

LAYING THE FOUNDATION: EXPERT WITNESSES

EVIDENCE AND PROCEDURE SEMINAR 2016: STEPS TO JUSTICE

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I. INTRODUCTION

The decision of a judge or jurors who decide a case mostly depends upon the testimony of witnesses and exhibits introduced at trial. Lay witnesses usually testify as to facts, but sometimes, because of the difficulty in distinguishing between fact and opinion, a lay witness may provide opinion testimony if it is (1) rationally based upon the witness's perception, and (2) helpful to a clear understanding of the witness's testimony.²

But some opinions are based on more than the witness's perception. A witness may have an opinion because of skill, knowledge, education, experience, or training which allows that witness to make a reliable inference about pertinent facts in the case. When this happens, that witness, an expert, may testify in the form of an opinion if certain criteria are met. Admission of expert testimony is proper if:

- (1) the expert is qualified to testify competently regarding the matters he intends to address;
- (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
- (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.³

II. EXPERT QUALIFICATION

A trial judge is allowed "broad discretion" in determining whether a witness is qualified to be an expert and whether expert testimony should be admitted, and the judge's decision to qualify an expert will not be overturned absent an abuse of discretion.⁴ Preliminary questions concerning the competency or qualification of an expert witness are determined by the court outside of the presence of the jury and are not subject to the rules of evidence, except with respect to privileges.⁵

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² La. Code Evid. art. 701; Fed. R. Evid. 701.

³ *Cheairs v. State*, 03-0680 (La. 12/3/03), 861 So. 2d 536, 542.

⁴ *Cheairs*, 861 So. 2d at 541; *Jones v. Black*, 13-1889 (La. App. 1st Cir. 5/2/14), 145 So. 3d 402, 410; *State v. Allen*, 41,548 (La. App. 2d Cir. 11/15/06), 942 So. 2d 1244, 1255; *Guidry v. Beauregard Elec. Coop., Inc.*, 14-1108 (La. App. 3d Cir. 4/8/15), 164 So. 3d 266, 278; *A.S. v. D.S.*, 14-1098 (La. App. 4th Cir. 4/8/15), 165 So. 3d 247, 257; *State v. White*, 14-631 (La. App. 5th Cir. 12/23/14), 168 So. 3d 664, 668.

⁵ La. Code Evid. art. 104.

In deciding preliminary questions, the trial judge generally applies the preponderance of the evidence standard, unless the law prescribes a specific foundation or prerequisite for admissibility.⁶

No special criteria apply to the qualification of a first-time expert because everyone must qualify for the first time.⁷ Experience alone is normally sufficient to qualify a witness as an expert.⁸ And credibility determinations, including evaluating expert witness testimony, are for the trier of fact.⁹ When the court has made a preliminary determination of admissibility, a party may introduce further evidence at trial relevant to the weight or credibility to be given the expert's testimony.

III. EXPERT METHODOLOGY

Although the focus of this paper is on Louisiana law, some familiarity with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰ is necessary because the Louisiana Supreme Court in *State v. Foret*¹¹ adopted *Daubert's* reasoning. When state rules follow the federal analogues, the interpretation from federal court decisions is persuasive authority. But the persuasiveness, as discussed below, is limited to methodology only.

A. The Evolution of Methodology in Federal Court - *Daubert* and All That

For seventy years the case of *Frye v. United States*¹² controlled the admissibility of expert scientific evidence in federal courts. Courts applying *Frye* typically limited its application to so-called "black box" testimony, *i.e.*, machines, devices, or techniques that authoritatively and automatically decide outcome-determinative truths,¹³ since such testimony has the aura of infallibility and thus the potential to overawe the jury.¹⁴

The *Frye* court affirmed the trial court's refusal to allow a scientist's testimony about a criminal defendant's test results from a predecessor of a polygraph machine stating that before admitting expert scientific testimony, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it

⁶ Comment (c) to La. Code Evid. art. 104.

⁷ *State v. Watts*, 14-0429 (La. App. 1st Cir. 11/21/14), 168 So. 3d 441, 451.

⁸ *Cheairs v. State*, 03-0680 (La. 12/3/03), 861 So. 2d 536, 542; *Guardia v. Lakeview Reg'l Med. Ctr.*, 11-1877 (La. App. 1st Cir. 11/2/12), 2012 WL 5381494; *Pratt v. Culpepper*, 49,627 (La. App. 2d Cir. 2/27/15), 162 So. 3d 616, 626; *Godchaux v. Peerless Ins. Co.*, 13-1083 (La. App. 3d Cir. 6/4/14), 140 So. 3d 817, 822; *Griggs v. Harrah's Casino*, 05-0321 (La. App. 4th Cir. 3/22/06), 929 So. 2d 204, 217; *Pertuit v. Jefferson Par. Hosp. Serv. Dist. No. 2*, 14-752 (La. App. 5th Cir. 5/14/15), 170 So. 3d 1106, 1111.

⁹ *Ryan v. Zurich Am. Ins. Co.*, 07-2312 (La. 7/1/08), 988 So. 2d 214, 222; *Detraz v. Lee*, 05-1263 (La. 1/17/07), 950 So. 2d 557, 564.

¹⁰ 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

¹¹ 628 So. 2d 1116 (La. 1993).

¹² 293 F. 1013, 1014 (D.C. Cir. 1923).

¹³ Michael H. Graham, *Scientific and Technological Evidence*, in Handbook of Federal Evidence 15 (4th ed., 1999 Pocket Part); Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law's Hubris*, 43 EMORY L.J. 913, 915-16 (1994).

¹⁴ Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317, 331 (2000).

belongs.” For the most part, U.S. courts only applied the *Frye* test in criminal cases.¹⁵ *Frye* did not stand as a roadblock to the admissibility of scientific expert testimony, being cited less than one hundred times in federal and state cases until 1975.¹⁶ But as the litigation use of diverse kinds of expert testimony dramatically increased, business and industry groups clamored for additional screening of expert scientific testimony.

In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁷ the United States Supreme Court considered whether *Frye* survived the 1975 adoption of Federal Rule of Evidence 702. The rule, since changed, provided:

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.

The Court held Rule 702 superseded *Frye*’s “rigid” requirement that testimony based on a scientific methodology or technique was admissible only if it had achieved “general acceptance” in the relevant field. The *Daubert* decision recognized Rule 702’s “liberal thrust” and its “general approach of relaxing the traditional barriers to opinion testimony.” The decision directs trial courts to assess whether proffered testimony or evidence admitted at trial is not only relevant, but reliable.¹⁸

According to *Daubert*, trial courts should make 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.”¹⁹ The Court referenced five factors that should guide the trial court’s decision.²⁰ It emphasized none of the factors was indispensable, and the overall inquiry is a flexible one. The non-definitive checklist directs trial courts to evaluate:

- (1) whether the expert’s technique or theory can be or has been tested—that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
- (2) whether the technique or theory has been subject to peer review and publication;
- (3) the known or potential rate of error of the technique or theory when applied;

¹⁵ *Confronting the New Challenges of Scientific Evidence: III. Judicial Responsibilities in Assessing Expert Testimony*, 108 HARV. L. REV. 1509, 1529 n. 160 (1995).

¹⁶ Michael J. Saks, *Merlin and Solomon: Lessons from the Law’s Formative Encounters with Forensic Identification Science*, 49 HASTINGS L.J. 1069, 1076 (1998).

¹⁷ 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

¹⁸ *Daubert*, 509 U.S. at 593–95.

¹⁹ *Daubert*, 509 U.S. at 592.

²⁰ *Daubert*, 509 U.S. at 593–94.

- (4) the existence and maintenance of standards and controls; and
- (5) whether the technique or theory has been generally accepted in the scientific community.

Over the next seven years, the U. S. Supreme Court addressed the admissibility of expert testimony three more times. In *General Electric Co. v. Joiner*²¹ the Court held that appellate courts must apply the highly deferential “abuse of discretion” standard to trial court rulings admitting or excluding scientific evidence. The *Joiner* court also allows federal trial courts to examine the relationship between an expert’s methodologies and conclusions, stating that they “are not entirely distinct from one another.” The Court concluded that a trial court must not “admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”²²

The Supreme Court concluded in *Kumho Tire Co. v. Carmichael*²³ that Rule 702 mandates all types of expert evidence are subject to the “gatekeeping” requirements of *Daubert*. *Kumho* reemphasized that the five *Daubert* factors could not always be used to evaluate the reliability and admissibility of all types of expertise. Trial courts should have broad discretion to devise alternative tests for “determining whether particular expert testimony is reliable.”²⁴ It is not necessary that all, or even one, of the *Daubert* factors be satisfied for the testimony to be admissible. Expert testimony from historically reliable disciplines which conforms to the standards associated with those disciplines shall be freely admitted. Conclusions consistent with commonly used methodologies will be admissible when drawn “from a set of observations based on extensive and specialized experience.”²⁵ And most significantly, trial courts may use discretion “to avoid unnecessary ‘reliability’ proceedings in ordinary cases when the reliability of the expert’s methods is properly taken for granted.”²⁶ The Court emphasized that the best gauge for assessing reliability of expert testimony is whether the expert employs in the courtroom the “same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”²⁷

In *Weisgram v. Marley Co.*,²⁸ the Court ruled that an appellate court reversing a trial court’s decision to admit an expert’s testimony need not remand the case to allow that party a second chance to cure what the appellate court regarded as unreliable evidence. Thus, the party affected by the exclusion of the evidence may not be permitted to reexamine the disqualified expert so as to provide a satisfactory explanation of his methodologies’ reasoning and conclusions. Further, the party harmed by the appellate decision to exclude testimony may not be permitted to find other experts who can validate or cure the excluded expert’s work.

Rule 702 was amended in 2000 in response to *Daubert* and *Kumho*,²⁹ and again in 2011 for styling purposes. Rule 702 now provides (emphasis added):

²¹ 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

²² *General Elec.*, 522 U.S. at 146.

²³ 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

²⁴ *Kumho*, 526 U.S. at 152.

²⁵ *Kumho*, 526 U.S. at 156.

²⁶ *Kumho*, 526 U.S. at 152.

²⁷ *Kumho*, 526 U.S. at 152.

²⁸ 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000).

²⁹ Advisory Committee Notes 2000 Amendments, Fed. R. Evid. 702.

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:

- (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 principles and methods to the facts of the case.*

The italicized language “affirms the trial court’s role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.”³⁰ The committee notes on amended Rule 702 make plain that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a “seachange over federal evidence law,” and “the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.”³¹

B. Methodology in Louisiana State Courts - *Daubert/Foret*

The Louisiana Supreme Court adopted the principles set forth in *Daubert* in *State v. Foret*.³² *Foret* establishes that article 702 controls the admissibility of expert scientific evidence in Louisiana. For the testimony of an expert to be admissible, the court must first determine whether the expert’s reasoning or methodology embodies “the knowledge and experience of his discipline.”³³ In making this reliability determination, the applicability of the five “*Daubert*” factors may be considered by the court.³⁴ The *Daubert* factors are flexible and do not represent a definitive checklist. Some or none of the factors may be readily applied in a particular case.³⁵

Unlike state article 702, amended federal Rule 702 allows further gatekeeper inquiry into the expert’s conclusions as well by testing whether the expert had sufficient facts (step 1 – “the testimony is based upon sufficient facts or data”) and whether the expert reliably applied the methodology to those facts (step 3 – “the witness has applied the principles and methods reliably to the facts of the case”). *Daubert* clearly limited the relevant inquiry to methodology only – “the focus, of course, must be solely on principles and methodology, not on the conclusions they generate.”³⁶ The Louisiana Supreme Court has endorsed this focus on methodology only.³⁷

Louisiana appellate courts have repeatedly emphasized the narrower rule that the sole focus is the expert’s methodology, not the expert’s conclusions.

³⁰ Advisory Committee Notes 2000 Amendments, Fed. R. Evid. 702.

³¹ *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996).
³² 628 So. 2d 1116 (La. 1993).

³³ *Foret*, 628 So. 2d at 1122.

³⁴ The five *Daubert* factors are listed in the section above, “The Evolution of Methodology in Federal Court.”

³⁵ *Kumho*, 526 U.S. at 150; *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So. 2d 226, 234.

³⁶ *Daubert*, 509 U.S. at 595.

³⁷ *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So. 2d 226, 236; *Blank v. Sid Richardson Carbon & Gasoline Co.*, 00-1025 (La. 6/2/00), 762 So. 2d 1115; *Lam v. State Farm Mut. Auto. Ins. Co.*, 05-1139 (La. 11/29/06), 946 So. 2d 133, 143 (Justice Johnson dissenting).

Daubert is intended to protect the sanctity of the fact finding process by assessing the validity of the methodology employed by an expert and not the expert's application of that methodology or his conclusions derived from the application of that methodology.³⁸

Recently, this Court decided in *Dinett v. Lakeside Hospital*, 2000-2682 (La.App. 4 Cir. 2/20/02), 811 So.2d 116, that *Daubert* comes into play only when the methodology used by the expert is being questioned. This court found it improper to use *Daubert* analysis when questioning the conclusions reached by applying the methodology to the facts.³⁹

We find that the trial court did not err in admitting [the doctor's] testimony. The requirements of *Daubert* and *Foret* were satisfied. . . . The focus of the gatekeeper under C.E. art. 702 "must be solely on principles and methodology, not on the conclusions that they generate."⁴⁰

As the jurisprudence indicates, there is a crucial difference between questioning the methodology employed by an expert witness, and questioning the application of that methodology or the ultimate conclusions derived from that application. Only a question of the validity of the methodology employed brings *Daubert* into play.⁴¹

In 2014 the Louisiana legislature amended article 702 which now reads as a mirror image of Rule 702. It is important to note that the legislature specifically commented with regard to the additional language that "no change in law or result in a ruling on evidence admissibility shall be presumed or is intended by the Legislature of Louisiana by the passage of this Act." At least one circuit has noted that the 2014 amendment effects no change in the law.⁴² Thus, methodology alone should continue to be the focus in Louisiana state courts despite the additional language.

Thus, in Louisiana, as long as the expert's methodology is acceptable, cross-examination at trial is the means by which the facts and application are tested, whereas federal courts now test facts and application at the gatekeeper hearing before allowing the expert to testify at all. While one can argue whether the federal approach is helpful or impermissibly invades the province of the trier of fact, it is inarguable that the federal approach goes beyond Louisiana article 702. Focusing on methodology only, the experts qualified in Louisiana should only be excluded if they violate fundamental principles of their disciplines' methodologies. Of course, the testimony must "fit" the facts of the case by assisting the trier of fact to understand the fact in issue.⁴³

³⁸ *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 14-0141 (La. App. 1st Cir. 12/23/14), 168 So. 3d 556, 579.

³⁹ *Doe v. Archdiocese of New Orleans*, 01-0739 (La. App. 4th Cir. 5/8/02), 823 So. 2d 360, 364. See also *Tadlock v. Taylor*, 02-0712 (La. App. 4th Cir. 9/24/03), 857 So. 2d 20, 25-27.

⁴⁰ *Keener v. Mid-Continent Cas.*, 01-1357 (La. App. 5th Cir. 4/20/02), 817 So. 2d 347, 355 (citing *Daubert*, 509 U.S. at 595).

⁴¹ *Rhine v. Bayou Pipe Coating*, 11-724 (La. App. 3d Cir. 11/2/11), 79 So. 3d 430, 434, writ granted, 12-0197 (La. 4/20/12), 85 So. 3d 1279.

⁴² *Gilchrist Const. Co., LLC v. State, DOTD*, 13-2101 (La. App. 1st Cir. 3/9/15), 166 So. 3d 1045, 1052 fn. 5 ("Article 702 was amended by 2014 La. Acts, No. 630, § 1, but the amendment made no change in the law; it simply revised the wording of the statute.")

⁴³ *Cheairs v. State*, 03-0680 (La. 12/3/03), 861 So. 2d 536.

C. Triggering a Hearing

The trial judge decides whether to admit or exclude expert testimony.⁴⁴ But there is little guidance as to when an evidentiary hearing is required or what procedures a court should employ in deciding whether to admit expert testimony. *Kumho* states, “[t]he trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert’s relevant testimony is reliable.”⁴⁵ And *Kumho* advises that the trial judge has discretion to avoid “unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted.”⁴⁶ But the threshold showing required for a *Daubert* hearing is unclear.

It is plain that trial courts are more likely to conduct a *Daubert* hearing on “less usual or complex cases,”⁴⁷ once the opposition has called the expert’s proffered testimony “sufficiently into question.”⁴⁸ In civil cases, a court might refuse “to undertake any reliability-relevancy determination until the movant has made a prima facie showing of specific deficiencies in the opponent’s proposed testimony.”⁴⁹ The U.S. Fifth Circuit has concluded that the issue was raised “by providing conflicting medical literature and expert testimony.”⁵⁰ Other federal circuit courts of appeal have specifically found that district courts are not required to hold a pretrial evidentiary reliability hearing in carrying out their trial court gatekeeping function.⁵¹

Louisiana procedural law concerning *Daubert* hearings was clarified by legislation effective in 2009. The amendments to Code of Civil Procedure article 1425 require a pretrial hearing only if the movant sets forth “sufficient allegations” showing the necessity for such a hearing. Article 1425(F)(1) provides (emphasis added):

Any party may file a motion for a pretrial hearing to determine whether a witness qualifies as an expert or whether the methodologies employed by such witness are reliable under Articles 702 through 705 of the Louisiana Code of Evidence. The motion shall be filed not later than sixty days prior to trial and shall set forth **sufficient allegations** showing the necessity for these determinations by the court.

⁴⁴ La. Code Evid. art 104(A).

⁴⁵ *Kumho*, 526 U.S. at 152 (emphasis in original).

⁴⁶ *Kumho*, 526 U.S. at 152.

⁴⁷ *Kumho*, 526 U.S. at 152.

⁴⁸ *Kumho*, 526 U.S. at 149.

⁴⁹ MARGARET BERGER, FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *Supreme Court’s Trilogy on the Admissibility of Expert Testimony* 28–29 (2d ed. 2000).

⁵⁰ *Tanner v. Westbrook*, 174 F.3d 542, 546 (5th Cir. 1999).

⁵¹ *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) (quoting *Daubert*, 509 U.S. at 592); *United States v. Nichols*, 169 F.3d 1255, 1262–64 (10th Cir. 1999).

In criminal cases, there appears to be no requirement that a pretrial *Daubert* hearing is necessary when a party challenges the admissibility of an expert's testimony.⁵² In *State v. Hampton*,⁵³ the Fourth Circuit acknowledged that the requirement of "sufficient allegations" has not been thoroughly explained and that it appears the only requirement is to allege that the expert's methodology is neither reliable nor satisfies the requirements of *Daubert* and *Foret*.⁵⁴ The court further noted that article 1425(F) poses no *evidentiary* burden on the party challenging admissibility.⁵⁵ As a practical matter, however, it is advisable for the *Daubert* movant to set forth a statement from a learned text, provide a peer reviewed publication, give the trial judge an affidavit or deposition from a qualified expert, or some other effort along those lines. In *Arceneaux v. Shaw Group, Inc.*,⁵⁶ for example, the *Daubert* movant listed three main reasons why the doctor's testimony was unreliable and introduced the report of a competing doctor. Sufficient allegations must mean something more than uninformed speculation. Without reaching this minimum threshold, there is no need for a pretrial hearing.

An objection to the admissibility of evidence is not preserved for appellate review unless a contemporaneous objection to the evidence is made on the record at the trial or hearing.⁵⁷ When the objecting party fails to request a *Daubert* hearing, objections to the admissibility of an expert witness's testimony under *Daubert* are not preserved for appeal.⁵⁸

D. At The Hearing

If a *Daubert* hearing takes place, the court "is not bound by the rules of evidence except those with respect to privileges."⁵⁹ In other words, expert testimony may be challenged by inadmissible evidence. "When expert testimony is challenged under *Daubert*, the burden of proof rests with the party seeking to present the testimony."⁶⁰ The role of the trial court is to evaluate the reliability of the expert's testimony under the standards set forth in *Daubert*.

Although the trial court is afforded broad discretion in determining whether expert testimony is reliable under *Daubert*, that discretion is premised upon an understanding that *Daubert* is intended to protect the sanctity of the fact finding process by assessing the validity of the methodology employed by an expert and not the expert's application of that methodology or his conclusions derived from

⁵² *State v. Ferguson*, 09-1422 (La. App. 4th Cir. 2010), 54 So. 3d 152 (trial court's refusal to hold a *Daubert* hearing when criminal defendant challenged the expert serologist's methodology of analyzing a blood test that has been in use and accepted as valid for 83 years was not error); *State v. Johnson*, 10-137 (La. App. 1st Cir. 12/22/10), 2010 WL 5464926 (no error in trial court's failure to hold a *Daubert* hearing when criminal defendant challenged fingerprint expert's methodology that defense counsel admitted has been in use and accepted as valid for over 70 years).

⁵³ 15-1222 (La. App. 4th Cir. 12/23/15), 2015 WL 9584029.

⁵⁴ *Hampton*, 2015 WL 9584029 at *4, n. 2.

⁵⁵ *Hampton*, 2015 WL 9584029 at *8.

⁵⁶ 12-0135 (La. App. 1st Cir. 9/24/12), 103 So. 3d 1086, 1089-90.

⁵⁷ La. Code Evid. art. 103(A); *Davis v. Kreuzer*, 633 So. 2d 796, 803 (La. App. 4th Cir. 1994); *Brown v. Schwegmann*, 05-0830 (La. App. 4th Cir. 4/25/07), 958 So. 2d 721.

⁵⁸ *State v. Pickett*, 03-1492 (La. App. 3d Cir. 5/26/04), 878 So. 2d 722; *Brown v. Schwegmann*, 05-0830 (La. App. 4th Cir. 4/25/07), 958 So. 2d 721.

⁵⁹ La. Code Evid. art. 104(A).

⁶⁰ *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998). See also *State v. Hampton*, 15-1222 (La. App. 4th Cir. 12/23/15), 2015 WL 9584029, *8 (the proponent of the challenged evidence bears the burden of establishing at the *Daubert-Foret* hearing that the evidence is reliable).

the application of that methodology. Certainly, not all experts are equal; however, issues involving the credibility of the expert, the weight to be given to the expert's testimony, and the resolution of conflicts between expert opinions testimony are to be assessed at trial by the trier of fact.⁶¹

For the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case. All the trial judge is asked to decide in a *Daubert* hearing is whether the methodology is reliable and passes *Daubert* scrutiny.⁶² Although under Code of Civil Procedure article 1425(F)(2), "the court may allow live testimony at the contradictory [*Daubert*] hearing," there is usually no reason for that. A paper-only hearing is usually advisable when the *Daubert* hearing involves complex scientific matters. Remember the court is not supposed to decide the merits of the matter, only that the expert's methodology and its relevance to the case is acceptable. Courts usually benefit from being able to review specialized scientific material in written form at their leisure since credibility of the witness is not at issue.

E. Ruling on the *Daubert* Motion

The 2009 amendment to Louisiana Code of Civil Procedure article 1425 also mandates that the court hold the hearing and issue a ruling no later than thirty (30) days before trial. The court must provide specific findings of fact, conclusions of law, and reasons for judgment to support its ruling. Reasons must include the elements required by articles 702–705. All or a portion of the court costs incurred, including expert witness fees and costs, in the discretion of the court, may be assessed to the non-prevailing party at the conclusion of the hearing on the motion. The parties may consent to different time limits for motion, hearing, and ruling prior to trial.

IV. EXPERT TESTIMONY MUST ASSIST THE TRIER OF FACT

The condition that expert testimony must assist the trier of fact is usually easily satisfied. The traditional view was that an expert could not testify about any matter within the knowledge of ordinary citizens. Courts now approach the issue as whether the expert's testimony would be helpful to the trier of fact.⁶³

But there are some cases where the court holds that expert testimony would not be helpful to the decision maker.⁶⁴ For example, expert testimony is not admissible on the issue of credibility.⁶⁵ Also, courts prohibit an expert from testifying as to what the law is on a certain subject because that is for the trial judge to decide.⁶⁶ Expert testimony has been allowed, however, on the subject of what constitutes the practice of law, because it is distinct from the law itself.⁶⁷

⁶¹ *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 14-0141 (La. App. 1st Cir. 12/23/14), 168 So. 3d 556, 579.

⁶² *Doe v. Archdiocese of New Orleans*, 01-0739 (La. App. 4th Cir. 5/8/02), 823 So. 2d 360, 364–65.

⁶³ Comment (c) to La. Code Evid. art. 702.

⁶⁴ *Hattori v. Peairs*, 95-0144 (La. App. 1st Cir. 1995), 662 So. 2d 509.

⁶⁵ Comment (e) to La. Code Evid. art. 702; *State v. Foret*, 628 So. 2d 1116 (La. 1993).

⁶⁶ *Wilson v. Wilson*, 542 So. 2d 568 (La. App. 1st Cir. 1989); *Morrison v. Johnston*, 571 So. 2d 788 (La. App. 2d Cir. 1990).

⁶⁷ *Louisiana State Bar Ass'n v. Carr and Associates, Inc.*, 08-21114 (La. App. 1 Cir. 5/8/09), 15 So. 3d 158, 171.

A leading treatise on evidence explains how the court should analyze whether expert testimony will assist the trier of fact.

The key is whether the expert testimony will assist the trier of fact. For example, an expert may not testify that a certain witness' testimony is truthful, but a court may permit an expert to testify as to the fallibility of eyewitness testimony. Thus the first inquiry in determining the admissibility of expert testimony is whether the trier of fact in the particular case will be required to draw an inference which he or she could use assistance in drawing. Some inferences are so common that expert testimony is unnecessary. Other inferences are beyond the ken of the average juror, and expert testimony is essential. This determination—whether the jury can use assistance in drawing the necessary inferences—is the first that a court must make in deciding whether to permit expert testimony. In making this determination, a judge should be careful to distinguish between the judge's knowledge and that of the average layman. A judge who is a racecar enthusiast may have greater knowledge of automobiles than the average lay person; the test for admissibility of expert testimony is the knowledge of average lay person and not that of the judge.⁶⁸

V. THE METHODOLOGY OF DIFFERENTIAL DIAGNOSIS

Differential diagnosis is the “determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings.”⁶⁹ According to the Federal Judicial Center's Reference Manual on Scientific Evidence, “[d]ifferential diagnosis . . . is an accepted method that a medical expert may employ to offer expert testimony that satisfies *Daubert*.”⁷⁰

For the most part, Louisiana courts agree that the basic methodology used by physicians to diagnose disease is sufficient for courtroom purposes. In one recent case, the district judge specifically commented that the “differential diagnosis [by] Plaintiffs expert, Dr. Roeser, is the only acceptable medical science. To this writer, such a differential diagnosis is also an exercise in ‘common sense.’”⁷¹ Courts allow the opinion testimony of treating doctors who follow their routine and established practices in making diagnoses. *Keener v. Mid-Continent Casualty*⁷² discussed the methodology of a differential diagnosis in a case involving a stroke.

We find that the trial court did not err in admitting Dr. Adams's testimony. The requirements of *Daubert* and *Foret* were satisfied. *Daubert* requires that to qualify as scientific evidence, an opinion must be derived by an accepted scientific method; the four-part test is illustrative, but is not an exclusive guide to determine the reliability of scientific testimony. We find that Dr. Adams's use of differential diagnosis, **which is clearly an accepted methodology in the medical community, was proper.** Dr. Adams moved to rule out every possible explanation of Mr.

⁶⁸ Frank L. Maraist, Evidence and Proof § 11.3, in 19 La. Civ. L. Treatise 296–98 (2d ed. 2007).

⁶⁹ STEADMAN'S MEDICAL DICTIONARY 531 (8th ed. 2006).

⁷⁰ JOHN B. WONG, ET AL., FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *Reference Guide on Medical Testimony* 690 (3d ed. 2011).

⁷¹ *Becker v. Murphy Oil Corp.*, 10-1519 (La. App. 4th Cir. 6/2/11), 70 So. 3d 885, 906 n. 42.

⁷² 01-1357 (La. App. 5th Cir. 4/20/02), 817 So. 2d 347, 355.

Keener's stroke before concluding that it was probably related to the surgery. Dr. Adams was honest in his acknowledgment that medical science cannot, at this point in time, clearly explain the cause of Mr. Keener's stroke, but that there was some suggestion, in current medical literature, that the temporal association between the surgery and the stroke was a factor. The fact that his opinion was not admittedly 100% certain goes to its weight, not its admissibility. The focus of the gatekeeper under C.E. art. 702 "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, supra at 595, n. 6, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. (Emphasis supplied.)

The Louisiana Fifth Circuit addressed a similar argument in *Younce v. Pacific Gulf Marine, Inc.*⁷³ when the defendant argued that *Daubert* somehow eliminated the equally traditional medical method of relying in part on the patient's history in favor of exclusive reliance on objective tests. The Fifth Circuit quickly dispatched the notion.

Dr. LaBorde, PGM's medical expert, testified that of the two factors used to determine causation, the "objective" evidence—records from physical examinations—is more reliable than the "subjective" evidence—the history given by the patient. Dr. LaBorde testified that while "medical causation," causation within the realm of treatment, may be based solely on the patient's history, "objective" evidence takes precedence in a determination of "forensic causation."

We agree with the trial judge's determination on this issue—we cannot agree that a *treating physician's* opinion on causation is so unreliable as to be *inadmissible* at trial. We note first that *Daubert's* concern is the reliability of expert's opinions based on less than "firsthand knowledge or observation." *Daubert*, 509 U.S. at 591, 113 S.Ct. at 2796, 125 L.Ed.2d at 482. It has also been stated that *Daubert* is "concerned with determining the admissibility of *new techniques*." *State v. Foret*, 628 So.2d at 1121 (emphasis supplied). We can't see how either of these concerns implicates an opinion on the causation of injuries given by a patient's treating physician. Dr. Watermeier's testimony, that "all" doctors rely on the patient's own statements in determining causation, was not contradicted by PGM's expert. Further, the risks inherent in relying *exclusively* on records are revealed by Dr. LaBorde's own testimony. Dr. LaBorde's assertions that "objective" records are more reliable are called into question by Dr. LaBorde's admission that his initial opinion, rendered without all of Younce's medical records, might "change" on review of additional information. (Emphasis in original.)

In *Dinett v. Lakeside Hospital*,⁷⁴ the trial court's exclusion of the treating physicians' opinions was reversed. The case involved whether plaintiff contracted hepatitis C from a blood transfusion. The treating doctors properly relied upon what the appellate court called "the standard medical methodology of relying upon patient history." The court pointed out that defendant's

⁷³ 01-0546 (La. App. 5th Cir. 4/10/02), 817 So. 2d 255, *rev'd on other grounds*, 02-4343 (La. 10/4/02), 827 So. 2d 1144.

⁷⁴ 00-2682 (La. App. 4th Cir. 2/20/02), 811 So. 2d 116.

motion sought to exclude physician opinions when their **methodology** was sound, thus making *Daubert* inapplicable.

. . . It is a routine and well established practice for a physician to give opinion testimony as to the cause of a patient's condition based upon the history provided by the patient. In the instant case, however, the trial court excluded the testimony on the sole basis of the testimony of another physician, Dr. Sandler, that because it is scientifically impossible to determine with any certainty that the transfusion was the source of Mrs. Dinett's infection, any opinion to that effect is merely a "guess."

We find the trial court erred in excluding the testimony on this basis. *Daubert* is inapplicable to the instant situation because it is not the experts' methodology that is being questioned; rather, it is the conclusions they reached in applying that methodology to the instant facts. Given that a pre-1990 blood transfusion is a known risk factor for acquiring Hepatitis C and Mrs. Dinett's history of having received such a transfusion (as well as having undergone other surgical procedures which also could have exposed her to Hepatitis C), there is nothing inherently unreliable about a physician testifying as to the probability that the transfusion caused her infection.

The plaintiff's burden in a civil case such as the instant one is to prove that defendant's conduct "more probably than not" caused plaintiff's condition. If the burden were to prove each element of the case beyond a reasonable doubt, as in a criminal matter, the testimony of Dr. Sandler that such proof of causation is scientifically impossible arguably would merit the granting of summary judgment in favor of defendants. In the instant case, however, the exclusion of the plaintiffs' experts at the summary judgment state improperly usurps the function of the jury at trial, which is to weigh the opinions of those experts against that of Dr. Sandler in determining whether the plaintiffs have met their burden of proving causation.

Other state court decisions have been receptive to the notion of separating physicians' methodology from their conclusions. And an appellate decision correctly noted that "it appears from the depositions that the requisite scientific level is higher than the indicia of reliability required for expert testimony and opinion at trial."⁷⁵

VI. CONCLUSION

A party lays a proper foundation for the admission of expert testimony by showing (1) a competent and qualified witness (2) has employed a sound methodology (3) which will assist the fact finder to decide the relevant factual issues of a case.

⁷⁵ *Wingfield v. State, DOTD*, 01-2668 (La. App. 1st Cir. 11/8/02), 835 So. 2d 785.