

MEDICAL EXPERT WITNESSES

THE GATEKEEPER'S FUNCTION

October 30, 2009

Judge John F. Fischer

What Is Evidence

- "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

12 O.S.2001 § 2401

What Evidence Is Admissible

- All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Oklahoma, by statute or by this Code. Evidence which is not relevant is not admissible.

12 O.S.2001 § 2402

Exceptions To Admissibility

- Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.

12 O.S. Supp. 2003 § 2403

Who May Testify

- Every person is competent to be a witness except as otherwise provided in the Evidence Code.

12 O.S.2001 § 2601

What May A Witness Say

- A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

12 O.S. Supp. 2002 § 2602

Lay Witness Opinions

- If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
 1. Rationally based on the perception of the witness;
 2. Helpful to a clear understanding of his testimony or the determination of a fact in issue; and
 3. Not based on scientific, technical or other specialized knowledge

12 O.S. Supp. 2002 § 2701

THE GATE

- FEDERAL RULE of Evidence 702
- OKLAHOMA RULE of Evidence 2702

Expert Testimony

- 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 in the form of an opinion or otherwise.

12 O.S. Supp. 2002 § 2702

Exception to Personal Knowledge

- Rule 2602 requiring personal knowledge is “subject to the provisions of Section 2703 of this title.”

12 O.S. Supp. 2002 § 2602

Rule 2703 Exception

- The facts or data upon which an expert bases an opinion are:
 1. those perceived by or made known to the expert at or before the hearing;
 2. otherwise inadmissible facts or data if of a type reasonably relied upon by experts in the field.

12 O.S. Supp. 2009 § 2703

Reliance on Relevant Facts

- Judgment reversed, in part, because the expert claimed experience from observation, but the extent of that observation was not shown, and the expert “revealed no knowledge of those facts considered by courts when determining the particular issue before the court.”

Kappler v. Storm, 1915 OK 895, 153 P. 1142, 1143,

Reliance on Reliable Facts

- Judgment affirmed where the trial judge sustained objections to an expert's opinion on the value of cattle because “nothing showed of record that the expert's opinion was based upon the proper criteria, i.e, the ‘material facts of age and breed’ of the cattle.”

Gulf Oil Corp. v. Simmons, 1946 OK 317, 174 P.2d 359,

THE OLD GATE

- *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923)
- The “General Acceptance” test
- Admissibility depends on the consensus of the relevant scientific community

Advantage

- The reliability of an expert's methods and opinions are evaluated by experts in the same field

Criticisms

- First – the 51/49 problem
- How do you determine a “consensus” or at what point are the methods and opinions of the minority sufficiently reliable to be considered by the Jury

Criticisms

- Second – the new science problem
- *Frye* was decided in 1923 and would have precluded a young physicist from testifying two years later about his general theory of relativity.
- *Frye* limited experts to what Thomas Kuhn described as puzzle solvers in the existing, “normal science,” paradigm.

Structure of Scientific Revolutions

THE NEW GATE

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
- Admissibility depends on scientific reliability and relevance

Daubert Facts

- The plaintiffs sued to recover for birth defects alleging they were caused by anti-nausea drugs
- Defendant's expert testified that statistical analysis had not shown the drug to be a risk factor for birth defects
- Plaintiffs' expert testified: (1) animal studies found a link, (2) the chemical structure of the drug was similar to other birth defect drugs, (3) "reanalyzed" statistical data suggested a link

The *Daubert* Test

- The expert's testimony must pertain to “scientific knowledge”
 - Use of the scientific method ensures reliability
- The testimony must assist the trier of fact
 - The testimony must be relevant

Summary Judgment Reversed

- The fact that (generally accepted) statistical evidence did not prove a link did not preclude the evaluation of other kinds of scientifically reliable evidence which, if reliable, might support a finding that the drugs caused the birth defects

The Expansion of *Daubert*

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137
(1999)

Suit against tire manufacturer alleging a blowout caused rollover accident

Plaintiffs offered an engineering expert who concluded a design or manufacturing defect caused the blowout

Engineers Are Experts Too

“*Daubert’s* general holding . . . applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” (p. 141)

THE OKLAHOMA GATE

Oklahoma (and 31 other states) follow *Daubert*

Christian v. Gray, 2003 OK 10, 65 P.3d 591

Circus inhalant case

“Today we . . . adopt *Daubert* and *Kumho* as appropriate standards for Oklahoma trial courts in deciding the admissibility of expert testimony in civil matters.”

Workers' Compensation Court

- A decision of the WCC must be supported by objective medical evidence:

"Objective medical evidence" means evidence which meets the criteria of Federal Rule of Evidence 702 and all U.S. Supreme Court case law applicable thereto.

85 O.S. Supp. 2005 § 3(17)

Workers' Compensation Court

“We conclude that 85 O.S.Supp.2005 § 3(17) incorporates Federal Rule 702, as amended December 1, 2000. We also conclude that the U.S. Supreme Court opinions construing former Rule 702 are those opinions referred to and incorporated by 85 O.S.Supp.2005 § 3(17). *Daubert* and *Kumho* are thus applicable to amended § 3(17).”

Scruggs v. Edwards, 2007 OK 6, 154 P.3d 1257

Decorating the Gate

2009 Amendments

- An expert may testify in the form of an opinion 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 witness has applied the principles and methods reliably to the facts of the case.

12 O.S. Supp. 2009 § 2702 – effective November
1, 2009

2009 Amendments

- The last three were added by the amendment to conform to amendments to Federal Rule 702
- No. 1 probably doesn't change anything, "sufficient" being less specific than 2703 and other Rules
- No. 2 seems to track *Daubert*
- No. 3 is not specifically addressed in *Daubert* but seems intuitive
- Doesn't appear the 2009 amendments made any substantive change

Who Decides

- Expert testimony raises three issues:
 1. Is the witness qualified as an expert?
 2. Is the expert's opinion admissible?
 3. What does the expert's opinion prove?

THE GATEKEEPER

- Typically, a challenge to the expert's qualifications is raised first.

An injured person is “not qualified to diagnose diseases or to form opinions as to the necessity of the treatment for physical disorders.”

Matchen v. McGahey, 1969 OK 48, 455 P.2d 52

THE GATEKEEPER

- The trial judge examines the relevance and reliability of the evidence : “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but must be 'scientific' and reliable.”
Daubert, 509 U.S. 579, at 589.
Christian, at par. 7

THE GATEKEEPER

- “Our Evidence Code currently recognizes the gatekeeping capacity of a trial judge, and *Daubert* is but a refinement of this role.”

Christian, at par. 9

Objections To Expert's Opinion

1. The expert's opinion is not relevant to the issues in the case.

An expert opinion that fails to assess the affect of a pre-existing condition is not probative evidence of a subsequent work-related injury.

Hammons v. Oklahoma Fixture Company, 2003 OK 7, 64 P.3d 1108

Objections To Expert Witnesses

2. Although relevant, the opinion's probative value is "substantially outweighed" by other considerations.

12 O.S. Supp. 2003 § 2403

The most qualified expert cannot testify if the expert is a judge or juror in the case.

12 O.S.2001 §§ 2605 & 2606

Objections To Expert Witnesses

3. Although the expert is qualified and the opinion is not otherwise objectionable, the methodology is not scientifically reliable.

An expert test administrator may not testify regarding the results of lie detector test because the test has not been proven to be scientifically reliable.

Determining Reliability

- Can (or has) the method been tested
- Has it been subjected to peer review/publication
- What is the method's error rate
- Is it generally accepted
- Others? this is a non-exhaustive list

Admissibility Versus Credibility

“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.”

Daubert, 509 U.S. 596

YOU BE THE JUDGE

- Plaintiff sued otolaryngologist after surgery on his ear to remove a tumor because the surgeon removed part of his carotid artery instead
- Is a Board Certified neurosurgeon with surgical experience on the internal carotid artery qualified to testify regarding the standard of care

Not In Mississippi

- Expertise in surgery on the carotid artery inside the brain is not equivalent to expertise in surgery on the middle ear.

Troupe v. McAuley, 2007

- Mississippi follows *Daubert*

YOU BE THE JUDGE

- Patient admitted for surgery
- After two abdominal eviscerations, his surgeon orders that he not be moved for 48 hours
- Patient develops bedsores before discharge and sues
- Is a registered nurse, with 18 years experience and who has specialized in wound care qualified to give expert testimony regarding whether the patient received appropriate care

Applying *Daubert*

- Does the nurse have scientific, technical or specialized knowledge
- Is that knowledge testable, subject to peer evaluation, with an acceptable rate of error and generally acceptable, others?
- Is that knowledge relevant to the issues in the case

IT DEPENDS

- If she is testifying regarding the standard of care appropriate for treatment of bedsores
- YES
- If she is testifying regarding the physician's standard care
- Don't know – the physician was dismissed

Gaines v. Comanche Co. Medical Hospital and Nursefinders, Inc., 2006 OK 39

BOTTOMLINE

- The General Acceptance test is still widely used in *Daubert* states
 - or, at least, the most emphasized of the *Daubert* standards
- *Daubert* has reduced the number of trials

Report of the 2006 Forum for State Appellate Court Judges – Pound Civil Justice Institute

Don't Shoot The Gatekeeper

- The trial judge applies these legal principles
- Determines who is an expert and whether that expert's opinion is admissible.

Jury Decides Credibility

- Issues of fact . . . shall be tried by a jury.

12 O.S.2001 § 556

- “The weight to be accorded to expert testimony is for the jury, who may follow their own experiences, observations and common knowledge and may reject opinions of experts.”

Boxberger v. Martin, 1976 OK 78, 552 P.2d 370

Jury Decides Credibility

- The fact that physicians could have admissible opinions with varying probative value prior to *Daubert* has not been changed by applying *Daubert*.

Scruggs v. Edwards, 2007 OK 6, 154 P.3d 1257

- Those opinions may vary even though they are based upon the same medical records, history and tests.

Conaghan v. Riverfield Country Day Sch., 2007 OK 60, 163 P.3d 557