

At Issue

Risk Assessment Instruments in Child Protective Services: Are They 'Evidence'?

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"If you don't know where you are going, you'll end up somewhere else."
—Yogi Berra

Social scientists do not generate information with absolute exactitude. Instead, they rely on the imperfect world of testing, experimentation, debate, and review to determine which social science research is valid and which is invalid. *At Issue* is whether this research is worthy of being labeled "evidence" in the legal sense. In a court of law, *evidence* can be defined as

- a body of facts on which proof is based,
- the means by which a fact is established, or
- facts that tend to support, clarify, or prove an issue in question.

In the child abuse and neglect arena, this raises the question whether risk assessment instruments are classifiable as "evidence" and admissible in court.

Reliability of Evidence

While there is universal agreement that expert testimony and evidence must be reliable, there is less clarity regarding the issue of who has final authority to determine this reliability. The question continually presented over the last century has been whether the court, the scientific community, or the jury should be the final arbiter.

Today, in the United States, the courts are clearly the gatekeepers. However, because judges are not also social scientists, errors will inevitably be made. The hallmark feature of scientific inquiry is its steadfast reliance on empiricism. The only information acceptable as "evidence" must be able to be sensed, measured, and its results reproduced. From a legal perspective, should risk assessment instruments and the data they contain be admissible in court? To address this question it is necessary to establish what "evidence" an expert witness can present to the court, since in most cases, expert testimony is introduced to evaluate the reliability of proffered evidence. Further, the law mandates that trial judges determine whether

an expert is relying on proper scientific methodology, and whether the application of that methodology to the conclusions reached is consistent and demonstrable.

Recent Case Law

An upheaval occurred in American evidence law in 1993 when the U.S. Supreme Court issued its *Daubert v. Merrell Dow* decision, overturning 70 years of law governing the area of novel scientific evidence. In writing the majority opinion for the Court, Justice Henry Blackmun held that subjective impressions are biased by the observer's model of the world and, therefore, can be misleading and do not represent definitive scientific evidence or knowledge.

Prior to *Daubert*, the admissibility of expert evidence was governed in federal courts, and in many state courts, by the *Frye* (1923) rule of "general acceptance." Despite its widespread adoption by many courts, this "general acceptance" standard was viewed by some as unduly restrictive, because it sometimes functioned to bar testimony based on intellectually credible but somewhat novel scientific approaches. This meant that novel scientific evidence could not be admitted unless the methods and principles under which it was established had achieved general acceptance within the relevant scientific or behavioral discipline. The *Daubert* court substituted a reliability test for a relevancy test.

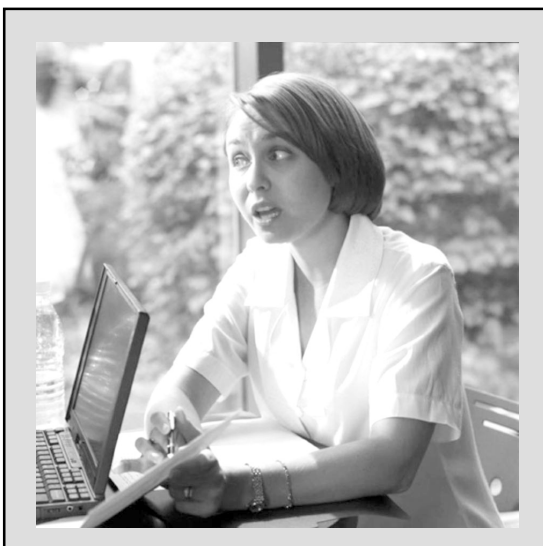
Nonetheless, the *Frye* rule has not been discarded. Instead of *Frye's* test of "general acceptance" in the scientific community, the new test requires an independent judicial assessment of reliability. The following boxes summarize the two U.S. Supreme Court decisions.

Frye: Where novel scientific evidence is at issue, the *Frye* inquiry permits the court to defer to scientific expertise as to whether or not the evidence has gained "general acceptance" in the relevant field. The trial court's gatekeeper role is to keep "pseudoscience" from being admitted.

Daubert: General acceptance is considered a standard absent from and incompatible with the Federal Rules of Evidence. Accordingly, "scientific knowledge" must be derived from the scientific method supported by "good grounds" in validating the expert's testimony, establishing a standard of "evidentiary reliability."

The *Daubert* Court explicitly refused to adopt any "definitive checklist or test" for determining the reliability of expert scientific testimony and emphasized the need for flexibility. The Court did list several factors, however, that it thought would be pertinent. They include the following:

- whether the theories and techniques employed by the scientific expert have been *tested*,



- whether they have been subjected to *peer review* and *publication*,
- whether the techniques employed by the expert have a *known error rate*,
- whether they are subject to *standards* governing their application, and
- whether the theories and techniques employed by the expert enjoy widespread acceptance (*Daubert*, 1993, pp. 592-594).

Furthermore, the Court emphasized that the admissibility inquiry must focus “solely” on the expert’s “principles and methodology” and “not on the conclusions that they generate.”

Another “reliability” issue that courts frequently face is the one addressed by the Supreme Court in *General Electric Co. v. Joiner* (1997). It noted that

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a ... court to admit opinion evidence which is connected to existing data only by the *ipse dixit* [an unsupported assertion, usually by a person of standing] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. (*Joiner*, p. 519)

Consequently, courts exercising their gatekeeper role under *Daubert* may properly assess whether an expert’s conclusions follow from the methodology employed to reach those conclusions.

Admissibility of Risk Assessment Instruments

It is impossible to identify firm evidence standards that are universally applicable to all branches of science because each one is at a different stage of development, and each discipline employs unique tools of investigation, operates on different assumptions, and uses different methodologies. In general, once a social scientist has properly framed a research question, it is necessary to design a research instrument to gather the appropriate data. The methodological problems that can be encountered are considerable. To name only a few, there are concerns about validity (accuracy of the data regarding a particular circumstance and the ability to generalize those conclusions to other similar circumstances), statistical regression, testing, selection bias, and correlational questions.

Risk assessment in child welfare is not a novel idea, and there is ample case law that has addressed this concept (e.g., *Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 2002; *Nicholson v. Williams*, 2002; *Garcia v. Scopetta*, 2003). In contrast, risk assessment instruments, as used in child protective services, have not yet been embraced or rejected by the courts.

Breathalyzer, fingerprinting, and DNA sampling are examples of hard science “evidence” that are now universally admitted. Polygraphs are not admissible in 49 states. Posttraumatic stress disorder (PTSD), “rape trauma syndrome,” and “recovered/repressed memory syndrome” are examples of social science “evidence” that have had mixed receptions.

In sum, we do not yet know what kind of a legal reception risk assessment instruments will receive. In any event, we can predict, with great assurance, that these instruments will be given a thorough shakedown before passing legal muster.

References:

- Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
- Frye v. United States*, 54 App. D. C. 46; 293 F. 1013 (1923).
- General Electric Co. v. Joiner*, 522 US 141, 118 S. Ct. 512 (1997).
- Garcia v. Scopetta*, 2003 U.S. Dist. LEXIS 19995 (E.D.N.Y., Nov. 6, 2003).
- Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 2002 U.S. Dist. LEXIS 22707 (2002).
- Nicholson v. Williams*, 203 F.Supp.2d 153 (2002).

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