Gate Keepers: Effective Use of Rule 104

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What do you do when discovery reveals that plaintiff's injury was not caused by your client or she does not even have the injury claimed, but a motion for summary judgment would yield an ORCP 47E affidavit that an unnamed expert will testify that plaintiff was injured by your client?

The Oregon Evidence Code offers an option: an OEC 104(1) hearing to determine the admissibility of plaintiff's evidence. OEC 104(1) is identical to and derived from Federal Rule of Evidence 104(a). *State v. Carlson*, 311 Or 201, 209 fn 8, 808 P2d 1002 (1990). FRE 104(a) is at the center of a burgeoning body of law on junk science and the court's role as the gatekeeper of evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 113 SCt 2786, 125 LEd2d 469 (1993). The substantive concepts of *Daubert* have long been accepted by the Oregon Supreme Court as a legitimate part of Oregon jurisprudence. *E.g. State v. O'Key*, 321 Or 285, 306-07, 899 P2d 663 (1995). So why not hold a hearing well before trial? It is a procedure lawyers and courts ought to consider.

OEC 104(1) Provides the Grounds.

Both OEC 104(1) and FRE 104(a) state:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (2) of this section. In making this determination the court is not bound by the rules of evidence except those with respect to privileges.

Consistent with federal law, in Oregon the burden is on the proponent of the evidence, and the two issues to be decided are 1) scientific validity and 2) pertinence. *O'Key* at 303, *citing Daubert*, 509 US at 592 n 10. The Oregon Supreme Court recognizes that an OEC 104(1) hearing is the appropriate mechanism to raise *Daubert* type issues regarding the admissibility of expert evidence. Indeed, the court has held that the issues should generally be decided before trial: "When proffered scientific evidence raises issues of scientific validity, these issues should be addressed by the trial court in a separate OEC 104(1) hearing, *preferably in advance of trial*." *O'Key*, 321 Or at 307, fn 29 (emphasis added).

Daubert Provides the Tool.

It is remarkable that *Daubert* did not arise out of an FRE 104(a) hearing. Rather, expert testimony for and against plaintiff's theory of liability was presented in the context of a motion for summary judgment. The trial court granted defendant's motion without an evidentiary hearing. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F Supp 570, 576 (SD Cal 1989).

On appeal, the United States Supreme Court seized upon FRE 104(a) as the procedural mechanism for determining admissibility of scientific evidence. Along with rejecting the *Frye* "generally accepted" standard for admitting scientific evidence, the Court held that an FRE 104(a) hearing is *required* whenever expert testimony is challenged—even at summary judgment. *Daubert*, 509 US at 592, fn 10. This aspect of the ruling is, perhaps, too easily overlooked.

In retrospect, the 1993 amendments to FRCP 26 requiring expert disclosures — read in conjunction with *Daubert* — make a pre-trial FRE 104(a) hearing the obvious process for resolving expert disputes. Indeed, a pre-trial FRE 104(a) hearing was soon presumed to be the proper practice to test *any* opinion testimony. *Kumho Tire Co., Ltd. v. Carmichael* , 526 US 137, 119 SCt 1167, 143 LEd2d 238 (1999). And by 2000, the practice was further reinforced when the Federal Rules of Evidence were amended to instill the principles of *Daubert* into FRE 702.

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All this suggests that for the trial judge in *Daubert* in 1989, it was by no means obvious that a pre-trial FRE 104(a) hearing was available or even appropriate to decide what evidence ought to be considered on summary judgment. In fact, before *Daubert*, as in Oregon practice today, Rule 104(a) was the province of motions in limine. The Supreme Court could have simply found an issue of fact for trial and reversed the trial court on that basis. But instead it closed the loop on the expansion of summary judgment begun with the *Celotex* trilogy in 1986 and provided a pre-trial mechanism to raise or refute issues of fact.

Expert Discovery (Not)

This is not to suggest that Oregon law is merely behind the times. The state's traditional hostility to expert discovery must be recognized. Although OEC 104(1) and FRE 104(a) are identical, differences between Oregon and federal practice are abundantly obvious. Perhaps most evident is the lack of anything remotely like an ORCP 47E affidavit under the federal rules, or of expert disclosures under Oregon rules. In Oregon, a 47E affidavit stops a defense lawyer in his or her tracks; with mandatory disclosures, *Daubert* hearings in federal court lead to summary judgment.

Any doubt about expert discovery in Oregon was resolved in *Stevens v. Czerniak*, 336 Or 392, 403-05, 84 P3d 140 (2004), a mandamus action arising out of a post-conviction proceeding, to which the rules of civil procedure apply. The trial court cannot require pretrial disclosure of experts' names or the substance of their testimony. The "legislature made a policy choice to continue the practice of not authorizing expert discovery in civil actions in state court." *Stevens*, 336 Or at 405.

The obvious tension between a pretrial *Daubert*-type hearing and Oregon's discovery rules was not addressed by the court in *O'Key* when it urged the pretrial use of OEC 104(1) hearings. And the *Stevens* court ws certainly not dealing with OEC 104(1). The Oregon Evidence Code applies to all courts in the state — and all civil and criminal actions. OEC 101(1) and (2). In *O'Key* the Supreme Court offes a basis to use OEC 104(1) to test conclusions of fact before trial. And it just plain makes sense to decide some fact issues (like causation) sooner rather than later. Sometimes, anyway.

Strategic Use of OEC 104(1)

In spite of the drawbacks here, and others plaintiffs' counsel will undoubtedly raise, OEC 104(1) offers a possible way through the thicket of ORCP 47E affidavits. It provides a procedural tool to test the admissibility of opinion evidence. Nevertheless, care should be taken to acknowledge and address the holdings of *Stevens* if you decide to ask for pretrial OEC 104(1) hearing: do not seek the identity of plaintiff's expert or the substance of that person's opinion, but focus, instead, on the general question of "admissibility." Rather than moving to exclude the testimony of Doctor X, move to exclude the factual premise or the conclusion you know Doctor X will draw from that premise. The point should be that it does not matter whose opinion it is, the opinion is unsound and irrelevant and should be excluded. This may be a hair that is too narrow for some to split. But there is a qualitative difference between a motion aimed at an expert witness, and one aimed at the fact record developed in discovery and the opinions that ought or ought not be drawn from it. ✪