

TAB 03:

Expert

Testimony

Expert Testimony and Capital cases

North Carolina Judicial College
Superior Court Judges
May 11, 2017

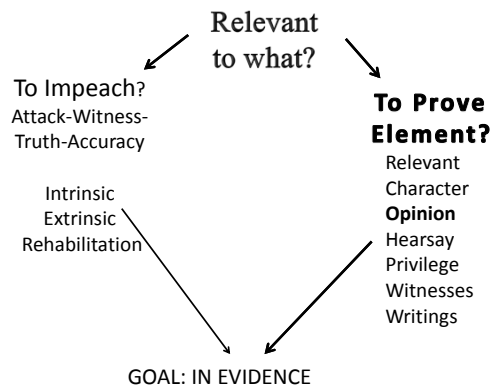
Today's Presentation: A Trilogy

- 1. Evidence Overview
- 2. Experts Overview
- 3. Capital Cases

The Evidence Highway

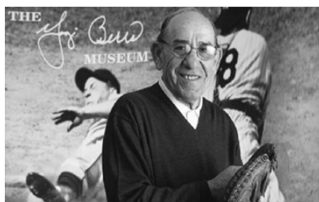


THE EVIDENCE HIGHWAY



Forks in the Road

"If you see a fork in the road, take it." – Yogi Berra



Experts

- Why call experts?
 - 1. The different realities principle – building bridges
 - 2. Experience Substitutes
 - 3. Aces wild
 - 4. Confirming suspicions
- A Helpfulness Checklist
 - 1. Complexity of the case
 - 2. Quantity of fact evidence
 - 3. Jury Expectations
 - 4. Rebuttal evidence

Expert Witnesses & Opinions

- Experts everywhere
- Medical Journals, too
- The number of journals indexed in Medicus exceeds:
 - A. 500
 - B. 1,000
 - C. 5,000
 - D. 50,000

Left Turn at Albuquerque



New 702(a) (2011)

- 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, if all of the following apply:
- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case. 2011 N.C. Sess. Laws 283, ss. 1.3, 4.2

A FIVE POINT FRAMEWORK FOR EXPERTS

1. Reliable Theory
2. Reliable Application of Theory
3. Reasonable certainty of conclusions (e.g., Reas. Medical certainty)
4. Helpfulness to trier of fact
5. Qualified Witness [R3 HQ]

Hello *Daubert*

- Goodbye *Howerton*.
- Start the revolution.
 1. The Good - Lots of precedent
 2. The Bad - Not in NC
 3. The Ugly - 50 Shades of Gray

Daubert

- It is the trial court's responsibility under Rule 104(a) to determine if:
 - (1) an expert is proposing to testify to scientific knowledge
 - (2) that will assist the trial of fact in understanding a fact in issue. The trial court can consider various factors in making a reliability determination.
- *Daubert* gives us 2 Rs for expert testimony –
 - Relevant and
 - Reliable
 - (We can also add Reviewable)

Courts Rule, Not Expert Communities

- AMA Code of Medical Ethics Opinion 9.07
- When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify, and be committed to evaluating cases objectively and to providing an independent opinion.
- *Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field.*

Hypo

- Plaintiff sued the manufacturer of a ladder, claiming it was defective and caused plaintiff's injuries. Plaintiff wanted to call an expert, Dr. Suzie Backus, an engineer by training, to testify that the caster stem collapsed on account of a brittle fracture resulting from overtightening. The expert found many articles on brittle fracture after a Google search.
- Allow?
- See *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887 (7th Cir. 2011).

Hypo

- *State v. Blue*. Defendant Peter Blue shot and killed his cousin Jimmy Shaw after an argument. Late at night, the two were arguing and the decedent pointed an AR-15 at the defendant, who promptly stood up and fired seven shots in rapid succession at decedent with the loaded 9-millimeter Beretta pistol he was carrying. Defendant then said, "What about now, Bozo?...."
- At trial, defendant offered an expert regarding the doctrine of the "use of force." The expert, one Dave Clotter, was going to testify to "pre-attack cues," "reaction time" and "force variables."

Hypo Continued

- The expert was a graduate of the FBI Academy and worked at the NC Department of Justice as an instructor "for subject control and arrest techniques. When asked about his knowledge, Clotter said it came from published articles in the field of use of force and his training as well as the tests used in the Justice Academy. Clotter said he had read and participated in some of the studies.
- What questions should the judge ask the expert as the gatekeeper? Would exclusion of the expert be error? See *State v. McGrady*, 368 N.C. 880 (2016).

HYP0 Continued

- In *State v. Walston*, ___ N.C. ___, ___ S.E.2d ___ (May 5, 2017), the Court found the trial court did not abuse its discretion in excluding defense expert testimony about repressed and suggestible memory.
- The Court observed:
 1. There is no rule that an expert must interview a victim
 2. Rule 702 does not require specific procedural requirements for evaluating expert testimony.
 3. Rule 403 can be considered as well as 702.
 4. Here, the Trial Court did its job, acting as a gatekeeper in determining the admissibility of expert testimony.

Two Broad Themes

- (1) Relocates the line between judge and jury, and turns judges into amateur scientists.
- (2) Creates a managerial model for judges (Case Management), with a new gravitational center -- experts

HYP0

- In a child sex abuse case, defense offers an expert M.D. on repressed memory and the suggestibility of memory. The expert had not interviewed the victims.
- What process should the trial court use in determining the admissibility of this testimony?
 1. Arguments from both sides
 2. Conducted Voir Dire
 3. Considered amended Rule 702
 4. Considered Rule 403
- Excluded the evidence. Proper?

How did we get here?

- Why did the Court make judges put on their scientist hats?
- *Justice Harry Blackmun, that's why.*

Hypo

- *Babbling Brooke*. Brooke Benson was charged with habitual impaired driving. At trial, an expert on retrograde extrapolation was permitted to testify on behalf of the government. The expert extrapolated based on his review that Benson's .07 blood alcohol concentration one hour and 45 minutes after a traffic stop would have been between .08 and .10 at the time of the stop.
- An assumption by the expert was that Benson was in a post-absorptive state at the time of the stop. This means that the defendant's blood was no longer absorbing alcohol and the blood alcohol level was declining. *State v. Babich*, ___ N.C. App. ___, 797 S.E.2d 359 (2017)

Hypo continued

- 1. Why did the expert make this assumption?
- 2. What impact does this assumption have on the expert's testimony?
- 3. How does it affect the Daubert two-step?
- [Even if testimony might be reliable in the abstract, it still has to be applied to the facts at issue.]
- 4. Does this testimony fit the facts of this case?

Daubert Factors, Part 1

- 1. Whether a theory or technique can be (and has been) *tested*
- New Vocabulary:
- Falsifiability, Refutability, Testability

Factors, Parts 2-4

- 2. Whether the theory or technique has been subjected to *peer review and publication*.
- 3. *The known or potential rate of error*
- 4. Whether the theory or techniques *generally accepted as reliable* in the relevant scientific community.
 - a. Self-Referential?

Fed. R. Evid. Advisory Comm. Notes 2000 Am. Add'l Factors, Parts 1-2

- (1) Whether experts are “proposing to testify about *matters growing naturally and directly* out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.” *Daubert*.
- (2) Whether the expert has *unjustifiably extrapolated* from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner*.

Additional Factors, Parts 3-4

- (3) Whether the expert has adequately accounted for *obvious alternative explanations*.
- (4) Whether the expert “is being as *careful as he would be* in his regular professional work outside his paid litigation consulting.” See *Kumho Tire Co.*

Additional Factor, Part 5

- (5) Whether the *field of expertise* claimed by the expert is *known to reach reliable results* for the type of opinion the expert would give.
- [These are guidelines; the test is flexible]

Hypo

- Suppose Judge Stone reviews dozens of publications regarding brittle fracture theory involving ladder defects.
- The judge ignored the potential rate of error and whether the theory was generally accepted in the scientific community.
- Yet the Judge found that the theory was sufficiently scientific to warrant a finding that it was more likely than not reliable. Permissible?

The Trilogy of *Daubert*, *Joiner*, & *Kumho Tire*

1. Super *Daubert*

- 2. *General Electric Co. v. Joiner*, 522 US 136 (1997):
- *Daubert* applies to all testimony under the abuse of discretion standard, is a flexible inquiry, and deference need not be given to the *ipse dixit* of the expert.

3. *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999)

“*Daubert*’s holding—the trial judge’s “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge.

We also conclude that a trial court *may* consider [the *Daubert* Factors].”

The Experience Expert

- *Breaking Way Bad*. A pharmacy school prof is prosecuted for recruiting a street gang to sell designer pharmaceuticals, mostly in prisons on the east coast. The gang recruited is a subset of the Bloods. A prosecution expert will testify about the history, symbology and operations of the Bloods gang in that area.

Hypo Continued

- In a pretrial hearing, the expert concedes his information is mostly based on his 25 years in police work, largely spent in gang enforcement as a detective, and training he received on the local gangs in various programs. No publications or educational degrees are offered in support of the expert's testimony.
- How would you state your opinion about the Daubert factors here? (*U.S. v. Thomas* (4th Cir. 2012))

Capital Cases

- There are special Issues given the nature of the cases.
- Mitigation Experts
- "The psychologist performs psychological testing and offers diagnostic impressions with the goal of describing the defendant in a sympathetic light to the jury and attempts to explain why he committed the crime."
- John M. Fabian, "Death Penalty Mitigation and the Role of the Forensic Psychologist," 27 *Law & Psychol. Rev.* 73 (2003).

Neuroimaging in the Sentencing Phase

- How persuasive is neurological expert testimony?
- Hypo – In the sentencing phase of a capital case, the defense offered an expert physician to testify about the results of MRI and positron emission tomography (PET) tests to show that she had structural and functional abnormalities in her brain consistent with the diagnosis of pseudocyesis, a false belief or delusion in being pregnant.
- Admit?
- Is there any causal connection between the abnormalities and the pseudocyesis diagnosis?
- *United States v. Montgomery*, 635 F.3d 1074 (8th Cir. 2011)

Psychopathy Checklist in Sentencing

- In a capital homicide case brought under the Violence Against Women Act, the trial court admitted a 'Psychopathy Checklist Revised' through a prosecution expert in the sentencing phase of the trial to show that the defendant was a psychopath. The defendant offered two articles written by his expert to rebut the prosecution's expert as to the scientific validity of the Checklist.
- Is the evidence relevant?
- Is it reliable? (*see, e.g., United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000))

The Reliability of Forensic Science

- Pres's Council of Advisors on Science and Tech. (PCAST)(2016):
- "[T]here are two important gaps: (1) the need for clarity about the scientific standards for the validity and reliability of forensic methods and
- (2) the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable, [especially] forensic "feature-comparison" methods— DNA samples, bitemarks, latent fingerprints, firearm marks, footwear, and hair."

PCAST

- a 2002 FBI re-examination of microscopic hair comparisons the agency's scientists had performed in criminal cases, in which DNA testing revealed that 11 percent of hair samples found to match microscopically actually came from different individuals;
- a 2004 [FBI] National Research Council report, on bullet-lead evidence, which found that there was insufficient research and data to support drawing a definitive connection between
- two bullets based on compositional similarity of the lead they contain;
- a 2005[FBI] report to review the use of latent fingerprint evidence in the case of a terrorist bombing in Spain, in which the committee found that "confirmation bias"—the inclination to confirm a suspicion based on other grounds—contributed to a misidentification and improper detention; and
- studies reported in 2009 and 2010 on bite-mark evidence, which found that current procedures for comparing bite-marks are unable to reliably exclude or include a suspect as a potential biter.

2009 Nat'l Acad. Sci/ Nat'l Research Council Report on Forensic Science: A Path Forward

- Lack of Mandatory Standardization, Certification, and Accreditation
- The fragmentation problem is compounded because operational principles and procedures for many forensic science disciplines are not standardized or embraced, either between or within jurisdictions. There is no uniformity in the certification of forensic practitioners, or in the accreditation
- of crime laboratories.

2009 Nat'l Acad. Sci/ Nat'l Research Council Report on Forensic Science: A Path Forward

- Problems Relating to the Interpretation of Forensic Evidence
- Often in criminal prosecutions and civil litigation, forensic evidence is offered to support conclusions about "individualization" (sometimes referred to as "matching" a specimen to a particular individual or other source)...
- With the exception of nuclear DNA analysis, however,
- no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.

Neutral Experts: *McWilliams v. Dunn* (2017)

- Where sanity is at issue in a capital case, is the defendant entitled to an expert independent of the prosecution?
- *Ake v. Oklahoma* (1985): "The State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense."
- Means?
- J. Alito: The *Ake* decision was deliberately ambiguous. All that is needed is a neutral expert, not one aligned with the defense
- J. Kagan: It means somebody on the defendant's side.
- J. Ginsburg: Assistance of counsel is not neutral.

NC

- In NC, if funding is from IDF, the problem of asking the court for an expert is obviated.
- But, if IDS does not fund the expert, a similar problem will be presented.
- How should this problem be resolved?

Predictions of Future Dangerousness

- Can experts testify about a defendant's future dangerousness under *Daubert*?
- "Research, in fact, confirms the error in associating dangerousness with mental illness, showing that "the vast majority of people who are violent do not suffer from mental illnesses...Violence is not a diagnosis, nor is it a disease. Potential to do harm is not a symptom or a sign of mental illness, rather it must be the central consideration when assessing future dangerousness.
- In reality, no one can predict future dangerousness precisely and with absolute certainty. Assessments of future dangerousness therefore may be more accurately described as the identification of factors associated with potential dangerous behavior by a given individual." Robert T. M. Phillips, 14 AMA J. of Ethics 472

What Time is it?