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A LAWYER'S LAMENT: UNPREDICTABILITY AND INCONSISTENCY IN THE WAKE OF THE *DAUBERT* TRILOGY

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"Anyone who isn't confused here doesn't really understand what's going on."

– Anonymous

Daubert v. Merrell Dow Pharmaceuticals, Inc.[1] was decided almost eight years ago. Since then, hundreds of articles by commentators and numerous decisions by judges have been devoted to analyzing its implications and to applying its teachings. This scholarship continued following the Supreme Court's decision in *General Electric Company v. Joiner*[2] where the court held that the trial judges' "gatekeeper" role, announced in *Daubert*, would be reviewed under an abuse-of-discretion standard. Two years later, in *Kumho Tire Company, Ltd. v. Carmichael*,[3] the Supreme Court answered the remaining question left in *Daubert*; namely, whether its analysis applied to all expert testimony described in Rule 702 of the Federal Rules of Evidence. The court answered "yes," the trial judges' "gatekeeping" function is not limited just to testimony based on scientific knowledge but extends to expert testimony based on "technical" and "other specialized" knowledge as well. More scholarship followed, continuing the attempt to chart the landscape of the Supreme Court's trilogy and to define its guideposts.

What all of these articles and cases reveal is that trial judges and trial lawyers are having difficulty understanding and applying the "teachings" of the Supreme Court's trilogy. Indeed, the process of admitting expert testimony in court has become the new battleground among litigants and the outcome of the battle often decides the litigation.

This paper is offered merely as a trial lawyer's lament. All across the country there are numerous lawyers devoting a considerable amount of time and not an insignificant amount of money to preparing cases for trial without the ability to predict what approach their trial judge will employ when the inevitable motion is filed challenging the admissibility of their expert testimony. It does not matter whether the lawyer is preparing the case for the plaintiff or the defendant. Particularly in the commercial litigation area, today's defense lawyer represents tomorrow's plaintiff. However the trial judges' "gatekeeper" functions are viewed by the courts, they are viewed with consternation by trial lawyers. With due respect to all the hard working and conscientious trial judges in the country, the notion that virtually unreviewable idiosyncratic decision-making is permissible on an issue that often is outcome-determinative is frightening. But, as Linda Ellerbee, a former reporter on the national news, used to say "and so it goes."

1 509 U.S. 579 (1993).
2 522 U.S. 136 (1997).
3 526 U.S. 137 (1999).

A Little History

Prior to *Daubert*, the standard for the admissibility of novel scientific evidence in the federal courts and in most state courts was provided by *Frye v. United States*.[4] In *Frye*, the Court summed up the problem and described the appropriate standard as follows:

> Just when a scientific principle or discovery crosses the line between experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while 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.[5]

If the court had only said "the thing from which the deduction is made must be sufficiently" *reliable* "in the particular field in which it belongs," today we may have almost 80 years of decisional law defining reliability and explaining how to apply the reliability factor. Consistency and predictability of the reliability factor would undoubtedly no longer be a problem. Instead, *Frye* prescribed the standard "whether the community of scientists involved generally accepts the theory or process" and academics, in particular, bashed "general acceptance" as being too rigid, inflexible and restrictive, claiming that it excluded from fact finder consideration expert testimony that should have been admitted as reliable and relevant.[6]

In 1975, Congress enacted the Federal Rules of Evidence. In drafting the rule governing the admissibility of expert testimony, the drafters omitted any reference to the general acceptance standard prescribed by *Frye*. Rule 702 provided:

> 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.

The Advisory Committee's notes accompanying the rule also made no reference to *Frye*. If the Advisory Committee expected the new Federal Rules to abrogate *Frye*'s "general acceptance" standard or to produce a reasonably precise formulation to apply in determining the admissibility of expert testimony, their expectations were unfulfilled.[7] In most federal jurisdictions, and in most state jurisdictions which adopted the Federal Rules of Evidence, *Frye* remained good law.

From the courts' point of view, despite any suggestion in the Federal Rules of Evidence to the contrary, *Frye* had "practical usefulness because, if there is general acceptance in the relevant scientific community, the prospects are high, but not certain, that the theory or process is reliable."[8] Moreover, despite the perception of *Frye* as restrictive, it seldom seemed to prevent trial lawyers, at least in civil cases, from getting their expert evidence before the trier of fact. *Frye* was applied almost exclusively to new and novel forensic evidence in criminal cases.[9] In civil cases, if the expert was qualified, a trial judge seldom second-guessed her opinions. If anything, it seemed in civil cases that if trial judges erred,

4 293 F. 1013 (D.C. Cir. 1923), *superceded by rule as stated in Daubert*, 509 U.S. at 587.
5 *Id.* at 1014.
6 *See* Ira H. Leesfield *et al.*, *Admissibility of Expert Testimony: What's Next?*, 36-DEC Trial 64, 65 (2000); *see also* Adam J. Siegel, *Setting Limits on Judicial Scientific, Technical, and Other Specialized Fact-Finding in the New Millennium*, 86 Cornell L. Rev. 167, 173-74 (2000).
7 *See* Siegel, *supra* note 6, at 176.
8 *See Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1348 (Mass. 1994).
9 *See* Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. Miami L. Rev. 317, 322 (2000).

they did so on the side of admissibility, not exclusion. Thus, at the time of the Supreme Court's decision in *Daubert*, much of the criticism about expert testimony was coming from the civil defense bar. "Too much junk science is admitted into evidence" became the new mantra.[10] The cry, experts for hire willing to say anything for the right price, reverberated around courthouse walls. These sentiments were furthered by huge mass tort cases – "Benedectin, Norplant, silicone breast implants, among others" – causing some to claim that these cases yielded "huge damages for non-existent harms."[11] Such was the ferment surrounding the issue of the admissibility of expert testimony when the Supreme Court stepped into the fray in 1993 and decided *Daubert*.

POST-*DAUBERT*

While the Supreme Court in *Daubert* may have trampled *Frye*'s "general acceptance" standard underfoot, it has hardly left in its place a clear, reasonably precise standard for trial judges to apply to determine the admissibility of expert testimony. Indeed, perhaps the only definitive statements that can be made following *Daubert* and its progeny are: (i) *Fyre* is essentially dead in the federal courts; (ii) if trial judges were *laissez faire* about the admissibility of expert evidence before *Daubert*, after it, for good or evil, they have become energized and involved; (iii) much confusion exists about how to apply the teachings of *Daubert* and *Kumho Tire*, especially in the areas of "technical" and "other specialized" knowledge; and (iv) inconsistent and unpredictable results are guaranteed by the abuse of discretion standard of review mandated by *Joiner* to be applied to trial judges' "gatekeeper" decisions.

Prior to *Daubert*, the last major procedural hurdle that a trial lawyer faced before trial was summary judgment. Invariably, in a civil case, one party or the other would file a motion for summary judgment, claiming that there were no factual issues in dispute as to one or more matters in the case. Extensive briefing by all parties would follow, the court would schedule a hearing and thereafter, more often than not, the motion would be denied and the action would be scheduled for trial. Following *Daubert* and its progeny, any trial lawyer whose case rests, in whole or part, on expert testimony has to be concerned about a motion challenging the reliability of his or her expert. The post-*Daubert* judicial environment is littered with these challenges. As described by counsel in an amicus brief filed with the court in *Kumho Tire*:

> We are astounded by the number of civil cases during the past several years in which opponents of expert testimony . . . have been permitted to impose huge burdens on the judicial system by filing blunderbuss motions asserting that the other side's expert testimony is inadmissible. These motions lead to the filing of voluminous memoranda in which the lawyers for both sides try their case on paper. Often, the parties then request, and may be granted, live hearings . . . which resemble mini-trials and can last days, even weeks.[12]

In *Kumho Tire*, the Supreme Court tried to deal with this problem by making it clear that the trial judge has the same "considerable leeway" in determining "*how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable."[13] The avalanche of motions requesting *Daubert* hearings, however, is still being filed and most judges are granting some form of hearing.

10 *See* William C. Smith, *No Escape From Science*, ABA Journal, August 2000, p. 62 (citing JoAnne A. Epps of Temple University School of Law in Philadelphia, PA).
11 *See id.* at 63 (quoting Doug Bandow of the Cato Institute in Washington, D.C.).
12 Robert J. Goodwin, *The Hidden Significance of Kumho Tire Co. v. Carmichael: A Compass for Problems of Definition and Procedure Created by Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 52 Baylor L. Rev. 603, 621 (2000) (quoting Brief of Margaret A. Berger, Edward J. Imwinkelried and Stephen A. Saltzburg as Amicus Curiae in Support of Respondents, p. 20).
13 *See Kumho Tire*, 526 U.S. at 152.

Perhaps more to the point, notwithstanding the Court's statement in *Kumho Tire* about the trial judge's need for latitude to determine the necessity of a hearing "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted,"[14] the Court's *Daubert* trilogy makes it difficult, absent an agreement among counsel, for a trial lawyer to determine during pre-trial preparation when an expert's methods can be taken for granted. Cases that go to trial, of course, are disputed. Where expert testimony is at the core of the plaintiff's case, opposing expert testimony is usually offered in the defendant's case. While the Court recognized in *Kumho Tire* that "experts might reasonably differ," where there are opposing experts it is now much more likely that one party will claim that the other party's expert falls "outside the range" of permissive difference allowed by *Daubert* and *Kumho Tire*.[15]

Once a motion is filed challenging an expert's procedure, methodology and conclusions, for what does the trial lawyer prepare? Of course, the lawyer must be prepared to establish that "the expert's testimony [is] grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded."[16] That is easier said than done. For example, does *grounded* mean that the method or procedure has to be validated by testing or is it sufficient that the method is commonly used in the field? Because *Daubert* and its progeny substantially expand the trial judges' "gatekeeping" function to all scientific, technical or specialized knowledge and not "specially or exclusively to unconventional evidence," *i.e.*, "novel scientific techniques," it follows that much expert testimony once routinely admissible in evidence is now subject to these types of questions on being challenged in court.[17]

Where an expert's testimony rests on pure science, *Daubert* is instructive. The expert's procedure and methodology must be subject to (i) empirical testing; (ii) scrutiny and publication in the relevant scientific community; (iii) consideration of the known or potential rates of error; and (iv) a determination of a degree of acceptance within the relevant scientific community.[18] The Court made clear that these factors are not exclusive.[19] However, following *Kumho Tire* every *qualified expert* called to opine on, for instance, the cause and origin of a fire, the application of economic principles or accounting standards, property valuation, medical causation, and, of course, odors of perfume[20] is subject to challenge under *Daubert* and its progeny. Given the breadth of the "gatekeeping" function, every trial judge's idiosyncrasies have become critically important. Lawyers ask, how will *my* trial judge approach the task of determining the reliability of my expert's testimony, especially since it is permissible for her approach to be different from the judge's approach sitting next door?

One commentator has suggested that *Daubert* and *Kumho Tire* appear to give two meanings to reliability: "On the one hand, 'reliable' is taken to mean that the explanative theory actually works, i.e., produces a correct, accurate, truthful, or valid conclusion. On the other hand, 'reliable' refers to meriting confidence worthy of dependence or reliance, i.e., possesses sufficient assurance of correctness to warrant acceptance by the trier of fact."[21] The commentator goes on to say that "[t]hese definitions, once applied, result in two separate analyses by the trial court: in the first, the court must determine that the explanative theory 'works', while in the second, only a determination is necessary that there exists sufficient

14 *See id.*
15 *See id.* at 153.
16 *See* Graham, *supra* note 9, at 357 n.32 (citing *American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994)).
17 *See Daubert*, 509 U.S. at 593 n.11.
18 *See id.* at 594.
19 *See id.* at 593.
20 *See Kumho Tire*, 526 U.S. at 151.
21 Graham, *supra* note 9, at 336.

assurances the explanative theory 'works' to warrant acceptance by the trier of fact."[22] Consider the case of *Pride v. Bic Corporation*.[23] The plaintiff, widow of the decedent, brought a products liability action alleging that a defective fixed-flame cigarette lighter caused her husband's death. The appellate court affirmed the lower court's decision to exclude the testimony of her two experts as not reliable because of:

> [t]he failure of Pride's experts to test their hypotheses in a timely and reliable manner or to validate their hypotheses by reference to generally accepted scientific principles as applied to the facts of this case renders their testimony on the cause and origin of the fire unreliable and therefore inadmissible under Daubert and Federal Rules of Evidence 702 and 104.[24]

Contrast *Pride* with *United States v. Gardner*,[25] in which the defendant was convicted of, among other things, using fire to commit a felony murder. Defendant, Ms. Gardner, challenged the reliability of the government's cause and origin expert on the basis that his testimony was unreliable. The court admitted the testimony. No mention was made in the appellate court decision of any testing of the methodology employed. Rather, the court explained only that such an expert may rely on photographs and reports prepared by others under Rule 703, as the government's expert did, if they are "the type of materials usually relied on in arson investigations to form an opinion about the cause of the fire."[26] Seemingly, these courts used two different approaches.

What does a trial lawyer, preparing to present a fire-cause-and origin expert, learn from these cases? Obviously, prepare, if possible, for both approaches. But, might his trial judge employ yet another method of analysis?

Then there is the case of *Westberry v. Gislaved Gummi AB*,[27] where a former employee and his wife brought an action against a manufacturer because of alleged excessive exposure to high concentrations of airborne talc. Westberry's treating physician provided the principal evidence of causation. The defendant challenged the reliability of the testimony on the basis that the physician "had no epidemiological studies, no peer-reviewed published studies, no animal studies, and no laboratory data to support a conclusion that the inhalation of talc caused Westberry's sinus disease."[28] The appellate court determined that the testimony was sufficiently reliable to warrant admission, stating that "[d]ifferential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated."[29]

Compare *Westberry* with *Black v. Food Lion, Inc.*,[30] a slip-and-fall action in which the plaintiff's medical expert testified that the slip-and-fall injury caused fibromyalgia. The trial court admitted the testimony. The appellate court reversed declaring, about the use of differential diagnosis, "[t]his analysis amounts to saying that because Dr. Reyna thought she had eliminated other possible causes of fibromyalgia, even though she does not know the real 'cause', it had to be the fall at Food Lion. This is not an exercise in scientific logic but in the fallacy of *post-hoc propter-hoc* reasoning, which is as unacceptable in science as in law."[31]

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22 *Id.*
23 218 F.3d 566 (6th Cir. 2000).
24 *Id.* at 578.
25 211 F.3d 1049, 1050 (7th Cir. 2000).
26 *See id.*; *see also Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.*, 240 F.3d 1 (1st Cir. 2001).
27 178 F.3d 257, 260 (4th Cir. 1999).
28 *See id.* at 262.
29 *Id.*
30 171 F.3d 308, 309 (5th Cir. 1999).
31 *Id.* at 313.

What does this mean for the use of expert medical testimony in personal injury cases? Differential diagnosis is the primary basis of such testimony.[32]

Kumho Tire's flexible approach encourages trial judges to consider even more factors than the Court was considering in *Daubert*, thus making the process more complicated and, of course, more unpredictable. As the Court stated:

> …we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we do so for subsets of cases categorized by category of the expert or by kind of evidence. Too much depends upon the particular circumstances of the particular cases at issue.[33]

The Association of Trial Lawyers of America has compiled an extensive list of what it calls the "new and additional factors" permitted by *Kumho Tire* and the amendment to Rule 702.[34] The Association then warns trial lawyers: "you and your expert should be prepared to address dozens of new and additional factors, and to do so with an awareness that the failure to adequately address any single factor can easily doom your expert and your case."[35] A sobering caution to say the least.

A HARBOR IN THE TEMPEST?

What trial lawyers want is consistency and predictability. No lawyer wants to devote hours of time and client money to the preparation of a case and still not know what analysis the trial judge will employ in determining the admissibility of the expert testimony. No doubt Justice Breyer was right when he observed that "much depends upon the particular circumstances of the particular case at issue" in determining the method of analysis.[36] On the other hand, there are many, many common threads in the presentation of expert testimony. In personal injury cases, medical experts have been employing differential diagnosis to establish causation, seemingly, since time immemorial. Fire cause-and-origin experts, property evaluators, engineers, economists and many other experts have been testifying in courts for a long period of time. Surely, the common threads that emerge from all of this experience can be crystallized by appellate courts into useful guidelines for trial courts and the trial bar.

One way to hasten the propagation of these common threads is to jettison the abuse of discretion standard of review and return to the *de novo* standard for *Daubert* decisions. This change may not solve all of the problems, but a somewhat more-consistent approach to the limits of differential diagnosis might emerge. Also, a better understanding of when the consistent use of a procedure is sufficient validation for admissibility purposes as opposed to when the procedure, irrespective of how long used, must be tested before it can be admitted might result.

As stated above, in *Joiner* the Supreme Court adopted the abuse of discretion standard of review.[37] In *Kumho Tire*, the Court made clear that this standard applies both to a trial court's determination of relevance and reliability and to its decision regarding how to make that determination.[38] By these rulings, the Court perpetuated the inconsistency and unpredictability borne of *Daubert* by reducing the likelihood of appellate guidance.

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32 There is a very thoughtful article on the use of differential diagnosis entitled *Navigating Uncertainty: Gatekeeping in the Absence of Hard Science*, 113 Harv. L. Rev. 1467 (2000).
33 *Kumho Tire*, 526 US at 150.
34 *See* Ned Miltenberg, Association of Trial Lawyers of America, *Out of the Fryeing Pan and into the Fire, and Out Again- or "Back to the Future"*, 2 Ann. 2000 ATLA CLE 2645 (2000).
35 *Id.*
36 *See Kumho Tire*, 526 U.S. at 150.
37 522 U.S. at 139.
38 526 U.S. at 141-42.

The Court's reasoning in *Joiner* is flawed. It is based simply on the fact that previous judicial decisions applied the abuse of discretion standard to evidentiary rulings.[39] Conceptually, however, a *Daubert* ruling does not resemble the classic evidentiary ruling. Unlike other evidentiary rulings, *Daubert* rulings are often the result of protracted and expensive "mini-trial[s.]"[40] Why channel these broad paper-laden inquiries into a narrow and limited review?

Unlike evidentiary rulings on the admissibility of hearsay, criminal records or computer-generated exhibits, *Daubert* rulings may be dispositive of, or significantly narrow, a litigant's case.[41] Since *Daubert* rulings are often outcome-determinative, they are more analogous to summary judgment decisions, which are reviewed by appellate courts *de novo*.[42] Like the review of a summary judgment decision, a review of a *Daubert* decision does not require an appellate court to assess the credibility of witnesses or the propriety of an admission of facts. The *Daubert* analysis is purely procedural: the trial judge chooses the "gatekeeping" factors to employ to assess the reliability of the expert's method or procedure and then determines its admissibility. These decisions warrant the heightened scrutiny afforded by *de novo* review. However, the trial judge's decision, regarding the qualifications of the expert and the admissibility of the facts on which the expert's opinion relies, should continue to be reviewed for an abuse of discretion.[43]

In the wake of *Joiner*, there is little possibility that a trial judge's "gatekeeping" decision will be reversed on appeal. Under the abuse-of-discretion standard, an appellate court does not assess whether the decision of the trial court was *correct*, but rather whether it was unreasonable or an error of law.[44] The appellate court must affirm the decision except on the rare occasion that no reasonable person could have adopted the same position.[45] Indeed, the Supreme Court soundly rejected the respondent's argument in *Joiner* that an outcome-determinative *Daubert* decision warrants a "more searching" abuse of discretion-type analysis, stating that the "particularly stringent standard of review" applied by the appellate court "failed to give the trial court the deference that is the hallmark of abuse-of-discretion review."[46] Seemingly, this "deference" troubled at least one judge in *Theresa Canavan's Case*, the case in which the Massachusetts Supreme Judicial Court adopted the abuse of discretion standard of review for its *Daubert*-type decisions. Judge Greaney, in a concurring opinion, felt compelled to observe that "[w]here new hard science is involved, an appellate court will always take a hard look at the trial judge's decision to admit or exclude the evidence."[47] In light of the Supreme Court's holding in *Joiner* and the strictures of the abuse-of-discretion standard, it is likely that his prediction will become no more than wishful thinking.

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39 *See Joiner*, 522 U.S. at 142-43 (citing cases with evidentiary rulings concerning: (i) admissibility of evidence of the characteristics of a gang in which the defendant was a member; (ii) a trial judge's decision to admit a full criminal record to show evidence of a prior judgment, despite an offer by defendant to concede to a prior judgment; and (iii) a trial judge's decision to depart from sentencing guidelines).

40 Goodwin, *supra* note 12, at 621 (citation omitted).

41 *See* Gregory A. Weimer, *Expert Evidence: What You Don't Know About Daubert Can Hurt You*, 24 Vt. B.J. & L. Dig. 51, 53 (1998) (reporting that estimates indicate that approximately two-thirds of the reported decisions addressing *Daubert* inquiries have excluded the proffered evidence) (citation omitted).

42 *See Gosselin v. Webb*, 2001 WL 246701 (1st Cir.); *see also Pride*, 218 F.3d at 575 (reviewing summary judgment order *de novo* and *Daubert* decision for abuse of discretion).

43 *See Congress & Empire Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878) ("Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court,...Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the [expert] evidence; but the appellate review will not reverse in such case, unless the ruling is manifesting erroneous."); *see also Commonwealth v. Vao Sok*, 683 N.E.2d 671, 677-78 (Mass. 1997) (applying the *de novo* standard to the trial judge's determination of the validity of the scientific methodology because the "conclusion will have applicability beyond the facts of the case before him" and the abuse of discretion standard to the qualifications of the expert witness and to the facts on which his methodology relied in arriving at his opinion because these are "fact-based inquir[ies]"), *abrogated by, Theresa Canavan's Case*, 733 N.E.2d 1042 (Mass. 2000).

44 *See Kumho Tire*, 526 U.S. at 159 (Scalia, J. concurring); *Theresa Canavan's Case*, 733 N.E.2d at 1052 (Greaney, J. concurring).

45 *See In re TMI Litig.*, 193 F.3d 613, 666 (3rd Cir. 1999) (stating that an abuse of discretion can occur "when no reasonable person would adopt the district court's view" and that it would not interfere with an exercise of discretion "unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.") (citations and sub. history omitted); *see also In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994) ("under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call."); *see generally* Margaret A. Berger, *When, if Ever, does Evidentiary Error Constitute Reversible Error?*, 25 Loy. L.A. L. Rev. 893, 894-95 (1992) (noting that while federal courts try approximately twenty thousand cases per year, she found only thirty appellate decisions which stated in officially reported opinions that the court was reversing because of evidentiary error).

46 *See Joiner*, 522 U.S. at 140-43.

47 733 N.E.2d at 1052.

Most disturbing, the Court in *Joiner* did not even consider the most troubling consequence of the adoption of the abuse of discretion standard: inconsistent and unpredictable results. Trial courts in the same jurisdiction considering the same type of expert evidence can use different methods of analysis and arrive at different conclusions which, if reasonable, will be affirmed by the appellate court.[48] A narrow standard of review perpetuates these inconsistencies and severely hampers the ability of appellate courts to develop guidelines of general applicability for trial courts and the trial bar.

This lack of guidance from appellate decisions creates problems for litigants and for the courts. To the consternation of trial attorneys, there is no way to select a "*Daubert*-proof" expert or to fully prepare for a *Daubert* hearing because a trial judge is not required to consider any particular reliability factors. Moreover, assessing the appropriateness of settlement is more difficult for a trial attorney who cannot predict whether his or her expert will be permitted to testify.[49] The unpredictability of the *Daubert* process, according to one commentator, is likely to lead to an increase in the incidence of malpractice claims as litigants, who have spent thousands of dollars on the preparation of their cases only to have them terminated by the exclusion of an expert, take out their frustrations on their lawyers.[50]

Trial courts may experience similar frustration as a result of *Joiner*. Without meaningful appellate guidance, trial courts will address anew the same type of expert testimony that has been explored by other trial courts in the same jurisdiction, resulting in more unnecessarily intense *Daubert* "mini-trials[.]"[51]

In contrast, with the application of a *de novo* standard of review, the appellate courts could begin to develop a more consistent set of guidelines regarding how to address certain types of expert testimony. Proponents of the abuse of discretion standard of review argue that *de novo* review of these decisions will impose an unnecessary burden on appellate courts. However, any additional burden on the appellate courts will be more than offset by the preservation of judicial resources in the trial courts resulting from clearer guidance to trial judges and lawyers.

This is one area in the tempest created by the *Daubert* trilogy in which there is a feasible, albeit partial, solution. The adoption of a *de novo* standard of review for *Daubert* decisions would move the courts one step closer to the predictability and consistency that trial lawyers and trial judges desperately want.

CONCLUSION

Perhaps Ralph Waldo Emerson was right when he said a "foolish consistency is the hobgoblin of little minds," but in the area of expert testimony, a little wise and well-reasoned consistency would certainly be welcome. Until such time, lawyers will continue to lament.

48 *See Vao Sok*, 683 N.E.2d at 677 ("Application of less than a de novo standard of review to an issue which transcends individual cases invariably leads to inconsistent treatment of similarly situated claims.") (citations omitted).
49 *See* Randolph N. Jonakait, *The Standard of Appellate Review for Scientific Evidence: Beyond Joiner and Scheffer*, 32 U.C. Davis L. Rev. 289, 310 (1999).
50 *See* Aaron E. Hoffman *et al.*, *Will the* Daubert *Gatekeeper Wave Your Expert Through? How is a Mere Lawyer to Know?*, ALAS Loss Prevention Journal, Fall 2000, pp. 11-12.
51 Goodwin, *supra* note 12, at 621 (citation omitted).