Judges and Juries as Evaluators of Expert Testimony

Comparative Law and Social Science
2012 Summer Institute of International and Comparative Law Paris, France

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US Supreme Court Justice Rehnquist Expressed Concern about The Expansion of the Judge’s Role in US Trials Involving Scientific Evidence:

I defer to no one in my confidence in federal judges….but I do not think [Rule 702 imposes on judges] the obligation or the authority to become amateur scientists…

Former Chief Justice of U.S Supreme Court
Justice William Rehnquist

(image from law.cornell.edu)
Dobbin et al. Survey of 400 State Trial Court Judges (2001-2002)

- Purpose: to explore judges’ understanding and treatment of *Daubert* issues

- Findings:
  - Judges endorsed role of judge as gatekeeper
  - Judges did not understand all *Daubert* criteria
    - They did well with peer review and general acceptance +
    - They stumbled with falsifiability and error rate
Assistance for American judges

- Judicial workshops provide training in scientific methodology, principles, findings in substantive areas

- Reference Manual on Scientific Evidence, Federal Judicial Center provides overview essays of particular fields – and the essays have been reviewed by other scientists, judges, and lawyers for clarity, balance, and fair treatment of the issues

- Judges may appoint special masters or may use court-appointed experts in complex cases
  - Special master – like a mini-judge; takes evidence; writes report of findings
  - Court-appointed experts – address specific issues identified by the judge
Cecil and Willging 1988 study of federal judges found modest use of appointment of experts
Cecil and Willging found:

- Reasons for appointing expert
  - To aid decision making, especially in case with conflicting adversary experts who are not credible
  - To provide more balance in expert testimony when one party did not present it, sometimes because the party could not pay for an expert
  - To increase likelihood of settlement, although this was infrequent

- Reasons for not appointing expert
  - Many cases do not require it
  - It is seen as intrusion on the adversary system
Australia’s (and now Canada’s) innovation in use of experts – the “hot tub”

- Experts for each party prepare written statements, exchange reports
- Expert conference
- Experts may appear in court together, present a summary of their statements, and have a general discussion with the judge, which may include critiquing and even cross-examining the other expert’s position
  - Recall that in Germany, expert may question other witnesses
What about juries and, for that matter, lay assessors? Can a group of people randomly selected from the citizenry appreciate social science expertise?
An important question – because lay participation in some form or another is common. See this map of legal systems of Council of Europe (from Jackson & Kovalev)
A surprising contrast

- A decline in the proportion of cases tried to juries (and to judges) in many common law countries – the “vanishing trial” phenomenon
- Yet a surge of new interest in employing citizens as legal decision makers (Spain; Russia; China; Korea (below left); Japan (below right)
Are Jurors Competent to Understand Complex Scientific Evidence?

- General “report card” on jury understanding of trial evidence is good –
  - Judge-jury verdict agreement is substantial and is not influenced by evidence complexity.
  - Strength of evidence is prime determinant of jury verdicts.

- BUT … many jurors report trouble understanding scientific and technical evidence and statistical explanations

- Empirical questions:
  - Can jurors understand and use such evidence appropriately?
  - To what extent can jury trial reforms improve comprehension and use?
Many people say no, that the jury is biased and incompetent, inefficient and unjust

Claims about jury biases
- Pro-defendant
  - open to syndrome evidence, “abuse excuses”
- Prejudiced against defendants
- Overly sympathetic to plaintiffs
- Anti-business

Claims about incompetence
- Make factfinding errors
- Cannot cope with complex trials and expert evidence

Photos from OJ Simpson trial and movie The Runaway Jury
Empirical Research on the Jury and Expert Testimony

- Research has been stimulated by debates as well as the expansion of the field of jury studies.
- Research has examined jury behavior and decision making using multiple methodologies.
  - Post-trial interviews with jurors
  - Observations of jury trials
  - Questionnaires given to judges, attorneys, jurors
  - Mock jury experiments
- Research findings are summarized in many books and articles
Bookshelves of research on juries!
Reassuring Evidence of Jury Competence

- Substantial agreement of judges with jury verdicts (63% to 84% across multiple studies)
- The judge-jury agreement rate is NOT influenced by trial complexity, suggesting jurors understand difficult evidence and expert evidence (multiple studies)
- Agreement rate is no different in trials with business defendants and individual defendants, suggesting jurors are not especially biased against business defendants (Hans, *Business on Trial* 2000)
- The strength of evidence in the case is the major predictor of jury verdicts, whether evidence strength is assessed by jurors themselves or by the trial judge
More Findings

- Some jurors are challenged by expert evidence.
  - Problems with statistical evidence, some trouble in individual cases

- Competent evaluation is promoted by diversity, group deliberation, leadership of knowledgeable jurors.

- Jury reforms can also enhance jury competence.
Research-Based Methods of Promoting Jury Competence

- **Encourage an “active” jury** – allow notetaking, question asking, jury discussions during trial

- **Provide more guidance** – offer checklists, interrogatories, interim attorney summaries, pre-instruction in law

- **Offer supportive materials** – provide jury notebooks; copies of instructions, slides, scientific evidence
Final Exam

- 1 hour (extended time given to some students who do not have extensive exposure to English)
- It’s an “open book” exam – you may bring your papers, notes, and the course readings to refer to during the exam.
- No electronic devices (computers, phones, recording devices) are permitted.
Final Exam

The exam consists of one comprehensive question.

- Two related parts to the question – budget your time on them appropriately, because they count the same.
- Each part will ask for your judgment or decision.
- Each part will then ask you to justify and support your judgment or decision by referring to our readings and class discussions.
  - The justification and support are the most critical parts of the exam!
Bonne chance on the exam!!!!!!
Please stay in touch.....