

COURT'S DUTY TO REVIEW RELIABILITY OF SCIENTIFIC  
EVIDENCE  
by Ted Babbitt

In Frye v United States, 293 F.2d 1013 (D.C. Cir. 1923), the Federal Courts adopted what has come to be known as the “Frye” standard for the admissibility of scientific evidence. That standard requires that a trial court make a preliminary determination of the reliability of scientific evidence before admitting it into evidence. Simply stated, the “Frye” test requires that the Court determine whether the scientific evidence has gained “general acceptance” in the scientific community before admitting it.

Subsequent to the decision in Frye, supra, Federal Rule of Evidence 702 was adopted. That Rule provides

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.

Subsequent to the adoption of Rule 702, the United State Supreme Court decided Daubert v Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed 2d 469 (1993). That case concluded that the Federal Evidence Code superseded the Frye test and broadened the standard for admissibility of scientific opinion, since the rule did not have the “general acceptance” language.

Like its counterpart in the Federal Rule, §90.702 of the Florida Evidence Code, was also adopted without the “general acceptance” requirement of Frye. The Florida Supreme Court, however, has not yet adopted the reasoning in Daubert, supra, and has retained the Frye test. Brim v State, 695 So.2d 268 (Fla. 1997); Murray v State, 692 So.2d 157 (Fla. 1997); Hadden v State, 690 So.2d 673 (Fla. 1977); Ramirez v State, 651 So.2d 1164 (Fla. 1995).

In Hadden, supra, at 578, the Supreme Court explained the Frye reasoning as follows:

Novel scientific evidence must . . . be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion. In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

In Ramirez, supra, at 1167 a four step test for the trial court to follow in determining the reliability of the proffered testimony is created. First, whether the expert testimony will assist the jury in understanding the evidence. Second, whether the testimony is based upon a scientific principle that is sufficiently established to have gained general acceptance. Third, whether the witness is qualified as an expert to give opinion testimony on that issue and lastly

after admitting the testimony, the jury is allowed to determine the credibility of that witness' opinion.

In Poulin v Fleming, 26 F.L.W. D748 (Fla. 5<sup>th</sup> DCA March 16, 2001), the trial court held that the testimony of three expert witnesses on the issue of whether a child's brain damage was caused by the application of radiation to the mother during her pregnancy did not meet the Frye test and was, therefore, inadmissible. In affirming, the Fifth District explained that an appellate court must make a *de novo* determination as a matter of law as to whether the trial court's decision should stand. In doing so, the appellate court reviewed relevant expert testimony, scientific writings and legal research in determining whether the "general acceptance" test had been met. Finding, in this particular case, that there was no peer reviewed medical literature supporting the opinions of the experts and that the experts themselves had had little, if any, experience outside the Courtroom with the medical issues involved, the appellate court affirmed the trial court's opinion that the testimony was not reliable on any basis other than that it was simply the experts' opinions.

The Supreme Court of Florida has not had an opportunity, within the last four years, to determine whether it will abandon Frye and adopt Daubert. This

case and Brim v State, 2000 WL 1568741 (Fla. 2d DCA Oct. 11, 2000) are ripe for determination of this issue. The Frye case, since its inception, has been criticized as being both harsh and inflexible. See Stokes v State, 548 So.2d 188 (Fla. 1989). Indeed, Frye requires that the trial court evaluate scientific principles without having the requisite underlying scientific knowledge. While the trial court's duty to determine the *reliability* of testimony is not unique to this issue, the very fact that expert testimony is required on the questions involved makes it difficult to understand how a trial judge could be put in the position of being a "super expert" when the Judge has little or no expertise on the issue. (See this author's prior article entitled "Requirements for Expert Testimony" Palm Beach County Bar Bulletin, June, 1998)

For now, at least, Frye, supra, is alive and well in Florida and expert testimony, whether offered in a civil or criminal case for either side, must first pass the test of general acceptance in the scientific community before it can be admitted.