


**Review of the North Carolina Law of  
Expert Evidence**

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**NC Is A *Daubert* State, Finally: *State v. McGrady*  
(N.C. S. Ct. 6/10/16)**

- “By adopting virtually the same language from the federal rule (Fed.R. Evid. 702) into the North Carolina Rule [N.C.R. Evid. 702(a), 2011], the General Assembly thus adopted the meaning of the federal rule as well.”
- N.C. R. Evid. 702(a) “now incorporates the standard from the *Daubert* line of cases.”
- “Our previous cases are still good law if they do not conflict with the *Daubert* standard.”
- NC was formerly a hybrid: more rigorous than *Frye*’s “general acceptance,” less demanding than *Daubert* (*Howerton v. Araia*, 2004)
- Unanimously affirms N.C. Ct. App. decision; more on **behavioral science** details of *McGrady* to come




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**What Is the *Daubert* Standard?—The Trilogy**

- *Daubert v. Merrell Dow* (1993): Trial court must act as **gatekeeper** to ensure **reliability** of expert testimony
- Dist. Ct. rejected—under *Frye*—non-epidemiological evidence that maternal Bendectin was not a risk factor for birth defects; that led directly to **summary judgement** for defendant
- S. Ct. held that Fed. R. Evid. 702 superseded *Frye*
- Trial court should normally conduct a preliminary assessment of expert testimony under Fed./NC Rule 104(a)




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### The *Daubert* Reliability Standard

- *Daubert* deals specifically with **scientific** experts
- “To qualify as ‘scientific knowledge,’ an inference or assertion must be derived by **the scientific method.**”
- “Proposed testimony must be supported by appropriate validation—*i.e.*, ‘good grounds,’ based on what is known.”
- “In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of **evidentiary reliability.**”
- The focus should be on **methods** rather than **conclusions**




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### Applying the *Daubert* Reliability Standard

- **Trial judge’s role:** “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”
- The judge should only admit scientific evidence that is both:
  - **Relevant**—a good *fit* with the issues in question; and
  - **Reliable**—grounded in the methods and procedures of science, possessing evidentiary trustworthiness




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### The *Daubert* Factors for Assessing Reliability

1. Theory or technique can be or has been **tested**
2. Theory or technique has been subjected to **peer review and publication**
3. The known or potential **rate of error** when theory or technique is applied
4. Existence and maintenance of **standards and controls**
5. **General acceptance can still have a bearing**




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### Additional Post-Daubert Factors

- Whether expert’s testimony grows naturally out of research conducted independent of litigation
- Whether experts have unjustifiably extrapolated from accepted premise to unfounded conclusion
- Whether the expert has adequately accounted for alternative explanations
- Whether the expert is being as careful in litigation as in normal practice
- Whether the claimed field of expertise is known to reach reliable results
- **Read the Advisory Committee Notes to Fed. Rule 702**




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### Trilogy Continues: *General Elec. v. Joiner* (1997)

- PCB exposure case; “Joiner’s experts had failed to show that there was a link between exposure to PCBs and small cell lung cancer.”
- Admissibility decisions reviewed under **abuse of discretion** standard
- And this on **methods versus conclusions**: “Conclusions and methodology are not entirely distinct. . . . Nothing. . . requires the court to admit expert opinion evidence that is connected to the existing data only by the *ipse dixit* of the expert.”
- “The court may conclude there is simply too great an analytical gap between the data and the opinion proffered. . . .”




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### Trilogy Concludes: *Kumho Tire v. Carmichael* (1999)

- Aff’d exclusion of engineer’s testimony about wear in an old tire causing fatal blowout
- Trial court has gatekeeper function for **all** expert testimony—“technical or other specialized knowledge” as well as scientific
- No shortcuts for non-scientific experts
- *Daubert* factors should be applied where relevant—but standard is **flexible**
- Overall goal remains the same: is expert applying **reliable principles and methods** in a **reliable** way?
- Trilogy leads to amended Fed. Rule 702 (2000) and NC Rule 702(a)(2011) . . .




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### Parsing NC R. Evid. 702(a), per *McGrady*

- (1) Expert must offer scientific, technical or other specialized knowledge **that will assist the trier of fact**—by providing insight beyond jurors' everyday experience
- (2) Expert must be **qualified** by knowledge, skill, experience, **or** education—applicable requirements will be content-specific: "Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?"
- (3) Then the **new** three-part, *Daubert*-based **reliability** test—




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### NC R. Evid. 702(a) Reliability Test

- (1) Is the testimony based on **sufficient facts or data**?
- (2) Is the testimony the product of **reliable principles and methods**?
- (3) Has the witness **applied** the principles and methods reliably to the facts?
- The inquiry should be **flexible and case-specific**, per *Kumho*
- Court endorses five *Daubert* factors, as appropriate, plus additional factors identified in federal cases
- Per *Joiner*, **abuse of discretion** standard on review




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### Applying this Framework to *McGrady's* Facts

- McG was convicted of first-degree murder in shooting of difficult neighbor; McG argued unsuccessfully that he was defending self and adult son
- Trial court excluded testimony of Cloutier, defense expert on "the science of the use of force"
- Cloutier has BA in criminal justice; graduated from FBI Academy in Quantico; retired as Goldsboro police captain; 11 years as teacher and director at NC Justice Academy; taught "subject control and arrest techniques" and use of lethal and non-lethal force; has provided expert testimony about use of force and crime scene investigation




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**McGrady: Cloutier's Excluded Opinions**

- (1) Based on "pre-attack cues" and "use of force variables" (including age, gender, size) in the interaction, McG's use of force was "a reasonable response to an imminent, deadly assault"
- Opinion doesn't go beyond what "lay jurors would be aware of, and would naturally consider"; "if these cues and variables are logically relevant at all, they are relevant precisely *because* they are within the understanding of a layperson"
- Therefore, this opinion "would not assist the jury as required by Rule 702(a)"




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**McGrady: Cloutier's Excluded Opinions**

- (2) Opinion based on "stress responses of the sympathetic nervous system": fear activates fight or flight response, leading to "perceptual narrowing" and "fragmented memory"; therefore, "defendant's memory and defendant's description of what he experienced were consistent with having perceived a threat to his life and the life of his son"
- Cloutier **not qualified** to testify about functioning of sympathetic nervous system
- Despite his "strong practical experience in police training and tactics," **this opinion** properly held to require "some formal medical training"




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**McGrady: Cloutier's Excluded Opinions**

- (3) "Reaction time" testimony to rebut any jury assumption that McG couldn't have acted defensively since he shot the victim in the back: with great statistical precision, Cloutier opined that "it's very possible and likely" that victim could have turned 180 degrees during McG's initial reaction to a threat
- This testimony was properly held **unreliable**: Cloutier based reaction time statistics on two earlier studies, but was unaware of their error rates, so his use of them was unreliable; Cloutier ignored effect of McG's back injury on reaction time, showing insufficient facts and data and failure to apply his own methodology reliably




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### General Behavioral Science Lessons from *McGrady*

- Make sure the expert is **really** adding something beyond common sense and everyday experience
- **Qualifications** are opinion-specific: an expert may know a lot about a lot, but is s/he qualified to render **this precise opinion?**
- Does the expert really understand the **underlying research** s/he's relying on?
- *McGrady* emphasizes **flexibility**: trial judges can use their own common sense in adapting the *Daubert* inquiry to the case
- And the **abuse of discretion** standard of review underscores this



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