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# Expert Testimony: Daubert vs. Frye

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# Rule of Evidence, 90.702

## Earlier Version (1976)

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion,

**however, the opinion is admissible only if it can be applied to evidence at trial.**

## Effective July 1, 2013

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise if:

- 1. The testimony is based upon sufficient facts or data;**
- 2. The testimony is the product of reliable principles and methods; and**
- 3. The expert has reliably applied the principles to the facts of the case.**



# Comparing the Tests

## Frye

- Subjected to peer review
- **Generally accepted**

If it has been peer reviewed and generally accepted by the relevant community... then it is sufficiently reliable to go to a jury.

Applies to new or novel evidence.

## Daubert

- Must be **Reliable**
- And **Relevant**

Reliability is determined by the court itself, which reviews the data, the methodology, and other factors, including general acceptance.

Applies to all expert testimony.



# Florida Legislature Amends Section 90.702 (2013)

- The *Frye* standard for determining the admissibility of expert testimony only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques.
- Experts routinely form medical causation opinions based on their experience and training.
- The *Frye* test is **inapplicable** to “pure opinion” testimony.

*Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007)



# Why the change?

- “The Legislature’s adoption of the *Daubert* standard reflected its intent to prohibit ‘**pure opinion**’ testimony... .”

*Gaimeo v. Florida Autosport, Inc.*, 154 So. 3d 385 (Fla. 1st DCA 2014)

- “In adopting the amendment to section 90.702, the legislature specifically stated its intent that the *Daubert* standard was applicable to all expert testimony, including that in the form of **pure opinion**.”

Charles W. Ehrhardt, 1 Fla. Prac., Evidence 702.3 (2014 ed.)

- “The *Daubert* test applies not only to ‘new or novel’ scientific evidence, but to all other expert opinion testimony. ... The legislative purpose of the new law is clear: **to tighten the rules** for admissibility of expert testimony in the courts of this state.”

*Perez v. Bell South Tele., Inc.*, 138 So. 3d 492 (Fla. 3d DCA 2014)



# The Florida Supreme Court vs. The Florida Legislature

*DeLisle v. Crane Co.*, 258 So. 3d 1221 (Fla. 2018)

- Section 90.702 is procedural in nature
- Legislature overstepped its bounds
- Infringed on the Court's rulemaking authority
- Expressed preference for *Frye* standard
- *Daubert* results in additional burden on court and litigants

“*Frye* relies on the **scientific community** to determine reliability whereas *Daubert* relies on the **scientific savvy of trial judges** to determine the significance of the methodology used.”



# The Supreme Court Changes Direction

- Less than a year later
- New Supreme Court
- *Daubert* is the preferred standard
- Allows trial judge to ensure that all scientific evidence is relevant/reliable
- Creates state/federal consistency
- Formally adopted the changes to sections 90.702 and 90.704 as procedural rules of evidence

*In re: Amendments to Florida Evidence Code,*  
278 So. 3d 551(Fla. 2019)





# Daubert Applies

- What must be established:
  - 1. Is the expert qualified?
  - 2. Is the testimony reliable?
  - 3. Will the testimony assist the trier of fact?
- Judge as the “gatekeeper” (with broad discretion)
- Not intended to invade the province of the jury
- Addresses reliability, not persuasiveness



*The gatekeeping function “is not intended to supplant the adversary system or the role of the jury: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”*



*U.S. v. Alabama Power Co.,  
730 F.3d 1278 (11th Cir. 2013)*



# Is the expert qualified?

- Knowledge
- Skill
- Experience
- Training
- Education

# Is the testimony relevant? Will it assist the trier of fact?

- Can the testimony be applied to the facts of the case?
- Is it information outside of the knowledge of that of an average juror?

# \*\*\*Is the testimony reliable?\*\*\*

## *Daubert* Test for Reliability:

1. Has the methodology been tested?
2. Has the theory or technique has been subjected to peer review or publication?
3. What is the known or potential error rate of the methodology?
4. Is the methodology (the theory or technique used) **generally accepted** (*Frye* test)?
5. This list is not exhaustive.



# Experience Alone/Pure Opinion

If the witness is relying solely or primarily on experience, then the witness must explain:

- a) how that experience leads to the conclusion reached,
- b) why that experience is a sufficient basis for the opinion, and
- c) how that experience is reliably applied to the facts of the case.



# Experience Alone/Pure Opinion

An expert cannot rely on experience without explaining in detail how the experience and other material consulted support the opinion rendered.

Expert must elaborate as to what analysis was conducted, how his/her experience informed that analysis and what steps he/she took to verify it.

This gets tricky where causation cannot be quantified.



# Expert Testimony: Medical Causation

- Under *Frye*, “pure opinion” testimony was admissible.
- Under *Daubert*, an expert can also rely on his or her experience, education and training – even without the need for underlying data or medical literature.
  - Conclusive clinical studies are not required
  - There is no practical way to conduct objective, randomized experiments to test causation in the medical context.





# The Expert's Deposition

- Highlight qualifications, skills, experience
- Explain how the opinion was reached
- Discuss methodology or potential error rate
- Be prepared to address the existence (or the absence) of literature/peer review
- Explain that the methodology is commonly used or generally accepted in the particular community



# The *Daubert* Hearing

- Is an evidentiary hearing required?
  - Are you challenging qualifications? Relevance? Reliability?
  - Federal courts allow them if the issues are complex.
  - Federal courts allow them if multiple experts and medical literature.
  - No requirement that the hearing be held before trial.
- At the pretrial hearing:
  - Even though the hearing is requested by the party challenging the testimony, it is the party offering the testimony who has the **burden of proof** to show the testimony is relevant and reliable.
  - This must be established by **clear and convincing** evidence.
  - Judge's decision is subject to an **abuse of discretion** standard.
  - Look for prior decisions precluding/limiting that expert.



*Daubert* is “an area where the abuse of discretion standard thrives. . . . The rules relating to *Daubert* issues are not precisely calibrated and must be applied in case-specific, evidentiary circumstances that often defy generalization.”



*U.S. v. Brown*,  
6415 F.3d 1257 (11<sup>th</sup> Cir. 2005).



# Expert Testimony: Shaken Baby Syndrome

- Medical Negligence Action
- Trial 1: Defense Was “Shaken Baby Syndrome”
  - Reversed on Evidentiary Issue
- Trial 2: Frye / Daubert Challenge
  - Pretrial Evidentiary Hearing
    - New Experts
    - Submitted Literature to the Court



# Expert Testimony: Birth-Related Injury/Timing

- Medical Negligence Action
- Causation Undisputed
  - Oxygen Deprivation = Brain Injury
- Conflicting Testimony
  - Related to TIMING of the Injury



# Hearing Challenges

- No Hard and Fast Rules for Procedure
- Relying on Deposition Testimony/Report
  - Limited in Scope
  - Literature Previously Disclosed
- Evidentiary Hearing
  - Expert Testifies Live
  - Additional Literature
  - Scope is Broad



*The courtroom is not the place for scientific guesswork,  
even of the inspired sort.*

*Law lags science; it does not lead it.*

➤➤ *Hendrix ex rel. C.P. v. Evenflo, Co., Inc., 609 F. 3d 1183  
(11th Cir. 2010) (quoting Rosen v. Ciba-Geigy Corp., 78 F.3d  
316 (7th Cir. 1996)).*





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