

EVIDENCE — EXPERT AND SCIENTIFIC TESTIMONY — Federal Rule (*Daubert*) and Arizona Rule (*Frye/Logerquist*) — Revised 3/2010

Before the Federal Rules of Evidence were promulgated, the admissibility of expert or scientific evidence, both in federal and state courts, was governed by the so-called *Frye* test of "general acceptance in the particular field":

When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.

. . . Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye v. United States, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923). In *Daubert v. Dow Pharmaceuticals*, 509 U.S. 579, 587 (1993), the United States Supreme Court held that the Federal Rules of Evidence, not *Frye*, now set the standard for admissibility of expert scientific testimony in a federal trial. Rule 702, Federal Rules of Evidence, provides:

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.

That rule does not require that the opinions expressed by an expert be based on "generally accepted" scientific principles before the evidence is admissible. *Id.* at 588.

The Supreme Court reasoned that, while the Rules of Evidence have superseded *Frye*, Federal Rule 702 still requires that the proffered evidence be reliable and relevant. *Id.* at 589-591. *Daubert* effectively establishes that in each case, the trial judge is the

"gatekeeper" who determines whether the expert's testimony is reliable and relevant. *Kumho Tire Co., Ltd., v. Carmichael*, 526 U.S. 137, 145 (1999).

Although over half the states have adopted the *Daubert* test, Arizona has repeatedly rejected the *Daubert* test in favor of the *Frye* rule. *State v. Tankersley*, 191 Ariz. 359, 364, 956 P.2d 486, 491 (1998); *State v. Johnson*, 186 Ariz. 329, 331, 922 P.2d 294, 296 (1996).

In *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 133 (2000), the Arizona Supreme Court again rejected *Daubert*. Further, the Court for the first time drew a distinction between "expert" and "scientific" opinion, and limited the application of *Frye* to "scientific" opinion cases — that is, cases in which a witness' opinion is offered "based on application of novel scientific principle or technique formulated by another," *id.* at 485, 1 P.3d at 128. In cases involving an expert's own experience and observation concerning human behavior, the issue is not "scientific" and *Frye* is inapplicable.

In *Logerquist*, a civil case, the plaintiff claimed that the defendant had molested her as a child in 1971 and 1973. The plaintiff further claimed that she had repressed the memory of the molestation and did not consciously remember it until sometime in the 1990's. The plaintiff sought to present the expert testimony of "a clinical psychiatrist who specializes in dissociative amnesia." *Id.* at 472, 1 P.3d at 115. The defense moved for a *Frye* hearing and, over the plaintiff's objections, the trial court held a *Frye* hearing at which both the plaintiff's and defendant's experts testified. After the hearing, the trial court barred the plaintiff from presenting her expert's testimony, finding that his opinions were "not generally accepted in the relevant scientific community of trauma remedy researchers." *Id.*

The *Logerquist* Court struck down the trial court's order excluding the expert testimony, again specifically rejecting *Daubert*. In addition, the Court held that no *Frye* hearing was required when an expert offers testimony about the expert's observations of human behavior:

Opinion testimony on human behavior is admissible when relevant to an issue in the case, when such testimony will aid in understanding evidence outside the experience or knowledge of the average juror, and when the witness is qualified, as Ariz. R. Evid. 702 requires, by "knowledge, skill, experience, training, or education." To put it simply, *Frye* is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior.

Logerquist v. McVey, *id.* at 480, 1 P.3d at 123. The Court said that *Frye* applies only to "opinion evidence based on novel scientific principles advanced by others." *Id.* When a proffered expert offers expert evidence based on a qualified witness' own experience, observation, and study, no *Frye* hearing is necessary. *Id.* Finding that "This case turns on a non-scientific issue," *id.* at 490, 1 P.3d at 133, the Court held that the plaintiff's expert "can be asked to testify to his opinions based on the results of his experience, his observations, his own research and that of others with which he is familiar, and the care of his patients." *Id.* at 481, 1 P.3d at 124. The Court held:

Frye is applicable when an expert witness reaches a conclusion by deduction from the application of novel scientific principles, formulae, or procedures developed by others. It is inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research. In the latter case, the validity of the premise is tested by interrogation of the witness; in the former case, it is tested by inquiring into general acceptance.

Logerquist v. McVey, 196 Ariz. At 490, 1 P.3d at 133. The Arizona Supreme Court reasoned that the function of determining which, if any, expert was believable should lie

with the jury rather than the trial judge. *Id.* at 491, 1 P.3d at 134. In a special concurrence, Vice Chief Justice Jones stated:

It is my general observation that a range of factual scenarios and a variety of cause and effect circumstances in specialized scientific fields may remain unexplained for generations, as in aspects of cosmic science or in medical or other forms of life science. But it is also true, as a practical matter, that their actual occurrence, repeated time and again, may be well within an expert's specialized knowledge and experience. Notwithstanding the doubt that may encircle scientific theory, it is actual experience, whether in the laboratory, the clinic, or elsewhere, that has been the *sine qua non* of medical and scientific progress. And it seems to me such experience, under Rule 702, would assist the trier of fact to understand the issues and the evidence in the case at bar. The exclusion of uncertain or doubtful scientific theory is one thing, but the exclusion of specialized knowledge of actual trauma which stems from real experience is quite another.

Id., special concurrence at 492, 1 P.3d at 135.

Justices Martone and McGregor dissented in *Logerquist*. Justice Martone expressed concern that the majority had held that expert testimony concerning "human behavior" is not "scientific":

That expert evidence about human behavior has no basis in science will be astounding news to the medical community. It also means that any psychiatrist, psychologist, or "human behavioralist" can be called as an "expert" and render any theory of human behavior, however farfetched. This presents a profound danger to our judicial system.

Id., dissent of J. Martone at 494, 1 P.3d at 137. He also noted that by limiting the judicial role to "scientific" evidence, any expert could avoid judicial scrutiny by characterizing his testimony as "experience-based." *Id.* at 496, 1 P.3d at 139. Justice McGregor also dissented, noting "the tendency of the decision to isolate Arizona's courts from the mainstream of judicial analysis." *Id.*, dissent of J. McGregor at 497, 1 P.3d at 140. The justice further reasoned that the distinction between "scientific" and "non-scientific"

evidence did not rest on a firm basis and would lead to "inexplicable evidentiary rulings."

Id. at 498, 1 P.3d at 141.