

■ Tensions in Daubert

Perspectives from a defense attorney

DCDLA & DRI Amicus Brief

- In support of adoption of FRE 702 & *Daubert* to modernize standards for admission of expert opinions
- *Frye/Dyas* was antiquated
- Link admissibility directly to reliability & trustworthiness of expert opinions
- Trial court already has a gatekeeper function

Silicone Breast Implant Litigation

- 1990 – Face to Face with Connie Chung
- 1991 – Verdicts: \$5.4 million, \$7.3 million, \$25 million
- 1993 – 12,359 individual lawsuits v. Dow Corning & class action v. 4 manufacturers tentative \$4.75 billion settlement
- 1994 – Dow Corning files for bankruptcy, remaining manufacturers settle for \$3.4 billion
- 1995 – medical literature – no link
- 1996 – judges rule claims scientifically invalid

Battle of the Experts

- Jurors rely on their *opinion of the expert* rather than the *expert's opinion*
- Influenced by factors other than the reliability of the methodology and its application
 - Credentials & experience
 - Demeanor, delivery & teaching ability
 - Command of facts
 - Perceptions of bias
 - Likeability

Judges as Gatekeepers

AP

NORC at the University of Chicago

SCIENCE AND TECHNOLOGY

June 15, 2023

Major declines in the public's confidence in science in the wake of the pandemic.

Half as many Republicans were confident in the scientific community compared to pre-pandemic levels. And bolstered support from Democrats during the pandemic eroded to pre-pandemic levels, based on an analysis of GSS data. Confidence in other institutions like education, business, journalism, and religion also slipped.



Pew Research Center

RT | NOVEMBER 14, 2023

Americans' Trust in Scientists, Positive Views of Science Continue to Decline

Among both Democrats and Republicans, trust in scientists is lower than before the pandemic

Judges as Gatekeepers

Science and Technology: Public Perceptions, Awareness, and Information Sources



February 2024

Executive Summary

Executive Summary



U.S. National
Science
Foundation



Key takeaways:

- Public confidence in science and scientists has remained high for decades, with the majority of American adults reporting positive assessments of science and scientists. In 2022, 88% of U.S. adults agreed that scientific research that advances the frontiers of knowledge is necessary and deserves federal government support.
- A clear majority of U.S. adults—77% as of September 2022—expresses at least a fair amount of confidence in scientists to act in the best interests of the public.
- As recently as 2020, a small percentage of American adults reported any recent experience with various science activities—for example, participating in an online crowdsourcing activity for science data collection (3%) or helping a child with a science project either for school or outside of school (19%).
- Households with greater parent educational attainment or income report more exposure to science through children's activities, such as school projects, than do households with lower educational attainment or income.
- The majority of American adults (60%) report a basic understanding of scientific research principles such as the usefulness of a study control group for comparison with a treatment group, yet only half of U.S. adults (50%) could correctly identify a scientific hypothesis as of 2020.

Daubert Challenges Work Both Ways

- Alleged loss of taste due to tonsillectomy
- Electrogustometry testing showed no loss of taste
- Challenge to EGM as unreliable
- Hearing before Judge Pan

2023 Amendment FRE 702

- **Rule 702. Testimony by expert witnesses.**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not:

- a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) ~~the expert has reliably applied~~ the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Chronology

- 1923 – *Frye*
- 1975 – FRE 702: 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.
- 1993 – *Daubert*
- 2000 – FRE 702 amended to reflect *Daubert*, *Joiner*, and *Kumho Tire*
- 2011 – FRE 702 stylistic amendments
- 2016 – *Motorola* adopts FRE 702
- 2023 – FRE amendment

Initiating a *Daubert* Challenge

- The earlier the better
- Consult with your expert on receipt of report
- Research testimonial history and exclusion of opinions
- Focus deposition questions to establish lack of reliability
 - Non-exclusive factors
- Present your expert to challenge reliability
 - Report
 - Deposition
 - *Daubert* hearing
- Methodology expert?

Avoiding a *Daubert* Challenge

- Vet your experts
 - Qualifications and scope of expertise
 - Prior challenges and exclusion
- Literature research
- Review and prepare on reliability
 - Expert needs to explain at deposition
 - Attorney may need to explain in briefing and argument

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