

Admissibility of Social Science Evidence in Law

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Adversary System Use of Experts

- Parties hire experts through their lawyers
 - For initial hiring decision, lawyers most often rely on the recommendations of other lawyers in their fields (for example, a criminal defense attorney would consult with other criminal defense attorneys; a plaintiff's lawyer specializing in tort cases would consult with other plaintiff's tort lawyers)
 - There is an initial discussion between the lawyer and the expert about the outline of the case and the broad issues requiring an expert evaluation
 - In turn the expert informs the lawyer about the expert's ability to perform the review, and of his or her hourly rate or other fees
 - If the work agreement is acceptable, the expert will receive a letter confirming his or her hiring and the fees that will be paid.
 - Materials are sent to the expert and reviewed
 - Typically there is communication between the lawyer and the expert by telephone or in person before the expert does a written review
 - Often, the expert signs a confidentiality agreement before agreeing to review the materials

Experts who testify and those who do not

- Experts who testify
 - Written report and resume are filed with the court and provided to the other party
 - Notes and writings by the expert concerning the case, including communications between the lawyer and the expert, are usually “discoverable” – that is, they may have to be provided to the other party in the litigation
- Experts who don't testify
 - Usually no requirement to provide these communications, because they are protected as part of the lawyer's trial preparation
 - Some lawyers may hire experts they do not intend to have testify (or after the written report, they do not want to have testify), and the expert is bound by the confidentiality agreement – called “parking” the expert

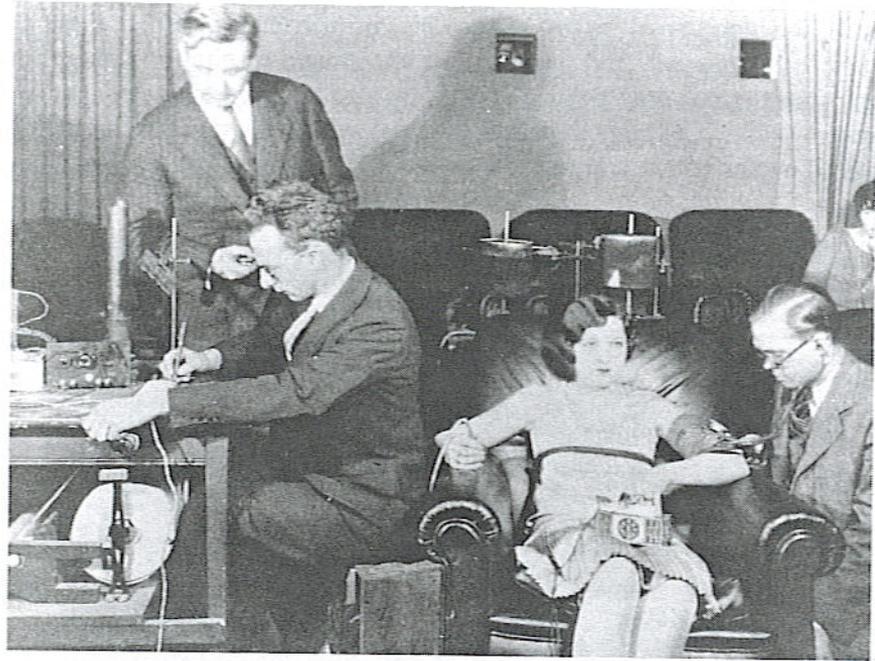
Cases Governing Admissibility of Expert Evidence in USA

- *Frye v. U.S.* (Court of Appeals, D.C. Circuit, 1923)
 - *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (U.S. Supreme Court, 1993)
 - *General Electric v. Joiner* (U.S. Supreme Court 1997)
 - *Kumho Tire Company v. Carmichael* (U.S. Supreme Court, 1999)
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The *Frye* Case

Defendant James Alphonso Frye

- recanted his prior confession in a murder trial
- offered an early version of lie detector test to prove his innocence in a murder trial
- The lie detector he offered was invented by Dr. William Marston (standing, in photo; image from www.umw.edu)



A Laboratory Set-Up of Lie Detector Apparatus - Used by Dr. Marston at Columbia University. Blood pressure, discontinuous method, is taken by Tyco's. Psychogalvanometer is connected to subject's fingers. Grip and respiration make record on smoked drum. Above photograph depicts Bill Marston standing and Olive Richard is in the back watching the smoked drum recording which is directly behind the model who is posing as the subject. A chronoscope is in her lap, her right hand holds the device for recording muscle tension. The electrodes are on her left hand and the student on the left is recording the galvanometer fluctuations. The student on the right is monitoring blood pressure.

Figure II-4. From Marston, William Moulton (1938). *The Lie Detector Test*. New York: Richard R. Smith, Reprinted by the American Polygraph Association, 1989.

Legal Rules of Expert Testimony

- *Frye* Test: D.C. Circuit Court of Appeals (1923)
 - Distinguished between the qualifications of the expert and the substance of the testimony
 - Held that the scientific evidence must meet the “general acceptance” test, that is, have support by a consensus of scientists in the relevant field of science
 - What are the problems with this test?
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Problems Scholars Have Identified with the *Frye* Rule

- Conservative rule
- Because of lengthy waiting period between a discovery and general acceptance, developing science couldn't meet test
- Problem of determining general acceptance
- Generally accepted science can be wrong



USA -- Federal Rules of Evidence – 1970s

Rule 702. Testimony by Experts. 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.



Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993)

- The case established principles for judicial review of expert scientific testimony
 - Is testimony based on good science?
 - **Can it be tested? Has it been tested?**
 - Was the testing done in the context of litigation? If so it may be less reliable.
 - **Has the scientific research been published in a peer reviewed scientific publication?**
 - **What is the known or potential rate of error?**
 - **Is the underlying science generally accepted?**
 - not required, but a positive indication of reliability)
 - Is it relevant to the case?
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Daubert Progeny

- *General Electric v. Joiner* (1997)
 - Held that the appellate standard of review for judicial decision on admissibility is abuse of discretion
 - Interesting concurrence by Justice Breyer, which advocates the use special masters; court appointed experts; narrowing of issues; and pretrial hearings of experts
 - *Kumho Tire Company v. Carmichael* (1999)
 - Held that *Daubert* applies to experience-based expert testimony
 - Important case for social science
 - Although most observers thought *Daubert* applied to social science research, *Kumho* reinforced the idea that a broad array of expert testimony should be reviewed by the judge for reliability
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Post *Daubert* -- FRE 702 is amended in 2000:

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 (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.*

Comparing *Frye* and *Daubert*

	Scientific foundation strong	Scientific foundation weak
General acceptance high		
General acceptance low		

Comparing *Frye* and *Daubert*

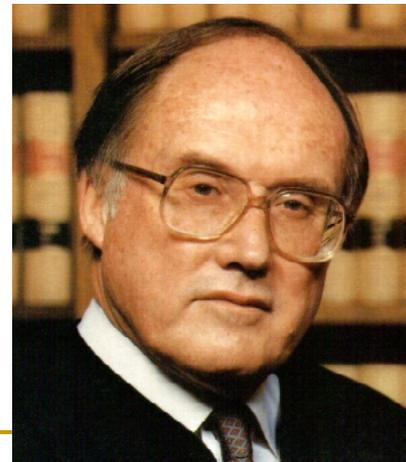
	Scientific foundation strong	Scientific foundation weak
General acceptance high	Both admit	<i>Frye</i> admits but <i>Daubert</i> excludes
General acceptance low	<i>Frye</i> excludes but <i>Daubert</i> admits	Both exclude

The Judge: Amateur Scientist?

I defer to no one in my confidence in federal judges....but I do not think [Rule 702 imposes on judges] the obligation or the authority to become amateur scientists...

Former Chief Justice of the U.S Supreme Court
William Rehnquist

(image from law.cornell.edu)



The “Amateur Scientists” Get Help

- Judicial workshops providing training in science
 - Brooklyn Law School’s Science for Judges workshops were funded by Common Benefit Trust, established by court order in the Silicone Gel Breast Implant products liability litigation
 - Reference Manual on Scientific Evidence, Federal Judicial Center
 - Research on judges’ understanding of science issues reveals some problems
 - We will discuss judicial comprehension of science later in the course
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Scholarly Critiques:

- Some scholars say that *Daubert's* criteria favor wealthy & repeat players in civil litigation, disadvantaging plaintiffs.
 - Scholars have observed the following pattern: Judges readily apply criteria to exclude plaintiffs' experts in civil lawsuits, but rarely exclude prosecution experts on forensic identification in criminal cases.
 - Some scholars question whether judges understand the underlying science well enough to reach reasonable decisions about admissibility.
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Sequence – expert testimony in civil lawsuit

■ Plaintiff's expert

- Direct examination (by plaintiff's lawyer)
- Cross-examination (by defense's lawyer)
- Redirect examination (by plaintiff's lawyer)

■ Defense's expert

- Direct examination (by defense's lawyer)
 - Cross-examination (by plaintiff's lawyer)
 - Redirect examination (by defense's lawyer)
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In Sum: Issues Relating to Experts in the American Adversary System

- Does the judge in his or her “gatekeeping” role take over what should be the function of the jury, to evaluate and weigh evidence?
 - Is it appropriate to have an “abuse of discretion” standard of review of the judge’s decision about admissibility?
 - How can the integrity of experts be maximized in this system?
 - Is the judge’s and jury’s understanding of expert testimony sufficient to be able to use expert evidence appropriately?
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Appointment and Use of Experts in Civil Law Systems

- In the reading, Knorrschild and van Koppen provide framework
 - They use Dutch and German examples
 - They focus on the domain of psychological experts performing witness credibility assessments
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The court selects an expert

- The judge (in Germany, also the prosecutor who is a magistrate) may select an expert from court lists of approved experts, or through recommendations or previous experiences with the expert
 - The defense is informed about the proposed choice of an expert, and may express preferences or make a request for a different expert to be appointed by the court
 - In extreme cases, an expert may be rejected outright by the defense or the prosecutor or private party on grounds of lack of neutrality or other evidence
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The court selects an expert

- Slightly different codes govern the choice of experts in Germany and the Netherlands.
 - Both countries have judicial appointment of experts, with input by the parties including the defense
 - In both countries, there are provisions for the rejection of a court expert, but under narrow conditions (narrower in Germany).
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Defense selection of additional experts in the Netherlands

■ The Netherlands

- ❑ The defense has a right to order a second opinion report
 - ❑ The defense has a right to appoint a second expert to be present during the court-appointed expert's examination
 - ❑ In both of these instances, the court will pay for the defense expert out of public funds
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Defense selection of additional experts in Germany

- German lawyers may also hire an additional expert
 - Depending on the situation, this expert may also be paid from public funds

Contact with expert in Germany and the Netherlands

- Phone call between the judge or lawyer and the expert
 - Discussion of case, request for expert evaluation, timing
 - If all is satisfactory, the court then makes the appointment of the expert, and provides specific questions to be answered
 - E.g. “Is the statement of the child credible?”
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Court rulings on statement analysis

- In Germany, the Federal Supreme Court has ruled on scientific requirements and approach for credibility assessments
 - Dutch Supreme Court has also issued guidelines for the methodology to be used in credibility assessments
 - But academic researchers have criticized these methods
 - Problem – how can regulations and rulings be used to promote reliable expert procedures, yet be flexible enough to take into account new scientific knowledge?
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Sequence – experts in civil law countries – illustrations by Knornschild & van Koppen

The Netherlands

- Written report
- Judge, prosecutor, and defense attorney read files
- Expert is rarely present at main hearing
- Expert may have to respond to questions about report, but this is not frequent
- Appearance of expert is usually of short duration

Germany (emphasizes immediacy)

- Usually a written report
- Appointed expert must appear in court, and be present throughout the entire main hearing.
- Expert makes oral presentation of the assessment, based on facts presented at hearing, and answers questions
- Expert may pose questions of the other witnesses after other court actors have asked their questions