## E22 Global Gatekeeping?: A Comparative Analysis of the Judicial Process for Determining the Reliability of Proffered Expert Testimony

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After attending this presentation, attendees will have an international perspective on the admissibility of scientific evidence in courtrooms across the globe and will be able to compare and contrast the gatekeeping standards of their own jurisdictions with those in several other countries. Attendees will learn what factors judges in other jurisdictions consider when admitting expert scientific evidence.

This presentation will impact the forensic science community by showing how similar and dissimilar various jurisdictions are across the globe in admitting expert scientific evidence. Members of the forensic community across the globe will learn various types and kinds of factors which can be considered in evaluating whether scientific evidence should be admitted in their courts. The various forensic communities across the globe can learn from each other regarding how to better evaluate expert scientific evidence in order to have the most reliable and relevant scientific evidence enter our courtrooms regardless of the geographic location of the court and science. Science and Law should intersect at the same location or venue regardless of where or who is evaluating the expert scientific evidence in order to render justice—at the truth where reliable and relevant scientific evidence exist.

The American judicial system has developed specific processes to regulate the admissibility of forensic science evidence and has focused on the role of the trial judge as the gatekeeper for such evidence. It is useful to compare those processes and that trial judge role, with the approach of the judicial systems of other nations. This presentation presents some of that comparison.

Initially, this presentation describes the Unites States gatekeeping process as a base for comparison. The 1923 standard announced in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923), established a requirement that proffered scientific evidence must have received "general acceptance in the particular field in which it belongs." Some version of *Frye* is still the applicable law in several states. In 1993, the Supreme Court established the trial judge as the gatekeeper for scientific evidence and announced new tests for admissibility in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). In addition to "general acceptance," *Daubert* requires judges to assess: (1) whether the underlying methodology is scientifically valid; (2) whether it can be and has been tested; (3) whether it has been subjected to peer review and publication; and, (4) whether there is a known or potential error rate. The *Daubert* standards apply to all federal courts and most State courts.

Recently, the role of forensic science has received considerable criticism. The National Research Council Report found serious deficiencies and called for major reforms. Post-conviction DNA testing has exonerated a number of persons who were convicted based on forensic science evidence. This debate over the reliability of forensic science evidence is also a currently active debate in a number of other countries.

In Canada, scientific evidence is also a topic of considerable concern. The Canadian system mostly parallels the U.S. process. While expert testimony is treated as a part of opinion evidence generally, Canadian courts have recognized the "gatekeeping" role of the trial judge. *R. v. Mohan* [1994] 2 S.C.R. 9. They have required evidentiary hearings that are similar to, and perhaps even more demanding, than a typical *Daubert* hearing. The Canadian evidentiary requirements of relevance and balanced probativeness are also similar. The reliability of proffered testimony appears to be decided on factors similar, but not identical, to *Daubert* tests. It appears however that the Canadian courts have, much like the United States, applied those standards less stringently to the prosecution than to the defense.

In England and Wales, the focus was traditionally on the experts rather than the science, although there is a stated requirement that the field of expertise must at least be "sufficiently well established to pass the ordinary tests of relevance and reliability;" *Dallagher* [2002] EWCA Crim 1903, [2003] 1 Cr App R 12 at [29]. Recently, highly publicized and the proposed closure of major forensic science facilities have spawned a movement to a system more resembling *Daubert*. The Law Commission, a government advisory organization, reported this year (2011) recommended statutory action that would require criteria similar to FRE 702, notably omitting however an analysis of error rate. The government appointed "Forensic Science Regulator" and the Forensic Science Society are also working toward the establishment of criteria for analytic procedures, testing and accreditation within the various disciplines.

In Australia expert testimony is regarded as a part of opinion evidence generally. The admission of opinion testimony is controlled by statutory rule, s79(1) of the *Evidence Act* 1995 (NSW). That rule has language strikingly similar to the Untied States rule and provides: "If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge." The expert must demonstrate to the satisfaction of the Court how the proffered opinion is based upon the training, study or experience and that such training, study, or experience permits the witness to provide an expert opinion (*Dasreef Pty Ltd. v. Hawchar* [2011] HCA 21).

**Evidence, Admissibility, International Standards**

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