. Far from mandating an arduous, exhausting "trial within a trial," the ***Daubert*** standard accords trial courts broad procedural flexibility in assessing the reliability of expert evidence. As Justice Breyer wrote for the Court in ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137 (1999), courts have "the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate

[1] See attached letter from Weitz and Luxenberg in the VIOXX litigation and recent news articles. : http://nypost.com/2015/02/01/feds-probe-civil-court-following-silvers-ar...

[2] Oklahoma (2009); Alabama (2012); Arizona (2012); Georgia (revised its rule in 2013 to apply Daubert and its progeny to all cases); Kansas (2014); Louisiana (2014)

reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." Id. at 152. Under ***Daubert,*** trial courts have "the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." Id.

Daubert hearings occur in relatively few cases. Twenty years have passed since the United States Supreme Court adopted the ***Daubert*** standard in **Daubert v. Merrill Dow Pharmaceuticals, Inc.,** 509 U.S. 579 (1993), and subsequently refined it in ***General Electric Co. v. Joiner,*** 522 U.S. 136 (1997), and ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137 (1999). That has been sufficient time to evaluate whether it has made a difference to the Federal courts in terms of burden or time spent since ***Frye*** was the prevailing rule.

Indeed, the National Center for State Courts, an independent, nonprofit clearinghouse for research to support improvement of the judiciary, did just that. It undertook a comparative analysis of Delaware's transition from a ***Frye*** standard to a ***Daubert*** standard and found: [3]

- Delaware trial courts were "not affected by excessive or unnecessary cost or delay as the result of ***Daubert***."
- ***Daubert*** improves the administration of justice and effectively lessens the burden on the courts. "Due to the higher quality of experts required of ***Daubert***, counsel presented the issues with more specificity. ... Judges, following the restrictive nature of ***Daubert***, often limited the scope of expert testimony (i.e., partial exclusion), which resulted in fewer bench or jury trials and more dispositions outside of the courtroom."
- When testimony was excluded due to a ***Daubert*** challenge, cases were more likely to result in a settlement or summary judgment, saving both parties the expense of going to trial, thereby reducing the costs and burdens on the court. Prior to ***Daubert***, defendants who challenged an expert still proceeded to trial if their motion was denied.

Finally, any judicial labor expended in assessments of reliability will be more than compensated when judicial labor is no longer demanded by cases that hinge upon unreliable expert testimony. Too many US courts are concerned with processing claims rather than adjudicating

[3] Waters, N. L. "Effects of the Daubert Trilogy in the Delaware Superior Court," National Center for State Courts (1999).

them on the merits. It is time for New Jersey to address this disconnect by updating its evidence code. The result will reinvigorate the court's gatekeeping function by improving the way it treats expert evidence.

Very truly yours,

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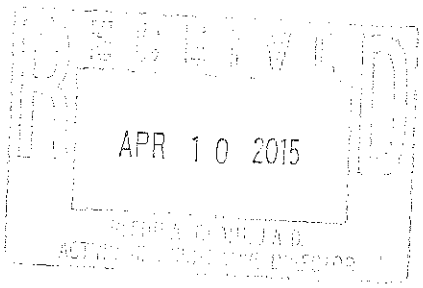
Comment Letter on the Report of the Committee on the Rules of Evidence

April 9, 2015

If you have any questions about the enclosed letter or require additional information, you may contact:



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December 29, 2004

Re: Vioxx Litigation

Dear Counselor:

While you are probably already familiar with Weitz & Luxenberg's groundbreaking work in asbestos litigation, please be aware that Weitz and Luxenberg is actively pursuing Vioxx cardiac and stroke injury cases, as well as injuries caused by Celebrex and Bextra. We are well situated to do so due to our extensive experience with pharmaceutical liability litigation and the fact that we have two offices in northern and southern New Jersey devoted primarily to pharmaceutical litigation, in addition to our main office in New York. We believe that the New Jersey Superior Court will be the most advantageous forum for the litigation of Vioxx claims. Set forth below is a detailed analysis of why we believe this so strongly. The analysis includes the key citations for your own review. If you would like, we would be happy to provide a packet of the pertinent cases and statutes cited since choice of forum is such a critical issue.

While an MDL is in formation, NJ state court is a far better venue for numerous reasons including speed of resolution, the standards of admissibility of the scientific evidence, a ruling forbidding *ex parte* interviews with treating doctors, the potential avoidance of the learned intermediary defense due to NJ law on direct marketing and a very liberal discovery statute of limitations that even includes wrongful death cases.

Merck is a New Jersey company so plaintiffs throughout the country can file their case in state court New Jersey with no risk of removal to federal court in accordance with 28 U.S.C. 1441(b). There has already been a "mass tort" court assigned to it (NJ Supreme Court appoints certain judges to supervise and try mass torts such as Diet Drugs, PPA, Hormone Replacement, and Vioxx). The Judge, Carole Higbee of Atlantic County has already issued several excellent decisions including a denial of *forum non conveniens* motions involving out of

state Vioxx plaintiffs holding "NJ has a substantial interest in policing the conduct and protecting the interests of its citizen corporations, such as Merck. While it's unfortunate that Merck and other large corporations generate litigation, that is a burden that any largely industrial state like NJ has to bear in order to receive the benefits that those same industries provide....NJ has a greater interest in allegedly fraudulent action that may have been committed by one of its citizens."

Additionally, Judge Higbee ruled last week that Merck lawyers may not conduct any *ex parte* conversations with any plaintiffs' treating doctors. Judge Higbee relied upon the decision in our case in the PPA litigation *Smith v. American Home Products Corp.*, 372 N.J. Super. 105 (Law Div. 2003). As you know, if the drug company gets access to discuss the case *ex parte* with the doctors, there is great potential for poisoning the causation and learned intermediary testimony. Many federal districts do permit *ex parte* discussions so this is a huge advantage over the MDL.

Given the background incidence of heart attacks and strokes in the older population -- the typical plaintiff who would have been prescribed Vioxx -- we believe federal court is a perilous venue. While the general causation issue -- can Vioxx cause heart attack and stroke -- should be winnable in a *Daubert* hearing, federal courts could dismiss many cases because of the myopic *Daubert* decisions on specific causation where a doctor can not absolutely rule out all alternative causes. However, in New Jersey, neither *Daubert*, nor the general acceptance *Frye* test is applied. Instead, in *Rubanick v. Witco Chemical Corp.*, 125 N.J. 421 (1991), the New Jersey Supreme Court held that the trial court must not "directly and independently" determine the soundness even of the methodology, much less of the study itself. *Id.* at 451. Rather, the "critical determination is whether comparable experts accept the soundness of the methodology..." *Id.* The court explained the policy reasons behind this liberal outlook: because of the extremely high level of proof required before scientists will accept a new theory, and particularly because of the current inability of science to fully comprehend [carcinogenesis], plaintiffs in toxic-tort litigation, despite strong and indeed compelling indicators that they have been tortiously harmed by toxic exposure, may never recover if required to wait general acceptance by the scientific community of a reasonable, but as yet not certain, theory of causation." Id. at 434

Accordingly, the Court rejected the general acceptance test in favor of the more liberal standard of whether comparable experts accept the methodology.

New Jersey law also recognizes that a contributory cause can be a substantial factor even if it is only a small percentage at fault. The New Jersey Supreme Court has held that even a 5% responsibility was a sufficient basis for liability, *Stephenson v. R.A. Jones & Co.* 103 N.J. 194 (1986). Similarly, the New Jersey courts have upheld verdicts that both cigarette smoking and asbestos exposure smoking were concurrent and contributory causes . *Goss v. American Cyanamid*, 278 N.J. Super. 227, 346-348 (App. Div. 1994) Thus, even though a client may have underlying heart problems and be a smoker, Vioxx could still be deemed a substantial contributory factor. In many a federal court, the case would get dismissed at the *Daubert* stage just because the expert could not rule out the other contributory causes.

New Jersey also has a very liberal statute of limitations - two years from discovery of injury *and* cause, *and* arguably, wrongdoing. **This even applies to wrongful death cases**. Indeed, in *Martinez v. Cooper Hospital*, 161 N.J. 45 (2000) the New Jersey Supreme Court held that in a wrongful death case the statute of limitations began to run not from the date of the patient's death, but from the date more than three years later when the mother received an anonymous letter indicating that hospital personnel failed to promptly treat the decedent patient.

New Jersey does *not* have a borrowing statute. In the leading choice of law case the New Jersey Supreme Court refused to apply an out-of state statute of repose which would have barred the claim because "the action is materially connected to New Jersey by the fact that the allegedly defective product was manufactured in and then shipped from this State by the defendant-manufacturer." The court when on to rule that:

> We are satisfied, therefore, that New Jersey in this case has a cognizable and substantial interest in deterrence that would be furthered by the application of its statute of limitations, and that interest is not outweighed by countervailing concerns over creating unnecessary and discriminatory burdens on domestic manufacturers or by fears of forum shopping and increased litigation in the courts of this State.

Gantes v. Kason Corporation, 145 N.J. 478, 492-493 (1995)

The New Jersey Supreme Court also has held that the "learned intermediary doctrine" does not apply to the direct marketing of drugs to consumers and that when the drug manufacturer has advertised its drug directly to consumers, the role of the prescribing doctor does *not* break the chain of causation for a drug company's failure to adequately warn patients of harmful side effects. *Perez v. Wyeth Labs., Inc.*, 161 N.J. 1, 27 (1999). Given the huge direct to consumer advertising of Vioxx, we believe the learned intermediary defense will be minimized or avoided.

We also believe New Jersey will be the jurisdiction that will have the quickest resolution. The Judge has been handling Vioxx claims for approximately two years already, millions of documents have been exchanged, many Merck depositions have transpired and trials are tentatively set for this Spring. In the federal arena, an MDL court has not even been assigned yet and as you know, no case can be tried by the MDL judge unless the plaintiff happens to reside in that jurisdiction. Thus, your cases probably could not get tried until after the MDL generic discovery is complete and the case remanded, which is years away.

You are probably wondering what are the negative points of filing in New Jersey. The only disadvantage to the client that comes to mind is the limited ability to obtain punitive damages. Under New Jersey law, we must show that important data was withheld from the FDA in order to get punitive damages in cases involving a drug that had been FDA approved. We believe factually that burden can be met. In any event, as a practical matter, due to the United States Supreme Court's *State Farm v. Campbell 123 S. Ct. 1513* (2003) and related cases finding that large punitive verdicts violate the due process clause, large punitive verdicts are

increasingly unlikely or if obtained, are reversed or reduced, especially in a case of a mass tort such as this.

Weitz & Luxenberg would welcome the opportunity to work with you on Vioxx cases and file them on your behalf in Atlantic County, where the court is venued. Fortunately, Atlantic County (home to Atlantic City) is sufficiently far from Merck (125 miles away) and other drug company headquarters so that the jury should not have a pharmaceutical taint. Atlantic County is considered a reasonable county for plaintiffs.

We should note that there may be some situations where we recommend filing a case in the MDL, depending on the details of the case and what we learn about the MDL, but we want you to be aware of the enormous advantages of the New Jersey option which at this juncture we believe is the optimal venue. We will naturally make a decision on a case specific basis after we review the records and when we know more about the MDL option.

If you have Vioxx cases you want us to review or have questions, please contact Glenn Zuckerman, Esq. at (800) 438-9786 extension 583.

Very truly yours,

Arthur Luxenberg

SHOOK
HARDY & BACON

March 31, 2015

Via email: Robert.Cornejo@house.mo.gov

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Rep. Robert Cornejo
Chairman, House Committee
on Civil & Criminal Proceedings
Missouri House of Representatives
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Re: House Bill 697
Amending § 490.065 RSMo to Assure The Reliability of Expert Testimony

Dear Chairman Cornejo:

I was grateful for the opportunity to appear before the Civil and Criminal Proceedings Committee on March 19, 2015. As promised, I am submitting this supplement to the remarks I made with a summary of my thoughts. My testimony focused on HB697 that would amend § 490.065 RSMo to provide additional options to the trial judge concerning expert testimony. There are many cases litigated that do not involve expert witness testimony. This bill will have no effect on cases where expert witness testimony is used.

I served as a circuit judge in the Sixteenth Judicial Circuit for over 20 years and have extensive first-hand experience with the operation of the current Missouri Rules governing expert testimony. I am aware that diligent judicial officers can hold differing opinions concerning this bill. Nevertheless, there were many cases over which I presided that could have benefitted from a pre-trial determination of the relevance and reliability of the expert witness testimony offered.

Shook, Hardy & Bacon has extensive experience litigating expert witness issues in both state and federal courts in Missouri and in other jurisdictions across the country and has litigated under the *Daubert* standard, the Frye Standard, and the standard currently employed in Missouri courts as set forth in § 490.065 RSMo. House Bill 697 would adopt the Federal Rules of Evidence 702, 703, 704 and 705 as they relate to expert witness testimony. The language of the bill would adopt the *Daubert* Standard and, by doing so, require Missouri judges to act as a gate keeper and exclude so-called expert testimony that is not based on a reliable foundation. This would bring the rules governing expert witness testimony in Missouri state courts in line with the rules applied

by federal courts in Missouri and throughout the country, and by the vast majority of courts in other states.

The most important effect of *Daubert* is to empower the trial judge to exclude from the jury any testimony that is irrelevant, unreliable or based on junk science. The *Daubert* standard sets out several guidelines for evaluating whether the testimony is sufficiently reliable, but leaves the trial judge with the discretion to evaluate the testimony and ensure its reliability. HB697 would authorize Missouri trial judges to conduct an in-depth analysis of the testimony and science presented by witnesses offered as experts. Adopting the *Daubert* standard would improve the quality and reliability of expert testimony, eliminate junk science, and conserve resources of the Court and party litigants. Meritorious cases, based on reliable expert testimony, would proceed while frivolous claims based on junk science could be identified and disposed of at an early stage without the heavy expenditure of resources caused by a trial.

It is worth noting that *Daubert* is not new. It has been the standard applied in Federal Courts (including those in Missouri) for more than 20 years. It has a proven track record and has gained broad acceptance in a majority of state courts throughout the nation. Litigants who bring meritorious cases will not be harmed by adoption of the *Daubert* standard. So long as parties are permitted to offer unreliable expert testimony, costs associated with litigation will continue to escalate. Under *Daubert*, it is possible that parties may have to invest more diligent effort at the outset of litigation to ensure that their claims and theories have a reliable basis. This kind of investment should be encouraged, as it allows limited resources to be focused on meritorious claims that are supported by reliable evidence.

In sum, HB697 provides a common sense approach to the issue of expert witness testimony and would be a vast improvement over the way in which expert witness testimony influences the truth seeking process currently used in civil litigation.

Very truly yours,

Judge John R. Gray (Ret.)
JRG/jm

cc: Committee Members *(via email)*

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

Nicole L. Waters, Ph.D.
National Center for State Courts
Project Director

Jessica P Hodge, M.S.
University of Delaware
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NCSC
National Center for State Courts

Funding for this project was provided by Third Sector New England, Inc. (TNSE) on behalf of the Project on Scientific Knowledge and Public Policy (SKAPP).

Acknowledgements

The authors would like to extend their gratitude to B. Michael Dann for donating his valuable time as an advisor on this project. New Castle County Resident Judge Richard Cooch was instrumental as a liaison for the Court and elicited the cooperation of the Delaware Superior Court judges and staff. New Castle County, Sussex County, and Kent County Prothonotary staff offered assistance to the authors and welcomed them as one of their own staff. The data collection efforts would not have been possible without the Courts' assistance.

The authors would also like to thank the judges and attorneys who participated in the interviews. They were gracious enough to give their time and share their experiences, which resulted in the most valuable information gathered for this project. Although the participants will not be mentioned by name, due to a respect for their confidentiality, each individual's participation was extremely valuable and appreciated.

Finally, the authors are especially appreciative of the administrative assistance throughout the project by Sherry Keesee-Buchanan and for the design and layout of the executive summary and final report by Amy E. Smith.

Authors' Note:
Confusion on how to pronounce this landmark case was expressed during the interviews for this project and hence, emphasized the need for clarification. Out of this need and respect to the original plaintiff, the authors verified the pronunciation of Jason Daubert's name through his original trial attorney; it is pronounced (Dow-bert).

Table of Contents

Introduction

"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]

The use of scientific expertise in the courtroom presents an inherent conflict between the goals of the two disciplines. The conflict between science and the law exists as a result of the underlying methods employed by the respective communities to uncover knowledge. As such, "the realities of science" often do not satisfy "the needs of the law."[2]

A legal dispute may require an expert witness to testify on adjudicative facts or legislative facts. An adjudicative fact is case-specific and used by the trier of fact to determine answers to such questions as: who, what, where, when, and why.[3] On the other hand, a legislative fact informs a question of law or policy and is applied more broadly than to the case at hand.[4] The law has case-specific goals; the judge or jury must determine guilt or liability. The goals of science, on the other hand, are to generalize to a larger population. Science will explain that a phenomenon or incidence is the effect that results from some given conditions.

Both types of expertise are useful; for example, the advancement of genetic research has informed product liability cases to determine whether an individual was exposed to an environmental factor manufactured by a large chemical company, or whether an individual suffers the said effects due to a genetic abnormality. If the expert testifies about the plaintiff's abnormality as it applies to the particular case, it is an adjudicative fact. A legislative fact expert may testify to the testing practices of the chemical engineering field or about epidemiological studies explaining the cause of genetic abnormalities.

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 evaluate the admissibility of all experts, whether their opinion is based on scientific, technical, or specialized knowledge. They must differentiate relevant and reliable experts from the so-called "hired guns" motivated by money alone, and such decisions have significant consequences. Eliminating an expert witness may dispose a case and admitting an expert may confirm a criminal defendant's guilt. Just over a decade ago, the judge's role in admissibility of experts was redefined as a "gatekeeper" in the U.S. Supreme Court decision, *Daubert*.[5] *Daubert* is one in a trilogy of decisions on the admissibility of expert witness

[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] David L. Faigman, David H. Kaye, Michael J. Saks, & Joseph Sanders, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, VOL. 1, West Publishing Co., St. Paul, MN, p. 31.

[3] Alisa Smith, LAW, SOCIAL SCIENCE, AND THE CRIMINAL COURTS, Carolina Academic Press, Durham, NC, p. 24.

[4] *Id* at 27.

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

testimony.[6]

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. The substantive results and methodological lessons learned from this study are presented in this report.

The Project on Scientific Knowledge and Public Policy (SKAPP) funded the current study to assess the feasibility of collecting data to understand if, and how, Daubert has altered the admission or exclusion of expert testimony.

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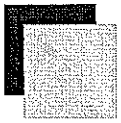
[6] The "trilogy" is comprised of *Daubert v. Merrell Dow Pharmaceuticals,* No. 92, 509 U.S. 579 LEXIS (1993); *General Electric Co. v. Joiner,* 522 S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); and *Kuhmo Tire, Ltd. V. Charmichael,* 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 238 (1999).



Legal History

Admissibility of an expert witness in the early 1900's was determined by applying the "commercial marketplace test."[7] 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. This rule was replaced in the early 20th century by *Frye v. United States*.[8] In this 1923 murder case against James Frye, he pled innocent. His plea was allegedly corroborated by an early polygraph test known as the "systolic blood pressure deception test." In 1923, this evidence was considered to be novel science in the eyes of the Court. In the Court's decision, which later became well-known as the "general acceptance" rule or the "*Frye* test," the Court held that:

> *Just when a scientific principle or discovery crosses the line between the experimental and demonstratable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*

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, was criticized for several reasons. The appeal of the *Frye* test was its simplicity. Yet beneath the simplicity, lies the downfall; it was simply vague. The *Frye* test did not specify the scope of the "particular field in which it belongs."

In the past few decades, subspecialties have emerged out of various scientific topics begging the question of what is the designated reference group. Furthermore, scientists within the same field have been famous for disagreements among themselves, giving rise to the image of the "battling experts." Thus, the court is left to decide what constitutes "general acceptance." Is the demarcation drawn at 50 percent or is a higher level of acceptance required? The *Frye* opinion did not address these nuances. The major critique of *Frye* is that it 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.

In 1993, the U.S. Supreme Court clarified Rule 702 of the Federal Rules of Evidence with regard to admissibility of expert testimony. Through the *Daubert* decision, the Court stated that it only interpreted the rules. However, "most courts and legal commentators found *Daubert* to herald a substantial change from past practice."[9] Indeed, FRE 701, 702, and 703 were eventually updated in 2000. Rule 702 was amended to read:

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[7] 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.

[8] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[9] *Supra* note 2 at 12.

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 thereto in the form of an opinion or otherwise, provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The most notable change in practice under *Daubert* was 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 prior to submitting it to the jury. Without acting as a gatekeeper, the judge thereby allows the expert to testify to the jury and the jury is left to evaluate the expert's opinion. Any inconsistency or weakness in the testimony is revealed during a cross-examination of the expert on the stand. Edmond and Mercer note, in their article, the pessimism toward the jury's ability to evaluate an expert that is expressed through the application of *Daubert* and the gatekeeper role.[10]

From a legal standpoint, a proffered expert's testimony must first be relevant to the case at hand and if deemed to be relevant, must also be reliable.[11] *Daubert* reframed admissibility to be determined by the judge, as gatekeeper, and focused on the principles and methodology. The Court provided four, non-exclusive factors to consider in determining admissibility:

- Can the theory be tested? (falsifiability)
- 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?[12]

Daubert is the first, in a series of three decisions by the U.S. Supreme Court that, together, comprise the *Daubert* trilogy. The second decision, *Joiner* (1997), further clarified the appropriate standard of review for appellate courts to apply since the admissibility decision may be "outcome-determinative" and render the outcome of a case (e.g., a summary judgment in favor of the defense by excluding the plaintiff's only expert).[13] Effectively, this decision gave more power to the trial courts in making admissibility decisions.

The third decision, *Kuhmo* (1999) completes the trilogy. Expert testimony can cover a multitude of topics. As such, the U.S. Supreme Court, in *Kuhmo*, faced the question of whether or not *Daubert* applies only to scientific knowledge or all expert testimony, including technical and other specialized knowledge. The expert in *Kuhmo* had specialized knowledge about tire tread, but would not qualify under several *Daubert* factors. The Court eventually ruled that the gatekeeping function in *Daubert* applies to all expert testimony and that the trial courts have considerable latitude in how to apply *Daubert* factors. The trial

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[10] Gary Edmond & David Mercer, Daubert *and the Exclusionary Ethos: The Convergence of* Corporate *and* Judicial *Attitudes towards the Admissibility of Expert Evidence in Tort Litigation*, Law & Policy, 26, 2004.

[11] *See Daubert*, 509 U.S. at 590. In the realm of science the terms "reliability" and "validity" have two distinct meanings. Reliability refers to the extent to which a particular technique or methodology produces consistent results from its practitioners when they are asked to perform the same task. Validity, on the other hand, refers to the extent to which the technique or methodology produces accurate answers. The Supreme Court in *Daubert* correctly tied the issue of evidentiary reliability to scientific validity.

[12] *Daubert*, 509 U.S. at 588-591.

[13] *General Electric Co. v. Joiner*, 522.

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. Indeed, the concern over specificity of the proffered opinion is frequently raised in deciding whether or not testimony is admissible.

Although the federal courts follow the procedural rules set forth in *Daubert*, the state courts have an option to retain *Frye*, adopt *Daubert*, or apply some hybrid form of the two. As such, only a few states have adopted *Daubert* in its entirety. According to Bernstein and Jackson, Delaware is one, of only nine states, that has "explicitly or implicitly adopted the full holdings of the *Daubert* trilogy."[14] Thus, because of its adherence to *Daubert*, Delaware was selected for this project.

Delaware is uniquely situated with respect to *Daubert*; as of 1989, Delaware case law had begun a shift toward using *Daubert*-like standards in reviewing expert testimony. In a serial murder trial, *State v. Pennell*, the Court excluded partial testimony on probabilities using DNA evidence, stating it was not reliable. In a criminal case, *Nelson v. State*, which proffered DNA evidence, the Court ruled that DNA matching evidence must be accompanied by statistical probabilities, citing *Daubert* and the Delaware Rules of Evidence (D.R.E.).[15] Subsequently, in 1999 the Delaware Supreme Court adopted the trilogy.[16]

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

[15] The five factors to consider are – is the witness qualified as an expert by knowledge, skill, experience, training or education; is the evidence relevant and reliable; is the expert's opinion based upon information reasonably relied upon by the experts in the particular field; will the specialized knowledge being offered assist the trier of fact to understand the evidence or determine a fact in issue; and will the expert testimony create unfair prejudice or confuse or mislead the jury?

[16] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999).

Literature Review

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. In particular, the plaintiff's bar felt the impact would be greatest against them.

Some recent studies have demonstrated that *Frye*'s general acceptance test is still widely used and that *Daubert* has not had a substantial impact on expert testimony or the rates of admissibility. Gatowski and her colleagues surveyed state court judges and found that the general acceptance factor was most useful to judges. In fact, judges did not often employ the other factors, in part due to a poor understanding of the error rate and falisifiability factors.[17] Groscup et al. analyzed state and federal appellate decisions in criminal cases and found that there was no difference in admissibility rates.[18] Judges apparently cited Daubert, but did not apply the specific criteria stated in Daubert. Similarly, Cheng and Yoon compared removal rates from state to federal courts as a proxy to measure whether litigants preferred *Frye* or *Daubert*; they found that the adoption of *Daubert* did not affect removal rates in tort cases.[19]

Dixon and Gill of the RAND Institute for Civil Justice found that *Daubert* had an impact in civil cases, but again, that the general acceptance prong was key in determining admissibility in federal court opinions.[20] They determined that *Daubert* did have an impact; compared to the *Frye* era, post-*Daubert* expert testimony was challenged and excluded more often. Furthermore, they noted that the number of summary judgments also rose.

In most empirical studies of *Daubert's* impact, investigators have conducted a content analysis of appellate opinions.[21] A key limitation of this methodology is the introduction of a selection bias. Appellate courts do not review all trial court decisions, and so the review is limited to a select group of trials. Another methodological approach, surveying judges and attorneys on their experiences with *Daubert* motions, was employed by Krafka et al. and by Gatowski et al.

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[17] Sophia Gatowski, et al., *Asking the Gatekeepers: A National Study of Judges on Judging Expert Evidence in a Post-Daubert World,* 25 L. & Hum. Behav. 433 (2001).

[18] Jennifer L. Groscup, et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases,* 8 Psych. Pub. Pol'y & L. 339, 344 (2002).

[19] Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards,* 91 Va. L. Rev. 471 (2005).

[20] Lloyd Dixon & Brian Gill, Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision, RAND Institute for Civil Justice, Santa Monica, CA.

[21] *See* D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?* 64 Alb. L. Rev. 99, (2000-2001); Henry F. Fradella, Lauren O'Neill, & Adam Fogarty, *The Impact of Daubert on Forensic Science,* 31 Pepp. L. Rev. 323, (2004); Groscup et al. *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases,* 8 Psych. Pub. Pol'y & L. 339, 344 (2002); and Rob Robinson, *Does CSI Lie? The New Institutionalism and the Treatment of Forensic Evidence by Federal Courts under Daubert,* [Paper Presented at Midwest Political Science Conference (2005)].

and provides an additional perspective.[22] Krafka et al. reports that *Daubert* has led to an increase in the number of challenges, effectively reducing the number of experts allowed to testify. The surveyed judges report that they excluded experts, not necessarily on *Daubert* grounds, but because ...

- the testimony was not relevant (47%),
- would not assist the trier of fact (40%), or
- the expert was not qualified (42%).

The first two reasons pertain to the Rules of Evidence as grounds for exclusion, while the later may apply to the factors specified in *Daubert.*

Previous work has not explored the impact of *Daubert* at the trial court level. This is in part due to the difficulty in collecting data on *Daubert.* In particular, no methodology to date has been able to reliably identify when a *Daubert* motion is filed or when a *Daubert* hearing is held. Anecdotal evidence that *Daubert* has introduced unnecessary delay and cost to the courts and litigants and that *Daubert* unfairly acts in advantage to civil defendants, has been just that, anecdotal.

The purpose of this empirical study is two-fold. One goal is 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. A second goal is 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.

The second goal pilot-tests 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?

This report presents the findings on the substantive conclusions on *Daubert's* impact in the Delaware Superior Courts and discusses the possibilities of future work, based on lessons learned from implementing the current methodology.

[22] Carol Krafka, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil, & Dean Miletich, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials,* 8 PSYCH. PUB. POL'Y & L. 309 (2002); Gatowski *surpa* note 16.

Methodology

Phase I – Case File Review

In the first phase, staff reviewed Delaware Superior Courts' case files to assess the incidence and use of *Daubert* motions and/or hearings. Both civil and criminal cases were sampled and reviewed in detail. Previous work has suggested that *Daubert* motions are most likely to appear in product liability civil cases and any serious criminal case in which a defendant faces charges such as felony rape or murder. The following sections detail the methodology used in the case file review.

Civil Case File Review

As shown in Table 1, just over half of the 19,400 filings in Delaware Superior Court are civil. Prior to contacting the court for a list of cases, product liability filings were estimated to comprise 3.4 percent of all civil filings.[23] Therefore, project staff made an initial request to the Prothonotary's office for a sample of 120 product liability cases between the years 1989-1993 and 1999-2004, 60 from each respectively. The Delaware Superior Court provided project staff with a complete list of product liability cases, from both time periods, totaling 126 cases. This number was smaller than the estimate of the population of product liability cases from Table 1. Therefore, due to a desired sample size of 120 cases, all 126 cases were retained and no sampling was necessary.

Table 1. Approximate Population of Cases for Case File Review

Pre-*Daubert* (1989-1993)			
14,040 filings x 5 years = 70,200 filings			
Civil (48%)	33,700	Criminal (52%)	36,500
Torts (10%)	3,370	Felony (64%)	23,360
Product Liability (3.4%)	**115**	Rape (1.6%) + Murder (0.9%) = (2.5%)	**584**
Post-*Daubert* (1999-2004)			
19,400 filings x 6 years = 116,400 filings			
Civil (55%)	64,020	Criminal (45%)	52,380
Torts (10%)	6,400	Felony (64%)	33,520
Product Liability (3.4%)	**218**	Rape (1.6%) + Murder (0.9%) = (2.5%)	**838**

[23] 2001 data for the Civil Justice Survey of State Courts. [Data available at http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/03957.xml].

The product liability cases were filed in all three counties in Delaware. A county breakdown of the 126 product liability cases for the specified time periods appears in Table 2.

Table 2. Products Liability Cases by County (N=126)

	Pre-Daubert		Post-Daubert	
County	N	%	N	%
Sussex	1	1.6	3	4.8
Kent	22	34.9	8	12.7
New Castle	40	63.5	52	82.5
Total	63		63	

The caseload for New Castle County surpasses that of the other two counties (Kent and Sussex) combined; as such, staff selected the largest county, New Castle, to compare electronic records to the paper case files. The goal of the comparison was to establish indicators in Delaware's electronic docketing system which could identify cases suitable for a more in-depth case file review.

The electronic case management system at the Superior Court of Delaware (JIC) allows court staff to review docketing information for each case. The notations in the system are detailed; the system provides dates, events, documents filed, and a brief description of the issue or resolution. An example entry reads:

> 06/25/04 DEFT'S JOINT SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF MOTION FOR ORDER EXCLUDING THE OPINIONS OF PLTFS EXPERTS ON CAUSATION ISSUES AND ACCORDANCE THEREWITH AN ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFTS.

Approximately 30 case files were reviewed in the JIC docketing system and compared with the paper files. Based on this initial review, staff adopted three identifier flags:

- Form 30 interrogatories
- Expert witness depositions
- Motions in limine

Project staff applied these criteria to assess the feasibility of identifying *Daubert* motions and search the electronic dockets of the remaining cases to identify which cases involved expert testimony, whether challenged or not. As a conservative approach, any case with a potential expert witness was flagged for an in-depth case file review.

Form 30 Interrogatories

Initially, the Form 30 Interrogatories appeared to identify all proffered expert witnesses for each side by name and area of expertise. Although the forms did, in fact, request such information, it was quickly apparent that at the time the Form 30 interrogatory was filed, the case had not sufficiently matured to consistently and reliably identify proffered experts. Form 30 interrogatories are filed early; procedural rules dictate that it accompany the plaintiff's complaint and the defendant's answer. Typically, responses to the interrogatory on expert witnesses read, "We reserve the right to call expert witnesses at a later date." Occasionally, an expert appeared on the form, indicating the party's intent; however, even when the expert was listed on the Form 30 Interrogatories, the expert did not necessarily testify at trial. Indeed, cases develop over time; as such, the Form 30 Interrogatory is but one component for identification of a party's intention to use expert testimony and the subsequent identifier flags produced more reliable results.

Expert Witness Depositions and Motions in Limine

From a review of the case files, project staff discovered the importance of examining docket activity following a pretrial stipulation order docket entry. A pretrial stipulation order is a request from the judge to the parties to disclose details about the impending trial and whether the case is ready for trial. If an out of court agreement is anticipated, this order may effectively prompt a settlement. If both parties respond to the pretrial stipulation in preparation for trial, the parties thereby reveal the experts set to testify on their behalf and provide notice to the opposing party.

Following the pretrial stipulation order, dates of expert witness depositions and motions in limine[24] to exclude testimony commonly appear in the electronic docket reports. If either event appeared in the electronic system, staff reviewed the full paper file. If the docket revealed an expert witness proffered by either side, staff reviewed the file.

Depositions of witnesses appeared in the JIC docketing system. However, an advanced degree listed after the witness's name was the only, albeit not always reliable, indicator of whether the witness was an expert or lay witness. For example, "motion in limine to exclude the testimony of expert witness, Dr. Smith." Upon review of the case file, some motions in limine did not address *Daubert* issues per se, but addressed other exclusionary requests (e.g., motion in limine to suppress evidence due to marital privilege). Overall, the case file reviews proved to be dependent on the presence of several identifiers within a contextual framework.

An order rendered by the bench to resolve a motion in limine was a critical document for the case file review phase. A judge considers arguments raised by counsel and issues a ruling that explains the rationale used by the judge to make a decision of admissibility. Motions in limine were raised by counsel through both formal written motions and orally during pretrial conferences or trial. Oral *Daubert* motions discovered through a review of transcripts was a consequential finding; for without a case file review, oral *Daubert* motions would have been overlooked through other cursory searches.

Criminal Case File Review

The criminal case file review was conducted in a manner similar to that described in the previous civil section. A request was made to the Prothonotary to search all cases with specific Delaware criminal codes to identify felony rape and murder charges with an indictment date falling within one of two time frames (1989-1993 or 1999-2004).[25] In the electronic docket system of the Superior Court, each charge is listed as a separate entry. Thus, in response to the request for a sample of felony murder or rape charges, the New Castle County Prothonotary's office produced a very large database. In total, the database listed 17,854 charges, involving 1,849 defendants from 1,950 unique cases. It was possible for the same defendant to be charged more than once and, at times, in multiple cases.

Most of the cases in the database were recent – spanning the six-year time frame from 1999-2004 (1,113 defendants, 1,160 cases, and 14,205 charges). Fewer charges appeared in the pre-*Daubert* time frame – spanning five years from 1989-1993 (736 defendants, 790 cases, 3,649 charges).[26]

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[24] A motion in limine is a pretrial motion requesting the court to prohibit opposing counsel from introducing evidence that is irrelevant, inadmissible, and/or prejudicial. It is similar to a motion to suppress testimony. A *Daubert* motion falls under the heading of a motion in limine.

[25] See Appendix A for a list of all Delaware Criminal Codes captured in this sample.

[26] Both the pre-*Daubert* and post-*Daubert* populations of murder and rape filings were slightly larger than the numbers estimated in Table 1.

A computer-generated random sample of 120 cases was drawn from the database by first identifying all 1,950 unique cases. The sample breakdown by county was as follows:

- NewCastle County: 49.2%
- Kent County: 25.8%
- Sussex County: 25.0%

The charges were predominantly felony rape (75.8%) and each defendant faced a median of two charges per case. Two cases listed approximately 60 charges against one defendant and only one defendant appeared twice in the sample.

Reviewing the criminal cases was more efficient than the civil cases, because the majority of cases were vacated, dismissed, or the defendant pled early in the case so that little, if any, coding was necessary. Dispositions of the criminal sample are revealed in Table 3.

Table 3. Dispositions of Criminal Sample

	Disposition	N	%
Non-Trial	Plead	73	60.8
	Dismissed/ Nolle Prosequi	23	19.2
	Incomplete Records	4	3.3
	Pending	3	2.5
Trial	Guilty	14	11.7
	Not Guilty	3	2.5
Total		**120**	

A majority of defendants pled to a charge or had charges against them dismissed. Seventeen defendants (14%) proceeded to trial.[27] Of the 14 defendants found guilty, 12 faced a jury and 2 opted for a bench trial. All of the defendants found not guilty appeared before a jury.

The criminal cases differed from the civil cases both procedurally and with regard to the impact of *Daubert*. Felony rape and murder charges were selected due to the severity of the charges and the higher anticipated likelihood of a proffered expert witness. Although rape charges likely involved the exchange of bodily fluids and eyewitness testimony, topics which lend themselves to an expert witness, rape is a crime with unique emotional relationships between the victim and the offender. In particular, rape cases are difficult to prosecute due to the need for cooperation and testimony from the victim.[28] Without full cooperation, the attorney general's office will initiate a case and later withdraw the charges (referred to as "nolle prosequi").

Pre-Trial Conferences

Due to a lack of indicator flags as seen in the civil docket review, a modified methodology was adopted for the criminal review. Simply, any case in which the judge held a pre-trial conference was reviewed. Typically the expert witness list was not well developed prior to trial and the electronic docket did not indicate whether an expert witness was proffered.

In addition, it was not always apparent whether the witness was a fact witness or an expert witness. For example, in one case, an EMT was the first to arrive at the scene of the crime and was proffered by the state as a witness. Whether the EMT was describing the crime scene as a fact witness or was describing the victim's injury as a medical expert was unclear from a review of the file.

[27] The trial rate for felony rape and murder charges is higher than for all felonies. See, for example, *Felony Defendants in Large Urban Counties, 2000*, BJS, Table 23, reporting that murder trial rates are approximately 33 percent, whereas the trial rate is only 3 percent for all felony offenses. The Annual and Statistical Report of the Delaware Judiciary: Superior Court, for fiscal year 2003 reports a 3.1 percent trial rate for all felonies, available at http://courts.state.de.us/Courts/Supreme%20Court/2003%20Annual%20Report/.

[28] See generally, Kerstetter, Wayne A. & Van Winkle, Barrik. (1990). Who decides? A study of the complainant's decision to prosecute in rape cases. *Criminal Justice and Behavior, 17* 268-283; Lord, V.B., & Rassel, G. (2000). Law enforcement's response to sexual assault: A comparative study of nine counties in North Carolina. *Women and Criminal Justice, 11* 67-88; Spohn, C. & Horney, J. (1990). A case of unrealistic expectations: The impact of rape reform legislation in Illinois. *Criminal Justice Policy Review, 4* 1-18.

Motions in Limine

Motions in limine were not limited to challenges to the admissibility of expert witness testimony. In fact, counsel routinely raised motions in limine to exclude other types of information or general testimony. For example, in one case, four motions in limine were filed on behalf of a defendant charged with murder. One motion sought to suppress the defendant's statements pursuant to custodial interrogation and another to exclude evidence from a search and seizure performed three years after the alleged offense. Thus, motions in limine were over-inclusive and thus not effective indicators for the criminal files. Moreover, formal motions in limine were quite rare; at times exclusionary requests arose orally during trial and were therefore not present in the case file.

All cases were coded and entered into a database. The coding forms for cases without experts included basic case events such as filing date, disposition date, case outcome, and a description of the parties. Staff collected more detailed information on cases with an identified expert. The coding forms tracked the number and type of expertise proffered by each side, any exclusionary motions including the grounds for exclusion, cases cited, and the ruling. In addition, attorney contact information was collected for follow-up in Phase II.[29]

Phase II – Interviews

In the second phase, staff conducted supplemental interviews by contacting 38 attorneys from cases identified through the case file review and all 19 Superior Court judges. Thirteen of the nineteen judges agreed to an interview (68%) and 20 of 38 attorneys agreed (53%). Several judges and attorneys responded to our initial contact, but did not believe they would be helpful. For example, the attorneys listed as counsel in the files were not always lead counsel or did not participate in the relevant *Daubert* motions, briefs, or hearings. Several judges explained that their calendar assignment did not lend itself to *Daubert* hearings and that they themselves had not seen any *Daubert* motions.

The interviewees represented parties in both civil and criminal cases, including plaintiff attorneys, defense attorneys, public defenders, prosecutors, and private defense attorneys. Additional attorney names were offered throughout the process of soliciting cooperation. However, due to time and budget restrictions, follow-up was not possible on all disclosed attorneys.

Interview Scripts

Based on past literature and the interests of the current study, two scripts were developed in order to guide the interviews, one for attorneys and another for judges. Two interview scripts were utilized so that questions asked of the interviewees correctly pertained to their specific roles. Although specific questions varied according to the particular interview guide (i.e., attorney script versus judge script), both scripts contained analogous themes. The themes included:

- the process in which a *Daubert* motion arises in a case.
- whether *Daubert* has caused more delay, burden, and/or cost.
- whether the gatekeeping role of judges has changed over time.
- whether *Daubert* has differentially impacted particular parties.
- the impact *Daubert* has had on case outcomes.

[29] The coding forms for civil and criminal cases are included in Appendix B along with an explanation of all the codes.

Within each of these themes, several probing questions were utilized in order to obtain information from the interviewees. It was important to narrow the scope of the questions to specifically ask attorneys and judges about other relevant perspectives. For example, when discussing the process in which *Daubert* challenges arise, the interviewers asked judges to explain the criteria they use in deciding whether to admit or exclude experts, and asked attorneys how they decide whether to initiate a motion in limine, challenging the admissibility of an expert. This enabled the authors to gather insightful data from all parties in the time frame allotted for the interviews. The interviews lasted approximately 30-45 minutes.

Because neither author is an attorney or a judge, it was important to seek advice from an outside party to ensure that the questions were important, appropriate, as well as provide external validation to the interview scripts. B. Michael Dann, a retired judge from Arizona, and currently a visiting fellow at the National Institute of Justice and independent court consultant, along with Anne E. Skove, a National Center for State Courts staff attorney, provided key advice regarding the interview scripts.

Findings

Civil

Results of Case File Review

In total, project staff reviewed, in depth, approximately half (N=57) of the product liability case files. The same methodology established in New Castle County was employed in Sussex and Kent County cases to request files for review. New Castle County's policy for retention of civil files was to remove files from the shelves to archive one year after the case is considered closed. At the time of data collection (January and February, 2005), any file initiated between 2001 and 2004 was typically found on the shelves, whereas files initiated prior to 2001 were stored off-site in archives. In fact, project staff located 80 percent of the cases filed after 1999, the post-*Daubert* group, on site.

After the initial review of 30 cases, staff searched the electronic dockets and applied the criteria warranting further review. Project staff reviewed an additional 27 cases and, of those, 22 proffered an expert witness, four were pending cases with an anticipated expert, and one file did not have any evidence of an expert witness, despite the presence of an indicator in the electronic docket.[30]

As a conservative approach, project staff attempted to identify whether an expert witness was proffered. Unfortunately, it is possible that an expert witness was consulted for a case, but was not identified in the court records due to a settlement or other resolution during the discovery phase. For the purposes of this pilot project, it was important not only to identify the presence of an expert, since in most product liability cases an expert is likely consulted, but whether an expert's testimony was challenged by the opposing side; and if an expert was challenged, on what grounds.[31]

Substantive Findings

An explicit reference to an expert witness was made in 30 percent of the cases. A notice of a deposition of an individual with a specified degree (e.g., John Smith, M.D.) was commonly noted in the JIC system. However, depending on the maturity of the case, some cases were disposed by a stipulated dismissal or settlement and the case was thereby not ready for trial. Thus, expert witnesses were potentially prepared to testify, but did not officially appear in the case file by the time of disposition.

How a case was disposed undoubtedly became an important characteristic in the case file review phase. Of the 106 cases with a final disposition recorded, the parties settled or stipulated a dismissal in nearly 40 percent of the cases. At some point pre-trial, the court dismissed another 43 percent of the cases. A summary judgment or default verdict was entered in eight cases and the remaining eight went to a jury or bench trial. Interestingly, of those that went to trial, the defendant prevailed in four of the seven cases and one resulted in a hung jury.

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[30] Although pending cases were initially to be excluded from the sample, it was quite informative to have reviewed all of the products liability cases. In fact, one very large and complex case involved *Daubert* at many levels. It was extremely informative to be able to review this pending case. In part, it shows the development of a complex case and what role *Daubert* played in the case.

[31] For more information on the grounds for which an expert was challenged as tracked in the coding documents, see Appendix B: Coding Forms.

Although it is not uncommon for a large proportion of cases to be resolved through a settlement or stipulated dismissal, it is an interesting consideration for future research. The role of the expert witness testimony in prompting an out of court agreement by the parties is unknown. Although researchers will find clues in the docket reports or case files, ultimately they would need to follow-up with attorneys in the case to ascertain what, if any impact, challenges to expert testimony may have had on the decision of whether to proceed to trial or resolve the case out of court.

Motions to Exclude Expert Witness Testimony

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*; although three of the post-*Daubert* cases were consolidated into one that spanned the entire time frame of the *Daubert* trilogy and resulted in a summary judgment in favor of the defendant after the plaintiffs' experts were excluded.

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. Typically, a plaintiff was injured and the case necessitated a bio-mechanical engineer to explain the mechanism that allegedly caused the malfunction and a medical expert to explain the physical injury of the plaintiff. The defendant files a motion in limine to limit the scope of the testimony, thereby limiting the medical expert from discussing the cause of the injury and the bio-mechanical engineer from speculating on the resulting injury. A similar pairing of experts existed in cases with a malfunctioning product that allegedly resulted in a fire. The engineering expert was proffered to testify about safety testing of the product and the fire expert would testify about the likely origin of the fire. Other disputes named automobile defects and severe medical complications resulting from a chemical or drug. Such cases involved issues that parallel the original Daubert dispute over the drug, Bendectin, and its effects.

In the early cases, pre-*Daubert*, the court did not appear to rule vastly different on the motions in limine as compared to the post-*Daubert* cases. However, the dispositions subsequent to the exclusion rulings less often resulted in a jury or bench trial post-*Daubert.* Across both time periods, an equal number of motions that were granted were denied, and more frequently resulted in a partial exclusion, or limit in the scope of admissible testimony, than a complete exclusion of an expert.

The impact of the bench rulings on admissibility of experts influences the disposition. For instance, if a plaintiff's lone expert is excluded, typically the case is resolved by either a summary judgment or a directed verdict. One judge colorfully illustrated this point during a hearing on the joint motion for summary judgment and motion in limine,

> *"the issues in the motion in limine and the motion for summary judgment are so intertwined that they're not really separate motions — the motion in limine is sort of a belt/suspenders kind of approach."* [32]

There were no differences between the pre-*Daubert* and post-*Daubert* cases in the number of summary judgments entered. However, it should be noted that the comparison is between

[32] Transcript from the pretrial and oral argument hearing on January 23, 2004 from McDaniel v. DaimlerChrysler Corporation, 02C-04-148, p. 16 lines 8-12 .

very small numbers of cases.

Likewise, when a defendant's motion in limine to exclude a plaintiff's expert is denied, the defendant must then assess the strength of the case against it and decide whether to proceed to trial. Following a defendant's denied motion to exclude an expert in the pre-*Daubert* cases, the cases all proceeded to trial, albeit with mixed success. After the *Daubert* trilogy, a defendant's denied motion in limine led to an out of court settlement. It is likely that factors in addition to *Daubert* influence the decision to go to trial.[33] Yet this finding redirects the inquiry of *Daubert's* impact on the courts to expansively include pre-trial and out of court activity. Unfortunately, the case files do not reveal the extent of any such influence.

The content of the motions in limine subtly reveal the impact *Daubert* factors have had on the court. In pre-*Daubert* times, counsel motioned the courts to exclude the opposing party's expert on grounds of relevancy or questioned the scope of the testimony as determined by the expert's qualifications or expertise. Whereas, post-*Daubert,* counsel presented the issues with more specificity, citing *Daubert*, along with other relevant Delaware case law.[34] Counsel addressed *Daubert* factors of testability, error rate, peer review, and additional factors such as general reliability of the methodology and relevance to the case at hand. *Daubert's* impact was emerging from a review of these civil cases, but how and to what extent is still unclear.

It was clear from the case file review that there is a unique history of Delaware case law in regards to *Daubert.* Case law cited in the motions in limine indicated that Delaware's progress towards a *Daubert* interpretation of the Delaware Rules of Evidence (D.R.E.) occurred before the U.S. Supreme Court's decision in 1993. Delaware's Rules of Evidence have closely followed the Federal Rules of Evidence (F.R.E.) since 1980 and before that followed *Frye*. In 1989, in the case of *State v. Pennell*, the Court stated that:

- experts must be qualified,
- evidence offered is reliable,
- opinion is reasonably relied upon by those in the field,
- knowledge will assist the trier of fact, and
- evidence will not mislead or prejudice the jury.[35]

The case involved DNA testimony against an accused serial murderer charged with three counts of first degree murder. The Court opined that scientific expert testimony was to be rigorously scrutinized and adopt the standards set in scientific fields. In its decision, the Court stated, "the State has failed to demonstrate a degree of reliability necessary to admit such statistical probabilities [for DNA matching]."[36]

Interviews

As previously stated, through the civil case file review, the impact of *Daubert* began to emerge, but how and to what extent was still unclear. The interviews with the judges and attorneys in all

[33] See generally, special issue on vanishing trials, *Journal of Empirical Legal Studies,* (November 2004) vol. 1, no. 3, pp. 459-984.

[34] For example see, *Minner v. American Mortgage* 791 A.2d 826; *Ward v. Shoney's Inc.* 2000 Del. Super. LEXIS 36; *Cunningham v. McDonald* 689 A.2d 1190; *M.G. Bancorporation Inc. v. LeBeau* 737 A.2d 513; and *Nelson v. State* 628 A.2d 69.

[35] *State v. Pennell*, 584 A.2d 513; 1989 Del. Super. LEXIS 520, p.4.

[36] *Id* at 30.

three counties of Delaware provided insightful information as to when and why *Daubert* challenges occur in civil cases and the impact it can have on the outcomes of these cases. One of the common threads throughout the interviews was that *Daubert* challenges occur most often in complex cases where the burden of proof cannot be met without the testimony of an expert.

Although not exclusively, the most common cases in which *Daubert* issues appear are in product liability or medical malpractice cases where experts must link damages to a specific injury. Indeed, several of the interviewees, including both judges and attorneys, spoke about the issue of biomechanical engineer experts. The demand for these experts and their testimony has largely increased in recent years. Although the Delaware Supreme Court has addressed this issue, these experts are relatively new; thus, the debate continues as to whether or not the testimony of a biomechanical engineer can or should be included.[37]

On the other hand, both judges and attorneys discussed how many experts have become "*Daubertized.*" These experts have testified so many times in the past that their reputation and credentials are no longer questioned. Indeed, one attorney explained how some experts begin to testify so much that it is important to find new people; in other words, the experts become "like tires, they lose their tread." Nonetheless, if an expert has been judged to be qualified in previous cases, it is their opinion about the present case that must be established. Hence, rather than being challenged on the reliability of their testimony, experts' opinions are judged by relevancy.

One of the reasons why many experts have become "*Daubertized*" is that there is not a large issue of "the wandering expert" or "the blue light expert" in Delaware.[38] As many of the attorneys and judges explained, unlike other jurisdictions, Delaware does not encounter many "junk science" experts. Disreputable or unqualified experts are not often proffered, because as many judges acknowledged, the bar in Delaware is particularly responsible and competent. This was further revealed by how the attorneys choose the experts for their cases. When asked how or where they find their experts, attorneys expressed concern about experts who advertise their services, because they seem to be in it only for the money. Moreover, as one attorney explained, it is important to retain an expert that does not sound crazy—"You need to believe in the guy yourself or you can't get the jury to believe."

As a result, many attorneys utilized organizations (e.g., The Defense Research Institute) and/or other experienced attorneys' suggestions when searching for experts. Because having a good expert can make or break a case, attorneys explained that they were selective with experts, and, with forethought, utilized the *Daubert* factors when deciding to retain or initiate a challenge to an opposing expert's testimony. Indeed, many of the judges and attorneys discussed how important having a credible expert is to the outcome of a civil case. So important, in fact, that *Daubert* challenges are viewed by many as a negotiation tool or as leverage for a settlement. As one judge explained, "if the value of the case doesn't warrant a lot of experts, the other side will try to shoot the other's expert out of the water." Another judge claimed that utilizing *Daubert* has become a strategy "to scare the other side to settle."

The cost and delay as a result of *Daubert* has had a differential impact by weighing most heavily

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[37] *See e.g., Eskin v. Carden,* No. 322, 2002, 842 A.2d 1222.

[38] Although not technical terms, an expert identified as a "wandering expert" or a "blue-light expert" is someone who travels from jurisdiction to jurisdiction to testify in cases on numerous topics or primarily for financial incentives, even if they do not have the credentials to do so.

on the civil plaintiffs' attorneys. The interviews targeted attorneys who have had experience with *Daubert* motions and are thus more likely to appear as counsel in a contested, complex case. These plaintiffs' attorneys expressed concern with the additional costs and fees that arise out of the discovery process and depositions of experts in response to a *Daubert* challenge. There is a push in Delaware Superior Court to avoid evidentiary hearings and base motion rulings on depositions. Yet plaintiffs' attorneys voiced their concern that the credibility of the expert and the nuances of the knowledge and proffered testimony are not optimally presented through written reports.

Several attorneys asserted that *Daubert* has shifted the trust away from jurors. Similarly, attorneys suggested that the Delaware Supreme Court, through its rulings, has demonstrated that it is intimidated by *Daubert* and subsequently, the Courts have weakened the trust bestowed upon jurors. Instead, the attorneys argue that jurors have the common sense to evaluate experts and their testimony. Clearly the judicial role as gatekeeper has shifted the responsibility away from the jury to the hands of the trial judge.

There was a clear trend in the post-*Daubert* dispositions, moving away from a trial. Although this trend is accompanied by a national trend of declining civil trials, whether *Daubert* has been adopted or not, the trend also appears when comparing motions in limine in pre- and post-*Daubert* cases. One plaintiff's attorney mentioned that, "if you survive the *Daubert* motions, the defense wants to settle; that is a positive outcome." As such, *Daubert* appears to have a dual effect by reducing the number of cases that "survive" *Daubert* challenges and result in a summary judgment and encourage the defense to settle if their challenge is not successful.

Criminal

Challenged Expert Witness Testimony

The criminal files required a qualitative assessment to determine what transpired during the course of the case, because in total, 34 cases were reviewed, of which only 15 identified an expert witness. A total of 10 cases involved a motion to challenge expert testimony.

Only two of the ten cases with challenged experts occurred pre-*Daubert*, of which eight were charged with murder. In the two rape cases, the Delaware Attorney General (DAG) proffered a medical expert to testify on the results of genital warts testing. In one case, the expert opined on the probability of both the offender and the victim testing positive for genital warts. In the other rape case, the victim was a young child who had contracted genital warts. Although neither of the two rape cases from this sample proffered SANE nurses as experts, information gleaned from the interviews about non-sample cases suggests that Sexual Assault Nurse Examiners (SANE) have been challenged on grounds that they lack qualifications.[39]

In the murder cases, two of the challenged experts presented DNA evidence, one defense expert was challenged on psychological findings, and one defendant made several challenges to the state's ballistic expert, handwriting expert, and to toxicology reports of the presence of THC. The files of the other three cases were incomplete or missing information on the nature of the proffered expertise.

In this sample, defendants were found guilty at trial in five of the ten cases with motions to limit testimony. Another four pled guilty at various stages of the case. At the time of this report the

[39] The admissibility of SANEs has been challenged in other jurisdictions. See for example, *Velasquez v. Commonwealth of Virginia*, 2001 WL 290999 at 2, (VA. App.) (2001); *People v. Hicks*, 7 Cal Rptr.2d 106, 10 (1999); *Gonzales v. The State of Texas*, 1991 WL 6706 (Tex. App-Hous. (14 Dist.).

final case was pending a jury trial verdict. The motions in limine raised in this limited sample were most often unsuccessful. However, even when the motions were granted, either by limiting the expert's testimony or by excluding the expert entirely, the testimony was not critical to the state's case against the defendant, as evidenced by the verdict.

The case file review for the criminal cases was less fruitful than for the civil cases. Motions in limine are apparently rare in criminal cases; when motions are raised in criminal cases, they are done so orally and typically during trial. Even though the criminal case, *State v. Pennell*, preceded *Daubert*, criminal motions in limine to exclude or limit expert testimony appear to be a rare occurrence. Typically the motions are filed in serious murder cases by the defense counsel. Which is not surprising, since Delaware defendants may face the death penalty; and therefore, it is prudent for the defense attorney to exhaust all efforts to benefit his or her client.

Interviews

Although the case file review for the criminal cases was less copious than for the civil cases, the information obtained from the interviews substantiated what was found during this process. In particular, the judges and attorneys explained that *Daubert* was not as consequential in criminal cases as compared to civil cases, and if there was a *Daubert* issue, it was typically handled during trial rather than having a separate pre-trial hearing. One of the reasons that *Daubert* challenges are not raised as often in criminal cases is because the experts and the science put forth to the court have already been "*Daubertized*." As the interviewees discussed, novel expert testimony is not often seen in criminal cases in Delaware since the issues brought up in expert testimony are repetitive and opined by regular experts (e.g., drug trafficking practices by undercover law enforcement officers or cause of death by medical examiners).

Daubert motions typically occur in higher stake criminal cases where decisions will greatly affect an individual's liberty. As one attorney explained, in such cases, the defense and state are going to put as much time and resources as they can into the case in order to prove the burden and to make sure innocent people are not going to jail. This is another reason why *Daubert* challenges are often held during trial, rather than having a pre-trial hearing. Because judges will typically not deny *Daubert* challenges, the standard in criminal cases is different than in civil cases. In other words, unlike in civil cases where judges discussed denying a motion in limine because it was not filed per the scheduling order, judges do not hold criminal parties to the same standard.

Law enforcement officers often testify as to whether there was intent to deliver, the weight, and the street value of a particular drug, and whether paraphernalia was present. As one attorney described, "Drug police are let in, so *Kumho* is working."[40]

Another area in which *Daubert* has infiltrated is fingerprint testimony. As one attorney explained, "Fingerprint evidence is not science, not repeatable or reliable." Although this opinion is becoming more widely acknowledged throughout the forensic science field,[41] there was disagreement among the interviewees as to whether fingerprint testimony would be excluded in the near future, particularly in Delaware. Because it has historically been viewed as scientifically reliable, it is now subject to *Daubert* challenges in some

[40] As discussed in a previous section, *Kumho* is one of the three cases that construct the *Daubert* trilogy. In *Kumho*, it was held that the criteria set forth in *Daubert* should also apply to experience-based expert testimony, not only that which relied on science. Accordingly, law enforcement officers can testify in drug cases based on their experience in the field, rather than reporting on statistical tests or peer-reviewed publications.

[41] Sandy L Zabell, *Fingerprint Evidence*, 12 J. L. & Pol'y, 143 (2005).

courts due to the fact that latent fingerprints (from the scene of the crime) are usually smudged or only partially present. As one judge explained in an interview, if fingerprint evidence is challenged, the judge has the responsibility to hear it. However, as two attorneys stated, "We won't be the first to challenge it."

Recently, courts have addressed what has been coined "the CSI Effect."[42] Due to the popularity of television shows such as *CSI: Crime Scene Investigation*, jurors are becoming more critical of evidence presented during criminal trials. Both judges and attorneys discus-sed how the expectations of jurors regarding scientific evidence, particularly DNA, has largely increased due to these television shows. As one attorney opined, "You seem to need experts for everything to impress a jury in criminal cases." The interviewees explained that prosecutors must now address CSI in opening statements. They have found the need to instruct jurors that DNA tests are not completed in most cases due to high cost and lengthy delays to receive results. Because "the CSI Effect" is a relatively new phenomenon, it is a trend worthy of further investigation.

[42] See e.g., Robin Franzen, "CSI Effect on Potential Jurors has some Prosecutors Worried", *Newhouse News Service*. (December 16, 2002).

Conclusions

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. Delaware Superior Court was not affected by excessive or unnecessary cost or delay as a result of *Daubert*. 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.

Overall, counsel in only 16 percent of product liability cases and 8 percent of felony murder and rape cases question an expert's testimony.

As confirmed in other work in this area, challenges to expert witness testimony are not a frequent occurrence in either civil or criminal cases in the Delaware Superior Court. 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. In fact, a well-respected and now retired judge in Delaware, Judge Quillen, stated in *Minner v. American Mortgage,* that if requests for hearings were,

> *"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."*[43]

Counsel challenged few types of experts. Most common in the product liability cases, the challenged expertise was engineering and/or medicine. Commonly the expertise discussed biomechanical engineering concepts by duo-experts (medical doctors teamed with mechanical engineers). In the criminal cases, the expertise was more varied, but nevertheless included limited backgrounds. Common criminal experts included DNA scientists, psychologists, medical doctors, and a handful of other forensic experts. The case facts obviously predicted the nature of the expertise.

Civil defense attorneys, by and large, filed the majority of motions to challenge expert testimony. The differential impact of these motions was realized by civil plaintiffs, due to the potential dispositive nature of the motion against a lone expert. The plaintiffs' bar experienced the brunt of the impact of *Daubert.* Yet defense attorneys in Delaware did not complain of frequently encountering proffered "junk science." In large part, the civil defense attorneys challenged experts as a tactical maneuver. The DAG's office proceeded with several cases even after a successful *Daubert* motion, indicating that the excluded expert evidence was not the sole evidence against the defendant and therefore, less consequential.

[43] *Minner v. American Mortgage & Guaranty Co.,* 791 A.2d 826 at 845. C.A. No. 96c-09-263-WTQ.

Daubert motions are used effectively as leverage in civil disputes. One civil attorney stated that *Daubert* has become a "sword not a shield" in the game of litigation. In particular, defense attorneys carefully 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 to artfully craft a *Daubert* motion. As such, the pre-trial phase becomes of primary interest to any researcher hoping to better understand the impact of *Daubert* at the trial court level.

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 (at times drawing on international experts) and expert reports. Thus, attorneys are required to seek experts who are credentialed; yet at the same time, conduct depositions in a timely manner so that they are prepared to file motions when appropriate.

Although Daubert did not have as big of an impact as many expected, nevertheless, it was perceived as a good doctrine.

Due to the higher quality of experts required by *Daubert*, the criterion set forth within this decision consequently commands more restriction and a higher scrutiny of expert testimony. Whereas 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. Judges, following the restrictive nature of *Daubert*, often limited the scope of expert testimony (i.e., partial exclusion), which resulted in fewer bench or jury trials and more dispositions outside of the courtroom.

The Court rendered varied rulings on the motions in limine. Most importantly, 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. Any future study on *Daubert* should account for these nuances in the data.

Did *Daubert* alter the method of disposition in a case? The Court did not appear to rule vastly different on the motions in limine in the post-*Daubert* era when compared to the pre-*Daubert* era. Nonetheless, it was revealed that the exclusionary rulings within the post-*Daubert* era less often resulted in a jury or bench trial. In other words, the dispositions oftentimes resulted in a summary judgment or a settlement between parties, not a trial.

In the interest of adhering to the standards set by the scientific method, the results of what impact *Daubert* has had on the Delaware Superior Court admittedly cannot control for the impact of influential factors which alter case processing over time. For instance, the results indicate that fewer cases reached trial post-*Daubert*. It is possible that the judge's new gatekeeper role is an effective way to screen out cases with weak or problematic expert witnesses from reaching trial. In fact, one attorney believed that, "judges do not

want the case to go to trial." However, it is likely that other factors such as effective pre-trial case management or the increased use of alternative dispute resolution techniques also affect this outcome, as compared to the impact of the *Daubert* trilogy alone.

Part of the success of the Delaware Superior Court in avoiding added cost or delay that was feared to accompany the Daubert ruling was because the Court has developed effective case management strategies to properly address Daubert and expert testimony.

The Delaware case, *Minner v. American Mortgage*, emphasized the importance of effective pre-trial case management and reliance upon the discovery record as a basis for ruling.[44] However, case management strategies differed for civil and criminal caseloads. For instance, with civil cases, *Daubert* motions and hearings were primarily conducted pre-trial. On the other hand, criminal cases often involved motions and hearings at trial or at the eve of trial. The caseloads differed, not only because judges were more apt to hear *Daubert* motions in criminal cases due to the higher stakes (i.e., a person's liberty), but also because novel scientific evidence is more common in civil cases. Whereas criminal cases often involve "*Daubertized* experts" (i.e., experts that routinely testify in court—e.g., medical examiners and law enforcement officers), civil cases are more likely to involve new science (e.g., novel prescription medicine).

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 likely not carried out in a similar manner by 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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[44] *Minner v. American Mortgage & Guaranty Co.* 791 A.2d 826.

Future Recommendations

The value of this research has prompted several suggestions to continue future work in this area. By searching through files and interviewing targeted trial judges and experienced attorneys, it became clear that the focus of future work in this area should be on pre-trial and trial activity, not isolated to disposition outcomes and appellate opinions. The interviewees recommended that a tracking system be in place with a cooperating court to track incoming *Daubert* motions and the subsequent rulings. Several members of the Delaware bar suggested that they, or another local bar, serve as a contact point to further supplement data collected on any pre-trial or discovery activity. The input attorneys provided in the interviews was particularly valuable, for instance, attorneys described how they searched for and used experts prior to filing any motions with the court.

The authors recommend that future work target particular cases and case types to provide fruitful collection of data on *Daubert* motions. Since the filings were so rare, it is imperative that the search is limited to areas in which *Daubert* motions are most common. This work should also be expanded to include additional jurisdictions with a variety of characteristics. Due to the difficulty of identifying when a *Daubert* issue is raised in a case, the interviews revealed that effective case management procedures are likely an important factor in whether or not the courts experience a large impact on their time and whether or not the attorneys report time delays or financial burdens. Similarly, it is 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. Clearly, the respect and admiration between the bench and the bar in Delaware cultivated a culture that is not likely to exist in all jurisdictions.

Methodological Lessons

The case file review, as employed in Delaware, was not effective as a means for reliably identifying *Daubert* motions on a large scale. A revised approach is recommended to identify the cases of interest. For the civil cases, a docket search for motions in limine was the best sole indicator. However, the search was most effective when the docket entries were reviewed in context. A massive electronic search will not reliably capture the desired *Daubert* activity. Although more time consuming, a review of the transcripts proved to be particularly valuable in identifying oral motions and bench rulings.

Furthermore, the timing of the case file review required careful consideration. For one, if a case has not matured within a month of a scheduled pre-trial conference, the likelihood of a *Daubert* motion decreased; typically the discovery process was not complete and expert witnesses had not been finalized. Second, older files presented the complication of missing documents as well as time consuming hurdles to retrieve files from archives, often located off-site. Comparing files across time frames was therefore complicated by the numerous changes in filing practices, file retention, and terminology. As with any longitudinal study, confidently isolating the impact of *Daubert* is difficult.

The advancements in electronic case docketing practices in the state courts across the country provide researchers with an improved opportunity to search electronic records. Likely technological advancements have been applied to complex civil cases more so than other civil cases and likewise more so for civil than for criminal cases. An investigation into electronic docketing capabilities prior to site selection, as well as

understanding the details available in the dockets would prove useful. For instance, the docket entries in Delaware were specific enough to obtain summarized results of bench rulings on motions, and even more appealing would be an electronic scan of the order detailing any justification provided by the judge. Nevertheless, missing documents may still present a problem for researchers, whether searching paper files or electronic files.

The time investment for conducting a case file review was minimal due to a low frequency of challenged experts. Reviewing and coding the civil cases averaged 2 cases per hour; the time required was only 15 minutes when no expert was challenged and approximately an hour with a challenge present. The disadvantages of a case file review were the logistics of travel and searching on-site. Delaware Superior Court demonstrated that their files were generally well-organized and accessible. However, it is expected that other courts of interest, may not demonstrate the same level of file integrity. This problem is exacerbated for files of interest older than 10 years. Since the *Daubert* decision in 1993, a before-and-after study requires a review of materials at least 12 years old.

By far, the interview phase proved to be most informative. The judges were able to discuss cases and reasons for their rulings and attorneys were able to speak to their thoughts and intentions in preparing motions or responding to challenges. Many of the interviewees offered transcripts, motions, and relevant materials from past cases, some of which was not available from the case file. Furthermore, the legal culture emerged as an important factor in the processing of *Daubert* issues and would have been missed without a qualitative interview with those entrenched in this activity. In fact, "the idea of cultural differences has come to be one of the most commonly held notions among researchers and practitioners on what propels courts in particular directions."[45] Thus, this component cannot be ignored in future studies.

[45] Brian J. Ostrom, Roger Hanson, & Matthew Kleiman. Caseload Highlights: Examining the Work of State Courts. Examining Court Culture. NCSC. (May 2005). p. 1.

Appendex A: Delaware Penal Codes

Code	Statute	Condensed Description
DE110634000aFA	MURDER BY ABUSE OR NEGLECT IN THE FIRST DEGREE	MURDER 1ST DEGREE ABUSE OR NEGLECT
DE11063400a1FA	MURDER BY ABUSE OR NEGLECT FIRST DEGREE RECKLESSLY CAUSE DEATH OF CHILD	MURDER 1ST DEGREE ABUSE OR NEGLECT
DE1106350001FA	MURDER SECOND DEGREE RECKLESSLY CAUSED DEATH WITH INDIFFERENCE TO HUMAN LIFE	MURDER 2ND DEGREE
DE1106350001FB	MURDER SECOND DEGREE RECKLESSLY CAUSED DEATH WITH INDIFFERENCE TO HUMAN LIFE	MURDER 2ND DEGREE
DE1106350002FB	MURDER SECOND DEGREE CAUSED DEATH DURING COMMISSION FELONY NOT IN 0636	MURDER 2ND DEGREE
DE11063600a1FA	MURDER FIRST DEGREE INTENTIONALLY CAUSED DEATH OF ANOTHER PERSON	MURDER 1ST DEGREE INTENTIONAL
DE11063600A1FA	MURDER FIRST DEGREE INTENTIONALLY CAUSED DEATH OF ANOTHER PERSON	MURDER 1ST DEGREE INTENTIONAL
DE11063600a2FA	MURDER FIRST DEGREE CAUSED DEATH OF ANOTHER DURING COMMISSION OF FELONY	MURDER 1ST DEGREE DURING COMMISSION OF FELONY(S)
DE11063600a6FA	MURDER FIRST DEGREE CAUSED DEATH DURING ENUMERATED FELONIES	MURDER 1ST DEGREE DURING COMMISSION OF FELONY(S)
DE11063600A7FA	MURDER FIRST DEGREE CAUSE DEATH TO AVOID ARREST ESCAPE 2ND OR ESCAPE A CONVICT	MURDER 1ST DEGREE
DE11077000a1FC	RAPE FOURTH DEGREE SEXUAL INTERCOURSE VICTIM IS LESS THAN 16 YEARS OLD	RAPE 4TH DEGREE MINOR
DE11077000A1FC	RAPE FOURTH DEGREE SEXUAL INTERCOURSE VICTIM LESS THAN 16 YEARS OLD	RAPE 4TH DEGREE MINOR
DE11077000a2FC	RAPE FOURTH DEGREE SEXUAL INTERCOURSE VICTIM LESS THAN 18 YEARS OLD	RAPE 4TH DEGREE MINOR
DE11077000A2FC	RAPE FOURTH DEGREE SEXUAL INTERCOURSE VICTIM LESS THAN 18 YEARS OLD	RAPE 4TH DEGREE MINOR
DE11077000a3FC	RAPE FOURTH DEGREE SEXUAL PENETRATION VICTIM IS LESS THAN 16 OR W/O CONSENT	RAPE 4TH DEGREE MINOR
DE11077000A3FC	RAPE FOURTH DEGREE SEXUAL PENETRATION VICTIM <16 YEARS OR WITHOUT CONSENT	RAPE 4TH DEGREE MINOR
DE11077000a4FC	RAPE FOURTH DEGREE VICTIM >15 BUT <18 AND DEFENDANT IN POSITION TRUST, AUTHORI	RAPE 4TH DEGREE MINOR
DE1107700a3aFC	RAPE FOURTH DEGREE SEXUAL PENETRATION OF ANOTHER PERSON WITHOUT CONSENT	RAPE 4TH DEGREE
DE1107700a3bFC	RAPE FOURTH DEGREE SEXUAL PENETRATION VICTIM LESS THAN 16 YEARS OLD	RAPE 4TH DEGREE MINOR
DE11077100a1FB	RAPE THIRD DEGREE VICTIM <16 DEF AT LEAST 10 YEARS OLDER OR VICT <14 DEF >19YR	RAPE 3RD DEGREE MINOR
DE1107710a2aFB	RAPE THIRD DEGREE SEXUAL PENETRATION CAUSED INJURY	RAPE 3RD DEGREE
DE1107710a2bFB	RAPE THIRD DEGREE SEXUAL PENETRATION VICTIM UNDER 16 YEARS OLD	RAPE 3RD DEGREE MINOR
DE11077200a1FB	RAPE SECOND DEGREE WITHOUT CONSENT	RAPE 2ND DEGREE
DE1107720a2aFB	RAPE SECOND DEGREE SERIOUS PHYSICAL INJURY	RAPE 2ND DEGREE
DE1107720a2bFB	RAPE SECOND DEGREE DURING THE COMMISSION OF OR ATTEMPTED COMMISSION OF A CRIME	RAPE 2ND DEGREE

Code	Statute	Condensed Description
DE1107720a2cFB	RAPE SECOND DEGREE VICTIM LESS THAN 16 YEARS SERIOUS PHYSICAL INJURY OCCURS	RAPE 2ND DEGREE MINOR
DE1107720a2dFB	RAPE 2ND DEG DISPLAYED WHAT APPEARS TO BE DEADLY WEAPON, DANGER INSTRU, ETC.	RAPE 2ND DEGREE
DE1107720a2fFB	RAPE 2ND DEGREE WITHOUT CONSENT PRINCIPAL OR ACCOMPLICE RELATIONSHIP EXISTED	RAPE 2ND DEGREE
DE1107720a2gFB	RAPE 2ND DEGREE VICTIM IS < 12 YEARS OF AGE AND DEFENDANT IS 18 YEARS OR OLDER	RAPE 2ND DEGREE MINOR
DE1107720a2hFB	RAPE SECOND DEGREE <16 YEARS BY PERSON IN POSITION OF TRUST, AUTHORITY, SUPERV	RAPE 2ND DEGREE MINOR
DE11077300a1FA	RAPE FIRST DEGREE CAUSED INJURY	RAPE 1ST DEGREE
DE11077300a2FA	RAPE FIRST DEGREE DURING THE COMMISSION OR ATTEMPTED COMMISSION OF CRIME	RAPE 1ST DEGREE
DE11077300a3FA	RAPE 1ST DEG. DISP. WHAT APPEARS TO BE DEADL. WEAP., DANGEROUS INSTRU., ETC.	RAPE 1ST DEGREE
DE11077300a4FA	RAPE 1ST DEGREE WITHOUT CONSENT AND PRINCIPAL OR ACCOMPLICE RELATIONSHIP EXIST	RAPE 1ST DEGREE
DE11077300a5FA	RAPE FIRST DEGREE VICTIM LESS THAN TWELVE YEARS OLD AND DEF 18 YEARS OR OLDER	RAPE 1ST DEGREE MINOR
DE11077300A5FA	RAPE FIRST DEGREE VICTIM LESS THAN TWELVE YEARS OLD AND DEF 18 YEARS OR OLDER	RAPE 1ST DEGREE MINOR
DE11077300a6FA	RAPE FIRST DEGREE VICTIM LESS THAN YEARS BY PERSON TRUST AUTHORITY AND SUPERVI	RAPE 1ST DEGREE
DE11077300c1FA	RAPE FIRST DEGREE VICTIM LESS THAN 16 YEARS OLD SERIOUS PHYSICAL INJURY	RAPE 1ST DEGREE MINOR
DE11077300c4FA	RAPE FIRST DEGREE SUBSEQUENT CONVICTION OF USI 1ST OR RAPE 1ST OR 2ND	RAPE 1ST DEGREE
DE1106350001FA	MURDER SECOND DEGREE RECKLESSLY CAUSED DEATH WITH INDIFFERENCE TO HUMAN LIFE	MURDER 2ND DEGREE
DE1106350001FB	MURDER SECOND DEGREE RECKLESSLY CAUSED DEATH WITH INDIFFERENCE TO HUMAN LIFE	MURDER 2ND DEGREE
DE11063600a1FA	MURDER FIRST DEGREE INTENTIONALLY CAUSED DEATH OF ANOTHER PERSON	MURDER 1ST DEGREE INTENTIONAL
DE11077000A2FC	RAPE FOURTH DEGREE SEXUAL INTERCOURSE VICTIM LESS THAN 18 YEARS OLD	RAPE 4TH DEGREE MINOR
DE11077000a3FC	RAPE FOURTH DEGREE SEXUAL PENETRATION VICTIM IS LESS THAN 16 OR W/O CONSENT	RAPE 4TH DEGREE MINOR
DE11077200a1FB	RAPE SECOND DEGREE WITHOUT CONSENT	RAPE 2ND DEGREE
DE1107720a2hFB	RAPE SECOND DEGREE <16 YEARS BY PERSON IN POSITION OF TRUST, AUTHORITY, SUPERV	RAPE 2ND DEGREE MINOR
DE11077300a1FA	RAPE FIRST DEGREE CAUSED INJURY	RAPE 1ST DEGREE
DE11077300a3FA	RAPE 1ST DEG. DISP. WHAT APPEARS TO BE DEADL. WEAP., DANGEROUS INSTRU., ETC.	RAPE 1ST DEGREE
DE11077300a6FA	RAPE FIRST DEGREE VICTIM LESS THAN YEARS BY PERSON TRUST AUTHORITY AND SUPERVI	RAPE 1ST DEGREE
DE11077000a1FC	RAPE FOURTH DEGREE SEXUAL INTERCOURSE VICTIM IS LESS THAN 16 YEARS OLD	RAPE 4TH DEGREE MINOR

Appendex B: Coding Forms

☐ New Castle
☐ Sussex
☐ Kent

Delaware Superior Court
Civil Case
Expert

ID_____

Judge_____

Case No.: _____ **Case Name:** _____

Type:☐ Products Liability **Filing Date:** ____/____/____

Total Plaintiffs:____
Individual: ____ Hosp/Clinic: ____
Insur. Co.: ____ Law Enf.: ____
Business: ____ Gov't: ____

Total Defense:____
Individual: ____ Hosp/Clinic: ____
Insur. Co.: ____ Law Enf.: ____
Business: ____ Gov't: ____

Any Expert to Testify? ☐ Yes ☐ No **Motion to Challenge?** ☐ Yes ☐ No

Total Experts for Plaintiff:_____
Expertise: _____ Counter-expert? ☐
Expertise: _____ Counter-expert? ☐
Expertise: _____ Counter-expert? ☐

Total Experts for Defense:_____
Expertise: _____ Counter-expert? ☐
Expertise: _____ Counter-expert? ☐
Expertise: _____ Counter-expert? ☐

Motion 1: Date: ____/____/____
Filed by: ☐ Plaintiff ☐ Defense
Expertise: _____ Grounds 1)____ 2)_____
3)_____ 4)_____ 5)_____ 6)_____
☐ *Minner* ☐ *Daubert* ☐ DRE____
☐ *Kumho* ☐ Other_____
Hearing ☐ Evid ☐ Date: ____/____/____
Opposition Memo? ☐ Outcome: _____
Date: ____/____/____ Order Grds:1) ____
2)____ 3)____ 4)____ 5)____ 6)_____

Motion 2: Date: ____/____/____
Filed by: ☐ Plaintiff ☐ Defense
Expertise: _____ Grounds 1)____ 2)_____
3)_____ 4)_____ 5)_____ 6)_____
☐ *Minner* ☐ *Daubert* ☐ DRE____
☐ *Kumho* ☐ Other_____
Hearing ☐ Evid ☐ Date: ____/____/____
Opposition Memo? ☐ Outcome: _____
Date: ____/____/____ Order Grds:1) ____
2)____ 3)____ 4)____ 5)____ 6)_____

Motion 3: Date: ____/____/____
Filed by: ☐ Plaintiff ☐ Defense
Expertise: _____ Grounds 1)____ 2)_____
3)_____ 4)_____ 5)_____ 6)_____
☐ *Minner* ☐ *Daubert* ☐ DRE____
☐ *Kumho* ☐ Other_____
Hearing ☐ Evid ☐ Date: ____/____/____
Opposition Memo? ☐ Outcome: _____
Date: ____/____/____ Order Grds:1) ____
2)____ 3)____ 4)____ 5)____ 6)_____

Motion 4: Date: ____/____/____
Filed by: ☐ Plaintiff ☐ Defense
Expertise: _____ Grounds 1)____ 2)_____
3)_____ 4)_____ 5)_____ 6)_____
☐ *Minner* ☐ *Daubert* ☐ DRE____
☐ *Kumho* ☐ Other_____
Hearing ☐ Evid ☐ Date: ____/____/____
Opposition Memo? ☐ Outcome: _____
Date: ____/____/____ Order Grds:1) ____
2)____ 3)____ 4)____ 5)____ 6)_____

PTC on Expert: ☐Yes ☐ No
Trial: B☐ J☐ **Date:**____/____/____
Case Disposition Date:____/____/____

Dispo: ____ **Prevailing Party:**☐ P ☐ D ☐ NA
Appealed Supreme Court? ☐Yes ☐ No
Outcome of Appeal: _____

Plaintiff's Attorney: Pro Se ☐
Name_____
E-mail_____
Phone_____

Defense Attorney: Pro Se ☐
Name_____
E-mail_____
Phone_____

☐ New Castle
☐ Sussex
☐ Kent

Delaware Superior Court
Criminal Case
Expert

ID_____

Judge_____

Case No.: _____ **Case Name:** _____

Type: ☐ Murder ☐ Rape
☐ Other _____

Indictment Date: ___/___/___

DE Penal Codes: _____

_____

_____

Counts:_____

Total Defendants:_____

Any Expert to Testify? ☐ Yes ☐ No

Motion to Challenge? ☐ Yes ☐ No

Total Experts for Prosecution:_____

Expertise: _____ Counter-expert? ☐

Expertise: _____ Counter-expert? ☐

Expertise: _____ Counter-expert? ☐

Total Experts for Defense:_____

Expertise: _____ Counter-expert? ☐

Expertise: _____ Counter-expert? ☐

Expertise: _____ Counter-expert? ☐

Motion 1: Date: ___/___/___
Filed by: ☐ Prosecution ☐ Defendant
Expertise: _____ Grounds 1)____ 2)_____
3)_____ 4)_____ 5)_____ 6)_____
☐ *Minner* ☐ *Daubert* ☐ DRE____
☐ *Kumho* ☐ Other_____
Hearing ☐ Evid ☐ Date: ___/___/___
Opposition Memo? ☐ Outcome: _____
Date: ___/___/___ Order Grds:1) ____
2)____ 3)____ 4)____ 5)____ 6)_____

Motion 2: Date: ___/___/___
Filed by: ☐ Prosecution ☐ Defendant
Expertise: _____ Grounds 1)____ 2)_____
3)_____ 4)_____ 5)_____ 6)_____
☐ *Minner* ☐ *Daubert* ☐ DRE____
☐ *Kumho* ☐ Other_____
Hearing ☐ Evid ☐ Date: ___/___/___
Opposition Memo? ☐ Outcome: _____
Date: ___/___/___ Order Grds:1) ____
2)____ 3)____ 4)____ 5)____ 6)_____

Motion 3: Date: ___/___/___
Filed by: ☐ Prosecution ☐ Defendant
Expertise: _____ Grounds 1)____ 2)_____
3)_____ 4)_____ 5)_____ 6)_____
☐ *Minner* ☐ *Daubert* ☐ DRE____
☐ *Kumho* ☐ Other_____
Hearing ☐ Evid ☐ Date: ___/___/___
Opposition Memo? ☐ Outcome: _____
Date: ___/___/___ Order Grds:1) ____
2)____ 3)____ 4)____ 5)____ 6)_____

Motion 4: Date: ___/___/___
Filed by: ☐ Prosecution ☐ Defendant
Expertise: _____ Grounds 1)____ 2)_____
3)_____ 4)_____ 5)_____ 6)_____
☐ *Minner* ☐ *Daubert* ☐ DRE____
☐ *Kumho* ☐ Other_____
Hearing ☐ Evid ☐ Date: ___/___/___
Opposition Memo? ☐ Outcome: _____
Date: ___/___/___ Order Grds:1) ____
2)____ 3)____ 4)____ 5)____ 6)_____

PTC on Expert: ☐Yes ☐ No

Trial: ☐ **B** ☐ **J** **Date:** ___/___/___

Case Disposition Date: ___/___/___

Dispo: ☐ NG ☐ G (on Primary Charge)

Appealed Supreme Court? ☐Yes ☐ No

Outcome of Appeal: _____

Prosecuting. Atty:

Name_____

E-mail_____

Phone_____

Def Atty: ☐ Pro se ☐ Private ☐ PD ☐ Ct. Appt.

Name_____

E-mail_____

Phone_____

Issues for Coding

Expertise:

1. Health care/ medicine
2. Engineering/ technology
3. Physical sciences (biology, chemistry)
4. Social and behavioral sciences
5. Business, economics, law and public administration
6. Education

Grounds for exclusion:

10. Qualifications - (Rule 702)
- 11. Experience/degree/credentials
- 12. Specificity

20. Relevancy – "assist trier of fact" or fit

30. Reliability

40. Daubert (validity)
- 41. Testability (falsifiable) (methodology)/tested
- 42. Error rate
- 43. Peer review/ publication
- 44. General acceptance (novel)

50. Non-scientific expert testimony (Kumho)

60. Other/ procedural

Outcome of motion:

1. Granted
2. Denied
3. Accepted in part or accepted, but modified
4. Other

Case Disposition:

1. Dismissed
2. Default/ uncontested
3. Summary Judgment
4. Transfer to another court
5. Settlement
6. Jury verdict
7. Bench verdict
8. Directed verdict
9. JNOV
10. Arbitration

Outcome of Appeal:

1. Petition not granted
2. Dismissed/ transferred/ lack of jurisdiction
3. Withdrawn
4. Affirmed (specify in whole or in part)
5. Reversed (specify in whole or in part)
6. Pending