



Psychological expert witness testimony and judicial decision making trends



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ABSTRACT

Despite the establishment of the *Daubert* standard in 1993, the evidentiary criteria are rarely used as a basis for admissibility of expert witness testimony in the behavioral sciences. Ever since the promulgation of *Frye* and the Federal Rules of Evidence, controversy has surrounded the admissibility of expert testimony in courtrooms. There appears to be no existing uniform application of standards governing the admissibility of psychological expert witness testimony. Therefore, it is essential for the psycho-legal communities to explore judicial decision-making trends regarding psychological expert witness evidence. In this current research, psychological expert witness testimony and judicial decision-making will be explored. In preliminary examination, 97 criminal and civil case summaries from the LexisNexis Academic Database involved issues of admissibility. Analyses conducted by eight trained and paired coders revealed that reliability and assistance to the trier of fact were the most often cited reasons for admissibility in courts. Consistent with prior studies, it was also found that the most applied standards for admissibility of psychological evidence were the Federal Rules of Evidence. Interestingly, while the *Daubert* scientific criteria for admission of scientific testimony were mentioned, they were rarely utilized. A secondary analysis of 167 civil and criminal appellate cases indicated that the reliability of testimony (18% of all cases), ability to assist the trier of fact (17%), the expert witness' qualifications (17%), and the relevance of the testimony (16%) were the most commonly cited reasons for determining admissibility. A tertiary qualitative analysis focusing on these four categories then revealed eight major trends in admissibility of psychological expert evidence.

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1. Introduction

There is a great deal of misunderstanding about the *Daubert* (*Daubert v. Merrell Dow Pharmaceuticals, 1993*) case among mental health professionals. In fact, courts rarely use the four scientific criteria enumerated in *Daubert* as a basis for excluding expert testimony in the behavioral sciences. The important issue, recognized by many courts, is whether the proposed testimony will assist the trier of fact. Put another way, is an expert needed to address the evidentiary issues or is it within the knowledge base of the ordinary layperson? In cases where the court decides that there is no “value added” significance, the testimony will be rejected as invading the province of the trier of fact (i.e. jury). The court decisions themselves often speak to which of the standards should be put in place for admitting non-scientific expert testimony.

Prior to *Daubert*, the prevailing standard for admissibility of expert testimony in a court of law was whether it was generally accepted in the relevant scientific discipline (*Frye v. U.S., 1923*). This left questions as to what constituted the “relevant scientific community” and how

large of a group using the technique was needed. However, experts were rarely cross examined regarding these issues.

The *Federal Rules of Evidence* (1975) spoke of a situation when “scientific, technical, or other specialized knowledge” would be of assistance to the trier of fact and the type of material presented out of the ken (knowledge base) of the ordinary lay person. Consequently, a properly qualified expert (by virtue of knowledge, skill, education, experience, and training) could render an opinion in testimony, provided the opinion was based on material “reasonably relied upon” by other members of the same profession. The Federal Rules did not specify what this reasonable reliance by other members of the same profession meant. This ambiguity set the groundwork for *Daubert*. It is important to be aware of the fact that the Federal Rules of Evidence spoke of three kinds of expert testimony: scientific, technical, and specialized knowledge. This was not changed in *Daubert*. Yet, the crux of the misunderstanding of *Daubert* is that practitioners used the four criteria enumerated for scientific testimony as if they were the only criteria against which proposed expert testimony is to be evaluated.

In *Daubert*, Justice Blackmun wisely noted that the analysis presented in this case would be restricted to scientific evidence, since that was the subject matter under discussion (whether a particular medication caused birth defects). Blackmun acknowledged that different criteria could be used to evaluate testimony that could better be described as technical or specialized knowledge. However, because of the issues

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raised in this case, only the scientific evidence would be considered. The *Daubert* scientific “factors” are well known: whether it can be or has been tested (falsifiability), whether there is a known error rate, whether it has been peer reviewed and published, and whether it is generally accepted. However, these criteria have little relevance to what is done in clinical forensic work. For example, what is the testable hypothesis and known error rate in a child custody evaluation?—that the tests used by the evaluator can really measure “parenting capacity”? In other words, what is the independent criterion against which “parenting capacity” is measured? A measure of the degree of misunderstanding is found in the promotional material of a well-known custody assessment instrument. It uses as the criterion variable whether or not the judge agrees with the evaluator’s report. If we consider personal injury cases, we have to ask whether the impact of a particular accident or injury can be accurately assessed by certain methodology. What is the known error rate in a case asserting that a defendant meets the criteria for an insanity defense? Is it whether or not the jury finds the defendant not guilty by reason of insanity?

Much of what is done in clinical forensic work cannot be subject to that kind of analysis. Clinical forensic investigation includes extensive interviews of collateral sources of information (third party information) in both civil and criminal cases in order to look for consistencies across data sources. What is a testable hypothesis here, that the integration of all these data sources gives a number that neatly fits into an equation telling the difference between an examinee’s mental state before or after an accident, or the mental state of a defendant at the time of a criminal offense? Unfortunately, many of our hard science colleagues who see the need for psychology to become purely scientific applaud the approach; if it cannot be demonstrated scientifically, it has no place in court. However, most mental health professionals acknowledge that their work is a blend of scientific, technical, and specialized knowledge.

In *Kumho Tire Company vs Carmichael* (1999), the United States Supreme Court held that *Daubert* applied to all expert testimony, but that it had to be used in a flexible manner. This echoed Blackmun’s observation that the four criteria may not be relevant in every particular case. The *Daubert* Court went so far as to say that the four factors were not “dispositive” or “exclusive” but merely guidelines to be used when the proposed testimony is of a scientific nature. According to Justice Breyer, the important issues were “relevance and reliability”. The factors determining reliability are to be determined by the facts of each individual case. Thus, judges are given great leeway, subject to an abuse of discretion standard, whether they admit or reject proffered expert testimony. Looking at the cases over the past fifteen years, courts have generally adhered to the principle that expert testimony must be reliable, but reliability is not necessarily determined by the narrow scientific factors listed in *Daubert* (Dixon & Gill, 2002; Faust, Grimm, Ahern, & Sokolik, 2010; Gatowski et al., 2001; Groscup, Penrod, Studebaker, Huss, & O’Neil, 2002; & Slobogin, 1999).

In fact, Dahir et al. (2005) offer an explanation for the lack of use of the *Daubert* scientific criteria. Their research suggests that in determining admissibility issues, judges that apply general acceptance are in fact applying *Daubert*, although error rate and falsifiability are not being used in the determinations. Groscup et al. (2002) offer an explanation that the *Daubert* decision suggests that courts focus on the federal rules as a part of their gate keeping duties. Furthermore, Groscup et al. (2002) note that the *Daubert* opinion was a call for the courts to renew focus on the Federal Rules instead of relying on Frye. The *Daubert* decision was the court’s attempt to view reliability through a more rigorous application of the Federal Rules. Groscup et al. (2002) findings would be consistent with the amendment to Rule 702, which specifically requires courts to consider reliability of testimony as a part of admissibility.

Slobogin (1999) made the observation that the most frequent reason for exclusion of expert testimony in behavioral science was failure to assist the trier of fact. Heilbrun (1996) observed in a symposium he

chaired that in the three years since *Daubert* was decided, there had been a variety of cases regarding the admissibility of expert testimony in the behavioral sciences, but none of them reflected a major change. In other words, the testimony that was admissible under Frye was also admissible under *Daubert*, and testimony that was excluded would have been excluded under either standard. With this background in mind, the misunderstanding in the application of the *Daubert* scientific criteria in admissibility of behavioral science testimony is clear.

The current research was undertaken fifteen years after Heilbrun’s presentation to see what was in fact being used as the criterion for admissibility of expert testimony for experts of the behavioral sciences.

2. Methods and procedures

In our efforts to look at the admissibility of expert witness testimony and the possible discovery of trends in judicial-decision making, criminal, civil and appellate cases were reviewed from the LexisNexis Academic Database. Only cases decided after 1998 were considered, as Groscup et al. (2002) reviewed cases through 1998. Specific search terms included, “psych***** and expert and admiss*** or exclu***”. In LexisNexis, asterisks represent any words that contain the prefixes indicated. Cases were only included in the study if the admissibility of psychological expert testimony was discussed and the judge provided reasoning behind decisions on admissibility.

A coding sheet was created to report variables concerning the psychological expert (i.e., degree and area of expertise, content of testimony), the standard or guideline applied, and qualitative descriptions of the reasoning used by the judge for admission or exclusion of testimony. General case information such as jurisdiction (the state or federal circuit) in which the decision was rendered and the type of case was also included on the coding form. If there was any mention specifically of *Frye*, *Daubert* scientific criteria, or the Federal Rules of Evidence, this was coded as well. Coded information about the admission decision included the trial court decision and the appellate court decision.

Eight pairs of doctoral level clinical psychology students were trained by the coordinator of the research. Training consisted of each member of the pair being assigned five cases to review and code. The research coordinator met with the pair and discussed the coding forms, along with the information obtained from the court cases, to ensure that the quality of information was consistent and pertinent.

In the initial phase of research, 379 cases from 18 states were selected for coding. Out of these, 170 cases were randomly assigned to the eight-paired coders for review. Coders independently, and in pairs, reviewed each case for discrepancies in coding, and a 90% inter-rater agreement was achieved. After final review, 97 cases met inclusion criteria.

In a second examination of cases from LexisNexis, coders specifically reviewed the cases examining the content of the judges’ reasoning for admission or exclusion of testimony. The content included the full judicial reason and/or brief terms reported. Judicial reasons and brief terms reported included the idea of relevance, probative value, and/or assisting the trier of fact. Seventy more cases were included in addition to the original 97, resulting in 167 cases that met the inclusion criteria. After the coders reviewed for discrepancies in coding, a 94% inter-rater agreement was achieved. It was found that the four reasons cited most often in the judges’ reasoning were reliability, assisting the trier of fact, qualifications, and relevance.

In a final examination of the cases, the judicial decisions were further analyzed to discover more specific trends in judicial reasoning for admitting or excluding an expert’s testimony. Using the overarching categories of relevance, assisting the trier of fact, qualifications and reliability, five cases related to the category were assigned to independent coders to look for more specific trends. A finding was considered a trend if it was included in two or more cases reviewed for one of the four main categories.

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